

Cheryl R. Winn
Attorney At Law

May 20, 2005

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PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Enforcement of Interconnection Agreement Between BellSouth
Telecommunications, Inc. and NuVox Communications, Inc.
PSC 2004-00295

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Opposition to NuVox's Petition for Rehearing.

Sincerely,


Cheryl R. Winn

Enclosure

cc: Parties of Record

586223

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In Re:)
)
Enforcement of Interconnection Agreement) Docket No. 2004-00295 (Closed)
between BellSouth Telecommunications, Inc.)
and NuVox Communications, Inc.)
_____)

BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION
TO NUVOX'S PETITION FOR REHEARING

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully files this Opposition to the Petition for Rehearing filed by NuVox Communications, Inc. ("NuVox") on May 9, 2005. NuVox seeks rehearing on a matter determined by the Commission on summary disposition, dated April 15, 2005. On April 26, 2005, however, the Commission closed the matter to which NuVox's Petition is directed, and removed the proceeding from its active docket. There is, thus, no pending case relating to the subject matter of NuVox's Petition. Further, the Petition for Rehearing raises no additional evidence, is deficient, and should be rejected.

BACKGROUND

On July 26, 2004, BellSouth filed a Complaint against NuVox, which initiated the complaint docket styled "Case No. 2004-00295." After NuVox filed its Answer in Case No. 2004-00295 on August 18, 2004, BellSouth moved for summary disposition, on September 13, 2004. NuVox opposed BellSouth's motion on September 30, 2004, and also filed a motion for procedural order, in which it requested a hearing on the issues and merits, on that same date.

On April 15, 2005, the Commission partially granted and partially denied BellSouth's motion for summary disposition in Case No. 2004-00295 ("April 15, 2005 Order"). In its Order,

the Commission ruled that “NuVox’s motion for a procedural schedule and hearing is denied.” April 15, 2005 Order at 5. The Order also stated that the “matter [would] remain on the Commission’s docket pending the outcome of the audit.” *Id.*

However, on April 26, 2005, the Commission rescinded a portion of its April 15, 2005 Order as follows:

The Commission noted that this matter would remain on the Commission’s docket pending the outcome of the audit. However, on its own motion, the Commission will remove this proceeding from its active docket. This matter is closed without prejudice to the filing of a future complaint, if any, regarding the outcome of the audit.

April 26, 2005 Order at 1. In its May 9, 2005, Petition, NuVox does not seek relief from the April 26, 2005 Order. In fact, NuVox does not discuss the impact of, or even mention, the April 26, 2005 Order in its Petition.¹

ARGUMENT

I. This Commission Should Deny NuVox’s Petition for Rehearing because the Petition Raises No Additional Evidence.

NuVox’s petition for rehearing should fail because it fails to meet the statutory standard for making a petition for rehearing. Specifically, NuVox’s petition fails to raise new or additional evidence before this Commission. The language of KRS 278.400 expressly contemplates a party offering new or “additional evidence that could not with reasonable diligence have been offered on the former hearing.” NuVox’s petition should be denied because it fails to raise any issue that was not or could not have been addressed to the Commission by

¹ In footnote 13 of its Petition, NuVox, demonstrates a fundamental deficiency in its Petition. Citing *Union Light Heat & Power Co. v. Public Service Comm’n*, 271 S.W. 361, 365-66 (1954), NuVox argues that “an administrative agency, like a court, may reconsider and change its orders ‘during the time it retains control over any question under submission to it.’” Petition at 6, n. 13. BellSouth agrees. However, as is obvious from the procedural facts (and fatal to NuVox’s Petition), the Commission, on its own motion, has closed out the very questions NuVox seeks to pose in its Petition. Indeed, before the Commission should entertain the matters asserted in NuVox’s Petition, a new complaint docket would first need to be established.

