Kay Flynn

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Wednesday, March 02, 2005 2:16 PM
To: Filings@psc.state.fl.us
Subject: 040527-TP BST's Official Recognition of NC Order, dated Feb. 21, 2005
Importance: High
Attachments: 040527-T.pdf

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A. Vicki Fatool
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B. Docket No.: 040527-TP
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.

C. BellSouth Telecommunications, Inc.
on behalf of Nancy B. White

D. 18 pages total (including letter, certificate of service and attached Order)

E. BellSouth Telecommunications, Inc.'s Request for Official Recognition of the North Carolina Utilities Commission Order Granting Motion for Summary Disposition and Allowing Audit, Docket No. P-913, Sub 7, dated February 21, 2005.

.pdf version attached

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Legal Department

NANCY B. WHITE
General Counsel-Florida

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ORIGINAL

March 2, 2005

Mrs. Blanca S. Bayo
Director, Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040527-TP
BellSouth v. NuVox

Dear Ms. Bayo:

By this letter, BellSouth Telecommunications, Inc. ("BellSouth") requests that the Commission officially recognize the decision of the North Carolina Utilities Commission in *In the Matter of Enforcement of Interconnection Agreement between BellSouth and NuVox Communications, Inc., Order Granting Motion for Summary Disposition and Allowing Audit,* Docket No. P-913, Sub 7, dated February 21, 2005 (attached). The NCUC's decision bears directly on the issues raised in BellSouth's pending Motion for Summary Disposition.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

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CERTIFICATE OF SERVICE
Docket No. 040527-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 2nd day of March, 2005 to the following:

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Nancy B. White /V.F.
Nancy B. White

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-913, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Enforcement of Interconnection Agreement	)	ORDER GRANTING MOTION
Between BellSouth Telecommunications, Inc.	)	FOR SUMMARY DISPOSITION
And NuVox Communications, Inc.	)	AND ALLOWING AUDIT

BEFORE: Chairman Jo Anne Sanford, Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, and James Y. Kerr, II

BY THE COMMISSION: This matter arises on Complaint filed by BellSouth Telecommunications, Inc. ("BellSouth") requesting the Commission to find that NuVox Communications, Inc. ("NuVox") breached the Parties' Interconnection Agreement ("Agreement") by refusing to allow BellSouth to conduct an audit of NuVox' enhanced extended loops ("EELs") in order to verify NuVox' self-certification that the EEL facilities are being used to provide "a significant amount of local exchange service." The Complaint further requests that NuVox be compelled to allow BellSouth's auditor to audit NuVox' EEL records immediately without further delay and that BellSouth be allowed to provide its auditor with records in BellSouth's possession, including customer proprietary information. NuVox filed its Answer to Complaint on June 21, 2004, denying BellSouth's unqualified right to the audit it seeks. By way of its Answer, NuVox also objected to BellSouth's sharing customer proprietary information with its auditor. BellSouth filed a reply to NuVox' Answer.

On July 26, 2004, NuVox filed a Motion to Adopt Procedural Order, seeking to have the Commission enter a procedural order (1) adopting and incorporating the record from a Georgia Public Service Commission ("GPSC") proceeding regarding nearly the same audit issue that is presented in the instant docket; (2) adopting the same legal conclusions reached by the GPSC and (3) establishing a schedule for oral argument and/or evidentiary hearing with respect to conclusions or findings that the Commission might make that would differ from the conclusions and findings of the GPSC. BellSouth filed its Opposition to NuVox's Motion to Adopt Procedural Order on August 16, 2004.[1] Bellsouth filed a Motion for Summary Disposition on August 21, 2004 and NuVox filed its Opposition to Summary Disposition on October 6, 2004. BellSouth filed a reply to NuVox' Opposition to Summary Disposition on October 15, 2004.

[1] A second version correcting clerical errors was filed on August 19, 2004.

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Positions of the Parties

BELLSOUTH: BellSouth argues that it seeks to enforce audit rights pursuant to Attachment 2, Paragraph 10.5.4 of the Agreement, which provides BellSouth the unqualified right, upon providing NuVox 30 days prior notice, to audit NuVox' EELs to verify the amount of local exchange traffic being transmitted on EEL circuits. BellSouth maintains that the FCC's *Supplemental Order Clarification* ("SOC")[2] is not incorporated into the pertinent audit provisions and that the Parties never intended such result. Because BellSouth's audit rights are a matter of contract interpretation, BellSouth argues that the matter should be decided as a matter of law without an evidentiary hearing.

NEWSOUTH: In opposition to BellSouth, NuVox argues that the Agreement incorporates the SOC and that the requirements of the SOC limit BellSouth's audit rights to (1) non-routine audits, (2) based on a reasonable concern regarding NuVox' compliance with EEL eligibility and self-certification criteria, and (3) conducted by an independent auditor. NuVox disputes that BellSouth has met or demonstrated that it has met any of the three SOC requirements. According to NuVox, it has submitted evidence tending to show that material issues of fact remain, thereby requiring the Commission to afford the Parties an evidentiary hearing prior to deciding the merits of the Complaint. NuVox maintains that BellSouth is not entitled to conduct an audit of its EELs on the facts now before the Commission. NuVox also argues that the Commission is bound by the decision of the GPSC in an action between the same parties regarding the same contractual language at issue in the matter now before the Commission.

