

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 9, 2008

IN RE:)	
)	
JOINT PETITION FOR ARBITRATION OF)	DOCKET NO.
NEWSOUTH COMMUNICATIONS CORP,)	04-00046
NUVOX COMMUNICATIONS, INC. KMC)	
TELECOM V, INC., KMC TELECOM III LLC,)	
AND XSPEDIUS COMMUNICATIONS, LLC ON)	
BEHALF OF ITS OPERATING SUBSIDIARIES)	
XSPEDIUS MANAGEMENT CO. SWITCHED)	
SERVICES, LLC AND XSPEDIUS)	
MANAGEMENT CO. OF CHATTANOOGA, LLC)	
OF AN INTERCONNECTION AGREEMENT)	
WITH BELL SOUTH)	

ORDER GRANTING, IN PART, AND DENYING, IN PART, RECONSIDERATION OF
THE FINAL ORDER OF ARBITRATION AWARD

This matter came before Director Tre Hargett, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the Panel of Arbitrators ("Panel" or "Arbitration Panel") assigned to this docket, on May 5, 2008 for consideration of the *Petition for Reconsideration and Clarification* filed by NuVox Communications, Inc. ("NuVox" or "Petitioner") on December 20, 2007.

I. Background

On February 11, 2004, NewSouth Communications, Inc. ("NewSouth"), NuVox, KMC Telecom V, Inc. ("KMC V"), KMC Telecom III ("KMC II") (collectively, "KMC"),¹ and

¹ The Authority issued an Order on August 31, 2005 accepting the withdrawal of KMC with prejudice.

Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC (“Xspedius Switched”) and Xspedius Management Co. of Chattanooga, LLC (“Xspedius Chattanooga”) (collectively “Xspedius”)² (collectively, the “Joint Petitioners” or “CLECs”), pursuant to Section 252(b) of the Communications Act of 1934, as amended (the “Communications Act”) and TRA Rule 1220-1-1, petitioned the TRA to arbitrate certain issues arising between the Joint Petitioners and BellSouth Telecommunications, Inc. (“BellSouth”) in the negotiation of an interconnection agreement.

The Hearing in this proceeding was conducted by the panel³ on January 25, 2005 through January 27, 2005 and deliberations were conducted on March 6, 2006, April 17, 2006, May 15, 2006, and June 26, 2006. On December 5, 2007, the Authority issued the *Final Order of Arbitration Award* (“*Final Order*”). On December 20, 2007, NuVox filed its *Petition for Reconsideration and Clarification* (“*Petition*”), in which it requested that the Authority reconsider and clarify its ruling on Items 26, 36, 37 & 51. The Pre-Arbitration Hearing Officer granted NuVox’s request on January 7, 2008.⁴ AT&T⁵ filed its response to the *Petition* on January 22, 2008. NuVox filed a reply to AT&T’s response on February 12, 2008, and AT&T responded to NuVox’s reply on March 17, 2008.

POSITION OF THE PARTIES

ITEM 26

In its *Petition*, Nuvox requests that the Authority reconsider its decision on Item 26. A majority of the Arbitrators voted not to require BellSouth to commingle UNEs or UNE

² On December 26, 2007, Xpedius announced that it had settled all issues with AT&T and wished to withdraw with prejudice.

³ Director Deborah Taylor Tate and Director Pat Miller were originally assigned to this panel. After their respective resignations, Director Sara Kyle and Director Tre Hargett were assigned to this panel

⁴ *Order Granting Petition for Reconsideration* (January 7, 2008). The Pre-Arbitration Officer recommended that the Authority consider the merits of the *Petition* after it considers the merits of the issues in Docket No. 04-00381.

