

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 6, 2006

IN RE:

**PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT BETWEEN
BELLSOUTH TELECOMMUNICATIONS, INC.
AND NUVOX COMMUNICATIONS, INC.**

**DOCKET NO.
04-00133**

ORDER APPROVING APPLICATION OF GEORGIA LAW

This matter came before Chairman Ron Jones, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 7, 2005 for consideration of a preliminary issue regarding applicable law. Specifically, the panel considered whether it should interpret the interconnection agreement at issue in this docket under Georgia law and, if so, whether its decisions should be controlled by the June 30, 2004 decision of the Georgia Public Utilities Commission ("Georgia PUC") in a nearly identical proceeding already litigated by the parties ("Georgia Proceeding").¹

Background

This matter involves a dispute regarding the audit rights of BellSouth Telecommunications, Inc. ("BellSouth") under the interconnection agreement between BellSouth and NuVox Communications, Inc. ("NuVox"). On May 4, 2004, BellSouth filed the *Complaint*

¹ See *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Public Service Commission Docket No. 12778-U, *Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order*, (June 30, 2004).

of BellSouth Telecommunications, Inc. to Enforce Interconnection Agreement and Request for Expedited Proceedings ("Complaint"), seeking to enforce the audit provisions in the interconnection agreement with NuVox. On May 24, 2005, at a regularly scheduled Authority Conference, the panel voted unanimously to appoint the Authority's General Counsel or his designee to act as the Hearing Officer in this proceeding to handle preliminary matters and prepare the docket for hearing.

On June 11, 2004, NuVox filed the *Answer of NuVox Communications, Inc.* and requested that BellSouth's *Complaint* be dismissed or denied.² NuVox asserted that Georgia law governs the agreement and should be applied by the TRA in interpreting the issues. In addition, NuVox contended the Georgia PUC had interpreted the same interconnection agreement and reviewed the same issues under governing principles of Georgia law in the Georgia Proceeding, which NuVox asserted should be incorporated into the record before the TRA if the Authority did not immediately dismiss or deny BellSouth's *Complaint*.

On August 24, 2004, NuVox filed its *Motion to Adopt Procedural Order*, in which it requested that the Authority: (1) adopt and incorporate in this docket the record of the Georgia PUC in the Georgia Proceeding; (2) adopt the same legal conclusions reached by the Georgia PUC; (3) establish a schedule for oral argument and briefing if the Authority considers adopting legal conclusions that are different from the conclusions of the Georgia PUC; and (4) establish a schedule for pre-filed testimony and a limited evidentiary hearing on Tennessee-specific factual issues.³

On September 8, 2004, BellSouth filed its *Opposition of BellSouth Telecommunications, Inc. to NuVox's Motion to Adopt Procedural Order*. BellSouth asserted that NuVox's procedural

² *Answer of NuVox Communications, Inc.*, p. 14 (June 11, 2004).

³ *Motion to Adopt Procedural Order*, p. 6 (August 24, 2004).

motion was an attempt to convince the TRA to “defer to the findings and conclusions of another state commission – even though the TRA has already made its own contrary findings in an EELs audit case” within Tennessee in TRA Docket No. 02-01203.⁴ In that matter, the TRA ruled that “BellSouth was not required to articulate a justification prior to the commencement of an audit conducted pursuant to the terms of the interconnection agreement.”⁵ BellSouth contended that each state commission is authorized to approve or reject agreements under Section 252(e) of the Telecommunications Act⁶ and, upon approval, each state interconnection agreement becomes the law governing the parties’ interconnection relationship in that state only. BellSouth further argued that the Georgia PUC’s findings in the Georgia Proceeding were incorrect.

On September 27, 2004, NuVox filed *NuVox Communications, Inc.’s Motion for Leave to File Reply to BellSouth Telecommunications, Inc.’s Response to NuVox’s Motion to Adopt Procedural Order* (“*Motion to File Reply*”), which was accompanied by NuVox’s *Reply to Opposition of BellSouth Telecommunications, Inc. to NuVox’s Motion to Adopt Procedural Order* (“*Reply*”). In the *Reply*, NuVox stated that it was not attempting through its *Motion to Adopt Procedural Order* to usurp the TRA’s authority to enforce the parties’ interconnection agreement. Rather, NuVox sought to focus the proceeding on the factual issues specific to Tennessee. According to NuVox, the legal issues already had been decided by the Georgia PUC and therefore were resolved under applicable Georgia law. NuVox further asserted that the TRA’s decision in Docket No. 02-01203, referenced by BellSouth, is not applicable to this dispute because the interconnection agreement in this docket is a different contract between different parties and has relevant terms different from those in the agreement at issue in Docket

⁴ *Opposition of BellSouth Telecommunications, Inc. to NuVox’s Motion to Adopt Procedural Order*, p. 1 (September 8, 2004).

⁵ See *In re: Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and ITC DeltaCom Communications, Inc.*, Docket No. 02-01203, *Order Approving Report and Recommendation*, p. 5 (September 29, 2004).

⁶ 47 U.S.C. § 252(e).

No. 02-01203.⁷ NuVox again requested that the Authority adopt and incorporate the record of the Georgia PUC in the Georgia Proceeding and adopt the legal conclusions reached by the Georgia PUC.⁸

During a Status Conference held on February 4, 2005, the Hearing Officer, noting no objection from BellSouth, granted NuVox's *Motion to File a Reply* and allowed NuVox's *Reply* as filed.⁹ During the Status Conference, the parties agreed to a two-step process for disposition of the docket.¹⁰ In the first step, the legal issues would be briefed by the parties and presented to the panel. The decision of the panel would determine whether a second part of the process might be needed to develop Tennessee-specific facts through an evidentiary record.

