

ORIGINAL

MOYLE, FLANIGAN, KATZ, RAYMOND & SHEEHAN, P.A.
ATTORNEYS AT LAW

The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301

Telephone: (850) 681-3828
Facsimile: (850) 681-8788

Wellington Office
(561) 227-1560
West Palm Beach Office
(561) 659-7500

DIANA K. SHUMANS
E-mail: dshumans@moylelaw.com

June 24, 2004

Ms. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RECEIVED-FPSC
04 JUN 24 PM 4:24
COMMISSION
CLERK

040527-TP

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

Dear Ms. Bayó:

On behalf of Nuvox Communications Incorporated, enclosed for filing and distribution is the original and fifteen copies of NuVox Communication, Inc's Motion to Dismiss Complaint of BellSouth Communications, Inc. Please acknowledge receipt of the above on the extra copy and return the stamped copies to me. Thank you for your assistance.

Sincerely,


Diana K. Shumans

CMP _____
COM _____
CTR _____
ECR _____DKS/adk
GCL _____
OPC _____Enclosure
MMS _____
RCA _____
SCR _____
SEC 1
OTH Kim P

RECEIVED & FILED


FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DAT
06987 JUN 24 04
FPSC-COMMISSION CLERK

**Before the
FLORIDA PUBLIC SERVICE COMMISSION**

In re:)
)
Enforcement of Interconnection Agreement)
Between BellSouth Telecommunications, Inc. and) Docket No.: _____
NuVox Communications, Inc.)
_____)

**NUVOX COMMUNICATIONS, INC. MOTION TO DISMISS
COMPLAINT OF BELL SOUTH TELECOMMUNICATIONS, INC.**

NuVox Communications, Inc. (“NuVox”), by its attorneys and pursuant to Rule 28-106.204(2), hereby files this Motion to Dismiss the Complaint of BellSouth Telecommunications, Inc. to Enforce Interconnection Agreement (“Complaint”) filed with the Florida Public Service Commission (“Commission”) on June 4, 2004. In its complaint, BellSouth Telecommunications, Inc. (“BellSouth”) seeks an order from the Commission that, pursuant to the parties' interconnection agreement (“Agreement”), BellSouth is entitled to audit NuVox’s records to verify the type of traffic placed over circuits converted from special access to unbundled network elements (“UNEs”) combinations of loops and transport, referred to as Enhanced Extended Link or EELs. The parties already have litigated the identical claims and issues before the Georgia Public Service Commission (“Georgia Commission”), and the Georgia Commission already has evaluated these same claims and issues under the identical relevant provisions of the Agreement. Therefore, BellSouth’s complaint is barred by the doctrines of collateral estoppel and *res judicata*. Furthermore, to litigate BellSouth’s complaint before this Commission would be a waste of valuable Commission and carrier resources that could be

devoted elsewhere. Accordingly, the Commission should dismiss BellSouth's complaint with prejudice.

BACKGROUND

NuVox and BellSouth have entered into a multi-state Interconnection Agreement that governs their relationship throughout the BellSouth region. Although each state commission has approved the interconnection agreement separately, the relevant provisions of the interconnection agreement do not vary from state to state. Moreover, regardless of the state in which the parties operate, as BellSouth admits, the Agreement is to be interpreted under Georgia law.¹

The parties already have litigated the same claims and issues before the Georgia Commission, and the Georgia Commission already has ruled on these same issues.² Specifically, over two years ago, BellSouth filed a complaint with the Georgia Commission seeking an audit of all circuits converted from special access to EELs. In its Georgia complaint like the current complaint, BellSouth sought to subject its auditing rights only to the provisions contained in

¹ Agreement, General Terms and Conditions, § 23 (stating "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.").

² *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U. At this time, the Georgia Commission has voted and its written decision has yet to be released. It is NuVox's understanding that the Georgia Commission's written decision, when finalized, will adopt parts of the Hearing Officer's recommendation supported by NuVox, parts of two Georgia Commission Staff recommendations, and amendments adopted by the Georgia Commissioners overruling parts of the Hearing Officer and initial Staff Recommendations. NuVox will provide the Commission with a copy of Georgia Commission's order when it becomes available. At that time, NuVox also will provide the Commission with a copy of the record and its briefing materials and submissions from that proceeding. Representations made by NuVox with respect to the Georgia Commission's decision are made based upon statements made and votes cast by Georgia Commissioners at the Georgia Commission meeting on May 18, 2004. The representations made herein are intended to be accurate and fair. NuVox reserves the right to supplement its Answer and to make any necessary modifications after the release of the Georgia Commission's order.

