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Timolyn Henry

From: Slaughter, Brenda [Brenda.Slaughter@BellSouth.COM]
Sent: Thursday, April 07, 2005 4:32 PM
To: Filings@psc.state.fl.us
Cc: Nancy White; Fatool, Vicki; Holland, Robyn P; Nancy Sims; Linda Hobbs; Bixler, Micheale; Marcus, Theodore
Subject: Docket 040527-TP
Importance: High
Attachments: 040527-TP Motion for Protective Order.pdf

- A. Brenda Slaughter
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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. 8 pages total
- E. BellSouth Telecommunications, Inc.'s Motion for Protective Order
 .pdf version attached

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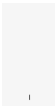
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<<040527-TP Motion for Protective Order.pdf>>

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April 7, 2005

Mrs. Blanca S. Bayó
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. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion for Protective Order, which we ask that you file in the captioned docket.

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

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket No. 040527-TP

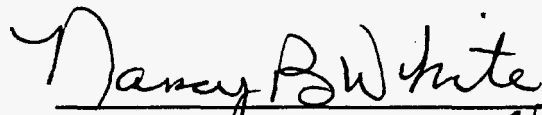
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 7th day of April, 2005 to the following:

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Nancy B. White (BSS)

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Enforcement of Interconnection)
Agreement Between BellSouth) Docket No. 040527-TP
Telecommunications, Inc. and NuVox)
Communications, Inc.) Filed: April 7, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION
FOR PROTECTIVE ORDER

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests, pursuant to Fla. R. Civ. P. 1.280(c),¹ that the Commission issue a protective order that would prevent NuVox Communications Corp. ("NuVox") from deposing, *duces tecum*, BellSouth employee Jerry Hendrix on April 18, 2005. Given the posture of the proceedings (discussed below), NuVox's discovery efforts are premature and are, by definition, not relevant to the subject matter (*i.e.*, the issues currently pending in this action). NuVox's discovery requests are designed solely to circumvent the process the FPSC has prescribed for these proceedings (and the *NewSouth* companion case²), 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 its decision on whether there are fact issues regarding which discovery might be relevant and helpful.³ NuVox should not be permitted to disrupt the *status quo* by going forward with discovery that not only

¹ Florida Rule of Civil Procedure 1.280 (c) states, in pertinent part, that, "upon motion by a party . . . from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party . . . from annoyance . . . or undue burden or expense that justice requires, including one or more of the following: (1) that discovery not be had" Fla. R. Civ. Pro. 1.280(c).

² See *In re: Complaint and Request for Summary Disposition By BellSouth Telecommunications, Inc. Against NewSouth Communications Corp, to Enforce Contract Audit Provisions*, Docket No. 040028-TP.

³ See Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, *that is relevant to the subject matter of the pending action . . .*") (emphasis added).

presumes that the Commission will resolve the preliminary issues in its favor, but would moot the critically important questions presently under consideration.

FACTUAL BACKGROUND

On Thursday, March 17, 2005 (received, U.S. mail, March 21, 2005), NuVox served notice upon BellSouth seeking the deposition, *duces tecum*, of Jerry Hendrix. The notice contained nine (9) document requests that cover an expansive array of documents (“all documents and records relating to . . .”, or “all documents and analysis supporting . . .”, or “copies of any and all documents relating to . . .”, *etc.*) relating to various aspects of the claims and defenses *arguably* at issue in this case.

NuVox and NewSouth officially merged some time in 2004 – after (it is believed) BellSouth’s initial Complaint filing in the *NuVox* 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, and remain, 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,⁴ 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.

ARGUMENT

By no means 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 NuVox’s deposition notice, *duces tecum*, would change the posture of these proceedings dramatically, because they

⁴ 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

rest on the supposition that an evidentiary hearing on “concern” and “auditor independence” are required to resolve BellSouth’s Complaint(s) and Summary Disposition request(s). The FPSC has said nothing to support that view.

Considered in this light, NuVox’s deposition, *duces tecum*, should be seen for what it is: an effort to steamroll the Commission’s deliberations and to impose NuVox’s theory of the case as the *status quo*. The only way that the discovery NuVox 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 with BellSouth’s position (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 NuVox’s unilateral and unwarranted discovery 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 NuVox’s discovery arguably be appropriate. For now, however, NuVox should not be permitted to put the “cart before the horse,” and should not be allowed to put BellSouth to self-evident burden and expense that, in all probability, will be shown to be undue.

Accordingly, the FPSC should disallow any 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 on the papers at this stage. BellSouth has

interpreted the FPSC's silence thus far as deliberation, and has refrained from issuing any discovery requests in the interim. NuVox/NewSouth, however, seeks to wrest the issue from the Commission and put the case on procedural footing to its liking.⁵ The Commission should not permit such a usurpation of its authority.

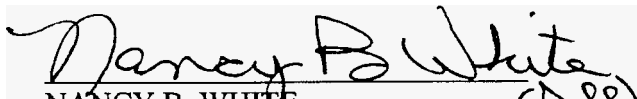
CONCLUSION

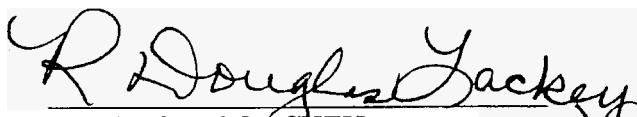
In conclusion, BellSouth remains convinced that the case(s) before the FPSC can be -- and should be -- resolved on the papers. Thus, in BellSouth's view, NuVox's deposition notice is not only premature, but is unwarranted as a foundational matter. However the issue is ultimately decided by the Commission, it is incumbent upon the parties to wait for the Commission to decide the direction of these proceedings before sharpening their discovery instruments. NuVox/NewSouth, accordingly, should be ordered to stand down.

⁵ In its impatience, NewSouth/NuVox has opted to pursue premature discovery (*i.e.*, interrogatories and production requests in *NewSouth*, and the instant deposition notice). 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 deposition notice, 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/NuVox began clamoring for discovery.

Respectfully submitted this 7th day of April, 2005.

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