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Of Counsel
H LaDon Baltimore

March 21, 2005

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

Via Hand Delivery

Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc ; Docket No ~~04-00333~~ 04-00133

Dear Sharla

Enclosed please find the original and 13 copies of NuVox's Reply Brief in the above-referenced matter. Please return a date stamped copy to the courier making this delivery Thank you for your assistance

Exhibit 4, the affidavit of Hamilton E. Russell III is being filed without a signature page However, that signature page should arrive in my office via overnight delivery tomorrow, and I will have delivered the original and 13 pages of that signature page.

If you have questions, please do not hesitate to contact me.

Sincerely,

H. LaDon Baltimore/dcg

H. LaDon Baltimore
NuVox Communications, Inc

LDB/dcg
Enclosures
cc: Parties of Record

Before the
TENNESSEE REGULATORY AUTHORITY

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

REPLY BRIEF OF NUVOX COMMUNICATIONS, INC.

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March 21, 2005

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And NuVox Communications, Inc.	)	

REPLY BRIEF OF NUVOX COMMUNICATIONS, INC.

NuVox Communications, Inc , through its attorneys, respectfully submits its reply brief in the above-captioned proceeding to the Tennessee Regulatory Authority ("Authority" or "TRA")

I. INTRODUCTION AND SUMMARY

BellSouth has refused to comply with each of the prerequisites to conducting an audit that are included in the parties' interconnection agreement ("Agreement") NuVox and BellSouth agree that BellSouth's audit right is governed by the terms and conditions of the parties' Agreement, which includes not only section 10.5 4 of Attachment (as BellSouth would like the Authority to believe), but also sections 23 and 35 1 of the Agreement's General Terms and Conditions The Authority must reject BellSouth's claims that NuVox is attempting to insert additional requirements into the Agreement, to the contrary, BellSouth is attempting to end-run requirements contained in the Agreement by ignoring the Agreement's General Terms and Conditions. Specifically, under the plain language of the Agreement, which must be interpreted in accordance with Georgia law and now includes two Georgia Public Service Commission

("Georgia Commission") orders directly on point, BellSouth must demonstrate a concern prior to conducting an audit and must hire an independent auditor to perform the audit

The only applicable precedents in this case are the decisions from the Georgia Commission [1] The relevant provisions of each NuVox/BellSouth Agreement do not mean different things in different states BellSouth's repackaging of arguments that the Georgia Commission already has squarely rejected provides no rational or legal basis to arrive at such an incongruous result BellSouth purposefully filed its first EEL audit complaint in Georgia, and has stated that (1) the Georgia Commission is the most appropriate entity to interpret Georgia law, and (2) this is a nine-state Agreement,[2] thus indicating that it intended the Georgia Commission decision to establish Georgia law that would apply across all nine states. Despite BellSouth's statements indicating that it intended the Georgia Commission decision to apply across all nine states, BellSouth now seeks to disavow the Georgia Commission decision as irrelevant and to convince the Authority to rely on two decisions from the North Carolina Utilities Commission ("NCUC") (including one involving a different interconnection agreement to which NuVox was not then a party) and a decision of the Authority—in an unrelated proceeding involving another interconnection agreement—instead [3]

Neither the NCUC's decision interpreting the Agreement, the NCUC decision interpreting an agreement between BellSouth and NewSouth, nor the Authority's decision

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1 *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , Georgia Commission Docket No 12778-U, Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order (June 30, 2004) ("*Georgia Order*"), Order on Rehearing, Reconsideration and Clarification (Aug 24, 2004) (collectively referred as the "decision")

2 *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , GPSC Docket No 12778-U, Hearing Tr at 47-48 (Aug 13, 2002) (stating, "this is a nine-state agreement, this is not an interconnection agreement just for Georgia, it's all nine states Georgia law governs this agreement BellSouth's view is what Commission better to decide what Georgia law requires than the Georgia Public Service Commission ") (attached as **Exhibit 1**)

3 NuVox intends to appeal the NCUC's decisions, on behalf of itself and NewSouth

interpreting interconnection agreements between XO/BellSouth and ITC^DeltaCom/BellSouth is binding precedent in this case [4] The NCUC interpreted the same provisions of the Agreement, presumably under Georgia law, but, in doing so, misinterpreted Georgia law, misinterpreted federal law, arrived at internally inconsistent conclusions, arrived at summary judgment factual conclusions contrary to those attested to by the non-moving party and decided the case without a hearing, oral argument or a full evidentiary record NuVox was not a party to the agreement at issue in the BellSouth/NewSouth proceeding upon which BellSouth relies, and, therefore, that decision is irrelevant to the Agreement at issue in this case

Nor does the Authority's decision in ITC^DeltaCom/XO/BellSouth have precedential effect with respect to this case In that proceeding, the Authority interpreted two distinct interconnection agreements (presumably under Tennessee law) to which NuVox was not a party In doing so, the Authority evaluated the specific language in the agreements and the arguments before it, which are separate and distinct from the BellSouth/NuVox Agreement Since the agreements are unique and the analysis is fact-specific, the Authority's decision in that case cannot be binding precedent in this proceeding, instead, the Authority must evaluate the specific language at issue in the BellSouth/NuVox Agreement.

In this case, NuVox is asking the Authority to interpret and enforce the Agreement before it. Contrary to BellSouth's claims, NuVox is not adding additional requirements to the Agreement – it is simply insisting that the provisions of the General Terms and Conditions be given their intended effect and that BellSouth comply with all relevant provisions of the Agreement In deciding this case, the Authority should apply Georgia law as

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[4] *See 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 ("ITC^DeltaCom/XO/BellSouth")

required and in so doing, it should apply the only relevant precedent to the issues before it in this proceeding: the decisions of the Georgia Commission. Relying on the GPSC's decision, which evaluated the same issues that are before the Authority, in no way divests the TRA of its jurisdiction to interpret and enforce interconnection agreements. Indeed, as BellSouth admits, the Authority has the jurisdiction to interpret and enforce each interconnection agreement that it approves, including the Agreement.[5] The Authority, however, does not have jurisdiction to make new law that would apply across the board to all interconnection agreements that it approved, which is essentially what BellSouth has asked the Authority to do by applying the decision in ITC^DeltaCom/XO/BellSouth to this case. As a matter of judicial economy and to prevent an incongruous result, the Authority should apply the decisions reached in the Georgia proceeding to this case, as the Georgia decisions are now part of governing Georgia law, and BellSouth is bound to abide by that law.

Even if the Authority determines not to apply the Georgia Commission decisions, but instead evaluates these same issues anew, it still must find, consistent with the Georgia Commission decisions, that BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform the audit. In the *Supplemental Order Clarification*, the Federal Communications Commission ("FCC") established specific requirements that ILECs must follow prior to seeking an audit of converted EELs circuits. ILECs must demonstrate a concern prior to conducting an audit and must hire an independent auditor to conduct that audit.[6] BellSouth cannot hide behind the concern requirement on the

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5 *See* BellSouth Brief at 10.

6 *Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶¶ 1, 31 (requiring the ILEC to provide an "independent third party" auditor), ¶ 31 n. 86 (requiring ILECs to demonstrate a concern).

ground that it was set forth in a footnote;[7] indeed, the FCC reiterated this same concern requirement in the *Triennial Review Order* rendering BellSouth's argument moot (and disingenuous) [8] The Authority also must reject BellSouth's argument—as the Georgia Commission already has done—that BellSouth simply may "have" a concern, but that it is not required to demonstrate it or otherwise share it with any person or entity To allow BellSouth to allege a concern without support or to permit BellSouth to keep its concern a secret would render the concern requirement meaningless Moreover, in holding BellSouth to the concern requirement, NuVox is not requiring BellSouth to conduct a "probable-cause" hearing [9] Instead, NuVox believes that BellSouth must produce reasonable support for its ever-evolving allegations of concern. Furthermore, there can be no doubt that the *Supplemental Order Clarification* plainly states that ILECs must hire an independent third party auditor to conduct any EELs audit [10]

The fully developed record in the Georgia proceeding demonstrates, as the Georgia Commission found, that under the plain language of the Agreement, the parties incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* Under Georgia law, which governs the Agreement, all law in effect when the parties enter into an agreement forms a part of that Agreement as though expressly stated therein

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7 BellSouth Brief at 29

8 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17368, ¶ 622 (2003) ("*Triennial Review Order*")

9 As discussed below, NuVox repeatedly has requested that BellSouth provide documentation to it in support of its audit request BellSouth has refused to do so NuVox never has stated that it would prohibit BellSouth from conducting an audit, NuVox simply stated that BellSouth only may audit those circuits for which it had demonstrated a concern

10 *Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶¶ 1, 31

unless the parties specifically exclude or displace that law by adopting conflicting standards [11] BellSouth has not presented any evidence to demonstrate that the parties somehow excluded or displaced the concern and independent auditor requirements of the *Supplemental Order Clarification* from the Agreement Nor can it; witness testimony in the Georgia proceeding from a person who *personally negotiated the Agreement* conclusively demonstrates that the parties intended to incorporate the concern and independent auditor requirements into the Agreement Mr Russell testified that the parties specifically excluded the "at BellSouth's sole discretion" language originally proposed by BellSouth that would have contradicted the concern and independent auditor requirements of the *Supplemental Order Clarification* [12]

The Authority must reject BellSouth's claim that the parties negotiated away their audit rights by entering into a voluntarily negotiated agreement Under the Act, a carrier "may negotiate and enter into a binding agreement without regard to the standards set forth in subsections (b) and (c) of section 251.[13] The fact of the matter is that the parties did not do so in this case, as is evident from Mr. Russell's testimony discussed above

As NuVox explained in its opening brief, BellSouth inappropriately relies on one provision in the parties' Agreement (section 10 5 4 of Attachment 2 to the Agreement) to the exclusion of all other provisions of the Agreement to support its claim that it is permitted to audit

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11 *See Norfolk and Western Ry Co v American Train Dispatchers' Association*, 499 U S 117, 129-30 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully as if they had been incorporated in its terms "), *Magnetic Resonance Plus, Inc v Imaging Systems, International*, 543 S E 2d 32, 34-35 (2001) ("[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter "), *see also Van Dyck v Van Dyck*, 429 S E 2d 914, 196 (1993) (stating, "[p]arties to a contract are presumed to have contracted with reference to relevant laws and their effect on the subject matter of the contract, and a contract may not be construed to contravene a rule of law ")

12 Georgia Hearing Transcript at 278, ll 1-4 (relevant portions are attached as **Exhibit 2**)

13 47 U S C § 252(a)(1)

each of NuVox's concerted EELs [14] By its own terms, section 10 5 4 neither excludes nor displaces the concern and independent auditor requirements of the *Supplemental Order Clarification*. Indeed, BellSouth admits that section 10 5 4 only discusses (1) the notice that BellSouth must provide prior to conducting an audit; and (2) which party will pay for the audit (BellSouth) [15] As BellSouth admits, the single provision of the Agreement upon which BellSouth relies is *silent* on the issues of concern and independent auditor [16] Since the Agreement is silent on the concern and independent auditor requirement, there can be no valid argument that the parties excluded or displaced the concern and independent auditor requirements from the Agreement.[17]

The Authority also must reject BellSouth's claim that the merger clause in section 45 of the General Terms and Conditions somehow precludes the concern and independent auditor requirements from inclusion in the Agreement [18] The parties did not intend for the "entire agreement" provision to nullify other provisions of the Agreement, including sections 23 and 35 1, which are no less part of the whole and which operate to incorporate legal requirements not repeated separately or verbatim in the Agreement.[19] The Authority must reject BellSouth's

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14 BellSouth Brief at 16-17, NuVox Brief at 6-8

15 BellSouth Brief at 16

16 *See* Georgia Hearing Transcript at 138, ll 1-19

17 Indeed, BellSouth already has admitted that if the Agreement is silent on the concern requirement (which BellSouth admits it is), then BellSouth must comply with the concern requirement set forth in the *Supplemental Order Clarification* In its Response to NuVox's Application to Modify or Review (regarding the Georgia Hearing Examiner's initial decision in Docket No 12778-U), BellSouth stated that if section 10 5 4 were silent with respect to its ability to conduct EELs audits "an argument could be made that the interconnection agreement should be interpreted and enforced consistent with applicable law, which would include the substantive requirements set forth in the *Supplemental Order Clarification* " BellSouth Response to NuVox Application to Modify or Review at 8 n 1 Relevant portions of BellSouth's Response are attached as **Exhibit 3**

18 BellSouth Brief at 21

19 As with any contract, in interconnection agreements, it is far easier to set forth standards that differ (by exemption or displacement) from those in applicable law than it is to list and or append the tombs of

claims and find that BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform that audit.

