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March 4, 2005

VIA HAND DELIVERY

Hon Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc
Docket No. 04-00133

Dear Chairman Miller:

Enclosed are an original and fifteen copies of BellSouth's Brief Regarding Legal Issues.

A copy of this letter is being provided to counsel for NuVox.

Cordially,

Joelle Phillips

575051

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 04-00133

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF REGARDING LEGAL ISSUES

BellSouth Telecommunications, Inc. ("BellSouth") files this *Brief Regarding Legal Issues* and respectfully shows the Hearing Officer as follows:

INTRODUCTION

NuVox has refused to comply with the straight-forward obligation in its Interconnection Agreement to submit to an EELs audit. In order to avoid the consequences of that refusal, NuVox has attempted to convince the Tennessee Regulatory Authority ("TRA" or "Authority") that it is required to defer to the findings and conclusions made by another state commission – ***even though (1) the TRA has already made its own contrary findings in an EELs audit case right here in Tennessee; and (2) a second state commission, reviewing identical issues, has twice rejected the other commission's findings and NuVox's arguments while granting BellSouth the precise relief it seeks here.*** *See Report and Recommendation of Pre-Hearing Officer,* February 13, 2004, (*"Order")* (Exhibit A), *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc. and Enforcement of Interconnection Agreement between BellSouth*

Telecommunications, Inc. and XO Tennessee, Inc., Docket No. 02-01203 ("DeltaCom/XO case" or "Docket No. 02-01203"); *In the Matter of Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Order Granting Motion for Summary Disposition and Allowing Audit*, February 21, 2005, Docket No. P-913, SUB 7 (*"North Carolina NuVox Order"*); *In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications Corp., Order Granting Motion for Summary Disposition and Allowing Audit*, August 24, 2004, Docket No. P-772, SUB 7 (*"North Carolina NewSouth Order"*). (North Carolina Orders attached as Exhibit B.)

NuVox hopes to avoid the same outcome, in this case, that the TRA rendered in the DeltaCom/XO EELs audit case, and NuVox has sought to use a "procedural" device to distract the TRA from precedent which is squarely on point. NuVox has undertaken this strategy in North Carolina and in Florida Not surprisingly, these states have refused to buy into the NuVox argument. *See North Carolina NuVox Order*; *In the Matter of Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Order Denying Motion to Dismiss and Placing Docket in Abeyance*, October 12, 2004, Docket No. 040527-TP. (Florida Order attached as Exhibit C.) Like these other states have decided, the TRA should not surrender its jurisdiction to make decisions about the meaning of the provisions in the interconnection agreements it approves. The TRA has already dealt with this same EELs audit issue in an earlier case, and this case should follow Tennessee's well-reasoned precedent.

Like most BellSouth agreements (including the agreements at issue in the DeltaCom/XO case), the NuVox agreement has a choice of law provision citing Georgia law. Solely on that basis, NuVox argues that the TRA is bound by a decision of the Georgia PSC – even though the agreement at issue in this docket is the agreement the TRA approved in Tennessee. NuVox's attempts to deprive the TRA of jurisdiction to make its own decisions is not supported by law and would set a precedent by which the TRA would never be able to arbitrate any BellSouth interconnection agreement that did not have a Tennessee choice of law provision. This is just not the way the Federal Act works.

BACKGROUND

BellSouth and NuVox entered into interconnection agreements to govern their contractual relationship in all nine states in BellSouth's region. Those separate interconnection agreements were separately submitted to, and approved by, each state's public service commission, pursuant to authority bestowed by Congress in the Telecommunications Act of 1996 (the "Act"). These several interconnection agreements are unique to each state, albeit with many similar, but not always identical terms

Under the Act, each state commission is empowered to interpret and enforce the agreements it approves. No state commission has the power to interpret or enforce the agreements approved by the other commissions. Nor can any state bind, or be bound by, the decisions of the other states' commissions in disputes arising out of the agreements those state commissions approved. In short, Tennessee interconnection agreements are to be construed in Tennessee by the TRA. The interconnection agreement out of which this dispute arises is the interconnection agreement that the

TRA approved ("Agreement" or "Tennessee Agreement") and it is the TRA's job, not the Georgia Public Service Commission's ("GPSC") job, to construe it to resolve this dispute.

As in the DeltaCom/XO case, the NuVox Tennessee Agreement permits NuVox to convert special access circuits to enhanced extended loops ("EELs") under certain terms and conditions. As a general matter, the Agreement permits NuVox to obtain EELs immediately – but that right is balanced against BellSouth's right to audit to see whether NuVox was actually entitled to obtain that EEL.

Pursuant to the Tennessee Agreement, NuVox converted 442 circuits to EELs in Tennessee.[1] In accordance with the Agreement's express terms, BellSouth provisioned the requested conversions based solely upon NuVox's self-certification that the circuits qualified for conversion under the Agreement.

Like the DeltaCom/XO Agreement, the Agreement permits BellSouth to audit NuVox's EELs, to verify compliance with NuVox's certification, upon notice to NuVox In March 2002, BellSouth provided the 30-day notice (specific in the Agreement) to NuVox that it desired to audit the converted circuits, after analyses of NuVox's Tennessee and Florida traffic raised questions about NuVox's certifications. BellSouth's assertion of its audit rights and notice of its intent to audit NuVox's Tennessee circuits fully complied with the express terms of the Agreement

While NuVox had taken advantage of ***its*** right to obtain EELS upon self-certifying under the contract, NuVox refused to allow BellSouth to get the benefit of the related EELs audit provision. Specifically, NuVox asserted that it did not need to comply with

the audit provision on the basis of various arguments, ***none of which is contained in the agreement.***

Notwithstanding the language of the Agreement, in NuVox's view, BellSouth may not audit NuVox's Tennessee EELs unless: (1) BellSouth "demonstrates a concern" (synonymous, apparently, with "litigate to establish a concern") as to (2) specific circuits (in Tennessee), whereupon (3) BellSouth may audit only those circuits for which concern is "demonstrated", (4) but only so long as the audit is conducted by an independent auditor (which means, "acceptable to NuVox") under AICPA standards (*i.e.*, approved by NuVox) and (5) at BellSouth's sole expense. These requirements do not appear in the parties' Agreement, with the technical exception of the audit expenses (but not on the terms and conditions upon which NuVox insists).

NuVox's stance is starkly similar to that offered unsuccessfully by the CLECs in the earlier DeltaCom/XO Tennessee EELs audit case. Just as those CLECs did in the earlier case, NuVox has unlawfully refused to permit BellSouth to audit its Tennessee EELs (as elsewhere). NuVox's position is impossible to reconcile with the TRA's decision in the earlier EELs audit case in which, construing a similar interconnection agreement, the TRA determined that BellSouth was entitled to conduct EELs audits without first demonstrating cause, as NuVox demands. *Order* at 9. NuVox's refusal to permit these same types of audits has left BellSouth no alternative but to seek enforcement – in each state – of its audit rights under the agreements approved and

[1] Pursuant to the terms and conditions of the other states' agreements, NuVox converted over two thousand circuits in six of the nine states (Tennessee, North Carolina, South Carolina, Georgia, Florida and Kentucky).

ordered in each state. To date, BellSouth has filed complaints in Georgia, Florida, Kentucky, North Carolina and, of course, Tennessee.[2]

As a practical matter, NuVox's position in Tennessee is difficult to understand. Given the ruling in the DeltaCom/XO EELs audit case, the precedent in Tennessee is clear. NuVox's interpretation of the Agreement simply cannot be squared with that precedent NuVox's attempt to have the TRA "adopt" the findings from a Georgia case is an obvious ploy to avoid the application of the TRA's precedent in this case.

NuVox's refusal to permit the audit of its EELs is a region-wide policy not based on reasons germane to any particular state. Thus, BellSouth's various enforcement complaints have necessarily articulated similar allegations. This does not mean, however, as a legal matter that, under the Act's enforcement scheme, each complaint is subject to the decision reached in another state by another commission.

The Tennessee DeltaCom/XO EELs Audit Case.

In February, 2004, the Hearing Officer in Docket No. 02-01203 entered a *Report and Recommendation* (Exhibit A), which was later adopted by the TRA. In that case, the Hearing Officer construed similar language in the interconnection agreements of those CLECs addressing the issue of EELs audits. It is clear from review of the Hearing Officer's *Order* that the very same arguments advanced by NuVox in this case have been rejected in a similar case by the TRA. In light of this applicable precedent, NuVox's attempt to obtain the TRA's agreement to defer to inconsistent findings and conclusions from a Georgia proceeding is non-sensical.[3] In the earlier Tennessee EELs

[2] The Georgia audit is currently underway The North Carolina audit, as ordered by the North Carolina Utilities Commission, will commence within 45 days of its February 21, 2005 Order

[3] The GPSC actually ordered NuVox to permit BellSouth to audit the Georgia EELs, albeit on a "demonstration of concern" basis The audit is ongoing. In addition, BellSouth has appealed the GPSC's

audit case, the TRA correctly found that the contract governed and that the contract did not require the type of threshold articulation of cause demanded by NuVox in this case. There is no reason to expect that the TRA considering the similar NuVox agreement would not reach a decision similar and consistent with its earlier decision in Docket No. 02-01203 NuVox simply raises the Georgia case (while ignoring North Carolina's two cases) in an attempt to divert the TRA from its own precedent and to obtain a decision in this case that is inconsistent with the TRA's decision in Docket No. 02-01203.

Even a cursory review of the *Order* attached as Exhibit A demonstrates that NuVox's theory in this case is squarely inconsistent with the TRA's earlier decision. Like the XO/DeltaCom case, this case is appropriate for resolution as a matter of law, on a paper record, without a hearing.

The Georgia Proceedings.

The first of BellSouth's EELs audit enforcement actions was filed in Georgia, on May 13, 2002, pursuant to the agreement approved by the GPSC for Georgia. On June 29, 2004, after two years of litigation, the GPSC issued its order and opinion. *See In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Dkt. No. 12778-U, *Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order* (June 29, 2004) (Exhibit D). The results in Georgia are best described as mixed.

The GPSC ruled that BellSouth was entitled to audit NuVox's Georgia EELs. Obviously, this is the ultimate result that BellSouth sought. In reaching that decision, however, the GPSC agreed with NuVox that the parties' agreement in Georgia required

ruling and the legal findings therein Thus, the findings that NuVox seeks to "import" in these proceedings are not "final" for preclusion or similar purposes

BellSouth to "demonstrate a concern" prior to conducting the audit. The GPSC found, contrary to NuVox's contentions, that BellSouth had demonstrated such a concern and ordered the audit.[4]

In an attempt to bind the TRA to the aspects of the Georgia order that NuVox finds favorable, NuVox has filed a motion seeking to require the TRA to defer to the Georgia order rather than make its own decision, and in spite of two North Carolina opinions that go the opposite way, are squarely on point, *and* are consistent with established Tennessee precedent.

DISCUSSION OF THE CASE

I. NuVox Wrongly Relies on the Choice of Law Language in an Attempt to Divest the TRA of Jurisdiction.

NuVox's *Motion* reflects a flawed understanding of the role that Congress assigned to the state commissions under the Act regarding interconnection agreements. Federal law does not support NuVox's attempt to short-circuit ***Tennessee's*** application of ***Tennessee's*** precedent to an Agreement approved in ***Tennessee***.

State commission authority to approve or reject interconnection agreements "carries with it the authority to interpret agreements that have already been approved," and to enforce them. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003). *See also Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Iowa Utils. Bd. v. F.C.C.*, 120 F 3d 753, 804 (8th Cir. 1997), *rev'd in part on other grounds by AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 385, 119 S.Ct. 721 (1999) ("state commissions retain primary authority to enforce the substantive terms of the agreements made

[4] The GPSC also agreed that the agreement in Georgia required BellSouth to select a third

pursuant to sections 251 and 252")[5] Thus, the Act charges state commissions to "determin[e] what the parties intended under their agreements" when resolving interconnection disputes arising out of state-approved agreements. *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d at 804.

The Federal Communications Commission ("FCC") has recognized that, "*due to its role in the approval process*, a state commission is well-suited to address disputes arising from interconnection agreements." *In re Starpower*, 15 F.C.C. Rcd. 11277, 11280 (emphasis added). *See MCIMetro Access Transmission Services, Inc.*, 317 F.3d at 1276. The linchpin of state commission authority to interpret and enforce interconnection agreements – a power that is not expressly articulated in the Act – is the state commissions' approval or rejection authority, which *is* expressly provided.

As the Eleventh Circuit opined in *MCIMetro Access Transmission Services, Inc.*, "the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance. . . ." *MCIMetro Access Transmission Services, Inc.*, 317 F.3d at 1277. The logic of Congress' approach, as the 11th Circuit observed, is clear:

> A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. *A court might ascribe to the agreement a meaning that differs from what the state commission believed it was approving* – indeed, the agreement as interpreted by the court *may be one the state commission would never have approved in the first place*. To deprive the state commission of authority to

party independent auditor, who should conduct the audit in accordance with AICPA standards.

[3] Section 252(e) provides the standards for approval or rejection of interconnection agreements by state public service commissions. *See* 47 U.S C. § 252(e).

> interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.

Id. at 1278 n.9 (emphases added).

The parties' Agreement was submitted for approval before commissions in each of the nine states in BellSouth's region. Under Section 252(e) of the Act, each state commission was authorized to approve or reject the agreements pursuant to the Act's standards. Upon approval, each state interconnection agreement became the law governing the parties' interconnection relationship *in that state and that state only.*

As the cited authorities illustrate, the TRA's role, authority and responsibility under the Act did not end when it approved the parties' Agreement for Tennessee. The TRA now has a duty to interpret and enforce the Agreement *it approved.*

It is possible (though BellSouth would consider it highly unlikely) that the TRA may find the GPSC's reasoning to be persuasive, and NuVox is free to argue that. However, it is certainly also possible that the TRA will find, consistent with its findings in the DeltaCom/XO EELs case and with the NCUC's related opinions, that the GPSC ascribed meanings to the Georgia agreement that differ, perhaps substantially, from what the TRA believes it approved for Tennessee. The Act safeguards this room for disagreement.

Obviously, as the foregoing authorities make clear, state commissions cannot bind, or be bound by, the decisions of other state commissions in disputes arising out of their respective state-approved interconnection agreements, regardless of how similar the terms, conditions and issues in a given set of disputes may be.

In addition, it would be imprudent for a commission to "adopt" the conclusions of other commissions in such disputes, especially when its own earlier decisions are contrary to such conclusions.

II. The Interconnection Agreement is Clear on its Face About BellSouth's Rights.

BellSouth is entitled to audit NuVox's EELs. Section 10 of Attachment 2 of the Agreement affords NuVox the right to convert special access circuits to EEL UNE combinations provided that the circuits are used to provide a "significant amount of local exchange traffic," which NuVox must self-certify. *See* Agreement Excerpts (attached as Exhibit E), Att. 2, §§ 10.5.1, 10.5.2, Exhibit E.

Section 10.5.4 specifically affords BellSouth the right to audit those EELs after conversion in order to verify the amount of local exchange traffic on the circuit. *See* Agreement, Att. 2, § 10.5.4, Exhibit E. Section 10.5.4 provides:

> 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. 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].

Agreement, Att. 2, § 10.5.4, Exhibit E. BellSouth has given NuVox repeated notice of its intent to conduct such an audit, and to seek the appropriate relief as dictated by the results of such audit. *See Letter from Jerry Hendrix to Hamilton E.*

Russell, March 15, 2002, Exhibit F. NuVox has failed and refused to allow such audit and therefore has breached the Agreement.

III. NuVox Wrongly Relies on Federal Law in Order to Change the Meaning of the Straight-Forward EELs Audit Provision of the Agreement.

NuVox has based its refusal to submit to the EELs audit on the (wrong) theory that BellSouth has acted inconsistently with the FCC's *Supplemental Order Clarification*.[6] NuVox is wrong on two levels: First, BellSouth's request has been fully consistent with the *Supplemental Order Clarification*. Second, and more significantly, however, under the Telecommunications Act of 1996 (the "Act") and the *Supplemental Order Clarification*, BellSouth's right to audit NuVox's records is governed by the terms of the voluntarily negotiated Agreement, not FCC rules, orders and pronouncements -- *e.g.*, the *Supplemental Order Clarification* – that the Parties did not incorporate in that Agreement. 47 U.S.C. § 252(a)(1); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251"); *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties

of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...").

In fact, that was precisely the basis for the ruling in the DeltaCom/XO case. In that case, the TRA decided that the contract governs, and that these similar contracts did not require BellSouth to jump through the non-contract-based hoops such as NuVox has raised. *See Order* at 9.

The NuVox agreement should be construed in the same manner that the TRA viewed the contract in the XO/DeltaCom EELs case. Attachment 2, Section 10.5.4 of the Agreement unambiguously allows BellSouth, upon 30 days' notice and at BellSouth's expense, to conduct an audit of NuVox's records to verify that NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Agreement, Att. 2, § 10.5.4, Exhibit E. The Agreement does not require that BellSouth meet *any* additional conditions. To the extent NuVox was interested in adding audit conditions from the FCC's *Supplemental Order Clarification*, NuVox could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated into the Parties' Agreement. Just as in the XO/DeltaCom EELs audit case, however, the Parties did not incorporate the *Supplemental Order Clarification's* audit requirements, putting aside issues about

[6] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

what those requirements might be, whether by reference or by including specific language from the *Order*. This omission was presumably intentional, as other sections or provisions of the Agreement specifically reference the Order with respect to specific issues. *See e.g.*, Agreement, Att. 2, §§ 10.5.2, 10.5.4, Exhibit E.

Section 10.5.4 unambiguously describes BellSouth's audit rights, and there is no valid theory under Georgia law (the governing law for the Agreement -- GTC § 23, Exhibit E) that supports the superimposition of the *Supplemental Order Clarification* onto the Agreement to re-write its express terms. *See e.g.*, *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 256 Ga. App. 58, 567 S.E.2d 697 (2002) ("Where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms"); *Sosebee v. McCrimmon*, 228 Ga. App. 705, 492 S.E.2d 584 (1997) ("Courts are not at liberty to revise contracts while professing to construe them").[7] Moreover, the Agreement's integration or "merger" clause would bar such a construction, even if there were an argument to support it.

Finally, NuVox's "independent auditor" protestations are unfounded. The contract expressly requires NuVox to raise its issues on the back-end, *i.e.*, post-audit, not on the front end, and certainly not in order to bar the audit. Agreement, Att. 2, § 10.5.4, Exhibit E. Moreover, NuVox's auditor independence and AICPA concerns are frivolous upon inspection, and should not be credited by the TRA.

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[7] Tennessee law on this subject is substantially similar to the controlling Georgia law cited above. *See Guardian Life Ins. Co. v. Richardson*, 129 S.W.2d 1107 (Tenn App. 1939) (contracts are to be construed according to the ordinary meaning of their plain terms).

FACTS

I. The Agreement.

Pursuant to Sections 251 and 252 of the Act, NuVox and BellSouth entered into the Agreement, effective June 30, 2000, to govern their relationship in Tennessee and each of the remaining eight states in BellSouth's operating territory. Complaint ¶ 5; Agreement, General Terms & Conditions § 2.1 *et seq.*, Exhibit E; Affidavit of Shelly Padgett ("Padgett Affidavit") at ¶ 6, (attached as Exhibit G). The Tennessee Agreement was approved by the Authority on October 30, 2000. The Agreement is a voluntarily negotiated agreement; that is, the Parties arrived at a mutual understanding as to its terms, without arbitration. Affidavit of Jerry Hendrix ("Hendrix Affidavit") at ¶ 3 (attached as Exhibit H).

The Agreement grants NuVox access to EELs. Agreement, Att. 2, § 10 *et seq.*, Exhibit E. The Agreement provides:

> Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to loop and transport combinations, also known as Enhanced Extended Link ("EEL") as defined in Section 10.3 below [which describes the various types of EELs combinations].

Agreement, Att. 2, § 10.2.1, Exhibit E. The Agreement also specifically provides for the conversion of NuVox's special access circuits to EELs, but only so long as NuVox uses the combination to provide a "'significant amount of local exchange service' (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer." Agreement, Att. 2, § 10.5.1, Exhibit E.

The Agreement uses the term, "significant amount of local exchange service," as that term is defined in the *Supplemental Order Clarification*.

Agreement, Att. 2, § 10.5.2, Exhibit E. Specifically, the Agreement incorporates by reference Paragraph 22 of the FCC's *Supplemental Order Clarification*, which provides three scenarios under which a competitive local exchange carrier ("CLEC") may self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att. 2, § 10.5.2, Exhibit E (citing *Supplemental Order Clarification* ¶ 22). Thus, the Agreement requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs. Agreement, Att. 2, § 10.5.2, Exhibit E.

The Agreement does not ***just*** provide NuVox with the ability to obtain EELS. It also affords BellSouth the right to audit any of NuVox's EELs. Agreement, Att. 2, § 10.5.4, Exhibit E; Hendrix Affidavit ¶ 4. Specifically, Section 10.5.4 of Attachment 2 to the Agreement states:

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

Agreement, Att. 2, § 10.5.4, Exhibit E.; Hendrix Affidavit ¶ 4. The 30 days' notice, expense burden and audit frequency requirements, thus, are the only

express qualifications of BellSouth's audit rights in the audit clause. Agreement, Att. 2, § 10.5.4, Exhibit E.; Hendrix Affidavit ¶ 4.

II. The *Supplemental Order Clarification*.

The *Supplemental Order Clarification* clarified certain issues from the *Supplemental Order*[8] regarding the "ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*." *Supplemental Order Clarification* ¶ 1.

In the *Supplemental Order Clarification*, the FCC balanced CLECs' and ILECs' interests by giving CLECs the ability to obtain EELs upon self-certification that a significant amount of local exchange service would be provided over the EEL combinations, while giving ILECs the power to audit the circuits after conversion to verify compliance. *Supplemental Order Clarification* ¶ 1. *See Supplemental Order Clarification*, ¶ 29 ("[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent necessary to determine a requesting carrier's compliance with the local usage options.")

