BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

In Re:	)	
	)	
Joint Petition for Arbitration of NewSouth Communications Corp., *et. al.* with BellSouth Telecommunications, Inc.	)	Docket No. 04-00046

NUVOX COMMUNICATIONS, INC.'S MOTION FOR LEAVE TO FILE A REPLY TO AT&T TENNESSEE'S RESPONSE

NuVox Communications, Inc. ("NuVox"), by and through its undersigned counsel, respectfully submits this Motion for Leave to File a Reply to the Response filed on January 22, 2008 by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") to NuVox's Petition for Reconsideration & Clarification.

In AT&T Tennessee's Response to NuVox's Petition for Reconsideration & Clarification, AT&T Tennessee makes several arguments for denying the Petition for Reconsideration & Clarification. In order to address the assertions in AT&T Tennessee's Response, NuVox needs to file a Reply. The arguments and precedents cited by AT&T Tennessee need to be addressed in order for the Tennessee Regulatory Authority ("TRA") to properly consider this matter.

TRA Rule 12200-1-2-.06(3) states: "No reply to a response shall be filed except on leave given upon the order of the Authority or hearing officer." Therefore, in compliance with such Rule, NuVox hereby requests leave to file the attached Reply to AT&T Tennessee's Response.

For the reason stated herein, NuVox requests leave to file the attached Reply to AT&T Tennessee's Response to NuVox's Petition for Reconsideration & Clarification.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via first class U.S. Mail, hand delivery, overnight delivery, or facsimile or electronic transmission to the following this 11th day of February, 2008.

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In the Matter of	)	
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Joint Petition for Arbitration of NewSouth Communications Corp., *et al.* with BellSouth Telecommunications, Inc.	)	Docket No. 04-00046

NUVOX'S REPLY TO AT&T'S RESPONSE TO NUVOX'S PETITION FOR RECONSIDERATION AND CLARIFICATION

NuVox Communications, Inc. ("NuVox") respectfully submits this Reply to AT&T Tennessee's Response to NuVox's Petition for Reconsideration and Clarification ("Petition") requesting that the Tennessee Regulatory Authority ("Authority") reconsider or clarify certain portions of its December 5, 2007 Final Order of Arbitration Award ("Final Order") in the above-captioned proceeding. In the Petition, NuVox respectfully requested that the Authority reconsider or clarify, as specified therein, its decisions with regard to Items 26, 36, 37 and 51 because those decisions either (a) create inconsistencies with resolution of other items and run contrary to the laws and rules governing interconnection and unbundling, particularly the Telecommunications Act of 1996 (47 U.S.C. § 151 *et seq.*), as amended, and the implementing rules and orders of the Federal Communications Commission ("FCC"), or (b) address contract language that never was in dispute between the parties and never was an issue in this arbitration. As NuVox demonstrates below, AT&T's Response does not contain a single compelling argument as to why the Authority should not grant every aspect of the relief sought by NuVox.

ITEM 26

(ISSUE 2-8): Should BellSouth be required to commingle UNEs or combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

In the Petition, NuVox demonstrated that the Authority's decision on this item, as set forth in the Final Order, is at odds with the plain language of the FCC's commingling rule, related FCC orders (the *TRO* and the *TRO Errata*) and the weight of judicial precedent. Petition at 2-4. AT&T responded by noting that one case cited by NuVox had been appealed by AT&T to the United States Court of Appeals for the Eleventh Circuit. AT&T Response at 3-4 (citing *NuVox Communications, Inc. v. Edgar*, 511 F. Supp. 2d 1198 (N.D. Fla. 2007) (reversing the Florida PSC's finding that BellSouth is not required to commingle Section 251 and Section 271 elements), *appeal pending*, Case No. 07-13028-F (11th Cir., argued Jan. 17, 2008). While this certainly is true, there is no indication at this time that the Eleventh Circuit intends to do anything other than uphold the Florida District Court's decision overturning a decision by the Florida Public Service Commission that is essentially the same as the one reached by the Authority with respect to this issue.