In this case, BellSouth has not satisfied either prerequisite to conducting an audit BellSouth has not demonstrated a concern with regard to the converted circuits it seeks to audit To demonstrate a concern, BellSouth must demonstrate that it has reasonable cause to believe that NuVox inappropriately certified compliance with the significant local use requirement and the particular safe-harbor elected [20] In this proceeding, BellSouth has not even attempted to demonstrate that it has a valid concern for conducting the audit.[21] Irrelevant and naked allegations set the standard too low and simply cannot suffice.

BellSouth also has failed to demonstrate that the auditor that it has chosen to conduct the audit is independent (*i e*, not subject to the control or influence of BellSouth). Despite NuVox's claims that ACA, the consulting group that BellSouth has chosen to conduct the audit, is not independent, and the Georgia Commission's decision further questioning ACA's independence,[22] BellSouth has failed to present any evidence on the record that its chosen auditor indeed is independent. As an initial matter, ACA's own marketing materials tout as

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applicable law from which no deviation was negotiated To insist otherwise, as BellSouth does, would turn principles of contracting on their head

20 NuVox certified all of its circuits under safe harbor option number one, which means that NuVox certified that, at the time of conversion, it believed it was the sole provision of local service to the customer being served by the EEL

21 *See infra* part IV

22 Heeding the Georgia Commission's warning that an audit by ACA would be entitled to little if any weight, BellSouth abandoned its ACA consultants and chose KPMG to conduct the audit NuVox had for nearly two years indicated that it would not object to KPMG or any similar entity well recognized and regarded for their work as independent auditors BellSouth also has chosen KPMG to conduct the North Carolina audit, despite that Commission's apparent preference for sorting out harms caused by a biased audit after they happen instead of preventing them Nevertheless, BellSouth insisted on litigating the issue there, and here The only reasonable conclusion to draw from this is that BellSouth is intent on driving NuVox into submission and raising its rival's costs through relentless and baseless litigation

"highly successful" audits that have recovered millions of dollars for its ILEC clients [23] In addition, as BellSouth admitted during the hearing before the Georgia Commission, BellSouth employees had participated in several conversations (*i e*, training) with ACA regarding, at a minimum, BellSouth's spin on the requirements set forth in the FCC's *Supplemental Order Clarification*.[24] Furthermore, ACA is a small consulting shop that appears to be completely dependent on ILECs for its revenues. In the Georgia proceeding, BellSouth was unable to identify a single ACA client that, like NuVox, was a facilities-based CLEC with no ILEC affiliation Since ACA is subject to the influence of BellSouth (it has afterall been schooled on BellSouth's view of the rules and has even come to BellSouth mid-audit seeking "help") and it dependent on ILECs for virtually all of its revenues, it cannot be reasonably be deemed to be independent.

Accordingly, the Authority must find that BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform that audit The Authority also must find that BellSouth has failed to demonstrate such concern with respect to any of the converted EEL circuits it seeks to audit, and that its chosen auditor (ACA) is not independent As NuVox has stated throughout the course of this litigation, if BellSouth demonstrates a valid concern and hires a truly independent auditor, then NuVox will permit the independent auditor to proceed with an audit of those circuits for which BellSouth has demonstrated a concern It is BellSouth's own failure to do so that has brought the parties before the Authority, and the Authority must not reward BellSouth for its steadfast noncompliance with the Agreement

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[23] Georgia Hearing Transcript at 199, ll 4-7, 15-25

[24] *Id* at 195, ll 14-25, 196, ll 1-5, 201, ll 8-25, 202, ll 1-16

II. THE AUTHORITY'S DECISION IN ITC^DELTACOM/XO/BELLSOUTH AND THE NCUC DECISIONS ARE NEITHER BINDING NOR APPLICABLE TO THE ISSUES IN DISPUTE IN THIS CASE

The only applicable precedents to this case are the Georgia Commission decisions, which address the same issues and the identical contract provisions, and do so by properly applying Georgia law, as required Despite BellSouth's prior assertion that the Georgia Commission is the entity most well situated to interpret the Agreement,[25] having lost before the Georgia Commission, BellSouth now argues that the Georgia Commission decision is inapplicable, and that the Authority somehow would divest itself of jurisdiction if it were to apply that decision to this case The Authority must reject BellSouth's attempt to avoid the Georgia Commission decisions (which now are part of governing Georgia law) by creating a false challenge to the Authority's jurisdiction.

The Authority also must reject BellSouth's claim that the ITC^DeltaCom/XO/BellSouth decision is applicable precedent. It is irrelevant whether the Authority rejected similar claims in a different proceeding involving a different interconnection agreement with distinct provisions The Authority must apply the arguments before it to the particular agreement that is before it, and cannot apply a fact-specific determination reached in one case to an unrelated interconnection agreement between different parties

The Authority also must reject BellSouth's reliance on the NCUC decision, in which the NCUC evaluated these issues without the benefit of developing a full evidentiary record. There can be no doubt, as BellSouth admitted, that the Georgia Commission is the most appropriate state commission to interpret Georgia law,[26] and BellSouth must be held to the

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25 Georgia Hearing Transcript at 48-49

26 The Georgia Commission undoubtedly has expertise in applying Georgia law and it is the only state commission able to contribute to that body of law Indeed the Georgia Commission's orders are now part of that governing body of Georgia law

Commission's decisions which now are a part of governing Georgia law. The Georgia Commission issued its decisions after considering all of the evidence in the record, the parties' numerous briefs and pleadings, two hearings, post-hearing billing materials produced by BellSouth, the reports of two hearing officers, and the Georgia Staff's multiple recommendations To say that BellSouth has had a full hearing on the issues at hand would be an understatement

A. BellSouth's Reliance On The Authority's Decision In Docket Number 02-01203 Is Misplaced

The Authority's decision in Docket Number 02-01203 has little if any bearing on this case BellSouth and NuVox have entered into their own interconnection agreement, which is separate and distinct from BellSouth's interconnection agreements with XO and ITC^DeltaCom As such, the Authority's decision is neither binding nor necessarily relevant to the evaluation of the BellSouth/NuVox Agreement.

The XO/BellSouth and ITC^DeltaCom/BellSouth agreements are separate interconnection agreements from the Agreement at issue, and contain different terms and conditions from the BellSouth/NuVox Agreement As NuVox demonstrated in its opening brief, the parties included the concern and independent auditor requirements of the *Supplemental Order Clarification* into their Agreement [27] The concern and independent auditor provisions are incorporated into the Agreement by operation of Georgia law, which requires that all law in effect when the parties enter into an agreement becomes part of that agreement unless specifically excluded or displaced. The parties also incorporated the *Supplemental Order Clarification*'s concern and auditor requirements into their Agreement through the Applicable

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[27] NuVox Brief at 11-19

Law provision.[28] Based on the Authority's decision in ITC^DeltaCom/BellSouth, there is no indication that either provision is included in either the XO/BellSouth or the ITC^DeltaCom/BellSouth agreements In particular, in contrast to the BellSouth/NuVox Agreement, the Authority found that neither the BellSouth/XO nor the BellSouth/ITC^DeltaCom interconnection agreement contained a provision referencing an intent to comply with applicable federal law [29]

Moreover, as apparently was not the case in the BellSouth/XO and BellSouth/ITC^DeltaCom proceeding, the General Terms and Conditions of the BellSouth/NuVox Agreement contain a provision specifying Georgia law as the governing law [30] In the Report and Order, the Hearing Examiner applied Tennessee law in determining the appropriate interpretation of the BellSouth/ITC^DeltaCom and BellSouth/XO interconnection agreements In the present case, the BellSouth/NuVox Agreement is governed by Georgia law, including the Georgia Commission's orders, and not by Tennessee law Accordingly, the BellSouth/NuVox Agreement must be evaluated consistent with governing Georgia law, the Authority's decision pertaining to the BellSouth/XO and BellSouth/ITC^DeltaCom interconnection agreements is not part of that body of law

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28 Agreement, General Terms and Conditions, § 35 1

29 *Enforcement of An Interconnection Agreement between BellSouth Telecommunications, Inc and ITC^DeltaCom Communications, Inc , Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and XO Tennessee, Inc* , Docket No 02-01203, Order Approving Report and Recommendation, at Attachment A, at 9 (Sept 29, 2004) ("Hearing Officer Report and Recommendation") (stating that neither agreement contained a provision that revealed an intent to defer to federal law for requirements not addressed in the audit provision)

30 It is unclear from the Hearing Examiner's Report and Recommendation whether the BellSouth/XO and BellSouth/ITC^DeltaCom provisions were governed by Tennessee law NuVox states that these agreements appear to be governed by Tennessee law, because the Pre-Hearing Officer cites to a Tennessee case for governing contact law authority *See* Hearing Examiner Report and Recommendation at 31 NuVox did not review these agreements for a governing law provision, as the existence of a governing law provision would not change the fact that the Hearing Officer apparently applied Tennessee law and not Georgia law in the BellSouth/XO and BellSouth/ITC^DeltaCom proceeding

The Authority is not permitted by law to accept BellSouth's invitation to apply the decision in the XO/DeltaCom proceeding to this case To be sure, under the Act, state commissions are permitted to interpret and enforce those interconnection agreements that they approve [31] However, state commissions do *not* have the authority to "issue rulings having the force of law beyond the relationship of the parties to the Agreement "[32] This is precisely what BellSouth has asked the Authority to do BellSouth wants the Authority to apply a decision reached with respect to a completely different interconnection agreement to the Agreement at issue in this proceeding Taking that action would be in direct violation of the law because the Authority would be applying a ruling reached with respect to one agreement beyond the relationship of the parties to that agreement

B. BellSouth's Reliance on the NCUC Decisions is Misplaced

The Authority should not afford any weight to the NCUC EEL audit decisions BellSouth argues that the Authority should rely on two NCUC decisions, one interpreting a contract between NewSouth and BellSouth and a different decision interpreting the Agreement between NuVox and BellSouth, despite fervent protests against application of the Georgia Commission decisions and its admission that the Georgia Commission is the most well suited state commission to interpret Georgia law [33] The Authority must find and conclude that neither NCUC decision merits any weight in this proceeding.