The Hearing Officer permitted the parties to file excerpts from the Georgia Proceeding record to the extent the excerpts specifically related to the preliminary legal issues being briefed by the parties in this docket. In addition to briefing the legal issues raised by the parties in their previous filings, the Hearing Officer requested that the parties brief the following issue: Whether the parties may, through a contractual provision in their interconnection agreement, limit the Authority's jurisdiction or ability to interpret that contract? The Hearing Officer also established a briefing schedule for the first phase of the proceedings.¹¹

NuVox and BellSouth filed initial briefs regarding the legal issues on March 4, 2005 and March 7, 2005, respectively. BellSouth filed an *Affidavit of Shelley Padgett on Behalf of BellSouth Telecommunications, Inc.* and an *Affidavit of Jerry D. Hendrix on Behalf of BellSouth Telecommunications, Inc.* in support of its brief. The parties filed reply briefs on March 21, 2005, and NuVox filed the *Affidavit of Hamilton E. Russell, III on Behalf of NuVox*

⁷ *Reply to Opposition of BellSouth Telecommunications, Inc. to NuVox's Motion to Adopt Procedural Order*, p. 3 (September 27, 2004).

⁸ *Id.* at 1-2.

⁹ *Order Establishing Briefing Schedule*, pp. 1-5 (March 17, 2005).

¹⁰ *Id.*

¹¹ *Id.*

Communications, Inc. in support of its reply brief.¹² On June 13, 2005, the parties presented oral arguments to the panel regarding the legal issues in the docket.

Preliminary Legal Issue

Before considering the substantive issues in this docket, the panel must consider the threshold legal issue of which law applies and whether the panel is bound by any existing precedent in the panel's interpretation of the issues. NuVox asserts that Georgia law governs the interconnection agreement provision related to audits, which is at issue in this docket.¹³ NuVox also contends the Georgia PUC, in the Georgia Proceeding, already interpreted and applied Georgia law to the issues that are raised in this case.¹⁴ NuVox argues that the Georgia PUC decision in the Georgia Proceeding now is part of the governing Georgia law and the TRA must construe the interconnection agreement between BellSouth and NuVox in a manner consistent with that decision.¹⁵

BellSouth acknowledges that its interconnection agreement with NuVox has a choice of law provision citing Georgia law.¹⁶ BellSouth, however, maintains that the TRA is not bound by any decision of the Georgia PUC in interpreting the interconnection agreement because the agreement at issue in this matter is the agreement that was approved in Tennessee by the Authority.¹⁷ BellSouth characterizes NuVox's argument as depriving the "TRA of jurisdiction to make its own decisions," which "is not supported by law and would set a precedent by which the TRA would never be able to arbitrate any BellSouth interconnection agreement that did not have a Tennessee choice of law provision."¹⁸ BellSouth also portrays NuVox's claims as a method to

¹² The original affidavit was not signed or notarized, and NuVox replaced it with a signed, notarized version on March 22, 2005.

¹³ *Initial Brief of Nuvox Communications, Inc.*, pp. 1-2 (March 4, 2005).

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *BellSouth Telecommunications, Inc.'s Brief Regarding Legal Issues*, p. 3 (March 7, 2005).

¹⁷ *Id.* at 3.

¹⁸ *Id.*

bypass the Authority's "application of Tennessee's precedent to an Agreement approved in Tennessee."¹⁹ BellSouth adds that under Section 252(e) of the Act, each state interconnection agreement after approval, is "the law governing the parties' interconnection relationship in that state and that state only."²⁰

November 7, 2005 Authority Conference

At a regularly scheduled Authority Conference held on November 7, 2005, the voting panel assigned to this docket considered whether Georgia law applies generally to the issues in this matter and, if so, whether the Georgia PUC's decision in the Georgia Proceeding controls the TRA's determinations on the issues. The panel found that parties are free to negotiate which state law should apply to their agreement and that the parties in this docket agreed that their interconnection agreement would be governed by, and construed and enforced in accordance with, the laws of the State of Georgia.

The panel voted unanimously that Georgia law would control the TRA's interpretation and construction of the interconnection agreement in this docket. "Tennessee follows the rule of *lex loci contractus*. This rule provides that a contract is presumed to be governed by the law of the jurisdiction in which it was executed absent a contrary intent."²¹ If parties to a contract manifest an intent to apply the laws of a different jurisdiction, "then that intent will be honored provided certain requirements are met."²²

The choice of law provision must be executed in good faith. The jurisdiction whose law is chosen must bear a material connection to the transaction. The basis for the choice of another jurisdiction's law must be reasonable and not merely a sham or subterfuge. Finally, the parties' choice of another jurisdiction's law must not be "contrary to 'a fundamental policy' of a state having a 'materially greater interest' and whose law would otherwise govern."²³

¹⁹ *Id.* at 8.

²⁰ *Id.* at 10.

²¹ *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999).


²² *Id.*

²³ *Id.* quoting *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303, 306 n.2 (Tenn. 1980) (citations omitted).

The panel also determined that the TRA is not bound by the Georgia PUC's interpretations and conclusions in the Georgia Proceeding. Instead, the TRA maintains the ability to interpret and apply Georgia law to the interconnection agreement in this docket. The panel also instructed the Hearing Officer to work with the parties to conclude any further procedural steps required before the agency may address the merits of BellSouth's complaint.

IT IS THEREFORE ORDERED THAT:

1. The panel will construe and enforce the interconnection agreement between BellSouth and NuVox in accordance with Georgia law.
2. The Hearing Officer shall proceed with any remaining preliminary matters and prepare the matter for a hearing before the panel.



Ron Jones, Chairman

Deborah Taylor Tate, Director²⁴



Sara Kyle, Director

²⁴ Director Tate voted in agreement with the other directors but resigned her position as director before the issuance of this order.