AT&T then asks the Authority to rely on a partially contrary decision reached by another federal district court in *Southwestern Bell* without explaining why (in its view) that decision is better reasoned and without disclosing that the holding of that case is rather limited. AT&T Response at 4 (citing *Southwestern Bell Tel., LP v. Missouri Public Serv. Comm'n*, 461 F. Supp. 2d 1055, 1069 (E.D. Mo. 2006), *appeal pending*, Nos. 06-3701, 06-3726, 06-3727 (8th Cir., argued June 14, 2007). Indeed, the Missouri District Court's decision, on appeal before the Eighth Circuit, is poorly reasoned. There, the district court ruled that section 271 switching need not be combined with section 251 unbundled network elements ("UNEs") because the FCC had

eliminated the UNE-Platform and otherwise refused to require combinations of section 271 elements with other section 271 elements. *Southwestern Bell*, 461 F. Supp. 2d at 1069-70 (addressing unbundled switching and UNE-Platform). The court's analysis misses the mark for several reasons. First, the combination of section 271 switching and section 251 UNEs is by definition not the UNE-Platform because the UNE-Platform contains only "UNEs" which are unbundled and priced at TELRIC-compliant rates pursuant to section 251. Moreover, the district court's decision is at odds with the actual language of both the FCC's rules and the *Triennial Review Order*[1] which expressly require the combination of section 271 elements, as a non-251 wholesale service, and section 251 UNEs which is known as commingling. *TRO,* 18 FCC Rcd at 17342-43 ¶ 579, *see also* 47 C.F.R. § 51.309. The district court simply failed to address the relevant FCC rule and *TRO* text. Finally, it is worth noting that the court's decision appears limited to section 271 switching, as other section 271 elements are not addressed. Presumably, other section 271 elements still need to be combined with section 251 UNEs pursuant to the FCC's commingling rule, rendering the Missouri District Court's establishment of an imaginary carve-out to the commingling rule all the more arbitrary and legally unsustainable.

Next, AT&T points the Authority to two cases[2] that address the issue of whether there is a requirement to combine section 271 elements with other section 271 elements. Section 251 UNEs are not mentioned. Because commingling by definition involves at least one section 251 UNE, *TRO* ¶ 579, these cases do not address commingling and simply are not on point.

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1 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

2 AT&T Response at 4 (citing *BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005) ("*BellSouth*"); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *14 (N.D. Ill. Sept. 28, 2006) ("*Illinois Bell*").

Moreover, the Mississippi District Court in *BellSouth* did not even make the decision suggested by AT&T. AT&T Response at 4 (citing *BellSouth,* 368 F. Supp. 2d at 565). Instead, the district court merely noted that it "would tend to agree" with the New York Commission's finding that there was no federal obligation to combine 271 elements with other 271 elements to replicate UNE-P. *Id.* The court actually made no substantive decision on the issue and instead concluded that it was up for the FCC to decide. *Id.* at 566. Similarly, in *Illinois Bell,* the Illinois District Court also addressed combinations of section 271 elements with other section 271 elements and did not address the issue of commingling at all. *Illinois Bell,* 2006 WL 2796488, at *14 (preempting the Illinois Commission from enforcing a state law that would have required SBC to combine section 271 elements with other section 271 elements).

Finally, AT&T's assertion that the Florida District Court's decision on commingling in *NuVox v. Edgar* cannot be squared with federal law is flatly wrong. AT&T Response at 5. That decision relies squarely on the text of the FCC's rule and order, rather than an imaginary exception dressed in tired and misleading rhetoric. Having examined the pertinent text of the FCC's commingling rule, the *TRO*, and other FCC precedent,[3] the Florida District Court correctly determined that section 271 elements are "wholesale facilities and services" and thus concluded that the FCC's "commingling requirement does in fact apply to those elements as well." *NuVox v. Edgar*, 511 F.Supp.2d at 1202-03.