1 *The NewSouth/BellSouth NCUC Proceeding*

The Authority should reject the NCUC's NewSouth/BellSouth EEL audit decision out of hand as inapplicable to the issues in dispute in this proceeding. The interconnection

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31 *See BellSouth Telecomms , Inc & MCI Metro Access Transmission Services, Inc* , 317 F 3d 1270, 1277 (11th Cir 2003)

32 *MCI Telecommunications Corp v Bell Atlantic-Pennsylvania*, 271 F 3d 491, 516 (3rd Cir 2001)

33 Georgia Hearing Transcript (Aug 2002) at 48-49

agreement between NewSouth and BellSouth was a separate and distinct agreement between separate parties from the Agreement at issue in this case Indeed, review of the two agreements demonstrates that the relevant provisions of the agreements are not identical As one example, the NuVox/BellSouth Agreement contains section 35 1, while the NewSouth/BellSouth agreement contains a different provision regarding applicable law. As another example, the NewSouth/BellSouth Agreement contains a second audit provision not found in the NuVox/BellSouth Agreement Furthermore, the NCUC evaluated BellSouth's complaint in that proceeding without the benefit of developing a full and fair evidentiary record [34] As such, it would be an error for the Authority to rely on the decision reached with respect to a different interconnection agreement to this proceeding

2 *The NuVox/BellSouth NCUC Proceeding*

The Authority also should not afford any weight to the NuVox/BellSouth NCUC decision As with the NewSouth/BellSouth NCUC decision, the NCUC decided the issues in dispute in the NuVox/BellSouth case without the benefit of having developed a full evidentiary record and despite the presence of conflicting affidavits which made plain that there were contested issues of fact In addition, the NCUC misconstrued Georgia law and applicable Fourth Circuit precedent

Under Georgia law, which indisputably controls, parties are presumed to incorporate existing law—the *Supplemental Order Clarification's* concern and independent auditor requirements in this case—unless they expressly state otherwise or displace those requirements of applicable law with express and conflicting standards [35] Applying Georgia law, the Georgia Commission concluded that the parties did not exclude the concern and independent

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[34] NuVox, on behalf of its NewSouth operating entity, intends to seek federal court review of this decision

[35] *See, e g , Van Dyck v Van Dyck*, 263 Ga 161, 163, 429 S E 2d 914, 916 (1993)

auditor requirements of the *Supplemental Order Clarification* from their Agreement In contrast, in the NCUC proceeding, the NCUC interpreted Georgia law in a manner that is contrary to the explicitly stated law Specifically, the NCUC found that when the parties wanted to *include* the *Supplemental Order Clarification*, they did so explicitly As such, the NCUC erroneously concluded that Georgia law requires the parties to state expressly that they want to be governed by law other than existing law. This is in direct conflict with applicable Georgia law, which requires that all law is included in the parties' agreement unless it is specifically *excluded* from that agreement. Furthermore, as discussed below, under Georgia law, there are no implied exceptions to a contract.

The NCUC NuVox decision also is internally inconsistent. In that decision, the NCUC found that the parties did not incorporate the concern requirement into their agreement, but did incorporate the independent auditor requirement into that agreement [36] Section 10 5 4, upon which BellSouth relies, is silent as to both the concern and independent auditor requirements. Accordingly, the NCUC cannot reasonably find that one requirement is incorporated into the agreement without also finding that the other requirement also is incorporated therein

In addition to misapplying Georgia law, the NCUC also misapplied controlling Fourth Circuit precedent [37] The parties entered into a voluntarily negotiated agreement BellSouth baselessly claims that in doing so, the parties somehow disclaimed all other requirements under law, despite the clear provision in the Agreement incorporating applicable law As discussed below, the Authority must reject BellSouth's argument that the parties

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36 *See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , Order Granting Motion for Summary Disposition and Allowing Audit, Docket No P-913, Sub 7)

37 NuVox intends to appeal the NCUC decision

disclaimed applicable law by entering into a negotiated agreement Indeed, the Fourth Circuit properly has recognized that voluntarily negotiated provisions of interconnection agreements are not necessarily negotiated without regard to section 251 standards [38] The Fourth Circuit noted the practical reality that when parties are negotiating interconnection agreements in good faith, as required by section 251(c)(1) of the Act, many issues already will have been resolved by FCC rules and interpretations

In this case, for example, the issue of whether BellSouth had to demonstrate a concern and hire an independent auditor already had been resolved by the *Supplemental Order Clarification*. The Fourth Circuit concluded that "[w]here a provision plainly tracks the controlling law, there is a *strong presumption* that the provision was negotiated with regard to the 1996 Act and controlling law."[39] In this case, the EEL audit provision at issue, section 10.5 4, plainly tracks controlling law with regard to the prerequisites for conducting an audit of converted EEL circuits Controlling law as set forth in the *Supplemental Order Clarification* requires that ILECs give 30 days' notice and that ILEC may not conduct more than one audit in a calendar year unless the audit finds non-compliance Section 10 5 4 plainly tracks controlling law on EEL audit prerequisites, triggering the "strong presumption" established in *AT&T Communications v BellSouth Telecommunications, Inc* that the parties intended to contract with regard to the other audit prerequisites (the concern and independent auditor requirements) contained in the *Supplemental Order Clarification*

Furthermore, the NuVox NCUC decision also should not be afforded any weight, because the NCUC decided BellSouth's motion for summary disposition in BellSouth's favor

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38 *AT&T Communications v BellSouth Telecommunications, Inc* 229 F 3d 457, 465 (4th Cir 2000)

39 *Id* (emphasis added)

and in spite of conflicting factual assertions made by NuVox [40] In contrast, the Georgia Commission evaluated the Agreement after having developed a full evidentiary record, including witness testimony confirming the plain language of the Agreement that the parties intended to incorporate the *Supplemental Order Clarification* concern and independent auditor requirements into the Agreement. Accordingly, the Authority must reject BellSouth's reliance on the NCUC decision

In short, given the poor reasoning of the NCUC NuVox/BellSouth decision, the internal inconsistencies within that decision, and the failure of the NCUC to hold an evidentiary hearing to sort through contested issues of fact, there can be no doubt that the Georgia Commission's decisions based on its expertise in applying Georgia law and a full evidentiary record are the decisions that the Authority should be looking to for guidance in this case The uniform provisions of the Agreement were not intended to have different meanings in different states, the Authority should not follow the NCUC's flawed decision-making to reach the same incongruous and absurd result

III. APPLYING THE GEORGIA COMMISSION DECISION TO THIS CASE DOES NOT DIVEST THE AUTHORITY OF JURISDICTION

The Authority must reject BellSouth's argument that applying the Georgia Commission decision to this case somehow would deprive the Authority of its jurisdiction [41] NuVox has in no way contested the Authority's jurisdiction in this matter BellSouth's

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[40] Although the NCUC concluded that BellSouth was not required to demonstrate a concern, it proceeded to issue "alternative" findings in the event that BellSouth was required to demonstrate a concern under the parties agreement In doing so, the NCUC relied on BellSouth's affidavit exclusively, and ignored NuVox's affidavit, which contained contradictory facts *See NCUC Order* at 12 The NCUC's decision to rely on a contested affidavit is contrary to established summary judgment jurisprudence, which prevents summary judgment when there are material facts in dispute

[41] *See* BellSouth Brief at 3

assertions to the contrary are misleading and inaccurate Moreover, NuVox has not pursued any argument that would undermine the TRA's authority to approve interconnection agreements under the framework established by the 1996 Act, or that otherwise would require the Authority to become a rubber stamp of other state commission determinations The parties sought uniformity in contracts by negotiating regional interconnection agreements. The Agreement is a regional Agreement; when its terms vary by state, terms like "in Tennessee" are used or "TN" is used in rate sheets to delineate those rates applicable in TN from those applicable elsewhere Thus, the Agreement does not mean different things in different states, unless where the parties have included language that would make clear that a different requirement applies "in Tennessee." Moreover, the Authority's approval of the Agreement in no way changed the language agreed to by the parties or their intent in agreeing to that language BellSouth's argument that the Authority's approval could somehow graft onto the Agreement intent and meaning that differs from what the parties actually negotiated is utterly fallacious [42]

The parties also sought uniformity in interpretation by selecting a single state's law (Georgia's) to govern throughout its region The Authority approved this choice-of-law provision. BellSouth then chose the Georgia Commission to determine, in the first instance, the very issue it now seeks to re-litigate against NuVox in Tennessee, having lost in Georgia [43] Indeed, the Parties' agreement to be bound by Georgia law mandates uniformity of

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42 *See id*

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

interpretation, and the Authority may follow the *Georgia Order* and *Georgia Reconsideration Order* on that ground alone [44]

IV. UNDER THE PLAIN LANGUAGE OF THE AGREEMENT, BELLSOUTH IS REQUIRED TO DEMONSTRATE A CONCERN PRIOR TO CONDUCTING AN AUDIT AND TO HIRE AN INDEPENDENT AUDITOR TO PERFORM THE AUDIT

The parties agree that BellSouth's right to audit NuVox's converted EEL circuits is governed by the plain language of the Agreement, but differ as to what the relevant terms of the Agreement mean [45] As an initial matter, the Authority must reject BellSouth's argument that the *Supplemental Order Clarification* does not require BellSouth to demonstrate a concern or to hire an independent auditor The *Supplemental Order Clarification* plainly includes those requirements and BellSouth's own actions demonstrate that it believes the *Supplemental Order Clarification* requires it to demonstrate a concern and to hire an independent auditor

The Authority also must reject BellSouth's argument that NuVox is attempting to incorporate requirements into the Agreement that do not exist Under the plain language of the Agreement, BellSouth is required to demonstrate a concern prior to conducting an audit, and to hire an independent auditor to conduct that audit By operation of Georgia law, the concern and

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[44] As stated above, given the lack of an evidentiary hearing and the NCUC's erroneous interpretation of Georgia law, there can be no doubt that the Authority must not follow the NCUC decision, but instead look to the Georgia Commission decision as applicable precedent Furthermore, BellSouth has made much of the voluntary nature of the Parties' Agreement in these proceedings, but chooses now to ignore the fact that, as noted above, one of the terms voluntarily agreed upon by the Parties was that their multi-state agreement would be governed by the law of a singe state—that of Georgia The obvious intent of such a provision is to ensure uniform requirements across the various BellSouth states BellSouth chose to initiate litigation regarding the meaning of the audit language in its Agreement with NuVox first before the state commission whose law governs the contract—Georgia Having received an answer it does not like, BellSouth now seeks to undermine the plain purpose of the governing law provision by seeking a different result in Tennessee, thus attempting to evade the effect of the voluntarily negotiated governing law provision and wasting the resources and time of both the parties and the Authority itself