Although, in the original *Supplemental Order,* the FCC did "not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport elements was so limited in duration," it recognized

[8] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order*, Commission 99-370 (1999).

the necessity of the audits in the *Supplemental Order Clarification* when it extended the temporary constraint. *Supplemental Order Clarification* ¶ 29.

The FCC observed (in a footnote) that audits should not be "routine." However, in so doing the FCC recognized that audits would occur and directed "requesting carriers [to] maintain appropriate records that they can rely upon to support their local usage certification." *Supplemental Order Clarification* ¶ 32, n.86. Importantly, the FCC acknowledged the existence of audit rights in interconnection agreements, and specifically declined to "restrict parties from relying on these agreements." *Supplemental Order Clarification* ¶ 32.

III. NuVox's EELs.

Pursuant to the Agreement's conversion process, NuVox converted approximately 442 special access circuits to EELs in Tennessee , starting in 2000. Padgett Affidavit ¶ 7. NuVox self-certified that the facilities were being used to provide a "significant amount of local exchange service." Padgett Affidavit ¶ 7. In support of its self-certification, NuVox stated that it was the "exclusive provider of local exchange service" for its Tennessee customers.[9] Padgett Affidavit ¶ 7. At no time did BellSouth demand or request an audit of any NuVox circuits prior to provisioning the conversions. Padgett Affidavit ¶ 8.

IV. BellSouth's Audit Requests and NuVox's Refusal.

On March 15, 2002, in accordance with the terms of the Agreement, BellSouth sent NuVox a letter providing 30 days' notice of BellSouth's intent to

[9] This particular option is one of the three potential options for NuVox to self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att 2, § 10 5 2, Exhibit E (citing *Supplemental Order Clarification* ¶ 22).

audit NuVox's EELs. BellSouth advised in the letter that the purpose of the audit was to "verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." *Letter from Jerry Hendrix to Hamilton Russell*, March 15, 2002, Exhibit F. BellSouth informed NuVox that it had selected an independent auditor to conduct the audit, and that Bellsouth would incur the costs of the audit (unless the auditors found NuVox's circuits to be non-compliant). *Letter from Jerry Hendrix to Hamilton Russell*, March 15, 2002 Exhibit D. BellSouth forwarded a copy of the audit request letter to the FCC. *Id.*

NuVox refused to permit the audit. Complaint ¶ 18; Hendrix Affidavit ¶ 7. Since the March 15, 2002 audit notice, the parties have exchanged correspondence and verbal communications -- BellSouth seeking to audit the EELs, and NuVox refusing to permit the audit as sought. Hendrix Affidavit ¶ 7. NuVox has refused the audit on two principal grounds: (1) BellSouth must "demonstrate a concern" that warrants the audit; and (2) BellSouth's auditor (as identified in the March 15, 2002 Letter), is not "independent." BellSouth has not conducted any previous audits of NuVox's Tennessee EELs pursuant to the terms of the Agreement or pursuant to the terms of previous Agreements with NuVox.

BellSouth has disagreed entirely with NuVox's position, and has repeatedly stated that the Agreement does not permit NuVox to block or delay the audit on any of NuVox's stated grounds. Hendrix Affidavit at ¶¶ 5-8.

LEGAL ARGUMENT

I. BellSouth is Entitled to Audit NuVox's EELs Under the Agreement.

BellSouth seeks a determination from the Authority that pursuant to the Parties' Agreement, BellSouth is entitled to audit NuVox's EELs. BellSouth has met the audit clause's notice criteria. BellSouth certainly is prepared to pay for it once it occurs. The purpose of the audit is to verify NuVox's compliance with its self-certification. Nothing more is needed to conclude, as a legal matter, that NuVox's refusal to allow BellSouth to conduct the audit is a clear and continuing breach of the Agreement.

A. The Agreement, not the *Supplemental Order Clarification*, controls the audit.

NuVox argues that BellSouth must comply with the requirements (as NuVox would interpret them) of the *Supplemental Order Clarification*. Such requirements are nowhere to be found in the Agreement. NuVox's position, thus, is utterly flawed, as a matter of law.

1. The Agreement is unambiguous.

The terms of the Agreement are unambiguous and must be accorded their plain meaning. *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 794 (Ga. 2001) ("whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, *no construction is required or even permissible*, and the contractual language used by the parties must be afforded its literal meaning") (emphasis added).[10] Section 10.5.4 of the Agreement's notice, expense and frequency of audit requirements are unambiguous and, thus, must be accorded their plain meaning. Conversely, the terms of Section 10.5.4 do not incorporate

any supposed requirements of the *Supplemental Order Clarification*, and instead define BellSouth's audit rights without reference to anything in that *Order* (save only a definitional reference to "local usage options"). Agreement, Att. 2, § 10.5.4, Exhibit E.[11]

The unambiguous language of the Agreement, thus, provides BellSouth an unqualified right to audit NuVox's circuits provided BellSouth gives 30 days' notice and assumes the audit's expense. *Id.*

2. <u>The Agreement reflects the Parties' entire understanding</u>.

Second, the Agreement contains an integration or "merger" clause. Agreement, GTC, § 45, Exhibit E. Section 45 of the General Terms and Conditions provides:

> This Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and *neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement* or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

Agreement, GTC, § 45, Exhibit E (emphasis added). Under Georgia contract law, this clause gives the Parties a substantive, contractual right against a tribunal's use of extraneous material to contradict the terms chosen in the contract. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga.

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[10] *See also, Guardian Life Ins Co v. Richardson*, 129 S.W.2d 1107 (Tenn. App. 1939).

[11] The reference in that definition shows that the parties knew how to reference the *Supplemental Order Clarification* where they intended it to govern. Consequently, when the parties did not reference it, it is clear that was intentional.

2002) (under Georgia law, "a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material"). *See also McBride v. Life Ins. Co. of Virginia*, 190 F.Supp.2d 1366, 1376 (M.D. Ga. 2002) ("As a matter of general contract construction, a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material."); *GE Life and Annuity Assurance Co. v. Combs*, 191 F.Supp.2d 1364, 1373 (M.D. Ga. 2002) (same).

The *Supplemental Order Clarification* is clearly not within the four corners of the Agreement. Thus, however NuVox might wish to characterize that order's requirements (NuVox's interpretation is problematic, as noted below), the result here is the same: the Agreement's merger clause bars the importation of any such requirements into the Agreement.[12]

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[12] NuVox argues that the *Supplemental Order Clarification* became a term and condition of the Agreement through the Agreement's "compliance with all applicable laws" provision when the Parties failed to expressly exempt its application. *See* Answer at 2, n. 3 The Agreement does require the parties to "comply 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." Agreement, GTC § 35.1, Exhibit E. Section 35.1, a generic contract clause found in a broad array of commercial agreements, is not relevant to this dispute, however. *See, e g , Texaco v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (D.C. Circuit, construing virtually identical "comply with all applicable laws" clause in pipeline contracts dispute, disregarded FERC's reliance on the clause in its administrative decision, stating that the clause is "merely a generic contract clause compelling both parties to adhere to the law" . . . [multiple citations omitted] and that "[i]ndeed, the structure of the . . . contracts confirms the banal nature of [the clause] and its irrelevance to rate setting ") Further, this ubiquitous clause, designed to allocate routine risks and costs of performing one's contractual obligations lawfully, should not be interpreted to override or alter the *specific Agreement provision that directly addresses EELs audits See Central Georgia Electric Membership Corp. v. Ga. Power Co.*, 121 S.E.2d 644, 646 (Ga. 1961) (whenever "apparent inconsistency [exists] between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and *pro tanto* nullification of the former"); V. Ferreira, Encyclopedia of Georgia Law, § 64 (1996 Rev.) (same). *See also Schwartz v. Harris Waste Management Group*, 516 S.E.2d 371, 375 (Ga.App. 1999) ("... under general rules of contract construction, a limited or specific provision will prevail over one that is more broadly inclusive").

3. The Agreement was voluntarily negotiated.

Third, the audit provision was voluntarily negotiated by BellSouth and NuVox pursuant to Section 252(a)(1) of the Act. Hendrix Affidavit ¶ 3. It is a fundamental principle under the Act that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c). *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)").

The ability of carriers to negotiate an interconnection agreement "without regard to subsections (b) and (c) of Section 251" extends to rules and orders of the FCC - such as the *Supplemental Order Clarification*. *Iowa Utilities Board v. Commission*, 120 F.3d 753, n. 9 (8th Cir. 1997), aff'd in part, rev'd in part on other grounds, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("[t]he

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Thus, with respect to EELs audits, it was not necessary for the Parties to engage in an encyclopedic recitation of laws, orders, *etc.* that did not form a part of their understanding; rather, the Parties could -- and did -- accomplish this through the selection of precise terms for the audits, *i.e.*, Section 10.5.4. *See, e.g., In Re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.,*

FCC's rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"). The FCC itself has acknowledged this fact, holding that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing rules we adopt." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

Because the Parties voluntarily negotiated the audit provision at issue, BellSouth's right to audit is governed solely by the Agreement. That the terms of the Agreement govern this dispute is clear from various court decisions which have refused to impose obligations under Sections 251(b) and (c) on parties to a voluntarily negotiated interconnection agreement. For example, in *Law Offices of Curtis v. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003), the Second Circuit Court of Appeals considered the extent to which an end-user customer could bring a claim for alleged violations of Section 251 of the 1996 Act based on conduct that breached the interconnection agreement between the ILEC and the end user's carrier. In dismissing such claims, the Second Circuit noted: "Once the ILEC 'fulfills the duties' enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement." *Id.*

Order Granting Motion For Summary Disposition and Allowing Audit, Dkt. No. P-772, Sub 7 (North

Moreover, as the Second Circuit noted in *Trinko*, the fact that parties may negotiate interconnection agreements without regard to Section 251(b) and (c) clearly contemplates that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. *Id.* To read the Act in a way such that ILECs are governed exclusively by the broadly worded language of Section 251 would make superfluous the option of negotiating interconnection agreements without regard to subsections (b) and (c). *Id.* at 322 (citations omitted). The Court of Appeals refused to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251." *Id.*

Similarly, in *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002), the federal district court refused to impose obligations under Section 251(b) and (c) upon an ILEC that had voluntarily negotiated an interconnection agreement. In that case, the plaintiff alleged that Verizon had failed to fulfill its duties under Section 251 by providing poor service, failing to provide pricing information, and intentionally causing a loss of phone service to the plaintiff's customers. In rejecting such claims, the district court noted that Verizon had negotiated with the plaintiff and had agreed upon the terms of interconnection agreements that had been approved by the state commission. According to the court, once a state commission grants approval, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)." The court held that the plaintiff "may not rely upon

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Carolina Utilities Commission, August 24, 2004).

the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...." *Id.*

No dispute exists that the FCC issued its *Supplemental Order Clarification* in connection with the adoption of rules establishing the network elements that an ILEC must unbundle under Section 251(c). *See Supplemental Order Clarification* ¶ 1. But that fact is irrelevant, because the Parties voluntarily negotiated the terms and conditions governing the audit of EELs, as reflected in Section 10.5.4 of the Agreement. Hendrix Affidavit ¶¶ 3-4, Exhibit C. Because NuVox and BellSouth were negotiating a voluntary agreement, they were free to agree to terms that were different from the audit requirements in the *Supplemental Order Clarification*, and that is precisely what they did. Agreement, Att. 2, § 10.5.4, Exhibit E.

For example, Section 10.5.4 of the Agreement contains no requirement that BellSouth demonstrate, articulate or even have a "concern" before conducting an audit. Agreement, Att. 2, § 10.5.4, Exhibit E; *see, in contrast, Supplemental Order Clarification* ¶ 31, n.86. Further, Section 10.5.4 states that BellSouth must pay the cost of any audit regardless of what the audit uncovers (*Id.*), whereas the *Supplemental Order Clarification* states that the competitive LEC must reimburse the ILEC for the cost of the audit "if the audit uncovers non-compliance with the local usage options." *Supplemental Order Clarification* ¶ 31. Allowing NuVox now to receive the perceived benefits of the *Supplemental Order Clarification* would render superfluous the Parties' ability to negotiate an interconnection agreement "without regard to the standards set forth in" Section 251(c). 47 U.S.C. § 252(a)(1). Furthermore, it would allow NuVox to "end run" the carefully

negotiated audit language in the Parties' Agreement, a result that is at odds with federal law. *Law Offices of Curtis V. Trinko LLP*, 294 F.3d at 322; *Ntegrity*, 2002 U.S. Dist. LEXIS 1471.

Further, NuVox's theory that the *Supplemental Order Clarification* somehow trumps or over-writes the Agreement is inconsistent with the *Order* itself. In declining to adopt certain auditing guidelines, the FCC noted that many "interconnection agreements already contain audit rights." *Supplemental Order Clarification* ¶ 32. In the words of the FCC: "We do not believe that we should restrict parties from relying on these agreements." *Id.* However, that is precisely what would happen here because, if the Authority were to adopt NuVox's position, BellSouth would be restricted from relying on the express audit language in the Agreement.

In addition to being inconsistent with the text of the Act and with every authority on the issue, adopting NuVox's position would undermine the Act's entire negotiation and arbitration scheme. To the extent NuVox was interested in having the *Supplemental Order Clarification* govern EELs audits, NuVox could have negotiated such language into the Agreement. Failing that, it could have sought arbitration on this issue. *See generally* 47 U.S.C. § 252(b). Having elected not to avail itself of these alternatives, NuVox should not be permitted to achieve the same end indirectly through this litigation. As in the XO/DeltaCom EELs case, this case is governed by the "four corners of the interconnection agreement." Order at 9.

II. The *Supplemental Order Clarification* Does Not Bar BellSouth's Audit of NuVox's EELs.

Even if the Authority determines that the *Supplemental Order Clarification* is somehow relevant to this dispute, which it is not, BellSouth is still entitled to audit NuVox's EELs immediately. NuVox's "demonstration of concern" and auditor preconditions are not only alien to the parties' Agreement, but also overstate -- at a minimum -- what the FCC actually required in the *Supplemental Order Clarification*. A less self-serving review of the relevant provisions of that order shows that the order does not justify NuVox's misconduct.

The *Supplemental Order Clarification* does not *require* an ILEC to demonstrate or even state a concern prior to the conduct of an audit. At most, the FCC's language expresses -- in a footnote -- the FCC's aspiration or, arguably, expectation, that interconnecting parties would not abuse the audit process.[13] The FCC, however, did not mandate that the party seeking an audit submit to the regulatory equivalent of a probable cause hearing, as NuVox has maintained.

In Paragraphs 31 and 32 of the *Supplemental Order Clarification*, the FCC made several relevant statements using, alternatively, mandatory and permissive terms that appear both in text and footnotes. Examination of these statements separates dicta from determinations.

In Paragraph 31 (text), the FCC stated:

[13] The FCC observed its accord with the position of certain CLECs that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service " *Supplemental Order Clarification*, 15 F.C.C. Rcd. at 9603, n.86.

> We emphasize that incumbent LECs *may not require* a requesting carrier to submit to an audit *prior to provisioning* combinations of unbundled loop and transport network elements.

Supplemental Order Clarification, ¶ 31 (emphases added). One readily observes here that the FCC forbade (with "emphasis") ILECs from using audits as a precondition to provisioning EELs to CLECs. "May not require" audits "prior to provisioning" is unambiguous and mandatory, representing a clear declaration by the FCC that any auditing of the circuits is not to occur until after they are first provisioned by the ILECs.

In a *footnote* to this very provision, however, the FCC wrote:

> The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. . . . We *agree* that this *should be* the only time that an incumbent LEC should request an audit.

Id. n.86 (emphases added). When read in context with the text of Paragraph 31 quoted above, footnote 86 leaves much to be desired as an FCC mandate, despite NuVox's insistence to the contrary.

The placement of these statements in a footnote as opposed to the text of the order suggests, from a declaration of policy standpoint, that the material is of lesser regulatory standing. More importantly, the strength of the statement upon which NuVox seizes – the last sentence – is weakened by the immediately preceding sentence that introduces it: a reference by the FCC to the *non-binding statements* of certain industry participants regarding *their* expectancy of how "routine" audits would be in a post-*Order* environment. Without maligning the

import of the parties' joint declaration (to which BellSouth was, in fact, a signatory), the statement is not a binding legal obligation immediately applicable to interconnection agreements. The operative language -- *e.g.*, "routine practice" and "concern" are subject to a variety of interpretations, obviously, and the FCC made no effort to choose one. As such, one can only conclude that the statement was one of expectancy, with respect to which the FCC generally agreed.

In the very next sentence, upon which NuVox principally relies, the FCC merely "agree[d] that this *should be* the only time that an incumbent LEC *should* request an audit." The FCC expressed no independent position; rather, it nodded approvingly at the cited declaration of intent by the industry parties mentioned. It did not issue any mandate, which certainly appears to be deliberate.

Paragraph 31 provides further demonstration that the FCC chose its language purposefully and carefully in order to distinguish between what it was requiring and what it may have wanted but chose not to mandate. With respect to the issues of burden and cost associated with ILEC audits, the FCC stated:

> In order to reduce the burden on requesting carriers, *we find* that incumbent LECs *must provide* at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements *that it will conduct an audit*, and *may not* conduct more than one audit of the carrier in any calendar year *unless* an audit finds non-compliance.

Id., ¶ 31 (emphases added). Here, again -- within the same operative textual paragraph upon which NuVox relies -- is an example of the FCC stating its intent with clarity, using mandatory language, and defining the obligations and limitations being imposed. Statements that the FCC "found," or that ILECs "must provide," or

that ILECs "will not conduct" or "may not conduct", *etc.*, leave little room for doubt as to regulatory meaning or intent. There are no double normatives, no nodding references to non-binding agreements of a sample of the industry, *etc.* This statement stands in stark contrast with footnote 86, to the clear detriment of NuVox's position.

Finally, the next two sentences in Paragraph 31 are also instructive. The FCC stated:

> We agree with Bell Atlantic that at the same time that an incumbent LEC *provides notice of an audit* to the affected carrier, it should send a copy of the notice to the Commission. While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

Id. (emphasis added). Here, the FCC placed itself in position to "monitor" the conduct of ILECs and CLECs with regard to EELs audits; it did not, however, establish FCC or any other prior approval as a precondition to those audits. If the FCC had intended any other result -- especially the result upon which NuVox insists -- it most certainly would have expressed it here. It did not.

In sum, one can only conclude from Paragraph 31 that the FCC *mandated* the following with respect to the mechanics of EELs audits:

1. that they may not precede, or be made preconditions to, the provisioning of EELs by the ILECs;

2. that at least thirty days' notice is required before any audit is to commence; and

3. that an ILEC may not perform more than one audit of any given CLEC per year, unless it finds non-compliance.

The remaining statements, as shown, simply do not rise to the level of unequivocal declarations of legal obligations as do the enumerated requirements.

The FCC's *Supplemental Order Clarification*, thus, establishes a symmetrical process aimed at speeding the provisioning process while providing compliance safeguards; just as the ILEC is required to provision or convert the circuits upon request, the CLEC is required to allow an audit upon request. The FCC clearly did not provide requesting carriers the right to obstruct the audit process by challenging the legitimacy of the ILEC's concerns leading to the audit request, nor did the FCC even require the ILEC to share its concern with the CLEC. The FCC merely required the ILEC to provide notice to the FCC of audits, so that the FCC could monitor their use. The FCC did not in any way require or suggest that any pre-approval of the audit request was necessary - not by the FCC, let alone by the CLEC whose records were subject to audit.[14] Notably, in the XO/DeltaCom EELs audit case, the hearing officer found that the agreements at issue in that case did not require "cause" but were still "consistent with federal requirements." Order at 8.

III. BellSouth Will Engage and Conduct a Proper Audit.

NuVox also questions BellSouth's power to choose an auditor and the standards by which the audit is to be conducted. Again, NuVox disregards the plain terms of the Agreement -- and common business sense -- in taking a patently unmeritorious position.

[14] Even if BellSouth were required to articulate a "concern" before initiating an audit, BellSouth has done so. Complaint at ¶¶ 15, 20, 22-23; Hendrix Affidavit ¶ 8, Exhibit C.

NuVox contends that BellSouth must "hire an independent auditor to conduct the audit in compliance with AICPA standards," and that BellSouth has failed, or will fail, to do so. This argument is pure fiction. Section 10.5.4 of the Agreement gives NuVox no contractual say in BellSouth's choice of auditor. Indeed, BellSouth has the right to conduct the audit itself.

Moreover, NuVox's audit concerns are misplaced. As a matter of course, BellSouth would not choose an auditor lacking the independence, experience or professionalism required to conduct a proper, thorough audit. First, a sham audit would reveal itself instantly, would harm BellSouth's legal interests, and would be of no value to BellSouth. Thus, any theoretical leverage that BellSouth might gain from a flawed audit would evaporate as soon as BellSouth attempted to enforce its rights based on such an audit's results.

Second, the Agreement makes clear, if any audit were to reveal non-compliance, BellSouth's remedy could only come through the filing of a "complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement." Agreement, Attachment 2, § 10.5.4, Exhibit E. In any such proceeding, the audit results would almost certainly be contested by NuVox, and would come under appropriate scrutiny before the Authority. An audit that lacked credibility would be exposed on the merits, and BellSouth would gain nothing. This fact alone negates the legitimacy of NuVox's concerns.

In any event, the check-and-balance the parties imposed in the Agreement was not an auditor selection prerequisite, or process through which NuVox could participate in that selection, veto it, *etc*. Rather, the parties chose to control the

issue by disallowing self-help on the basis of the audit results alone, and instead requiring BellSouth to prove its case to "an appropriate Commission" before which such results could be carefully scrutinized. Thus, not only is NuVox's auditor selection argument entirely without contractual support, it rests on a demonstrably weak premise and disregards the control mechanism in the Agreement that adequately addresses this very issue.