NuVox in its pleadings in KPSC docket 2004-00295. Accordingly, because NuVox's petition failed to raise any new or additional evidence, this Commission should deny NuVox's petition.

II. NuVox Is Not Entitled To Relief.

As demonstrated, NuVox's Petition should not be considered as there is no active matter to which it relates and over which the Commission has jurisdiction. The Commission correctly decided matters raised in docket 2004-00295. In its order closing the docket, the Commission expressly provided the Commission was removing the proceeding from its active docket and that the matter was closed "without prejudice to the filing of a future complaint, if any, regarding the outcome of the audit." NuVox's remedy is to file a new complaint, if any, regarding the outcome of the audit. It would be premature to treat NuVox's petition as a new complaint because the audit has only just begun.

A. The Commission Properly Permitted the Audit.²

NuVox claims that the Commission erred in determining that BellSouth "demonstrated a concern for the fifteen circuits for which the Commission has permitted the audit to proceed." Petition at 2. This Commission correctly ruled to permit the audit.

Affidavit testimony before the Commission, along with the averments in BellSouth's Complaint and the practical situation envisioned by the Agreement make clear that the Commission had a logical basis for concluding, as it did, that BellSouth was entitled to audit NuVox's circuits. Indeed, on the facts before it, the Commission could have ordered that BellSouth be permitted to audit *all* of the Kentucky enhanced extended links ("EELs"). See BellSouth's Motion for Summary Disposition in Case No. 2004-00295 at 7-11 (and Affidavits cited therein). It follows, the Commission did *not* err in permitting the limited audit.

² In its April 15, 2005 Order, the Commission did not rule that, pursuant to the Kentucky Interconnection Agreement, BellSouth was actually required to "demonstrate a concern" as an audit pre-condition. Had it done so, it, indeed, would have erred.

The Commission properly noted, after reviewing the plain language of the Agreement, that “BellSouth has complied with [the Agreement] between the parties and is entitled to audit NuVox’s records in order to verify the type of traffic being carried over the combinations of loop and transport network elements.” April 15, 2005 Order at 4-5. The Commission further observed that, “[h]owever, the Commission finds that the audit *should be* limited to those 15 circuits for which BellSouth has shown sufficient concern and reasonably identified as circuits for which it remains the local service provider.” April 15, 2005 Order at 5 (emphasis added).

A proper, harmonizing reading of these back-to-back statements is that the Commission: (1) fully credited BellSouth’s position that the Kentucky Agreement *did not* contain any “demonstration of concern” requirement; but (2) felt, presumably as a matter of administrative equity, that the audit should nonetheless be limited to 15 circuits (identified and discussed in ¶¶ 22 and 23 of BellSouth’s Complaint).

The circuits for which the audit was ordered (and is underway) are, obviously, those that BellSouth referenced in its Complaint. These circuits, as averred, are the 15 still active circuits (as of the Complaint) out of 21 that BellSouth’s July 2003-January 2004 examinations revealed were used by NuVox to serve end users “who also received local exchange service from BellSouth.” Complaint at ¶¶ 22 and 23. A list of those circuits has been provided to the auditor, which has commenced the audit.³ See Exhibit 1, Letter from J. Hendrix to B. Russell, May 16, 2005.

³ NuVox contends that BellSouth “unlawfully used NuVox customer and proprietary information to create a concern (in 2004) that it did not have as of the date it issued its audit notice (2002).” Petition at 2. To the contrary, BellSouth has observed all laws governing carrier proprietary information in the examinations conducted in this matter. As for the “creation of concern” argument, it should be noted that BellSouth filed its Complaint in Kentucky on July 23, 2004, well after the Kentucky-circuit-specific issues were identified.

B. NuVox's Challenge to the Auditor's Independence Is Premature.

The Commission did not err when it chose not to provide NuVox an evidentiary forum to challenge the auditors' independence prior to the conduct of the audit itself. *See* Petition at 3.