PUBLIC STAFF: The Public Staff believes that the Commission should adhere to the doctrine of collateral estoppel and accept the GPSC's interpretation of the audit clause in the Georgia interconnection agreement between BellSouth and NuVox, finding that the audit requirements contained in the SOC were incorporated into the Agreement. Accordingly, the Public Staff further believes that the SOC and the Agreement require BellSouth to have a concern before being permitted to audit NuVox' EELs. However, the Public Staff disagrees with NuVox' position regarding the need for an evidentiary hearing. The Public Staff is satisfied that the reasons BellSouth gave for requesting an audit meet the SOC threshold requirement of having a concern prior to conducting an audit. Therefore, the Public Staff believes it is unnecessary for the Commission to consider further evidence regarding the legitimacy of BellSouth's stated concerns. On the question of whether the auditor selected by BellSouth is sufficiently independent to meet the SOC requirement that an EEL audit be conducted by an independent auditor, the Public Staff, in agreement with BellSouth, believes this requirement has been met since the selected auditor is not related to, affiliated with, subject to the influence or control of, or dependent on BellSouth. In sum, the Public Staff recommends the Commission find that BellSouth satisfied the conditions to invoke its audit right under the Agreement and order NuVox to submit to the audit within 45 days of the Commission's order.

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[2] *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587 (2000)

ISSUE 1: Does the doctrine of collateral estoppel apply to require the Commission to adopt or follow the decision and conclusions of the GPSC in *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U (rel. June 30, 2004)?

DISCUSSION

The Commission believes that NuVox' Motion to Adopt Procedural Order, which asks the Commission to adopt the same legal conclusions reached by the GPSC, is an attempt by NuVox to raise the affirmative defense of collateral estoppel. An affirmative defense must be pled affirmatively in the Answer and shall be so drawn as to fully advise the complainant and the Commission of the particular grounds of defense. Commission Rule R1-9. NuVox did not plead the defense of collateral estoppel in its Answer and it did not seek leave to amend its Answer so that it could assert the defense. Therefore, ordinarily, the Commission would find that NuVox has waived the defense of collateral estoppel and cannot avoid this result by a procedural motion asking the Commission to adopt the legal conclusions of another tribunal. However, because NuVox did argue the GPSC determination in the Preliminary Statement section of its Answer, the Commission finds that BellSouth had sufficient notice of the estoppel issue. Since both parties have in fact fully briefed the issue of estoppel in their several filings, and, in order to avoid disposing of this issue on a procedural technicality, the Commission will address the merits of the defense of collateral estoppel.

The GPSC interpreted the Parties' Georgia interconnection agreement (not their North Carolina agreement) and, based on findings and legal conclusions stated in its Order, determined (1) that BellSouth was not entitled to conduct an audit of NuVox' EELs without first demonstrating a concern and (2) that BellSouth must hire an independent auditor to conduct the audit. Much of the language of the Georgia agreement, particularly the language pertaining to EEL audits, is nearly identical to the language approved by the Commission in the North Carolina Agreement. Nevertheless, the Commission finds that it is not bound to adopt or follow the conclusions of the GPSC.

Neither the doctrine of collateral estoppel nor the principle of full faith and credit requires the Commission to give preclusive effect to the GPSC's interpretation of a clause in the Georgia Nuvox agreement that is also found in the North Carolina NuVox Agreement. The Full Faith and Credit clause only requires the courts of North Carolina to give foreign judgments the same force and effect they would have in the states where they were rendered. *Freeman v. Pacific Life Ins. Co.*, 156 N.C. App. 583, 577 S.E.2d 184 (2003). The validity and effect of a judgment of another state must be determined by the laws of the rendering state. *Id.*; *Boyle v. Boyle*, 59 N.C. App. 389, 297 S.E.2d 405 (1982). Thus, to determine whether preclusive effect must be given to the GPSC's interpretation of the language of the audit provision, the Commission must look to the law of Georgia.

Under Georgia law, a judgment used as a basis for the application of collateral estoppel (issue preclusion) must be a final judgment. *CS-Lakeview at Gwinnett, Inc., v. Retail Development Partners,* 268 Ga. App. 480, 602 S.E.2d 140, *r'con denied, cert. denied, (2004); Greene v. Transport Ins. Co.,* 169 Ga. App. 504, 313 S.E.2d 761 (1984). A judgment is not final as long as there is a right to appellate review, *e.g.*, when an appeal has been entered within the time allowed. *Id.*; *Lexington Developers, Inc. v. O'Neal Construction Co., Inc.,* 143 Ga. App. 440, 238 S.E.2d 777 (1977). In Georgia, a judgment is suspended when an appeal is entered within the time allowed. *Id.* On the facts of the matter now before the Commission, BellSouth has filed a timely appeal of the GPSC *Nuvox* decision.[3] It necessarily follows that the GPSC's judgment in *Nuvox* is not final and, therefore, cannot be the basis of the application of the doctrine of collateral estoppel. The Georgia courts would not give preclusive effect to the GPSC decision under the circumstances. Thus, the Commission is not required to give the decision greater effect or weight of authority than it would be given under Georgia law by Georgia courts.