Finally, NuVox's suggestion that BellSouth must be limited in its audit rights to prevent abuse is inconsistent with the facts of the companies' business experience. BellSouth has never before conducted an audit of NuVox's EELs in Tennessee. Padgett Affidavit, ¶ 9.

CONCLUSION

For the reasons set forth, BellSouth respectfully requests that the Authority issue (1) a determination that NuVox's refusal to allow BellSouth to audit its EEL combinations violates the Parties' Agreement; and (2) an order directing NuVox to do all things reasonably necessary to permit the auditor selected by BellSouth to commence the audit immediately.

Respectfully submitted,

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 12, 2004

IN RE:	)	
	)	
ENFORCEMENT OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND ITC^DELTACOM COMMUNICATIONS, INC.	)	**DOCKET NO. 02-01203**
	)	
ENFORCEMENT OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND XO TENNESSEE, INC.	)	

REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

This matter came before the Pre-Hearing Officer on January 22, 2004 for the purpose of hearing oral arguments on the cross motions for summary judgment of BellSouth Telecommunications, Inc. ("BellSouth") and ITC^DeltaCom Communications, Inc. ("DeltaCom") jointly with XO Tennessee, Inc ("XO" – together with DeltaCom referred to as the "CLECs") filed with the Tennessee Regulatory Authority (the "TRA") on December 22, 2003. For the reasons stated herein, the Pre-Hearing Officer recommends that summary judgment in favor of the CLECs be granted in part

Background

An Interconnection Agreement between BellSouth and DeltaCom was approved by the TRA on August 10, 2001 Included in this agreement is a section entitled "Special Access Service Conversions" with the following relevant subsections

8 3 5 1 [DeltaCom] may not convert special access services to combinations of loop and transport network elements, whether or not [DeltaCom] self-provides its entrance facilities (or obtains entrance facilities from a third party) , unless [DeltaCom] uses the combination to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer To the extent [DeltaCom] requests to convert any special access services to combinations of loop and transport network elements at UNE prices, [DeltaCom] shall provide to BellSouth a letter certifying that [DeltaCom] is providing a significant amount of local exchange service (as described in this section) over such combinations The certification letter shall also indicate under what local usage options [DeltaCom] seeks to qualify for conversion of special access circuits

8 3 5 3 BellSouth may audit [DeltaCom] records to the extent reasonably necessary in order to verify the type of traffic being transmitted over combinations of loop and transport network elements The audit shall be conducted by a third party independent auditor, and [DeltaCom] shall be given thirty days written notice of scheduled audit. Such audit shall occur no more than one time in a calendar year, unless results of an audit find noncompliance with the significant amount of local exchange service requirement In the event of noncompliance, [DeltaCom] shall reimburse BellSouth for the cost of the audit If, based on its audits, BellSouth concludes that [DeltaCom] 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 the Interconnection 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 [DeltaCom]

The Interconnection Agreement between BellSouth and XO,[1] approved by the TRA on August 29, 2000, contains the following language also found in a section entitled "Special Access Service Conversions"

1 4 [XO] may not convert special access services to combinations of loop and transport network elements, whether or not [XO] self-provides its entrance facilities (or obtains entrance facilities from a third party), unless [XO] uses the combination to provide a "significant amount of local exchange service," to a particular customer, as defined in 1 4 1 below. To the extent [XO] converts its special access services to combinations of loop and transport network elements at UNE prices, [XO], hereby, certifies that it is providing a significant amount of local exchange service over such

[1] The Interconnection Agreement was originally between BellSouth and Nextlink Tennessee, Inc, which changed its name to XO Tennessee, Inc pursuant to a September 26, 2000 Order of the TRA entered in Docket No 00-00842

> combinations, as set forth in 1 4 1 below If, based on audits performed as set forth in this section, BellSouth concludes that [XO] 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 the Interconnection 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 [XO] Notwithstanding any provision in the Parties interconnection agreement to the contrary, BellSouth may only conduct such audits as reasonably necessary to determine whether [XO] is providing a significant amount of local exchange service over facilities provided as combinations of loop and transport network elements, and, except where noncompliance has been found, BellSouth shall perform such audits no more than once each calendar year BellSouth shall provide [XO] and the FCC at least thirty days notice of any such audit, shall hire an independent auditor to perform such audit, and shall be responsible for all costs of said independent audit, unless noncompliance is found, in which case [XO] shall be responsible for reimbursement to BellSouth for the reasonable costs of such audit [XO] shall cooperate with said auditor, and shall provide appropriate records from which said auditor can verify [XO]'s local usage certification as set forth in 1.4 1 below In no event, however, shall BellSouth or its hired auditor require records other than those kept by [XO] in the ordinary course of business

Pursuant to these provisions, BellSouth provided a thirty-day notice to DeltaCom and XO on May 23, 2002, and April 26, 2002, respectively, of its intent to conduct an audit [2] The CLECs have refused to allow BellSouth to proceed with an audit under the terms proposed by BellSouth [3]

On November 5, 2002, BellSouth filed a complaint against DeltaCom in TRA Docket No. 02-01203 and an identical complaint against XO in TRA Docket No 02-01204, alleging a violation of the respective audit provisions. DeltaCom and XO both filed an answer and counter-complaint on December 5, 2002, essentially alleging that BellSouth's request to conduct an audit was inconsistent with both the language of the interconnection agreement

[2] *Complaint of BellSouth Telecommunications, Inc to Enforce Interconnection Agreement Against DeltaCom*, p 4 (November 5, 2002), *Complaint of BellSouth Telecommunications, Inc to Enforce Interconnection Agreement Against XO*, p 5 (November 5, 2002)

[3] *Id, Answer and Counter-Complaint of DeltaCom*, p 5 (December 5, 2002), *Answer and Counter-Complaint of XO*, p 4 (December 5, 2002)

and the requirements of the Federal Communications Commission ("FCC" or "Commission") Because these two dockets raised identical issues, the Chairman of the Authority consolidated the dockets into Docket No 02-01203 at the regularly scheduled Authority Conference held on November 18, 2002

Statutory and Regulatory Framework

In its third order pertaining to implementation of the Telecommunications Act of 1996, the FCC concluded that all requesting carriers are entitled to convert special access services to a combination of loop and transport, or extended enhanced loop ("EEL"), at unbundled network element prices [4] In a subsequent order, the FCC clarified that this conversion is not available to long-distance telecommunications service providers ("IXCs") unless the IXC is providing a "significant amount" of local exchange service [5] Accordingly, in order to justify a conversion, a requesting carrier must certify that the EEL will be used for a "significant amount" of local traffic [6] To confirm compliance with this local service requirement, the FCC authorized limited audits of the requesting carrier by the provisioning incumbent local exchange carrier ("ILEC") [7]

BellSouth's *Motion for Summary Judgment Order Requiring Audit*

In its *Motion for Summary Judgment Order Requiring Audit*, BellSouth seeks the following relief

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-238 (*Third Report and Order and Fourth Further Notice of Proposed Rulemaking*) 15 F C C R 3696, ¶ 486 (November 5, 1999)

[5] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-370 (*Supplemental Order*) 15 F C C R 1760, ¶¶ 4-5 (November 24, 1999)

[6] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 00-183 (*Supplemental Order Clarification*) 15 F C C R 9587, ¶ 29 (June 2, 2000) (hereinafter "*Clarification*")

[7] *Id*

1 A finding that the issues presented in the Complaints and Answers in the above styled docket are issues of law, regarding which there is no dispute as to relevant facts;

2 A finding that the Parties' Interconnection Agreements require the defendants to submit to an audit as sought by BellSouth,

3 An order requiring the defendants to submit to and cooperate with an audit conducted by American Consultants Alliance ("ACA") of all extended enhanced loops, such audit to commence as soon as practicable, but in no event later than 30 days from the issuance of such order; and

4 Any other such relief the Pre-Hearing Officer deems just and reasonable

In pursuance of the requested relief, BellSouth essentially contends that the Interconnection Agreements contain the totality of its authority to audit the CLECS to determine compliance with the "significant amount of local exchange service" requirement [8] BellSouth further contends that, although the FCC has authorized and provided guidelines for such audits, the Commission has also sanctioned deviation from these guidelines by private agreement, pursuant to the perimeters established under 47 U S C.A § 252(a)(1) for the voluntary negotiation of interconnection agreements [9] For this reason, BellSouth suggests that any dispute regarding its audit authority must be resolved by the language of each Interconnection Agreement [10]

On this premise, BellSouth concludes that it has appropriately exercised its audit authority. Contrary to the position espoused by the CLECs, BellSouth argues that neither Interconnection Agreement requires BellSouth to "articulate a particular concern" as a

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[8] BellSouth's *Memorandum in Support of Motion for Summary Judgment Order Requiring Audit*, p 5 (December 22, 2003) (hereinafter "BellSouth's *Memo*")

[9] BellSouth's *Memo*, at 5-12 *See also, Clarification*, at ¶ 32 (allowing parties to rely on audit provisions contained in negotiated interconnection agreements)

[10] BellSouth's *Memo*, at 5-12

prerequisite to an audit [11] BellSouth suggests that the CLECs are obligated to permit any audit requested with the requisite thirty-day notice [12] BellSouth further argues that nowhere does either Interconnection Agreement exclude new EELS from its audit authority [13] Finally, BellSouth contends that its choice of American Consultants Alliance complies with the ordinary meaning of "independent" as defined by Webster's Dictionary,[14] an acceptable standard since no particular meaning for "independent" was specified in either agreement [15] BellSouth also contends that the scope of the audit is appropriately determined by the auditor and that a sampling of data from each EEL, rather than a sampling of EELS, is appropriate and necessary to make an assessment of compliance [16]

Joint Motion of DeltaCom and XO for Summary Judgment

In the *Joint Motion of DeltaCom and XO for Summary Judgment*, the CLECs contend that, notwithstanding relevant provisions of the Interconnection Agreements, BellSouth's audits must be conducted in compliance with federal guidelines and suggest that BellSouth's audit requests conflict with these guidelines in the following respects [17]

1 BellSouth's audit request must be "based upon cause,"

2 An audit can include only EEL conversions, and

3 The auditor must conduct the evaluation in accordance with the standards of the American Institute for Certified Public Accountants ("AICPA") and must also meet the AICPA standards for determining independence

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[11] *Id* at 12
[12] *Id* at 13-14
[13] BellSouth's *Response to the Joint Motion of XO and DeltaCom for Summary Judgment*, p 6 (January 13, 2004) (hereinafter "BellSouth's *Response*")
[14] (Defining "independent" as "not subject to control by others" and "not affiliated with a larger controlling unit")
[15] BellSouth's *Memo*, at 14-15
[16] BellSouth's *Response*, at 7
[17] *Joint Motion of DeltaCom and XO for Summary Judgment*, p 6 (December 22, 2003) (hereinafter "*Joint Motion*)

The CLECs contend that BellSouth's audit requests violate federal requirements because they failed to articulate a concern that is arguably required by the FCC before an audit may be commenced [18] The CLECs also contend that federal audit provisions, as well as the audit provisions in the interconnection agreements, apply to only converted, but not to new, EELs [19] Finally, the CLECs request that BellSouth be required to select a "truly independent auditor" and that such auditor examine only a "representative sampling of EELs" rather than every EEL employed by the CLECs [20]

Standard for Summary Judgment

The procedural standards governing review of motions for summary judgment are well settled [21] Tennessee Rule of Civil Procedure 56 04 provides that summary judgment is appropriate when (1) no genuine issues with regard to the material facts relevant to the claim or defense contained in the motion remain to be tried and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts [22] The moving party bears the burden of proving that its motion satisfies these requirements [23] To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense.[24]

After a properly supported motion for summary judgment is asserted, the burden shifts to the nonmovant to respond with evidence establishing the existence of specific,

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[18] *Joint Motion*, at 3, *See also, Clarification*, at ¶ 31, n 86
[19] *Joint Motion*, at 4-6, *See also, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F C C R 19,020, ¶ 623 (August 21, 2003) (hereinafter "*Report and Order*")
[20] *Joint Motion*, at 5, 6
[21] *See* Tenn R Civ P 56, *Hunter v Brown*, 955 S W 2d 49, 50-51 (Tenn 1997)
[22] *See Byrd v Hall*, 847 S W 2d 208, 210 (Tenn 1993), *Anderson v Standard Register Co* , 857 S W 2d 555, 559 (Tenn 1993)
[23] *See Downen v Allstate Ins Co* , 811 S W 2d 523, 524 (Tenn 1991)
[24] *See McCarley v West Quality Food Serv* , 960 S W 2d 585, 588 (Tenn 1998), *Robinson v Omer*, 952 S W 2d 423, 426 (Tenn 1997)

disputed, material facts which must be resolved by the trier of fact [25] Thus, if the moving party successfully negates a claimed basis for the action, the nonmovant may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim If the moving party fails to negate a claim, the nonmovant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail [26]

The standards governing the assessment of evidence in the summary judgment context are also well established The evidence must be viewed in the light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor.[27] Summary judgment is appropriate only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion [28]

Findings of Fact and Conclusions of Law

According to 47 U S C A § 252(a)(1), a voluntarily negotiated interconnection agreement need not comply with the requirements of 47 U S C A § 251 (b) or (c) Because the interconnection agreements at issue in this Docket were voluntarily negotiated, the Parties were at liberty to include terms materially different from their federal counterparts [29]

Notwithstanding this freedom to negotiate, the audit provisions of both interconnection agreements are largely consistent with federal requirements, *i e* , audits are justified to the extent "reasonably necessary" to determine compliance with the local usage requirements, the CLECs are entitled to a thirty-day notice prior to any audit, absent a

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[25] *See Byrd,* 847 S W 2d at 215
[26] See *McCarley*, 960 S W 2d at 588, *Robinson*, 952 S W 2d at 426
[27] *See Robinson*, 952 S W 2d at 426, *Byrd*, 847 S W 2d at 210-11
[28] *See McCall v Wilder*, 913 S W 2d 150, 153 (Tenn 1995), *Carvell v Bottoms*, 900 S W 2d 23, 26 (Tenn 1995)
[29] *See AT&T Corp v Iowa Utilities Bd* , 525 U S 366, 373, 119 S Ct 721, 726, 142 L Ed 2d 835 (1999)

finding of non-compliance, only one audit per year is permitted, absent a finding of non-compliance, the ILEC pays for the cost of the audit, and the audit must be conducted by an independent auditor.[30] However, neither agreement, as pertaining to audit requirements, references federal law or in any way suggests an intent to defer to federal law for any inconsistent or absent provision, strongly suggesting that the interconnection agreements are meant to govern in this respect. Accordingly, the cross motions for summary judgment should be decided in reference to the language of the interconnection agreements, rather than federal law. In doing so, the intent of the parties should be determined from the four corners of the interconnection agreements.[31]

On this premise, there is no readily apparent reason that an audit request from BellSouth must be "based upon cause" as suggested by the CLECs. The interconnection agreements do provide for audits as "reasonably necessary" to determine or verify compliance with the local traffic requirement, but "reasonably necessary" may just as rationally apply to the breadth of the audit as well as to the justification for the audit. However, neither interconnection agreement provides a process whereby BellSouth actually articulates cause to the CLEC prior to commencement of the audit. Accordingly, it is rational to place the decision to conduct an audit initially within the discretion of BellSouth, the party bearing the cost of the audit should there be no findings of noncompliance.

Also based on the language of the interconnection agreements, audits should be limited to converted, rather than new, EELs. While it may be true, as suggested by BellSouth, that the concerns are the same with new and converted EELs, the interconnection agreements do not provide for the audit of new EELs. As mentioned above, the relevant audit language is found in both interconnection agreements in a section entitled "Special

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[30] *Clarification*, at ¶¶ 29, 31.
[31] *See Simonton v. Huff*, 60 S.W.3d 820, 825 (Tenn. Ct. App. 2000).

Access Service Conversions "[32] Each section refers multiple times to converted EELs and not at all to the acquisition of new EELs In the absence of any reference to new EELs, it is reasonable to conclude that the audit provisions are meant to apply to converted EELs only

Matters not specifically addressed in the interconnection agreements are left for resolution by the TRA For instance, each agreement requires an audit to be conducted by an independent auditor, but neither agreement provides a method for ascertaining the independence of the auditor The FCC has expressly stated that this issue is most appropriately decided by the relevant state commission [33] In this instance, additional information is needed from the Parties in order for the TRA to make this determination Additional information is also necessary in order for the TRA to determine an appropriate audit methodology, *e g* , whether the audit should utilize a sampling of EELs or a sampling of data from each and every EEL

Recommendation

For the reasons specified above, it is recommended that the Panel decide the cross-motions for summary judgment as follows

1 Deny BellSouth's *Motion for Summary Judgment Order Requiring Audit* in its entirety

2 Grant the *Joint Motion of DeltaCom and XO for Summary Judgment* to the extent that it seeks to limit an audit by BellSouth to converted EELs

3 Deny the *Joint Motion of DeltaCom and XO for Summary Judgment* in all other respects

[32] Interconnection Agreement with DeltaCom, Section 8 3 5, Interconnection Agreement with XO, Section 4 1

[33] *Report and Order*, at ¶ 625 (August 21, 2003)

It is also recommended that the Panel make the following express pronouncements

1 BellSouth is not required to articulate a justification prior to the commencement of an audit conducted pursuant to the terms of the interconnection agreements,

2 The interconnection agreements allow for an audit of only converted EELs;

3 BellSouth shall submit for TRA approval the letter of engagement between itself and its independent auditor, and

4 BellSouth shall submit for TRA approval a proposed methodology/procedure for conducting each audit of converted EELs

Respectfully submitted,

Kim Beals, Counsel
as Pre-Hearing Officer

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO P-913, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Enforcement of Interconnection Agreement	)	ORDER GRANTING MOTION
Between BellSouth Telecommunications, Inc	)	FOR SUMMARY DISPOSITION
And NuVox Communications, Inc	)	AND ALLOWING AUDIT

BEFORE Chairman Jo Anne Sanford, Commissioners J Richard Conder, Robert V Owens, Jr , Sam J. Ervin, IV, Lorinzo L Joyner, and James Y Kerr, II

BY THE COMMISSION This matter arises on Complaint filed by BellSouth Telecommunications, Inc ("BellSouth") requesting the Commission to find that NuVox Communications, Inc ("NuVox") breached the Parties' Interconnection Agreement ("Agreement") by refusing to allow BellSouth to conduct an audit of NuVox' enhanced extended loops ("EELs") in order to verify NuVox' self-certification that the EEL facilities are being used to provide "a significant amount of local exchange service " The Complaint further requests that NuVox be compelled to allow BellSouth's auditor to audit NuVox' EEL records immediately without further delay and that BellSouth be allowed to provide its auditor with records in BellSouth's possession, including customer proprietary information NuVox filed its Answer to Complaint on June 21, 2004, denying BellSouth's unqualified right to the audit it seeks By way of its Answer, NuVox also objected to BellSouth's sharing customer proprietary information with its auditor BellSouth filed a reply to NuVox' Answer

On July 26, 2004, NuVox filed a Motion to Adopt Procedural Order, seeking to have the Commission enter a procedural order (1) adopting and incorporating the record from a Georgia Public Service Commission ("GPSC") proceeding regarding nearly the same audit issue that is presented in the instant docket, (2) adopting the same legal conclusions reached by the GPSC and (3) establishing a schedule for oral argument and/or evidentiary hearing with respect to conclusions or findings that the Commission might make that would differ from the conclusions and findings of the GPSC BellSouth filed its Opposition to NuVox's Motion to Adopt Procedural Order on August 16, 2004 [1] Bellsouth filed a Motion for Summary Disposition on August 21, 2004 and NuVox filed its Opposition to Summary Disposition on October 6, 2004 BellSouth filed a reply to NuVox' Opposition to Summary Disposition on October 15, 2004

[1] A second version correcting clerical errors was filed on August 19, 2004

Positions of the Parties

BELLSOUTH: BellSouth argues that it seeks to enforce audit rights pursuant to Attachment 2, Paragraph 10 5 4 of the Agreement, which provides BellSouth the unqualified right, upon providing NuVox 30 days prior notice, to audit NuVox' EELs to verify the amount of local exchange traffic being transmitted on EEL circuits BellSouth maintains that the FCC's *Supplemental Order Clarification* ("SOC")[2] is not incorporated into the pertinent audit provisions and that the Parties never intended such result Because BellSouth's audit rights are a matter of contract interpretation, BellSouth argues that the matter should be decided as a matter of law without an evidentiary hearing

NEWSOUTH: In opposition to BellSouth, NuVox argues that the Agreement incorporates the SOC and that the requirements of the SOC limit BellSouth's audit rights to (1) non-routine audits, (2) based on a reasonable concern regarding NuVox' compliance with EEL eligibility and self-certification criteria, and (3) conducted by an independent auditor NuVox disputes that BellSouth has met or demonstrated that it has met any of the three SOC requirements According to NuVox, it has submitted evidence tending to show that material issues of fact remain, thereby requiring the Commission to afford the Parties an evidentiary hearing prior to deciding the merits of the Complaint NuVox maintains that BellSouth is not entitled to conduct an audit of its EELs on the facts now before the Commission NuVox also argues that the Commission is bound by the decision of the GPSC in an action between the same parties regarding the same contractual language at issue in the matter now before the Commission

PUBLIC STAFF: The Public Staff believes that the Commission should adhere to the doctrine of collateral estoppel and accept the GPSC's interpretation of the audit clause in the Georgia interconnection agreement between BellSouth and NuVox, finding that the audit requirements contained in the SOC were incorporated into the Agreement Accordingly, the Public Staff further believes that the SOC and the Agreement require BellSouth to have a concern before being permitted to audit NuVox' EELs However, the Public Staff disagrees with NuVox' position regarding the need for an evidentiary hearing The Public Staff is satisfied that the reasons BellSouth gave for requesting an audit meet the SOC threshold requirement of having a concern prior to conducting an audit Therefore, the Public Staff believes it is unnecessary for the Commission to consider further evidence regarding the legitimacy of BellSouth's stated concerns On the question of whether the auditor selected by BellSouth is sufficiently independent to meet the SOC requirement that an EEL audit be conducted by an independent auditor, the Public Staff, in agreement with BellSouth, believes this requirement has been met since the selected auditor is not related to, affiliated with, subject to the influence or control of, or dependent on BellSouth. In sum, the Public Staff recommends the Commission find that BellSouth satisfied the conditions to invoke its audit right under the Agreement and order NuVox to submit to the audit within 45 days of the Commission's order

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[2] *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587 (2000)

ISSUE 1 Does the doctrine of collateral estoppel apply to require the Commission to adopt or follow the decision and conclusions of the GPSC in *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc*, Docket No 12778-U (rel June 30, 2004)?