[45] *See* BellSouth Brief at 12 ("BellSouth's right to audit NuVox's records is governed by the terms of the voluntarily negotiated Agreement ")

independent auditor requirements of the *Supplemental Order Clarification* are incorporated into the Agreement The *Supplemental Order Clarification*'s concern and independent auditor requirements also are incorporated into the Agreement through the Applicable Law provision [46]

BellSouth has not even attempted to refute the validity of the governing Georgia law or the Applicable Law provision Instead, to support its position that it is not required to demonstrate a concern or to hire an independent auditor, BellSouth simply relies on one section of the Agreement (Section 10 5 4 of Attachment 2) to the exclusion of all other provisions of the Agreement Relying on that section in a vacuum, however, still does not support BellSouth's claim Under section 10 5.4, BellSouth must provide 30 days' notice to NuVox prior to conducting the audit and must pay for the audit Section 10 5.4, as BellSouth has admitted, is silent with respect to the concern and the independent auditor requirements.[47] Under Georgia law, since section 10 5 4 neither excludes nor displaces the *Supplemental Order Clarification*'s concern and independent auditor requirements, those requirements are incorporated into the Agreement

The Authority similarly must reject BellSouth's claim that the Agreement's integration clause somehow displaces the concern and independent auditor requirements. The parties did not intend for the "entire agreement" provision to nullify other provisions of the Agreement, including sections 23 and 35.1, which are no less part of the whole and which operate to incorporate legal requirements not repeated separately or verbatim in the Agreement

Furthermore, the Authority also must reject BellSouth's claim that the concern and independent auditor requirements are not included in the Agreement because the parties voluntarily negotiated the Agreement Although the parties could have voluntarily negotiated

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46 Agreement, General Terms and Conditions, § 35 1

47 Georgia Hearing Transcript at 138, ll 15-19, 149, ll 25, 150, ll 1-6

the Agreement to exclude the concern and independent auditor requirements, the fact of the matter is that the parties did not do so. Furthermore, the cases that BellSouth cites in support of its position are antitrust cases that have no bearing on this case, and, in any event, do not support BellSouth's position The Authority must reject BellSouth's arguments and find and conclude that BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to conduct that audit.

A. The *Supplemental Order Clarification* Requires BellSouth To Demonstrate A Concern And To Hire An Independent Auditor

The Authority must reject BellSouth's claim that it has unfettered discretion to conduct an audit and that it may hire any person or entity to conduct the audit In its opening brief, NuVox demonstrated that, under the *Supplemental Order Clarification*, BellSouth is required to demonstrate a concern prior to conducting an EELs audit [48] As NuVox explained, in the *Supplemental Order Clarification*, the FCC granted ILECs limited audit rights, subject to compliance with specific requirements In particular, the FCC permitted an ILEC to conduct an audit only when it "has a concern that a requesting carrier has not met the criteria for providing a significant amount of local service "[49] Indeed, the Georgia Commission correctly found that the FCC required BellSouth to demonstrate a concern, and not merely have a concern that it is permitted to keep a secret.[50] The Authority similarly must reject BellSouth's argument that the *Supplemental Order Clarification* does not require BellSouth to demonstrate or state a concern prior to conducting the audit.[51] To accept BellSouth's interpretation that BellSouth only must

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48 NuVox Brief at 9-11

49 *Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 31, n 86

50 *Georgia Order* at 5

51 BellSouth Brief at 28-29

have a concern, but that it does not have to share that concern with any person or entity, would render the FCC's concern requirement meaningless [52]

1. *BellSouth Must Demonstrate A Concern*

Under the plain language of the *Supplemental Order Clarification*, BellSouth is required to demonstrate a concern prior to conducting an EELs audit, it is not sufficient that BellSouth merely have a concern that it does not share with any person or entity In the *Supplemental Order Clarification*, the FCC stated that an ILEC only could conduct an EELs audit when it "has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service "[53] The Georgia Commission correctly determined that this requirement meant that BellSouth must demonstrate a concern prior to conducting an EELs audit [54] In support of its finding that the *Supplemental Order Clarification* required BellSouth to demonstrate a concern, the Georgia Commission found that its determination was "reinforced by the *Triennial Review Order*," which prohibited ILECs from verifying a carrier's self certification unless it had cause

> Although the basis and criteria for the service 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 [55]

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52 Tellingly, BellSouth did not claim that it was not required to demonstrate a concern until after the Hearing Examiner issued his preliminary decision in the proceeding before the Georgia Commission, in which he concluded that BellSouth must demonstrate a concern This court must reject BellSouth's argument in this proceeding as the Georgia Commission rejected BellSouth's eleventh hour argument in the case before it *See Georgia Order* at 5

53 *Supplemental Order Clarification*, ¶ 31 n 86

54 *Georgia Order* at 5

55 *Georgia Order* at 5 (quoting *Triennial Review Order*, 18 FCC Rcd at 17368, ¶ 622 (emphasis added))

Notably, the FCC could have left out the "based upon cause" part this statement had it in fact meant to distance itself from the concern requirement it imposed in the *Supplemental Order Clarification* It did no such thing Indeed, the Georgia Commission correctly concluded that the FCC's statement in the *Triennial Review Order* "eliminates any ambiguity over whether the . footnote in the *Supplemental Order Clarification* was intended to make the demonstration of concern a mandatory pre-condition of audits "[56]

BellSouth does not provide any legal or rational basis for its assertion that the *Supplemental Order Clarification* does not require it to demonstrate a concern Instead, BellSouth argues aimlessly and baselessly that the footnote wherein the FCC adopts the requirement is somehow of lesser regulatory standing and that the *Supplemental Order Clarification* must be interpreted such that the concern requirement has no real meaning [57] Apparently, BellSouth believes that the FCC intended for it to be permissible for BellSouth to conduct an audit based on a concern that it has, but that it is permitted to keep that concern a secret The Georgia Commission correctly found that BellSouth's argument was nonsensical,[58] and the Authority likewise reject BellSouth's attempts to render the FCC's concern argument meaningless

The Authority also must reject BellSouth's argument that the FCC's concern requirement does not apply, because the FCC included that argument in a footnote [59] The placement of the concern requirement, whether in a footnote or otherwise, has no bearing on the existence of that requirement Furthermore, as stated above, in the main text of the FCC's

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56 *Id*

57 *See* BellSouth Brief at 28-29

58 *Georgia Order* at 5

59 *See* BellSouth Brief at 29

Triennial Review Order, the FCC reiterated that ILECs must demonstrate a concern prior to conducting an audit.[60]

Requiring BellSouth to demonstrate a concern does not subject it to a probable cause hearing, as BellSouth suggests [61] Contrary to BellSouth's argument, the concern requirement does not require BellSouth to obtain TRA or CLEC approval prior to conducting an audit In an effort to convince the Authority that it is not required to demonstrate a concern, and to render the concern requirement meaningless, BellSouth reads a concern approval requirement, a so-called "probable-cause hearing" into NuVox's statement that BellSouth must demonstrate a concern prior to conducting an audit In this case, the Authority only became involved because BellSouth refused to demonstrate a concern to NuVox despite NuVox's repeated requests Hence a dispute arose between the parties and BellSouth invoked the Agreement's dispute resolution provisions in seeking Authority intervention and resolution of the dispute As such, whether the state commission becomes involved in determining whether BellSouth has demonstrated a concern is a matter left to the parties If BellSouth had presented a valid concern to NuVox when it requested an audit (or in response to the repeated requests NuVox has made since), then it would not have been necessary to BellSouth to demonstrate a concern before the Authority

Accordingly, the Authority must find, consistent with the Georgia Commission decisions, that the *Supplemental Order Clarification* plainly requires BellSouth to demonstrate a concern before it may proceed with an audit. In doing so, the Authority must reject BellSouth's claim that the concern requirement somehow is not applicable because it is contained in a footnote (despite the fact that the FCC reiterated that requirement in the *Triennial Review*

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60 *See supra* at 24 (quoting *Triennial Review Order*)

61 *See* BellSouth Brief at 28

Order) The Authority also must reject BellSouth's seemingly alternative claim, that it must have a concern, but that it is permitted to keep that concern a secret. As discussed below, the parties incorporated this requirement into their Agreement.

2. *The Supplemental Order Clarification Also Requires BellSouth To Hire an Independent Auditor*

There is no merit to BellSouth's assertion that it may hire any party to conduct the audit and that it even may conduct the audit itself it if chooses.[62] In the *Supplemental Order Clarification*, the FCC unambiguously stated that stated that the ILEC must hire an "independent third party" to conduct the audit [63] As discussed below, the parties incorporated this requirement into their Agreement

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

NuVox does not dispute that the Agreement controls BellSouth's right to conduct an audit,[64] contrary to BellSouth's argument, however, under the plain language of the Agreement, BellSouth and NuVox incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* into their Agreement As NuVox explained in its opening brief,[65] the FCC's concern and independent auditor requirements of the *Supplemental Order Clarification* are incorporated into the Agreement by operation of Georgia law [66] As the Georgia Commission found, under Georgia law, "parties are presumed to enter

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62 BellSouth Brief at 33

63 *Supplemental Order Clarification* ¶¶ 1, 31

64 *See* BellSouth Brief at 20

65 NuVox Brief at 13-15

66 Section 23 of the Agreement states that the "Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia " Agreement, General Terms and Conditions, § 23

into agreements with regard to existing law "[67] In the present case, NuVox did not enter into the Agreement until after the FCC released the *Supplemental Order Clarification*, and, therefore, the concern and independent auditor requirements of that decision are part and parcel of the Agreement [68]

1. *The Parties Did Not Exclude the Concern and Independent Auditor Requirements of the Supplemental Order Clarification from their Agreement*

The parties did not exclude the concern and independent auditor requirements from the *Supplemental Order Clarification.*[69] In particular, the parties did not exclude the concern and independent auditor provisions through section 10 5 4 of the Agreement The Authority must reject BellSouth's attempt to create a stand-alone agreement out of section 10 5 4 of Attachment 2 [70] Contrary to BellSouth's argument, that provision does not operate in a vacuum outside the scope of Georgia law and independent of the main body of the Agreement (the "General Terms and Conditions") As explained above, both Georgia law, designated in section 23 of the Agreement, and the "applicable law" provision (section 35 1 of the Agreement) establish that requirements of applicable law are included as though expressly stated and that any voluntary agreement to the contrary must be memorialized expressly [71] These provisions operate

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67 Georgia Order at 16 (citing *Van Dyck v Van Dyck*, 429 S E 2d at 196

68 Thus there were no pre-existing audit requirements Thus, BellSouth's reliance on the FCC's recognition in the *Supplemental Order Clarification* that some "interconnection agreements *already* contain audit rights" (emphasis added) is, as BellSouth well knows, entirely misplaced *See* BellSouth Brief at 27 NuVox also has never argued that the *Supplemental Order Clarification* "trumps or over-writes" the Agreement and NuVox objects to this inaccurate representation of its arguments (and to any others) by BellSouth

69 *See* NuVox Brief at 14-15 for further discussion of this issue

70 *See* BellSouth Brief at 11-12, 20-21

71 The Authority must reject BellSouth's claim to displace the Applicable Law provision *See* BellSouth Brief at note 12 In *Texaco Inc v FERC*, upon which BellSouth relies, the D C Circuit (not applicable precedent to this proceeding) evaluated whether FERC had authority to abrogate a contract in light of the *Sierra-Mobile* doctrine The court's statements regarding the applicable law provision were not central to

to make clear that the *Supplemental Order Clarification*'s concern and independent auditor provisions are incorporated into the Agreement. The plain text of section 10 5 4 neither excludes nor displaces those audit prerequisites.

