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February 3, 2003

EX PARTE

Ms Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: *Ex Parte Presentation, Review of the Section
251 Unbundling Obligations of Incumbent Local
Exchange Carriers, CC Docket Nos. 01-338, 96-98,
98-147*

Dear Ms. Dortch:

Attached is a recent report by a Georgia Public Service Commission Hearing Officer in Georgia concerning BellSouth's attempts to audit certifications under the FCC's current Safe Harbor requirements. The Hearing Officer concludes that "BellSouth has not violated any potential limitations placed on ILECs by the Supplemental Order." Report at p. 5. In addition, the officer found that "BellSouth has provided a reasonable basis for a 'concern' to support the initiation of the audit." Report at p. 8.

I am filing this notice in the dockets identified above, as required by Section 1.1206(b)(2) of the Commission's rules, and request that you associate this notice with the record of those proceedings.

Sincerely,

Jon Banks

Attachment

Cc: Christopher Libertelli
Matt Brill
Jordan Goldstein
Lisa Zaina
Rich Lerner
Bill Maher
Jeffrey Carlisle
Scott Bergmann
Michelle Carey
Tom Navin

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA**

DOCKET NO. 12778-U

In Re: Enforcement of Interconnection Agreement between BellSouth
Telecommunications, Inc. and NuVox Communications, Inc.

Appearances:

On Behalf of NuVox Communication, Inc.
John J. Heitman Attorney

On Behalf of BellSouth Telecommunications:
Bennett Ross, Attorney

On Behalf of the Commission Staff:
Daniel Walsh, Attorney

**ORDER DENYING REQUEST TO DISMISS, DENY OR STAY
CONSIDERATION, DENYING REQUEST TO ENTER AN ORDER THAT THE
INTERCONNECTION AGREEMENT HAS BEEN BREACHED AND
GRANTING REQUEST TO AUDIT.**

On May 13, 2002, BellSouth Telecommunications, Inc. (“BellSouth” or “BST”) filed a Complaint with the Georgia Public Service Commission (“Commission”) to enforce certain provisions of an Interconnection Agreement with NuVox Communications, Inc. (“NuVox”) and request expedited proceedings. NuVox filed its Answer on May 21, 2002. This matter was assigned to a Hearing Officer on June 18, 2002, pursuant to O.C.G.A. Section 46-2-58. Oral argument was scheduled and heard on August 13, 2002. The parties were later requested to submit Briefs addressing two specific issues. The Briefs were filed on October 4, 2002

JURISDICTION

The Commission has general jurisdiction over this matter pursuant to O.C.G.A. Sections 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. Section 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the Telecommunications and Competition Development Act of 1995. The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996. Since the Interconnection Agreement between the parties was approved by Order of the Commission on October 5, 2000, a Complaint that a party is in violation of the Agreement equates to a claim that a party is out of compliance with a Commission Order. The Commission is authorized to enforce, and to ensure compliance with its orders pursuant to O.C.G.A. Sections 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in insuring that its Orders are upheld and enforced.¹

BACKGROUND

BellSouth filed this Complaint requesting that the Commission enforce the audit provisions of its Interconnection Agreement with NuVox.² BST asserts that it is entitled to audit NuVox's records to verify the type of traffic being placed over combination of loop and transport network elements.

BellSouth requests that the Commission, on an expedited basis: (1) enter an order declaring that NuVox has breached its Interconnection Agreement with BellSouth by failing to allow BST to commence an audit of the facilities that NuVox has self-certified as carrying "a significant amount of local exchange service;" (2) enter an order requiring NuVox to allow such an audit of its records; and (3) enter an order requiring NuVox to cooperate in such audit by providing the auditors selected by BellSouth with appropriate

¹ *Campaign for a Prosperous Georgia v. Georgia Power Company*, 174 Ga. App. 263, 264, 329 S.E. 2nd 570 (1985).

