**State of Florida**

# Public Service Commission

**CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD**
**TALLAHASSEE, FLORIDA 32399-0850**

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** June 9, 2005

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

**FROM:** Office of the General Counsel (Rojas, Susac)
Division of Competitive Markets & Enforcement (Wright)

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

**AGENDA:** 06/06/05 – Regular Agenda – Final Order – Parties May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** Request that this recommendation immediately follow the recommendation in Docket No. 040028-TP.

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\040527.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). NuVox refused to comply with the audit, and to date, BellSouth has not conducted an audit of NuVox's EELs.

On June 4, 2004, BellSouth filed a Complaint against NuVox to enforce an audit provision in their interconnection agreement. On June 24, 2004, NuVox filed its Answer and Motion to Dismiss BellSouth's Complaint. On September 13, 2004 BellSouth filed a Motion for Summary Disposition. On October 12, 2004, Order No. PSC-04-0998-FOF-TP was issued, which denied NuVox's Motion to Dismiss, placed the docket in a 30-day abeyance and required

the parties to enter staff-assisted discussion to attempt to resolve the outstanding issues. No resolution was reached and on February 2, 2005, staff held a conference call with the parties to discuss the procedural handling of the docket. On March 17, 2005, NuVox served a Notice of taking Deposition Duces Tecum of BellSouth employee Jerry Hendrix. BellSouth filed a Motion for Protective Order on April 7, 2005. No ruling has been made on the Motion for Protective Order.

On April 12, 2005, BellSouth filed a Supplemental Affidavit of Jerry Hendrix. On May 13, 2005, NuVox filed a response to BellSouth's supplemental filing. In its response, NuVox argues that BellSouth's "supplement" is an unauthorized filing not permitted by either the Commission rules or the Uniform Rules and should be disregarded.

BellSouth's supplemental filing asserts that NuVox challenged BellSouth's EELs audit procedures before the FCC in the context of BellSouth's Five State 271 Application. BellSouth indicates that the FCC rejected that challenge. NewSouth argues that the Commission's rules and Orders in this proceeding do not contemplate receipt of supplemental filings; thus, consideration of this material is inappropriate. Staff believes it is in the Commission's discretion as to whether to consider or disregard the supplemental material. Staff notes that it has not specifically addressed the supplemental material in its analysis, but its consideration would in no way alter staff's recommendation.

This recommendation addresses BellSouth's Motion for Summary Disposition. It is undisputed that the parties' ICA is governed by, construed and enforced in accordance with the laws of the State of Georgia. Staff believes that the dispute hinges solely upon the interpretation of the following language found in Attachment 2, Section 10.5.4 of the parties interconnection agreement (ICA):

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NuVox, audit NuVox's records not more than once 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 the 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 this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of and transport network elements to special access services and may seek appropriate retroactive reimbursement from NuVox.

Attachment 2, Section 10.5.4

**Summary of Staff's Recommendation**

Staff recommends granting BellSouth's Motion for Summary Disposition and allow BellSouth to audit NuVox's records regarding the use of Enhanced Extended Links (EELs). Staff believes the parties' interconnection agreement (ICA) governs this dispute and not the FCC's Supplemental Order Clarification (SOC) and the Triennial Review Order (TRO). The language in Attachment 2, Section 10.5.4 of the parties' ICA is clear and unambiguous as to BellSouth's right to audit NuVox's records. Furthermore, if BellSouth concludes that NuVox is not providing a significant amount of local exchange traffic over the EELs, then BellSouth would be able to file a complaint with the Florida Public Service Commission, pursuant to the dispute resolution process set forth in the parties' ICA. NuVox would then have the opportunity to challenge the results of the audit, if necessary.

