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April 7, 2005

RECEIVED

APR 07 2005

PUBLIC SERVICE
COMMISSION

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

**Re: Case No. 2004-00295 – BellSouth Telecommunications
v. NuVox Communications, Inc.**

Dear Ms. O'Donnell:

On February 24, 2005, BellSouth filed with the Commission a copy of an order from the North Carolina Utilities Commission ("NCUC") granting BellSouth's motion for summary judgment and permitting an audit of NuVox's converted enhanced extended link ("EEL") circuits in North Carolina.¹

This letter is to advise the Commission that: (1) NuVox sought judicial review of the NCUC order; and (2) on April 4, 2005, the United States District Court for the Eastern District of North Carolina, Western Division, granted NuVox's motion for a preliminary injunction, thereby enjoining BellSouth from engaging in an audit of NuVox's North Carolina circuits. The injunction became effective today, after NuVox posted a \$1.5 million bond with the court's clerk.

In granting NuVox's motion, the Court stated that NuVox had "raised a serious question of law," noting that both parties agree that the terms of the interconnection agreements are identical in Georgia and in North Carolina, but that "two state utility commissions, applying the same law to the same dispute over the same agreement, came up with two different results." TRO at 5.

¹ See *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. P-913, Sub 7, Order Granting Motion for Summary Disposition and Allowing Audit (Feb. 21, 2005).

Ms. Elizabeth O'Donnell
April 7, 2005
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A copy of the court's order is enclosed. Please contact me if you have any questions regarding this filing.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Douglas F. Brent". The signature is stylized with a long horizontal line extending to the right.

Douglas F. Brent

c: service list in 2004-00295

DFB:jms

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:05-CV-207-BR(3)

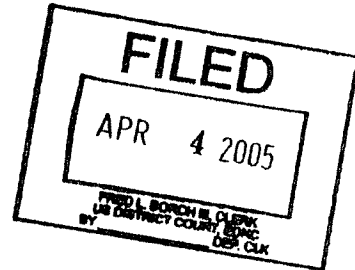
NUVOX COMMUNICATIONS, INC. and)
NEWSOUTH COMMUNICATIONS)
CORP.,)

Plaintiffs,)

v.)

NORTH CAROLINA UTILITIES COMMISSION:)
JO ANNE SANFORD, Chairman,)
J. RICHARD CONDER, Commissioner,)
ROBERT V. OWENS, JR., Commissioner,)
SAM J. ERVIN, IV, Commissioner,)
LORINZO L. JOYNER, Commissioner,)
JAMES Y. KERR, II, Commissioner, and)
MICHAEL F. WILKINS, Commissioner)
(in their official capacities as Commissioners of)
the North Carolina Utilities Commission); and)
BELLSOUTH TELECOMMUNICATIONS, INC.,)

Defendants.)



ORDER FOR PRELIMINARY
INJUNCTION

This matter is before the court on plaintiffs' 28 March 2005 motion for preliminary injunctive relief under Fed. R. Civ. P. 65. Pursuant to the court's order of the same date, defendants responded to the motion on 31 March 2005, and the court held a hearing on 1 April 2005. After reviewing the parties' filings and hearing the arguments of counsel, the court **ALLOWS** the motion based on the following findings and conclusions.

I. BACKGROUND

Plaintiffs NuVox Communications, Inc. ("NuVox") and NewSouth Communications Corp. ("NewSouth") are competitive local exchange carriers authorized by the North Carolina Utilities Commission ("NCUC") to provide local telephone service in North Carolina. Compl. ¶ 11.

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Accordingly NuVox and NewSouth entered into interconnection agreements with defendant BellSouth Telecommunications, Inc. (“BellSouth”) on 30 June 2000 and 18 May 2001, respectively. Id. ¶ 2. After the events giving rise to this action occurred, NuVox and NewSouth entered into an asset purchase agreement, and NewSouth ceased to exist as a separate entity on 31 December 2004. Id. ¶ 10. Under the agreements, plaintiffs are allowed to use a type of telecommunications circuit called converted Enhanced Extended Links (“EELs”) so long as they meet certain criteria. Id. ¶¶ 3, 21, 44. Plaintiffs buy EELs at a lower rate than other types of telecommunications circuits. Id. ¶ 3; Padgett Decl. ¶ 7. BellSouth is permitted to audit plaintiffs’ use of EELs subject to certain prerequisites. Compl. ¶ 4.

Two of these prerequisites are at the center of the dispute in this litigation. Id. Plaintiffs allege that BellSouth is required to comply with prerequisites set forth in an FCC regulation because those prerequisites are incorporated into the interconnection agreements. Id. ¶¶ 23-25, 46-47. Consequently, when BellSouth gave notice that it intended to conduct an audit without satisfying these prerequisites, a dispute arose between plaintiffs and BellSouth over BellSouth’s compliance with the terms of the parties’ agreements, and BellSouth filed complaints against plaintiffs with the NCUC. Id. ¶¶ 32-34, 60-61. The NCUC awarded summary disposition in both proceedings to BellSouth, finding that the FCC regulation was not completely incorporated into the interconnection agreements with regard to audits. Id. ¶¶ 38-39, 68. BellSouth gave notice to NuVox on 3 March 2005 that it intended to commence its audit of NuVox’s North Carolina EELs on 4 April 2005. Id. ¶¶ 37, 66; Russell Decl., Exh. G (3/3/05 letter from BellSouth to NuVox). In a prior proceeding before the Georgia Public Service Commission (the “GPSC”) in which BellSouth sought to audit NuVox’s EELs in Georgia pursuant to the parties’ interconnection agreement, the GPSC found that

the FCC regulation was completely incorporated into the parties' interconnection agreement with regard to audits. Compl. ¶ 57.