² Attachment 2, Section 10.5.4.

working facilities and access to any required records in an manner that will allow the timely completion of the audit in question.³

NuVox contends that the Complaint is frivolous and insists on compliance with the audit provisions of both the FCC's Supplemental Order Clarification ("Supplemental Order")⁴ and the Interconnection Agreement. NuVox urges the Commission to dismiss the Complaint.

BST argues that only the provisions of the Interconnection Agreement govern it with respect to terms and conditions of the audit. BST asserts that in accordance with the Interconnection Agreement, it has, upon 30 days notice to NuVox, the authority to audit NuVox's records to verify the type of traffic being transmitted over combinations of loop and transport network elements purchased by NuVox from BellSouth and to determine whether, based on the audit results, NuVox is providing a significant amount of local exchange service over the loop and transport combinations. BellSouth claims that the facilities to be audited were purchased as special access facilities, but were subsequently converted to Extended Enhance Links ("EELs") based upon NuVox's self- certification that such facilities were being used to provide a "significant amount of local exchange service."⁵

BellSouth presented evidence that it has given NuVox the required 30 days notice of its intent to audit NuVox's records.⁶ BellSouth claims that NuVox's stated reasons for refusing to allow the audit to commence all deal with matters that are not relevant to the commencement of the audit, or that do not need to be resolved prior to the commencement of the audit.⁷

³ *Complaint of BellSouth Telecommunications, Inc. to Enforce Interconnection Agreement and Request for Expedited Proceedings* ("Complaint"), p. 5.

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*. CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, 15 FCC Rcd 9587 (released June 2, 2000) ("Supplemental Order") The Supplemental Order was incorporated by reference in this Docket. The Comments of the various parties filed at the FCC with respect to this issue have been filed with the Executive Secretary and are also a part of this record.

⁵ Interconnection Agreement, Section 10.5.4 of Attachment 2. Bellsouth notes that the price paid by NuVox for these facilities when NuVox characterizes the facilities as EELs providing a "significant amount of local exchange service" is less than NuVox would pay if the facilities continued to be treated as special access facilities. Complaint of BST p. 4.

⁶ BST Exhibit 1.

⁷ *Complaint*, p. 2.

NuVox claims that BST is seeking to pick-and-choose the audit parameters that suit it best from either the FCC's Supplemental Order or the parties' Interconnection Agreement. NuVox argues that BST must comply with the Supplemental Order which states that audits must not be a routine practice and may only be conducted under limited circumstances and only when the ILEC has a concern that the requesting carrier is not meeting the qualifying criteria and that such an audit must be performed by an independent third party which is hired and paid for by the ILEC.⁸ NuVox also contends that BellSouth has failed to state a legitimate concern for requesting the audit, that the consultants hired by BellSouth are not independent and that BellSouth's recent issuance of notifications of audits to several CLECs is evidence of a pattern amounting to a routine practice in violation of the Supplemental Order.

NuVox contends that the delay BST has experienced in commencing the proposed audit is attributable to BellSouth's own refusal to follow the governing terms of the Supplemental Order. NuVox notes that it filed a Petition for Declaratory Ruling with the FCC seeking resolution of many of the issues in dispute between the parties and that if the Commission does not wish to dismiss or deny BST's Complaint, it should hold consideration of this matter in abeyance until the FCC issues a declaratory ruling in response to NuVox's Petition.⁹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BellSouth complied with the audit provisions of the Interconnection Agreement.

The Interconnection Agreement at Paragraph 10.5.4 of Attachment 2 provides:

BellSouth may, at its sole expense, and upon thirty (30) days notice to TCI, audit TCI'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 TCI is not providing a significant amount of local exchange traffic over the

⁸ *Supplemental Order, 9603*, para, 31 & n. 86.

⁹ *NuVox Answer* pp. 1- 2.

combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this 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 TCI.¹⁰

BellSouth presented evidence that it had provided notice that complies with the Agreement. In BellSouth Exhibit 1, a letter was submitted that states “[p]er the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on April 15 at NuVox’s office in Greenville, SC, or another NuVox location as agreed to by both parties.”¹¹

BellSouth has not, yet, violated the audit requirements of the Supplemental Order.

