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Of Counsel
H LaDon Baltimore

March 4, 2005

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

Via Hand Delivery

Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc.; Docket No 04-00333

Dear Sharla:

Enclosed please find the original and 13 copies of the Initial Brief of NuVox Communications, Inc Thank you for your assistance If you have questions, please do not hesitate to contact me.

Sincerely,

H. LaDon Baltimore
NuVox Communications, Inc.

LDB/dcg
Enclosures
cc: Parties of Record

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	
Between BellSouth Telecommunications, Inc.	)	Docket No. 04-00133
And NuVox Communications, Inc.	)	
	)	

INITIAL BRIEF OF NUVOX COMMUNICATIONS, INC.

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March 4, 2005

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INITIAL BRIEF OF NUVOX COMMUNICATIONS, INC.

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel and in accordance with the procedure adopted at the conference held in this docket on February 4, 2005, respectfully submits its initial brief in the above-captioned proceeding. BellSouth seeks to audit certain of NuVox's converted enhanced extended link ("EEL") circuits, but has failed to satisfy the prerequisites to conducting the audit. Specifically, BellSouth has failed to demonstrate that it has a legitimate concern for auditing any of the circuits at issue, and BellSouth has failed to hire an independent auditor to conduct the audit. These prerequisites are set forth in the Federal Communications Commission's ("FCC") *Supplemental Order Clarification*[1] and are incorporated into the parties' interconnection agreement ("Agreement") by application of Georgia law (agreed to by the parties) and the Agreement's "Applicable Law" provision.

The Georgia Public Service Commission ("Georgia Commission") already has addressed these same issues and identical provisions of the Agreement, and has concluded that, in accordance with the Agreement and through application of governing Georgia law: (1) BellSouth must demonstrate a concern prior to conducting an audit, and (2) BellSouth must hire

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*")

an independent auditor that is AICPA-compliant to perform that audit.[2] Those Georgia Commission orders now are part of governing Georgia law, and the Agreement must be construed in a manner consistent with them.

In this case, the Tennessee Regulatory Authority ("Authority") is evaluating under Georgia law the identical issues and Agreement provisions as those that were before the Georgia Commission. The Authority similarly should conclude that BellSouth must comply with the concern and independent auditor requirements prior to conducting an audit. Since BellSouth has failed to satisfy these requirements, the Authority must deny BellSouth's complaint.

I. EXECUTIVE SUMMARY

The dispute in this case arose because BellSouth has sought to audit NuVox's converted EEL circuits without satisfying the prerequisites to conducting an audit. BellSouth seeks to audit NuVox's converted EELs circuits to determine whether NuVox has complied with the significant local use requirement in the FCC *Supplemental Order Clarification*. Under sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), BellSouth and NuVox entered into a regional nine-state interconnection agreement ("Agreement") that

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[2] *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , Order Adopting in Part and Modifying the Part the Hearing Officer's Recommended Order, Docket No 12778-U (rel June 30, 2004) ("*Georgia Order*") (attached hereto as **Exhibit 1**), Order on Rehearing, Reconsideration and Clarification (rel Aug 24, 2004) (appended hereto as **Exhibit 2**) ("Georgia Reconsideration Order") BellSouth has appealed the Georgia Order and Georgia Reconsideration Order, *see BellSouth Telecommunications, Inc v NuVox Communications, Inc et al* , Case No 1 04-CV-2790-WSD (U S D Ct Ga) On February 21, 2005, the North Carolina Utilities Commission adopted an order with holdings that contradict or conflict with certain of the Georgia Commission's holdings and essentially result in the same contract language from the Agreement meaning different things in different states Without a hearing, the North Carolina Commission also adopted alternative holdings based on contested allegations of fact *See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , North Carolina Commission Docket No P-913, Sub 7, Order Granting Motion for Summary Disposition and Allowing Audit (Feb 21, 2005). NuVox intends to appeal the North Carolina Commission's order

governs the circumstances in which BellSouth may conduct an EELs audit.[3] Specifically, under the Agreement, BellSouth is required to comply with all applicable law in effect when the parties entered into the Agreement, unless the parties explicitly excluded or displaced (by incorporating conflicting language) those requirements.[4]

Under applicable law, BellSouth is required to demonstrate a concern and to hire an independent auditor to conduct the audit In the *Supplemental Order Clarification*, the FCC established specific requirements that incumbent local exchange carriers ("ILECs") must follow prior to seeking an audit of converted EELs circuits: ILECs must demonstrate a concern prior to conducting an audit and must hire an independent auditor to conduct that audit.[5] Through the applicable law provision and in accordance with Georgia law, which governs the Agreement, the parties incorporated into the Agreement the concern and independent auditor requirements of the FCC's *Supplemental Order Clarification*.[6] BellSouth steadfastly has refused to comply with either of these requirements, and, therefore, is not entitled to audit any of NuVox's converted EEL circuits.

BellSouth's refusal to comply with these simple terms suggests that (1) BellSouth does not have a concern (a legitimate reason or cause) for conducting an audit of any of NuVox's converted EELs, and instead wants to conduct a fishing expedition, and (2) BellSouth's chosen

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3 NuVox Answer at note 1 Relevant provisions of the Agreement are attached as **Exhibit 3** The Parties submitted the Agreement to each state commission for approval and each, including the Authority, has approved it The relevant provisions in each agreement are identical and the meaning of those provisions does not vary from state to state When the parties intended different terms to govern in different states, state specific provisions were added (*i e*, "in Tennessee") The relevant provisions of the Agreement contain no provisions of that kind, and the parties intended them to have uniform meaning in all nine BellSouth states

4 Agreement, General Terms and Conditions, § 35 1

5 *See Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶ 1 (requiring ILECs to hire an "independent third party" to conduct the audit), 15 FCC Rcd at 9603, n 86 (requiring ILECs to demonstrate a concern prior to conducting an audit)

6 Agreement, General Terms and Conditions, §§ 23, 35 1

auditor is not independent and, because of this lack of independence, is predisposed to issue audit findings that would support BellSouth's fishing expedition. However, the FCC adopted the concern and independent auditor requirements precisely to avoid situations such as this where ILECs such as BellSouth seek to conduct intrusive and disruptive audits without cause to believe that such audits would result in some finding that self-certifications made with respect to the significant local use requirements were not accurate.

This month will mark the third year in which the parties have battled over BellSouth's regional audit request. BellSouth knows what it must do to conduct the audit, and once it does so, NuVox will permit the audit to proceed.[7] NuVox never has stated that it will prohibit BellSouth from conducting an EELs audit; NuVox simply has requested that BellSouth conduct only the audit it is entitled to under the Agreement.

When read in context and not in isolation, the plain language of the Agreement makes clear that the parties did not intend for NuVox to sacrifice the protections afforded by the concern and independent auditor requirements. In the Georgia proceeding, NuVox witness Mr. Hamilton Russell, who personally negotiated the Agreement on NuVox's behalf, confirmed what the text of the relevant provisions of the Agreement makes plain: the parties intended to incorporate the *Supplemental Order Clarification's* concern and independent auditor requirements into the Agreement.[8] The parties in fact agreed to strike language that would have given BellSouth the right to conduct audits at its "sole discretion," as such language was

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7 It is not a simple matter to be a party to an audit as BellSouth seems to suggest Indeed, KPMG, the independent auditor that BellSouth chose to conduct the Georgia EELs audit, has been auditing forty-four of NuVox's converted EELs circuits since November 2004 Audits are an extremely resource-intensive and time-consuming process for the audited party

8 Georgia Hearing Tr at 278, 11 1-4; at 286, 11 6-13 Relevant portions of the transcript in the Georgia proceeding are attached hereto as **Exhibit 4**

inconsistent with the "concern" requirement set forth in the *Supplemental Order Clarification.*[9] Notably, Mr. Russell was the only witness to testify based on actual knowledge of the parties' negotiations; BellSouth did not proffer a witness with firsthand knowledge of the negotiations.

The Georgia Commission already has evaluated each party's arguments, including the arguments that BellSouth raises in its complaint and pleadings filed to date in this docket before the Authority. The Georgia Commission explicitly rejected the same arguments that BellSouth raises in this proceeding, on the ground that they are contrary to fact and Georgia law, which (at BellSouth's insistence) governs the Agreement, even here in Tennessee.[10] In these orders, the Georgia Commission concluded that, under the parties' Agreement, BellSouth is required: (1) to demonstrate a concern with respect to the converted EEL circuits it seeks to audit, and (2) to retain an independent auditor complaint with AICPA standards to conduct the audit.[11] The Agreement at issue here is the same Agreement that was at issue in Georgia – the relevant terms and the meaning of them does not vary from state-to-state. These Georgia decisions, sought by BellSouth long before it sought any others, now are part of governing Georgia law, and, under the plain language of the Agreement, the Agreement must be construed in accordance with them

In the *Georgia Order*, the Georgia PSC concluded that "the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting an audit."[12] The Georgia PSC also concluded that, under Georgia law, "parties are presumed to enter into agreements with regard to existing law" and that the plain text of the Agreement indicated no

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9 *Id* at 278, ll 1-4 (Russell).

10 *See Georgia Order* at 5-8, 12-14

11 *See id*

12 *Id* at 5

intent to exclude or otherwise displace the concern and independent auditor requirements from the *Supplemental Order Clarification*, which was applicable law in existence at the time the parties negotiated and entered into the Agreement.[13] Accordingly, the Georgia PSC concluded that the *Supplemental Order Clarification's* concern and independent auditor requirements were incorporated into the parties' Agreement, and, therefore, found that BellSouth must demonstrate a concern for each converted circuit prior to being able to conduct an audit and must hire an AICPA-compliant auditor to conduct the audit.[14]

Despite the Georgia Commission's orders, BellSouth continues to challenge the fundamental concern and independent auditor requirements. BellSouth inappropriately relies on one provision (section 10.5.4 of Attachment to of the Agreement)—to the exclusion of all others—to support its claim that it is permitted to audit every one of NuVox's converted EELs. Section 10.5.4 of Attachment 2 to the Agreement does not represent a stand-alone agreement and it does not provide BellSouth with an unqualified audit right, as BellSouth appears to claim.[15] Though section 23 of the Agreement's General Terms, which selects Georgia law as governing, and section 35.1 of the General Terms, which requires compliance with all applicable law, the Agreement incorporates applicable law not expressly excluded or displaced by conflicted language, including the *Supplemental Order Clarification's* concern and independent auditor requirements.

By its own terms, section 10.5.4 does not exclude or displace with conflicting requirements the concern and independent auditor requirements from the FCC's *Supplemental Order Clarification*. Moreover, there is no conflict between section 10.5.4 and either section 23

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13 *Id* at 6, 8, 12 (citations omitted)

14 *Id* at 8, 12

15 *See* BellSouth Complaint at 4, ¶ 9

or section 35.1 of the Agreement with regard to the concern and independent auditor requirements. Indeed, by BellSouth's own admission, section 10.5.4 is silent on the issue of whether BellSouth must demonstrate a concern prior to conduct an audit and to hire an independent auditor to conduct that audit.[16] Therefore, given BellSouth's admission, there cannot be any legitimate conflict between section 10.5.4, upon which BellSouth relies, and section 23, section 35.1, or the *Supplemental Order Clarification.* Absent any conflict, and given the silence in section 10.5.4, there is no basis to conclude anything other than the parties intended to incorporate the concern and independent auditor requirements of the *Supplemental Order Clarification* into the Agreement.

In this proceeding, BellSouth has not demonstrated a legitimate concern with respect to the circuits that it seeks to audit, nor has it identified the particular circuits that it seeks to audit. BellSouth has not provided, and the record does not contain, any evidence to suggest that NuVox did not properly self-certify compliance with the "safe harbor" it selected. In addition, the consulting shop that BellSouth has selected to conduct the audit—American Consultants Alliance ("ACA")—is not "independent." ACA appears to be subject to the influence of BellSouth, has conducted itself in a manner that raises reasonable doubt as to its integrity and professional qualifications, and is predisposed to make findings that favor BellSouth. The Authority also must reject BellSouth's request to provide the auditor with records, including those that contain Carrier Proprietary Information and Customer Proprietary Network Information, all of which is protected from disclosure under section 222 of the Act.[17] Any audit conducted would be of NuVox's records, not BellSouth's records. The Authority also

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16 Georgia Hearing Tr at 149, ll 16-19, 25, 150, ll 1-4

17 *See* BellSouth Complaint at 10, ¶ 4

must reject BellSouth's claim for interest.[18] The Agreement makes no provision for interest in this context.

II. THE PLAIN LANGUAGE OF THE AGREEMENT REQUIRES BELLSOUTH TO DEMONSTRATE A CONCERN WITH RESPECT TO THE CIRCUITS IT SEEKS TO AUDIT AND TO RETAIN AN INDEPENDENT AUDITOR TO CONDUCT THE AUDIT

The plain language of the Agreement requires BellSouth to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform the audit. BellSouth has sought to evade the concern and independent auditor requirements by relying exclusively on section 10.5.4 of Attachment 2 to the Agreement.[19] Section 10.5.4 is a provision of an attachment to the Agreement; it is not an agreement unto itself. As discussed below, even if the Authority were to read section 10.5.4 in a vacuum (which would be in error), there is no merit to BellSouth's argument that section 10.5.4 exempts BellSouth from complying with the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* that are incorporated into the Agreement by operation of Georgia law (section 23) and the Agreement's applicable law provision (section 35.1).

The *Supplemental Order Clarification* requires BellSouth to demonstrate a concern and to hire an independent auditor prior to conducting any limited audit of converted circuits.[20] The *Supplemental Order Clarification*, which predates the Agreement, is incorporated

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18 *See id* at 11, ¶ 5.

19 *See* BellSouth Complaint at 4, ¶ 9

20 *See Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶ 1 (requiring ILECs to hire an "independent third party" to conduct the audit), 15 FCC Rcd at 9603, n 86 (requiring ILECs to demonstrate a concern prior to conducting an audit) The Georgia Commission emphasized that the auditor must be AICPA-compliant "[t]he FCC has stated clearly not only that auditors must be independent that that the independent auditor must conduct the audit in compliance with AICPA standards" *Georgia Order* at 13

into the Agreement by operation of Georgia law.[21] In section 23 of the Agreement, the parties selected Georgia law to govern.[22] Section 35.1 of the Agreement provides that the parties must abide by all applicable law.[23] Therefore, under Georgia law, and in accordance with the Agreement, the *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the Agreement unless excluded in an express exemption or displaced by conflicting requirements set forth therein.

As discussed below, the parties neither excluded nor displaced the concern and independent auditor requirements of the *Supplemental Order Clarification*. In particular, section 10.5.4 of the Agreement, upon which BellSouth relies exclusively, is silent with respect to those requirements and neither expressly excludes nor contains any other terms that conflict with or displace those requirements. Accordingly, by operation of Georgia law, those requirements are incorporated into the Agreement.

A. The FCC's *Supplemental Order Clarification* Requires BellSouth To Demonstrate a Concern and to Hire an Independent Auditor

The primary disputes in this case are whether BellSouth is required to demonstrate a concern prior to conducting an audit and whether BellSouth must hire an independent auditor to conduct that audit. The answer to both inquiries is yes: as discussed below, by operation of the plain language of the Agreement, which incorporates the concern and independent auditor requirements of the *Supplemental Order Clarification*, BellSouth is required

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21 When the parties entered into the Agreement, there were not any existing EELs audit provisions or other generally applicable audit provisions In other words, there were no pre-existing audit provisions contained in the Agreement that could be applicable to EEL audits When the parties negotiated the Agreement, they were fully aware of the *Supplemental Order Clarification*, and fully intended to incorporate the concern and independent auditor requirements into the Agreement *See* Georgia Hearing Tr at 278, ll 15-18, 286, ll 6-13 (Russell) (stating that the parties were fully aware of the *Supplemental Order Clarification* when they negotiated the Agreement and that they intended to incorporate its concern requirement)

22 Agreement, General Terms and Conditions, § 23

23 *Id*. General Terms and Conditions, § 35 1

to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform that audit.