Section 10 5 4 of Attachment 2 to the Agreement does not contain the exemptions to which BellSouth claims it is entitled Under section 10.5 4 of Attachment 2 to the Agreement, BellSouth is required to provide thirty days' notice prior to conducting an audit [72] The plain text of section 10.5.4 does not contain any language expressly exempting BellSouth from or otherwise displacing the concern and independent auditor requirements, and, therefore, those requirements are included in the Agreement.

Even if this section were to be viewed in isolation from the overarching and foundational provisions of the General Terms and Conditions (an absurd reading that BellSouth proffers), the text is silent on—and there is no "apparent inconsistency" with—the concern and independent auditor requirements [73] Indeed, in the hearing before the Georgia Commission, BellSouth admitted that section 10.5.4 is silent with regard to the concern and independent auditor requirements [74] By BellSouth's own admission, this silence must result in a default to the *Supplemental Order Clarification's* concern and independent auditor requirements. This

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that case, and simply are inapplicable to the present case Moreover, other courts have held that parties must be held to the applicable law provisions in their agreements *See, e g , Georgia Electronic Company v Marshall,* 595 F 2d 309, 319 (5th Cir 1979) (holding that the company agreed to be bound by all applicable law in effect when the parties entered into the contract and requiring the company to comply with applicable federal safety laws)

72 Agreement, Attachment 2, § 10 5 4 Section 10 5 4 also requires BellSouth to pay for the cost of the audit Based on repeated representations by BellSouth that it will pay for the audit, regardless of the outcome, and BellSouth's failure to brief this sub-issue, NuVox has not briefed this issue as it does not take issue with BellSouth's position that, regardless of the outcome, the audit will be conducted at BellSouth's sole expense

73 BellSouth Brief at note 12 BellSouth's reliance on *Central Georgia Electric Membership Corp v Ga Power Co* is misplaced, because there is no conflict between section 10 5 4 of the Agreement and section 35 1 of the General terms and Conditions or between section 10 5 4 and the concern and independent auditor requirements set forth in the *Supplemental Order Clarification*

74 Georgia Hearing Transcript at 138, ll 1-19

silence also reveals that there is no conflict between section 10.5 4 of the Agreement and the terms of either section 23 or section 35 1 of the Agreement such that one provision governs in lieu of the other There also is no conflict between section 10 5 4 and the *Supplemental Order Clarification's* concern and independent auditor requirements. These provisions work in tandem, thus requiring BellSouth to provide 30 days notice and to demonstrate a concern and hire an independent auditor prior to conducting an EEL audit

2 *Witness Testimony Demonstrates that the Parties Intended to Include the Concern and Independent Auditor Provisions Into Their Agreement*

BellSouth is simply incorrect to the extent that it argues that the parties chose to incorporate or track some provisions of the *Supplemental Order Clarification* while excluding others [75] First, by virtue of the Applicable Law provision, the parties did incorporate applicable law, including the concern and independent auditor requirements set forth in the *Supplemental Order Clarification*, and section 10 5.4 does not suggest otherwise. Second, the *only* witness with personal knowledge of the negotiations, NuVox witness Hamilton B Russell, III, testified to the contrary [76] In his testimony, Mr. Russell was unequivocal in his testimony that BellSouth, attempting to exempt itself from the concern requirement, had proposed language that would allow it to conduct an audit "at its sole discretion"—in other words, without a concern—and that NuVox refused to agree to that term [77] When asked again about whether the requirement of a concern was specifically discussed, Mr. Russell remained unequivocal that the intent was for the concern requirement of the *Supplemental Order Clarification* to apply·

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75 BellSouth Brief at 26-27

76 *See also* Affidavit of Hamilton Russell Aff ¶ 14 (attached as **Exhibit 4**)

77 Georgia Hearing Transcript at 279-80 ("BellSouth wanted the right to conduct an audit at its sole discretion We believed they had to have a concern to do that and so we struck the language of 'sole discretion '")

A We discussed the issue that BellSouth could not conduct an audit without a concern

Q But you didn't propose any specific language obligating BellSouth to do so?

A It was covered in the Supplemental Order Clarification [78]

In short, to the extent that an express exemption or conflicting language is not included, the Agreement itself requires compliance with all applicable law, which includes the concern and independent auditor requirements of the *Supplemental Order Clarification* Furthermore, the testimony before the Georgia Commission was undisputed that although BellSouth proposed language that would in effect cause NuVox to waive the concern requirement, NuVox specifically declined to do so

C. The Entire Agreement Provision Does Not Affect The Application Of The *Supplemental Order Clarification* To This Agreement

The Authority must reject BellSouth's misguided attempt to exclude the concern and independent auditor requirements based on the "entire agreement" provision in the Agreement [79] BellSouth's claim that section 45 of the Agreement, which states that the "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...,"[80] somehow overrides other provisions of the Agreement is absurd The parties did not intend for the "entire agreement" provision to nullify other provisions of the Agreement, including sections 23 and 35 1, which are no less part of the whole and which operate to incorporate legal requirements not repeated separately or verbatim in the Agreement

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78 *Id* at 280

79 *See* BellSouth Brief at 21-22

80 Agreement, General Terms and Conditions, § 45

Notably, in this regard, BellSouth suggests that there is a conflict between section 10 5 4 of Attachment 2 of the Agreement and the *Supplemental Order Clarification's* concern and independent auditor requirements (which BellSouth erroneously describes as "extraneous material.") [81] As stated above, BellSouth admitted that section 10 5.4 is silent on the concern and independent auditor requirements It is impossible for the silence -- the absence of plain text in section 10.5 4 regarding the concern and independent auditor requirements -- to create the conflict BellSouth claims Accordingly, no such conflict or "contradiction" exists, and, as explained at length above, section 10 5 4 does not trump the concern and independent auditor provisions set forth in the *Supplemental Order Clarification.*

V. NUVOX DID NOT NEGOTIATE AWAY THE CONCERN AND INDEPENDENT AUDITOR PROTECTIONS CONTAINED IN THE *SUPPLEMENTAL ORDER CLARIFICATION*

NuVox does not dispute that under the Act "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 "[82] The dispute in this case is over whether they did so with respect to the concern and independent auditor requirements adopted by the FCC in the *Supplemental Order Clarification* [83] While parties "may" negotiate to bind themselves to standards that differ from those set forth in sections 251(b) and (c) and the FCC's associated rules and orders, they also may agree to bind themselves to standards that ***do not*** differ from those set forth in sections 251(b) and (c) and the FCC's associated rules and orders (as is most often the case). In this case, with respect to the

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81 BellSouth Brief at 21

82 47 U S C § 252(a)(1) (emphasis added)

83 *See Georgia Order* at 6-7

concern and independent auditor requirements, the parties did not enter into an agreement without regard to the relevant provisions of section 251 of the Act and the FCC's associated rules and orders Moreover, the cases upon which BellSouth relies to support its position in no way suggest that BellSouth and NuVox somehow displaced applicable law by entering into a voluntarily negotiated agreement.

Although not entirely clear in BellSouth's brief, it appears that BellSouth is arguing that the requirements set forth in the *Supplemental Order Clarification* do not apply because the parties voluntarily negotiated the Agreement [84] BellSouth is correct only to the extent that in negotiating the interconnection agreement, the parties actually exercised their right to—and successfully did—negotiate terms that deviate from the standards set forth in sections 251(b) and (c) and the FCC's associated rules and orders Otherwise, the standards set forth in sections 251(b) and (c) and the FCC's associated rules and orders apply [85]

The "reward" in the context of a negotiated agreement is simply that the parties voluntarily agree with respect to the extent, if any, that they will not be bound by the standards set forth in sections 251(b) and (c) and the FCC's associated orders, and that they do not have a state commission imposing terms on them in an arbitration that the state commission determines are required by sections 251(b) and (c).[86] Thus, the parties are not "rewarded" with an exemption from the substantive requirements of sections 251(b) and (c) unless they voluntarily negotiate and include express exemptions in their interconnection agreement Furthermore, BellSouth's reliance on *MCI Telecommunications Corp v U S West* also is misplaced, because in that case, the Court addressed issues related to an arbitrated interconnection agreement The

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84 BellSouth Brief at 23-24

85 *See Jenkins v Morgan*, 112 S E 2d 23, 24 (Ga Ct App 1959)

86 *See* BellSouth Brief at 23 (citing *MCI Telecommunications Corp v U S West Communications*, 204 F 3d 1262, 1266 (9th Cir 2000)

court's characterization of negotiated agreements in its summary introduction did not address the "may" aspect of section 252(a)(1) and the agreement-specific nature of negotiated agreements Certainly, section 252(a) does not provide the legal basis for the blanket exemption that BellSouth now claims.

Furthermore, in addressing negotiated aspects of a part negotiated, part arbitrated interconnection agreement, the Fourth Circuit held that "[w]here a provision plainly tracks controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law "[87] Therefore, contrary to BellSouth's argument, parties that enter into negotiated agreements do not bind themselves solely to federal requirements recited in those agreements but instead incorporate such requirements unless they are specifically excluded or displaced with conflicting requirements, as explained above [88]

BellSouth's reliance on *Trinko* and *Ntegrity* also do not support its position that the *Supplemental Order Clarification's* concern and independent auditor requirements are not incorporated into the Agreement [89] BellSouth has attempted to disclaim these audit prerequisites on the ground that the parties voluntarily negotiated the Agreement. None of the cases upon which BellSouth relies suggest that applicable law is somehow automatically excluded from the Agreement by virtue of the parties declining to seek arbitration of it [90] The fact of the matter is that although the parties could have excluded the concern and independent auditor requirements from their Agreement, they did not do so

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87 *AT&T of Southern States v BellSouth Telecommunications*, 229 F 3d 457, 465 (4th Cir 2000)

88 *See Jenkins v Morgan*, 112 S E 2d 23, 24 (Ga Ct App 1959)

89 *See* BellSouth Brief at 24-26

90 *Id*

Neither *Trinko* nor *Verizon New Jersey* support BellSouth's claim that the obligations under sections 251(b) and (c) of the 1996 Act do not pertain to carriers that have negotiated interconnection agreements.[91] As an initial matter, the plaintiffs in both *Trinko* and *Verizon New Jersey* pursued antitrust claims, and did not allege interconnection agreement violations Indeed, in *Trinko*, the plaintiffs were a CLEC's customers, which brought suit against the ILEC alleging poor performance, and were not parties to an interconnection agreement with the defendant ILEC [92]