In its Supplemental Order, the FCC found that (1) audits will not be routine practice and may only be conducted under limited circumstances and (2) only when the ILEC has stated a concern that a requesting carrier is not meeting the qualifying criteria and (3) that such an audit must be performed by an independent third party which is hired and paid for by the ILEC.¹²

The question of whether BellSouth *must* comply with the provisions governing audits contained in the Supplemental Order need not be addressed in this order. The fact that BellSouth has not violated any potential limitations placed on ILECs by the Supplemental Order makes a determination of what provisions prevail unnecessary.

1. BellSouth has not, yet, shown a pattern that constitutes “routine practice”.

The Supplemental Order notes that “[t]he incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a

¹⁰ NuVox was formerly known as Trivergent Communications Inc. or “TCI”.

¹¹ Letter to Hamilton E. Russell, III from Jerry Hendrix, March 15, 2002, p. 2.

¹² *Supplemental Order*, 9603, para. 31 & n. 86. and 9604 para. 31.

requesting carrier has not met the criteria for providing a significant amount of local exchange service.”¹³

NuVox asserts that BellSouth’s recent activity qualifies as “routine practice” contrary to the Supplemental Order. Since March 15, 2002, BST has noticed 15 CLEC for audit.¹⁴ However, as pointed out by BellSouth, EELs have been available under the FCC’s Order since November 1999 and the Supplemental Order was issued in June of 2002. BellSouth made no request to conduct an audit until March of 2002, almost two years after it was given the legal right to conduct audits.¹⁵ Further, while BellSouth has sought to initiate 13 audits this year, there are approximately 40 CLECs currently purchasing EELs.

In the event that subsequent activity demonstrates that an aggressive pattern does in fact exist, NuVox can raise this issue during the proceeding following completion of the audit.

2. BellSouth has stated a “concern” that a requesting carrier is not meeting the qualifying criteria for providing a significant amount of local exchange service.

Although BellSouth vehemently disagrees that the Supplemental Order limits its audit rights under the Interconnection Agreement, it claims that those additional requirements have all been met. BellSouth stated that it gave a specific basis for its concern, i.e. records from Tennessee and Florida that indicate an inordinate amount of traffic from NuVox is not local, and that NuVox changed its jurisdictional factor significantly.¹⁶

NuVox, on the other hand, states that the amount of local traffic is irrelevant because it selected a safe harbor option that only requires a showing of being the exclusive provider to the end user and that the line terminates at one of NuVox’s collocations. NuVox also rejected the reason offered claiming that it has nothing to do with the converted circuits in Georgia.

¹³ *Id.*

¹⁴ Tr. p. 33.

¹⁵ Tr. p. 13.

¹⁶ Tr. p. 14.

NuVox claims that BellSouth's alleged concern has no bearing upon whether NuVox is in compliance with the requirements safe harbor Option 1, under which NuVox certified all of its conversions. NuVox asserts that under Option 1, there is no restriction on the type of traffic that can be carried over a converted circuit. Therefore, NuVox argues, it is not reasonable for BST to cite statewide (and not even circuit specific) traffic figure and adjusted PIUs for two states (none of them being Georgia) when those figures have nothing to do with the exclusive provider and collocation requirements specified in that Option.¹⁷

In the case pending at the FCC, BellSouth provided evidence of what would trigger a concern: past problems with self-reported jurisdictionalization of traffic; unusually low percent local terminating traffic on a statewide basis (higher weighting given to lower percentage); carrier statements that indicate that safe harbors are not being met; claims to offer only or primarily data services; and claims to offer only or primarily long distance services.¹⁸