Moreover, the Commission wholly rejects the notion that it is bound by other state agencies' interpretations of contract language when interpreting interconnection agreements approved by the Commission to govern parties' relationships in North Carolina with each other and with customers located in North Carolina. NuVox has cited *Global NAPS, Inc. v. Verizon New England Inc.,* 332 F.Supp.2d 341 (D. Mass. 2004) as persuasive authority for just such a holding, but *Global NAPS* is not binding on the Commission. Although the Commission believes *Global NAPS* to be distinguishable from the case at hand in several respects, the Commission disagrees with the federal district court's opinion to the extent that it may stand for the premise that state commissions interpreting interconnection agreements they have approved for their own states must follow the contractual interpretations of sister state commissions made with respect to agreements they have approved to govern parties' relationships in their respective states.

Interconnection agreements are not to be treated as typical commercial contracts. They are interpreted under state law, but, setting them apart from other contracts that are negotiated solely between private parties is the fact that state commissions play a major role in their formation. The Act gives state commissions the express authority to approve or reject interconnection agreements and this authority clearly carries with it the authority to interpret and enforce the very agreements they have already approved. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.,* 317 F.3d 1270 (11th Cir. 2003). Section 252(e) of the Act establishes a scheme whereby each state commission has the authority to approve, reject and determine what the parties' intended under their interconnection agreements. A state commission's interest in an approved agreement does not end with approval, but continues for the period of time the agreement remains in effect or relevant to the parties' relationship with each other and with customers in the state of approval. The authority granted to each state commission to determine in the first instance the

[3] BellSouth has appealed the GPSC decision in federal court pursuant to § 252 (e)(6) and in state court.

meaning of an agreement it approved would be undermined, and the role Congress prescribed for state commissions under the Act would be subverted, if the commissions are bound by the interpretations of other state commissions. *Allowing one state* to make approvals, rejections and/or interpretations that are binding on all the other states, would in essence establish a national standard and destroy the state-by-state scheme designed by Congress. *See id.*

In addition, allowing one state commission's determination to bind all the rest would create a situation where the parties' would have an incentive to be the first to file an action in a state deemed favorable and destroy the jurisdiction of all other state commissions—a *forum shopping* nightmare not intended by the Act. It is also worth noting that an interconnection agreement approved by one state commission is not the same agreement when approved in another state even when it is between the same parties and employs very similar contract provisions. Two state commissions may interpret similar language differently and the agreement as interpreted by one state may be an agreement that another state would reject outright. *See id.*

Accordingly, the Commission concludes that NuVox' Motion to Adopt Procedural Order should be denied and that the doctrine of collateral estoppel does not require the Commission to adopt or follow the decision and contract interpretation of the GPSC.

ISSUE 2: Is BellSouth entitled to conduct an audit of NuVox' EELs under Paragraph 10.5.4 of Attachment 2 of the Agreement?

DISCUSSION

The Commission has jurisdiction over the matters raised in BellSouth's Complaint pursuant to Sections 251 and 252 of the federal Telecommunications Act of 1996 (47 U.S.C §§ 251, 252), N.C.G.S. §§ 62-30, 62-31; 62-73 and Commission Rule R1-9. Also, the Commission has jurisdiction under Section 15 of the General Terms and Conditions of the Agreement which provides that interpretation disputes may be resolved by the Commission on either Party's petition.

The undisputed facts shown in the filings of record and the related Commission docket regarding the Agreement (P-55, Sub 1231, In the Matter of Interconnection Agreement between BellSouth Telecommunications, Inc.. and TriVergent.. Communications, Inc. (NuVox)) are summarized hereinbelow.

BellSouth, an incumbent local exchange carrier ("ILEC"), and NuVox, a competing local provider ("CLP"), entered into the Agreement effective June 30, 2000. The Agreement was voluntarily negotiated pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act") and was approved by the Commission on November 8, 2000. Section 23 of the General Terms and Conditions of the Agreement provides that the Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Georgia. The "Compliance with Applicable Law" clause provides in Paragraph 35.1:

Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

With regard to BellSouth's providing EEL combinations to Nuvox, Paragraph 10.2.2 of Attachment 2 provides:

Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"), the EEL will be connected to [NuVox]'s facilities in [NuVox]'s collocation space at the POP SWC. [Emphasis added].