In the *Supplemental Order Clarification*, the FCC granted ILECs certain audit rights, subject to compliance with specific requirements. In particular, the FCC found that audits must not be routine,[24] and that an ILEC only may conduct an audit when it "has a ***concern*** that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."[25] In addition, the FCC specified that an audit only may be conducted by an "independent third party."[26]

Indeed, the Georgia Commission already has concluded that, under the *Supplemental Order Clarification*, BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to conduct that audit. In doing so, the Georgia Commission properly rejected BellSouth's arguments that those requirements are not included in the *Supplemental Order Clarification*. In rejecting BellSouth's arguments, the Georgia Commission evaluated the requirements set forth in the *Supplemental Order Clarification*, and concluded that the order requires ILECs, such as BellSouth, to demonstrate a concern.[27] In doing so, the Georgia Commission stated that "audits should only take place when the ILECs have a concern."[28]

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24 *See id* at 9603, ¶ 31, n 86

25 *Id* (emphasis added)

26 *Id* § 1 (requiring ILECs to hire an "independent auditor")

27 *Georgia Order* at 5

28 *Id*

The Georgia Commission elaborated that its reading of the *Supplemental Order Clarification* is "reinforced by the *Triennial Review Order*," which prohibited the ILECs from verifying a carrier's self-certification unless it had cause.[29]

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they ***share the basic principles*** of entitling requesting carriers unimpeded UNE access based upon self-certification, ***subject to later verification based upon cause***, are equally applicable.[30]

The Georgia Commission concluded, and there can be no doubt, that the FCC'sstatement "eliminates any ambiguity over whether the ... footnote in the *Supplemental Order Clarification* was intended to make the demonstration of concern a mandatory pre-condition of audits. Not only does the *Triennial Review Order* provide that ILECs must base audits on cause, but it states that this principle is shared by the *Supplemental Order Clarification*."[31] There can be no doubt that, under the *Supplemental Order Clarification*, BellSouth is required to demonstrate a concern prior to conducting an audit.[32]

B. The Parties Incorporated the *Supplemental Order Clarification's* Concern and Independent Auditor Requirements Into Their Agreement

The parties incorporated the *Supplemental Order Clarification*'s concern and independent auditor requirements into their Agreement. Although the parties voluntarily negotiated the Agreement, and, as such, had the opportunity to exclude or displace the

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29 *Id* (quoting *Review of 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, 17368, ¶ 622 (2003) ("*Triennial Review Order*"))

30 *Id* (emphasis added)

31 *Id*

32 It appears that BellSouth does not dispute that the independent auditor requirement et forth in the *Supplemental Order Clarification* applies. Instead, the parties dispute whether BellSouth's chosen auditor—ACA—is actually independent

Supplemental Order Clarification's concern and independent auditor requirements;[33] the fact of the matter is that they did not do so.[34] The plain language of section 10.5.4 does not indicate any intent to exclude application of or otherwise displace the concern and independent auditor requirements.

The FCC's *Supplemental Order Clarification* and independent auditor requirements are incorporated into the Agreement by operation of Georgia law. The parties do not dispute that the Agreement is governed by Georgia law.[35] Under Georgia law, as discussed herein, all law in existence when the parties enter into a contract is included into that contract as though expressly set forth therein unless the parties expressly exclude application of that law. In this case, the parties neither excluded nor displaced the concern and independent auditor requirements of the *Supplemental Order Clarification* in section 10.5.4 or anywhere in the Agreement.

The applicable law provision contained in section 35.1 of the Agreement serves to amplify that the parties intended to incorporate these *Supplemental Order Clarification* requirements and all other requirements of applicable law that were not excluded or expressly displaced with conflicting language. To the extent that there is any ambiguity, NuVox demonstrated to the Georgia Commission—and the Georgia Commission agreed—that the parties did not intend to exempt or displace the concern and independent auditor prerequisites set forth in the *Supplemental Order Clarification.* NuVox also demonstrated that BellSouth, through its own conduct, acknowledged that the parties are bound by the auditor and concern requirements of the *Supplemental Order Clarification.*

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33 *Georgia Order* at 5

34 *Id* at 6-8

35 Agreement, General Terms and Conditions, § 23

1. The FCC's *Supplemental Order Clarification* Concern and Independent Auditor Requirements Are Incorporated Into the Agreement by Operation of Georgia Law

The concern and independent auditor requirements of the *Supplemental Order Clarification* are incorporated into the Agreement under Georgia law. Section 23 of the Agreement states that the "Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia."[36] As the Georgia Commission found, under Georgia law, "parties are presumed to enter into agreements with regard to existing law."[37] In addition, the Supreme Court of Georgia concluded that laws in existence at the time of the contract are incorporated into that contract:

> [l]aws that exist at the time and place of the making of a contract, enter into and form a part of it...and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter.[38]

In the present case, the parties did not enter into the Agreement until *after* the FCC issued the *Supplemental Order Clarification*.[39] Furthermore, as discussed below, neither courts nor commissions will imply exceptions into the Agreement where none exist.[40] Accordingly, since the *Supplemental Order Clarification* was part of the governing law when the parties entered into the Agreement, by operation of Georgia law, it was incorporated into the parties' Agreement.

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36 *Id*

37 *Georgia Order* at 16 (citing *Van Dyck v Van Dyck*, 263 Ga 161, 163 (1993))

38 *Magnetic Resonance Plus, Inc v Imaging Systems, International*, 273 Ga 525, 543 S E 2d 32, 34-5 (2001), *see also Van Dyck v Van Dyck*, 263 Ga at 163 (stating that "[p]arties to a contract are presumed to have contracted with reference to relevant laws and their effect on the subject matter of the contract, and a contract may not be construed to contravene a rule of law ")

39 *See* Russell Rebuttal Testimony at 13, ll 14-15, *see also* Georgia Hearing Tr at 291, ll. 1-8

40 *See Jenkins v Morgan*, 100 Ga App at 562 (emphasizing that "[t]he parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary unless so provided by the terms of their agreement ")

Moreover, the Georgia Commission decisions are part of Georgia law, and, therefore, under the Agreement, BellSouth is bound to abide by those decisions.

As the Georgia Commission already has found, the parties did not exclude or displace the concern and independent auditor requirements of the *Supplemental Order Clarification*.[41] Under Georgia law, parties are presumed to incorporate existing law into their Agreement, and must explicitly exclude or displace any current law to which they do not wish to be bound.[42] Specifically, as the Georgia Commission concluded, if parties "intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein."[43] In addition, under Georgia law, no exemptions will be implied into the contract: "parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary."[44] The Georgia Commission correctly found that the Agreement does not contain any provision stating that the parties excluded or displaced the concern and independent auditor requirements.[45]

BellSouth is likely to argue, as it did before the Georgia Commission, that the notice requirement memorialized in section 10.5.4 is the only prerequisite to conducting an audit. The Georgia Commission already has rejected BellSouth' argument, finding that the Agreement does not provide that the notice requirement set forth in section 10.5.4 is the only prerequisite to conducting an audit.[46]

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41 *Georgia Order* at 6

42 *Jenkins v Morgan*, 100 Ga App 561, 562, 112 S E 2d 23, 24 (1959))

43 *Georgia Order* at 6 (citing *Jenkins v Morgan*, 100 Ga App 561, 562, 112 S E 2d 23, 24 (1959))

44 *Jenkins v Morgan*, 100 Ga App 561, 562, 112 S E 2d 23, 24 (1959)).

45 *Georgia Order* at 6

46 *Id* at 7

The Georgia Commission also correctly rejected BellSouth's assertion that it should imply an intent to displace the concern and independent auditor requirements on grounds that the parties specified an intent to follow the *Supplemental Order Clarification* by referencing it in certain sections and to displace the requirements set forth in the *Supplemental Order Clarification* where no reference was made.[47] Georgia law bars the reading of such an implied intent into a contract.[48] Indeed, in the *Georgia Order*, the Georgia Commission made clear that an agreement will not be read to exclude applicable law unless the parties specifically excluded such law:

> [i]t is one thing to say an agreement that specifies a variance from existing law in one section reflecting intent to follow existing law in a different section where no such specification is made; it is quite another to conclude that an agreement that specifies compliance with existing law in one section reflects intent to vary from existing law where no such specification is made."[49]

Moreover, as explained below, section 35 1 of the Agreement makes plain that the parties did not intend to deviate from the requirements of federal law, unless they included express language creating an exemption or displacing such requirements.

Thus, the plain text of the Agreement demonstrates that the parties intended to include the requirements of applicable law, unless they specified language that exempts or displaces such requirements. The absence of a reference to the *Supplemental Order Clarification's* concern and independent auditor requirements (*i e* , silence) does not signal an intent to displace or create an exemption from them. Rather, it indicates an intent to follow them, since there is no express language in section 10.5.4 or elsewhere creating an exemption to or otherwise displacing the concern and independent auditor requirements.

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47 *Id*

48 *Jenkins v Morgan*, 100 Ga App 561, 562, 112 S E 2d 23, 24 (1959)

49 *Georgia Order* at 7

2. The Parties Incorporated the *Supplemental Order Clarification*'s Concern and Independent Auditor Requirements Into Their Agreement by Operation of the Applicable Law Provision

In addition to governing Georgia law, which unambiguously provides that existing law is part of the contract unless specifically excluded (such that the *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the Agreement), the Agreement by its own terms explicitly incorporates applicable federal and state law. Notably, the Agreement contains an "Applicable Law" provision, which states that the parties will comply with all applicable federal and state law that relates to the obligations addressed in the Agreement:[50]

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

This provision demonstrates that the parties agreed that the Agreement would incorporate (and, unless expressly stated otherwise, not supplant) all law related to the obligations under the Agreement, including the *Supplemental Order Clarification's* concern and independent auditor requirements.

Moreover, this provision instructs, consistent with Georgia law, that "[n]othing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law."[51] Thus, not only does section 35.1 of the

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50 Agreement, General Terms and Conditions, § 35.1

51 The *Supplemental Order Clarification's* concern and independent auditor requirements are "mandatory" The FCC did not make them optional Although "requirements" are by their very nature mandatory, an

Agreement expressly require BellSouth to comply with the concern and independent auditor requirements, as they are part of applicable law not expressly excluded or displaced in section 10.5.4 or in any other section of the Agreement, but also it bars BellSouth's myriad unsupported interpretations of the Agreement, all of which would require the Authority to find an implied exemption from or displacement of the concern and independent auditor requirements. Consistent with Georgia law, including the Georgia Commission decisions on these legal issues, and the express language of section 35.1, there is no basis to imply that the parties exempted or displaced the *Supplemental Order Clarification's* concern and independent auditor requirements.

C. The Agreement Does Not Exclude or Displace the Concern and Independent Auditor Requirements Set Forth in the *Supplemental Order Clarification*

As stated above, existing law becomes part of the Agreement unless the parties explicitly exclude or displace that law from their agreement.[52] As the Georgia Commission already has found, the parties did not—by the plain terms of their Agreement (or otherwise)—exclude the *Supplemental Order Clarification's* concern and independent auditor requirements.[53] BellSouth cannot lawfully overcome this determination of Georgia law by inviting the Authority to imply an exception or displacement of the concern and independent auditor requirements. There simply is no merit to BellSouth's argument that certain provisions of the Agreement—the

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example of an "optional" requirement contemplated by this language would be the *Supplemental Order Clarification's* so-called three safe harbors for EEL conversions Requesting carriers have the option of certifying compliance with one of the three (making them "optional" requirements) Another example of an "optional" requirement would be the Act's statement that "bill-and-keep" is a permissible, but not required, substitute for cash-based reciprocal compensation in certain instances *See* 47 U S C § 252(d)(2)(B)(i)

52 *Jenkins v Morgan,* 112 S E. 2d at 24 (stating [p]arties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract)

53 *See Georgia Order* 7 (finding that there was no evidence in the Agreement to vary from the *Supplemental Order Clarification*'s concern requirement)

audit provision and the entire agreement provision—in any way exclude or displace the concern and independent auditor requirements set forth in the *Supplemental Order Clarification.*

The Authority must reject BellSouth's attempt to create a stand-alone agreement out of section 10.5.4 of Attachment 2.[54] BellSouth is likely to argue, as it did before the Georgia Commission, that the notice requirement memorialized in section 10.5.4 is the only prerequisite to conducting an audit. The Georgia Commission already has rejected BellSouth's argument, finding that the Agreement does not provide that the notice requirement set forth in section 10.5.4 is the only prerequisite to conducting an audit.[55] Contrary to BellSouth's argument, section 10.5.4 does not operate in a vacuum outside the scope of Georgia law and independent of the main body of the Agreement (the "General Terms and Conditions"). As explained above, both Georgia law, designated in section 23 of the Agreement, and the "applicable law" provision (section 35.1 of the Agreement) establish a presumption that requirements of applicable law are included as though expressly stated and that any voluntary agreement to the contrary must be memorialized expressly. These provisions operate to make clear that the *Supplemental Order Clarification's* concern and independent auditor provisions are incorporated into the Agreement.[56] The plain text of section 10.5.4 neither excludes nor displaces those audit prerequisites.[57] Indeed, the Georgia Commission emphasized that "[t]he Agreement, however, does not state that notice is the only precondition. . . . Without language evidencing an intent to

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54 *See* BellSouth Complaint at 4, ¶ 9

55 *See Georgia Order* at 7

56 *Id* at 5-8

57 *See id* at 7-8

vary from the requirement to show a concern, it is unreasonable to conclude that NuVox intended to waive its protection under federal law."[58]

Pursuant to Georgia law, the parties must expressly state any exemptions to or displacement of applicable law within the contract. As such, although parties *may* voluntarily agree to deviate from applicable law in their interconnection agreements, they must do so expressly. The plain text of section 10.5.4 confirms that the parties did not exclude the concern and independent auditor requirements. The text of section 10.5.4 of Attachment 2 to the Agreement does not contain the exemptions to which BellSouth claims it is entitled. In particular, section 10.5.4 does not exclude the concern or independent auditor requirements:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox]'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 [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 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 [NuVox].

Because the plain text of section 10.5.4 does not contain language expressly exempting BellSouth from, or otherwise displacing, the concern and independent auditor requirements, BellSouth's claim of such exemptions must be rejected.