Section 10.5.4 of the parties' Agreement. In addition to complying with the terms of Section 10.5.4, however, BellSouth's auditing rights and the Commission's resolution of any dispute arising under the Agreement, are subject to the audit provisions set forth in the Federal Communications Commission's ("FCC") *Supplemental Order Clarification*, which is incorporated into the Agreement by operation of section 35.1 of the Agreement and Georgia law.

In the *Supplemental Order Clarification*, the FCC found, *inter alia*, that: (1) audits will not be routine practice and only may be conducted under limited circumstances and only when the incumbent local exchange carrier ("ILEC") has a concern that a requesting carrier is not meeting the qualifying criteria;³ and (2) such an audit must be performed by an independent third party that is hired and paid for by the ILEC.⁴

The Georgia Commission already has addressed precisely the same issues as those raised in BellSouth's complaint, namely, (1) whether BellSouth is required to demonstrate a concern under the Agreement, and (2) whether BellSouth is required to hire an independent auditor under the Agreement. The Georgia Commission already has found in reviewing these same issues and the same relevant Agreement provisions that BellSouth must demonstrate a concern prior to conducting an audit of particular converted circuits and it must hire an independent auditor to conduct the audit in compliance with AICPA standards.⁵ In short, the

³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9603, ¶ 31 & n.86 (2000) ("*Supplemental Order Clarification*") (stating "[t]he incumbent LECs...state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange traffic...[w]e agree that this should be the only time that an incumbent LEC should request an audit.").

⁴ *Id.* at 9604, ¶ 31.

⁵ BellSouth fails to set forth all relevant provisions of the Agreement in its complaint. Section 35.1 of the General Terms and Conditions requires the parties to comply with all applicable law, including "all applicable federal, state, and local statutes, rules, regulations, codes, effective orders, decision, injunctions, judgments, awards and decrees that relate to the obligations under this Agreement...." Agreement, General Terms and

Georgia Commission's decision vindicated NuVox's rejection of BellSouth's audit request on grounds that BellSouth had failed to demonstrate a concern,⁶ that the audit should be limited in scope (to a small subset of converted circuits – 44), and that the auditor BellSouth selected for the audit (the same auditor proposed in this case) was not acceptable. BellSouth now seeks to relitigate these same issues – and has brought the same causes of action – before this Commission.

DISCUSSION

The Commission should dismiss BellSouth's complaint. After two years of litigation in Georgia, BellSouth knows what it must do in order to proceed with an audit of any of NuVox's converted EEL circuits. If BellSouth demonstrates a concern with respect to a particular circuit, then NuVox will let a truly independent auditor (not the consulting shop BellSouth currently proposes)⁷ do an AICPA-compliant audit of any circuits for which BellSouth demonstrates a concern. In the meantime, the Commission should not allow BellSouth to drain

Conditions, § 35.1. Pursuant to section 23 of the General Terms and Conditions, the Agreement is "governed by, and construed and enforced in accordance with, the laws of the state of Georgia." Agreement, General Terms and Conditions, § 23. Under Georgia law, laws that exist at the time and place of the making of a contract, enter into and form a part of it and, although parties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, these exemptions must be expressly stated in the contract. The Agreement contains no express exemptions from the concern and independent auditor requirements established by the FCC in the *Supplemental Order Clarification*. In accordance with these provisions of the Agreement, these *Supplemental Order Clarification* requirements are incorporated into the Agreement as applicable law, and as the Georgia Commission found, BellSouth is required to comply with them prior to proceeding with an audit.

⁶ The Georgia Commission found that BellSouth eventually demonstrated a concern with respect to only a small number of circuits; however, BellSouth supplied billing materials that convinced the Georgia Commission of this only days before the Georgia Commission adopted its decision and more than two years after BellSouth filed its Georgia complaint.

⁷ BellSouth has proposed to use as auditor a consulting enterprise that is incapable of performing an AICPA-compliance audit on its own and that has demonstrated a lack of discretion and good judgment by engaging in private mid-audit conversations with BellSouth without the audited party present. As stated above, the Georgia Commission already has found that BellSouth proposed auditor was not acceptable.

the Commission's resources or those of NuVox, while *BellSouth* reluctantly takes the steps necessary (if it proves it is so inclined to do so) to comply with the Agreement.