## Discussion of Issues

**Issue 1**: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion For Summary Disposition?

**Recommendation**: Yes. Staff recommends granting BellSouth's Motion for Summary Disposition and allowing BellSouth, at its sole expense, and upon thirty (30) days notice to NuVox, to audit NuVox's records to verify the type of traffic being transmitted over loop and transport combinations, also known as Enhanced Extended Link (EELs). (Rojas, Susac)

**Staff Analysis**:

**Parties Arguments:**

**BellSouth**

In its Complaint, BellSouth argues that its right to audit NuVox is governed solely by the parties' voluntarily negotiated Agreement. BellSouth argues that it is not necessary to look beyond the four corners of the Agreement. BellSouth claims that neither the SOC[1] nor the TRO is applicable to this dispute. BellSouth does not dispute the fact that the FCC issued its SOC in connection with adoption of rules establishing network elements pursuant to unbundling requirements under Section 251(c). However, BellSouth contends that the duties of each party in this case are defined by their Agreement and not Section 251(c).[2]

BellSouth claims that when parties negotiate and enter into an interconnection agreement voluntarily, they may do so "without regard to the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. §252(a). BellSouth argues that this allows parties to bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Section 251(b) and (c) of the Act.[3] BellSouth claims that the parties

[1] 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).

[2] 47 U.S.C. § 252(a); AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties would other have under Section 251(b) or Section 251(c)"); Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp., 294 F.3d 307, 322 (2d Cir. 2002), cert. granted, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of Section 251"); Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc., 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts . . . .")

[3] See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 373 (1999) ("an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"; MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)"; Iowa Utilities Board v. Commission, 120 F.3d 753, n. 9 (8th Cir. 1997) aff'd in part, rev'd in part on other grounds, See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 ("[t]"he FCC's rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations.")

were free to negotiate different terms from the audit requirements in the SOC, and that is precisely what resulted from the parties' negotiations.

BellSouth argues that, to the extent NuVox was interested in adding audit conditions from the SOC, NuVox could have requested such language be incorporated into the parties' ICA during negotiations. In the case at hand, BellSouth argues that its current request to audit loops and transports does not contain the language specifically incorporating the SOC. BellSouth asserts that the omission was intentional and Attachment 2, § 10.5.4, Exh. A of the parties' ICA is clear as to the parties' rights in this regard. And, "where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms."[4] BellSouth argues that the language of the agreement provides it with an unqualified right to audit NuVox's circuits provided BellSouth gives 30 days notice and assumes the cost of the audit. In sum, BellSouth claims that the ICA supersedes the FCC's SOC, and adopting NuVox's position would undermine the entire negotiation and arbitration scheme set forth in the Act.

Furthermore, even though it does not believe the Order is relevant to this dispute, BellSouth asserts that it has met the criteria contained in the SOC. BellSouth cites paragraphs 1, 29 and 32 in support of its position, and asserts that these three paragraphs support the notion that an ILEC may audit a CLEC to confirm that it is providing significant amounts of local exchange service over EEL combinations. Further, BellSouth recognizes that audits should not be routine, and notes that it has not audited NuVox in approximately three years. Last, BellSouth asserts that it has cause to conduct the audit and has hired an independent third party to conduct the audit.[5]

BellSouth also argues that the TRO does not apply to this dispute. The TRO was adopted well after the execution of the parties ICA and therefore has no relevance to the interpretation of the ICA, unless and until the Order is incorporated into the Agreement via the change of law provision. BellSouth claims that the TRO has not been incorporated into the ICA, and therefore, is not relevant to this dispute.

As stated above, BellSouth seeks to audit NuVox's records pursuant to the terms and conditions in the parties' ICA. BellSouth claims the Agreement alone sets forth the terms of the parties' rights with respect to EEL audits and FCC Orders, such as the TRO and the SOC, cannot be read to vary the terms of the Agreement. BellSouth also argues that under Georgia law, a merger or integration clause in a contract provides the parties with a substantive, contractual right against a tribunal's use of extraneous material to "construe" the contract in contradiction terms. GE Life and Annuity Assurance Co. v. Donaldson, 189 F.Supp. 2d 1348, 1357 (M.D. Ga. 2002) ("a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material.") Last, BellSouth contends that this auditing issue is purely contractual and the Commission need not conduct a hearing.

[4] Moore & Moore Plumbing, Inc. v TriSouth Contractors, Inc., 256 Ga. App. 58, 567 S.E.2d 697 (2002)
[5] BellSouth Mr. Hendrix Affidavit, ¶5, 12 and 16.