Even if the Authority were to view section 10.5.4 in isolation from the overarching provisions of the Agreement (the General Terms and Conditions), as BellSouth

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[58] *Id*

requests the Authority do, the text is silent on and does not conflict with the *Supplemental Order Clarification's* concern and independent auditor requirements. Indeed, in the hearing before the Georgia Commission, BellSouth admitted that section 10.5.4 is silent with regard to the concern and independent auditor requirements.[59] By BellSouth's own admission, that silence necessarily must result in a default to the requirements of the *Supplemental Order Clarification.*[60]

Because section 10.5.4 is silent on whether BellSouth must demonstrate a concern and hire an independent auditor, there is no conflict between section 10.5.4 and the terms of either section 23 or section 35.1 of the Agreement. There also is no conflict between section 10.5.4 and the *Supplemental Order Clarification.* This is not a case where specific terms trump general ones or where requirements of the contract conflict with and thereby trump the concern and independent auditor requirements found in applicable law. Indeed, during the Georgia hearing, BellSouth witness Padgett acknowledged that section 10.5.4 (when viewed in isolation from the overarching General Terms and Conditions) is "silent" on the concern requirement,[61] and that it does not expressly address the independent auditor requirement (which is tantamount to silence).[62] Accordingly, there is simply no conflict between section 10.5.4 of Attachment 2 and sections 23 and 35.1 of the Agreement, such that one provision governs in lieu of the other. Instead, these provisions work in tandem, requiring BellSouth to state a concern and to hire an independent auditor in order to conduct an EEL audit. Thus, as the Georgia Commission correctly determined, the "plain meaning of the Agreement" is not that which BellSouth

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59 Georgia Hearing Tr at 149, ll 16-19, 25, 150, ll 1-4.

60 *Id*

61 *Id* at 138, ll 15-19 (Padgett)

62 *Id* at 149, ll 25, 150, ll 1-6 (Padgett)

implausibly suggests – it is instead, as NuVox suggests, with the concern and independent auditor requirements incorporated therein and not excluded or displaced by implication.[63]

D. Evidence of the Parties' Intent Eliminates Any Ambiguity and Affirms That the Parties Did Not Agree to the Exemptions BellSouth Claims

The Agreement unambiguously requires BellSouth to demonstrate a concern and to hire an independent auditor prior to conduct an EELs audit. Record evidence from the Georgia proceeding demonstrating the parties' intent reinforces the plain language of the Agreement. Indeed, record evidence from the Georgia proceeding unequivocally demonstrates that the parties intended to include these requirements into their Agreement.

In the Georgia proceeding, NuVox witness Hamilton Russell, the only witness with actual knowledge of the parties' negotiations to take the stand and to be subject to cross-examination under oath, testified that the parties were fully cognizant of the FCC's *Supplemental Order Clarification* and its prerequisites pertaining to EEL audits.[64] Having already negotiated the Agreement's General Terms and Conditions, including the applicable law and Georgia law provisions, Mr. Russell explained that there was no need to ensure that each audit pre-requisite contained in the *Supplemental Order Clarification* was expressly included in section 10.5.4 of Attachment 2, as all requirements were included unless explicitly exempted or displaced.[65] Mr. Russell also testified that there was no intent to create exemptions from or to displace the concern and independent auditor requirements of the *Supplemental Order Clarification* [66] Indeed, Mr. Russell explained that the parties agreed to strike language originally proposed by

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63 *Georgia Order* at 6-8

64 Georgia Hearing Tr at 278, ll 15-18, 286, ll 6-13 (Russell)

65 *Id* at 278, ll 15-18 (Russell)

66 *Id* at 278, ll 1-4, 279, ll 22-25, 280, ll 1-2 (Russell)

BellSouth that would have allowed BellSouth to conduct audits at its "sole discretion."[67] Mr. Russell recalled that the parties discussed and agreed that the proposed language was inconsistent with the requirements set forth in the *Supplemental Order Clarification*, including the "concern" requirement set forth in footnote 86 of that order.[68]

BellSouth's witness had no actual knowledge of the parties' negotiations, as BellSouth decided to protect those with actual knowledge from having to testify under oath.[69] Thus, in the event that any ambiguity is claimed or perceived, evidence regarding the parties' intent in negotiating the Agreement affirms NuVox's position and points to the inevitable conclusion that BellSouth is not exempt from, but rather, must demonstrate that it has complied with the concern and independent auditor requirements.

E. BellSouth's Course of Conduct Affirms That BellSouth Is Required to Comply With the Concern and Independent Auditor Requirements

BellSouth's own course of conduct (prior to and since it served its notice in March 2002) also demonstrates that the parties agreed to be bound by the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* and incorporated into the Agreement by sections 23 and 35.1. In the Georgia proceeding, NuVox presented evidence in the form of the March 15, 2002, notice letter from BellSouth in which BellSouth notified NuVox that it was requesting an audit pursuant to and in compliance with the FCC's *Supplemental Order Clarification.*[70] In that two-page letter, BellSouth cites the *Supplemental Order Clarification* no less than a half-dozen times, using such phrases as

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67 *Id* at 278, ll 1-4 (Russell)

68 *Id* at 278, ll 24-25, 279, ll 1-16, 280, ll 15-16 (Russell)

69 *Id* at 122, ll 23-25 (Padgett) BellSouth previously had succeeded in shielding those individuals from discovery

70 *See* **Exhibit 5** Letter to Hamilton E Russell, III, Regional Vice President – Legal and Regulatory Affairs, NuVox Communications, Inc , from Jerry D Hendrix, Executive Director, BellSouth Telecommunications (Mar 15, 2002)

"[c]onsistent with the FCC Supplemental Order Clarification," "requirements of the FCC Supplemental Order," "per the Supplemental Order," and "as required in the Supplemental Order." BellSouth attempted to distance itself from and downplay the importance of that letter by calling the letter a "form letter." That argument is hollow [71] Indeed, it is belied by the fact that BellSouth copied the Chief of the FCC's Competition Policy Division of the Wireline Competition Bureau – even though *that* notification requirement is not expressly included in section 10.5.4 of Attachment 2. In fact, the notification requirement appears only in the *Supplemental Order Clarification* Thus, BellSouth's claim that it is in no way subject to the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* cannot be squared with the actions of the BellSouth "client" that is a party to the Agreement.

The Georgia record also contains evidence in the form of calls and e-mail exchanges between the parties that further demonstrate that BellSouth thought the *Supplemental Order Clarification* concern and independent auditor requirements applied until it realized that NuVox actually would insist that BellSouth must comply with them.[72] Specifically, in email correspondence to NuVox, BellSouth admitted that audits of EEL circuits "should only be undertaken in the event BellSouth has a concern that a particular carrier has not met the local service requirements set forth in the Supplemental Order Clarification."[73]

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71 Quite frankly, it is as silly as BellSouth's standard argument that the concern requirement is not really a requirement of the *Supplemental Order Clarification*, because it appears only in a footnote of that order The reality is that BellSouth cannot walk away from statements on grounds that they were made in a form letter, and the FCC's footnotes (to the extent that they are adopted by a majority of that fractured agency) constitute applicable law BellSouth made these same arguments before the Georgia Commission, which the Georgia Commission promptly rejected *See Georgia Order* at 7-8

72 Georgia Hearing Tr Russell Rebuttal at 12, ll 5-22, 13, ll 1-7 (referring to NuVox Exhibit HER-2); 18, ll 21-23

73 *See* Email to John Heitmann, Counsel to NuVox Communications, Inc , from Parkey Jordan, BellSouth (Apr 1, 2002) (attached hereto as **Exhibit 6**)

The Georgia record also revealed that BellSouth, in *ex parte* presentations before the FCC, acknowledged that it is not exempt from the concern and independent auditor requirements.[74] Indeed, the record showed that while BellSouth was telling the Georgia Commission that it was exempt from the concern and independent auditor requirements, BellSouth was telling the FCC that the requirements apply and that it is complying with them, even with respect to NuVox.[75]

During the Georgia proceeding, while the parties were arguing over whether certain requirements set forth in the *Supplemental Order Clarification* applied, BellSouth admitted that certain provisions not expressly set forth (or excluded or displaced) in section 10.5.4 applied. On December 1, 2003, BellSouth sent NuVox a letter claiming that NuVox was obligated to retain records supporting its EELs conversion requests:

> [p]aragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to provide compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question.[76]

Thus, with regard to the potential EELs audit that is the subject of this proceeding, BellSouth has insisted that NuVox maintain records in accordance with requirements set forth the *Supplemental Order Clarification*. NuVox agrees that the record maintenance requirements set forth in the *Supplemental Order Clarification* are those that are applicable. This is the case because section

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74 *See* Georgia Hearing Tr at 156, ll 14-17, 159, ll 3-15 (Padgett)

75 *E g*, Georgia Hearing Tr at 159, ll 3-15 (Padgett)

76 Letter from Parkey D Jordan, Senior Counsel, BellSouth, to John J Heitmann, Partner, Kelley Drye & Warren LLP (Dec 1, 2003) (provided as **Exhibit 7**).

10.5.4 contains no express exemption from or displacement of that requirement, and by operation of applicable law (and Georgia law) it applies. Thus, BellSouth's claim that 30-days' notice is the only *Supplemental Order Clarification* audit requirement incorporated into the Agreement is belied by its own claim that the records retention requirement contained in the *Supplemental Order Clarification* but not expressly repeated in section 10.5.4 of the Agreement also applies (which it does).

III. BELLSOUTH HAS FAILED TO DEMONSTRATE A CONCERN

In order to conduct an audit, BellSouth must demonstrate a valid and legitimate concern with respect to the particular converted circuits it seeks to audit. In other words, BellSouth must demonstrate that it has probable or reasonable cause to believe that NuVox inappropriately certified compliance with the significant local use requirement and the particular safe-harbor elected.[77]

NuVox repeatedly has requested that BellSouth provide documentation to support a concern for auditing the circuits at issue, but BellSouth steadfastly has refused to do so. In this docket, BellSouth also has failed to provide evidence that would support reasonable allegations of concern. As an initial matter, the allegations BellSouth makes regarding the level of local exchange traffic exchanged between the parties in Tennessee (and Florida) is irrelevant. BellSouth claims that it noticed an "inordinately low" volume of local exchange traffic sent from NuVox to BellSouth.[78] NuVox disputes these claims as contrary to fact. NuVox sends high volumes of local traffic to BellSouth, and did so at the time referenced by BellSouth. Indeed,

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[77] All of NuVox's circuits were certified under safe harbor option number one, which means that NuVox certified that at the time of conversion, it believed that it was the sole provider of local service to the customer being served by the EEL

[78] BellSouth Complaint at 5, ¶ 16

BellSouth and NuVox have long agreed to the use of jurisdictional factors indicating that over 90% of the traffic sent by NuVox to BellSouth is local. Nevertheless, the quantity of traffic exchanged between the parties on certain unspecified trunks has virtually nothing to do with the amount of local traffic carried on particular end user dedicated EEL circuits. In some instances, the rules simply do not require that any local traffic be directed over an EEL serving a particular customer.[79] Thus, BellSouth's allegations regarding a "low" amount of local traffic in Tennessee appear to be baseless and are, in any event, irrelevant.

BellSouth also alleges in its complaint that there are forty-four circuits in Tennessee "NuVox is using, or used, to serve end users who also receive(d) local exchange service from BellSouth."[80] While such allegations, if supported could well prove sufficient to demonstrate a concern, BellSouth has not provided any documentation to support these allegations. BellSouth also has not demonstrated that it provides local exchange services to the same customer served by those EELs. And, BellSouth has not demonstrated that those same customers are NuVox's customers served via the EEL circuits in question or that BellSouth served those customers when NuVox made its certification. Without any supporting evidence, BellSouth cannot be deemed to have a legitimate concern that would entitle it to an audit of the implicated circuits.

Compounding BellSouth's lack of evidence of a concern is the fact that BellSouth violated the law to obtain information about the circuits at issue. NuVox provided carrier proprietary information to BellSouth's wholesale unit for the purpose of provisioning the

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79 Under safe harbor option one, NuVox could use an EEL exclusively for non-local traffic, provided it uses a parallel EEL or other service arrangements to carry the customer's local traffic *Supplemental Order Clarification* ¶ 22 ("[t]he carrier can then use the loop-transport combinations to carry any type of traffic, including using them to carry 100% interstate access traffic")

80 BellSouth Complaint at 7, ¶ 24

requested services. BellSouth then provided this information to its retail unit. Section 222(b) of the Act bars BellSouth from providing this information to its retail unit; under section 222(b) of the Act, BellSouth is prohibited from using carrier proprietary information *for any purpose* other than to provide the requested service.[81] BellSouth cannot be permitted to obtain an audit based on this unlawful use of NuVox's carrier proprietary information.

Furthermore, in the Georgia proceeding, the Georgia Commission recognized that whether BellSouth had demonstrated a concern was "fact-specific."[82] As such, the alleged circuit-specific concerns that BellSouth had for 44 circuits in Georgia cannot be applied to circuits in any other state, including the 44 circuits with respect to which BellSouth has alleged a similar concern here in Tennessee. Instead, BellSouth must demonstrate that it has an actual concern for each of the circuits that it seeks to audit in this particular case. BellSouth has failed to do so. Accordingly, the Authority must deny its complaint.

IV. THE AUTHORITY MUST REJECT BELLSOUTH'S REQUEST FOR INTEREST

BellSouth is not entitled to collect interest on the difference between the applicable special access rate(s) and the EELs rates that NuVox paid to BellSouth per circuit.[83] The Agreement contains no provision for interest in this context.

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81 47 U S C § 222(b)

82 *Georgia Order* at 10

83 BellSouth Answer at 11, Request for Relief ¶ 5.

V. CONCLUSION

For the foregoing reasons, the Authority should deny BellSouth's complaint in its entirety.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on this the 4th day of March, 2005, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or electronic transmission, or facsimile transmission to the following.

Guy Hicks
Bellsouth Telecommunications, Inc
333 Commerce Street, Suite 2101
Nashville, TN 37201

H. LaDon Baltimore

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 1

Docket No. 12778-U

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

ORDER ADOPTING IN PART AND MODIFYING IN PART THE HEARING OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

This matter arises from the May 13, 2002 Complaint by BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement ("Agreement"). BellSouth asserts that it has the right under the parties' interconnection agreement to audit NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. The facilities that BellSouth wishes to audit were initially purchased as special access facilities but were subsequently converted to enhanced extended loops ("EELs") based on NuVox's self-certification that the facilities were used to provide a significant amount of local exchange service.

In construing the interconnection agreement, it is necessary to consider the June 2, 2000 order of the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order Clarification*"). The parties disagree both with respect to the meaning of the FCC order, and the extent to which the order was incorporated into the Agreement.

I. STATEMENT OF PROCEEDINGS

On May 13, 2002, BellSouth filed its Complaint to enforce the parties' Commission-approved interconnection agreement. The specific relief requested by BellSouth was that the Commission resolve the Complaint on an expedited basis, declare that NuVox breached the interconnection agreement by refusing to allow BellSouth to audit the facilities NuVox self-certified as providing "a significant amount of local exchange service," require NuVox to allow such an audit as soon as BellSouth's auditors are available and order NuVox to cooperate with the auditors selected by BellSouth. (BellSouth Complaint, pp. 5-6). NuVox filed with the Commission its Answer to the Complaint on May 21, 2002. NuVox supplemented its Answer on June 4, 2002

A. Initial Assignment to Hearing Officer

In an effort to accommodate BellSouth's request for expedited treatment, the Commission assigned the matter to a Hearing Officer for oral argument. Oral argument took place before the Hearing Officer on August 13, 2002. BellSouth and NuVox filed their briefs on October 4 and October 7, 2002 respectively. Regarding whether an audit should be allowed to proceed, the relevant questions were whether BellSouth was required to demonstrate a concern that NuVox had not satisfied the criteria of its self-certification, and whether, if required, BellSouth had demonstrated such a concern. In the event that BellSouth was permitted to proceed with the audit, NuVox objected to the auditor BellSouth intended to use charging that the auditor was not independent.

