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March 21, 2005

VIA HAND DELIVERY

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

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

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth Telecommunications, Inc.'s Reply to NuVox Communications, Inc.'s Initial Brief.

Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

JP:nc

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 04-00133

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY TO NUVOX COMMUNICATIONS, INC.'S INITIAL BRIEF

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully files this Reply to NuVox Communications, Inc.'s ("NuVox's") Initial Brief filed in this matter on March 4, 2005.

ARGUMENT

I. The "*Georgia Order*" Does Not Control The Outcome Here.

NuVox is fixated on establishing that a non-final decision of the Georgia Public Service Commission ("GPSC"),[1] in a matter concerning *Georgia EELs*, provisioned under an interconnection agreement *approved in Georgia, for Georgia*, is the supreme law of the land. To get to this conclusion, NuVox must bulldoze both the Act's approval and enforcement architecture -- which gives *each* state commission the authority to enforce (and interpret) the interconnection agreements *it* approves -- and the TRA's own contrary precedent on point. NuVox cannot prevail. The Act requires the TRA freshly to consider the issues before it as it construes the Agreement it approved for Tennessee. In doing so, the TRA surely will recognize basic principles of *stare decisis* and follow its own precedent – not the *Georgia Order*.

[1] *In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , Docket No 12778-U, *Order* (July 6, 2004) BellSouth timely appealed the GPSC's decision As such, the GPSC's order is not to be considered "final" for preclusion or similar purposes in this matter

When the TRA – as it must – considers the terms and conditions of the Tennessee Agreement it approved, it will understand (as the North Carolina Utilities Commission has now twice understood) that: (1) BellSouth is not required to "demonstrate a concern" as a prerequisite to an audit of NuVox's Tennessee EELs; and (2) BellSouth's auditor selection is not circumscribed in the fashion NuVox advocates. BellSouth has met all of the applicable pre-requisites for the audit it seeks. It should now be permitted to audit the Tennessee EELs without further delay or obstruction.

A. The Authority Should Follow Its *ITC^DeltaCom* Precedent.

In *ITC^DeltaCom*,[2] the TRA already has decided, albeit in a case with different CLECs, that BellSouth need not demonstrate cause before auditing EELs provisioned to CLECs pursuant to agreement language identical to that at issue in this matter. Yet, in a 27-page brief, including 83 footnotes, NuVox failed even to mention the application of that precedent in this matter. NuVox's silence, thus far, is telling. For NuVox to prevail, however, it must convince the TRA to abandon its own precedent. There is no basis for that to occur, and NuVox has presented none. The TRA should follow its *ITC^DeltaCom* precedent by ordering the commencement of the audit.

B. After Georgia, NuVox's Argument Has Been Taking on Water.

If the three other authorities to consider the arguments now advanced by NuVox are any indication, the GPSC ruling to which NuVox clings is a sinking precedent. The North Carolina Utilities Commission has now twice exposed and rejected the *Georgia*

[2] *See Report and Recommendation of Pre-Hearing Officer*, February 13, 2004, *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*" or "*DeltaCom*" case)

Order's flawed logic in lengthy opinions in two separate EELs audit matters involving NuVox and its merger partner, NewSouth.[3] These cases involved identical audit clauses, identical arguments and essentially identical parties. Summary disposition for BellSouth was granted in both.[4] And, although it has not yet addressed the merits of the parties' positions, the Florida Public Service Commission, in the EELs audit contest there, rejected out-of-hand NuVox's premise that the FPSC was bound to follow the GPSC's decision.[5]

When it adds the *ITC^DeltaCom* decision to this mix of authorities, the TRA should conclude that: (1) the *Georgia Order* represents an increasingly isolated minority view in this region on the present issues; (2) the TRA is certainly not "bound" to follow the *Georgia Order* under any circumstances; and (3) the TRA should adhere to its own precedent on these matters.

C. Section 252 Forecloses The Argument That The *Georgia Order* Controls.

BellSouth discussed Telecommunication Act's Section 252 and the federal cases construing it at length in its Opposition to NuVox's Procedural Order Motion, and in its Brief Regarding Legal Issues. NuVox has not (yet) addressed the impact of Section

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[3] *In the Matter of Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc., Order Granting Motion for Summary Disposition and Allowing Audit*, February 21, 2005, Docket No P-913, SUB 7 ("*North Carolina NuVox*"), *In the Matter of BellSouth Telecommunications, Inc. v NewSouth Communications Corp , Order Granting Motion for Summary disposition and Allowing Audit,* August 24, 2004, Docket No P-772, SUB 7 ("*NewSouth Order*")

[4] NuVox's North Carolina EELs audit is to start by April 7, 2005 The audit of NewSouth's EELs has been completed

[5] *See In re. Complaint to enforce interconnection agreement with NuVox Communications, Inc by BellSouth Telecommunications, Inc* , Docket No 040527-TP, *Order Denying Motion to Dismiss and Placing Docket in Abeyance* (October 12, 2004) ("*FPSC Order*")

252 on its position that the *Georgia Order* is binding precedent in this case. NuVox's failure to address these issues is telling.

