

ORIGINAL

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From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Thursday, March 24, 2005 2:34 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Marcus, Theodore
Subject: 040028-TP BellSouth's Opposition to NewSouth's Motion to Compel
Attachments: 040028 BST Opposition.pdf

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- CMP** _____
- COM** B. Docket No. 040028-TP: Complaint and Request for Summary Disposition BellSouth Telecommunications, Inc. Against NewSouth Communications, Corp. to Enforce Contract Audit Provisions
- CTR** _____
- ECR** _____
- GCL** C. BellSouth Telecommunications, Inc. on behalf of Nancy B. White
- OPC** _____
- MMS** D. 7 pages total
- RCA** E. BellSouth Telecommunications, Inc.'s Opposition to NewSouth Communications Corp.'s Motion to Compel.
- SCR** _____
- SEC** L <<040028 BST Opposition.pdf>>
- OTH** _____

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DOCUMENT NUMBER-DATE
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ORIGINAL

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March 24, 2005

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

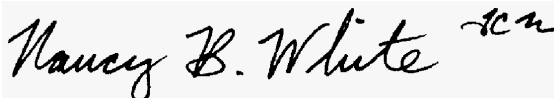
**Re: Docket No.: 040028-TP
Complaint and Request for Summary Disposition BellSouth
Telecommunications, Inc. Against NewSouth Communications, Corp.
to Enforce Contract Audit Provisions**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Opposition to NewSouth Communications Corp.'s Motion to Compel, which we ask that you file in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Nancy B. White

Enclosures

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

578346

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
Docket No. 040028-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 24th day of March, 2005 to the following:

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Complaint and Request for Summary Disposition)
By BellSouth Telecommunications, Inc. Against)
NewSouth Communications Corp., to Enforce) Docket No. 040028-TP
Contract Audit Provisions)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION TO
NEWSOUTH COMMUNICATIONS CORP.'S MOTION TO COMPEL**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny the Motion to Compel filed by NewSouth Communications, Corp. ("NewSouth") on March 17, 2005. Given the posture of the proceedings (discussed below), NewSouth's underlying discovery requests are premature at best, and are, by definition, not relevant to the subject matter (*i.e.*, the issues currently pending in this action). NewSouth's discovery requests, and Motion to Compel, are designed solely to circumvent the process the FPSC presently has prescribed for these proceedings (and the *NuVox* companion case¹), by launching the development of a factual record that the Commission has yet to determine is even appropriate in the first place.

The FPSC can, and must, see through this attempt to derail the process the Commission has set on track. Before any discovery is permitted, the Commission should reach a decision on whether there are fact issues regarding which discovery might be relevant and helpful. NewSouth should not be permitted to disrupt the *status quo* by going forward with discovery that not only presupposes the answers (in its favor, of course), but would moot the critically important questions presently under consideration

¹ See *In re: Complaint to Enforce Interconnection Agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.*, Docket No. 040527-TP.

by the FPSC.

BACKGROUND

NuVox and NewSouth officially merged some time in 2004 – after (it is believed) BellSouth’s initial Complaint filing in the *NewSouth* matter at bar. The companies are, thus, one entity at this time, not two. For several months now, both the Commission and the parties have treated the *NuVox* and *NewSouth* matters as though aligned. For example, at *NuVox/NewSouth’s urging*, the matters were held in abeyance (*Order No. PSC-04-0998-FOF-TP*, dated October 12, 2004) so that settlement of *both matters* could be explored. BellSouth acquiesced, and participated in the mediated discussions. Absolutely nothing came of those discussions. The abeyance of both matters, accordingly, was eventually lifted.

On February 15, 2005, after having been advised of the failure of the settlement discussions, the Commission’s Staff held a Status Conference Call at 10:30 a.m. with the parties (*i.e.*, BellSouth, NewSouth and NuVox) to set the next steps in both proceedings. The parties’ positions on what should next occur were distinctly different. NewSouth/NuVox advocated for full evidentiary hearings on what it argues are the “issues”: *i.e.*, whether BellSouth has demonstrated a concern that would warrant the requested audit, and whether BellSouth’s auditor selection is required to meet (and, in fact, meets) AICPA standards relating to “independence.”