On November 5, 2002, the Hearing Officer issued an 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. The Hearing Officer determined that it was not necessary to reach the issue of whether BellSouth was required to demonstrate a concern because BellSouth did show that it had a concern. (November 5, 2002 Order, p. 5). The Hearing Officer based this conclusion upon BellSouth's allegations that records from Florida and Tennessee indicated that in those states an inordinate amount of the traffic from NuVox was not local. *Id* at 8. BellSouth had asserted that, because most customers generate more local than toll calls, if NuVox were the exclusive provider, it would be expected that a significant percentage of the carrier's traffic would be local. (BellSouth October 4, Brief, p. 10). Yet, according to BellSouth, its records reflected that local traffic constituted only 25% of its traffic in one state. *Id.* at 11. An additional issue raised by NuVox was whether the auditor BellSouth intended to use, American Consultants Alliance ("ACA"), was independent. The Hearing Officer rejected NuVox's charges that ACA was not independent. (Hearing Officer's November 5, 2002 Order, pp. 8-10).

On November 26, 2002, NuVox applied to the Commission for review of the Hearing Officer's decision. NuVox challenged both the Hearing Officer's conclusions that BellSouth demonstrated a concern and that the auditor was independent. (NuVox Application, p. 2). Finding that questions remained essential to the resolution of the issues, the Commission remanded the matter to a Hearing Officer for an evidentiary hearing on "whether BellSouth was obligated to demonstrate a concern prior to being entitled to conduct the requested audit of NuVox, whether BellSouth demonstrated a concern and whether the proposed auditor is independent." (Remand Order, p. 2).

B. Second Assignment to a Hearing Officer

As a preliminary matter, the Hearing Officer denied NuVox's request for discovery and request that the dates for this proceeding be based upon the date on which the FCC releases the Triennial Review Order. (Procedural and Scheduling Order, p 2). On October 17, 2003, an evidentiary hearing was held before the Hearing Officer. Nuvox and BellSouth filed briefs on December 23, 2003 and December 29, 2003 respectively. On February 11, 2004, the Hearing Officer issued his Recommended Order on Complaint ("Recommended Order").

The Hearing Officer first determined that BellSouth was obligated to demonstrate a concern. The Hearing Officer based this conclusion upon evidence that in negotiating the interconnection agreement the parties were cognizant of the *Supplemental Order Clarification* and that the language of the interconnection agreement does not make it exempt from the requirements of this order to show a concern. (Recommended Order, pp. 8-9).

The Hearing Officer next determined that BellSouth demonstrated a concern that NuVox is not the exclusive provider of local exchange service. Id. at 9-10. This conclusion was based on BellSouth's identification of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who the Hearing Officer found also receive local exchange service from BellSouth. Id. at 9.

The Hearing Officer then found that BellSouth's proposed auditor is an independent third party auditor as required by the *Supplemental Order Clarification* and the Agreement. The Hearing Officer concluded that the evidence did not demonstrate that ACA was subject to the control or influence of, associated with or dependent upon BellSouth. Id. at 11. The Hearing Officer determined that neither the interconnection agreement nor the *Supplemental Order Clarification* requires that the auditor comply with American Institute of Certified Public Accountants ("AICPA") standards; therefore to the extent NuVox insists upon the proposed auditor's adherence to those standards, NuVox should bear the additional costs. Id.

C. Petitions for Review of the Recommended Order

On March 12, 2004, NuVox filed its Objections to and Application for Commission Review of Recommended Order on Complaint. On this same date, BellSouth filed its Petition for Review of Recommended Order.

NuVox raised numerous grounds of disagreement with the Hearing Officer's Recommended Order. First, NuVox argued that the Hearing Officer erred in finding that BellSouth demonstrated a concern. As a preliminary matter, NuVox argued that BellSouth's notice was deficient because BellSouth didn't have a concern at the time it notified NuVox of its intent to audit. (Objections, p. 2). NuVox also contended that BellSouth did not include any evidence to support the Hearing Officer's conclusion that NuVox does not provide a significant amount of local exchange service to a number of customers NuVox serves via EELs. *Id.* at 5. NuVox charged that the Hearing Officer erred in finding that BellSouth supplied evidence demonstrating BellSouth provides local exchange services to thirty or so NuVox customers served by forty-four converted EELs in Georgia. *Id.* at 6.

The second component of the Recommended Order that NuVox takes issue with is the conclusion that BellSouth is entitled to audit all of Nuvox's EELs in Georgia. NuVox stated that the scope of the audit, if approved, should be limited to those circuits for which BellSouth has demonstrated a concern. (Objections, p. 16). NuVox argued that BellSouth's alleged concern is customer and circuit specific. *Id.* at 17. NuVox also relied upon the *Supplemental Order Clarification* to support a narrower scope for any audit. The *Supplemental Order Clarification* permits only limited audits that will not be routine. (Objections, p. 17, citing to *Supplemental Order Clarification,* ¶¶ 29, 31-32).

NuVox also argued that the Hearing Officer erred in concluding that the proposed auditor is independent. The standard used by the Hearing Officer for independence was that the auditor could not be subject to the control or influence of, associated with or dependent upon BellSouth. (Recommended Order, p. 11). While NuVox did not find fault with this standard, it argued that the Hearing Officer misapplied the standard in this instance. NuVox contended that admissions by BellSouth's witness of discussions with the proposed auditor concerning matters such as the *Supplemental Order Clarification* and other audits reveal that ACA is subject to the influence of BellSouth. (Objections, p. 19). NuVox also claimed that ACA received training from BellSouth, and consulted with BellSouth during audits. *Id.* at 20.

Finally, NuVox requested that the Commission stay the order should it be determined that BellSouth may proceed with the audit. NuVox asserts that it will be irreparably harmed by such a Commission order. (Objections, p. 22)

BellSouth raised two points in its Petition for Review of Recommended Order. First, BellSouth requested that the Commission clarify that BellSouth is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth argued that review of this information is likely to uncover additional violations by NuVox. (Petition, p. 3). BellSouth argued that such records include information that may not be subject to disclosure absent an order from a regulatory agency. *Id.*

The second argument raised by BellSouth in its Petition is that the Hearing Officer erred in finding that BellSouth is required to demonstrate a concern before conducting an audit. BellSouth asserted that the *Supplemental Order Clarification* only requires that incumbent local exchange carriers ("ILECs") have a concern, not that such a concern be stated or demonstrated. In addition, the parties' interconnection agreement does not include this requirement that BellSouth demonstrate a concern, and differs from the federal law on other aspects of the audit. (Petition, pp. 11-12).

II. JURISDICTION

The Commission has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the Georgia's Telecommunications and Competition Development Act of 1995 ("State Act"). The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act"). Since the Interconnection Agreement between the parties was approved by Order of the Commission, 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. §§ 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in ensuring that its Orders are upheld and enforced. Campaign for a Prosperous Georgia v. Georgia Power Company, 174 Ga. App. 263, 264, 329 S.E.2d 570 (1985).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. BellSouth is required to demonstrate a concern.

The first issue to address is whether BellSouth was required to demonstrate a concern that NuVox is not satisfying the terms of its self-certification. If the Commission were to determine that BellSouth need not demonstrate a concern, then it becomes a moot question as to whether BellSouth did, in fact, present evidence adequate to show that it has a concern. If the Commission determines that BellSouth must make such a showing, then the Commission must turn its attention to the evidence in the record.

There are two questions that must be answered in determining whether BellSouth must show a concern. The first question is whether the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting this type of audit If this question is answered in the affirmative, the next question is whether the parties' interconnection agreement opts out of this requirement.

The Commission Staff ("Staff") recommended that the Commission determine that BellSouth was required to demonstrate a concern. The *Supplemental Order Clarification* requires that the ILEC demonstrate a concern prior to conducting an audit. The *Supplemental Order Clarification* states that audits should only take place when the ILECs have a concern. (*Supplemental Order Clarification,* ¶ 31, n.86). This reading of the Supplemental Clarification Order is reinforced by the *Triennial Review Order*, which states as follows.

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order,* ¶ 622).

This language eliminates any ambiguity over whether the above-cited footnote in the *Supplemental Order Clarification* was intended to make the demonstration of a concern a mandatory pre-condition of these audits Not only does the *Triennial Review Order* provide that ILECs must base audits on cause, but it states that this principle is shared by the *Supplemental Order Clarification*. At the time the parties negotiated their interconnection agreement, federal law required that BellSouth demonstrate a concern prior to conducting an audit.

BellSouth's argument that at most ILECs only have to "have" a concern, rather than an obligation to state or demonstrate the required concern has no merit. Such a construction would render meaningless the FCC's requirement. A construction that would allow BellSouth to meet the concern requirement, without so much as stating what that concern is, sets the bar unacceptably low.

Having concluded that the *Supplemental Order Clarification* requires that BellSouth demonstrate a concern, it is necessary to examine the parties' interconnection agreement. No one disputed that BellSouth and NuVox were free to contract to terms and conditions that were different than what is set forth in the *Supplemental Order Clarification* The parties disagree over whether that was what they did.

Under Georgia law, parties are presumed to enter into agreements with regard to existing law. *Van Dyck v Van Dyck*, 263 Ga. 161, 163 (1993). If parties intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein. *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959). The parties' interconnection agreement does not expressly state that the parties stipulated that the contract would be governed by principles other than existing law. To the contrary, the parties agreed to contract with regard to applicable law:

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other party for compliance with the Order to the extent required or permitted by the term of such Order.

(Agreement, General Terms and Conditions, § 35.1).

As stated above, the federal law provides that BellSouth must demonstrate a concern prior to proceeding with an audit. With respect to audits, the Agreement included the following provision:

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

(Agreement, Att. 2, § 10.5.4).

BellSouth emphasized that parties may voluntarily agree to terms and conditions that would not otherwise comply with the law. (BellSouth Petition, p. 6). BellSouth argued that the parties negotiated specific terms and conditions for audits, and that pursuant to federal law, these are the terms and conditions that should govern their audit rights. *Id.* Specifically, BellSouth attacked NuVox's reliance on the Georgia Supreme Court's decision in *Van Dyck,* which involved the "automatic proration" of alimony or child support. The Court in *Van Dyck* concluded, *inter alia,* that because some sections of the parties' contract provided for "automatic proration" based on contingent events, the parties' failure to include the same language in the section under dispute meant that no such "automatic proration" was intended in relation to that section. *Van Dyck,* 263 Ga. at 164. BellSouth points out that NuVox and BellSouth expressly reference the *Supplemental Order Clarification* at times in the Agreement, but not with respect to the audit rights. (BellSouth Petition, p. 11). BellSouth reasons that *Van Dyck* therefore supports its position *Id.*

BellSouth's analysis overlooks a key distinction between this case and *Van Dyck.* In *Van Dyck,* the applicable law prohibited "automatic proration," except as specifically provided for in the decree. *Van Dyck,* 263 Ga. at 163. The provision in dispute in that case did not specifically provide for "automatic proration," and the Court did not construe the provision to allow for such a proration. *Id.* Therefore, the Court found that the agreement did not reflect the intent to differ from applicable law. In contrast, BellSouth asks this Commission to conclude that the relevant law does not apply to this section of the Agreement. It is one thing to say an agreement that specifies a variance from existing law in one section reflects intent to follow existing law in a different section where no such specification is made; it is quite another to conclude that an agreement that specifies compliance with existing law in one section reflects intent to vary from existing law where no such specification is made.

BellSouth also argues that the *Jenkins* decision favors its position because the Agreement sets forth the "legal principles to govern" the terms of the audit. (BellSouth Petition, p. 12). BellSouth states that the parties agreed that the Agreement "contains language making the giving of 30 days' notice the only precondition that must be satisfied before BellSouth can conduct an audit." *Id.* The Agreement, however, does not state that the notice is the only precondition. The Agreement does not address the requirement to demonstrate a concern, and that is the specific issue in dispute. Without language evidencing intent to vary from the requirement to show a concern, it is unreasonable to conclude that NuVox intended to waive its protection under federal law.

Unless a contract is ambiguous, the finder of fact need not look any further than the language in the agreement to determine the intent of the parties. *Undercofler v. Whiteway Neon Ad, Inc.*, 114 Ga. 644 (1966). An agreement cannot be deemed ambiguous until "application of the pertinent rules of interpretation leaves it uncertain as to which of two or more possible meanings represents the true intention of the parties." *Crooks v Crim*, 159 Ga. App. 745, 748 (1981). Construing the contractual provision in question in accordance with well-established rules of construction results in the conclusion that BellSouth is obligated to demonstrate a concern. Even if the Commission were to find the contract ambiguous, the evidence of intent

presented at the hearing supports NuVox's arguments that the parties intended for BellSouth to be obligated to show a concern prior to conducting an audit.

NuVox sponsored the testimony of Hamilton Russell, one of the NuVox employees personally responsible for negotiating the interconnection agreement. Mr. Russell testified that, during the negotiation process, the parties discussed the "concern" requirement, and that the parties agreed that BellSouth must state a valid concern prior to initiating an audit. (Tr. 278). Mr. Russell testified further that the parties agreed to strike the language proposed by BellSouth that would have allowed BellSouth to conduct the audit at its "sole discretion." (Tr. 278). The interconnection agreement does not provide that BellSouth may conduct an audit at its sole discretion, but remains silent on the "concern" requirement. Had language allowing BellSouth to conduct the audit at its sole discretion been incorporated into the final Agreement, then it may have withstood the presumption that the parties intended to contract with reference to existing law. That such language was proposed, and that NuVox balked at its inclusion, supports a finding that the parties agreed to follow the existing law as set forth in the *Supplemental Order Clarification.*

The Commission adopts the Staff's recommendation that the Agreement requires BellSouth to demonstrate a concern prior to conducting an audit. Such a concern was required under relevant law at the time the parties negotiated the Agreement, and it does not contain any language indicating that the parties did not intend to contract with reference to existing law. Even if the Agreement were found to be ambiguous, which it is not, the evidence in the record demonstrates that the parties intended for BellSouth to have to demonstrate a concern prior to conducting an audit.

B. BellSouth demonstrated a concern.

The Hearing Officer correctly explained that a concern "cannot be so speculative as to render the FCC's requirement meaningless, nor can the standard for determining whether a concern exists be so high as to require an audit to determine if such a concern exists." (Recommended Order, p. 9). Neither party disputed this standard.

In its effort to demonstrate a concern, BellSouth presented evidence of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who also receive local exchange service from BellSouth. (Tr. 96-98, BellSouth Exhibit 2 (proprietary)). BellSouth compared the name and location of each NuVox end user customer served by EEL circuits with BellSouth end user records and discovered forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users that are also receiving local exchange service from BellSouth.[1] (Tr. 98) BellSouth argued that NuVox cannot be the exclusive provider of local exchange service to an end user that also receives this service from BellSouth. (Tr. 98).

[1] In her prefiled direct testimony, Ms. Padgett stated that BellSouth had identified at least forty-five circuits. This number was subsequently amended to forty-four. (*See* BellSouth's Post-Hearing Brief, p. 21).

NuVox argued that BellSouth's evidence does not show that BellSouth provides local exchange service to customers of NuVox served via converted EELs. (NuVox Post-Hearing Brief, p. 36). Through cross-examination of BellSouth's witness, NuVox explored several reasons that the customers alleged to be receiving local exchange service from BellSouth were not, in fact, receiving such service. NuVox asserted that (1) the numbers for the customers identified as BellSouth end users generated a "not active" or "this number has been disconnected" recording when called; (2) the name of the BellSouth's customer was different than the name of the customer served by NuVox; (3) the address of BellSouth's end user was different than the address for NuVox's customer; and (4) certain numbers when dialed "ring to a computer or modem," which, according to NuVox, means the customer is receiving DSL and not local exchange service. Tr. at 164, 167-168, 173, 180-183.