⁵ Formerly BellSouth Telecommunications, Inc.

combinations with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act. NuVox argues that the *TRO Errata* demonstrates that the FCC requires ILECs to commingle Section 251 UNEs with any other wholesale facilities, including Section 271 elements. It adds that a federal District Court reversed a Florida PSC Order based on the same conclusion reached by the majority of Directors.⁶ NuVox avers that while BellSouth is not required to combine non-251 elements, it must commingle Section 251 elements with Section 271 elements. Finally, it contends that requiring BellSouth to commingle loops and switches is not equivalent to UNE-P, because BellSouth would not be required to offer switching at TELRIC prices.⁷

AT&T maintains that the Authority's decision is consistent with federal law, and that NuVox's position would effectively recreate UNE-P. AT&T points out that the commingling aspect of the *NuVox v. Edgar* decision is on appeal before the US Eleventh Circuit Court of Appeals,⁸ and that decisions in three other federal court cases are consistent with the Authority's ruling.⁹

ITEM 36

Nuvox requests that the panel clarify its determination that line conditioning should be defined as set forth in FCC Rule 47 C.F.R. § 51.319(a)(1)(iii)(A), which requires BellSouth to provide line conditioning that it regularly performs in order to provide xDSL services.

⁶ *Petition*, pp. 5-6, citing *NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007) (December 20, 2007).

⁷ *Petition*, p. 4. NuVox incorporates by reference the arguments filed by the Competitive Carriers of the South ("CompSouth") on December 20, 2007 in Docket No. 04-00381.

⁸ *AT&T Tennessee's Response to NuVox's Petition for Reconsideration and Clarification*, p. 3 (January 22, 2008) (hereinafter "*AT&T Response*").

⁹ *AT&T Response*, pp. 4-5, citing *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005) and *Illinois Bell Tel. Co. v. O'Connel-Diaz*, No. 05-C-1149, 2006 U.S. Dist. LEXIS 70221, at *13 (N.D. Ill. Sept. 28, 2006) (January 22, 2008).

Specifically, NuVox requests the Authority to clarify its ruling by expressly and affirmatively prohibiting AT&T from limiting the provisioning of line conditioning to circumstances in which it regularly performs this function for its own customers.¹⁰

AT&T contends that NuVox is asking the Authority to go beyond the federal definition of line conditioning, and that the Authority reached the same conclusion in the *Generic Docket*.^{11, 12}

ITEM 37

A majority¹³ of the Panel voted that any provision of service that BellSouth provides for its own customers shall be made available to CLECs regardless of length.¹⁴ NuVox contends that this sentence is ambiguous and requests that the Authority clarify whether AT&T is obligated to provide line conditioning on copper loops of 18,000 feet or more in length. Specifically, it requests that the Authority delete the final sentence of the Deliberations and Conclusions section for this item and replace it 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."¹⁵

AT&T counters that NuVox is attempting to obtain special treatment that goes beyond how AT&T treats other Tennessee CLECs.¹⁶

Item 51

NuVox states that because the parties had agreed to contract language which conforms to both paragraphs 627 and 628 of the *TRO*, the reimbursement of audit costs was never at issue in

¹⁰ *Petition*, pp. 4-5 (December 20, 2007).

¹¹ *See In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law*, Docket No. 04-00381, *Order*, (November 28, 2007) (hereinafter *Generic Docket Order*).

¹² *AT&T Response*, pp. 6-7.

¹³ Director Jones did not vote with the majority and filed a separate opinion explaining his position.

¹⁴ *Final Order*, pp. 31-33 (December 5, 2007).

¹⁵ *Petition*, pp. 5-6 (December 20, 2007).

¹⁶ *AT&T Response*, pp. 7-8 (January 22, 2008).

this proceeding, and it therefore requests the Authority to strike part (5) of its Deliberations and Conclusions for Item 51 to avoid creating a controversy.¹⁷

AT&T argues that there is no need for the Authority to waste its time addressing a matter that is not in dispute, and that deleting the language in question may convey the erroneous impression that the Authority's EEL¹⁸ language differs from the FCC's position on the issue as set forth in the *TRO*.¹⁹

FINDINGS AND CONCLUSIONS

This matter came before the panel at the regularly scheduled May 5, 2008 Authority Conference. Based upon the record as a whole, the panel reached the following determinations regarding each item.