BellSouth's complaint is barred by the doctrines of *res judicata* and collateral estoppel. This Commission previously has held that in order for collateral estoppel to be applicable, the following prerequisites must be present:

- (1) The issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.⁸

Each of the above-stated criteria is satisfied in this case. First, the issues at stake are identical to the issues raised – and adjudicated – before the Georgia Commission. In both cases, BellSouth seeks to conduct an EELs audit of converted circuits, and relies on the exact same provisions of the Agreement to support its position, an Agreement which must be interpreted under Georgia law. Second, these issues have been litigated in full before the Georgia Commission. Indeed, the Georgia Commission already has evaluated the relevant provisions of the Agreement under Georgia law. Third, the determinations made by the Georgia Commission, namely, that BellSouth must demonstrate a concern prior to conducting an audit, and that BellSouth must hire an independent auditor, which it did not do, are the critical parts of the judgment in that action. More specifically, contrary to BellSouth's allegation, as the Georgia Commission already has found, the Agreement incorporates the concern and independent auditor

⁸ *In re: Application for Certificates to Provide Water and Wastewater Service in Alachua County under Grandfather Rights by Turkey Creek, Inc. & Family Diner, Inc., d/b/a Turkey Creek Utilities*, Docket No. 921098-WS, Order No. PSC-95-1445-FOF-WS, Order Denying Request for Deferral of Show Cause Proceedings, Clarifying Initial Show Cause Order, and Reinitiating Show Cause Proceedings, 1995 WL 733715, at *4 (Fla.P.S.C. Nov. 28, 1995).

requirements of the FCC's *Supplemental Order Clarification* and requires BellSouth to demonstrate a specific, bona fide and legitimately related concern that NuVox has not met the criteria to which it certified compliance. Lastly, both NuVox and BellSouth have had a full and fair – to litigate the issues of whether BellSouth must demonstrate a concern and hire an independent auditor. Therefore, BellSouth is barred from raising these same issues under the doctrine of collateral estoppel.

BellSouth also is precluded from bringing the instant claims before this Commission under the doctrine of *res judicata*. *Res judicata* serves to foreclose the "relitigation of matters that were litigated or could have been litigated in an earlier suit."⁹ The Florida Commission previously has found that four elements must be satisfied for the doctrine of *res judicata* to bar a subsequent suit:

(1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.¹⁰

All four criteria are satisfied. First, though not yet released, the Georgia Commission has rendered a decision on the merits.¹¹ Second, the decision has been rendered by the legal body with the appropriate jurisdiction over the claims brought in the proceeding – the Georgia Commission. Third, the parties in the Georgia proceeding, not to mention the Agreement – and the provisions of the Agreement – at issue, are identical. Fourth, the same cause of action –

⁹ *Id.* (citing, for example, *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984)).

¹⁰ *Id.* at *3 (citing *Harte v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986)).

¹¹ *See supra* note 2.

[REDACTED]

breach of contract – is present in both cases. Accordingly, BellSouth's complaint is barred by the doctrine of *res judicata*.

The Georgia Commission already has concluded that BellSouth must demonstrate a concern prior to conducting an audit and must hire an independent auditor to conduct the audit. As the Georgia Commission already has found, the parties' Agreement, which incorporates certain auditing requirements set forth in the FCC's *Supplemental Order Clarification*, does not provide BellSouth with unfettered discretion to conduct an audit of all circuits converted from special access to EELs. Having lost on these legal issues before the Georgia Commission, BellSouth is now seeking another bite at the apple. The fact remains, however, that BellSouth has not demonstrated a concern nor has it hired an independent auditor, and as the Georgia Commission found, until it does so, BellSouth is not entitled to conduct an EELs audit.

CONCLUSION

WHEREFORE, for the reasons discussed above, NuVox respectfully requests that the Florida Public Service Commission dismiss BellSouth's complaint and all of the relief sought forth therein.

Respectfully submitted,

NuVox Communications, Inc.

John J. Heitmann
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
jheitmann@kelleydrye.com
jkashatus@kelleydrye.com



Jon C. Moyle Jr.
MOYLE, FLANIGAN, KATZ, RAYMOND & SHEEHAN, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (telephone)
(850) 681-8788 (facsimile)
jmoylejr@moylelaw.com

Counsel to NuVox Communications, Inc.

June 24, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Complaint of BellSouth Communications, Inc., was furnished via hand delivery to Nancy B. White, c/o Nancy H. Sims, BellSouth Telecommunications, Inc., 150 South Monroe Street, Tallahassee, Florida 32301 and Beth Keating, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 this 24th day of June, 2004.


Jon C. Moyle, Jr.