BellSouth witness Ms. Padgett testified that there were explanations for each of NuVox's assertions. First, Ms. Padgett testified that NuVox may have gotten a "not active" or "this number has been disconnected" recording for certain BellSouth customers because it appeared NuVox was dialing the wrong number or was dialing the billing number, which is not a valid telephone number. (Tr. 233-234). Ms. Padgett explained that differences in customer names may be the result of the same customer going by two different names. (Tr. 169-170). The same is true for differences in customer addresses, which can be explained by the customer's use of a "different naming convention" when establishing service. (Tr. 175-176). An alternative explanation for a difference in address may be that the customer receives service at one address but has bills sent to a different address. (Tr. 236). Ms. Padgett also testified that digital subscriber line ("DSL") service works on the high frequency portion of a loop, while telephone service works on the low frequency portion. (Tr. 236). If the telephone number of an end user who receives DSL service is dialed, the call would still be completed. (Tr. 236) The Hearing Officer concluded that Ms. Padgett's explanations were reasonable. (Recommended Order, p. 10).

In its Objections to and Application for Review of the Recommended Order, NuVox states that BellSouth did not "prove" that it was providing local exchange service to the end use customers in question. (*See* Objections, p. 9 "does not constitute proof that BellSouth provides local service," p.10 "BellSouth Exhibit 2 cannot reasonably be found to constitute proof that BellSouth provides local service . . ."). NuVox also states that "it has never been established" that BellSouth provides service to these customers. *Id.* at 7. In making these arguments, NuVox sets the "concern" standard unreasonably high. The stated purpose of BellSouth's audit is to examine whether NuVox is complying with its certification as the exclusive provider of local exchange service. If the "concern" requirement was construed to require BellSouth to prove that NuVox was not the exclusive provider of service in order to conduct such an audit, then no audit would be necessary in the event the concern was satisfied. To state that BellSouth cannot conduct an audit unless it proves its case prior to conducting an audit is effectively stripping BellSouth of any audit rights it has under the Agreement.

BellSouth presented the Commission with evidence that supported that it had a concern that NuVox was not the exclusive provider of local exchange service. NuVox questioned the evidence, and BellSouth provided credible explanations in response to those questions NuVox charges that these explanations were mere speculation, and that BellSouth's witness did not have

actual knowledge that these explanations were accurate. (Objections, pp. 12-13). Again, the issue is not whether BellSouth can demonstrate with certainty that NuVox is in violation of the safe harbor provision, but rather, that it has a legitimate concern. By providing credible explanations for the questions raised by NuVox, BellSouth satisfies this requirement. It is reasonable to conclude that BellSouth has stated the necessary concern.

The Commission concludes that BellSouth has submitted sufficient evidence to demonstrate a concern that NuVox is not the exclusive provider of local exchange service to a number of customers served via converted EELs. The Commission emphasizes that the determination that the concern requirement was satisfied is fact-specific.

The Staff recommended that the Commission reject Nuvox's argument that BellSouth should have to re-file the notice of its intent to conduct an audit. The Agreement provides BellSouth may proceed with an audit upon thirty days notice. (Agreement, Att. 2, § 10.5.4). BellSouth initially relied upon data from Tennessee and Florida related to the division between local and toll calls. On remand, BellSouth raised a separate concern related to forty-four converted circuits in Georgia. NuVox argued that, because the notice issued related to the initial concern, BellSouth failed to meet this requirement in the Agreement. (Objections, pp. 2-3).

NuVox received ample notice of the concern raised by BellSouth during the remanded proceeding to the Hearing Officer. It cross-examined BellSouth extensively on the alleged concern. It sponsored witnesses to rebut the allegations of BellSouth. It briefed the issues before the Commission. The apparent intent of the notice requirement in the Agreement is to protect NuVox from BellSouth commencing an audit without NuVox having any opportunity to challenge the concern, raise any objection or otherwise prepare in an effort to minimize the disruption to its business that an audit would cause. That this order is being released two years after BellSouth filed its Complaint in this docket indicates that NuVox has not lacked for preparation. NuVox has not cited to anything that the Agreement requires as to the form of the notice. As BellSouth points out, "no particular form of written notice is required." (BellSouth Response to NuVox Objections, p. 2). Because NuVox has been on notice for more than thirty days that BellSouth intended to audit based on the concern raised with the forty-four converted circuits, allowing BellSouth to proceed with an audit without serving additional notice upon NuVox meets both the spirit and the letter of the Agreement. Furthermore, NuVox's argument is based on the incorrect premise that BellSouth's initial concern was determined to be inadequate. That is not the case. The Commission remanded the matter for an evidentiary hearing once it determined that there were significant questions of fact remaining without any evidentiary hearing.

The Commission adopts the Staff's recommendation that BellSouth satisfied the concern requirement in the Agreement. In relation to BellSouth's showing of a concern, the Staff recommended that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding should be modified to state that the Commission finds BellSouth has provided evidence indicating that it may be providing such service. The Commission does not need to reach the question of whether BellSouth is providing this service until BellSouth presents the results of ACA's audit. The Commission adopts the Staff's recommendation on this issue.

C. The scope of the audit should be limited to the forty-four EELs for which BellSouth demonstrated a concern.

The Recommended Order states that the audit should apply to all EELs. (Recommended Order, p. 10). The Staff recommended that the Commission limit the scope of the audit to converted EELs because such an order was consistent with the relief sought in BellSouth's complaint. In other words, the relief granted by the Hearing Officer on this issue surpassed the relief that BellSouth had requested.

NuVox argued that the scope of the audit should be limited to the circuits for which BellSouth has stated a concern. NuVox based this argument on both applicable facts and law. BellSouth's allegations related to the forty-four circuits do not apply to any other converted EEL circuits used by NuVox in Georgia. (NuVox Post-Hearing Brief, p. 44). In addition, the *Supplemental Order Clarification* permits only limited audits. (Nuvox Brief, p. 44, citing to *Supplemental Order Clarification* ¶¶ 29, 31-32). NuVox argued that permitting BellSouth to audit those circuits for which no concern has been raised would not constitute a limited audit. (NuVox Post-Hearing Brief, p. 44).

The Commission agrees with Nuvox that a limited audit should include only those circuits for which BellSouth has demonstrated a concern. However, the Commission does not entirely adopt NuVox's position on the scope of the audit. The Commission finds that it is reasonable to limit the audit initially to the forty-four circuits. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

D. The auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

BellSouth requested that the Commission clarify that it is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth's concern was based on a comparison of NuVox records with its own records. It is possible that a customer for which NuVox has certified that it is the exclusive provider of local exchange service is also receiving this service from another carrier. The policy reason behind BellSouth's request, therefore, is that examination of these records is necessary to uncover any additional violations. (BellSouth Petition, p.3). The legal basis BellSouth offers in support of its request is that 47 U.S.C. § 222(c)(1) authorizes BellSouth to release customer proprietary network information ("CPNI") with the approval of other parties or if required by law. *Id* at 3.

The determination of the scope of the audit disposes of BellSouth's policy argument because the Commission limited the audit to the forty-four converted circuits for which BellSouth stated a concern. The Staff recommended that the Commission reject BellSouth's legal argument. The federal statute prohibits the release of CPNI, with certain exceptions. The

exceptions in 47 U.S.C. § 222(c)(1) provide that CPNI may be released with the approval of the customer or if required by law. BellSouth is not required by law to release this information to its auditor; but rather it is requesting authorization from the Commission to do so. It does not appear consistent with the intent of the law to authorize release of the information in this instance. The Staff recommended that BellSouth only be permitted to release the CPNI with the customer's approval.

The Commission adopts the Staff's recommendation with respect to the release of CPNI to BellSouth's auditor.

E. The auditor proposed by BellSouth must be compliant with with the standards and criteria established by the American Institute of Certified Public Accountants.

The *Supplemental Order Clarification* requires that audits must be conducted by independent third parties paid for by the incumbent local exchange provider. (*Supplemental Order Clarification*, ¶ 1). The Agreement includes the following language on BellSouth's audit rights:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record 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.

(Agreement, Att. 2, § 10.5.4).

This language does not specifically address the issue of the independence of the auditor. BellSouth maintained that it is not required to use a third party independent auditor. It supported this position with the same argument that it used to support its position on the "concern" requirement. That is, BellSouth argued that "the only audit requirement to which the parties agreed is that BellSouth give 30-days' notice." (BellSouth Post-Hearing Brief, p. 3). NuVox disagreed, and argued that the parties did not exempt BellSouth from its obligation to conduct an audit using an independent third party auditor. (Tr. 253). This question of contract construction poses the same question as was addressed with the concern requirement. The Agreement does not expressly state either that BellSouth must show a concern or that BellSouth does not need to show a concern.

The Staff recommended that the Commission find that the *Supplemental Order Clarification* and the Agreement require that the audit be conducted by an independent third party auditor. For the reasons discussed in the analysis of the "concern" issue, the Commission adopts Staff's recommendation that the Agreement is unambiguous that the audit is required to be conducted by an independent third party.

The next question is whether the auditor selected by BellSouth is independent. NuVox vigorously objected to the Hearing Officer's conclusion that ACA satisfied this request. NuVox

argued that ACA is a small consulting shop that was dependent on ILECs for its business, and therefore could not be characterized as independent. (NuVox Post-Hearing Brief, p. 46). NuVox also claims that ACA marketing material characterizing as "highly successful" its audits that have recovered large sums for ILEC clients reflects a bias. *Id.* NuVox also complained that BellSouth's witness, Ms. Padgett admitted that she had private conversations with ACA regarding the requirements set forth in the *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present. (NuVox Objections, p. 19). NuVox reasons that this illustrates that ACA is subject to the influence of BellSouth. *Id.* NuVox requested that BellSouth conduct the audit using a nationally recognized accounting firm. (NuVox Post-Hearing Brief, p. 47). NuVox also contested the auditor's independence on the ground that ACA is not certified under the standards established by the AICPA. (Tr. 275).

BellSouth argues that none of these points demonstrate that ACA is not independent from BellSouth. (BellSouth Post-Hearing Brief, pp. 27-28). BellSouth counters NuVox's claims with evidence that ACA has competitive local exchange carrier clients and that BellSouth has not previously hired ACA. *Id.* BellSouth also argues that neither the Agreement nor the *Supplemental Order Clarification* required the auditor to comply with AICPA standards. *Id* at 28.

The *Triennial Review Order*, which the FCC issued after the date of the Agreement, states that audits must be conducted pursuant to the standards established by the AICPA. (*Triennial Review Order*, ¶ 626). The question then is whether this compliance is required for audits conducted pursuant to agreements entered into prior to the issuance of the *Triennial Review Order*. NuVox's position that it should be required is based on a reading that, like with the "concern" requirement, the FCC was simply clarifying in the *Triennial Review Order* what was intended by the term "independent" in the *Supplemental Order Clarification*. (Tr. 276). BellSouth argues that the *Triennial Review Order* does not impact the parties' rights under the Agreement, and in fact, illustrates that the *Supplemental Order Clarification* did not contain this requirement. (BellSouth Post-Hearing Brief, FN 7).

The Staff recommended that the Commission find that BellSouth's auditor met the standards of independence set forth in the *Supplemental Order Clarification,* but that the Commission should consider in its evaluation of the credibility of any audit results whether the audit was conducted pursuant to AICPA standards. The Commission does not adopt the Staff's recommendation. NuVox raised serious concerns about the auditor's independence. The FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards. It is true that this latter standard was not clarified until after the parties entered into the Agreement; however, the parties disputed the meaning of the independent requirement prior to the issuance of the *Triennial Review Order*. NuVox always maintained that for an auditor to be independent it must comply with AICPA standards. (Tr. 275). That the FCC later identified AICPA compliance as a prerequisite of an independent audit supports a conclusion that NuVox was correct. BellSouth's argument that the inclusion of the requirement in the latter FCC Order indicates that it was not present in the former is mistaken in this instance. In the *Triennial Review Order*, the FCC gives no indication that it is reversing any portion of the *Supplemental Order Clarification.* The most logical

construction of the *Triennial Review Order* is that it is clarifying the requirement that had been in place from the prior FCC order

In reaching this conclusion, the Commission concedes that the *Supplemental Order Clarification* did not expressly state that AICPA compliance was a prerequisite for an auditor to be deemed "independent." In fact, the *Supplemental Order Clarification* does not expound on the criteria to be considered in determining whether a third party auditor is independent. This lack of detail should not be construed to render the "independent" requirement meaningless. Rather, it leaves to the discretion of the Commission what is required to comply with the standard of independence. For guidance in reaching this determination, it is reasonable to look at other orders of the FCC. The *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party auditor to be independent. The Commission finds that any audit firm selected by BellSouth itself be compliant with AICPA standards and criteria.

The Commission remains cognizant that parties are capable of negotiating and agreeing to terms and conditions that are different than the specific requirements set forth in the law. The Commission has concluded that the parties did not do so with regard to this provision of the Agreement. Therefore, the issue is whether the federal law at the time the parties entered into the Agreement required third party audits to comply with AICPA standards in order to be deemed independent. For the reasons discussed, the Commission concludes that it is a fair construction of the term "independent" to require AICPA compliance.

Regardless of whether BellSouth argues it has a contractual right to conduct an audit that does not comply with AICPA standards, as the finder of fact the Commission may decide the proper weight to afford the findings of any such audit. In light of the FCC's determination that audits should be conducted pursuant to AICPA standards, the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards. Given that BellSouth would not be able to convert loop and transport combinations to special access services until it prevailed before the Commission, it would not make any difference if the Commission were to permit BellSouth to conduct the audit with an auditor that was not AICPA compliant. As discussed above, the Commission has concluded that BellSouth does not have this right under the Agreement; however, it is important to distinguish between the parties' arguments concerning their respective contractual rights and the Commission's discretion in evaluating the evidence.

The Staff recommended that NuVox should not have to pay the costs related to adherence to AICPA standards. The Commission agrees. The Recommended Order appeared to base the conclusion that NuVox should pay for compliance with AICPA standards on the premise that such compliance was above and beyond what had been agreed to by the parties. Given the conclusion that AICPA compliance is required by the Agreement, the basis for making NuVox pay no longer exists.

F. NuVox's Request for a Stay is denied.

NuVox requested that, should the Commission permit BellSouth to proceed with the audit, that it stay the effect of the order under O.C.G.A. § 50-13-19(d) pending the outcome of any judicial review. NuVox argues that it would be irreparably harmed if BellSouth were to proceed, that it has a likelihood of success on the merits, and that BellSouth would not be harmed if a stay was granted because if NuVox did not prevail on appeal, the time during the stay of the order would not be precluded from the audit. (NuVox Objections, p. 22). BellSouth responds that O.C.G.A. § 50-13-19(d) is inapplicable as it only applies to final orders. (BellSouth Petition, p. 11). BellSouth also argues that NuVox has not shown either that it will be irreparably harmed if the audit is allowed to proceed or that it has a likelihood of success on the merits in an appeal.

The Staff recommended that the Commission deny the requested stay. The Commission adopts Staff's recommendation. The Commission agrees with BellSouth that NuVox has not shown that it will be irreparably harmed if the audit is allowed to proceed because it could recover its out of pocket expenses should it prevail. Moreover, BellSouth will have to come back before the Commission with the findings from its audit prior to converting combinations of loop and transport network elements to special access services. In addition, NuVox has not demonstrated that it has a likelihood of success on appeal. The issue of whether BellSouth has demonstrated a concern is a question of fact, and the Commission's determination is entitled to deference on such an issue. Finally, the limited scope of the approved audit reduces any harm that NuVox can claim as a result of the Commission's decision.