DISCUSSION

The Commission believes that NuVox' Motion to Adopt Procedural Order, which asks the Commission to adopt the same legal conclusions reached by the GPSC, is an attempt by NuVox to raise the affirmative defense of collateral estoppel An affirmative defense must be pled affirmatively in the Answer and shall be so drawn as to fully advise the complainant and the Commission of the particular grounds of defense. Commission Rule R1-9 NuVox did not plead the defense of collateral estoppel in its Answer and it did not seek leave to amend its Answer so that it could assert the defense Therefore, ordinarily, the Commission would find that NuVox has waived the defense of collateral estoppel and cannot avoid this result by a procedural motion asking the Commission to adopt the legal conclusions of another tribunal However, because NuVox did argue the GPSC determination in the Preliminary Statement section of its Answer, the Commission finds that BellSouth had sufficient notice of the estoppel issue Since both parties have in fact fully briefed the issue of estoppel in their several filings, and, in order to avoid disposing of this issue on a procedural technicality, the Commission will address the merits of the defense of collateral estoppel

The GPSC interpreted the Parties' Georgia interconnection agreement (not their North Carolina agreement) and, based on findings and legal conclusions stated in its Order, determined (1) that BellSouth was not entitled to conduct an audit of NuVox' EELs without first demonstrating a concern and (2) that BellSouth must hire an independent auditor to conduct the audit Much of the language of the Georgia agreement, particularly the language pertaining to EEL audits, is nearly identical to the language approved by the Commission in the North Carolina Agreement Nevertheless, the Commission finds that it is not bound to adopt or follow the conclusions of the GPSC

Neither the doctrine of collateral estoppel nor the principle of full faith and credit requires the Commission to give preclusive effect to the GPSC's interpretation of a clause in the Georgia Nuvox agreement that is also found in the North Carolina NuVox Agreement The Full Faith and Credit clause only requires the courts of North Carolina to give foreign judgments the same force and effect they would have in the states where they were rendered *Freeman v Pacific Life Ins Co*, 156 N C App 583, 577 S E 2d 184 (2003) The validity and effect of a judgment of another state must be determined by the laws of the rendering state *Id*, *Boyle v Boyle,* 59 N C App 389, 297 S E 2d 405 (1982) Thus, to determine whether preclusive effect must be given to the GPSC's interpretation of the language of the audit provision, the Commission must look to the law of Georgia

Under Georgia law, a judgment used as a basis for the application of collateral estoppel (issue preclusion) must be a final judgment *CS-Lakeview at Gwinnett, Inc , v Retail Development Partners,* 268 Ga App 480, 602 S E 2d 140, *r'con denied, cert denied, (2004), Greene v Transport Ins Co* , 169 Ga App 504, 313 S E 2d 761 (1984) A judgment is not final as long as there is a right to appellate review, *e g* , when an appeal has been entered within the time allowed *Id* , *Lexington Developers, Inc v O'Neal Construction Co , Inc* , 143 Ga App 440, 238 S E 2d 777 (1977) In Georgia, a judgment is suspended when an appeal is entered within the time allowed *Id* On the facts of the matter now before the Commission, BellSouth has filed a timely appeal of the GPSC *Nuvox* decision [3] It necessarily follows that the GPSC's judgment in *Nuvox* is not final and, therefore, cannot be the basis of the application of the doctrine of collateral estoppel The Georgia courts would not give preclusive effect to the GPSC decision under the circumstances. Thus, the Commission is not required to give the decision greater effect or weight of authority than it would be given under Georgia law by Georgia courts

Moreover, the Commission wholly rejects the notion that it is bound by other state agencies' interpretations of contract language when interpreting interconnection agreements approved by the Commission to govern parties' relationships in North Carolina with each other and with customers located in North Carolina NuVox has cited *Global NAPS, Inc v Verizon New England Inc* , 332 F Supp 2d 341 (D Mass 2004) as persuasive authority for just such a holding, but *Global NAPS* is not binding on the Commission Although the Commission believes *Global NAPS* to be distinguishable from the case at hand in several respects, the Commission disagrees with the federal district court's opinion to the extent that it may stand for the premise that state commissions interpreting interconnection agreements they have approved for their own states must follow the contractual interpretations of sister state commissions made with respect to agreements they have approved to govern parties' relationships in their respective states

Interconnection agreements are not to be treated as typical commercial contracts They are interpreted under state law, but, setting them apart from other contracts that are negotiated solely between private parties is the fact that state commissions play a major role in their formation The Act gives state commissions the express authority to approve or reject interconnection agreements and this authority clearly carries with it the authority to interpret and enforce the very agreements they have already approved *BellSouth Telecommunications, Inc v MCIMetro Access Transmission Services, Inc* , 317 F 3d 1270 (11th Cir 2003) Section 252(e) of the Act establishes a scheme whereby each state commission has the authority to approve, reject and determine what the parties' intended under their interconnection agreements A state commission's interest in an approved agreement does not end with approval, but continues for the period of time the agreement remains in effect or relevant to the parties' relationship with each other and with customers in the state of approval The authority granted to each state commission to determine in the first instance the

[3] BellSouth has appealed the GPSC decision in federal court pursuant to § 252 (e)(6) and in state court

meaning of an agreement it approved would be undermined, and the role Congress prescribed for state commissions under the Act would be subverted, if the commissions are bound by the interpretations of other state commissions Allowing one state to make approvals, rejections and/or interpretations that are binding on all the other states, would in essence establish a national standard and destroy the state-by-state scheme designed by Congress *See id*

In addition, allowing one state commission's determination to bind all the rest would create a situation where the parties' would have an incentive to be the first to file an action in a state deemed favorable and destroy the jurisdiction of all other state commissions—a forum shopping nightmare not intended by the Act It is also worth noting that an interconnection agreement approved by one state commission is not the same agreement when approved in another state even when it is between the same parties and employs very similar contract provisions Two state commissions may interpret similar language differently and the agreement as interpreted by one state may be an agreement that another state would reject outright *See id*

Accordingly, the Commission concludes that NuVox' Motion to Adopt Procedural Order should be denied and that the doctrine of collateral estoppel does not require the Commission to adopt or follow the decision and contract interpretation of the GPSC

ISSUE 2 Is BellSouth entitled to conduct an audit of NuVox' EELs under Paragraph 10 5 4 of Attachment 2 of the Agreement?

DISCUSSION

The Commission has jurisdiction over the matters raised in BellSouth's Complaint pursuant to Sections 251 and 252 of the federal Telecommunications Act of 1996 (47 U S C §§ 251, 252), N.C G S §§ 62-30, 62-31, 62-73 and Commission Rule R1-9 Also, the Commission has jurisdiction under Section 15 of the General Terms and Conditions of the Agreement which provides that interpretation disputes may be resolved by the Commission on either Party's petition

The undisputed facts shown in the filings of record and the related Commission docket regarding the Agreement (P-55, Sub 1231, In the Matter of Interconnection Agreement between BellSouth Telecommunications, Inc and TriVergent Communications, Inc (NuVox)) are summarized hereinbelow

BellSouth, an incumbent local exchange carrier ("ILEC"), and NuVox, a competing local provider ("CLP"), entered into the Agreement effective June 30, 2000 The Agreement was voluntarily negotiated pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act") and was approved by the Commission on November 8, 2000 Section 23 of the General Terms and Conditions of the Agreement provides that the Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Georgia The "Compliance with Applicable Law" clause provides in Paragraph 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

With regard to BellSouth's providing EEL combinations to Nuvox, Paragraph 10 2 2 of Attachment 2 provides

> *Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No 96-98 ("June 2, 2000 Order"),* the EEL will be connected to [NuVox]'s facilities in [NuVox]'s collocation space at the POP SWC [Emphasis added]

The Agreement further provides in Paragraph 10 5 2 of Attachment 2

> For the purpose of special access conversions, a "significant amount of local exchange service is as defined *in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No 96-98 ("June 2, 2000 Order") The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order* When [NuVox] requests conversion of special access circuits, [NuVox] will self-certify to BellSouth in the manner specified *in paragraph 29 of the June 2, 2000 Order* that the circuits to be converted qualify for conversion In addition there may be extraordinary circumstances where [NuVox] is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order In such case, [NuVox] may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order If a waiver is granted, then upon [NuVox]'s request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance. [Emphasis added]

Paragraph 10 5 4 of Attachment 2 of the Agreement provides.

> 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 set forth in the 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]

On March 15, 2002, BellSouth sent a letter notifying NuVox of its intent to conduct an audit of NuVox' EELs beginning thirty days from the date of the letter BellSouth's letter stated that BellSouth had selected an independent auditor, American Consultants Alliance ("ACA") to conduct the EEL audit and that BellSouth would incur the costs of the audit The letter also indicated that the local usage requirements to be verified by audit were those stated in the SOC To date, BellSouth has not conducted any audit of NuVox' EELs since the Parties executed the Agreement

After BellSouth gave notice of its intent to audit, the Parties engaged in discussions regarding such audit, but to date they have not reached an agreement permitting the audit to proceed By correspondence dated April 9, 2002, NuVox indicated through its attorney that BellSouth could not go forward with the audit because the Parties continued to be unable to agree on two threshold requirements from the SOC (1) identification of BellSouth's "concern" that prompted the audit request and (2) selection of an independent auditor

The companies continued to discuss the matter, but neither substantially changed its position BellSouth continued to maintain it had a right to audit NuVox' EELs and that it had met the requirements of both the Agreement and the SOC, while NuVox continued to dispute BellSouth's entitlement to an audit based on its position that BellSouth had not met the audit requirements of the SOC

Before examining NuVox' arguments that BellSouth has not met specific requirements of the SOC, the Commission must first determine whether the requirements of the SOC are incorporated into the Agreement or otherwise apply to BellSouth's audit rights Having reviewed the relevant provisions of the Agreement, the pleadings, and the Parties' briefs and comments, including all attached exhibits and affidavits, the Commission concludes that the Parties did not expressly incorporate the SOC into the Agreement and that the Parties agreed that the EEL audit provisions of Attachment 2 of the Agreement would govern EEL audits [4]

The Agreement provides that the laws of the State of Georgia shall govern construction of the Agreement North Carolina courts have recognized the validity of

[4] The Commission understands that, at times, BellSouth stated its audit request was in compliance with the SOC and that BellSouth may have intended and attempted to comply with the SOC requirements However, before analyzing whether any such attempts on the part of BellSouth were successful, the first question the Commission must answer is whether the Agreement in fact requires BellSouth to comply with the SOC The answer is not determined or changed by BellSouth's actions or statements, but is found by construing the agreed upon language in the Parties' Agreement BellSouth has not waived any rights it has under the Agreement as written by citing to the SOC or claiming its actions were in accord with that Order

such choice of law provisions *Behr v Behr,* 46 N C App 694, 266 S E 2d 393 (1980) Therefore, the Commission will construe the Agreement in accord with Georgia law Under Georgia law, contract construction is initially a matter of law for the court *Schwartz v Harris Waste Management Group,* 237 Ga App 656, 516 S E 2d 371 (1999) If the contract language is clear and unambiguous, the court must enforce the contract according to its terms *Id* The court must determine whether the contract is clear and unambiguous by looking to the contract alone for its meaning *Id* Paragraph 10 5 4 of Attachment 2 of the Agreement provides BellSouth the right to audit NuVox' EELs as stated

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NuVox, audit NuVox' records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements

After examining the Agreement as a whole and focusing more closely on Attachment 2, the Commission finds the cited language is unambiguous and provides BellSouth the right to audit NuVox' records at BellSouth's expense on thirty days prior notice, but not more than once in a twelve month period, unless a previous audit has revealed non-compliance with the specified local usage option [5] There are no other restrictions in the Agreement on when BellSouth can initiate and conduct an audit of NuVox' EELs

In the matter now before the Commission, even if NuVox and the Public Staff are correct in their view that the SOC establishes requirements pertaining to an ILEC's entitlement to an EEL audit, the Agreement with BellSouth, not the SOC, governs when BellSouth is entitled to an audit The Agreement was negotiated pursuant to Section 252(a)(1) of the Act which permits parties to enter voluntarily negotiated interconnection agreements without regard to the standards of subsections (b) and (c) of Section 251 of the Act The FCC has acknowledged that 252(a)(1) extends to FCC rules and orders and means that parties entering negotiated agreements need not comply with FCC requirements established pursuant to 251(b) and (c) [6] The SOC was issued by the FCC in connection with the establishment of rules regarding the unbundling obligations of Section 251(c) Moreover, the FCC stated in the SOC, ¶ 32, that where "interconnection agreements already contain audit rights, [w]e do not believe

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[5] Even if ambiguity were an issue, the rules of contract construction would require the Commission to attempt to ascertain the intent of the parties from the four corners of the Agreement before finding that any ambiguity has left an issue of fact remaining There is no ambiguity or remaining question of fact where the intention of the parties can be determined by construction of the Agreement as a whole *See Yargus v Smith,* 254 Ga App 338, 562 S E 2d 371 (2002), *Harris v Distinctive Builders, Inc* 180 Ga App 686, 549 S E 2d 496 (2001), *Travelers Ins Co v Blakey,* 180 Ga App 520, 349 S E 2d 474 (1986) As discussed herein, the intent of the Parties can be determined from the four corners of the Agreement without looking to parol evidence

[6] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996)

that we should restrict parties from relying on these agreements " Hence, it follows that the Parties were free to negotiate and agree upon terms for their interconnection agreement that were different from any stated requirements of the SOC Having entered into the Agreement, the Parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Sections 251 and 252 of the Act or FCC rulings and orders issued pursuant to the stated sections Accordingly, pursuant to Paragraph 10 5 4 of Attachment 2 of the Agreement, BellSouth is entitled to audit NuVox' EELs on 30 days prior notice, provided that BellSouth pays for the audit[7] and has not conducted such an audit within a twelve-month period Because the Agreement clearly addresses the subject of when BellSouth is entitled to conduct an audit, there is no need to look to the SOC for other possible requirements regarding when BellSouth may audit NuVox' EELs

NuVox argues that the Agreement incorporates the requirements of the SOC through Paragraph 35 1 of the General Terms and Conditions of the Agreement According to NuVox, Paragraph 35 1, the "Compliance with Applicable Law" clause, is proof of the Parties' intent to incorporate the SOC in their Agreement However, the Commission disagrees There is no express language in the Agreement that incorporates the SOC in its entirety into the Agreement Compliance with applicable law clauses are found in most complex commercial agreements and are not unique to interconnection agreements At most, Paragraph 35.1 provides that the Parties must abide by all *applicable* existing law To the extent that the Parties have expressly and specifically addressed requests for EEL audits and have agreed on their own governing terms in Section 10 of Attachment 2 of the Agreement, Paragraph 35.1 does not override these negotiated provisions Paragraph 10 5 4 of Attachment 2 specifically and unambiguously addresses when BellSouth is entitled to audit NuVox' EELs and the manner in which BellSouth must start the audit process The Agreement is not silent on the circumstances for entitlement to conduct an EEL audit

In addition, to the extent the Compliance with Applicable Law clause *may* create any ambiguity or conflict with the audit provisions of Paragraph 10 5 4 (the Commission does not find ambiguity), the Supreme Court of Georgia has held

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.

Central Georgia Electric Membership Corp , 217 Ga 171, 173-74, 121 S E 2d 644, 646 (1961) (quoting 3 Corbin, p 176, Contracts §547) The Court of Appeals of Georgia has upheld this principle numerous times, stating that "when a provision specifically

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[7] Section 10 5 4 requires BellSouth to incur the expense of the audit without regard to the outcome of the audit The "non-compliance" clause refers to the restriction against conducting more than one audit in a twelve-month period unless an audit has revealed non-compliance The clause does not shift the expense of the audit onto NuVox, and, to the extent the SOC contemplated such a shift, it is trumped by the Agreement

addresses the issue in question, it prevails over any conflicting general language" *Tower Projects, LLC v Marquis Tower, Inc*, 267 Ga App 164, 598 S E 2d 883 (2004), *Deep Six, Inc v Abernathy*, 246 Ga App 71, 538 S E 2d 886 (2000), *Schwartz*, 237 Ga App at 661 516 S E 2d at 375 Therefore, inasmuch as the audit provisions of the Agreement before the Commission come after the Applicable Law clause and specifically address the subject of when BellSouth is entitled to audit NuVox' EELs, while the Applicable Law clause is general and broadly inclusive in nature, the audit provisions of the Agreement prevail over the general clause

Moreover, the SOC itself plainly states that the FCC does not believe it should restrict parties from relying on audit provisions contained in negotiated interconnection agreements Clearly, the FCC did not intend the SOC to negate or take the place of specific audit provisions of interconnection agreements and thus, this Commission will not read the SOC to do so The FCC's statement that "[w]e do not believe that we should restrict parties from relying on these [existing interconnection] agreements" certainly applied to interconnection agreements predating the SOC, but it also applied more broadly to future negotiated agreements as well It logically follows from the FCC's statement that the FCC recognized the continuing right of the parties, under Section 252 of the Act, to enter voluntarily negotiated agreements on terms that differ from the standards of Section 251 of the Act and orders, such as the SOC, issued pursuant to Section 251

NuVox also argues that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law NuVox applies this principle by arguing that the SOC and any audit requirements in the SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement as though expressly stated therein, unless expressly excluded or displaced by the terms of the Agreement NuVox concludes that the Agreement neither expressly excludes nor contains any terms that displace requirements found in the SOC The Commission does not agree

Under Georgia law, contracting parties are required to abide by applicable existing law, but only as to those matters not specifically addressed in the parties' voluntarily negotiated agreements *Jenkins v Morgan*, 100 Ga App 561, 112 S E 2d 23 (1959) Georgia courts recognize that if the parties are silent on an issue, existing law will apply, but that the parties are free to contract otherwise, i e , parties may agree to be bound by terms that are different from existing law *Id* (where agreement provided that no interest would accrue prior to maturity but was silent as to interest after maturity date, existing law required payment of interest from date of maturity)

Regarding the Agreement at hand, the SOC was part of the existing law at the time the Parties entered into the Agreement Under Georgia law, the Parties were thus bound to abide by applicable existing law, i e , the SOC, but only as to those matters not addressed in the Parties' voluntarily negotiated Agreement On the face of the Agreement, in Paragraph 10 5 4, the Parties addressed and did not remain silent on "when" BellSouth would be entitled to conduct an audit and the manner in which

BellSouth could initiate an audit These matters were dealt with by the Parties The Parties supplied their own terms and did not leave them to be filled in or determined by existing law Thus, between these Parties, after entering into the Agreement, the standards of the existing law were no longer part of the applicable law governing when and how an EEL audit could be initiated Instead, the terms of the Agreement became the applicable law regarding entitlement to and initiation of an EEL audit

The Parties' intent not to incorporate the whole of the SOC into the Agreement is apparent from the contract language, specifically the language found in Section 10 of Attachment 2 concerning conversion of special access services to EELs For example, Paragraph 10 5 2 references the SOC (the June 2, 2000 Order) five times, providing that the term or phrase "significant amount of local exchange service" is as defined in the SOC and that "[t]he Parties agree to incorporate by reference paragraph 22 of the [SOC] " Paragraph 10 5 2 further provides that NuVox' manner of self-certification regarding usage of circuits for local exchange will be the manner specified in paragraph 29 of the SOC If the SOC in its entirety were automatically read into the Agreement by operation of law as NuVox contends, these provisions referencing the SOC would be superfluous and without meaning The definition of a significant amount of local exchange service would have been a given if the Parties had intended the SOC to be incorporated into the Agreement Moreover, Paragraph 10 5 2, which pertains to EELs converted from special access (a topic directly addressed in the SOC), demonstrates the Parties' intent not to incorporate the entire SOC in their Agreement, but rather to incorporate specific provisions, e g , paragraph 22 is incorporated into Paragraph 10 5 2 by reference Again, if NuVox were correct in its position that the whole of the SOC was incorporated into the Agreement, there would have been no need to re-incorporate paragraph 22, a specific part of the SOC

Clearly, when the Parties intended to be bound by SOC provisions, they expressly so provided and identified selected portions for incorporation into the Agreement The level of specificity and the way the Parties selectively and carefully made precise, unambiguous references to the SOC throughout the section of the Agreement regarding EELs are strong indications that the Parties did not consider or intend the SOC in its entirety to govern the provisioning of EELs or BellSouth's auditing of them On the contrary, with regard to matters addressed in the Agreement, the Parties intended the SOC to apply sometimes in part and sometimes not at all, depending upon the express provisions of separate subparagraphs of the Agreement dealing with specific situations

In summary, the Commission concludes that the Parties to the Agreement did not incorporate the SOC, in its entirety, into the Agreement Therefore, the specific provisions of Paragraph 10 5 4 of Attachment 2 of the Agreement govern "when" BellSouth is entitled to audit NuVox' EELs and the procedure BellSouth must use to initiate such an audit BellSouth has complied with the conditions of Paragraph 10 5 4 by providing 30 days prior notice to NuVox and indicating that the audit will be at its own expense Since BellSouth has not conducted an audit of NuVox' EELs at any time since the Agreement was executed in 2000, it is not in violation of the only other

restriction on its audit rights, that it not conduct an audit of NuVox' records more than once in any twelve-month period Accordingly, BellSouth is entitled under the agreed upon terms of the Agreement to conduct an audit of NuVox' EELs without having to take any further action to justify either its entitlement or its decision to conduct an audit