In this proceeding BellSouth pointed out that if NuVox were the exclusive provider of its end users local exchange service, one would expect a significant percentage of NuVox's traffic to be local, since most customers typically generate considerably more local calls than toll calls.¹⁹ BellSouth contends that its records indicate, at least in one state, that local traffic constituted only 25% of the total traffic on NuVox's network, while historical data indicates that local traffic generally constitutes 87% of the total traffic originated on the BellSouth network. BellSouth claims, "the fact that NuVox's circuits carry only 25% local traffic may indicate that NuVox is not the exclusive provider of local exchange service for the customers NuVox is serving."²⁰ NuVox seems to acknowledge that its privilege to carry any type of traffic under Option 1 is conditioned on it being the exclusive provider. NuVox stated in its Brief "under Option No. 1, provided that NuVox is the exclusive provider of an end user's local exchange service and the circuit terminates at a NuVox collocation, NuVox can use the

¹⁷ *NuVox Answer*, Docket No. 12778-U,

¹⁸ *BellSouth's Opposition*, FCC Docket No. 96-98, Attachment, p. 4.

¹⁹ *Brief of BellSouth Telecommunications, Inc.* ("BellSouth Brief"), p. 10.

²⁰ *Id.* P. 11.

converted circuits ‘to carry any type of traffic including using them to carry 100 percent interstate access traffic’”²¹

The FCC stated that an audit would only be undertaken when the incumbent LEC has a *concern* that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. This statement was contained in a footnote following the thrust of the Order stated “[w]e emphasize that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combination of unbundled loop and transport network elements.” The FCC made no specific conditions or standard of evidence with respect to the level of the concern. The FCC’s intention appears to be a trade-off for providing the CLEC with the automatic conversion while allowing the ILECs an opportunity to verify that the local usage options. For that reason, the FCC crafted a balance between the CLEC’s self-certification and automatic conversion and the ILEC’s right to ensure compliance. Additionally in an effort to curtail any anticompetitive abuse of the audit right, the FCC requires that the ILEC pay for the audit.

The Commission finds BellSouth has provided a reasonable basis for a “concern” to support the initiation of an audit. If that concern is later determined to be a tool use for harassment or anticompetitive behavior, the Commission will take that in to account at the conclusion of the audit and in other future proceedings. This is a case of first impression for the Commission and different facts and circumstances may result in a different outcome in future proceedings, particularly if NuVox is found to be in compliance with the local usage requirements for loop transport combinations.

3. NuVox has failed to provide convincing evidence that the Auditor selected by BellSouth lacks independence.

NuVox questions the independence of the auditor, American Consultants Alliance (“ACA”) selected by BellSouth. Specifically, NuVox argues that the proposed auditor is a consulting enterprise whose principals each have had prior careers with ILECs and whose client base appear to be comprised almost entirely of ILECs. In addition, NuVox points out that ACA represents its success to recover millions of dollars for its ILEC

²¹ *NuVox Brief*, p. 16

clients.”²² NuVox is concerned that the results oriented nature of the comments indicates further ILEC affiliation. NuVox states that ACA is beholden to nearly all ILEC client base and, as such, is inherently biased.²³

BellSouth contends that the statements of previous success are simply an effort to demonstrate that they have performed successfully. BST infers that this gives NuVox pause simply because it fears that an audit may result a costly discovery.²⁴

Both parties offered opinions on what they consider to be the appropriate definition of “independent.” NuVox relies on the FCC’s previous ruling which invoked standards adopted by the American Institute of Certified Public Accountants (“AICPA”) to ascertain auditor independence in the SBC Communications merger proceeding.²⁵ The AICPA standards require auditor to “avoid situations that may impair the appearance of independence.”²⁶ BellSouth insists that the more general definition found in Webster’s dictionary should apply since the FCC adopted the AICPA standard only in connection with the merger of Ameritech and SBC and not in the Supplemental Order governing audits of conversions of special access circuits to combination of UNEs.²⁷ BellSouth defines independent as “not subject to control by other, not affiliated with a larger controlling unit.” BST emphasizes that no facts exist demonstrating that ACA is in any way affiliated with BellSouth or in any way controlled by BellSouth.²⁸

Black’s Law Dictionary defines independent as: 1. Not subject to the control or influence of another; 2, not associated with another often larger, entity; and 3. Not dependent or contingent on something else.²⁹

It is difficult to imagine that one could hire any expert in the telecommunications industry that has not had some affiliation with an ILEC. As emphasized by BellSouth before the FCC, virtually all audits relating to UNEs and interconnection are initiated by

²² *NuVox Answer*, Docket No. 12778-U p. 8., *Reply*, FCC Docket No. 96-98, Attachment B.