IV. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues presented to the Commission for decision should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to the terms of the parties' interconnection agreements, the Federal Act and the State Act.

WHEREFORE IT IS ORDERED, that BellSouth was obligated pursuant to the terms of the parties' Agreement to demonstrate a concern prior to conducting an audit of NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users.

ORDERED FURTHER, that BellSouth demonstrated a concern that NuVox was not the exclusive provider of local exchange service to the end users served via the forty-four converted EELs at issue.

ORDERED FURTHER, that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding is modified to state that BellSouth has provided evidence indicating that it may be providing such service.

ORDERED FURTHER, that BellSouth provided adequate notice, pursuant to the Agreement, of its intent to audit.

ORDERED FURTHER, that the scope of BellSouth's audit shall be limited to the forty-four circuits for which BellSouth demonstrated a concern. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

ORDERED FURTHER, that the auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

ORDERED FURTHER, that any audit firm selected by BellSouth must be compliant with AICPA standards and criteria.

ORDERED FURTHER, that NuVox does not have to pay for any costs related to bringing an auditor into compliance with AICPA standards.

ORDERED FURTHER, that NuVox's request for a stay is hereby denied.

ORDERED FURTHER, that except as otherwise stated the Recommended Order of the Hearing Officer is adopted.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

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

The above by action of the Commission in Administrative Session on the 18th day of May, 2004.

Reece McAlister Executive Secretary	H. Doug Everett Chairman
Date: _____	Date: _____

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 2

Docket No. 12778-U

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

ORDER ON REHEARING, RECONSIDERATION AND CLARIFICATION

On June 30, 2004, the Georgia Public Service Commission ("Commission") issued an Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order ("Order") in the above-styled matter. The Commission concluded that BellSouth Telecommunications, Inc. ("BellSouth") was entitled, under the parties' interconnection agreement and the applicable law, to conduct an audit of NuVox Communications, Inc.'s ("NuVox") records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. (Order, p. 15). The Order also included findings of fact and conclusions of law on the terms and conditions pursuant to which BellSouth was permitted to conduct its audit.

On July 7, 2004, BellSouth filed with the Commission a Motion for Rehearing, Reconsideration and Clarification ("Motion"). The Motion asked the Commission to reconsider its decision on the scope of the audit as well as which party must bear the costs of the audit, and asked the Commission to clarify that the Order was not intended to preclude the disclosure of customer proprietary network information ("CPNI") to the auditor pursuant to provisions of the Federal Act other than 47 U.S.C. 222(c)(1), which was specifically addressed.

1. Scope of the Audit

BellSouth moved for reconsideration of the scope of the audit. BellSouth argues that the Order is inconsistent with the Commission's vote at its Administrative Session. At the Administrative Session, Commissioner Burgess made the following motion, which the Commission adopted, to amend the Staff's recommendation on the scope of the audit:

> . . . [That] at this time the audit be limited to forty-four circuits which BellSouth has provided the billing information. And depending upon the outcome of that audit, then the Commission would authorize BellSouth to go forward with a full audit of the remaining 340 some circuits. That would be the amendment that I would offer at this time.

BellSouth argues that the "obvious import" of the amendment that a finding that NuVox falsely certified with respect to any customer served by the forty-four EELs audited BellSouth would be

permitted to conduct a "full audit" of the remaining EELs. (Motion, p. 2). BellSouth states that the Order is inconsistent with this vote because it does not allow BellSouth to proceed with a full audit until the Commission determines whether it is appropriate to expand the scope of the audit. *Id.*

In its August 3, 2004 Reply in Support of its Motion ("BellSouth Reply"), BellSouth states that if it is required to demonstrate a concern on a "circuit-by-circuit" basis, then the results of the audit will not be able to be used to demonstrate that concern. (BellSouth Reply, p. 3). BellSouth also argues that there is no authority for requiring BellSouth to demonstrate a concern on a "circuit-by-circuit" basis. *Id.*

On July 15, 2004, NuVox filed with the Commission its Opposition to BellSouth's Motion ("Opposition"). Nuvox argues that the Order accurately characterizes the Commission's vote at Administrative Session. NuVox states that the Commission determined that it would hold off on determining whether to expand the scope of the audit until it had the opportunity to review the findings of the limited audit. (Opposition, p. 2). NuVox states that if BellSouth finds non-compliance, "then it may attempt to raise additional concerns and it may approach the Commission to request that it be permitted on that basis to broaden the scope of the audit." *Id.* at 3.

The Staff recommended that the Commission deny reconsideration on this ground. The Order is consistent with the Commission's vote. The Order states that "[o]nce the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits." (Order, p. 11). The Commission voted to expand the scope of the audit depending on the outcome of the audit of the forty-four circuits. Practically, this can only mean that the Commission may determine to expand the scope of the audit.

The Commission did not commit to allowing a full audit upon the finding of a false certification with respect to a single customer, nor did the Commission vote to set a particular standard on what specific audit findings would warrant expanding the scope. The Commission is also not requiring BellSouth to demonstrate a concern on a "circuit-by-circuit" basis with regard to the converted circuits not included in the limited audit that the Commission is approving at this time. A reasonable interpretation of the Commission vote is that it intended to evaluate the audit findings before it tied its hands on the decision of whether to expand the scope of the audit. This approach makes sense and is not legal error. After reviewing the results of the initial audit, the Commission could find, consistent with its Order, that an audit that revealed a sufficient number of violations with respect to the forty-four circuits was adequate to demonstrate a concern for other converted circuits not included in the limited audit.

The Commission adopts the Staff recommendation and denies reconsideration on this issue for the reasons outlined herein.

2. Responsibility to Pay for the Audit

BellSouth also moved for reconsideration of the Commission's finding that BellSouth was responsible for paying for the audit. BellSouth argues that because the Commission found that the parties did not evidence the intent to part from federal law on the independence of the auditor, the Commission is obligated to apply the requirements of the *Supplemental Order Clarification* as to who pays for the audit. (Motion, p. 4). The *Supplemental Order Clarification* requires competitive local exchange carriers to reimburse the incumbent if the audit uncovers non-compliance. *Id.* Finally, BellSouth argues that the language that BellSouth conduct the audit "at its sole expense" applies only if BellSouth itself conducts the audit. *Id.* NuVox argues that the plain language of the agreement obligates BellSouth to bear the costs of the audit regardless of the outcome, and that nothing in the agreement conditions that obligation on whether BellSouth itself, as opposed to an independent auditor. (Opposition, p. 4).

The Staff recommended that the Commission deny reconsideration on this issue. In its Order, the Commission found that the parties agreed to an independent auditor. Consistent with relevant case law, parties may stipulate for other legal principles to govern their contractual relationship, but the intent to do so will not be implied. *Jenkins v. Morgan,* 100 Ga. App. 561, 562 (1959). The agreement did not indicate that the parties intended to vary from the federal law requirement that the audit be conducted by an independent auditor. Therefore, the Commission, by not impermissibly implying such intent, determined that under the contract BellSouth must use an independent auditor to conduct the audit. In contrast, BellSouth did commit expressly to pay for the audit. The intent for the audit to take place at BellSouth's sole expense is not implied. Consistent with contract law that allows parties to stipulate to terms independent from the law, BellSouth is obligated to pay for the audit.

The Commission adopts Staff's recommendation and denies reconsideration on this issue for the reasons outlined herein. BellSouth's argument that the Commission is bound to apply the terms of the *Supplemental Order Clarification* to the issue of which party pays for the audit because it applied the terms of this FCC Order in determining whether the auditor had to be independent is misguided. This argument presumes that the Commission ignored the interconnection agreement with regard to the independence of the auditor, and therefore, the Commission should ignore it again on the issue of which party must pay for the audit. That is not what the Commission did, and if it were, the proper course would be to reconsider the decision on the independence of the auditor rather than which party pays for the audit. As stated above, the Commission determined the interconnection agreement did not evidence intent to depart from federal law on the issue of the independence of the auditor, but did evidence that intent on the issue of which party was responsible for paying for the audit.

Attachment 2, Section 10.5.4 of the parties' interconnection agreement states, in part, as follows:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] 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.

This provision expressly provides that the audit is to be conducted at BellSouth's sole expense. BellSouth's argument that this only applies if BellSouth is allowed to conduct the audit itself without an independent auditor must fail for the same reasons that support the Commission's interpretation that the parties' agreement requires BellSouth to conduct the audit with an independent auditor.

While the Commission's analysis in the June 30, 2004 Order stands on its own, it is instructive that BellSouth's own pleadings on reconsideration undermine its position that by the inclusion of the language "BellSouth may . . . audit [NuVox's] records" the parties indicated that the audit need not be conducted by an independent auditor. In its Motion, BellSouth states that "[t]he obvious import of Commissioner Burgess' amendment was that if the audit revealed that NuVox had falsely certified that it was the exclusive provider of local exchange service to any customer served by the forty-four EELs audited, then BellSouth would be permitted to conduct a 'full audit' of the remaining EELs circuits that NuVox had converted from special access services in Georgia." (Motion, p. 2) (emphasis added). BellSouth later stated that "[i]n other words, according to NuVox's logic . . . BellSouth was only entitled to audit the forty-four EELs . . ." *Id.* at 3. (emphasis added). BellSouth filed this pleading after the Commission had determined that the audit must be conducted by an independent auditor. Yet, BellSouth characterized an audit to be conducted by an independent auditor, at the request of BellSouth, as an audit that BellSouth was to conduct. This characterization by BellSouth emphasizes why the language in the interconnection agreement does not reflect any intent to vary from the parties' rights and obligations under federal law. The relevant language in its Motion is the same as the language in the interconnection agreement. While BellSouth maintains that the language in the interconnection agreement indicates that it could conduct the audit itself, it uses similar language to describe the audit that will be conducted by the independent auditor.

As stated above, the Commission has previously concluded that the interconnection agreement did not evidence intent to vary from federal law on the issue of whether an independent auditor was required. BellSouth has not moved directly for the Commission to reconsider that prior ruling. However, one of the arguments relied upon by BellSouth in moving to reconsider the issue of which party must pay for the audit is based upon the position that the interconnection agreement allowed BellSouth to conduct the audit itself. The purpose of this discussion has been to affirm the prior analyses on this issue contained in the Commission's June 30, 2004 Order, and to point out that BellSouth's pleadings on reconsideration support the Commission's earlier construction of the interconnection agreement. BellSouth has not provided any meritorious reason to reconsider the issue of which party must pay for the audit.

3. CPNI

BellSouth requests that the Commission clarify that its Order was not intended to preclude the disclosure of CPNI to the auditor pursuant to provisions of the Federal Act other than 47 U.S.C. 222(c)(1), which was specifically addressed. BellSouth argues that the Commission does not have the authority to enforce 47 U.S.C. § 222(d). NuVox responds that the clarification that BellSouth seeks would allow it to sidestep the intent of the Order and federal

law. (Opposition, p. 6). NuVox also argues that BellSouth has not supported that 47 U.S.C. 222(d) justifies release of CPNI to the auditor. *Id.*

The Staff recommended that the Commission clarify that its order did not speak to 47 U.S.C. § 222(d)(2), but to specify that this clarification does not mean either that the Commission agrees that BellSouth is permitted to disclose the CPNI to an auditor under this subsection or that the Commission agrees with BellSouth's arguments that the Commission cannot enforce this subsection.

The issue before the Commission was whether to require BellSouth under 47 U.S.C. § 222(c)(1) to provide the information to the auditor. While it is true that BellSouth mentioned subsection (d) in a footnote to its Application for Review of the Hearing Officer's Recommended Order, the footnote merely stated that "arguably" BellSouth could release the CPNI under subsection (d)(2), but urged the Commission to avoid arguments over the scope of this subsection and merely order BellSouth under subsection (c)(1) to provide the information. The Commission declined to order BellSouth under subsection (c)(1) to release the information to its auditor.

The Commission adopts Staff's recommendation both with respect to the clarification of the Commission order and the terms and conditions of the clarification. BellSouth did not ask the Commission for permission to disclose CPNI under subsection (d)(2), and should it disclose the information to the auditor, it will do so at its own risk.

* * * * *

WHEREFORE IT IS ORDERED, that BellSouth's Motion to reconsider the scope of the audit is hereby denied.

ORDERED FURTHER, that BellSouth's Motion to reconsider the determination on which party must pay for the audit is hereby denied.

ORDERED FURTHER, that with regard to CPNI, the Commission clarifies that its June 30, 2004, Order did not address 47 U.S.C. 222(d); however, this clarification does not mean either that the Commission agrees that BellSouth may release the information under subsection 222(d) or that the Commission agrees with BellSouth's argument that the Commission does not have the authority to enforce this code section.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

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

The above by action of the Commission in Administrative Session on the 17th day of August, 2004.

_____
Reece McAlister
Executive Secretary

Date: _____

_____
H. Doug Everett
Chairman

Date: _____

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 3

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and TriVergent Communications, Inc. ("TCI"), a South Carolina corporation, on behalf of itself and its certificated operating affiliates identified in Part C hereof, and shall be deemed effective as of June 30, 2000. This Agreement may refer to either BellSouth or TCI or both as a "Party" or "Parties ".

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company ("ILEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, TCI is an alternative local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, for TCI to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and TCI agree as follows:

1. **Purpose**

The resale, access and interconnection obligations contained herein enable TCI to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that TCI will not be considered to have offered telecommunications services to the public in any state within BellSouth's region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. Furthermore, the Parties agree that execution of this agreement will not preclude either party from advocating its position before the Commission or a court of competent jurisdiction.

BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

21.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

21.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

21.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TCI or BellSouth to perform any material terms of this Agreement, TCI or BellSouth may, on fifteen (15) business days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) business days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth in Section 12. In the event that the Parties reach agreement as to the new terms consistent with the above, the Parties agree to make the effective date of such amendment retroactive to the effective date of such Order consistent with this section, unless otherwise stated in the relevant Order.

22. **Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

23. **Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.

not in any way disparage or discriminate against the other Party or its products or services.

35. **Compliance with Applicable Law**

35.1 Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

35.2 Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

36. **Labor Relations**

Each Party shall be responsible for labor relations with its own employees. Each Party agrees to notify the other Party as soon as practicable whenever such Party has knowledge that a labor dispute concerning its employees is delaying or threatens to delay such Party's timely performance of its obligations under this Agreement and shall endeavor to minimize impairment of service to the other Party (by using its management personnel to perform work or by other means) in the event of a labor dispute to the extent permitted by Applicable Law.

37. **Compliance with the Communications Law Enforcement Act of 1994 ("CALEA")**

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each Party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such other Party's noncompliance, and shall at the non-compliant Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

38. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 4

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the Matter of:	
Enforcement of Interconnection Agreement Between BELLSOUTH TELECOMMUNICATIONS, INC. and NUVOX COMMUNICATIONS, INC.	Docket 12778-U

244 Washington Street
Atlanta, Georgia

Friday, October 17, 2003

The above-entitled matter came on for hearing pursuant to Notice at 10:00 a.m.

BEFORE:

JEFFREY STAIR, Hearing Officer

CROSS EXAMINATION

BY MR. HEITMANN:

Q Morning, Ms. Padgett.

A Good morning.

Q Ms. Padgett, on page 1 and 2 of your testimony, it states that you work for BellSouth Marketing, is that correct?