Notwithstanding the foregoing conclusion, and alternatively, (1) if the SOC requires an ILEC to have a concern that a requesting CLP has not met the criteria for providing a significant amount of local exchange service before the ILEC is permitted to request and conduct an audit and (2) if such requirement is incorporated into the Agreement by the terms of the Agreement or by operation of law, the Commission agrees with the Public Staff and finds that BellSouth has met the SOC threshold requirement of "[having] a concern" Footnote 86 of ¶31 of the SOC expresses the FCC's agreement with the joint position of the ILECs and the CLPs that EEL audits would not be a routine matter of course but would be undertaken "when the incumbent LEC has a concern" The FCC then continues in ¶31 expressly to order that ILECs provide CLPs with 30 days written notice that "it will conduct an audit" The FCC addresses and ensures the non-routineness of EEL audits by ordering that ILECs "may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance" Arguably, the FCC established a scheme whereby an ILEC could conduct an audit once in a calendar year and could only do so more frequently if a permitted audit revealed non-compliance (which would serve as a concern) In any case, the FCC did not specify what should be stated in an ILEC's notice that it would conduct an audit The FCC did not in any way indicate that proof or evidence of a concern should be required prior to an audit For example, the FCC did not use terminology such as "demonstrate," "show" or "prove" a concern Likewise, the FCC did not set forth any procedure (such as the form or timing) for the provision of any such evidence The Commission therefore concludes that if an ILEC must have a concern prior to performing an audit where no audit has been performed within the preceding twelve-month period, the FCC did not intend to set a high hurdle but rather set the bar low, e.g , an audit is appropriate when an ILEC "has a concern" The FCC's requirement that an ILEC give written notice that "*it will conduct an audit*" does not suggest that the FCC intended its general agreement with the parties in footnote 86 (that an ILEC should have a concern) to establish a stringent test or precondition whereby the ILEC must prove (litigate) the fact of its concern to the Commission's or the CLP's satisfaction

Accordingly, the Commission finds that the reasons given by BellSouth meet any threshold requirement of "having a concern" that may have been established by the SOC as a precondition to an audit BellSouth initially explained to NuVox in an email dated April 1, 2002 that BellSouth's own records showed a high percentage of NuVox' traffic in Tennessee and Florida was intrastate access and that NuVox was claiming a significant change in its percent interstate usage jurisdictional factors These observations caused BellSouth concern that NuVox' certification(s) that it provided a significant amount of local traffic over circuits in Tennessee and Florida may not have been correct, and they (the observations) reasonably serve as the basis of a concern that would cause BellSouth to want to test the accuracy of NuVox' self-certifications in each state where special access circuits were converted based on such certifications

Subsequent to its initial observations and concerns, as sworn to in the Affidavit of Jerry D Hendrix (Exhibit C to BellSouth's Motion for Summary Disposition), BellSouth further analyzed its customer records and found that BellSouth was providing local exchange service to a number of NuVox' EEL-served customers, including customers in North Carolina NuVox cannot be the exclusive provider where BellSouth is providing local exchange service Again, such observations would reasonably cause BellSouth a legitimate concern about whether NuVox' self-certifications for special access conversions were accurate The concerns raised by the observations BellSouth communicated to NuVox are sufficient to meet the threshold requirement of having a concern Thus, BellSouth has met any SOC requirement, if applicable, that it have a concern prior to conducting an EEL audit

ISSUE 3 Is BellSouth required to prove that it has selected an independent auditor prior to conducting an audit of NuVox' EELs?

DISCUSSION

As discussed hereinabove, the Parties' Agreement governs as to matters specifically addressed in the Agreement, but existing law applies as to matters not addressed in the Agreement While the Agreement contains provisions regarding when BellSouth is entitled to conduct an audit, it does not contain any provision regarding how an audit will be conducted or regarding the selection of third parties to perform EEL audits The Agreement is silent on methods or standards for the audit or the selection of a third party auditor NuVox has argued that the SOC conditions an ILEC's audit rights on the use of an "independent auditor " The Commission believes that the SOC does provide the appropriate criteria regarding the minimum qualification standards for a third party hired to conduct an EEL audit, inasmuch as the Agreement is silent on this issue

In the SOC, the FCC relied on and sanctioned the stated agreement between ILECs and CLPs that independent auditors should be used to perform audits of EEL usage [8] Though the SOC did not define the term "independent auditor," the word "auditor" is commonly understood and used in business and law to mean a professional skilled in conducting audits, who is licensed by a recognized profession and subject to a code of conduct requiring a high level of independence [9]

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[8] BellSouth was a signatory to the letter conveying this agreement to the FCC *February 28, 2000 Joint Letter* (filed *ex parte* on February 29, 2000), CC Docket No 96-98

[9] In *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 626 (2003) ("Triennial Review Order" or "TRO"), issued after execution of the Agreement, the FCC affirmed its prior sanctioning of the parties' agreement to conduct audits using independent auditors The FCC also ruled that the independent auditor must perform its audit in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA") This requirement that the audits conform to AICPA standards was not part of the SOC and, in its TRO, ¶ 622, the FCC acknowledged that it was adopting auditing procedures "comparable" to but in some respects different

BellSouth has chosen American Consultants Alliance ("ACA") to conduct the audit of NuVox' EELs Through the affidavit of its Assistant Vice President – Pricing, Jerry Hendrix, BellSouth represents that ACA is not subject to BellSouth's control or influence The Commission finds that, subject to the SOC's requirement that a third party selected to perform an EEL audit must be an "independent auditor" (and the Commission believes, in the context of an EEL audit, that the SOC contemplates that an independent auditor is a licensed professional as discussed above), the selection of the third party auditor is a matter for BellSouth BellSouth is not required to consult with or seek the approval of NuVox, the party being audited Similarly, BellSouth is not required to obtain the Commission's approval of its choice of an auditor The Commission does not believe the FCC's independence requirement was intended to require ILECs to submit to hearings on their choice of auditor prior to exercising their audit rights The CLPs remedy for failure to select an independent auditor is to attack the auditor's qualifications in a complaint proceeding should the ILEC file a complaint for non-compliance with local usage certifications based on the auditor's findings. Therefore, in choosing a third party to audit NuVox' EELs, BellSouth is advised to give due consideration to the "independent auditor" requirement If ACA's audit uncovers NuVox' alleged non-compliance with local usage certifications and BellSouth files a complaint with the appropriate Commission pursuant to Section 10 5 4 of Attachment 2 of the Agreement, the credibility of the auditor as well as the credibility of the auditor's work is subject to challenge and may be offered as a defense to any such complaint

Accordingly, the Commission concludes that BellSouth is required to select an independent auditor to conduct EEL audits, but that selection of the auditor is a matter for BellSouth The proper time for NuVox to challenge the independence of the auditor is in a complaint proceeding should the results of the audit be used by BellSouth in an attempt to establish that NuVox was not entitled to conversion of special access circuits based on local usage requirements

ISSUE 4 Should the Commission issue an order finding that BellSouth is entitled to provide its auditor with records in BellSouth's possession, including those that contain proprietary information?

DISCUSSION

BellSouth's Complaint requests that the Commission "clarify that BellSouth is authorized to provide the auditor with whatever BellSouth records the auditor may reasonably require in conducting the audit, including records in BellSouth's possession that contain proprietary information of another carrier " Section 222 of the Act generally imposes a duty on telecommunications carriers to protect the confidential information of other carriers and to use such information in its possession only for the purpose of

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from those in the SOC Nevertheless, although requirements newly imposed by the TRO may not apply to audits conducted pursuant to interconnection agreements entered prior to issuance of the TRO, the FCC's affirmation of the requirement that an "independent auditor" conduct EEL audits and its ruling regarding adherence to AICPA standards provide highly persuasive corroboration that the FCC intended the SOC to require, at a minimum, that a licensed professional perform EEL audits

providing telecommunications service Section 222 further imposes a duty on telecommunications carriers not to use or disclose customer proprietary network information for other than the provision of telecommunications service unless required by law or authorized to do so by the customer It does not appear from the filings of record that the Parties fully briefed this issue

Therefore, the Commission declines to authorize BellSouth's disclosure of proprietary information of other parties in the absence of a showing by BellSouth that such is required by law or that the proper authorizations have been obtained Should BellSouth disclose proprietary information to its auditor on its own, it will do so at the risk that it may be in violation of Section 222 of the Act or other applicable agreements that it may have with the carriers or customers to whom the information pertains

CONCLUSIONS

The doctrine of collateral estoppel does not require the Commission to adopt or follow the decision and contract interpretation of the GPSC Having complied with the requirements of Section 10 5 4 of Attachment 2 of the Agreement, BellSouth is entitled to audit NuVox' records in order to verify the type of traffic being transmitted over combinations of loop and transport network elements BellSouth is not required to make any further or additional showings regarding entitlement to audit NuVox' records under the Agreement in advance of the audit While a third party selected to conduct an EEL audit must be an independent auditor, the selection of the third party is a matter for BellSouth that is not subject to NuVox' or the Commission's approval, at least in the first instance Any challenge regarding the auditor's qualifications or allegations of bias is properly reserved for a complaint proceeding initiated under Section 10 5 4 pursuant to the dispute resolution process of the Agreement The Commission declines to authorize BellSouth to disclose proprietary information of other carriers to its auditor

IT IS, THEREFORE, ORDERED as follows

1 That NuVox' motion for procedural order is denied;

2 That NuVox' request for oral argument and/or an evidentiary hearing is denied,

3 That BellSouth's request for summary disposition is allowed,

4 That BellSouth has met the requirements of Section 10 5 4 of Attachment 2 of the Agreement and is therefore entitled to audit NuVox' records to verify the type of traffic being transmitted over EEL circuits,

5 That NuVox shall permit BellSouth's chosen auditor to conduct the audit as previously noticed by BellSouth and the audit should begin no later than 45 days from the date of this Order, and,

6 That BellSouth's request for interest on the amount of the difference between EEL rates paid by NuVox and special access rates that may be found applicable should be made in a complaint brought pursuant to Paragraph 10 5 4 of Attachment 2 of the Agreement, and is, therefore, denied because it is not appropriately before the Commission at this time in this proceeding

ISSUED BY ORDER OF THE COMMISSION

This the 21st day of February, 2005

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

tb022105 01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc Complainant	)	
v.	)	ORDER GRANTING MOTION FOR SUMMARY DISPOSITION AND ALLOWING AUDIT
NewSouth Communications, Corp. Respondent	)	

BEFORE Chairman Jo Anne Sanford, Commissioners J. Richard Conder, Robert V Owens, Jr., Sam J. Ervin, IV, Lorinzo L Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: This matter arises on Complaint filed by BellSouth Telecommunications, Inc. ("BellSouth") requesting the Commission to find that NewSouth Communications Corp. ("NewSouth") breached the parties' Interconnection Agreement ("Agreement") by refusing to allow BellSouth to conduct an audit of NewSouth's enhanced extended loops ("EELs") in order to verify NewSouth's self-certification that the EEL facilities are being used to provide "a significant amount of local exchange service." Alternatively, and only if the Commission deems it necessary, BellSouth requests the Commission to find that NewSouth violated the terms of the Federal Communication Commission's ("FCC's") *Supplemental Order Clarification* (SOC)[1] and 47 U S C § 251 by refusing to allow BellSouth to audit NewSouth's EELs. The Complaint further prays that NewSouth be compelled to allow BellSouth's auditor to conduct an audit of the NewSouth EELs. Simultaneously with its Complaint, on November 25, 2003, BellSouth filed a motion for summary disposition, arguing that a hearing in this matter is not necessary for the Commission to rule on the parties' rights under the Agreement and the applicable law. NewSouth filed its Answer to Complaint on December 29, 2003, denying BellSouth's unqualified right to the audit it seeks and also opposing summary disposition BellSouth replied to NewSouth's Answer and Opposition to the Complaint and Request for Summary Disposition

Pursuant to the Commission's *Order* dated February 9, 2004, the Public Staff filed comments on March 8, 2004, and both BellSouth and NewSouth filed responsive comments on March 31, 2004. On May 4, 2004, NewSouth filed a request for oral argument on the issue of whether disputed material facts exist and require an

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[1] *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587 (2000).

evidentiary hearing. BellSouth filed a response on May 10, 2004, re-asserting that an evidentiary hearing is not needed as there are no material issues of fact in dispute, but stating that it does not oppose an oral argument if it would be helpful to the Commission. BellSouth requests that any oral argument also address whether it is entitled to audit NewSouth's EELs under the Agreement.

ISSUE. Is BellSouth entitled to conduct an audit of NewSouth's EELs under Section 4.5.1 5 of Attachment 2 of the Agreement?

Positions of the Parties

BELLSOUTH: BellSouth argues that it seeks to enforce audit rights pursuant to Attachment 2, Section 4 5 1 5 of the Agreement, which provides BellSouth the unqualified right, upon providing NewSouth 30 days prior notice, to audit NewSouth's EELs to verify the amount of local exchange traffic being transmitted on EEL circuits. BellSouth maintains that the SOC is not incorporated into the pertinent audit provisions and that the parties never intended such result Because BellSouth's audit rights are a matter of contract interpretation, BellSouth argues that the matter should be decided as a matter of law without an evidentiary hearing Alternatively, if the Commission finds that the SOC is incorporated into the Agreement and controls the manner in which BellSouth may exercise its audit rights, BellSouth asserts that it has complied with all SOC audit-related provisions and that summary disposition is still appropriate because the relevant facts are undisputed BellSouth's position is that it is entitled to conduct an audit of NewSouth's EELs under the terms of the Agreement and, alternatively, under the SOC.

NEWSOUTH: In opposition to BellSouth, NewSouth argues that the Agreement incorporates the SOC and that the requirements of the SOC limit BellSouth's audit rights to (1) non-routine audits, (2) based on a reasonable concern regarding NewSouth's compliance with EEL eligibility and self-certification criteria, and (3) conducted by an independent auditor. NewSouth disputes that BellSouth has met or demonstrated that it has met any of the three SOC requirements. According to NewSouth, it has submitted evidence tending to show that material issues of fact remain, thereby requiring the Commission to afford the parties an evidentiary hearing prior to deciding the merits of the Complaint. NewSouth maintains that BellSouth is not entitled to conduct an audit of its EELs on the facts now before the Commission.

PUBLIC STAFF: The Public Staff agrees that the question of whether the SOC is incorporated into the Agreement can be decided by the Commission as a matter of law without the need for a hearing However, the Public Staff, agreeing with NewSouth, believes that under the law of Georgia, which is the applicable law governing interpretation of the Agreement, the SOC is incorporated into the Agreement as part of existing law at the time the parties entered into the Agreement. The Public Staff further believes that the SOC, and in turn the Agreement, requires BellSouth to have a concern before being permitted to audit NewSouth's EELs. Because the Public Staff reads BellSouth's Complaint, Para. 47, Jerry Hendrix' affidavit (Complaint, Exhibit E), and

BellSouth's June 6, 2002 letter to NewSouth (NewSouth Answer, Exhibit G) to contain expressions of BellSouth's concerns concerning the accuracy of NewSouth's statements of compliance with EEL eligibility criteria, it disagrees with NewSouth and maintains that BellSouth has met the SOC's "concern" requirement. Therefore, the Public Staff believes it is unnecessary for the Commission to consider further evidence regarding the legitimacy of BellSouth's stated concerns. On the question of whether the auditor selected by BellSouth is sufficiently independent to meet the SOC requirement that an EEL audit be conducted by an independent auditor, the Public Staff, in agreement with BellSouth, believes this requirement has been met since the selected auditor is not related to, affiliated with, subject to the influence or control of, or dependent on BellSouth (Complaint, Exhibit E, Hendrix affidavit). Accordingly, the Public Staff recommends that the Commission find that BellSouth satisfied the conditions to invoke its audit right under the Agreement and order NewSouth to submit to the audit within 45 days of the Commission's order.

DISCUSSION

The Commission has jurisdiction over the matters raised in BellSouth's Complaint pursuant to Sections 251 and 252 of the federal Telecommunications Act of 1996 (47 U.S.C §§ 251, 252), N.C.G.S. §§ 62-30, 62-31, 62-73 and Commission R1-9.

The undisputed facts shown in the filings of record and the related Commission docket regarding the Agreement (P-55, Sub 1305, Renegotiated Interconnection Agreement with NewSouth Communications Corp.) are summarized hereinbelow

After the FCC's June 2, 2000 release of the SOC, BellSouth, an incumbent local exchange carrier ("ILEC"), and NewSouth, a competing local provider ("CLP"), entered into the Agreement on May 18, 2001. The Agreement was voluntarily negotiated pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act") and was approved by the Commission on September 28, 2001. Section 18 of the General Terms and Conditions of the Agreement provides that the Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Georgia While the Table of Contents for the Agreement indicates the inclusion of a provision entitled, "Compliance with Applicable Law," such clause does not appear in the body of the Agreement. However, Attachment 2 of the Agreement (which, according to its Section 1 1, contains the terms and conditions specifically applicable to the unbundled network elements ("UNEs") and combinations of such elements being offered by BellSouth pursuant to the Agreement) provides in Section 1.5 that combinations of network elements will be provided "subject to applicable FCC Rules and Orders." Section 4 2 of Attachment 2 of the Agreement provides

> Where necessary to comply with an effective Commission and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 4 3 below

When the Complaint was filed, the Agreement had been amended on three occasions, the last time being on January 16, 2003, to provide NewSouth access to additional EELs All amendments were approved by Commission Order.

The Agreement further provides that NewSouth may not convert special access services to combinations of loop and transport network elements unless the combinations are used to provide a particular customer with "a significant amount of local exchange service" as defined by the FCC in Paragraph 22 of the June 2, 2000 SOC, which the Agreement expressly incorporates by reference (Agreement, Attachment 2, §§ 4.5 1, 4.5 1 2). Section 4.5.1.2 also provides that when NewSouth requests conversion of special access circuits to EELs, NewSouth must self-certify in the manner established by the FCC in the SOC that the circuits qualify for conversion. Section 4 5 1.5 of Attachment 2 of the Agreement provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements If based on its audits, BellSouth concludes that NewSouth 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 set forth in the 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 NewSouth.

Section 4.5.2 2 of Attachment 2 of the Agreement provides.

> Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5 2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

On April 26, 2002, BellSouth sent a letter by email and overnight delivery, notifying NewSouth of its intent to conduct an audit of NewSouth's EELs beginning on May 27, 2002. In the letter, BellSouth purported to have provided notice and selected an independent auditor, American Consultants Alliance ("ACA"), in accordance with the SOC. The letter also indicated that the local usage requirements to be verified by audit are those stated in the SOC and that BellSouth had forwarded a copy of the letter/notice to the FCC as required in the SOC To date, BellSouth has not conducted any audit of NewSouth's EELs since the parties executed the Agreement.

On May 3, 2002, NewSouth responded to the notice indicating that it would work with BellSouth to facilitate the requested audit of EELs that had been converted from special access circuits However, three weeks later on May 23, 2002, NewSouth sent another letter to BellSouth stating that it disputed BellSouth's notice of intended audit. NewSouth complained that BellSouth's notice of audit did not meet certain requirements of the SOC and advised BellSouth to follow the procedures in the Agreement's Dispute Resolution clause if it still wanted to conduct an audit. By letter dated June 6, 2002, BellSouth replied, generally stating that it had met the requirements questioned by NewSouth. The June 6 letter also provided reasons for BellSouth's desire to verify NewSouth's local usage certifications After receiving no response, BellSouth sent another letter on June 27, 2002, indicating that in the absence of response it planned to commence an audit on July 15. This time NewSouth responded by letter dated June 29 that it did not agree to permit BellSouth to audit its EELs. BellSouth again responded to concerns raised by NewSouth and, in a letter dated July 17, 2002, stated that it had not only complied with the audit provisions of the Agreement but had also made an effort to comply with all FCC rules on audits, though these rules had not been incorporated into the Agreement.

The companies continued to exchange correspondence over the next year, but neither party substantially changed its position. BellSouth continued to state it had a right to audit NewSouth's EELs and that it had met the requirements of both the Agreement and the SOC, while NewSouth continued to dispute BellSouth's entitlement to an audit based on its position that BellSouth had not met the audit requirements of the SOC.

Before examining NewSouth's arguments that BellSouth has not met specific requirements of the SOC, the Commission must first determine whether the requirements of the SOC are incorporated into the Agreement or otherwise apply to BellSouth's audit rights. Having reviewed the relevant provisions of the Agreement, the pleadings, and the parties' briefs and comments, including all attached exhibits and affidavits, the Commission concludes that the parties did not expressly incorporate the SOC into the Agreement and that the parties agreed that the EEL audit provisions of Attachment 2 of the Agreement would govern EEL audits.

The Agreement provides that the laws of the State of Georgia shall govern construction of the Agreement. North Carolina courts have recognized the validity of such choice of law provisions. *Behr v Behr,* 46 N.C. App. 694, 266 S.E.2d 393 (1980). Therefore, the Commission will construe the Agreement in accord with Georgia law Under Georgia law, contract construction is initially a matter of law for the court *Schwartz v Harris Waste Management Group,* 237 Ga. App. 656, 516 S.E 2d 371 (1999). If the contract language is clear and unambiguous, the court must enforce the contract according to its terms. *Id.* The court must determine whether the contract is clear and unambiguous by looking to the contract alone for its meaning. *Id.* Section 4 5 1 5 of Attachment 2 of the Agreement provides BellSouth the right to audit NewSouth's EELs as stated:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements

The cited language is unambiguous and provides BellSouth the right to audit NewSouth's records at BellSouth's expense on thirty days prior notice, but not more than once in a twelve month period, unless a previous audit reveals non-compliance with the specified local usage option There are no other restrictions in the Agreement on when BellSouth can initiate and conduct an audit of NewSouth's EELs.

