

State of Florida



# Public Service Commission

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**DATE:** February 1, 2007

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Tan) *Tan* *PCW*  
Division of Competitive Markets & Enforcement (Casey, Wright) *Casey* *Wright*

**RE:** Docket No. 040028-TP – Complaint and request for summary disposition to enforce contract audit provisions in interconnection agreement with NewSouth Communications Corp., by BellSouth Telecommunications, Inc.

Docket No. 040527-TP – Complaint to enforce interconnection agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.

**AGENDA:** 02/13/07 – Regular Agenda – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\040028.RCM.DOC

### Case Background

On March 15, 2002 BellSouth Telecommunications, Inc. (BellSouth) transmitted a letter by email and overnight delivery to NuVox Communications, Inc. (NuVox), notifying NuVox of its intent to audit NuVox's Enhanced Extended Links (EELs).<sup>1</sup> On April 26, 2006, BellSouth

<sup>1</sup> An enhanced extended link (EEL) consists of an unbundled network elements (UNEs) combination of loops and transport.

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transmitted a letter to NewSouth Communications, Corp (NewSouth), notifying NewSouth of its intent to audit NewSouth's EELs.<sup>2</sup> Both NewSouth and NuVox refused to comply with the audit.

BellSouth filed a Complaint and Request for Summary Disposition against NewSouth on January 12, 2004 to enforce an audit provision in their interconnection agreement. On June 4, 2004, BellSouth filed a similar Complaint against NuVox, collectively "Complaints."

The parties requested that the Commission not take action on the complaint to allow for the differences to be solved through negotiations. The parties reached a resolution and thus filed a Joint Motion to Dismiss Complaints with prejudice on January 24, 2007.

BellSouth and AT&T Inc. (AT&T) filed *In the Matter of BellSouth Corporation and AT&T Inc., Application Pursuant to Section 214 of the communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to Transfer the Control of BellSouth Corporation to AT&T Inc.* WC Docket No 06-74, with the Federal Communications Commission ("FCC") on March 31, 2006. This application requested authority to transfer AT&T control of authorizations and certain licenses held directly and indirectly by BellSouth.

The merger went into effect on December 29, 2006 when the FCC granted approval of the merger of BellSouth and AT&T, subject to the voluntary commitments of AT&T.

The final EEL audit merger condition approved by the FCC states:

AT&T/BellSouth shall cease all ongoing or threatened audits of compliance with the [FCC]'s EEL eligibility criteria (as set forth in the *Supplemental Order Clarification's* significant local use requirement and related safe harbors, and the *Triennial Review Order's* high capacity EEL eligibility criteria), and shall not initiate new EELs audits.

Parties further assert that pursuant to the FCC's announced adoption of a Memorandum Opinion and Order approving the merger, on December 29, 2006, BellSouth became obligated to cease all "ongoing or threatened" EEL audits. Parties assert that the disputes before the Commission are moot in consideration of the EEL audit merger condition approved by the FCC and therefore, request that the joint motion to dismiss be granted.

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<sup>2</sup> On April 6, 2005, a memo to CCA was issued in Docket No. 050162-TI acknowledging NewSouth Holdings, Inc. holds the name of NuVox Communications, Inc., as filed with the Florida Department of State, effective March 3, 2005.

**Discussion of Issues**

**Issue 1:** Should the Commission grant BellSouth Telecommunications, Inc. and NuVox Communications, Inc.'s Joint Motion to Dismiss Complaints?

**Recommendation:** Yes, The Commission should grant the parties' Joint Motion to Dismiss Complaints, therefore Docket Nos. 040028-TP and 040527-TP should be dismissed with prejudice. (Tan)

**Staff Analysis:** The law is clear that the plaintiff's right to take a voluntary dismissal is absolute. *Fears v. Lunsford*, 314 So.2d 578, 579 (Fla. 1975). It is also established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act. *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So.2d 68, 69 (Fla. 1978). In their Joint Motion to Dismiss Complaints, the parties advise the Commission that they are in agreement that the disputes in these dockets are rendered moot by the FCC's adoption of a Memorandum Opinion and Order approving the merger and request that BellSouth's Complaints be dismissed with prejudice to the rights of each party to further pursue these issues in any forum. Accordingly, staff recommends that the Commission grant the parties' Joint Motion to Dismiss Complaints. No other party has filed for intervention in this matter; therefore, acknowledging the voluntary joint motion to dismiss will not be prejudicial to any party.

Docket Nos. 040028-TP, 040527-TP

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**Issue 2:** Should these dockets be closed?

**Recommendation:** Yes, If the Commission grants the Joint Motion to Dismiss Complaints for Docket Nos. 040028-TP and 040527-TP, no further action needs to be taken and the dockets should be closed. If the Commission denies staff's recommendation, the dockets should remain open. (Tan)

**Staff Analysis:** If the Commission grants the Joint Motion to Dismiss Complaints for Docket Nos. 040028-TP and 040527-TP, no further action needs to be taken and the dockets should be closed. If the Commission denies staff's recommendation, the dockets should remain open.