A I'm sorry, did you say page 1?

Q Pages 1 and 2 of your testimony.

A 1 and 2.

Q I believe it states that you work in some capacity for BellSouth's marketing organization, is that correct?

A I work for BellSouth Telecommunications in the Interconnection Services Marketing Organization

Q How is it that you market interconnection services to companies like NuVox?

A BellSouth markets its interconnection services via an interconnection sales force, advertising in trade publications.

Q Is your testimony today part of that marketing effort?

A No, it's not.

Q Now Ms. Padgett, you didn't negotiate the interconnection agreement at issue in this case, did you?

A No, I didn't. However, I am very familiar with

A I'm sorry, would you state that again, please?

Q With respect to an exclusion from Georgia law, an exclusion from the applicability of the Supplemental Order Clarification and an exclusion from the requirement within that order that BellSouth needs to have a concern prior to conducting an audit and the requirement in that order that BellSouth needs to state -- to hire an independent auditor, would you agree with me that the agreement is, at best, silent on those issues?

A As to the first three parts of that, I agree with you the agreement does not state affirmatively that the parties exclude those particular issues. However, again, the parties did agree as to what they would include and I got lost after the first three.

Q Okay. The first three -- I think we can end up with the latter two, which I just want to confirm is the requirement that BellSouth have concern. Is the agreement silent on that point?

A The agreement is silent on that point.

Q With respect to the requirement that BellSouth hire an independent auditor, you would argue the agreement is silent on that point?

A May I look at the terms?

Q Sure. Do you have a copy of the general terms with you?

those 44 circuits in a little while, but when you state that BellSouth is also providing service to those end users, do you mean local exchange service? What kind of service do you mean?

A Local exchange service.

Q Ms. Padgett, I'm looking at language on page 8 of your testimony with regard to the concern still, and I want to ask you is there any language in the interconnection agreement that conflicts with or trumps the concern requirements set forth in the Supplemental Order Clarification?

A I'm sorry, where did you say you were looking?

Q Page 8 of your testimony. Again, with respect to the concern requirement. In particular, you state that NuVox never sought to add language requiring BellSouth to demonstrate the concern. My question to you is is there any language in the interconnection agreement that conflicts with, trumps or excludes that concern requirement.

A No, but once again, the parties set forth limitations as to when it would occur, they did not list anything about a concern. And again, BellSouth has shown that we do have a concern, we have more than a concern, we have actual cases where it's clear that NuVox isn't complying with the certification.

Q Now is there any language in the interconnection

agreement that trumps or conflicts with the requirement that you hire an independent auditor?

A There is not anything necessarily that specifically excludes it, but again, the language is pretty clear, it just says BellSouth may conduct the audit, doesn't say anything at all about a third party auditor.

Q I'm looking at page 9 of your testimony, lines 17 through 21, continuing on to page 10. This is with respect to who would pay for the audit. Now has BellSouth's position with respect to who pays for this audit been consistent since March 15 of 2002?

A BellSouth has made various offers in the context of settling this disagreement with NuVox that differ from that, yes.

Q In the notice of the audit, the March 15 letter, which I believe is attached to your testimony, I believe it's SWP-1, is that correct? No, it's not, bear with me one second. It's actually attached to the testimony of Mr. Russell, Exhibit HER-1.

Doesn't BellSouth state that the Supplemental Order requires that NuVox pay for 20 percent -- pay for the audit if 20 percent non-compliance is found?

A No, it doesn't say that. I do understand how you could read it that way, but that's not what the letter intended to say and again, as I stated in my testimony,

A That's correct, because that's what the parties agreed to in the interconnection agreement.

Q Now Ms. Padgett, if I could turn your attention to your rebuttal testimony, I'd like to take a look at Exhibit SWP-6. Are you there?

A Yes.

Q Could you identify for me what this document is?

A This is an ex parte presentation that BellSouth gave to the FCC in June of 2002.

Q Could your turn to page 2 of that exhibit. Do you see the fourth bullet on page 2?

A Yes.

Q Could you read that for me?

A "Audits are only conducted when a concern is raised by pre-specified criteria."

Q Did you exclude NuVox from that?

A No, I didn't. As I said earlier, BellSouth set forth a specific process internally so that each audit would be conducted the same as the previous one. And that included a list of criteria that we looked at across the board for every carrier, so there could be no question that we were looking for a cause to audit a particular carrier. We looked at the same criteria for each one. That doesn't have anything to do with the interconnection agreement language. The interconnection agreement doesn't require us

each audit to be conducted the same way. This was the first of those audits.

Q Okay. On page 6 of that exhibit, Ms. Padgett, is sort of a conclusion statement by BellSouth. Could you read what it says on page 6 for me, please?

A Certainly.

"BellSouth has fully complied with the FCC's Orders in exercising its right to audit by:

"Conducting audits only when it has a concern that the safe harbors are not being met

"By hiring an independent auditor."

Q It seems to me -- does this seem to state that BellSouth thinks concern is required by the FCC's order?

A No, we don't think that, BellSouth does not believe it's a requirement. We chose, however, to do that for business reasons, for reasons of making sure that the audits were not questioned in terms of bias, but primarily because we don't want to go audit when there doesn't appear to be any reason to do it, when we have to pay for the audit if there's no non-compliance there.

Q So your testimony today is that this sheet from page 6, BellSouth is not telling the FCC, listen, we're complying with your orders because we tell carriers a concern and we hire an independent auditor? This says

something else?

A I didn't hear part of your sentence.

Q It's your testimony today that this sheet is not -- on this sheet, BellSouth is not telling the FCC that we're complying with your orders because we conduct audits only when we have a concern and when we hire an independent auditor?

A I think you've got an extra "not" in there.

Q Okay.

A What we are saying is that we have fully complied with the FCC's orders, we don't conduct audits on routine basis and we have hired an independent auditor.

Q So what's the meaning of the second bullet -- excuse me, the first bullet regarding concern? Why would you mention the concern if it wasn't a requirement, Ms. Padgett?

A The FCC made it pretty clear that they didn't want audits to occur on a routine basis. BellSouth doesn't conduct audits on a routine basis and that was specifically the question that was asked to us, that this presentation, this ex parte, was in response to, is do you or do you not conduct routine audits. No, we don't.

MR. HEITMANN: Okay, I would like to move to some testimony with respect to the proprietary information filed into the record and I'd like to introduce an exhibit in

BellSouth had nine separate interconnection agreements on its website for NuVox and BellSouth?

A No, I am not aware of that.

Q Are you aware that now there's only one, that BellSouth subsequently changed it?

A No, I don't know how the public website deals with the different records. It may be that they're separated by state, may not, I don't know, haven't looked at it.

Q Let's move on to issue number 3, which is the independence of the auditor, the auditor you selected. And you mentioned before that you selected this entity, ACA, to conduct all your EEL audits, is that correct?

A That's correct.

Q And when they conduct it, do you continue to confer with them about what they found and whether it's a violation or not?

A No, we don't. They do keep me posted on the status as they go through an audit. They tell me what kinds of information they're getting, that's the extent of it.

Q While the audit is going on?

A Yes.

Q Hmmm. Before you engaged ACA to conduct this audit, had you discussed the Supplemental Order Clarification requirements at all with them?

A Yes. As part of the interview process, we asked

them to go through it with us and asked them a couple of questions about their understanding, because our experience had been that most auditing firms had no idea even what it was.

Q Now are you familiar with -- actually I'm sure you are actually, because you sent them to us -- the documents that you sent to us regarding ACA and the exhibits that Mr. Russell attached to his testimony regarding ACA?

A Yes, I am.

Q Could I point your attention to Exhibit HER-8 attached to Mr. Russell's testimony?

A Okay.

Q Could you describe what this document is for me?

A This document is part of the initial proposal that ACA sent to BellSouth, it's an exhibit listing their typical engagements.

Q Are you familiar with some of the companies named on this exhibit?

A Some of them, yes.

Q Is Centel an ILEC?

A Where are they on here?

Q The second bullet.

A I looked them up in the LURG and they're listed as a reseller and a ULEC. I don't know what that means.

Q Is Ameritech an ILEC?

of their business case in general.

Q Now when they do audits -- I think I saw some evidence that they do some PIU, PLU reporting audits -- are PIU and PLU reporting typically done by an independent auditor? Are those sorts of audits done by an independent auditor?

A To my knowledge, they are, yes.

Q On page 2 of that letter, Mr. Fowler, who wrote the letter on behalf of American Consultants Alliance, says he's currently conducting an audit of carrier's conversion from special access rates to UNEs on behalf of Sprint. Did you consult with him about how that audit was going?

A I have asked him since this time and it's my understanding that that got held up in complaints similar to this one, that it never proceeded.

Q So when this auditor comes back and confers with you, he discusses what it is they're finding, checks on the status, do you ever ask them to do additional work?

A I don't recall. They have come to me with proposals before primarily asking -- you know, we've having trouble getting the kind of information we need from a carrier, can we send them this kind of a letter, or could you do this to put -- you know, ask them to send it to cooperate, that kind of thing. That's about the extent of it.

Q Did you have those conversations with that independent auditor, so-called independent auditor, with the CLEC to be audited present or are those held privately?

A We've done some of both.

Q How is it possible for that auditor, ACA, to avoid an appearance of partiality when you have conversations with them about ongoing audits and the substance of audits and information you should look at without the other side present? How can they be independent, how can they be impartial?

A Again, ACA has absolutely no incentive to be partial, and every incentive not to be partial. The arrangement we have worked out with them is they're paid on an hourly basis, it doesn't matter what they find or what they don't find as far as what the firm ACA gets out of it, they get the same dollar amount one way or the other.

Q Now I think in one of the attachments to your rebuttal testimony, you submitted a letter between you and ACA that we had never seen before, despite the fact that you had said that we had seen everything. And I think the letter -- I'm looking for it now, I'll try and identify the exhibit -- states that you want them to go ahead with two audits initially, is that correct?

A I recall a letter similar to that, I'm not sure that's what you're referring to.

supplies some of its needs and is therefore not independent. And I think that's correct, we take EELs from you and we're dependent on you for EELs, we're dependent on you for loops and many other unbundled network elements. So I think you're right, we can be dependent on you, but NuVox is not an affiliate of BellSouth, we're not legally affiliated. Now ACA is not legally affiliated with BellSouth, are they?

A No, they're not.

Q Is ACA legally affiliated with any of the ICOEs or ILECs listed on a typical engagement sheet?

A Not that I'm aware of, no.

Q Have you asked whether they are?

A That specific question? No, but they have given us information as to who their partners are and that's included in the proposal that we've given you.

Q Now if all of ACA's clients or perhaps a substantial majority of ACA's clients are ILECs, would that not indicate to you that a substantial majority of ACA's revenues come from ILECs?

A That certainly does indicate that to me, but that's common with any business. They have a target market. There's nothing wrong with that. I'm sure that's true of any auditing firm, that they have a particular market that they focus on.

Q But yet this auditing firm, consulting firm,

it with you. In the first sentence you state "It is my understanding that ACA can and is willing to supply the requisite showing and attestation of compliance with the AICPA standards." Have they done so?

A No, they have not and BellSouth has not asked them to do so. The audits that we have conducted to this point through ACA have not required that we do that, although we've offered to do that on a number of occasions.

Q So you state in the second sentence, "BellSouth has not requested to this point that ACA make such a showing in an attempt to reduce the auditing process."

Now is it that you understand that ACA is prepared to make an attestation of compliance with the AICPA auditing standards?

A ACA has a relationship with an auditing firm that is a member of -- I don't know if it's AICPA or the organization that supplies those standards. I think it's AICPA -- that is a member and they have worked with them in the past to do that when it was required.

Q Now when you refer to AICPA standards, do you mean to include or exclude those standards governing what it means to be an independent auditor?

A In this situation, I was responding to Mr. Russell's statements that -- regarding the FCC's requirements in the triennial review, which do require an

MR. HEITMANN: The witness is available for cross examination.

HEARING OFFICER STAIR: Mr. Ross.

MR. ROSS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ROSS:

Q Mr. Russell, good afternoon. I wasn't sure I was actually going to live to see this moment, but I'm glad I did.

A Oh, yeah.

Q I just have a few questions and I will try to be brief.

Issue 1, I want to discuss the negotiations surrounding the audit language in the agreement. Is it correct that during negotiations, NuVox never proposed specific language that would have obligated BellSouth to demonstrate a concern prior to conducting an audit?

A During our negotiations, which started in I believe the third quarter of 2001, -- I could be wrong about that date -- we came around to the time where we were finishing up negotiations and the Supplemental Order Clarification was released. I believe it was adopted in late May and released in early June. Both parties recognized the importance of the Supplemental Order Clarification and we did not -- we discussed how that would

impact our relationship. We did not except out the requirement of a concern, and in fact, deleted from Section 10.5.4 BellSouth's proposal that it be able to conduct an audit with -- at its sole discretion.

Q Mr. Russell, I appreciate that answer, but you didn't answer my question. I will try very hard to ask yes or no questions and I would appreciate it if you could answer yes or no and then provide whatever explanation you need.

A Okay.

Q My question was isn't it true that NuVox never proposed specific language that would have specifically required BellSouth to demonstrate a concern prior to conducting an audit? Yes or no.

A We did not propose that language because that issue was covered in the Supplemental Order Clarification which was effective prior to the execution date of this agreement and made part of it by reference.

Q Was the issue of whether BellSouth had to demonstrate a concern prior to conducting an audit ever discussed during the negotiations?

A Yes.

Q And when was that?

A We discussed that when we looked at BellSouth's template agreement in Section 10.5.4. BellSouth wanted the

right to conduct an audit at its sole discretion. We did not believe that to be fair and we felt that there should be -- BellSouth should not have sole discretion to conduct such audits.

Q I'm sorry, maybe you misunderstood my question, I'll try to clarify it so maybe I can get a responsive answer. Did you specifically raise the issue with BellSouth during negotiations about whether BellSouth had to demonstrate a concern prior to conducting an audit? Yes or no.

A Yes.

Q Okay.

A BellSouth wanted the right to conduct an audit at its sole discretion. We believed they had to have a concern to do that and so we struck the language of "sole discretion".

Q Could you point to me where in your prefiled testimony you testified that NuVox discussed the issue of whether or not BellSouth had to demonstrate a concern?

A Not once in our -- I'm sorry --

Q What page?

A Page 16, lines 17 through 22, "The parties negotiated none of the exemptions claims by BellSouth. Not once in our negotiations did BellSouth propose that it be exempt from the requirement of having to demonstrate a

Q -- NuVox proposed various language about the audit, correct?

A Correct.

Q As part of that proposal, was there any specific language that dealt with the independence of the auditor?

A During our negotiations and when the Supplemental Order Clarification was issued in early June prior to execution, both parties looked at that Supplemental Order Clarification. We discussed what requirements it required of the parties. One was independent auditor, the other was a concern for an audit. Those things are specifically addressed in that order, so we discussed those things in the negotiation and did not except out those provisions.

Q I'm sorry, maybe you mis -- I'm referring to Mr. Heitmann's proposed language that's referenced in your Exhibit HER-4.

A Right.

Q As part of that proposed language, did Mr. Heitmann include any language that said specifically BellSouth has to hire an independent auditor? Yes or no.

A The e-mail that is attached says we're going to track the Supplemental Order Clarification, which includes those provisions.

Q Well, you obviously don't want to answer the question, Mr. Russell, so I'll move on.

NUVOX COMMUNICATIONS, INC.