While NewSouth and the Public Staff argue that a precatory statement in footnote 86 of the SOC imposes additional conditions on BellSouth's entitlement to an audit, the Commission does not agree. Even if NewSouth's interpretation of the SOC is correct, the Agreement, not the SOC, governs when BellSouth is entitled to an audit. The Agreement was negotiated pursuant to Section 252(a)(1) of the Act which permits the parties to enter voluntarily negotiated interconnection agreements without regard to the standards of subsections (b) and (c) of Section 251 of the Act. The FCC has acknowledged that 252(a)(1) extends to FCC rules and orders and means that parties entering negotiated agreements need not comply with FCC requirements established pursuant to 251(b) and (c).[2] The SOC was issued by the FCC in connection with the establishment of rules regarding the unbundling obligations of Section 251(c). Moreover, the FCC stated in the SOC, ¶ 32, that where "interconnection agreements already contain audit rights, [w]e do not believe that we should restrict parties from relying on these agreements." Hence, it follows that the parties were free to negotiate and agree upon terms for their interconnection agreement that were different from any stated requirements of the SOC. Having entered into the Agreement, the parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Sections 251 and 252 of the Act or FCC rulings and orders issued pursuant to the stated sections. Accordingly, pursuant to Section 4.5.1.5 of Attachment 2 of the Agreement, BellSouth is entitled to audit NewSouth's EELs on 30 days prior notice, provided that BellSouth pays for the audit and has not conducted such an audit within a twelve-month period. Because the Agreement clearly addresses the issue of when BellSouth is entitled to conduct an audit, there is no need to look to the SOC for other possible requirements regarding when BellSouth may audit NewSouth's EELs.

NewSouth has argued that the Agreement itself incorporates the provisions of Sections 251 and 252 of the Act. The Commission rejects this argument NewSouth generally points to the Agreement's preamble or "Witnesseth" section and Section 1.0 of the Agreement's General Terms and Conditions as proof of the parties' intent that the Agreement incorporated and would be subordinate to Sections 251 and 252. However, these passing references to 251 and 252 are the normal "boilerplate" references included to explain the reason the parties are entering into an interconnection

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

agreement That is to say, execution of an interconnection agreement satisfies the parties' obligations under 251 and 252 and that is the reason the parties have chosen to enter into the Agreement—to meet their statutory obligations The Commission's approval of the Agreement and amendments to the Agreement supports the parties' statement that the Agreement meets their 251 and 252 obligations. The Commission's approval is in essence a ruling that the Agreement complies with the requirements of Sections 251 and 252 of the Act *See* 47 U.S.C. § 252.

In addition, the provisions of the "Witnesseth" section and Section 1.0 of the General Terms and Conditions are general and broadly inclusive. To the extent these general provisions may create an ambiguity or conflict with the audit provisions of Section 4.5 1.5, the Supreme Court of Georgia has held:

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former

Central Georgia Electric Membership Corp., 217 Ga 171, 173-74, 121 S.E.2d 644, 646 (1961) (quoting 3 Corbin, p.176, Contracts §547). The Court of Appeals of Georgia has upheld this principle numerous times, stating that "when a provision specifically addresses the issue in question, it prevails over any conflicting general language" *Tower Projects, LLC v. Marquis Tower, Inc.*, __ Ga. App. __, 2004 WL 859165 (2004), *Deep Six, Inc. v Abernathy,* 246 Ga. App. 71, 538 S.E. 2d 886 (2000); *Schwartz,* 237 Ga App. at 661, 516 S E.2d at 375. Therefore, inasmuch as the audit provisions of the Agreement before the Commission come after the cited general provisions and specifically address the issue of when BellSouth is entitled to audit NewSouth's EELs, the audit provisions of the Agreement prevail over the general clauses.

NewSouth has further argued that Section 1.5 of Attachment 2 of the Agreement incorporates the provisions of the SOC. Again, the Commission disagrees with NewSouth There is no express language in the Agreement that incorporates the SOC in its entirety into the Agreement. NewSouth relies on the language of Section 1 5, which states, "[s]ubject to applicable and effective FCC Rules and Orders as well as effective State Commission Orders, BellSouth will offer combinations of network elements pursuant to such orders." However, Section 1.1 of Attachment 2 provides that BellSouth agrees to offer to NewSouth unbundled network elements obligated to be provided under Section 251(c)(3) of the Act, and states that "[t]he **'specific'** terms and conditions that apply to the unbundled network elements are described below in this Attachment 2" (emphasis added) The Commission concludes that Section 1 1 sets forth the purpose of the entire Attachment 2—to "set forth" the UNEs and combinations of UNEs that BellSouth will offer in accordance with its obligations under the Act. Section 1.5 then fulfills this purpose statement in Section 1.1 by specifically setting forth and identifying the UNEs and UNE combinations that BellSouth will offer. Although Section 1.5 begins with a statement that BellSouth will offer combinations of UNEs subject to applicable and effective FCC Rules and Orders, this statement cannot be

properly construed without reading it in light of Section 1.1. Section 1.1 expressly states a further purpose of Attachment 2—to describe the "specific terms and conditions that will apply to [UNEs]" that are offered

The statement that Attachment 2 will describe the terms and conditions applicable to UNEs offered under the Agreement is express recognition of the parties' intent to agree (under § 252(a)(1) of the Act) to terms not identical to the language of § 251 of the Act Section 1.5 does not override the specific statement in Section 1 1 providing that Attachment 2 contains the terms applicable to the provisioning of UNEs With regard to audit rights, Section 4 5 1 5 of Attachment 2 specifically and unambiguously addresses when BellSouth is entitled to audit NewSouth's EELs To the extent that the more general "subject to" language of 1.5 creates any ambiguity or conflicts with the subsequent section on audits, the audit provisions are specific on the issue at hand and they prevail. Moreover, though the FCC's SOC may apply generally to the provisioning of UNEs as a result of the language in 1.5, the SOC itself plainly states that the FCC does not believe it should restrict parties from relying on audit provisions contained in negotiated interconnection agreements. Clearly, the FCC did not intend the SOC to negate or take the place of specific audit provisions of interconnection agreements and thus, this Commission will not read the SOC to do so even if the SOC generally applies to the Agreement through the terms of Section 1.5.

NewSouth has also argued that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law NewSouth applies this principle by arguing that the entire SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement, and that the parties would have had to have included an express statement excluding the SOC from the Agreement if they wanted to be relieved from the requirements and restrictions of the SOC. The Commission does not agree. Under Georgia law, contracts are interpreted in light of existing law and each case cited by NewSouth for this premise is in agreement with this proposition. However, none of the cases cited by NewSouth support the premise that all existing law is read into the parties' contract by operation of law, unless the parties expressly exclude it [3] To the

[3] Both NewSouth and the Public Staff have noted and relied on the holding of the Georgia Public Service Commission ("GPSC") in *In Re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U, Order (July 6, 2004) In *Nuvox*, the GPSC, on facts similar to those in the instant case, found the SOC was incorporated in the parties' interconnection agreement by law. The GPSC cited *Jenkins v Morgan*, 100 Ga. App. 561, 112 S.E 2d 23 (1959) for the premise that "If the 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 " GPSC Order at 6 The GPSC then went on seemingly to require not only that other legal principles be expressly stated in the parties' contract, but that there be an express statement or stipulation that the contract will be governed by principles other than existing law if the parties so intend. The Commission believes *Jenkins* has been misconstrued The *Jenkins* court held the parties were "presumed to contract under existing laws, and no intent will be implied to the contrary unless so provided by terms of their agreement." *Jenkins*, 100 Ga App. at 562, 112 S E.2d at 23. *Jenkins* does not require language expressly stating that the parties want to be governed by other than the existing law *Jenkins* merely holds that existing law will control unless the express terms of the agreement show the parties' intent to establish terms that are different from the existing law. Additionally, the GPSC's discussion of and heavy

contrary, Georgia law requires contracting parties to abide by applicable existing law, but only as to those matters not specifically addressed in the parties' voluntarily negotiated agreements *Jenkins v. Morgan,* 100 Ga. App. 561, 112 S.E. 2d 23 (1959) Georgia courts recognize that if the parties are silent on an issue, existing law will apply, but that the parties are free to contract otherwise, i e., parties may agree to be bound by terms that are different from existing law. *Id.* (where law provided that liquidated obligations would bear interest from date of maturity and agreement provided that no interest would accrue prior to maturity but was silent as to interest after maturity date, existing law required payment of interest from date of maturity).

Regarding the Agreement at hand, the SOC was part of the existing law at the time the parties entered into the Agreement and when they made amendments to it. Therefore, the law of the State of Georgia requires that the parties abide by applicable existing law, i.e , the SOC, but only as to those matters not addressed in the parties' voluntarily negotiated Agreement. On the face of the Agreement, in Section 4.5 1.5, the parties did address "when" BellSouth would be entitled to conduct an audit and the manner in which BellSouth could initiate an audit. These matters were dealt with by the parties and not left to be determined by existing law

The parties' intent not to incorporate the whole of the SOC into the Agreement is apparent from the contract language, specifically the language found in Section 4.5 of Attachment 2 concerning conversion of special access services to EELs.[4] For example, Section 4.5.1 2 references the SOC (the June 2, 2000 Order) five times, providing that the term or phrase "significant amount of local exchange service" is as defined in the SOC and that "[t]he Parties agree to incorporate by reference paragraph 22 of the [SOC] " Section 4.5.1.2 further provides that NewSouth's manner of self-certification regarding usage of circuits for local exchange will be the manner specified in paragraph 29 of the SOC. If the SOC in its entirety were automatically read into the Agreement by operation of law as NewSouth contends, these provisions referencing the SOC would be unnecessary, superfluous and without meaning. The definition of a significant amount of local exchange service would have been a given if the parties had intended the SOC to be incorporated into the Agreement. Moreover, Section 4.5.1.2, which pertains to EELs converted from special access (a topic directly addressed in the SOC),

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reliance on a clause of the General Terms and Conditions of the *Nuvox* agreement, providing that the parties agreed to comply with all applicable law, ignores the holding of the *Central Georgia* that specific terms prevail over broad, conflicting general language See discussion above at p 7.

[4] To the extent that the references in the Agreement to Sections 251 and 252 of the Act and the language of Section 1.5 of Attachment 2 may have created ambiguity juxtaposed against the audit provisions of Section 4.5 (discussed above at pp. 7-8), the rules of contract construction require the Commission to attempt to ascertain the intent of the parties from the four corners of the Agreement before finding that any ambiguity has left an issue of fact. There will be no question of fact if the intention of the parties is ascertained by applying the rules of contract construction. *See Yargus v Smith,* 254 Ga. App. 338, 562 S E 2d 371 (2002); *Harris v. Distinctive Builders, Inc.* 180 Ga. App. 686, 549 S.E 2d 496 (2001); *Travelers Ins. Co v Blakey,* 180 Ga. App. 520, 349 S.E.2d 474 (1986). The discussion in this section of the Order meets the Commission's obligation to apply the rules of construction to ascertain the intent of the parties regarding whether specific contract provisions would have precedence over general statements concerning existing law.

demonstrates the parties' intent not to incorporate the entire SOC in their Agreement, but rather to incorporate specific provisions, e.g , paragraph 22 is incorporated into Section 4.5.1.2 by reference. Again, if NewSouth were correct in its position that the whole of the SOC was incorporated into the Agreement, there would have been no need to re-incorporate paragraph 22, a specific part of the SOC. Clearly, when the parties intended to be bound by SOC provisions, they expressly so provided and precisely identified selected portions for incorporation into the Agreement.

It is noteworthy that Section 4.5.2.2 of the Agreement expressly provides that audits of a certain type of special access conversion, agreed on by the parties but not addressed in the SOC, would be "subject to the requirements set forth in the [SOC], except as expressly modified herein " NewSouth maintains that the SOC audit rights had to be specifically referenced since Section 4.5.2.2 audits pertain to a type of EEL not addressed in the SOC. However, the specific SOC reference in 4.5 2.2 again shows that the parties were precise and careful in making references to the SOC—even noting that the SOC would apply except as modified. The level of specificity and the way the parties selectively and carefully made detailed, unambiguous references to the SOC throughout the section of the Agreement regarding EELs is strong indication that the parties did not consider or intend the SOC in its entirety to govern the provisioning of EELs or BellSouth's auditing of them. On the contrary, with regard to matters addressed in the Agreement, the parties intended the SOC to apply sometimes in part, sometimes in whole, and sometimes not at all, depending upon the express provisions of separate subsections of the Agreement dealing with specific situations

In support of its position regarding the applicability of the SOC to audits of EEL facilities, NewSouth pointed out that BellSouth's initial correspondence giving notice of its intent to conduct an audit stated that BellSouth was acting in accord with the SOC and cited or quoted the SOC several times The Commission does not find this fact to be probative on the issue of whether the SOC was incorporated into the Agreement. BellSouth did not waive its rights under the Agreement by citing to the SOC or claiming its actions were in accord with the SOC.

In summary, the Commission concludes that the parties to the Agreement did not incorporate the SOC, in its entirety, into the Agreement. Therefore, the specific provisions of Section 4.5 1 5 of Attachment 2 of the Agreement govern "when" BellSouth is entitled to audit NewSouth's EELs and the procedure BellSouth must use to initiate such an audit. BellSouth has complied with the conditions of Section 4.5.1 5 by providing 30 days prior notice to NewSouth and indicating that the audit will be at its own expense Since BellSouth has not conducted an audit of NewSouth's EELs at any time since the Agreement was executed in 2001, it is not in violation of the only other restriction on its audit rights, that it not conduct an audit of NewSouth's records more than once in any twelve-month period. Accordingly, BellSouth is entitled under the agreed upon terms of the Agreement to conduct an audit of NewSouth's EELs without having to take any further action to justify either its entitlement or its decision to conduct an audit Notwithstanding this conclusion, the Commission's analysis does not end here.

As stated above, the parties' Agreement governs as to matters specifically addressed in the Agreement, but existing law applies as to matters not addressed in the Agreement While the Agreement contains provisions regarding when BellSouth is entitled to conduct an audit, it does not contain any provision regarding how an audit will be conducted or regarding the selection of third parties to perform EEL audits NewSouth has argued that the SOC conditions an ILEC's audit rights on the use of an "independent auditor." The Commission believes that the SOC provides the appropriate criteria regarding the minimum qualification standards for a third party hired to conduct an EEL audit, inasmuch as the Agreement is silent on this issue.

In the SOC, the FCC relied on and sanctioned the stated agreement between ILECs and CLPs that independent auditors should be used to perform audits of EEL usage [5] Though the SOC did not define the term "independent auditor," the word "auditor" is commonly understood in business and law to mean a professional skilled in conducting audits, who is licensed by a recognized profession and subject to a code of conduct requiring a high level of independence.[6]

BellSouth has chosen American Consultants Alliance ("ACA") to conduct the audit of NewSouth's EELs. Through the affidavit of its Assistant Vice President – Pricing, Jerry Hendrix, BellSouth represents that ACA is not subject to BellSouth's control or influence In communications of record with the FCC, BellSouth represented that prior to hiring ACA to conduct EEL audits of approximately 13 CLPs, including NewSouth, BellSouth had no relationship with ACA The Commission finds that, subject to the SOC's requirement that a third party selected to perform an EEL audit must be an "independent auditor," the selection of the third party auditor is a matter for BellSouth BellSouth is not required to consult with or seek the approval of NewSouth, the party being audited. Similarly, BellSouth is not required to obtain the Commission's approval of its choice of an auditor In choosing a third party to audit NewSouth's EELs, BellSouth is advised to give due consideration to the "independent auditor" requirement. If ACA's audit uncovers NewSouth's alleged non-compliance with local usage certifications and BellSouth files a complaint with the appropriate Commission pursuant

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[5] BellSouth was a signatory to the letter conveying this agreement to the FCC. *February 28, 2000 Joint Letter* (filed *ex parte* on February 29, 2000), CC Docket No 96-98

[6] *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 626 (2003) ("Triennial Review Order" or "TRO"), issued after execution of the Agreement, the FCC affirmed its prior sanctioning of the parties' agreement to conduct audits using independent auditors. The FCC also ruled that the independent auditor must perform its audit in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA"). This requirement that the audits conform to AICPA standards was not part of the SOC and, in its TRO, ¶ 622, the FCC acknowledged that it was adopting auditing procedures "comparable" to but in some respects different from those in the SOC Nevertheless, although requirements newly imposed by the TRO may not apply to audits conducted pursuant to interconnection agreements entered prior to issuance of the TRO, the FCC's affirmation of the requirement that an "independent auditor" conduct EEL audits and its ruling regarding adherence to AICPA standards provide highly persuasive corroboration that the FCC intended the SOC to require, at a minimum, that a licensed professional perform EEL audits.

to Section 4 5.1 5 of Attachment 2 of the Agreement, the credibility of the auditor as well as the credibility of the auditor's work is subject to challenge and may be offered as a defense to any such complaint

CONCLUSION

Having complied with the requirements of Section 4.5.1.5 of Attachment 2 of the Agreement, BellSouth is entitled to audit NewSouth's records in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. BellSouth is not required to make any further or additional showings regarding entitlement to audit NewSouth's records under the Agreement in advance of the audit. While a third party selected to conduct an EEL audit is required by the FCC's SOC to be an independent auditor, the selection of the third party is a matter for BellSouth that is not subject to NewSouth's or the Commission's approval, at least in the first instance. Any challenge regarding the auditor's qualifications or allegations of bias is properly reserved for a complaint proceeding initiated under Section 4 5 1.5 pursuant to the dispute resolution process of the Agreement.

IT IS, THEREFORE, ORDERED as follows:

1. That NewSouth's motion for oral argument is denied;

2. That NewSouth's request for a full evidentiary hearing is denied;

3 That BellSouth's request for summary disposition is allowed;

4. That BellSouth has met the requirements of Section 4.5.1 5 of Attachment 2 of the Agreement and is therefore entitled to audit NewSouth's records to verify the type of traffic being transmitted over EEL circuits, and,

5. That NewSouth shall permit BellSouth's chosen auditor to conduct the audit as previously noticed by BellSouth and the audit should begin no later than 45 days from the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of August, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

tb080904 01

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint to enforce interconnection agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.	DOCKET NO. 040527-TP ORDER NO. PSC-04-0998-FOF-TP ISSUED: October 12, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION TO DISMISS AND PLACING DOCKET IN ABEYANCE

BY THE COMMISSION.

Case Background

On June 4, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint to enforce its interconnection agreement with NuVox Communications, Inc. (NuVox). BellSouth asks that the Commission take the appropriate action to enforce the audit provisions in Section 10.5.4 of the agreement with NuVox and order appropriate relief for NuVox's breach of the agreement. On June 24, 2004, NuVox filed a Motion to Dismiss BellSouth's complaint. On July 1, 2004, BellSouth filed its Response to NuVox's Motion to Dismiss.

Motion to Dismiss

I. Standard of Review

In reviewing a motion to dismiss, this Commission takes all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla 1st DCA, 1963).

Exhibit C

Furthermore, a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

II. Analysis and Conclusion

The crux of NuVox's Motion to Dismiss is based upon the doctrines of collateral estoppel and res judicata. NuVox argues that the parties have litigated identical claims and issues before the Georgia Public Service Commission (GPSC). NuVox argues that the GPSC has evaluated these same claims and issues under the identical relevant provisions of the parties' agreement. NuVox concludes from this that the doctrines of collateral estoppel and res judicata should bar BellSouth from bringing this claim before this Commission.

We reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission. Thus, NuVox's sole reliance on the doctrines of Collateral Estoppel and Res Judicata fails to demonstrate that BellSouth's Complaint does not state a cause of action upon which relief can be granted. Based on the foregoing, we find it appropriate to deny granting NuVox's Motion to Dismiss.

However, while the Georgia Commission's decision is not binding on this Commission, this matter has undergone substantial litigation. In an effort to avoid a potentially unnecessary burden upon the resources of this Commission and for purposes of administrative efficiency, this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues. If such discussions are unsuccessful, this matter shall be set for hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that NuVox's Motion to Dismiss shall be denied. It is further

ORDERED that this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues.

By ORDER of the Florida Public Service Commission this 12th day of October, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

JPR

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Georgia Public Service Commission

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12778
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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

Exhibit D

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

Recce McAlister
Executive Secretary

Date 6-29-04

H. Doug Everett
Chairman

Date. 06-29.04

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.

2. **Term of the Agreement**

2.1 The term of this Agreement shall be three years, beginning June 30, 2000 and shall apply to the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. If as of the expiration of this Agreement, a Subsequent Agreement (as defined in Section 2.2 below) has not been executed by the Parties, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration shall be as set forth in Section 2.4 below.

2.2 The Parties agree that by no later than one hundred and eighty (180) days prior to the expiration of this Agreement, they shall commence negotiations with regard to the terms, conditions and prices of resale and/or local interconnection to be effective beginning on the expiration date of this Agreement ("Subsequent Agreement").

2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2, above, the Parties are unable to satisfactorily negotiate new resale and/or local interconnection terms, conditions and prices, either Party may petition the Commission to establish appropriate local interconnection and/or resale arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection and/or resale arrangements no later than the expiration date of this Agreement. The Parties further agree that in the event the Commission does not issue its order prior to the expiration date of this Agreement, or if the Parties continue beyond the expiration date of this Agreement to negotiate the local interconnection and/or resale arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to the day following the expiration date of this Agreement.

2.4 Notwithstanding the foregoing, in the event that as of the date of expiration of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and either no arbitration proceeding has been filed in accordance with Section 2.3 above, or the Parties have not mutually agreed (where permissible) to extend the arbitration window for petitioning the applicable Commission(s) for resolution of those terms upon which the Parties have not agreed, then either Party may terminate this Agreement upon sixty (60) days notice to the other Party. In the event that BellSouth or TCI terminates this Agreement as provided above, BellSouth shall continue to offer services to TCI pursuant to the terms, conditions and rates set forth in BellSouth's Statement of Generally Available Terms (SGAT) to the extent an SGAT has been approved by the applicable Commission(s). If any state Commission has not approved a BellSouth SGAT, then upon BellSouth's termination of this Agreement as provided herein, BellSouth will continue to provide services to TCI

pursuant to BellSouth's then current standard interconnection agreement. In the event that the SGAT or BellSouth's standard interconnection agreement becomes effective as between the Parties, the Parties may continue to negotiate a Subsequent Agreement, and the terms of such Subsequent Agreement shall be effective retroactive to the day following expiration of this Agreement.