The Agreement further provides in Paragraph 10.5.2 of Attachment 2:

For the purpose of special access conversions, a "significant amount of local exchange service: is as defined *in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"). The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order.* When [NuVox] requests conversion of special access circuits, [NuVox] will self-certify to BellSouth in the manner specified *in paragraph 29 of the June 2, 2000 Order* that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where [NuVox] is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order. In such case, [NuVox] may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon [NuVox]'s request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance. [Emphasis added].

Paragraph 10.5.4 of Attachment 2 of the Agreement provides:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a

complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in the Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].

On March 15, 2002, BellSouth sent a letter notifying NuVox of its intent to conduct an audit of NuVox' EELs beginning thirty days from the date of the letter. BellSouth's letter stated that BellSouth had selected an independent auditor, American Consultants Alliance ("ACA") to conduct the EEL audit and that BellSouth would incur the costs of the audit. The letter also indicated that the local usage requirements to be verified by audit were those stated in the SOC. To date, BellSouth has not conducted any audit of NuVox' EELs since the Parties executed the Agreement.

After BellSouth gave notice of its intent to audit, the Parties engaged in discussions regarding such audit, but to date they have not reached an agreement permitting the audit to proceed. By correspondence dated April 9, 2002, NuVox indicated through its attorney that BellSouth could not go forward with the audit because the Parties continued to be unable to agree on two threshold requirements from the SOC: (1) identification of BellSouth's "concern" that prompted the audit request and (2) selection of an independent auditor.

The companies continued to discuss the matter, but neither substantially changed its position. BellSouth continued to maintain it had a right to audit NuVox' EELs and that it had met the requirements of both the Agreement and the SOC, while NuVox continued to dispute BellSouth's entitlement to an audit based on its position that BellSouth had not met the audit requirements of the SOC.

Before examining NuVox' arguments that BellSouth has not met specific requirements of the SOC, the Commission must first determine whether the requirements of the SOC are incorporated into the Agreement or otherwise apply to BellSouth's audit rights. Having reviewed the relevant provisions of the Agreement, the pleadings, and the Parties' briefs and comments, including all attached exhibits and affidavits, the Commission concludes that the Parties did not expressly incorporate the SOC into the Agreement and that the Parties agreed that the EEL audit provisions of Attachment 2 of the Agreement would govern EEL audits.[4]

The Agreement provides that the laws of the State of Georgia shall govern construction of the Agreement. North Carolina courts have recognized the validity of

[4] The Commission understands that, at times, BellSouth stated its audit request was in compliance with the SOC and that BellSouth may have intended and attempted to comply with the SOC requirements. However, before analyzing whether any such attempts on the part of BellSouth were successful, the first question the Commission must answer is whether the Agreement in fact requires BellSouth to comply with the SOC. The answer is not determined or changed by BellSouth's actions or statements, but is found by construing the agreed upon language in the Parties' Agreement. BellSouth has not waived any rights it has under the Agreement as written by citing to the SOC or claiming its actions were in accord with that Order.

such choice of law provisions. *Behr v. Behr*, 46 N.C. App. 694, 266 S.E.2d 393 (1980). Therefore, the Commission will construe the Agreement in accord with Georgia law. Under Georgia law, contract construction is initially a matter of law for the court. *Schwartz v. Harris Waste Management Group*, 237 Ga. App. 656, 516 S.E.2d 371 (1999). If the contract language is clear and unambiguous, the court must enforce the contract according to its terms. *Id.* The court must determine whether the contract is clear and unambiguous by looking to the contract alone for its meaning. *Id.* Paragraph 10.5.4 of Attachment 2 of the Agreement provides BellSouth the right to audit NuVox' EELs as stated:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NuVox, audit NuVox' records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements.

After examining the Agreement as a whole and focusing more closely on Attachment 2, the Commission finds the cited language is unambiguous and provides BellSouth the right to audit NuVox' records at BellSouth's expense on thirty days prior notice, but not more than once in a twelve month period, unless a previous audit has revealed non-compliance with the specified local usage option.[5] There are no other restrictions in the Agreement on when BellSouth can initiate and conduct an audit of NuVox' EELs.

In the matter now before the Commission, even if NuVox and the Public Staff are correct in their view that the SOC establishes requirements pertaining to an ILEC's entitlement to an EEL audit, the Agreement with BellSouth, not the SOC, governs when BellSouth is entitled to an audit. The Agreement was negotiated pursuant to Section 252(a)(1) of the Act which permits parties to enter voluntarily negotiated interconnection agreements without regard to the standards of subsections (b) and (c) of Section 251 of the Act. The FCC has acknowledged that 252(a)(1) extends to FCC rules and orders and means that parties entering negotiated agreements need not comply with FCC requirements established pursuant to 251(b) and (c).[6] The SOC was issued by the FCC in connection with the establishment of rules regarding the unbundling obligations of Section 251(c). Moreover, the FCC stated in the SOC, ¶ 32, that where "interconnection agreements already contain audit rights, [w]e do not believe