In addition, contrary to BellSouth's claims, neither case supports the proposition that a carrier that has entered into an interconnection agreement cannot allege a violation of the Act or other provisions of Applicable Law In *Trinko*, the court did not examine whether the ILEC's conduct violated the terms of an interconnection agreement, but instead reviewed whether the ILEC's actions could constitute an independent violation of various regulations, including section 251 of the Act The court specifically limited its application to "this case", and on the basis that the interconnection agreement, which was not before it, could "result in a different set of duties than those defined by the statute "[93] In contrast, in the present case, the dispute arises under the obligations set forth in the parties' Agreement As stated above, the Agreement incorporates Applicable Law, including sections 251(b) and (c) of the 1996 Act and the concern and independent auditor requirements of the *Supplemental Order Clarification* As

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91 *See* BellSouth Br at 24-25, *see also Law Offices of Curtis V Trinko, LLP v Bell Atlantic Corporation*, 294 F 3d 307 (2nd Cir 2002), *superceded, Law Offices of Curtis v Trinko, LLP v Bell Atlantic Corporation*, 305 F 3d 89 (2nd Cir 2002), *Verizon New Jersey, Inc v Ntegrity Telecontent Services, Inc* , 219 F Supp 2d 616 (D N J 2002)

92 *See Trinko*, 305 F 3d at 94

93 *Id* at 104 As discussed above, parties to a voluntarily negotiated interconnection agreement *may* agree to be governed by contract provisions that deviate from existing law, however, they must include express provisions reflecting their intent to do so The plain text of the Agreement and the record in the Georgia proceeding—the only state to hold a full evidentiary record on the issues in dispute—does not contain any indication or evidence whatsoever that the parties in this case in any way excluded the concern and independent auditor requirements of the *Supplemental Order Clarification* from their Agreement

such, under the Agreement, BellSouth is required to comply with both the terms of the Act and the concern and independent auditor requirements of the *Supplemental Order Clarification*, thus negating the *Trinko* court's concern that an agreement might result in different obligations than those set forth in the Act.

Similarly, *Verizon New Jersey* is wholly inapplicable to the present case In *Verizon New Jersey*, a CLEC brought a counterclaim alleging violations of antitrust law, not Verizon's obligations under the interconnection agreement In concluding that Ntegrity's counterclaim could not be sustained under antitrust law, the court stated that Ntegrity had negotiated provisions in its interconnection agreement with Verizon that quashed its claim under the Act, and, thus under antitrust laws The court found that Ntegrity's interconnection agreement only provided for the provision of paper bills, yet Ntegrity had claimed that Verizon New Jersey violated its obligations under the Act and the antitrust laws by providing it with poor performance, in part, due to the provision of paper, not electronic, bills [94] The present situation is distinct; in this case, NuVox seeks to defend its rights—and enforce BellSouth's obligations—squarely incorporated into the Agreement Thus, it is BellSouth, and not NuVox, that is seeking an "end run" around the provisions of the Agreement

VI. NUVOX DID NOT NEGOTIATE AWAY THE CONCERN AND INDEPENDENT AUDITOR PROTECTIONS CONTAINED IN THE *SUPPLEMENTAL ORDER CLARIFICATION*

NuVox does not dispute that under the Act "an incumbent local exchange carrier ***may*** negotiate and enter into a binding agreement with the requesting telecommunications carrier

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[94] *Verizon New Jersey*, 219 F Supp 2d at 630-31

or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 "[95] The dispute in this case is over whether they did so with respect to the concern and independent auditor requirements adopted by the FCC in the *Supplemental Order Clarification* [96] While parties "may" negotiate to bind themselves to standards that differ from those set forth in sections 251(b) and (c) and the FCC's associated rules and orders, they also may agree to bind themselves to standards that ***do not*** differ from those set forth in sections 251(b) and (c) and the FCC's associated rules and orders (as is most often the case). In this case, with respect to the concern and independent auditor requirements, the parties did not enter into an agreement without regard to the relevant provisions of section 251 of the Act and the FCC's associated rules and orders Moreover, the cases upon which BellSouth relies to support its position in no way suggest that BellSouth and NuVox somehow displaced applicable law by entering into a voluntarily negotiated agreement.

Although not entirely clear in BellSouth's brief, it appears that BellSouth is arguing that the requirements set forth in the *Supplemental Order Clarification* do not apply because the parties voluntarily negotiated the Agreement [97] BellSouth is correct only to the extent that in negotiating the interconnection agreement, the parties actually exercised their right to—and successfully did—negotiate terms that deviate from the standards set forth in sections 251(b) and (c) and the FCC's associated rules and orders. Otherwise, the standards set forth in sections 251(b) and (c) and the FCC's associated rules and orders apply [98]

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95 47 U S C § 252(a)(1) (emphasis added)

96 *See Georgia Order* at 6-7

97 BellSouth Brief at 23-24

98 *See Jenkins v Morgan*, 112 S E 2d 23, 24 (Ga Ct App 1959)

The "reward" in the context of a negotiated agreement is simply that the parties voluntarily agree with respect to the extent, if any, that they will not be bound by the standards set forth in sections 251(b) and (c) and the FCC's associated orders, and that they do not have a state commission imposing terms on them in an arbitration that the state commission determines are required by sections 251(b) and (c) [99] Thus, the parties are not "rewarded" with an exemption from the substantive requirements of sections 251(b) and (c) unless they voluntarily negotiate and include express exemptions in their interconnection agreement Furthermore, BellSouth's reliance on *MCI Telecommunications Corp v U S West* also is misplaced, because in that case, the Court addressed issues related to an arbitrated interconnection agreement The court's characterization of negotiated agreements in its summary introduction did not address the "may" aspect of section 252(a)(1) and the agreement-specific nature of negotiated agreements Certainly, section 252(a) does not provide the legal basis for the blanket exemption that BellSouth now claims

Furthermore, in addressing negotiated aspects of a part negotiated, part arbitrated interconnection agreement, the Fourth Circuit held that "[w]here a provision plainly tracks controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law."[100] Therefore, contrary to BellSouth's argument, parties that enter into negotiated agreements do not bind themselves solely to federal requirements recited in those agreements but instead incorporate such requirements unless they are specifically excluded or displaced with conflicting requirements, as explained above [101]

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99 *See* BellSouth Brief at 23 (citing *MCI Telecommunications Corp v U S West Communications*, 204 F 3d 1262, 1266 (9th Cir 2000))

100 *AT&T of Southern States v BellSouth Telecommunications*, 229 F 3d 457, 465 (4th Cir 2000)

101 *See Jenkins v Morgan*, 112 S E 2d 23, 24 (Ga Ct App 1959)

BellSouth's reliance on *Trinko* and *Ntegrity* also do not support its position that the *Supplemental Order Clarification's* concern and independent auditor requirements are not incorporated into the Agreement [102] BellSouth has attempted to disclaim these audit prerequisites on the ground that the parties voluntarily negotiated the Agreement None of the cases upon which BellSouth relies suggest that applicable law is somehow automatically excluded from the Agreement by virtue of the parties declining to seek arbitration of it [103] The fact of the matter is that although the parties could have excluded the concern and independent auditor requirements from their Agreement, they did not do so

Neither *Trinko* nor *Verizon New Jersey* support BellSouth's claim that the obligations under sections 251(b) and (c) of the 1996 Act do not pertain to carriers that have negotiated interconnection agreements [104] As an initial matter, the plaintiffs in both *Trinko* and *Verizon New Jersey* pursued antitrust claims, and did not allege interconnection agreement violations Indeed, in *Trinko*, the plaintiffs were a CLEC's customers, which brought suit against the ILEC alleging poor performance, and were not parties to an interconnection agreement with the defendant ILEC.[105]

In addition, contrary to BellSouth's claims, neither case supports the proposition that a carrier that has entered into an interconnection agreement cannot allege a violation of the Act or other provisions of Applicable Law In *Trinko*, the court did not examine whether the ILEC's conduct violated the terms of an interconnection agreement, but instead reviewed

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102 *See* BellSouth Brief at 24-26

103 *Id*

104 *See id* at 24-25, *see also Law Offices of Curtis V Trinko, LLP v Bell Atlantic Corporation*, 294 F 3d 307 (2nd Cir 2002), *superceded, Law Offices of Curtis v Trinko, LLP v Bell Atlantic Corporation*, 305 F 3d 89 (2nd Cir 2002), *Verizon New Jersey, Inc v Ntegrity Telecontent Services, Inc* , 219 F Supp 2d 616 (D N J 2002)

105 *See Trinko*, 305 F 3d at 94

whether the ILEC's actions could constitute an independent violation of various regulations, including section 251 of the Act The court specifically limited its application to "this case", and on the basis that the interconnection agreement, which was not before it, could "result in a different set of duties than those defined by the statute "[106] In contrast, in the present case, the dispute arises under the obligations set forth in the parties' Agreement. As stated above, the Agreement incorporates Applicable Law, including sections 251(b) and (c) of the 1996 Act and the concern and independent auditor requirements of the *Supplemental Order Clarification* As such, under the Agreement, BellSouth is required to comply with both the terms of the Act and the concern and independent auditor requirements of the *Supplemental Order Clarification*, thus negating the *Trinko* court's concern that an agreement might result in different obligations than those set forth in the Act.

Similarly, *Verizon New Jersey* is wholly inapplicable to the present case In *Verizon New Jersey*, a CLEC brought a counterclaim alleging violations of antitrust law, not Verizon's obligations under the interconnection agreement In concluding that Ntegrity's counterclaim could not be sustained under antitrust law, the court stated that Ntegrity had negotiated provisions in its interconnection agreement with Verizon that quashed its claim under the Act, and, thus under antitrust laws. The court found that Ntegrity's interconnection agreement only provided for the provision of paper bills, yet Ntegrity had claimed that Verizon New Jersey violated its obligations under the Act and the antitrust laws by providing it with poor

106 *Id* at 104 As discussed above, parties to a voluntarily negotiated interconnection agreement *may* agree to be governed by contract provisions that deviate from existing law, however, they must include express provisions reflecting their intent to do so The plain text of the Agreement and the record in the Georgia proceeding—the only state to hold a full evidentiary record on the issues in dispute—does not contain any indication or evidence whatsoever that the parties in this case in any way excluded the concern and independent auditor requirements of the *Supplemental Order Clarification* from their Agreement

performance, in part, due to the provision of paper, not electronic, bills [107] The present situation is distinct; in this case, NuVox seeks to defend its rights—and enforce BellSouth's obligations—squarely incorporated into the Agreement. Thus, it is BellSouth, and not NuVox, that is seeking an "end run" around the provisions of the Agreement

VII. BELLSOUTH DID NOT DEMONSTRATE A CONCERN

In its opening brief, BellSouth does not demonstrate—or even attempt to demonstrate by providing documentation to support its allegations—that it has a concern with regard to any of NuVox's converted EEL circuits in Tennessee Instead, BellSouth relies on its untenable claim that it does not have to provide any support of its allegations of concern to the party to be audited. In its initial brief, NuVox demonstrated that, to date, despite NuVox's repeated requests therefore, BellSouth has failed to demonstrate a concern for the circuits that it seeks to audit; indeed, BellSouth has not even identified the particular circuits for which it claims to have a concern [108] Given BellSouth's failure to provide any support for its contested and unfounded allegations of concern, the Authority must deny BellSouth's complaint, as BellSouth has failed to satisfy the applicable audit prerequisites