3. **Ordering Procedures**

3.1 To the extent not already provided, State shall provide BellSouth its Carrier Identification Code (CIC), Operating Company Number (OCN), Group Access Code (GAC) and Access Customer Name and Address (ACNA) code as applicable prior to placing its first order.

3.2 The Parties agree to adhere to the BellSouth Local Interconnection and Facility Based Ordering Guide and Resale Ordering Guide, as appropriate for the services ordered, provided however that nothing required in these guides shall override TCI's rights or BellSouth's obligations under this Agreement.

3.3 TCI shall pay charges for Operational Support Systems (OSS) as specifically set forth in Attachments 1, 2, 3, 5 and 7 of this agreement, as applicable.

4. **Parity**

When TCI purchases, pursuant to Attachment 1 of this Agreement, telecommunications services from BellSouth for the purposes of resale to end users, BellSouth shall provide said services so that the services are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its affiliates, subsidiaries and end users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to TCI shall be at least equal in quality to that which BellSouth provides to itself. The provisioning intervals for network elements shall be at least equal to, but no longer than, those that BellSouth provides to itself. BellSouth shall make available network elements to TCI on the same terms and conditions as BellSouth provides to its affiliates, subsidiaries, end-users and any other carriers. The quality of the interconnection between the networks of BellSouth and the network of TCI shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by end users and service quality as perceived by TCI.

5. **White Pages Listings**

BellSouth shall provide TCI and its customers access to white pages directory listings under the following terms:

5.1 Listings. BellSouth or its agent will include TCI residential and business customer listings in the appropriate White Pages (residential and business) or alphabetical directories. Directory listings will make no distinction between TCI and BellSouth subscribers.

5.2 Rates. BellSouth and TCI will provide to each other subscriber primary listing information in the White Pages at no charge except for applicable service order charges as set forth in the applicable tariffs.

5.3 Procedures for Submitting TCI Subscriber Information. BellSouth will provide to TCI a magnetic tape or computer disk containing the proper format for submitting subscriber listings. TCI will be required to provide BellSouth with directory listings and daily updates to those listings, including new, changed, and deleted listings, in an industry-accepted format. These procedures are detailed in BellSouth's Local Interconnection and Facility Based Ordering Guide.

5.3.1 Notwithstanding any provision(s) to the contrary, TCI agrees to provide to BellSouth, and BellSouth agrees to accept, TCI's Subscriber Listing Information (SLI) relating to TCI's customers in the geographic area(s) covered by this Interconnection Agreement. TCI authorizes BellSouth to release all such TCI SLI provided to BellSouth by TCI to qualifying third parties via either license agreement or BellSouth's Directory Publishers Database Service (DPDS), General Subscriber Services Tariff, Section A38.2, as the same may be amended from time to time. Such TCI SLI shall be intermingled with BellSouth's own customer listings of any other CLEC that has authorized a similar release of SLI. Where necessary, BellSouth will use good faith efforts to obtain state commission approval of any necessary modifications to Section A38.2 of its tariff to provide for release of third party directory listings, including modifications regarding listings to be released pursuant to such tariff and BellSouth's liability thereunder. BellSouth's obligation pursuant to this Section shall not arise in any particular state until the commission of such state has approved modifications to such tariff.

5.3.2 No compensation shall be paid to TCI for BellSouth's receipt of TCI SLI, or for the subsequent release to third parties of such SLI. In addition, to the extent BellSouth incurs costs to modify its systems to enable the release of TCI's SLI, or costs on an ongoing basis to administer the release of TCI SLI, TCI shall pay to BellSouth its proportionate share of the reasonable and nondiscriminatory costs associated therewith.

5.3.3 BellSouth shall not be liable for the content or accuracy of any SLI provided by TCI under this Agreement. TCI shall indemnify, hold harmless and defend

BellSouth from and against any damages, losses, liabilities, demands claims, suits, judgments, costs and expenses (including but not limited to reasonable attorneys' fees and expenses) arising from BellSouth's tariff obligations or otherwise and resulting from or arising out of any third party's claim of inaccurate TCI listings or use of the SLI provided pursuant to this Agreement. BellSouth shall forward to TCI any complaints received by BellSouth relating to the accuracy or quality of TCI listings.

5.3.4 Listings and subsequent updates will be released consistent with BellSouth system changes and/or update scheduling requirements.

5.4 Unlisted/Non-Published Subscribers. TCI will be required to provide to BellSouth the names, addresses and telephone numbers of all TCI customers that wish to be omitted from directories.

5.5 Inclusion of TCI Customers in Directory Assistance Database. BellSouth will include and maintain TCI subscriber listings in BellSouth's directory assistance databases at no charge. BellSouth and TCI will adhere to appropriate procedures regarding lead time, timeliness, format and content of listing information as set forth in the BellSouth Local Interconnection and Facility Based Ordering Guide.

5.6 Listing Information Confidentiality. BellSouth will accord TCI's directory listing information the same level of confidentiality that BellSouth accords its own directory listing information, and BellSouth shall limit access to TCI's customer proprietary confidential directory information to those BellSouth employees who are involved in the preparation of listings.

5.7 Optional Listings. Additional listings and optional listings will be offered by BellSouth at tariffed rates as set forth in the General Subscriber Services Tariff.

5.8 Delivery. BellSouth or its agent shall deliver White Pages directories to TCI subscribers at no charge and within the same time frame as BellSouth delivers such directories to its own subscribers.

6. **Bona Fide Request/New Business Request Process for Further Unbundling**

Subject to 47 C.F.R. 51.317 and 47 C.F.R. 51.319 BellSouth shall, upon request of TCI, provide to TCI access to network elements not identified in this agreement at any technically feasible point for the provision of TCI's telecommunications service. . Any request by TCI for access to a network element, interconnection option, or for the provisioning of any service or product that is not already available shall be treated as a Bona Fide Request/New Business Request, and shall be submitted to BellSouth pursuant to the Bona Fide Request/New Business Request process set forth in Attachment 12 of this Agreement.

7. **Local Dialing Parity**

BellSouth shall provide local dialing parity as described in the Act and required by FCC rules, regulations and policies. TCI End Users shall not have to dial any greater number of digits than BellSouth End Users to complete the same call. In addition, TCI End Users shall experience at least the same service quality as BellSouth End Users in terms of post-dial delay, call completion rate and transmission quality.

8. **Court Ordered Requests for Call Detail Records and Other Subscriber Information**

8.1 To the extent technically feasible, BellSouth maintains call detail records for TCI end users for limited time periods and can respond to subpoenas and court ordered requests for this information. BellSouth shall maintain such information for TCI end users for the same length of time it maintains such information for its own end users.

8.2 TCI agrees that BellSouth will respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to TCI end users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.3 TCI agrees that in cases where TCI receives subpoenas or court ordered requests for call detail records for targeted telephone numbers belonging to TCI end users, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.4 Where BellSouth is providing to TCI telecommunications services for resale or providing to TCI the local switching function, then TCI agrees that in those cases

where TCI receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to TCI end users, if TCI does not have the requested information, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Where the request has been forwarded to BellSouth, billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.5 TCI will provide TCI end user and/or other customer information that is available to TCI in response to subpoenas and court orders for their own customer records. BellSouth will redirect subpoenas and court ordered requests for TCI end user and/or other customer information to TCI for the purpose of providing this information to the law enforcement agency.

9. **Liability and Indemnification**

9.1 BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing, or its lack of action in preventing, unbillable or uncollectible TCI revenues.

9.2 TCI Liability. In the event that TCI consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of TCI under this Agreement.

9.3 Liability for Acts or Omissions of Third Parties. Neither BellSouth nor TCI shall be liable for any act or omission of another telecommunications company providing a portion of the services provided under this Agreement.

9.4 Limitation of Liability.

9.4.1 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by TCI, any TCI Customer or by any other Person or entity, for damages associated with any of the services provided by BellSouth pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, BellSouth's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by TCI, any TCI Customer or any other Person or entity, resulting from the gross negligence or willful misconduct of BellSouth, shall not be subject to such limitation of liability.

9.4.2 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by BellSouth, any BellSouth Customer or by any other Person or entity, for damages associated with any of the services provided by TCI

pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, TCI's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by BellSouth, any BellSouth Customer or any other Person or entity resulting from the gross negligence or willful misconduct of TCI, shall not be subject to such limitation of liability.

9.4.3 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its Customer and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to Customer or third Party for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such Loss and (ii) Consequential Damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a Loss as a result thereof, such Party shall indemnify and reimburse the other Party for that portion of the Loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such Loss.

9.4.4 Neither BellSouth nor TCI shall be liable for damages to the other's terminal location, POI or other company's customers' premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a company's negligence or willful misconduct or by a company's failure to properly ground a local loop after disconnection.

9.4.5 Except in case of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the Services, or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

9.5 Indemnification for Certain Claims. The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or

damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement.

9.6 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

10. Intellectual Property Rights and Indemnification

10.1 No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. TCI is strictly prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark.

10.2 Ownership of Intellectual Property. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.

10.3 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 8 of this Agreement.

10.4 Claim of Infringement. In the event that use of any facilities or equipment (including software), becomes, or in reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense, but subject to the limitations of liability set forth below:

10.4.1 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or

10.4.2 obtain a license sufficient to allow such use to continue.

10.4.3 In the event 9.4.1 or 9.4.2 are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.

10.5 Exception to Obligations. Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.

10.6 Exclusive Remedy. The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.

11. **Treatment of Proprietary and Confidential Information**

11.1 Confidential Information. It may be necessary for BellSouth and TCI to provide each other with certain confidential information, including trade secret information, including but not limited to, technical and business plans, technical information, proposals, specifications, drawings, procedures, customer account data, call detail records and like information (hereinafter collectively referred to as "Information"). All Information shall be in writing or other tangible form and clearly marked with a confidential, private or proprietary legend and that the Information will be returned to the owner within a reasonable time. The Information shall not be copied or reproduced in any form. BellSouth and TCI shall receive such Information and not disclose such Information. BellSouth and TCI shall protect the Information received from distribution, disclosure or

dissemination to anyone except employees of BellSouth and TCI with a need to know such Information and which employees agree to be bound by the terms of this Section. BellSouth and TCI will use the same standard of care to protect Information received as they would use to protect their own confidential and proprietary Information.

11.2 Exception to Obligation. Notwithstanding the foregoing, there will be no obligation on BellSouth or TCI to protect any portion of the Information that is: (1) made publicly available by the owner of the Information or lawfully disclosed by a Party other than BellSouth or TCI; (2) lawfully obtained from any source other than the owner of the Information; or (3) previously known to the receiving Party without an obligation to keep it confidential.

12. **Assignments**

Neither Party hereto may assign or otherwise transfer its rights or obligations under this Agreement, except with the prior written consent of the other Party hereto, which consent shall not be unreasonably withheld; provided, however, that, so long as the performance of any assignee is guaranteed by the assignor: (i) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other Party, to any Affiliate of such Party and (ii) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other, to any person or entity that obtains control of all or substantially all of such assigning Party's assets, by stock purchase, asset purchase, merger, foreclosure, or otherwise. Each Party shall notify the other in writing of any such assignment. Nothing in this Section is intended to impair the right of either Party to utilize subcontractors.

13. **Escalation Procedures**

Each Party hereto shall provide the other party hereto with the names and telephone numbers or pagers of their respective managers up to the Vice Presidential level for the escalation of unresolved matters relating to their performance of their duties under this Agreement. Each Party shall supplement and update such information as necessary to facilitate prompt resolution of such matters. Each Party further agrees to establish an automatic internal escalation procedure relating to unresolved disputes arising under this Agreement.

14. **Expedite Procedures**

Each Party shall promptly establish a nondiscriminatory procedure for expediting installation and repair of facilities provided pursuant to this Agreement.

15. **Resolution of Disputes**

Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission, the FCC or a court of law for resolution of the dispute. Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their obligations under the Agreement while any dispute resolution is pending

16. **Taxes**

16.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

16.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

16.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

16.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

16.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

16.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

16.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

16.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing

Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.

16.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party.

16.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.

16.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing

Party at the time that the respective service is billed. The Parties agree to use best efforts to bill taxes promptly.

16.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. Both Parties shall retain the right to contest the imposition of such taxes and fees. However, the Party contesting the imposition of such taxes and fees shall bear the resulting expense.

16.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

17. Network Maintenance and Management

17.1 The Parties shall work cooperatively to implement this Agreement. The Parties shall exchange appropriate information (e.g., maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government, etc.) as reasonably required to implement and perform this Agreement.

17.2 Each Party hereto shall design, maintain and operate their respective networks as necessary to ensure that the other Party hereto receives service quality which is consistent with generally accepted industry standards at least at parity with the network service quality given to itself, its Affiliates, its End Users or any other Telecommunications Carrier.

17.3 Neither Party shall use any service or facility provided under this Agreement in a manner that impairs the quality of service to other Telecommunications Carriers' or to either Party's End Users. Each Party will provide the other Party notice of any such impairment at the earliest practicable time.

17.4 BellSouth agrees to provide TCI prior notice consistent with applicable FCC rules and the Act of changes in the information necessary for the transmission and routing of services using BellSouth's facilities or networks, as well as other changes that affect the interoperability of those respective facilities and networks. This Agreement is not intended to limit BellSouth's ability to upgrade its network through the incorporation of new equipment, new software or otherwise so long as such upgrades are not inconsistent with BellSouth's obligations to TCI under the terms of this Agreement.

18. **Changes In Subscriber Carrier Selection**

18.1 Both Parties hereto shall apply all of the principles set forth in 47 C.F.R. § 64.1100 to the process for End User selection of a primary Local Exchange Carrier. BellSouth shall not require a disconnect order from an TCI Customer or another LEC in order to process an TCI order for Resale Service for an TCI End User. Until the FCC or the Commission adopts final rules and procedures regarding a Customer's selection of a primary Local Exchange Carrier, unless already done so, TCI shall deliver to BellSouth a Blanket Representation of Authorization that applies to all orders submitted by TCI under this Agreement that require a primary Local Exchange Carrier change. Both Parties hereto shall retain on file all applicable documentation of authorization, including letters of authorization, relating to their End User's selection as its primary Local Exchange Carrier, which documentation shall be available for inspection by the other Party hereto upon reasonable request during normal business hours.

18.2 If an End User denies authorizing a change in his or her primary Local Exchange Carrier selection to a different local exchange carrier ("Unauthorized Switching"),

the Party receiving the End User complaint shall switch or caused to be switched that End User back to his preferred carrier in accordance with Applicable Law.

19. **Force Majeure**

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

20. **Year 2000 Compliance**

Each Party warrants that it has implemented a program the goal of which is to ensure that all software, hardware and related materials (collectively called "Systems") delivered, connected with BellSouth or supplied in the furtherance of the terms and conditions specified in this Agreement: (i) will record, store, process and display calendar dates falling on or after January 1, 2000, in the same manner, and with the same functionality as such software records, stores, processes and calendar dates falling on or before December 31, 1999; and (ii) shall include without limitation date data century recognition, calculations that accommodate same century and mulucentury formulas and date values, and date data interface values that reflect the century.

21. **Modification of Agreement**

21.1 BellSouth shall make available, pursuant to 47 USC § 252(i) and the FCC rules and regulations regarding such availability, to TCI at the same rates and terms and conditions of any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC § 252. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement and for the identical term of such other agreement.

21.2 If TCI changes its name or makes changes to its identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of TCI to notify

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.

24. **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.

25. **Notices**

25.1 Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, addressed to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

TriVergent Communications, Inc.

TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601

Hamilton E. Russell, III
Executive Vice President of Regulatory Affairs
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: brussell@trivergent.com
Phone: 864-331-7323
Facsimile: 864-331-7144

and

Riley Murphy, Esq.
General Counsel
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: rmurphy@trivergent.com
Phone: 864-331-7318
Facsimile: 864-331-7146

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

25.2 Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

25.3 BellSouth shall provide TCI notice via Internet posting of price changes and of changes to the terms and conditions of services available for resale.

26. **Relationship of Parties**

This Agreement shall not establish, be interpreted as establishing, or be used by either Party to establish, or to represent their relationship as any form of agency, partnership or joint venture. Neither Party shall have any authority to bind the other or to act as an agent for the other unless written authority, separate form this Agreement, is provided. Nothing in this Agreement shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties. Nothing herein shall be construed as making either Party responsible or liable for the obligations and undertakings of the other Party.

27. **Third Party Beneficiaries**

This Agreement does not provide, and shall not be construed to provide, third parties with any benefit, remedy, claim, liability, reimbursement, cause of action, or other privilege.

28. **Cooperation on Preventing End User Fraud**

The Parties agree to cooperate fully with one another to investigate, minimize, prevent, and take corrective action in cases of fraud.

29. **Good Faith Performance**

In the performance of their obligations under this Agreement the Parties will act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action will not be unreasonably delayed, withheld or conditioned.

30. **Independent Contractors**

Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement, and retains full control over the employment, direction, compensation and discharge of its employees assisting in the performance of such obligations. Each Party shall be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes and all other regulations governing such matters. Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (i) its own acts and performance of all obligations imposed by Applicable Law in connection with its activities, legal status and property, real or personal and, (ii) the acts of its own Affiliates, employees, agents and contractors during the performance of the Party's obligations hereunder.

31. **Subcontracting**

If any obligation is performed through a subcontractor, each Party shall remain fully responsible for the performance of this Agreement in accordance with its terms, including any obligations either Party performs through subcontractors, and each Party shall be solely responsible for payments due the Party's subcontractors. No contract, subcontract or other Agreement entered into by either Party with any third party in connection with the provision of any facilities or services provided herein, shall provide for any indemnity, guarantee or assumption of liability by, or other obligation of, the other Party to this Agreement with respect to such arrangement, except as consented to in writing by the other Party. No subcontractor shall be deemed a third party beneficiary for any purposes under this Agreement. Any subcontractor who gains access to CPNI or Confidential Information covered by this Agreement shall be required by the subcontracting Party to protect such CPNI or Confidential Information to the same extent that the subcontracting Party is required to protect the same under the terms of this Agreement.

32. **Severability**

If any term, condition or provision of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not invalidate the entire Agreement, unless such construction would be unreasonable. The Agreement shall be construed as if it did not contain the invalid or unenforceable provision or provisions, and the rights and obligations of each Party shall be construed and enforced accordingly. Provided, however, that in the event such invalid or unenforceable provision or provisions are essential elements of this Agreement and substantially impair the rights or obligations of either Party, the Parties shall promptly negotiate a replacement provision or provisions. If impasse is reached, the Parties will resolve said impasse under the dispute resolution procedures set forth in Section 13.

33. **Survival of Obligations**

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, and any obligation of a Party under the provisions regarding indemnification, Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination thereof.

34. **Customer Inquiries**

34.1 Each Party shall refer all questions regarding the other Party's services or products directly to the other Party at a telephone number specified by that Party.

34.2 Each Party shall ensure that each of their representatives who receive inquiries regarding the other Party's services: (i) provide the numbers described in Section 46.1 to callers who inquire about the other Party's services or products, and (ii) do

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.

39. **Rule of Construction**

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

40. **Headings of No Force or Effect**

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

41. **Multiple Counterparts**

This Agreement may be executed multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

42. **Implementation of Agreement**

If TCI is a facilities based provider or a facilities based and resale provider, this section shall apply. Within 60 days of the execution of this Agreement or within 30 days of TCI placing its first order, whichever is later, the Parties will adopt a schedule for the implementation of the Agreement. The schedule shall state with specificity time frames for submission of including but not limited to, network design, interconnection points, collocation arrangement requests, pre-sales testing and full operational time frames for the business and residential markets. An implementation template to be used for the implementation schedule is contained in Attachment 10 of this Agreement.

43. **Additional Fair Competition Requirements**

43.1 In the event that either Party transfers facilities or other assets to an Affiliate which are necessary to comply with its obligations under this Agreement, the obligations hereunder shall survive and transfer to such Affiliate.

43.2 BellSouth shall allow local exchange customers of TCI to select BellSouth for the provision of intraLATA toll services on a nondiscriminatory basis; provided, however, that prior to establishment of BellSouth as the intraLATA toll carrier for TCI local exchange customers, the Parties shall negotiate a billing and collections agreement on commercially reasonable terms whereby TCI shall bill the customer on BellSouth's behalf and shall collect from the customer and remit to BellSouth intraLATA toll revenues. TCI agrees to bill its customers on BellSouth's behalf for both presubscribed and "dial around" intraLATA toll traffic. The Parties shall exchange customer record data on a timely basis as necessary to bill such customers for intraLATA toll usage.

43.3 BellSouth shall not use information derived from providing services or facilities to TCI to create a lead or other information base for a "winback" sales program.

44. **Filing of Agreement**

Upon execution of this Agreement it shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act. If the regulatory agency imposes any filing or public interest notice fees regarding the filing or approval of the Agreement, TCI shall be responsible for publishing the required notice and the publication and/or notice costs shall be borne by TCI.

45. **Entire Agreement**

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

This Agreement may include attachments with provisions for the following services:

Network Elements and Other Services
Local Interconnection
Resale
Collocation

The following services are included as options for purchase by TCI. TCI shall elect said services by written request to its Account Manager if applicable.

Optional Daily Usage File (ODUF)
Enhanced Optional Daily Usage File (EODUF)
Access Daily Usage File (ADUF)
Line Information Database (LIDB) Storage
Centralized Message Distribution Service (CMDS)
Calling Name (CNAM)

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year above first written.

BellSouth Telecommunications, Inc.

Signature

Jerry D. Heaton

Name

Sr. Director

Title

06/30/2000

Date

TriVergent Communications, Inc.