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[5] Even if ambiguity were an issue, the rules of contract construction would require the Commission to attempt to ascertain the intent of the parties from the four corners of the Agreement before finding that any ambiguity has left an issue of fact remaining. There is no ambiguity or remaining question of fact where the intention of the parties can be determined by construction of the Agreement as a whole. *See Yarqus v. Smith*, 254 Ga. App. 338, 562 S.E.2d 371 (2002); *Harris v. Distinctive Builders, Inc.* 180 Ga. App. 686, 549 S.E.2d 496 (2001); *Travelers Ins. Co. v. Blakey*, 180 Ga. App. 520, 349 S.E.2d 474 (1986). As discussed herein, the intent of the Parties can be determined from the four corners of the Agreement without looking to parol evidence.

[6] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

that we should restrict parties from relying on these agreements." Hence, it follows that the Parties were free to negotiate and agree upon terms for their interconnection agreement that were different from any stated requirements of the SOC. Having entered into the Agreement, the Parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Sections 251 and 252 of the Act or FCC rulings and orders issued pursuant to the stated sections. Accordingly, pursuant to Paragraph 10.5.4 of Attachment 2 of the Agreement, BellSouth is entitled to audit NuVox' EELs on 30 days prior notice, provided that BellSouth pays for the audit[7] and has not conducted such an audit within a twelve-month period. Because the Agreement clearly addresses the subject of when BellSouth is entitled to conduct an audit, there is no need to look to the SOC for other possible requirements regarding when BellSouth may audit NuVox' EELs.

NuVox argues that the Agreement incorporates the requirements of the SOC through Paragraph 35.1 of the General Terms and Conditions of the Agreement. According to NuVox, Paragraph 35.1, the "Compliance with Applicable Law" clause, is proof of the Parties' intent to incorporate the SOC in their Agreement. However, the Commission disagrees. There is no express language in the Agreement that incorporates the SOC in its entirety into the Agreement. Compliance with applicable law clauses are found in most complex commercial agreements and are not unique to interconnection agreements. At most, Paragraph 35.1 provides that the Parties must abide by all *applicable* existing law. To the extent that the Parties have expressly and specifically addressed requests for EEL audits and have agreed on their own governing terms in Section 10 of Attachment 2 of the Agreement, Paragraph 35.1 does not override these negotiated provisions. Paragraph 10.5.4 of Attachment 2 specifically and unambiguously addresses when BellSouth is entitled to audit NuVox' EELs and the manner in which BellSouth must start the audit process. The Agreement is not silent on the circumstances for entitlement to conduct an EEL audit.

In addition, to the extent the Compliance with Applicable Law clause *may* create any ambiguity or conflict with the audit provisions of Paragraph 10.5.4 (the Commission does not find ambiguity), the Supreme Court of Georgia has held:

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.

Central Georgia Electric Membership Corp., 217 Ga. 171, 173-74, 121 S.E.2d 644, 646 (1961) (quoting 3 Corbin, p.176, Contracts §547). The Court of Appeals of Georgia has upheld this principle numerous times, stating that "when a provision specifically

[7] Section 10.5.4 requires BellSouth to incur the expense of the audit without regard to the outcome of the audit. The "non-compliance" clause refers to the restriction against conducting more than one audit in a twelve-month period unless an audit has revealed non-compliance. The clause does not shift the expense of the audit onto NuVox, and, to the extent the SOC contemplated such a shift, it is trumped by the Agreement.

addresses the issue in question, it prevails over any conflicting general language." *Tower Projects, LLC v. Marquis Tower, Inc.*, 267 Ga. App. 164, 598 S.E.2d 883 (2004); *Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 538 S.E. 2d 886 (2000); *Schwartz*, 237 Ga. App. at 661, 516 S.E.2d at 375. Therefore, inasmuch as the audit provisions of the Agreement before the Commission come after the Applicable Law clause and specifically address the subject of when BellSouth is entitled to audit NuVox' EELs, while the Applicable Law clause is general and broadly inclusive in nature, the audit provisions of the Agreement prevail over the general clause.

Moreover, the SOC itself plainly states that the FCC does not believe it should restrict parties from relying on audit provisions contained in negotiated interconnection agreements. Clearly, the FCC did not intend the SOC to negate or take the place of specific audit provisions of interconnection agreements and thus, this Commission will not read the SOC to do so. The FCC's statement that "[w]e do not believe that we should restrict parties from relying on these [existing interconnection] agreements" certainly applied to interconnection agreements predating the SOC, but it also applied more broadly to future negotiated agreements as well. It logically follows from the FCC's statement that the FCC recognized the continuing right of the parties, under Section 252 of the Act, to enter voluntarily negotiated agreements on terms that differ from the standards of Section 251 of the Act and orders, such as the SOC, issued pursuant to Section 251.