The TRA's authority to approve or reject interconnection agreements derives from the Act, 47 U.S.C. § 252(e), and "carries with it the authority to interpret and enforce the provisions of agreements" it approved. *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000). *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003) (same); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (same); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (same); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) (same).

What NuVox seeks from the TRA calls into question *the very foundation of its jurisdiction* to approve or enforce or interpret interconnection agreements in Tennessee. The TRA should stay within the Act's established jurisprudence, and reject the course proposed by NuVox. The TRA, thus, should heed the comments of the 11th Circuit, which opined:

> A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. A [tribunal] might ascribe to the agreement a meaning that differs from what the state commission believed it was approving -- indeed, the agreement as interpreted by the [tribunal] may be one the state commission would never have approved in the first place. To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.

BellSouth Telecommunications, Inc., 317 F.3d at 1278, n.9.

NuVox's effort to persuade the TRA to "adopt" the GPSC's ruling is a naked attempt to establish preclusive effect of that order in this matter. This runs afoul of the weight of established authority on the subject. Rather than address these authorities, NuVox has chosen to ignore them in its pursuit of an un-founded and un-principled free pass from the TRA for its continuing breach of contract. That is not the right path for the Authority.

The TRA must follow the law in this matter, starting, as it must, with its subject matter jurisdiction under Section 252. It is inconceivable that the GPSC's interpretive decisions bind the TRA in this case, whether one calls it "preclusion," "full faith and credit," or anything else.[6] The Georgia PSC did not approve the Tennessee Agreement: the TRA did. The Georgia PSC did not have jurisdiction to approve or reject the Tennessee Agreement: the TRA did. Accordingly, the Georgia PSC does not have the authority to construe or interpret or enforce the Tennessee Agreement: the Authority does.

The TRA should continue to do the job established for it under the Act.

D. <u>The Parties Cannot Divest The TRA Of Its Jurisdiction</u>.

The parties chose Georgia law solely to supply the interpretive tools for the resolution of disputes under the Tennessee Agreement. By direct implication, if not by express argument, NuVox seeks to enlarge this rudimentary choice-of-law principle into the *de facto* vesting in the GPSC of ultimate authority to interpret *all* of the

[6] This is precisely the recent finding of the Florida Public Service Commission in the EELs audit enforcement complaint brought by BellSouth in Florida, where NuVox has made similar preclusion contentions before the FPSC. As the FPSC stated in rejecting NuVox's Motion to Dismiss "[w]e reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission. Thus NuVox's sole reliance on the doctrines of

NuVox/BellSouth state-approved agreements. Not only does NuVox's position distort the choice-of-law clause's significance, but the suggestion that necessarily follows from NuVox's argument is improper on its face.

It is axiomatic that parties to a contract may not confer subject matter jurisdiction on a tribunal that does not otherwise have it. *McRary v. McRary*, 228 N.C. 714, 720, 47 S.E.2d 27, 32 (N.C. 1948) ("If the court is without jurisdiction of the subject matter the parties cannot confer it"). *See Sherrer v. Hale*, 285 S.E.2d 714, 717 (Ga. 1982) ("... we agree that the parties cannot by waiver or consent confer equity jurisdiction on a court where it is otherwise without jurisdiction"). *See also Whittaker v. Furniture Factory Outlet Shops*, 145 N.C.App. 169, 173, 550 S.E.2d 822, 824 (N.C. App. 2001) ("... parties cannot by agreement or stipulation, confer subject matter jurisdiction upon a court by consent).

The converse of this principle is also true; that is, that parties to an agreement may not contractually, *e.g.*, through use of a choice-of-law clause, divest a tribunal of subject matter jurisdiction so vested in it by law. *See Ford v. NYLCare Health Plans*, 141 F 3d 243, 248 n.6 (5th Cir. 1998) ("... parties *cannot use a choice-of-law provision* to divest federal courts of jurisdiction ...") (emphasis added). *See also Barnett & Assoc. v. Smith*, 1987 Tenn. App. LEXIS 3164 (noting that choice of law provision choosign Californai law did not divest Tennessee Chancery Court's subject matter jurisdiction.)