Signature

Riley M. Murphy

Name

Sr. Vice President and General Counsel

Title

June 30, 2000

Date

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Centralized Message Distribution System is the Telcordia (formerly BellCore) administered national system, based in Kansas City, Missouri, used to exchange Exchange Message Interface (EMI) formatted data among host companies.

Commission is defined as the appropriate regulatory agency in each of the states in BellSouth's nine state region: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Daily Usage File is the compilation of messages or copies of messages in standard Exchange Message Interface (EMI) format exchanged from BellSouth to a CLEC.

Exchange Message Interface is the nationally administered standard format for the exchange of data among the Exchange Carriers within the telecommunications industry.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Intercompany Settlements (ICS) is the revenue associated with charges billed by a company other than the company in whose service area such charges were incurred. ICS on a national level includes third number and credit card calls and is administered by Telcordia (formerly BellCore)'s Calling Card and Third Number Settlement System (CATS). Included is traffic that originates in one Regional Bell Operating Company's (RBOC) territory and bills in another RBOC's territory.

Intermediary Function is defined as the delivery of traffic from TCI, a CLEC other than TCI or another telecommunications carrier through the network of BellSouth or TCI to an end user of TCI, a CLEC other than TCI or another telecommunications carrier.

Local Interconnection is defined as 1) the delivery of local traffic to be terminated on each Party's local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; 2) the LEC network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

Local Traffic is as defined in Attachment 3.

Message Distribution is routing determination and subsequent delivery of message data from one company to another. Also included is the interface function with CMDS, where appropriate.

Multiple Exchange Carrier Access Billing ("MECAB") means the document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF:), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by Telcordia (formerly BellCore) as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or CLECs or by one LEC in two or more states within a single LATA.

Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the following Network Elements: unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; signaling; access to call-related databases; dark fiber as set forth in Attachment 2 of this Agreement. BellSouth will provide packet switching capability only to the extent required pursuant to FCC rules. BellSouth will make Operator Call Processing and Directory Assistance Services available at the rates set forth in Exhibit C of Attachment 2 of this Agreement.

Non-Intercompany Settlement System (NICS) is the Telcordia (formerly BellCore) system that calculates non-intercompany settlements amounts due from one company to another within the same RBOC region. It includes credit card, third number and collect messages.

Percent of Interstate Usage (PIU) is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate "non-intermediary" minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all "non-intermediary", local , interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating Party pays services.

Percent Local Usage (PLU) is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all "non-intermediary" local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating Party pays minutes of use.

Revenue Accounting Office (RAO) Status Company is a local exchange company/alternate local exchange company that has been assigned a unique RAO code. Message data exchanged

among RAO status companies is grouped (i.e. packed) according to From/To/Bill RAO combinations.

Service Control Points ("SCPs") are defined as databases that store information and have the ability to manipulate data required to offer particular services.

Signal Transfer Points ("STPs") are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. STPs enable the exchange of Signaling System 7 ("SS7") messages between switching elements, database elements and STPs. STPs provide access to various BellSouth and third party network elements such as local switching and databases.

Signaling links are dedicated transmission paths carrying signaling messages between carrier switches and signaling networks. Signal Link Transport is a set of two or four dedicated 56 kbps transmission paths between TCI designated Signaling Points of Interconnection that provide a diverse transmission path and cross connect to a BellSouth Signal Transfer Point.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 ("Act") means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

SCHEDULE OF TRIVERGENT COMMUNICATIONS, INC. OPERATING AFFALIATES

Trivergent Communications, Inc. (AL, FL, GA, KY, LA, MS, NC, SC, TN)

Attachment 2

Network Elements and Other Services

TABLE OF CONTENTS

ACCESS TO NETWORK ELEMENTS AND OTHER SERVICES

1. Introduction

1.1 Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the Network Elements, unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; operator systems; signaling; access to call-related databases; dark fiber as set forth in this Attachment.

1.2 BellSouth shall, upon request of TCI, and to the extent technically feasible, provide to TCI access to its network elements for the provision of TCI's telecommunications service. If no rate is identified in the contract, the rate for the specific service or function will be as set forth in applicable BellSouth tariff or as negotiated by the Parties upon request by either Party.

1.3 TCI may purchase network elements and other services from BellSouth for the purpose of combining such network elements in any manner TCI chooses to provide telecommunication services to its intended users, including recreating existing BellSouth services. With the exception of the sub-loop elements which are located outside of the central office, BellSouth shall deliver the network elements purchased by TCI for combining to the designated TCI collocation space. The network elements shall be provided as set forth in this Attachment.

1.4 BellSouth will provide the following combined network elements for purchase by TCI. The rate of the following combined network elements is the sum of the individual element prices as set forth in this Attachment. Order Coordination as defined in Section 2 of Attachment 2 of this Agreement is available for each of these combinations:

- SL1 or SL2 loop and cross connect
- Port and cross connect
- Port and cross connect and common (shared) transport
- Port and vertical features
- SL2 Loop with loop concentration
- Port and common (shared) transport
- SL1 or SL2 Loop and LNP

10.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

10.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

10.4 Other Network Element Combinations

In the state of Georgia, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below: (1) Existing Combinations of network elements other than EELs; and (2) combinations of network elements other than EELs that are not Existing Combinations but that BellSouth ordinarily combines in its network. In all other states, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below, combinations of network elements other than EELs only to the extent such combinations are Existing Combinations.

10.5 Special Access Service Conversions

10.5.1 TCI may not convert special access services to combinations of loop and transport network elements, whether or not TCI self-provides its entrance facilities (or obtains entrance facilities from a third party), unless TCI uses the combination to provide a "significant amount of local exchange service" (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer.

10.5.2 For the purpose of special access conversions, a "significant amount of local exchange service" is as defined in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"). The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order. When TCI requests conversion of special access circuits, TCI will self-certify to BellSouth in the manner specified in paragraph 29 of the June 2, 2000 Order that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where TCI is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order. In such case, TCI may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon TCI's request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance.

10.5.3 Upon request for conversions of up to 15 circuits from special access to EELs, BellSouth shall perform such conversions within seven (7) days from BellSouth's receipt of a valid, error free service order from TCI. Requests for conversions of

fifteen (15) or more circuits from special access to EELs will be provisioned on a project basis. Conversions should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when TCI requests a conversion. The Access Service Request process will be used for conversion requests.

10.5.4 BellSouth may, at its sole expense, and upon thirty (30) days notice to TCI, audit TCIs records not more than one in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that TCI is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from TCI.

10.6 Rates

10.6.1 Georgia

10.6.1.1 The non-recurring and recurring rates for the EEL combinations set forth in 10.3, whether or not such EELs are Existing Combinations, are as set forth in Exhibit A of this Attachment.

10.6.1.2 On an interim basis, for combinations of loop and transport network elements not set forth in Section 10.3, where the elements are not Existing Combinations but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

10.6.1.3 To the extent that TCI seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, TCI, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

10.6.2 All Other States

10.6.2.1 Subject to Section 10.2.3 and 10.4 preceding, for all other states, the non-recurring and recurring rates for the Existing Combinations of EELs set forth in

BellSouth Telecommunications
Interconnection Services
675 W Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

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

Exhibit F

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 electronic mail)
Jodie Donovan-May, FCC (via electronic mail)

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)

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.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 04-00133

AFFIDAVIT OF SHELLEY PADGETT
ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC.

Comes the affiant, Shelley Padgett, and being duly sworn, deposes and says:

1. My name is Shelley Padgett. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I currently am Assistant Director-Regulatory and Policy and Support for BellSouth Telecommunications, Inc. In that capacity I am responsible for transport issues, including EELs and EEL audits.

2 Complainant BellSouth, a wholly-owned subsidiary of BellSouth Corp , is a Georgia corporation with its principal place of business located at 675 W. Peachtree Street, N.E., Atlanta, Georgia, 30375

3. BellSouth is an incumbent local exchange carrier providing telecommunications services in a nine-state region (South Carolina, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, and Tennessee).

4. Defendant NuVox is a Delaware corporation with its principal place of business at 301 North Main Street, Suite 5000, Greenville, South Carolina 29601.

5. NuVox is a competitive local exchange carrier providing local and long distance voice and data services throughout BellSouth's service territory.

6. On June 30, 2000, the Parties entered into an interconnection agreement that afforded NuVox the ability to order Enhanced Extended Links ("EELs") from BellSouth (the

"Agreement"). The Agreement also afforded NuVox the right to convert special access circuits to EELs so long as NuVox was meeting one of three safe harbors set forth in the Agreement (and also set forth in the *Supplemental Order Clarification*) and so long as NuVox provided a significant amount of local exchange traffic over the EEL. Agreement, Att. 2, § 10.5.2, Exh. A.

7. In 2000, pursuant to the conversion process set forth in the Agreement, NuVox began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. NuVox self-certified that the EELs were to be used to provide a "significant amount of local exchange service" based on the "exclusive provider of local exchange service" safe harbor option provided for under the Agreement. Since 2000, NuVox has requested conversion of approximately 443 circuits from special access services to UNEs in Tennessee.

8. Pursuant to the terms of the Agreement, BellSouth processed the orders for conversions from special access circuits to EELs based on NuVox's self-certifications. At no time did BellSouth demand or request an audit of any NuVox circuits prior to the conversion of those circuits from special access to EELs.

9. BellSouth has not previously audited NuVox's EELs in Tennessee.

10. This concludes my statement.

Shelley Padgett

Affirmed to before me this 2nd day of March, 2005.

Notary Public

575008

EUDINE J. DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 04-00133

AFFIDAVIT OF JERRY D. HENDRIX

ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC.

Comes the affiant, Jerry Hendrix, and being duly sworn, deposes and says:

1. My name is Jerry Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I am currently Assistant Vice President – Pricing at BellSouth Telecommunications, Inc. ("BellSouth"). I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers ("CLECs") Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Regulatory Organization. I have been employed with BellSouth since 1979.

2. BellSouth Telecommunications, Inc. ("BellSouth") is an incumbent local exchange carrier that provides local service in a nine-state region in the Southeast. NuVox provides telecommunications services in each of BellSouth's nine states.

3. I executed the Interconnection Agreement with NuVox on behalf of BellSouth. The Parties voluntarily negotiated the terms and conditions of the Agreement pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 ("Act"). The Parties did not arbitrate any of the provisions in the Agreement before a state public service commission.

4. In Section 10.5.4 of the Agreement, the Parties agreed that BellSouth would have an unqualified right to audit NuVox's Tennessee EELs for compliance with the requirement that

Exhibit H

NuVox provide a significant amount of local exchange traffic over the EELs, upon 30 days' notice and at BellSouth's expense. Agreement, Att. 2, § 10.5.4, Exh. A. The parties specifically did not incorporate the terms of the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* into the audit provision. BellSouth is entitled to conduct an audit of NuVox's EELs under these terms.

5. BellSouth intends to engage an independent auditor to audit NuVox's EELs in accordance with the terms of the Agreement. The firm thus selected is not related to BellSouth nor affiliated with BellSouth in any way. Nor is the firm subject to the control or influence of BellSouth or dependent on BellSouth.

6. Pursuant to the Agreement, BellSouth requested an audit of NuVox's EELs on March 15, 2002. On that date, I sent NuVox a letter notifying NuVox of BellSouth's intent to conduct an audit thirty days hence "to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." My letter informed NuVox that an independent auditor would conduct the audit, and that BellSouth would incur the costs of the audit (unless the auditors found NuVox's circuits to be non-compliant). *See Letter from Jerry Hendrix to Hamilton Russell*, 3/15/02, Exh. B

7. Between March 2002 and May 2002, BellSouth and NuVox exchanged correspondence and had discussions regarding BellSouth's audit request. Despite the fact that BellSouth satisfied all prerequisites for BellSouth to conduct the audit under the Agreement, NuVox persistently refused to permit the audit.

8. In support of its refusal to permit the audit, NuVox has cited the FCC's *Supplemental Order Clarification*, in seeming disregard of the actual Agreement. *See, e.g., Letter from John Heitmann to Parkey Jordan,* 4/9/02, Exh. C. Even if the Authority determines that the

Supplemental Order Clarification is somehow relevant to this dispute, which it is not, BellSouth has met the alleged criteria set forth in that *Order*. BellSouth has provided NuVox with thirty days' notice of its intent to audit the Tennessee EELs with an independent auditor. And, even if BellSouth were required to articulate or "demonstrate" a "concern" before initiating an audit, BellSouth has done so, as evidenced (1) by BellSouth's April 1, 2002 e-mail setting forth BellSouth's concerns, and, further, (2) BellSouth's analysis of its own customer records which showed that a number of NuVox's EEL-served customers were also BellSouth local exchange service customers. *See e-mail from Parkey Jordan to John Heitmann,* 4/1/02, Exh. D, BellSouth's Complaint at ¶¶ 18-21.

9. The parties made extensive efforts to resolve this dispute prior to the filing of the Complaint.

10. This concludes my statement

Jerry D. Hendrix

Affirmed to before me this 2nd day
of March, 2005

Notary Public

575029 RUDOLF J DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006

-----Original Message-----
From: Jordan, Parkey
Sent: Monday, April 01, 2002 5:10 PM
To: 'jheltmann@kelleydrye.com'
Subject: Nuvox EEL Audit

9FZ001I.DOC
(38 KB)

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.

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.3 Obligations of the Customer (Cont'd)

2.3 10 Jurisdictional Report Requirements (Cont'd)

(D) Audit Results for BellSouth SWA

(1) Audit results will be furnished to the customer via Certified U.S. Mail (return receipt requested). The Telephone Company will adjust the customer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to completion of the audit, and the usage for the two (2) quarters following the completion of the audit After that time, the customer may report a revised PIU pursuant to (A) preceding. If the revised PIU submitted by the customer represents a deviation of 5 percentage points or more, from the audited PIU, and that deviation is not due to identifiable reasons, the provisions in (B) preceding may be applied

(2) Both credit and debit adjustments will be made to the customer's interstate access charges for the specified period to accurately reflect the interstate usage for the customer's account consistent with Section 2.4.1 following.

(3) If, as a result of an audit conducted by an independent auditor, a customer is found to have over-stated the PIU by 20 percentage points or more, the Telephone Company shall require reimbursement from the customer for the cost of the audit. Such bill(s) shall be due and paid in immediately available funds 30 days from receipt and shall carry a late payment penalty as set forth in Section 2.4.1 following if not paid within the 30 days.

-----Original Message-----
From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Tuesday, April 09, 2002 4:20 PM
To: 'parkey.jordan@bellsouth.com'; 'shelley.walls@bellsouth.com'
Cc: 'brussell@bellsouth.com'
Subject: NVX/BST EEL Audit Memo

<<(DC01-179890-v1) NVX BST EEL Audit Memo.DOC>>

Parkey and Shelley,
Attached, please find NuVox's response to your April 1 e-mail/memo and follow-up to our two most recent calls.
Thanks, John

KELLEY DRYE & WARREN LLP

MEMORANDUM

TO:	**Parkey Jordan** **Shelley Walls**	**FILE NO:**	**012687.0001**
CC:	**Bo Russell**		
FROM:	**John Heitmann**		
DATE:	**April 9, 2002**		
RE:	**BST SPA to EEL Conversion Audit**		

This memorandum is in response to Parkey's e-mail memorandum of Monday, April 1, 2002 and serves as a follow-up to calls between the parties on this matter conducted on Wednesday, April 3 and on April 8, 2002. In sum, I believe that, through our discussions, we have made significant progress addressing threshold issues related to BellSouth's proposed audit of NuVox's converted EEL circuits. However, at this point, the parties remain far apart on two issues and I believe we agree that it does not appear likely that the parties will agree on how to resolve those two issues on their own. Those two threshold issues are: (1) identification of a reason (*i.e*, "concern") that BellSouth has for requesting the audit, and (2) selection of an independent auditor. Below, I will recap NuVox's position on those issues, as well as with respect to the other threshold issues discussed previously. It is NuVox's understanding that BellSouth plans to weigh its options internally regarding the two "impasse" issues. NuVox remains open to additional discussions on those issues and with respect to any other issues concerning the proposed audit. NuVox will continue to cooperate with BellSouth as the parties endeavor to sort through and resolve this and numerous other disputes that currently cloud what otherwise should be a healthy and substantial business relationship between the parties, as we appreciate that both sides would benefit substantially if fewer resources were devoted to dispute resolution.

1. Reason for the Audit (Concern re Certified Compliance)

As identified on today's call, this is the first of two likely "impasse" issues. As stated in previous correspondence, NuVox insists that BellSouth identify a reason (*i.e.*, a "concern") that triggers its limited right to conduct an audit. Because the FCC's local use restrictions (applicable only to EEL conversions) are "interim", the FCC determined that audit rights would be limited (indeed, it only granted audit rights after the use restrictions were extended beyond their initial term). Thus, circuit conversion audits may be neither routine nor random.

In Parkey's April 1 letter, BellSouth offered the following reasons for the audit request: (1) BellSouth's records show a high percentage of intrastate access traffic in Tennessee and Florida, and (2) NuVox now claims a significant change in certain PIU jurisdictional factors.

As I explained on today's call, those alleged facts have no bearing upon whether NuVox is in compliance with the requirements of "safe harbor" "Option One" – which is the option under which all NuVox conversions have been certified (to date). Under that option, there is no restriction on the type of traffic that can be carried over a converted circuit. Thus, it is not reasonable for BellSouth to cite statewide (and not even circuit specific) traffic figures and adjusted PIUs for two states (and not for each state in which it seeks to cover with its audit request), when those figures have absolutely nothing to do with the exclusive provider and collocation requirements specified in Option One.

Because NuVox believes that the FCC's *Supplemental Order Clarification* contemplates that audits will be rare and only undertaken for the purpose of pursuing a legitimate and rationally related concern regarding compliance, NuVox is unwilling to have the audit commence prior to having been informed of such a concern.

2. **Scope of the Audit**

NuVox accepts BellSouth's representation that none of the circuits listed are "new EELs". Furthermore, both parties agree that the audit may not address conversions that have been requested, but not completed. Given that NuVox's current pending requests should be completed prior to the commencement date of the audit, it is unlikely that the parties have any disagreement here. NuVox proposes that BellSouth confirm that it has completed conversion of all circuits identified, once actual dates have been set for commencing the audit.

3. **Independent Auditor/NDA**

The parties are in agreement that there will be two NDAs. One NDA should be between the parties and the auditor regarding the audit report and results. The other should be between NuVox and the auditor regarding actual documentation provided at the audit. NuVox will propose an NDA for the auditor to sign once it is satisfied that an independent auditor has been selected. We have not reviewed BellSouth's proposal for the other NDA, but we are willing to consider that as the starting point. We will propose changes to that document, if any are needed, at the same time we propose the other NDA.

4. **Independent Auditor/"Ex Parte" Rules**

The parties agree that neither party shall discuss the substance of the FCC's safe harbor requirements and the *Supplemental Order Clarification* (or its interpretation of them) without the other party present, but that purely logistical and scheduling-type inquiries may handled individually. Indeed, the independent status of the auditor would be best assured if no conversations regarding the substance of the FCC's safe harbor requirements and the *Supplemental Order Clarification* took place.

NuVox appreciates that BellSouth has hired its selected auditor for other audits, as well, and that BellSouth will need to discuss those audits with the auditor separately. However, NuVox would be prejudiced, if BellSouth was able to discuss with the auditor

what must be looked at and demonstrated with respect to compliance with Option One. Thus, should the same auditor eventually serve on the audit of NuVox circuits, NuVox proposes that the following ex parte rule should govern with respect to the additional contact that BellSouth wishes to have regarding other audits:

BellSouth may discuss other engagements with the auditor independently, provided that those discussions do not address the substance of the FCC's safe harbor requirements and the Supplemental Order Clarification *or what it would take to demonstrate compliance with the safe harbor options set forth therein.*

5. **Money Issues/20% Threshold**

Although NuVox believes other threshold levels could be considered reasonable, NuVox will accept the 20% threshold. If more than 20% of the circuits in a given state are found to be non-compliant and BellSouth files with and prevails before the relevant state commission, according to the EEL audit procedures previously agreed to by the parties in Section 10.5.4 of Attachment 3, NuVox will reimburse BellSouth for the reasonable costs of the audit attributable to that state (NuVox proposes that such attribution be done on a pro rata basis).

6. **Money Issues/NRC**

The parties remain in disagreement over this issue. Although NuVox would prefer to have the issue of the NRC applicable to any re-conversions resolved prior to commencement of the audit, the parties have agreed that this issue can be resolved in the context of a state commission proceeding initiated by BellSouth pursuant to Section 10.5.4 of Attachment 3 of the parties' Agreement. That section requires BellSouth to file a complaint with the relevant state commission if non-compliance is found and if BellSouth would like to seek re-conversions based on that finding.

7. **Independent Auditor**

As we explained on our call, NuVox cannot agree that ACA qualifies as an independent auditor. Given the ILEC backgrounds of the proposed auditors and the fact that their client base appears to be virtually all ILEC, NuVox believes that the proposed auditor's views will be unduly influenced by that background as well as past and present representation, despite the best of intentions to be neutral. The additional materials supplied on Wednesday regarding BellSouth's engagement of ACA lend no additional assurances of independence. In ACA's proposal to BellSouth, it touts that its "successful" audits have saved its clients (ILECs) "millions of dollars". Thus, it appears that the proposed auditor measures success in terms of finding non-compliance and securing a monetary benefit for his client. NuVox believes that it will be difficult for the proposed auditor to overcome the normal and natural desire to succeed (based on his own view of what a successful audit would be). Accordingly, NuVox renews its objection to BellSouth's selected auditor and renews its request for BellSouth to select an auditor without such an impressive portfolio of ILEC consultant representation. As NuVox has

explained on an earlier call, ACA appears to be a successful and well qualified consultant but that success makes them less than qualified to serve as an independent auditor.

JJH

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2005, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Hamilton E. Russell, III
NuVox Communications, Inc.
301 North Main St, Suite 500
Greenville, SC 29601

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

John J. Heitmann, Esquire
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
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