NuVox also argues that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law. NuVox applies this principle by arguing that the SOC and any audit requirements in the SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement as though expressly stated therein, unless expressly excluded or displaced by the terms of the Agreement. NuVox concludes that the Agreement neither expressly excludes nor contains any terms that displace requirements found in the SOC. The Commission does not agree.

Under Georgia law, contracting parties are required to abide by applicable existing law, but only as to those matters not specifically addressed in the parties' voluntarily negotiated agreements. *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E. 2d 23 (1959). Georgia courts recognize that if the parties are silent on an issue, existing law will apply, but that the parties are free to contract otherwise, i.e., parties may agree to be bound by terms that are different from existing law. *Id.* (where agreement provided that no interest would accrue prior to maturity but was silent as to interest after maturity date, existing law required payment of interest from date of maturity).

Regarding the Agreement at hand, the SOC was part of the existing law at the time the Parties entered into the Agreement. Under Georgia law, the Parties were thus bound to abide by applicable existing law, i.e., the SOC, but only as to those matters not addressed in the Parties' voluntarily negotiated Agreement. On the face of the Agreement, in Paragraph 10.5.4, the Parties addressed and did not remain silent on "when" BellSouth would be entitled to conduct an audit and the manner in which

BellSouth could initiate an audit. These matters were dealt with by the Parties. The Parties supplied their own terms and did not leave them to be filled in or determined by existing law. Thus, between these Parties, after entering into the Agreement, the standards of the existing law were no longer part of the applicable law governing when and how an EEL audit could be initiated. Instead, the terms of the Agreement became the applicable law regarding entitlement to and initiation of an EEL audit.

The Parties' intent not to incorporate the whole of the SOC into the Agreement is apparent from the contract language, specifically the language found in Section 10 of Attachment 2 concerning conversion of special access services to EELs. For example, Paragraph 10.5.2 references the SOC (the June 2, 2000 Order) five times, providing that the term or phrase "significant amount of local exchange service" is as defined in the SOC and that "[t]he Parties agree to incorporate by reference paragraph 22 of the [SOC]." Paragraph 10.5.2 further provides that NuVox' manner of self-certification regarding usage of circuits for local exchange will be the manner specified in paragraph 29 of the SOC. If the SOC in its entirety were automatically read into the Agreement by operation of law as NuVox contends, these provisions referencing the SOC would be superfluous and without meaning. The definition of a significant amount of local exchange service would have been a given if the Parties had intended the SOC to be incorporated into the Agreement. Moreover, Paragraph 10.5.2, which pertains to EELs converted from special access (a topic directly addressed in the SOC), demonstrates the Parties' intent not to incorporate the entire SOC in their Agreement, but rather to incorporate specific provisions, e.g., paragraph 22 is incorporated into Paragraph 10.5.2 by reference. Again, if NuVox were correct in its position that the whole of the SOC was incorporated into the Agreement, there would have been no need to re-incorporate paragraph 22, a specific part of the SOC.

Clearly, when the Parties intended to be bound by SOC provisions, they expressly so provided and identified selected portions for incorporation into the Agreement. The level of specificity and the way the Parties selectively and carefully made precise, unambiguous references to the SOC throughout the section of the Agreement regarding EELs are strong indications that the Parties did not consider or intend the SOC in its entirety to govern the provisioning of EELs or BellSouth's auditing of them. On the contrary, with regard to matters addressed in the Agreement, the Parties intended the SOC to apply sometimes in part and sometimes not at all, depending upon the express provisions of separate subparagraphs of the Agreement dealing with specific situations.

In summary, the Commission concludes that the Parties to the Agreement did not incorporate the SOC, in its entirety, into the Agreement. Therefore, the specific provisions of Paragraph 10.5.4 of Attachment 2 of the Agreement govern "when" BellSouth is entitled to audit NuVox' EELs and the procedure BellSouth must use to initiate such an audit. BellSouth has complied with the conditions of Paragraph 10.5.4 by providing 30 days prior notice to NuVox and indicating that the audit will be at its own expense. Since BellSouth has not conducted an audit of NuVox' EELs at any time since the Agreement was executed in 2000, it is not in violation of the only other

restriction on its audit rights, that it not conduct an audit of NuVox' records more than once in any twelve-month period. Accordingly, BellSouth is entitled under the agreed upon terms of the Agreement to conduct an audit of NuVox' EELs without having to take any further action to justify either its entitlement or its decision to conduct an audit.