AT&T mistakenly points the Authority to language in *TRO* footnote 1990 that is not germane to the commingling issue. AT&T Response at 5. The language quoted by AT&T – the same language that is at the core of much of the case law to which it erroneously cites for

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[3] The District Court found that the FCC's repeated use of the term "section 271(c) wholesale obligations" eliminated any doubt as to whether section 271 elements were wholesale facilities and services within the meaning of the FCC's commingling rule and the accompanying *TRO* text on commingling. *NuVox v. Edgar*, 511 F.Supp.2d at 1203.

support – states simply that BOCs, like AT&T, are not required to combine, "pursuant to section 271, elements that no longer are required to be unbundled under section 251." *TRO* n.1990. This language says nothing more than that there is no section 271-based obligation to combine section 271 elements with other section 271 elements.[4] It says nothing about whether there is a section 251-based obligation to combine section 251 UNEs with section 271 elements – something the FCC has separately defined as "commingling". *See TRO* ¶ 579, 47 C.F.R. § 51.5. Indeed, the quoted language makes quite plain that it does not address section 251 UNEs. Rather, it was the *next sentence* in footnote 1990 that addressed the issue of combining section 251 UNEs with section 271 elements. That language, which conflicted with language in the FCC's commingling rule and in the commingling section of the *TRO*, had stated that such combinations of section 251 UNEs with section 271 elements were not required. As the Florida District Court observed, the FCC eliminated that sentence through its *TRO Errata*. *NuVox v. Edgar*, 511 F.Supp.2d at 1204. As the district court explained, "[m]aintaining consistency required the removal of a footnote declining to apply the commingling rule to...section 271 elements." *Id.*

At bottom, the Authority must recognize that because (1) section 271 elements are "obtained at wholesale...pursuant to any method other than unbundling under section 251(c)(3)", *TRO* ¶ 579, *see also* 47 C.F.R. § 51.309, and (2) the FCC in its *TRO Errata* eliminated language from footnote 1990 that would have required the result reached by the Authority, *TRO Errata* ¶ 27, the Authority must modify its decision in the manner requested by NuVox. Any other result

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[4] This is in contrast to section 251, where the FCC has determined, and the U.S. Supreme Court has upheld that there is a section 251 obligation for incumbent local exchange carriers to combine section 251 UNEs with other section 251 UNEs. *See, e.g.,* 47 C.F.R. § 51.315.

would render the FCC's *TRO Errata* meaningless and would carve an exception out of the FCC's commingling rule and accompanying *TRO* text that simply does not exist.

ITEM 36

(ISSUE 2-18): (A) How should line conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning?

In the Petition, NuVox requested that the Authority clarify its decision so that it includes an express, affirmative ban on AT&T limiting the provisioning of line conditioning to circumstances in which it regularly performs line conditioning for its own customers. NuVox noted that such a modification would address the concerns of Director Jones, as expressed in his separate opinion: "the obligation to perform line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to retail customers." Petition at 5 (citing Separate Opinion of Director Jones, Docket No. 04-00046, at 11-12 (Dec. 5, 2007)). As NuVox explained, its proposed clarification is consistent with the Authority's Final Order in which the Authority appears to ban "[a]ny attempt to limit an ILEC's obligation to perform line conditioning". *Id.* (citing Final Order at 31).

In opposition, AT&T offers two makeweight arguments. AT&T suggests that the Authority need not re-visit the issue because CompSouth did not seek reconsideration of the same issue in the Generic Docket. AT&T Response at 7. This suggestion ignores two salient points, the most important of which is that NuVox has no obligation to seek reconsideration of the same issue twice and that doing so in the arbitration docket that governs what its interconnection agreement will say on this topic was the most prudent step to take. Moreover, while NuVox is a member of CompSouth, it is one of many and it does not have unilateral control over how the association allocates its limited legal budget. Finally, there is nothing that

would prevent the Authority from issuing the same clarification NuVox requests here in its Generic Docket, as well.