**NuVox**

NuVox argues that BellSouth's request to audit is unreasonable and fails to meet the criteria set forth in the FCC's SOC and TRO. NuVox asserts that the express terms of the parties' Agreement require compliance with Section 251(c)(3), FCC's Rules and Orders, such as the SOC.[6] In addition, NuVox claims that BellSouth selected an auditor that is neither independent of BellSouth nor an auditor.

NuVox also argues that the ICA incorporates the SOC and the TRO as a matter of law. Under Georgia law,[7] the parties are presumed to have incorporated existing law into their contracts, and to have negotiated with regard to existing law, unless the Parties explicitly state otherwise. Further, NuVox argues that there is a "strong presumption" that negotiated provisions that plainly track controlling law were negotiated "with regard to the 1996 Act and controlling law." AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 229 F.3d 457, 465 (4th Cir. 2000). NuVox claims that these decisions incorporate the SOC into the parties ICA, and that the TRO should also be incorporated because it is merely a continuation of the SOC.

For example, NuVox cites a quote from Section 10.5, Attachment 2 of the ICA to illustrate the incorporation of the SOC; this section provides that NuVox may not convert special access unless it uses the combination to provide a "significant amount of local exchange service." Next, the ICA defines "significant amount of local exchange service" with reference to the SOC , and thereby incorporates the Order.

As for the TRO applicability, NuVox argues that the Order carried over the requirement that an ILEC cannot audit without concern, and must conduct the audit in accordance with the American Institute of Certified Public Accountants (AICPA) standards. In addition, the TRO retained the SOC's requirements as to payment for the audit. In this dispute, NuVox claims that BellSouth did not select an independent auditor that is AICPA compliant.

In addition, NuVox argues that a Motion for Summary Disposition should not be granted in light of its argument that discovery is appropriate in this matter. As stated in the case background, BellSouth has not responded to NuVox's discovery requests, deeming it premature and instead has filed for a Protective Order with the Commission. Therefore, NuVox argues that Summary Disposition is not appropriate in light of outstanding discovery which could reveal an issue of fact.

In conclusion, NuVox argues that the SOC and the TRO should be read in conjunction with the parties' ICA, and when read in conjunction with the ICA, BellSouth's request to audit NuVox is unreasonable and fails to meet the criteria set forth in the aforementioned Orders. NuVox adds that in Order No. PSC-04-0998-FOF-TP, the Commission directed the parties to participate in staff-assisted negotiations, noting that if the negotiations were unsuccessful, the

[6] Agreement, General Terms and Conditions §§ 23 and 35.1
[7] There is no dispute between the parties that Georgia law governs the parties' ICA.

matter would be set for hearing. NuVox implies that this prior Order indicates that the Commission has already determined that a hearing in this matter is appropriate.[8]

**Standard**

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[9] The burden is on the movant to demonstrate that the opposing party cannot prevail.[10] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[11] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[12] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[13] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[14]

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[8] Staff notes that BellSouth's Motion for Summary Disposition of this case was filed in the short interim between the filing of staff's recommendation regarding NuVox's Motion to Dismiss and the Commission's decision at the Agenda Conference. The Motion for Summary Disposition was not considered by the Commission in rendering its decision on the Motion to Dismiss; thus, staff believes that the Commission could not have intended to prejudge BellSouth's Motion for Summary Disposition in rendering its decision on NuVox's Motion to Dismiss.