Notwithstanding the foregoing conclusion, and alternatively, (1) if the SOC requires an ILEC to have a concern that a requesting CLP has not met the criteria for providing a significant amount of local exchange service before the ILEC is permitted to request and conduct an audit and (2) if such requirement is incorporated into the Agreement by the terms of the Agreement or by operation of law, the Commission agrees with the Public Staff and finds that BellSouth has met the SOC threshold requirement of "[having] a concern." Footnote 86 of ¶31 of the SOC expresses the FCC's agreement with the joint position of the ILECs and the CLPs that EEL audits would not be a routine matter of course but would be undertaken "when the incumbent LEC has a concern." The FCC then continues in ¶31 expressly to order that ILECs provide CLPs with 30 days written notice that "it will conduct an audit." The FCC addresses and ensures the non-routineness of EEL audits by ordering that ILECs "may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance." Arguably, the FCC established a scheme whereby an ILEC could conduct an audit once in a calendar year and could only do so more frequently if a permitted audit revealed non-compliance (which would serve as a concern). In any case, the FCC did not specify what should be stated in an ILEC's notice that it would conduct an audit. The FCC did not in any way indicate that proof or evidence of a concern should be required prior to an audit. For example, the FCC did not use terminology such as "demonstrate," "show" or "prove" a concern. Likewise, the FCC did not set forth any procedure (such as the form or timing) for the provision of any such evidence. The Commission therefore concludes that if an ILEC must have a concern prior to performing an audit where no audit has been performed within the preceding twelve-month period, the FCC did not intend to set a high hurdle but rather set the bar low, e.g., an audit is appropriate when an ILEC "has a concern." The FCC's requirement that an ILEC give written notice that "*it will conduct an audit*" does not suggest that the FCC intended its general agreement with the parties in footnote 86 (that an ILEC should have a concern) to establish a stringent test or precondition whereby the ILEC must prove (litigate) the fact of its concern to the Commission's or the CLP's satisfaction.

Accordingly, the Commission finds that the reasons given by BellSouth meet any threshold requirement of "having a concern" that may have been established by the SOC as a precondition to an audit. BellSouth initially explained to NuVox in an email dated April 1, 2002 that BellSouth's own records showed a high percentage of NuVox' traffic in Tennessee and Florida was intrastate access and that NuVox was claiming a significant change in its percent interstate usage jurisdictional factors. These observations caused BellSouth concern that NuVox' certification(s) that it provided a significant amount of local traffic over circuits in Tennessee and Florida may not have been correct, and they (the observations) reasonably serve as the basis of a concern that would cause BellSouth to want to test the accuracy of NuVox' self-certifications in each state where special access circuits were converted based on such certifications.

Subsequent to its initial observations and concerns, as sworn to in the Affidavit of Jerry D. Hendrix (Exhibit C to BellSouth's Motion for Summary Disposition), BellSouth further analyzed its customer records and found that BellSouth was providing local exchange service to a number of NuVox' EEL-served customers, including customers in North Carolina. NuVox cannot be the exclusive provider where BellSouth is providing local exchange service. Again, such observations would reasonably cause BellSouth a legitimate concern about whether NuVox' self-certifications for special access conversions were accurate. The concerns raised by the observations BellSouth communicated to NuVox are sufficient to meet the threshold requirement of having a concern. Thus, BellSouth has met any SOC requirement, if applicable, that it have a concern prior to conducting an EEL audit.

ISSUE 3: Is BellSouth required to prove that it has selected an independent auditor prior to conducting an audit of NuVox' EELs?

DISCUSSION

As discussed hereinabove, the Parties' Agreement governs as to matters specifically addressed in the Agreement, but existing law applies as to matters not addressed in the Agreement. While the Agreement contains provisions regarding when BellSouth is entitled to conduct an audit, it does not contain any provision regarding how an audit will be conducted or regarding the selection of third parties to perform EEL audits. The Agreement is silent on methods or standards for the audit or the selection of a third party auditor. NuVox has argued that the SOC conditions an ILEC's audit rights on the use of an "independent auditor." The Commission believes that the SOC does provide the appropriate criteria regarding the minimum qualification standards for a third party hired to conduct an EEL audit, inasmuch as the Agreement is silent on this issue.

In the SOC, the FCC relied on and sanctioned the stated agreement between ILECs and CLPs that independent auditors should be used to perform audits of EEL usage.[8] Though the SOC did not define the term "independent auditor," the word "auditor" is commonly understood and used in business and law to mean a professional skilled in conducting audits, who is licensed by a recognized profession and subject to a code of conduct requiring a high level of independence.[9]

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[8] BellSouth was a signatory to the letter conveying this agreement to the FCC. *February 28, 2000 Joint Letter* (filed *ex parte* on February 29, 2000), CC Docket No. 96-98.

[9] In *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 626 (2003) ("Triennial Review Order" or "TRO"), issued after execution of the Agreement, the FCC affirmed its prior sanctioning of the parties' agreement to conduct audits using independent auditors. The FCC also ruled that the independent auditor must perform its audit in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA"). This requirement that the audits conform to AICPA standards was not part of the SOC and, in its TRO, ¶ 622, the FCC acknowledged that it was adopting auditing procedures "comparable" to but in some respects different

