COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Case No. 2004-00295
Between BellSouth Telecommunications, Inc.	)	
And NuVox Communications, Inc.	)	

NUVOX COMMUNICATIONS, INC.'S OPPOSITION TO BELLSOUTH'S MOTION FOR SUMMARY DISPOSITION

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel, respectfully submits its opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Summary Disposition ("Motion") filed on September 13, 2004, in the above-captioned proceeding.[1] For the reasons set forth herein, among others, BellSouth's Motion must be denied.

Introduction

In its Motion, BellSouth asks the Kentucky Public Service Commission ("Commission") to join it in taking a single provision of the parties' regional nine-state interconnection agreement ("Agreement") out of context and outside the scope of the governing Georgia law, and, on that basis, grant it summary judgment so that it can proceed with a fishing expedition, the request for which had been rejected and allowed to lay fallow for two years. The Commission must reject BellSouth's request to grant summary disposition in its favor based on BellSouth's far-fetched and erroneous arguments.

Critically, the arguments BellSouth repackages in its Motion already have been squarely rejected by the Georgia Public Service Commission ("Georgia PSC") as being contrary to fact

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[1] BellSouth Telecommunications, Inc. Motion for Summary Disposition, Case No. 2004-00295 (filed Sept. 13, 2004).

and governing Georgia law.[2] There is a Georgia PSC Order and an Order on Reconsideration that address identical legal issues to those raised by BellSouth in this case.[3] These orders, which BellSouth sought and now ignores, vindicated NuVox's position in that case (and in this one) by affirming that (1) BellSouth is required to demonstrate a concern with respect to each converted Enhanced Extended Link ("EEL") circuit it seeks to audit, and (2) BellSouth is required to retain an independent auditor compliant with AICPA standards and criteria. In reaching these legal conclusions, the Georgia PSC properly applied Georgia law and rejected the array of erroneous arguments raised by BellSouth.

These Georgia PSC decisions are now part of governing Georgia law. The relevant provisions of the Agreement do not mean different things in different states.[4] BellSouth's repackaging of arguments already squarely rejected provides no rational or legal basis to arrive at

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2 BellSouth's failure to acknowledge the Georgia PSC's decisions is, to say the least, stunning. Only BellSouth's "entire understanding" argument seems to have been freshly invented for this and other post-Georgia cases. BellSouth Motion at 12-13. That BellSouth argument takes one provision of Agreement (Section 45 of the General Terms and Conditions) and claims that others – namely the provision which expressly selects Georgia law as governing (Section 23 of the General Terms and Conditions) and the provision which expressly affirms that compliance with applicable law is required and, consistent with governing Georgia law, expressly confirms that an intent to deviate from applicable law cannot be implied (Section 35.1 of the General Terms and Conditions) – are some how not part of the "entire agreement". That argument is absurd. The parties did not with the "entire agreement" provision intend to nullify certain provisions of the Agreement, even though those provisions expressly operate to incorporate legal requirements not repeated separately or verbatim in the Agreement. Notably, in this regard, BellSouth suggests that there 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 it erroneously describes as "extraneous material"). As BellSouth has admitted in the Georgia proceeding, section 10.5.4 does not address those prerequisites. Accordingly no such conflict or "contradiction" exists.

3 *See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order*, Docket No. 12778-U (June 30, 2004) ("*Georgia Order*") (attached as Exhibit B to NuVox's Answer). Only BellSouth's unfounded claim for interest presents a new legal issue. BellSouth Complaint at 9, ¶ 4; NuVox Answer at 14, ¶ 4.

4 When the parties intended different terms to govern in different states, state specific phrases were added (*i.e.*, "in Kentucky"). The relevant provisions of the Agreement contain no provisions of that kind and were intended to have uniform meaning in all nine BellSouth states.

such an incongruous result. Indeed, reaching the untenable result BellSouth suggests may well violate the Full Faith and Credit Clause of the U.S. Constitution.[5]

BellSouth's Motion must be rejected not only because it is based on erroneous legal arguments that disregard governing Georgia law, but also because there are genuine issues of material fact that are in dispute and that make summary disposition (other than denial of BellSouth's complaint) impossible.[6]

Notably, material factual issues include, but are not limited to (1) whether the parties intended for BellSouth to have an unqualified right to audit NuVox's converted EELs circuits without any of the limitations imposed by applicable law (*i.e.*, the concern and independent auditor requirements from the Federal Communications Commission's ("FCC") *Supplemental Order Clarification*), (2) whether BellSouth has demonstrated concern such that it is permitted to conduct an audit of NuVox's converted EEL circuits, (3) whether BellSouth's proposed auditor is independent, and (4) whether BellSouth demanded an audit prior to conversion of any EEL circuits. Although BellSouth Affiants Hendrix and Padgett make assertions with respect to these issues, those assertions simply are not correct. As NuVox Affiant Russell attests, (1) the parties did not intend to displace the *Supplemental Order Clarification's* concern and independent auditor requirements with the language contained in Section 10.5.4 of Attachment 2 of the Agreement, (2) BellSouth has refused to demonstrate a concern with respect to any of the