[9] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[10] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

[11] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[12] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[13] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[14] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

Moreover, staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[15] the Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

**Analysis**

Staff recommends granting BellSouth's Motion for Summary Disposition because the clear, unambiguous, and voluntarily-negotiated language of the ICA allows BellSouth to audit NuVox upon thirty (30) days notice. Under Georgia law[16] "where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible." Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc., 176 Ga.App. 586, 337 S.E.2d 29, 35 (Ct.App.1985). "[A] word or phrase is ambiguous only when it is of uncertain meaning, and may be fairly understood in more ways than one." Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 787 (1947) (emphasis added); see United States Fidelity & Guar. Co. v. Gillis, 164 Ga.App. 278, 296 S.E.2d 253, 255 (Ct.App.1982) (Contract language that is capable of only one logical interpretation is accorded its literal meaning, but terms that are susceptible of more than one reasonable interpretation are "uncertain of meaning or expression and, thus, ambiguous."). "The existence or non-existence of ambiguity is always a question of law for the court." Stern's Gallery, 337 S.E.2d at 35. Since interpretation of unambiguous

[15] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

[16] It is undisputed that the parties' ICA is governed by, construed and enforced in accordance with the laws of the State of Georgia.

contract terms is for the court solely, the former Fifth Circuit, deciding a contract case under Georgia law, concluded that "merely because the parties disagree upon the meaning of contract terms will not transform the issue of law into an issue of fact." General Wholesale Beer Co. v. Theodore Hamm Co., 567 F.2d 311, 313 (5th Cir.1978) (per curiam) (emphasis added)

As stated in the case background, staff believes that the dispute hinges solely upon contract interpretation of the following language found in Attachment 2, Section 10.5.4 of the parties interconnection agreement (ICA):

> **BellSouth may, at its sole expense, and upon thirty (30) days notice to NuVox, audit NuVox's records** not more than once 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 the 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 this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of and transport network elements to special access services and may seek appropriate retroactive reimbursement from NuVox.

Attachment 2, Section 10.5.4 (emphasis added)

Staff believes the language at issue is capable of only one logical interpretation and should be accorded its literal meaning that, "BellSouth may, at its sole expense, and upon thirty (30) days notice to NuVox, audit NuVox's records . . . ."

Staff believes that neither the SOC nor the TRO should apply to the set of facts in this dispute, and that the plain, unambiguous language of the agreement should prevail. Staff recognizes that neither the SOC nor the TRO appear in the disputed language of Attachment 2, Section 10.5.4. The parties' entered into a voluntary agreement whereby they incorporated specific language of the SOC in certain sections of the ICA, and omitted specific language from that Order in other sections of the ICA. Staff believes that this omission was intentional and that the plain language of the parties' ICA governs the dispute. If the SOC, in its entirety, was incorporated into the parties' ICA as a matter of law as NuVox argues, then the specific references to the SOC would be unnecessary and redundant. Further, staff also believes that the TRO does not apply because the Order was issued after the execution of the ICA, and neither party has amended the ICA to reflect the holdings of the TRO.

In addition, staff recognizes NuVox's argument that Summary Disposition is not appropriate in light of its outstanding discovery. However, staff still believes granting the Motion for Summary Disposition is appropriate in this particular matter. As a general rule,

courts do not condone the granting of summary judgment while a motion to compel discovery is pending, unless it can be determined that "the disallowed discovery would add nothing of substance to the party's claim." McCall v. Henry Medical Center, 250 Ga. App. 679, 685 (2) (551 S.E.2d 739) (2001). In the case at hand, it is staff's belief that discovery would add nothing of substance to a party's position because there is no issue of material fact.

In conclusion, staff recommends granting BellSouth's Motion for Summary Disposition and allow it to audit NuVox's records regarding the use of Enhanced Extended Links (EELs). Staff believes the language in Attachment 2, Section 10.5.4 of the parties' ICA is clear and unambiguous as to BellSouth's right to audit NuVox's records. Staff also believes that the FCC's SOC and the TRO do not apply to this dispute. Last, if BellSouth concludes that NuVox is not providing a significant amount of local exchange traffic over the EELs, then BellSouth would be able to file a complaint with the Florida Public Service Commission, pursuant to the dispute resolution process set forth in the parties' ICA. NuVox would then have the opportunity to challenge the results of the audit, if necessary.

**Issue 2**: Should this Docket be closed?

**Recommendation**: Yes. In the event BellSouth's Motion for Summary Disposition is granted, staff recommends closing the docket because no further action is needed by the Commission. (Rojas, Susac)

**Staff Analysis**: In the event BellSouth's Motion for Summary Disposition is granted, staff believes that no further action is needed by the Commission.