As to Item 26, a majority of the panel found that while one of the cases cited, *NuVox v. Edgars*, supports the Petitioner's position, not only is that decision currently on appeal to the Eleventh Circuit of the U.S. Court of Appeals, other state commissions and federal district courts have reached the same decision as the Authority on the commingling issue. Thus, the majority found that there is no precedential legal authority to compel the Authority to reconsider its decision on this issue and therefore voted to deny reconsideration of Item 26.²⁰

As to Item 36, a majority of the panel found that the FCC Rule 47 C.F.R. §51.319(a)(1)(iii) is descriptive of BellSouth's line conditioning obligation which specifically requires line conditioning to be provided whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop. The majority found that

¹⁷ *Petition*, pp. 6-7 (December 20, 2007).

¹⁸ EEL = Enhanced Extended Loop.

¹⁹ *AT&T Response*, pp. 8-9 (January 22, 2008).

²⁰ Director Jones voted no on the prevailing motion. He explained that it remains his position that the commingling obligation includes wholesale services provided pursuant to Section 271.

NuVox's requested clarification is warranted to avoid any ambiguity regarding the panel's decision. Therefore, a majority of the panel²¹ voted to grant NuVox's requested clarification and affirm that AT&T is prohibited from limiting the provisioning of line conditioning to circumstances in which it regularly performs line conditioning for its own customers.

As to Item 37, it was observed that in the *Final Order* a majority of the panel voted that any provision of service that BellSouth provides for its own customers shall be made available to CLECs regardless of length. A majority of the panel found that NuVox's contention that the sentence is ambiguous was well-taken. Therefore, a majority of the panel²² voted to grant NuVox's requested clarification by deleting the sentence in the *Final Order* that reads:

"The majority of the Panel voted that any provisions of service that BellSouth provides for its own customers shall also be made available to CLECs regardless of length."

And to replace the deleted sentence with the following language:

"The Panel voted that BellSouth must provide load coil removal to CLECs regardless of loop length and regardless of whether it provides such services to its own retail customers."

ITEM 51

As to Item 51, the panel voted to deny reconsideration of this issue. A majority of the panel²³ found that the Authority properly addressed the issue by stating that reimbursement of audit costs should conform to the *Triennial Review Order*.

²¹ Director Kyle found that the *Final Order* correctly reflects the deliberations on this issue and that clarification is also unnecessary because the incumbent LEC's duty to provide line conditioning is described in FCC Rule 51.319(a)(1)(iii) which is quoted in the *Final Order*. Therefore, Director Kyle voted to deny the request for clarification on this issue.

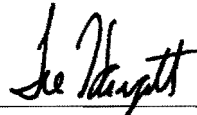
²² Director Kyle voted to deny the request for clarification and in so doing found that the *Final Order* accurately reflects the deliberations on this matter and clearly spells out BellSouth's obligations concerning load coil removal from the issuance of the FCC's *First Report and Order* through the issuance of the *Triennial Review Order*.

²³ Director Kyle's vote to deny reconsideration was based on the fact that she did not vote with the majority in the original deliberations on this issue and instead chose to be consistent with a previous decision of the Authority in Docket No. 02-01203. Given Director Kyle's original vote on this issue, she did not support clarification of the issue as requested by Nuvox.

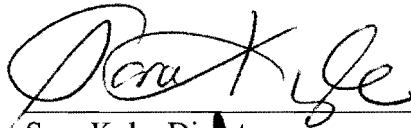
IT IS THEREFORE ORDERED:

The *Petition for Reconsideration and Clarification* filed by NuVox Communications, Inc. on December 20, 2007 is granted as to Items 36 and 37 as discussed herein and is denied as to Items 26 and 51.

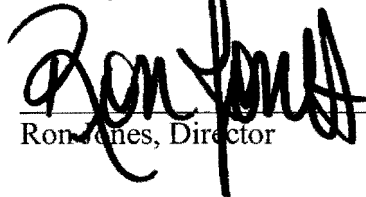
TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS
ARBITRATORS



Tre Hargett, Director



Sara Kyle, Director



Ron Jones, Director