Notably, each of BellSouth's allegations of concern is contested by NuVox First, BellSouth claims that it noticed an "inordinately low" volume of local exchange traffic sent from NuVox to BellSouth.[109] As NuVox explained in its brief, BellSouth's allegation is incorrect As Mr. Russell confirms in the Affidavit attached hereto, the level of traffic exchanged between the parties is not at all low and that the parties have agreed that it generally is in the mid-ninety

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107 *Verizon New Jersey*, 219 F Supp 2d at 630-31

108 *See* NuVox Brief at 25-26

109 BellSouth Complaint at 5, ¶ 16 BellSouth appears to have abandoned its previous and baseless claim of concern based on a NuVox change in jurisdictional factors

percent range [110] Moreover, the quantity of traffic exchanged between the parties on certain unspecified trunks has virtually nothing to do with the amount of local traffic carried on particular end user dedicated EEL circuits [111] In some instances, the rules do not require that any local traffic be directed over an EEL serving a particular customer [112] At bottom, BellSouth's initial allegation of concern is irrelevant and factually incorrect

As part of its ongoing effort (unfolding ever-so gradually over the course of the past three years) to manufacture a concern where it initially had none, BellSouth alleges in its complaint that there are forty-four circuits in Tennessee that "NuVox is using, or used, to serve end users who also receive(d) local exchange service from BellSouth "[113] BellSouth has failed to provide any documentation in support of these allegations and has denied repeated requests from NuVox for such documentation.[114] NuVox contests and will not accept such unsupported allegations [115] Without any supporting documentation and any information about which circuits BellSouth has a concern, the Authority must find that BellSouth has not demonstrated a concern

VIII. BELLSOUTH HAS NOT CHOSEN AN INDEPENDENT AUDITOR

The consultants that BellSouth has selected to perform the audit—ACA—are not independent auditors. Indeed, ACA appears to be quite susceptible to the influence of BellSouth Despite NuVox's and other CLECs' repeated concerns about BellSouth's chosen auditor, BellSouth still has failed to present any evidence demonstrating that its chosen auditor indeed is

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110 Russell Aff ¶ 19

111 NuVox Brief at 26

112 *Supplemental Order Clarification*, 15 FCC Rcd at 9598, ¶ 22 ("[t]he carrier can then use the loop-transport combinations to carry any type of traffic, including using them to carry 100% access traffic")

113 BellSouth Complaint at 7, ¶ 24

114 BellSouth eventually provided such documentation in the Georgia proceeding

115 Russell Aff ¶¶ 20-21

independent Instead, BellSouth essentially asks NuVox to take its word for it [116] As is made clear by the attached Affidavit of Hamilton Russell, NuVox contests BellSouth's unsupported claim that ACA is a suitable independent auditor [117]

As BellSouth admitted during the hearing before the Georgia Commission, BellSouth employees had participated in several conversations with ACA regarding, at a minimum, BellSouth's interpretation of the requirements of the FCC's *Supplemental Order Clarification* BellSouth participated in these discussions with ACA before and during ongoing audits with and without the audited party being present [118] BellSouth witness Shelley Padgett also admitted to discussing privately with ACA the types of information being provided during an ongoing audit and indicated that ACA had requested BellSouth's help in getting the target to comply with requests for information (that likely were generated by BellSouth in the first place) A truly independent auditor would not engage in such conversations with the auditor in the first instance, and certainly would not engage in such conversations without the audited entity being present

In addition, based on ACA's own marketing materials, it is clear that ACA is not truly independent ACA is a small consulting firm that depends on ILECs, including BellSouth, for virtually all of its revenues.[119] Indeed, as NuVox demonstrated before the Georgia Commission, in its marketing materials, ACA touts as "highly successful" its audits that have recovered millions of dollars for its ILEC clients [120] If ACA is dependent upon BellSouth (and

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116 BellSouth Brief at 32-33

117 Russell Aff ¶ 27

118 Georgia Hearing Transcript at 195, ll 14-25, 196, ll 1-5, 201, ll 8-25, 202, ll 1-16

119 *See* Georgia Order at 13

120 Georgia Hearing Transcript at 199, ll 4-7, 15-25

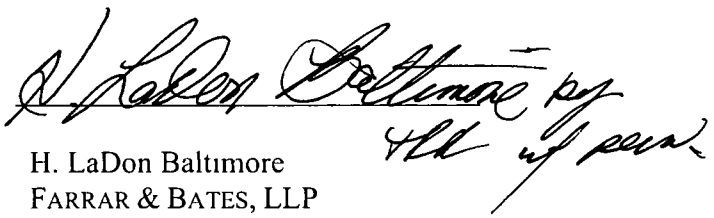
other ILECs) for all of its revenue, then it cannot at the same time be independent Notably, ACA has no clients that, like NuVox, are non-ILEC-affiliated facilities-based CLECs

Accordingly, BellSouth has not established ACA's independence and there are compelling reasons to doubt it

IX. CONCLUSION

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

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that on this the 21st day of March, 2005, a true and correct copy of the foregoing has been forwarded via first class U S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

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

H. LaDon Baltimore

Exhibit 1

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the Matter of:	
Enforcement of Interconnection Agreement between BELLSOUTH TELECOMMUNICATIONS and NUVOX COMMUNICATIONS	Docket No. 12778-U

Hearing Room 110
244 Washington Street
Atlanta, Georgia

Tuesday, August 13, 2002

The above-entitled matter came on for ORAL ARGUMENT pursuant to Notice at 1:21 p.m.

BEFORE:

NANCY GIBSON, Hearing Officer

* * *

uncovering violations of the Commission's rules.

You know, as far as the FCC's, you know, independent status under AICPA standards, Mr. Heitmann neglects to mention that the FCC didn't adopt those standards in its supplemental order. It may have adopted them in connection with a merger of AmeriTech and SBC, but it didn't adopt them here.

The fact of the matter is though, and I think this is a point Mr. Heitmann never addressed, is to the extent there is any bias by this firm, the Commission will have the opportunity to consider that in determining what relief to grant, because the interconnection agreement obligates BellSouth to come back to this Commission and say ah-ha, we believe that NuVox is not in compliance with the requirements; give us relief.

Mr. Heitmann, other counsel can cross examine ACA and establish whatever bias it wants, and the Commission can take that into account in granting relief. But this alleged bias from a firm that's never done any work for BellSouth should not prevent BellSouth from going forward and having this audit at this time.

As far as the concerns and whether or not this is a matter of routine, you know, Mr. Heitmann said this is -- BellSouth has pointed to problems in Tennessee and Florida. True. What Mr. Heitmann didn't mention is this is a nine-

state agreement, this is not an interconnection agreement just for Georgia, it's all nine states. Georgia law governs this agreement. BellSouth's view is what Commission better to decide what Georgia law requires than the Georgia Public Service Commission.

As far as the 13 audits that BellSouth has sought to initiate, again, Mr. Heitmann doesn't mention that there are approximately 40 CLECs who are purchasing EELs. BellSouth has identified a very small subset of CLECs that BellSouth has reason to believe may not be in compliance with the FCC's requirements. The suggestion that just because NuVox filed a petition for declaratory ruling at the FCC stopped BellSouth from pursuing audits is absolutely not correct. What stopped BellSouth from pursuing audits is until we actually get an audit underway, there's not much sense in us pursuing audits with other companies. This is a very important issue for our company.

What's the practical impact of adopting NuVox's position? The practical impact is that every time we try to have an audit, this Commission will become embroiled. This Commission will become embroiled because there'll be a dispute about whether or not the firm is independent and there'll be a dispute about whether or not BellSouth's concerns are legitimate or not. So every time we seek to conduct this audit, you can bet if NuVox's position is

Exhibit 2

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

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

244 Washington Street
Atlanta, Georgia

Friday, October 17, 2003

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

BEFORE:

JEFFREY STAIR, Hearing Officer

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

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

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

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

A The agreement is silent on that point.

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

A May I look at the terms?

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

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

A No, I am not aware of that.

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

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

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

A That's correct.

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

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

Q While the audit is going on?

A Yes.

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

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

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

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

A Yes, I am.

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

A Okay

Q Could you describe what this document is for me?

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

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

A Some of them, yes

Q Is Centel an ILEC?

A Where are they on here?

Q The second bullet.

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

Q Is Ameritech an ILEC?

A Yes.

Q Could you look down to the last sentence on that page, could you read that sentence for me?

A "Our use of experienced personnel has resulted in highly successful and efficient audits and in conjunction with our detailed documentation our LEC clients have recovered millions of dollars."

Q Now I think we just established you could not point out a single client of theirs in that list that was a facilities based CLEC like NuVox. The only ones we could point out and identify were ILECs, ICOEs being a subset of ILECs. So would you think their LEC clients are ILECs?

A I don't know, because again, they clearly have performed work for CLEC concerns.

Q Now why would a company that is supposed to be doing an independent audit characterize one as being successful if it recovers millions of dollars for its LEC clients?

A That just makes business sense to me. If you're trying to sell your services to someone, you say what I have provided has allowed people to get the billing right -- that makes perfect sense to me.

Q But what this company seems to be saying is that listen, I'm going to assist you on a revenue hunt, I'm very good at going out and getting millions of dollars of

of their business case in general.

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

A To my knowledge, they are, yes.

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

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

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

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

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

A We've done some of both

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

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

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

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

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

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

A Okay.

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

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

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

A Yes.

Q And when was that?

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

Exhibit 3

BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In Re	)	
	)	
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc.	)	Docket No 12778-U

BELLSOUTH TELECOMMUNICATIONS, INC.' RESPONSE TO NUVOX'S APPLICATION TO MODIFY OR REVIEW ORDER

I. INTRODUCTION

BellSouth Telecommunications, Inc ("BellSouth") respectfully submits its response to the application filed by NuVox Communications, Inc ("NuVox") requesting that the Commission modify or review the Recommended Order of the Hearing Officer dated November 4, 2002 In the Recommended Order, the Hearing Officer decided that BellSouth is entitled to audit NuVox's records to verify whether NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements The Hearing Officer's decision is correct and should be adopted by the Commission

In its application NuVox raises a number of complaints about the Hearing Officer's Recommended Order, none of which has merit The Hearing Officer correctly found that BellSouth had not violated the audit requirements set forth in the June 2, 2000 Supplemental Order Clarification issued by 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*"), even assuming such requirements applied to this case, which is an issue the Hearing Officer did not resolve

Although NuVox voluntarily negotiated an Interconnection Agreement ("Agreement") that gives BellSouth the absolute right to conduct an audit upon 30 days' notice, NuVox is desperately seeking to ensure that no such audit takes place This is clear from NuVox's own filing, in which NuVox seeks a stay "to prevent the audit" from ever occurring NuVox never explains what harm it will suffer if the audit proceeds The audit will not cost NuVox anything, since, under the terms of the Agreement, BellSouth must bear all the audit costs The audit will not be burdensome to NuVox, since BellSouth has agreed to conduct the audit at NuVox's premises and to conclude the audit as expeditiously as possible.