AT&T also argues that the Authority may not look beyond the FCC's definition of line conditioning and thus may not provide the clarification requested by NuVox. AT&T Response at 6. However, as framed, argued and decided, the Authority has before it not only the issue of how line conditioning should be defined – an issue in which it wisely chose to adopt the FCC's definition and to reject AT&T's self-serving re-write of it – but it also has before it the broader issue of addressing AT&T's obligations with respect to line conditioning. In this regard, Commissioner Jones correctly concluded that federal law clearly provides that "the obligation to perform line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to retail customers." Separate Statement of Director Jones, at 11-12 (citing *TRO*, ¶ 643).[5] In the interest of protecting Tennessee consumers who might chose not to limit themselves to the services AT&T deems fit for them and to ensure that they can take advantage of competitors' desire to do more with the same legacy copper loops, the Authority should grant NuVox's request for clarification.

ITEM 37

(ISSUE 2-19): Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet?

In its Petition, NuVox requested that that the Final Order's decision on Item 37 be modified so that the final sentence of the Deliberations and Conclusions section for this item is

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5 *See also Triennial Review Order*, n.1947 (affirmatively citing the FCC's *UNE Remand Order* and explaining how the line conditioning obligation is part of the "basic loop" unbundling obligation and that it applies to "loops of any length" and "even where the incumbent itself is not providing advanced services"), ¶ 642 (readopting the line conditioning rules adopted in the FCC's *UNE Remand Order* for the same reasons and without limitation), ¶ 644 (concluding that requiring ILECs to perform line conditioning for CLECs furthers the goals of Section 706).

deleted and replaced with language affirming AT&T's federal obligation to provide line conditioning on loops regardless of loop length and regardless of whether AT&T performs such line conditioning for its own retail customers. Petition at 5-6. In opposition, AT&T asks the Authority to reject NuVox's request because NuVox otherwise would receive special treatment and obtain an unfair advantage over other competitors. AT&T Response at 8. In designating this issue for arbitration, NuVox did not seek special treatment, but rather merely sought to fend off AT&T's unlawful attempt to limit NuVox's federal right to and AT&T's federal obligation to provide line conditioning on loops regardless of loop length. Section 252 confers upon NuVox the right to seek such relief individually in an arbitration proceeding and that is what has happened here. Nevertheless, if the Authority wants to curb AT&T's attempt to limit its line conditioning obligations in a manner directly contrary to federal law in a manner that applies to all CLECs, NuVox would have no objection whatsoever to the Authority doing so upon its own motion in the Generic Docket. Otherwise, it bears noting that other CLECs will have the right to adopt NuVox's interconnection agreement pursuant to Section 252(i).

ITEM 51

(ISSUE 2-33): (B) Should there be a notice requirement for BellSouth to conduct and audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?

In its Petition, NuVox requested that the Authority modify its decision on this item to eliminate an aspect of it that addressed an issue not put before it and already negotiated and resolved by the parties. Petition at 6-7. In response, AT&T submits that the Authority need not "waste time" making the modification NuVox requests. AT&T Response at 8. However, AT&T ignores the fact that the Authority's jurisdiction in arbitration proceedings is limited to disputed issues. Section 252 (b)(4) ("the State commission shall limit its consideration of any

petition ... to the issues set forth in the petition and in the response"). Further, AT&T's opposition heightens NuVox's fears that AT&T somehow will seek to modify or alter the language already agreed-upon with NuVox. AT&T's alleged concern that the modification the Authority needs to make in this docket – where audit reimbursement was not an issue – could somehow create confusion with respect to the Authority's decision on the issue in the Generic Docket – where such reimbursement was an issue – is unfounded, as the Authority's decision in the Generic Docket need not be affected by its decision in this carrier-specific arbitration docket.

CONCLUSION

For all the reasons set forth above and in the Petition, NuVox respectfully requests that the Authority reconsider and modify its initial findings with regard to Items 26, 36, 37 and 51 in the manner requested by NuVox.

Respectfully submitted this 11th day of February, 2008.

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