²³ *Id.* p. 7.

²⁴ Tr. p. 46.

²⁵ *In Re: Application of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control*, CC Docket No. 98-141, Memorandum Opinion and Order (released October 9, 1999), para. 504, n. 923, *Joint Reply Comments of Cbeyond Communications, LLC. ITC^DeltaCom Communications, Inc.; KMC Telecom Holdings, Inc.; NuVox, Inc.; and XO Communications, Inc.* FCC Docket No. 96-98 p. 6. (“Joint Comments”).

²⁶ AICPA Standards, Section 100.26.

²⁷ Tr.p.11 and Tr. p. 47.

²⁸ Tr. p. 11.

²⁹ *Black’s Law Dictionary, Seventh Edition.*

ILECs.³⁰ Any auditor that is unfamiliar with special access and EEL would require an enormous amount of training, as well as expense and could result in further accusations that the consultant lacks autonomy due to training methodologies used.

BellSouth hired and paid for ACA an independent audit as required by the FCC's Order. BST asserts that: it hired ACA because its principals understand the FCC's Orders on the subject; BellSouth was not required to provide any education to the audit teams; and if another firm had been hired which required education on the subject, BST could have been accused of biasing the audits. Further BellSouth commits that there was no prior relationship between BST and ACA.³¹

NuVox has failed to present sufficient evidence to support its claim that ACA lacks independence. Any bias on the part of ACA that can be demonstrated in the hearing to determine the accuracy of the audit will be addressed at that time. The audit team will, undoubtedly, stand cross-examination and any issues with regard to independence can be raised and more appropriately addressed at that time, once the results and accuracy of the audit have undergone scrutiny. Prior work experience with or for an ILEC does not necessarily mean that the consulting organization's impartiality has been compromised. Above all, credibility must be maintained to sustain a viable consulting firm. A reliable, well-documented and solidly supported audit must come before the Commission prior to relief being granted. If ACA's work product is shown to be partial, it can and will be addressed by the Commission. The Commission will take any claim of false reporting or biased very seriously.

ORDERING PARAGRAPHS

The Hearing Officer certifies the record in this docket to the Commission and issues this recommendation pursuant to O.C.G.A. §§ 46-2-58(d) and 50-13-17(a). Based upon the evidence, the Hearing Officer finds and concludes that NuVox has failed present sufficient evidence to demonstrate a need dismiss this proceeding or hold this matter in abeyance.

WHEREFORE IT IS ORDERED, that NuVox's request to dismiss or deny BellSouth's Complaint is hereby denied.

³⁰ BellSouth's Opposition, FCC Docket No. 96-98, p. 5.

ORDERED FURTHER, that NuVox's alternative request to stay consideration of the Complaint until the FCC issues an order on NuVox's pending Petition for Declaratory Ruling is hereby denied.

ORDERED FURTHER, that BellSouth's request for the Commission to enter an Order declaring that NuVox has breached its Interconnection Agreement is hereby denied.

ORDERED FURTHER, that BellSouth's request to audit to verify that NuVox's self-certification that it is providing "a significant amount of local exchange service" is hereby granted.

ORDERED FURTHER that the Commission shall deal with any complaints as to the unreasonableness of the audit on the part of BellSouth or the lack of cooperation on the part of NuVox swiftly.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as the Commission may deem just and proper.

ORDERED FURTHER, that any motion for reconsideration or rehearing in this case shall not have the effect of staying the Order of Commission, except insofar as the Commission may otherwise provide.

This ____ day of _____, 2002.

Nancy G. Gibson
Hearing Officer for the
Georgia Public Service Commission

³¹ *Id.*, Attachment p.5.