Plaintiffs filed a verified complaint on 28 March 2005 seeking declaratory and injunctive relief from the NCUC orders under 47 U.S.C. § 252 and Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 643 (2002) (a party to an interconnection agreement may seek review of a utility commission's interpretation of that agreement under the general grant of jurisdiction set forth in 28 U.S.C. § 1331 and § 252(e)(6) of the Telecommunications Act of 1996). Compl. ¶ 14. Plaintiffs seek an injunction prohibiting BellSouth from conducting an audit of their North Carolina EELs until this court can make a determination on the merits of the case.

II. DISCUSSION

A. *Standard of Review*

In ruling on a motion for preliminary injunction, the court must consider the familiar Blackwelder factors: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. Scotts Co. v. United Indus. Corp., 315 F.3d 264, 271 (4th Cir. 2002) (citing Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977)). Although all four factors are to be considered, the irreparable harm to the plaintiff and the potential harm to the defendant are the two most important factors and are referred to as the "balance of the harms." Direx Israel, Ltd v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991). The balancing of the harms between the plaintiff and the defendant must be conducted first, as that balance "fixes the degree of proof required for establishing the likelihood of success by the plaintiff." Id. at 817. "[T]he plaintiff

bears the burden of establishing that each of these factors supports granting the injunction.” In re Microsoft Corporation Antitrust Litigation, 333 F.3d 517, 526 (4th Cir. 2003) (quotations omitted) (citing Direx Israel, Ltd., 952 F.2d at 812).

B. *Balance of the Harms*

In comparing the harm to each party, the court concludes that this factor weighs strongly in favor of plaintiffs because BellSouth’s ability to conduct the audit is precisely the subject of the instant litigation. Although, in the absence of an injunction, BellSouth will obviously “cease” conducting its audit if the court ultimately rules in plaintiffs’ favor, BellSouth Br. Opp. Mot. at 12-13, plaintiffs will already have incurred an irreparable injury: the exact harm that they sought to prevent. Furthermore, because BellSouth has not yet commenced the audit, the entry of a preliminary injunction preserves the status quo *ante litem*, which “is a sound idea . . . , provided that it can be done without imposing too excessive an interim burden upon the defendant, . . . for otherwise effective relief may become impossible[.]” Blackwelder, 550 F.2d at 194-95.

In comparison, the harm to BellSouth is minimal. BellSouth has presented evidence that it may be entitled to significantly more money from plaintiffs if an audit reveals that plaintiffs have not met the criteria for using EELs; however, there is clearly an adequate contractual remedy for this loss of profit. “The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” Hughes Network Systems, Inc. v. InterDigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994) (internal quotation and citation omitted). Furthermore, the parties agreed during oral argument that this case is appropriate for a swift disposition – the parties are to submit a proposed schedule for bringing the case to trial by the end of this week – and thus any harm to BellSouth in

delaying the audit is minimized.

C. *Likelihood of Success on the Merits*

If the balance tips decidedly in favor of the plaintiff, he need not demonstrate a likelihood of success, but only that serious questions are raised by his complaint; it will “be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.” Blackwelder, 550 F.2d at 195; Scotts Co. 315 F.3d at 271. Plaintiffs have certainly raised a serious question of law. At oral argument, counsel acknowledged that the terms of the interconnection agreements are identical in Georgia and North Carolina. All parties agree that the agreements are governed by the application of Georgia law. Thus, two state utility commissions, applying the same law to the same dispute over the same agreement, came up with two different results.

D. *Public Interest*


The court finds that this factor does not particularly weigh in favor of any party to this litigation. However, this does not prevent the court from issuing an injunction so long as “the public interest does not appear to alter the conclusion to be drawn from the other factors.” Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 366-67 (4th Cir. 1991).

III. CONCLUSION

Plaintiffs’ motion for a preliminary injunction is ALLOWED, and BellSouth is hereby enjoined from conducting an audit of NuVox’s North Carolina EELs. Defendants are further enjoined from taking any action to enforce the NCUC orders allowing BellSouth to conduct an audit of plaintiffs’ EELs. Pursuant to Fed. R. Civ. P. 65(c), the preliminary injunction will become

effective only upon plaintiffs' posting of appropriate security in the amount of \$1.5 million with the Clerk.

This 14 April 2005.



W. EARL BRITT
Senior United States District Judge

nvc/bsc/tec
tro.wpd

Penny Slattery

From: Douglas Brent
Sent: Thursday, April 07, 2005 4:22 PM
To: Penny Slattery
Subject: RE: filing

that's it, thank you.

Doug

From: Penny Slattery
Sent: Thursday, April 07, 2005 4:20 PM
To: Douglas Brent
Subject: RE: filing

I've printed the letter and the Order for Preliminary Injunction. Is that all I'm supposed to have?
If so - I'm getting ready to take this to PSC for filing.

From: Douglas Brent
Sent: Thursday, April 07, 2005 4:05 PM
To: Penny Slattery
Cc: Jan Sample
Subject: filing

Penny,

please make 10 copies; get one stamped and leave the rest. there is one enclosure to the letter.

We will mail service copies from here. Thanks for your help!

Doug