BellSouth, on the other hand, contended that neither of NewSouth/NuVox’s “issues” is germane to the resolution of BellSouth’s Complaints and Summary Disposition requests. As BellSouth argued, the language of the interconnection agreements controls these matters. That language is plain, comprehensive and

straightforward, and clearly does not require any demonstration of concern by BellSouth as an audit prerequisite, and similarly does not place the limitations on BellSouth's auditor selection that NewSouth/NuVox alleges. Thus, the "fact questions" NewSouth/NuVox seeks to raise are nothing more than red herrings, and should not prevent the FPSC from finding in BellSouth's favor.

The result of the February 15, 2005 conference call,² as BellSouth understood it, was that the FPSC is now determining which of these fundamentally different positions is correct. Thus, whether this is a case to be decided "on the papers" (perhaps supplemented by oral argument on the legal merits) or whether an evidentiary hearing is needed (with respect to which fact discovery might be appropriate), are now the issues pending before the FPSC.

By no means, however, has the FPSC ruled, or even suggested, that fact discovery is appropriate *at this juncture* of the proceedings. Indeed, it is preposterous to assume that there is anything for the parties to do at this point other than to wait for the FPSC to decide whether it can and will rule on the papers (possibly supplemented by oral argument on legal questions), or whether there are substantial fact questions that eliminate that option. It is obvious that NewSouth's discovery and Motion to Compel alter that landscape dramatically, because they rest on the supposition that an evidentiary hearing is required to resolve BellSouth's Complaint(s) and Summary Disposition request(s). The FPSC has said nothing to support that view.

ARGUMENT

² Because of the alignment of issues and parties, the Staff suggested that if the Commission takes oral argument on the legal issues to supplement the paper record, the two dockets should be held on the same day.

Considered in this light, NewSouth's Motion to Compel should be called what it is: an effort to steamroll the Commission's deliberations and to impose NewSouth's will as the *status quo*. The only way that the discovery NewSouth seeks can be "relevant" and helpful is if there are issues pending in this action to which such discovery would arguably be addressed. Of course, it is BellSouth's position that there are no such issues. The Commission may ultimately disagree (though BellSouth thinks it unlikely), but until it does, fact discovery is simply premature. *See, e.g., Washington Alder LLC v. Weyerhaeuser Co.*, 2004 WL 948775 (D. Or. 2004) at 2 (party's discovery requests concerning divestiture remedy for alleged antitrust violations were "premature" and would only be permitted "if a divestiture proceeding [became] necessary"). The FPSC certainly should not reward NewSouth's audacious ploy by putting BellSouth to discovery tasks that, in all probability, are unwarranted.

Should the FPSC decide that an evidentiary record is needed to resolve BellSouth's Complaint and Summary Disposition request, then and only then would NewSouth's discovery be appropriate. For now, however, NewSouth should be ordered to stand down.

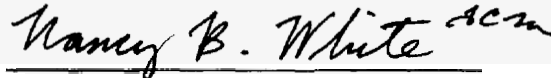
The FPSC should prevent NewSouth (and, frankly, NuVox) from putting the proverbial "cart before the horse." NewSouth should not be allowed fact discovery until the Commission decides, as it has committed itself to do, whether there are fact issues to be resolved in this matter requiring a broader record than what appears in the papers at this stage. BellSouth has interpreted the FPSC's silence thus far as deliberation; NewSouth apparently senses a vacuum and an opportunity for mischief.³ NewSouth's

³ In its impatience, NewSouth/NuVox has opted to pursue premature discovery (*i.e.*, interrogatories

Motion to Compel should be denied.

Respectfully submitted this 24th day of March, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



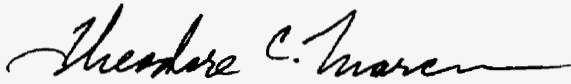
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and production requests in *NewSouth*, and a newly-served deposition notice for a BellSouth officer who provided a short affidavit with the *NuVox* complaint filing). And, now, it harasses BellSouth with a Motion to Compel. *NewSouth/NuVox* knows that discovery is patently premature, but pursues it anyway instead of waiting for the FPSC first to decide the direction of the proceedings. The Motion to Compel, thus, is not only a desperate attempt to change the *status quo*, but it is also a comment – albeit sideways – on the Commission’s decisional pace. This disquiet is unjustified: the FPSC’s conference call with the parties – February 15, 2005 – occurred only one month before *NewSouth* (and *NuVox*) began clamoring for discovery.