DIRECT TESTIMONY OF HAMILTON E. RUSSELL, III

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

DOCKET NO. 12778-U

SEPTEMBER 12, 2003

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH NUVOX COMMUNICATIONS, INC. ("NUVOX") AND YOUR BUSINESS ADDRESS.

A. My name is Hamilton E. Russell, III. I am employed by NuVox as Vice President, Regulatory and Legal Affairs. My business address is 301 North Main Street, Suite 5000, Greenville, SC 29601.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A. I received a B.A. degree in European History from Washington and Lee University in 1992 and a J.D. degree from the University of South Carolina School of Law in 1995. I have been employed by NuVox and its predecessors since February of 1998. From July of 1995 until January of 1998 I was an associate with Haynsworth Marion McKay & Guerard, LLP. From August of 1993 until July of 1995 I worked for the Office of the Speaker of the South Carolina House of Representatives.

Q. IN YOUR PRESENT POSITION, ARE YOU RESPONSIBLE FOR LEGAL AND REGULATORY ISSUES RELATED TO OR ARISING FROM NUVOX'S

Q. NOW YOU STATED THAT BOTH PARTIES, INCLUDING BELLSOUTH, RECOGNIZED THAT BELLSOUTH NEEDED TO DEMONSTRATE A CONCERN AND ESTABLISH THE INDEPENDENCE OF BELLSOUTH'S CHOSEN AUDITOR. WHAT'S THE BASIS FOR THAT STATEMENT?

A. There are actually several bases for that statement. First, BellSouth states repeatedly in its notice (Exhibit HER-1) that its actions are consistent with the requirements of the *Supplemental Order Clarification*. BellSouth only adopted its current argument (which contends that neither the *Supplemental Order Clarification* nor the General Terms and Conditions of the parties' Interconnection Agreement apply and that only Section 10.5.4 applies) only after NuVox rejected the fabricated concerns BellSouth eventually invented.

Second, on March 19, 2002 (at approximately 12:00PM), my outside counsel, Mr. Heitmann, had a telephone conversation about that matter with Mr. Hendrix and during that conversation Mr. Hendrix conceded that BellSouth owed NuVox information regarding its concern. On a second call with Mr. Hendrix, this time with NuVox represented by me, Mr. Heitmann, and Jerry Willis of NuVox on March 25, 2003, Mr. Hendrix again acknowledged that BellSouth needed to provide NuVox with its concern, but that it wanted to keep that information as a confidential secret between the parties. Ms. Padgett (then Ms. Walls) also attended that call. These calls are memorialized in the March 27, 2002 e-mail from Mr. Heitmann to Ms. Padgett (then Ms. Walls) attached hereto as Exhibit HER-2.

Third, BellSouth, in its pleadings to the FCC on this matter indicated that it was its intent to comply fully with the FCC's *Supplemental Order Clarification* (although it asserted that such a concern need not be legitimate nor demonstrated), while it simultaneously was telling this Commission that certain selected provisions of the *Supplemental Order Clarification* weren't really requirements (because they were included in a footnote!) or simply did not apply (for many of the same reasons set forth by Ms. Padgett – other reasons offered by BellSouth were fabricated and apparently have been dropped).

Q. IN HER TESTIMONY, MS. PADGETT DISCUSSES SOME OF THE HISTORY BEHIND THE NEGOTIATION OF SECTION 10.5.4 OF THE AGREEMENT. DO YOU RECALL THOSE NEGOTIATIONS?

A. Yes, I do. The negotiations on all of Section 10.5 of Attachment 2 – which addresses the conversion of special access circuits to UNEs – were arduous and went on for months. When the FCC released its *Supplemental Order Clarification* on June 2, 2000, the parties were nearing the conclusion of their negotiations. Frankly, that order, despite its evident imperfections gave both sides a means by which to work around their previous stand-off over the language in various provisions of Section 10.5, as it filled-in (for better or worse) many of the interstices that the parties were trying to create language to fill during the months preceding it. In short, one common way to avoid a negotiations dispute is to track an FCC rule or order. Although we are hearing it from BellSouth in this case, I never before had heard from BellSouth that they simply would not comply with an FCC order.

Q. MS. PADGETT SUGGESTS THAT BECAUSE NUVOX DID NOT SEEK TO INCORPORATE BY REFERENCE OR INCLUDE DIRECTLY LANGUAGE FROM FOOTNOTE 86 REQUIRING BELLSOUTH TO DEMONSTRATE A CONCERN PRIOR TO CONDUCTING AN AUDIT, BELLSOUTH IS EXEMPTED FROM THE REQUIREMENT. IS THAT WHAT THE PARTIES AGREED TO?

A. No, obviously not. Having been frustrated in the attempt to fill the interstices left by the FCC's prior orders on the topic, the parties embraced the *Supplemental Order Clarification* as a means of getting past an impasse. NuVox did not negotiate away the requirements of demonstrating a concern (or of auditor independence). The plain text of Section 10.5.4 contains no evidence of the exclusion BellSouth now claims.

Q. MS. PADGETT, HOWEVER, SUGGESTS THAT NUVOX DID INCORPORATE THE LANGUAGE THAT IT WANTED FROM THE *SUPPLEMENTAL ORDER CLARIFICATION* CONCERNING AUDITS. DOES THAT MEAN THAT NUVOX NEGOTIATED AND AGREED TO AN EXEMPTION FOR BELLSOUTH FROM THE OTHERS?

A. No. The parties negotiated none of the exemptions claimed by BellSouth. Not once in our negotiations did BellSouth propose that it be exempt from the requirement of having to demonstrate a concern or from the requirement of having to retain an independent auditor. BellSouth never brought it up and we never agreed to it. The text of Section 10.5.4 does not suggest otherwise.

Q. MS. PADGETT SPECULATES WITH RESPECT TO THE LEGAL SIGNIFICANCE OF THE AGREEMENT BEING A "VOLUNTARILY NEGOTIATED" ONE. HOW WOULD YOU REPLY TO THAT.

A. Briefly, since that is an issue that is better left to briefing by BellSouth's attorneys and ours. Neither the facts nor the law support Ms. Padgett's speculation in this regard.

Q. BUT WHAT ABOUT MS. PADGETT'S REMARKS REGARDING THE PROVISION OF SECTION 10.5.4 THAT STATES THAT SUCH AUDITS WILL BE CONDUCTED AT BELLSOUTH'S "SOLE EXPENSE"?

A. As originally proposed by BellSouth, that provision was one that stated that audits may be conducted at BellSouth's "sole discretion". NuVox corrected that over-reaching with some of its own – we proposed changing the word "discretion" to "expense". The *Supplemental Order Clarification* does not provide that such audits will be conducted at BellSouth's "sole expense". Instead, it provides that "incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local use options." We knew that our proposal would create ambiguity with respect to whether the "sole expense" language indicated an agreement to deviate from the cost shifting mechanism set forth in that sentence of the *Supplemental Order Clarification* or whether it was merely intended to track the "hire and pay for" language in the first part of the quoted text. In its audit notice (Exhibit HER-1), BellSouth claimed that cost shifting was required *per the Supplemental Order Clarification.* As is demonstrated by the emails attached hereto as Exhibit HER-5, BellSouth insisted that the

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 5

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Executive Director

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

March 15, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc.
Suite 500
301 North Main Street
Greenville, SC 29601

Dear Mr. Russell:

NuVox has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

> "We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NuVox.

NuVox is required to maintain appropriate records to support local usage and self-certification. ACA will audit NuVox's supporting records to determine compliance of

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NuVox's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. In accordance with the Supplemental Order, NuVox is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. Circuits found to be non-compliant with the certification provided by NuVox will be converted back to special access services and will be subject to the applicable non-recurring charges for those services. BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per 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. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NuVox plan for ACA to be on-site for two weeks. Our audit team will consist of three auditors and an ACA partner in charge.

NuVox will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

Enclosures

cc: Michelle Carey, FCC (via hand delivery)
Jodie Donovan-May, FCC (via hand delivery)

Larry Fowler, ACA (via electronic mail)
John Heitmann, Kelley Drye & Warren LLP (via electronic mail)
Tony Nelson, NuVox (via electronic mail)
Jim Schenk, BellSouth (via electronic mail)

ATTACHMENT A
NuVox
March 15, 2002

Audit to Determine the Compliance Of Circuits Converted by NuVox From BellSouth's Special Access Tariff to Unbundled Network Elements With The FCC Supplemental Order Clarification, Docket No. 96-98

Information to be Available On-site April 15

Prior to the audit, ACA or BellSouth will provide NuVox the circuit records as recorded by BellSouth for the circuits requested by NuVox that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NuVox self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NuVox's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NuVox is the end user's only local service provider.

- Please provide a Letter of Agency or other similar document signed by the end user, or
- Please provide other written documentation for support that NuVox is the end user's only local service provider.

Second Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.
- Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.

- Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NuVox chose for self certification, other supporting information may be required.

NuVox Communications, Inc.
Docket No. 04-00133
March 4, 2005

Exhibit 6

Heitmann, John

From: Jordan, Parkey [Parkey.Jordan@BellSouth.COM]
Sent: Monday, April 01, 2002 5:10 PM
To: 'jheitmann@kelleydrye.com'
Subject: Nuvox EEL Audit

9FZ001!.DOC (34 KB)

<<9FZ001!.DOC>> John, sorry to be so late in the day getting this to you. I have been in meetings all afternoon. This is the response to your "threshold issues" regarding the Nuvox EEL audit.

John, this is in response to the issues you raised in your email of March 27, 2002, regarding BellSouth's audit request to Nuvox for EEL circuits. I believe we covered most of these issues, at least briefly, on our conference call yesterday. As for providing Nuvox with the auditor's agreement, we can provide you with the auditor's proposal to BellSouth, which we have accepted. Shelley will send you a copy via overnight mail. As for your specific enumerated issues:

1. Reason for the Audit

   I do not agree that that the FCC has obligated BellSouth to disclose to Nuvox the reason for conducting the audit. That being said, I do agree that that audits of EEL circuits are not "routine" and should only be undertaken in the event BellSouth has a concern that a particular carrier has not met the local service requirements set forth in the Supplemental Clarification Order. I would have assumed that Nuvox would want to maintain the confidentiality of the reasons for the audit, but if that is not the case, I have no problem simply providing the information. In the case of Nuvox, the facts that cause BellSouth concern and that prompted this audit are as follows:

   BellSouth's records show that a high percentage of NuVox's traffic in Tennessee and Florida is intrastate access, yet NuVox has certified that it provides a significant amount of local traffic over circuits in these two states. In addition, Nuvox is now claiming a significant change in its PIU jurisdictional factors.

2. Scope of Audit

   BellSouth indicated when requesting the audit that the audit would encompass all the special access circuits that Nuvox has requested be converted. Nuvox should have that information, but on March 28, 2002, Shelley Walls forwarded to you via email the spreadsheet listing those circuits. The audit will encompass converted circuits only. New EELS are not included in this audit.

3. Independent Auditor/NDA

   As we discussed on the conference call on March 28, the auditor BellSouth has selected is an independent auditor, not an agent of BellSouth. You spent some time on the call questioning Larry Fowler about his background, the background of his company and his affiliation (or lack thereof) with BellSouth. I believe we have established that the auditor is an independent third party. The auditor will be requesting information relevant to prove that the circuits listed in the spreadsheet are or are not in compliance with the appropriate local usage option under which the circuits were converted. BellSouth will not be reviewing the information Nuvox provides to the auditor. However, BellSouth will see the audit results. I believe it is appropriate for BellSouth to agree not to disclose any information contained in the audit results, or the results themselves, and we forwarded you a nondisclosure agreement for that purpose.

4 Independent Auditor / "Ex Parte" Rules

The independent auditor will have to certify, in connection with the audit, that he did in fact act independently. BellSouth has no intention of "bribing" the auditor, and I feel certain that Nuvox similarly has no such intention I do not want to burden the auditor or the parties with unnecessary and burdensome rules. However, BellSouth will agree with Nuvox that during the audit the parties will not conduct any substantive conversations with the auditor concerning information provided by Nuvox or the auditor's use of that information without both parties being represented

5. Money Issues / 20% Threshold

The Supplemental Clarification Order provides that "incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options " The Order does not speak in terms of partial reimbursement. In fact, per the language of the Order, there is no threshold level of non-compliance that must be met for the CLEC to become responsible for the cost of the audit. Any non-compliance triggers the reimbursement obligation. However, to allow for unintentional errors, BellSouth has established a reasonable threshold under which no reimbursement will be necessary. In other contexts, BellSouth has used a threshold of 20% to shift the burden of payment for an audit. PIU audits described in BellSouth's tariffs specify the 20% threshold (see tariff section attached). Further, the parties' interconnection agreement states that the party requesting a PIU or PLU audit will be responsible for the cost of the audit unless the audited party is found to have misstated the PIU or PLU in excess of 20% (see Attachment 3, Section 6.5, of the parties' interconnection agreement) We believe such a proposal is reasonable and consistent with industry practice. Further, we believe that no such threshold actually exists per the Supplemental Clarification Order, and that any non-compliance would shift the burden for payment to Nuvox. Whether Nuvox agrees with this position should not affect whether Nuvox proceeds with the audit BellSouth is the party responsible for paying the auditor, and reimbursement from Nuvox, if applicable, has no affect on whether the audit occurs in the first place. Unless non-compliance is found, this will be a moot issue.

6. Money Issues / NRC

To the extent Nuvox's circuits, or any number of them, fail to meet the requirements for those circuits to be provisioned and maintained as UNEs, BellSouth will convert those circuits to the corresponding special access circuits. The charge for such conversion should be the appropriate non-recurring charges set forth in BellSouth's tariffs. Bear in mind that if Nuvox has in fact lived up to its certification, no such charges will apply. However, by law, BellSouth provisions special access circuits only pursuant to filed and approved tariffs, not pursuant to interconnection agreements. Again, the rate for reestablishing special access circuits is not a threshold issue that must be litigated before the audit occurs. If Nuvox has certified correctly, no charges would apply, and the issue will never arise.

I trust that the foregoing has provided you with sufficient information and that Nuvox will be willing to proceed with the audit in a timely manner. While we want to work with Nuvox and provide all relevant information so that the process can run smoothly, we do not want unnecessary delays in the audit itself.

NuVox Communications, Inc
Docket No 04-00133
March 4, 2005

Exhibit 7

BellSouth Corporation
Legal Department
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375-0001

parkey.jordan@bellsouth.com

Parkey D. Jordan
Senior Counsel

404 335 0794
Fax 404 658 9022

December 1, 2003

VIA ELECTRONIC MAIL
and Via First Class Mail

John J. Heitmann
Kelley Drye & Warren LLP
1200 19th St. NW
Suite 500
Washington, DC 20036

Dear John

Shelley Padgett has provided me with a copy of your November 24, 2003 letter. As a preliminary matter, last spring Mary Jo Peed sent you a letter specifically instructing you not to correspond directly with our clients. Shelley's letter to which you were responding was addressed to Bo Russell, and while we have no objection to your responding on your client's behalf, we expect you to respond to me or Bennett Ross, as you are well aware of our involvement in the EEL audit matter.

As for the substance of your letter, BellSouth cannot identify the internal Nuvox records that Nuvox should retain in order to support its certification that the EEL circuits in question meet the Interconnection Agreement's requirements. Paragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to prove compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question

Sincerely,

Parkey Jordan

Parkey Jordan

cc Shelley Padgett, Interconnection Marketing
Bennett Ross, Senior Counsel