The only plausible explanation for the depths to which NuVox is apparently prepared to go to prevent an audit is a concern about what the audit will uncover On the one hand, if the audit reveals that NuVox is not providing a significant amount of local exchange traffic over combinations of loops and transport network elements, NuVox will have engaged in regulatory arbitrage, which this Commission should not condone On the other hand, if the audit reveals that NuVox is providing a significant amount of local exchange traffic, this case will be over However, neither this Commission nor BellSouth will know for certain what an audit will show unless the audit is permitted to proceed. Accordingly, the Commission should adopt the Recommended Order and deny NuVox's application and request for a stay

II. DISCUSSION

A. The Audit Requirements In The FCC's Supplemental Order Do Not Apply In This Case.

NuVox devotes its entire application to challenging BellSouth's compliance with the requirements for audits under the *Supplemental Order*, even though such requirements do not apply in this case. Although the Hearing Officer decided that it was not necessary to resolve this issue, the law could not be clearer that BellSouth's right to conduct an audit of NuVox's records

The law is clear that neither the unbundling requirements of Section 251(c) nor the FCC's rules and orders implementing those requirements can override the express terms of the BellSouth – NuVox Agreement Because BellSouth and NuVox voluntarily agreed to audit terms in their Agreement, BellSouth's ability to audit NuVox's records is governed solely by those terms Consistent with the plain language of Section 252(a)(1) and the holding of every case to address the issue, BellSouth's audit rights are not governed by the FCC's *Supplemental Order*, which constitutes an independent ground for the Commission to adopt the Recommended Order [1]

B. The Hearing Officer Correctly Found That BellSouth Had Stated A "Concern" That Justifies An Audit Under The FCC's Supplemental Order.

Even assuming the audit provisions in the *Supplemental Order* apply in this case, the Hearing Officer correctly found that BellSouth had stated a valid "concern" that would justify an audit consistent with the *Supplemental Order* Specifically, the Hearing Officer pointed to records from Tennessee and Florida indicating that an inordinate amount of traffic from NuVox is not local and the fact that NuVox had changed its jurisdictional factor significantly, which, according to the Hearing Officer, were sufficient grounds for BellSouth's "concern "

In challenging the Hearing Officer's findings, NuVox argues that BellSouth has not provided "evidence" establishing that "NuVox has not properly self-certified compliance with FCC safe harbor Option 1 " Application at 4 However, this argument misses the mark because no such "evidence" is required Notwithstanding NuVox's claims to the contrary, the FCC's

[1] The outcome in this case might be different if the parties' Interconnection Agreement were silent on the issue of the extent to which unbundled loop and port combinations could be substituted for special access services or BellSouth's ability to conduct an audit In such a case, an argument could be made that the interconnection agreement should be interpreted and enforced consistent with applicable law, which would include the substantive requirements set forth in the FCC's *Supplemental Order* However, that is not this case, since the BellSouth-NuVox Agreement is not silent on these issues and contains express language negotiated by the parties setting forth the specific circumstances under which an audit would be conducted

Exhibit 4

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

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

AFFIDAVIT OF HAMILTON E. RUSSELL, III
ON BEHALF OF NUVOX COMMUNICATIONS, INC.

I, Hamilton E Russell, III, of legal age, being duly sworn, do hereby depose and state·

1 My name is Hamilton E. Russell, III I have personal knowledge of the facts stated herein, and they are true and correct.

2 My business address is 2 North Main Street, Greenville, South Carolina I am currently employed by NuVox Communications, Inc ("NuVox") as a Vice President of Legal Affairs. In this position, I am responsible for legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation, and other services from BellSouth Prior to holding this position, I was a Regional Vice President of Regulatory and Legal Affairs for NuVox. In that capacity, I was responsible for negotiating numerous interconnection agreements on behalf of NuVox and its predecessor, TriVergent, including the interconnection agreement ("Agreement") that underlies this dispute

3 NuVox is a competitive local exchange carrier ("CLEC") that provides telecommunications services in various states throughout the United States, including Tennessee and other states in BellSouth's region

4 I was personally involved in negotiating the regional nine-state interconnection Agreement that is at issue in this case. As such, I participated in the negotiation of section 10 5 4

of Attachment 2 to the parties' Agreement. Mr Hendrix, BellSouth's affiant, did not participate in the negotiation of that section

5 The parties entered into and signed a single interconnection agreement that would govern their relationship throughout each of the nine states in BellSouth's region. The parties filed copies of the interconnection agreement with the applicable state commission Although there is technically a different interconnection agreement in each state approved by each state commission, the provisions in each agreement relevant to this dispute are identical and their meaning does not vary from state to state.

6 The parties voluntarily negotiated the terms and conditions of the Agreement pursuant to section 252(a)(1) of the Communications Act of 1934, as amended (the "Act"). The parties did not arbitrate any of the provisions before any state public service commission

7 The parties were fully aware of the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* when they negotiated the Agreement

8. BellSouth's right to audit NuVox's converted EELs circuits is not based solely on section 10 5 4 of the Agreement Instead, BellSouth's right to audit NuVox's circuits is governed by the Agreement as a whole, including sections 35 1 and 23 of the General Terms and Conditions, which incorporates the concern and independent auditor requirements of the *Supplemental Order Clarification*.

9. Accordingly, there are several provisions of the Agreement—in addition to section 10 5 4—that are relevant to whether the parties incorporated the *Supplemental Order Clarification* into their Agreement

10 The parties agreed that the Agreement would be governed by the laws of Georgia Section 23 of the General Terms and Conditions of the Agreement specifies that the Agreement is governed by Georgia law.

11. The parties also negotiated an applicable law provision, which, consistent with their choice of Georgia law, reflects the parties' agreement to comply with all applicable law in effect at the time of contracting (subsequent changes in law may be included via change in law amendments). All applicable law is incorporated into the Agreement unless specifically excluded or displaced. Section 35 1 of the General Terms and Conditions states

> 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

12 The parties, therefore, clearly incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* into the Agreement

13 Since we chose Georgia law as governing and further memorialized a basic tenet of Georgia law in the applicable law provision, there was no need to ensure that each audit prerequisite contained in the *Supplemental Order Clarification* was repeated verbatim in section 10.5 4 of Attachment 2

14 In addition, the parties did not exclude or displace the concern and the independent auditor requirements of the *Supplemental Order Clarification* from the Agreement. Indeed, the parties specifically negotiated the EELs audit provisions, and intended to include

these requirements from the *Supplemental Order Clarification*. BellSouth initially proposed language in the Agreement that would have allowed BellSouth to conduct audits at its "sole discretion." I recall that the parties discussed and agreed that the proposed language was inconsistent with the prerequisites set forth in the *Supplemental Order Clarification*, including the concern requirements set forth in footnote 86 of that order. Accordingly, the parties agreed to strike the language from the Agreement.

15 Section 10 5 4 of the Agreement does not operate independently from the General Terms and Conditions of the Agreement

16 BellSouth's own actions indicate that it believes that the *Supplemental Order Clarification* is part of the parties' Agreement For example, by letter dated March 15, 2002, BellSouth notified NuVox of its intent to conduct an audit. As Mr. Hendrix states in his affidavit, BellSouth also submitted that letter to the FCC, in accordance with the requirement in the *Supplemental Order Clarification* that the ILECs notify the FCC prior to conducting an audit. That particular requirement, however, is not stated in the parties' Agreement, but is incorporated into the Agreement by operation of the fact that the *Supplemental Order Clarification* is incorporated into the Agreement. There are other examples and I expressly reserve the right to testify about them, if necessary, in accordance with a procedural schedule adopted by the Authority.

17. BellSouth has not demonstrated a concern with regard to auditing the circuits at issue. BellSouth sent a letter to NuVox dated March 15, 2002, in which it indicated that it intended to conduct an audit of NuVox's converted EELs circuits. At that time that BellSouth made its audit request, NuVox had converted approximately 260 special access circuits to EELs in Tennessee

18. After receipt of the letter, NuVox requested that BellSouth demonstrate a concern, as required by the *Supplemental Order Clarification* BellSouth acknowledged its obligation to do so, but has since reversed position NuVox also raised numerous other issues regarding BellSouth's request To this end, NuVox and BellSouth conducted several phone calls and exchanged extensive correspondence The parties were unable to resolve many of these issues

19 In a letter dated April 1, 2002, 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 percent interstate jurisdictional factors. The information that BellSouth provided in its letter dated April 1, 2002, is to my knowledge false and does not appear to be related in any way to the converted EEL circuits for which NuVox has certified that it was the sole provider of local services at the time of the conversion request Moreover, NuVox and BellSouth have agreed that the percentage of local traffic factors for those states is in the mid-ninety percent range. BellSouth has refused informal and formal requests to provide documentation to support its accusations Thus, the unsupported and false allegations made by BellSouth in this regard are insufficient to demonstrate a concern

20 More than a year after requesting an audit, BellSouth made additional unsupported allegations of a concern regarding various converted EEL circuits in Tennessee BellSouth has refused informal and formal requests to provide documentation to support its accusations. Given that BellSouth has made erroneous, and in my view, highly suspect, allegations of concerns to justify its audit request, I will not consider accepting BellSouth's latest manufactured allegations of concern (see BellSouth Complaint, ¶¶ 19-22) without reviewing supporting documentation first.

21. NuVox has contested the scant factual allegations that BellSouth has made allegedly to support its audit request (such as arguing that BellSouth identified a certain number of customers that also received local exchange service from BellSouth). BellSouth has refused to provide any documentation to support its claim, despite the fact that NuVox is contesting BellSouth's allegations

22 The consulting firm BellSouth proposes to use to conduct the audit in Tennessee, American Consultants Alliance ("ACA"), is the same consulting firm that BellSouth proposed to use to conduct the audit in Georgia.

23 It is my understanding, based on the testimony of Ms Padgett, that ACA is not itself capable of complying with AICPA standards.

24. The consulting firm that BellSouth wants to use to conduct the audit is not independent It is my understanding that the parties agree that, in order to be independent, ACA cannot be subject to the influence or control of BellSouth

25. Information provided by BellSouth to NuVox indicates that ACA is a consulting firm that is dependent on incumbent LECs and their affiliates for the bulk of their work The roster of ACA engagements provided to NuVox does not indicate that ACA has done work for any competitive LECs that are not themselves affiliated with incumbents. In its marketing materials, ACA touts as "highly successful" its audits that have received millions of dollars for its incumbent LEC clients

26. In addition, it is my understanding that ACA has had various conversations with BellSouth regarding the *Supplemental Order Clarification* and has even had private mid-audit conversations with BellSouth seeking BellSouth's help in getting information from the CLEC

being audited A professional and independent auditor would not have such conversations that caste such serious doubt on its impartiality and independence.

27 NuVox repeatedly has indicated that it would accept a nationally or locally well recognized independent auditor to conduct the audit and BellSouth has steadfastly refused to suggest any firm other than ACA