This Commission properly noted that the "agreement allows BellSouth to select the auditor." April 15, 2005 Order at 3. The Commission further opined that "it is not a condition [of the Agreement] that the auditor must be approved by NuVox or the Commission." *Id.* Both statements are precisely correct. The Agreement sets the timing for NuVox to make auditor-independence and related challenges. That time is *after* the audit, *i.e.*, at such time as BellSouth brings a complaint, if at all, based upon the auditors' findings. *See* April 15, 2005 Order at 5.

What NuVox is obviously seeking is *two* "bites at the apple," one bite that comes from the contract, and a second bite that NuVox creates out of whole cloth. But the contract, as the Commission properly noted, only provides one opportunity to challenge auditor independence. That opportunity has yet to arrive and, indeed, may never arrive, if NuVox has played by the rules with respect to its self-certifications.

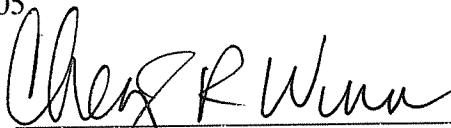
III. The Commission Should Deny NuVox's Petition as Moot because the Audit Has Commenced.

The underlying subject matter of Case No. 2004-00295 has to do with BellSouth's ability to audit certain unbundled network elements, EELs, provisioned to NuVox pursuant to the Parties' Kentucky Interconnection Agreement. Pursuant to the terms of the April 15, 2005 Order, the audit was to commence within 30 days of that Order. Accordingly, BellSouth engaged an auditor, Grant Thornton LLP, for the audit and, again pursuant to the Order's terms, the audit commenced on May 16, 2005. *See* Exhibit 1, Letter from J. Hendrix to B. Russell, May 16, 2005. Thus, the issues over which NuVox seeks reconsideration (*e.g.*, stays of the order and the audit), putting aside the jurisdictional defects of its Petition, are moot.

CONCLUSION

NuVox's Petition, thus, should be rejected as it raises no additional evidence. Further, the case under which NuVox's Petition arises has been closed. In addition, the Commission did not err in determining that: (1) BellSouth had observed all contractual requirements in seeking the audit; and (2) NuVox's challenge to the auditors is premature. Finally, with the audit already underway, NuVox's petition is moot. These findings should not be disturbed.

Respectfully submitted, May 20, 2005.



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EXHIBIT



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May 16, 2005

VIA ELECTRONIC MAIL

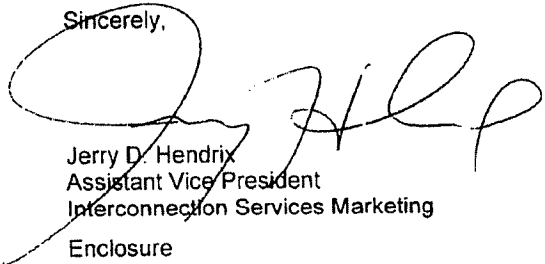
Mr. Bo Russell
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Greenville, SC 29601
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Mr. John Heitmann
1200 19th Street, NW, Suite 500
Washington, DC 20036

Dear Mr. Russell and Mr. Heitmann:

Please be advised that pursuant to the Kentucky Public Service Commission order dated April 15, 2005 in Case No. 2004-00295, the audit of 15 EEL circuits in Kentucky has commenced. As part of the audit, the auditor will contact you shortly.

Sincerely,



Jerry D. Hendrix
Assistant Vice President
Interconnection Services Marketing

Enclosure

cc: Mary Campbell, NuVox (via electronic mail)
John Fury, NuVox (via electronic mail)
Theodore Marcus, BellSouth (via electronic mail)
Parkey Jordan, BellSouth (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)

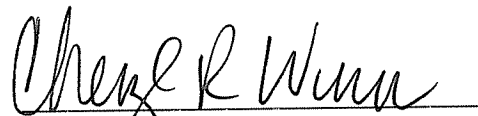
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof, this 20th day of May 2005.

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