Of course, BellSouth denies that the parties ever expressly or impliedly agreed or consented (either at the time of contracting or any subsequent time, *e.g.*, upon BellSouth's filing of an enforcement complaint in Georgia prior to filing in Tennessee) to

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collateral estoppel and *res judicata* fails to demonstrate that BellSouth's Complaint does not state a cause

the jurisdiction of the GPSC to interpret the terms of the agreements approved in and by the other states. But, even assuming that that was the case, such consent -- and resulting waiver of the TRA's jurisdiction -- is legally invalid. The choice of law clause in the Tennessee Agreement, thus, cannot be construed so as to confer jurisdiction on the GPSC -- or to divest the Authority of its own jurisdiction -- to interpret and enforce the terms of the Tennessee Agreement. Because adoption of NuVox's position in this regard would yield that forbidden result, it should not be undertaken.

II. The Plain Language Of The Tennessee Agreement Negates NuVox's Tortured Argument.

BellSouth has thoroughly addressed the merits of NuVox's position in its Brief Regarding Legal Issues (and, in part, in its Opposition to NuVox's Motion to Adopt Procedural Order). BellSouth will not burden the Authority by repeating those arguments here. Suffice it to say, however, that NuVox takes a winding and twisted path of reasoning to arrive at the conclusion that BellSouth must first establish cause for an audit, and pre-qualify its auditor as "independent" before any audit may commence These terms and conditions simply do not appear anywhere in the Tennessee Agreement.

What actually *do* appear in the agreement are plainly worded expense, notice and frequency of audit requirements. Anything more is pure advocacy on the part of a party desperately seeking to escape being audited as agreed. The TRA should keep simple things simple and order that the audit commence forthwith.[7]

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of action upon which relief can be granted " *FPSC Order* at 2.

[7] Finally, NuVox is totally off-base when it argues that BellSouth has violated, or would violate, the Act's Section 222's provisions regarding proprietary network information NuVox's Initial Brief at 26-27 BellSouth has committed no such violation, as NuVox well knows, and NuVox raises the issue solely

CONCLUSION

The TRA's decision in *ITC^DeltaCom* was correctly decided and is readily applicable in this case. The TRA should neither overturn, nor stray from, that decision, and should find that there is no "demonstration of concern" pre-requisite in the terms and conditions of the Tennessee Agreement.

With respect to the GPSC's order, as the Authority undoubtedly knows, it will not always find itself in accord with the decisions of its counterparts in other states regarding the meaning of terms in interconnection agreements held in common. The TRA can disagree with the conclusions of the GPSC in this matter. The GPSC's ruling is objectively flawed and, in any event, did not exist at the time the TRA approved the Tennessee Agreement. The GPSC's decision cannot be applied retroactively to the time the Authority approved the Tennessee Agreement, which is the result NuVox obviously seeks.

The Act is not offended by the type of disagreement between state commissions that, at present, is represented by the *ITC^DeltaCom*, *North Carolina NewSouth* and *North Carolina NuVox* decisions, on the one hand, and the lone *Georgia NuVox* decision on the other. If one decision is fundamentally wrong, then the process of judicial review established under the Act will eventually distill the binding legal principles. The Act embraces federalism in the achievement of Congress's goals by giving to each state commission plenary authority to "ensure compliance with federal law as set out in the [Act]" through the approval and rejection process of Section 252.

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as a smokescreen. NuVox is bent on creating any alleged "fact" question it believes it can raise, regardless of merit or basis, so as to prolong the inevitable. NuVox's protest is transparent, and should not concern the Authority for a moment

See BellSouth v. MCIMetro Access, 317 F.3d at 1278. That authority would be meaningless if NuVox's first-to-decide gambit prevails in this case.

Summary disposition, as BellSouth has demonstrated, is appropriate. NuVox, as it must, insists that there are material facts in dispute. That is not so. The contract is straight-forward and says, with clarity, that NuVox must permit BellSouth to audit the EELs circuits upon 30 days' notice, at its own expense, and no more than once per year. That notice has been duly given and the audit should proceed. The Authority can, and should, reach this conclusion on the basis of the papers before it, its own precedent, and the weight of the authorities in its sister states in this region.

For the reasons set forth, BellSouth respectfully requests that the TRA grant BellSouth's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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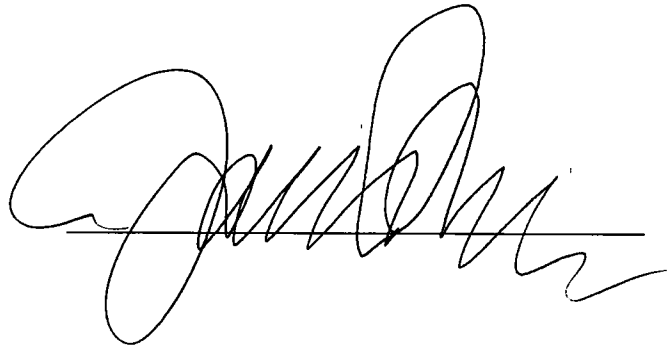

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