BellSouth has chosen American Consultants Alliance ("ACA") to conduct the audit of NuVox' EELs. Through the affidavit of its Assistant Vice President – Pricing, Jerry Hendrix, BellSouth represents that ACA is not subject to BellSouth's control or influence. The Commission finds that, subject to the SOC's requirement that a third party selected to perform an EEL audit must be an "independent auditor" (and the Commission believes, in the context of an EEL audit, that the SOC contemplates that an independent auditor is a licensed professional as discussed above), the selection of the third party auditor is a matter for BellSouth. BellSouth is not required to consult with or seek the approval of NuVox, the party being audited. Similarly, BellSouth is not required to obtain the Commission's approval of its choice of an auditor. The Commission does not believe the FCC's independence requirement was intended to require ILECs to submit to hearings on their choice of auditor prior to exercising their audit rights. The CLPs remedy for failure to select an independent auditor is to attack the auditor's qualifications in a complaint proceeding should the ILEC file a complaint for non-compliance with local usage certifications based on the auditor's findings. Therefore, in choosing a third party to audit NuVox' EELs, BellSouth is advised to give due consideration to the "independent auditor" requirement. If ACA's audit uncovers NuVox' alleged non-compliance with local usage certifications and BellSouth files a complaint with the appropriate Commission pursuant to Section 10.5.4 of Attachment 2 of the Agreement, the credibility of the auditor as well as the credibility of the auditor's work is subject to challenge and may be offered as a defense to any such complaint.

Accordingly, the Commission concludes that BellSouth is required to select an independent auditor to conduct EEL audits, but that selection of the auditor is a matter for BellSouth. The proper time for NuVox to challenge the independence of the auditor is in a complaint proceeding should the results of the audit be used by BellSouth in an attempt to establish that NuVox was not entitled to conversion of special access circuits based on local usage requirements.

ISSUE 4: Should the Commission issue an order finding that BellSouth is entitled to provide its auditor with records in BellSouth's possession, including those that contain proprietary information?

DISCUSSION

BellSouth's Complaint requests that the Commission "clarify that BellSouth is authorized to provide the auditor with whatever BellSouth records the auditor may reasonably require in conducting the audit, including records in BellSouth's possession that contain proprietary information of another carrier." Section 222 of the Act generally imposes a duty on telecommunications carriers to protect the confidential information of other carriers and to use such information in its possession only for the purpose of

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from those in the SOC. Nevertheless, although requirements newly imposed by the TRO may not apply to audits conducted pursuant to interconnection agreements entered prior to issuance of the TRO, the FCC's affirmation of the requirement that an "independent auditor" conduct EEL audits and its ruling regarding adherence to AICPA standards provide highly persuasive corroboration that the FCC intended the SOC to require, at a minimum, that a licensed professional perform EEL audits.

providing telecommunications service. Section 222 further imposes a duty on telecommunications carriers not to use or disclose customer proprietary network information for other than the provision of telecommunications service unless required by law or authorized to do so by the customer. It does not appear from the filings of record that the Parties fully briefed this issue.

Therefore, the Commission declines to authorize BellSouth's disclosure of proprietary information of other parties in the absence of a showing by BellSouth that such is required by law or that the proper authorizations have been obtained. Should BellSouth disclose proprietary information to its auditor on its own, it will do so at the risk that it may be in violation of Section 222 of the Act or other applicable agreements that it may have with the carriers or customers to whom the information pertains.

CONCLUSIONS

The doctrine of collateral estoppel does not require the Commission to adopt or follow the decision and contract interpretation of the GPSC. Having complied with the requirements of Section 10.5.4 of Attachment 2 of the Agreement, BellSouth is entitled to audit NuVox' records in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. BellSouth is not required to make any further or additional showings regarding entitlement to audit NuVox' records under the Agreement in advance of the audit. While a third party selected to conduct an EEL audit must be an independent auditor, the selection of the third party is a matter for BellSouth that is not subject to NuVox' or the Commission's approval, at least in the first instance. Any challenge regarding the auditor's qualifications or allegations of bias is properly reserved for a complaint proceeding initiated under Section 10.5.4 pursuant to the dispute resolution process of the Agreement. The Commission declines to authorize BellSouth to disclose proprietary information of other carriers to its auditor.

IT IS, THEREFORE, ORDERED as follows:

1. That NuVox' motion for procedural order is denied;

2. That NuVox' request for oral argument and/or an evidentiary hearing is denied;

3. That BellSouth's request for summary disposition is allowed;

4. That BellSouth has met the requirements of Section 10.5.4 of Attachment 2 of the Agreement and is therefore entitled to audit NuVox' records to verify the type of traffic being transmitted over EEL circuits;

5. That NuVox shall permit BellSouth's chosen auditor to conduct the audit as previously noticed by BellSouth and the audit should begin no later than 45 days from the date of this Order, and,

6. That BellSouth's request for interest on the amount of the difference between EEL rates paid by NuVox and special access rates that may be found applicable should be made in a complaint brought pursuant to Paragraph 10.5.4 of Attachment 2 of the Agreement, and is, therefore, denied because it is not appropriately before the Commission at this time in this proceeding.

ISSUED BY ORDER OF THE COMMISSION.

This the 21st day of February, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

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