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5 U.S. Constitution, Article IV, § 1. *See Global Naps, Inc. v. Verizon New England Inc.*, 2004 WL 1918706 * 23 (D. Mass. Aug. 26, 2004) (holding that the Massachusetts Department of Telecommunications and Energy violated the Full Faith and Credit Clause by failing to give preclusive effect to a prior interpretation of the Rhode Island Public Utilities Commission of identical language in an interconnection agreement).

6 Under Kentucky law, summary judgment is inappropriate when there are material facts in dispute. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476 (Ky. 1991). The Commission is seldom asked to grant summary judgment, and clearly does not grant summary judgment in contested cases when parties disagree on material facts. *See Petition of CTA Acoustics, Inc.*, Case No. 2003-00226, slip op. at 8 (KY PSC January 21, 2004)(denying summary judgment and further noting that "even in cases where the parties have agreed to stipulate the facts, the Commission's responsibility to protect the public interest may well justify further inquiry and hearing.")

converted Kentucky circuits at issue, (3) the consulting firm BellSouth has chosen to conduct the audit cannot be considered independent and, as BellSouth revealed at the Georgia hearing, cannot on its own comply with AICPA standards, and (4) BellSouth now seeks to audit circuits that were not converted at the time of its notice and thus did indeed seek an audit of circuits prior to their conversion. Because these are genuine issues of material fact, summary disposition is inappropriate as a matter of law, and NuVox respectfully requests that the Commission deny BellSouth's Motion.

I. SUMMARY OF FACTS

Pursuant to sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), BellSouth and NuVox entered into a regional nine-state interconnection agreement that governs their relationship throughout the BellSouth region.[7] The parties submitted the Agreement to each state commission separately, and each state commission has approved the Agreement. Thus, there is technically a different NuVox/BellSouth interconnection agreement in each state, although the relevant provisions in each agreement are identical and their meaning does not vary from state to state.[8]

The Agreement governs BellSouth's right to audit circuits converted from special access to EELs.[9] BellSouth, however, inappropriately relies on one provision -- to the exclusion of all others -- to support its claim that it is permitted to audit NuVox's converted EELs. Section 10.5.4 of Attachment 2 to the Agreement does not represent a "stand-alone agreement" and it does not provide BellSouth with an "unqualified" audit right, as BellSouth claims.[10] By its

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7 NuVox Answer at note 1; Affidavit of Hamilton Russell ¶ 4 ("Russell Affidavit")[Exhibit A].

8 Russell Affidavit ¶ 4.

9 BellSouth Motion at 7-8.

10 *See* BellSouth Motion for Summary Disposition, Affidavit of Jerry Hendrix on Behalf of BellSouth Telecommunications, Inc., ¶ 4 (hereinafter "Hendrix Aff.")

express terms, the Agreement incorporates applicable law not expressly excluded or displaced,[11] including the *Supplemental Order Clarification's* concern and independent auditor requirements.[12] By its own terms, section 10.5.4 does not exclude or displace the concern and independent auditor requirements from the FCC's *Supplemental Order Clarification.*

As noted, NuVox and BellSouth already have litigated these issues – involving identical provisions of the parties' Agreement – before the Georgia Commission.[13] In that proceeding, NuVox witness Mr. Hamilton Russell, who personally negotiated the Agreement on NuVox's behalf, confirmed what the text of the relevant provisions of the Agreement makes plain: the parties intended to incorporate the *Supplemental Order Clarification's* concern and independent auditor requirements into the Agreement.[14] Mr. Russell was the only witness to testify based on actual knowledge of the parties' negotiations; BellSouth did not proffer a single witness with firsthand knowledge of the negotiations. In the *Georgia Order*, the Georgia PSC concluded that "the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting an audit."[15] The Georgia Commission further concluded that, under Georgia law, "parties are presumed to enter into agreements with regard to existing law."[16] Accordingly, the Georgia Commission concluded that the *Supplemental Order Clarification's* concern and independent auditor requirements were incorporated into the parties' Agreement, and, therefore,

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11 Agreement, General Terms and Conditions, § 35.1; *see also* Agreement, General Terms and Conditions, § 23.

12 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, 15 FCC Rcd 9587 (June 2, 2000) ("*Supplemental Order Clarification*").

13 *See Georgia Order.*

14 *See* Russell Rebuttal at 16, ll. 17-21; Tr. at 278, ll. 1-4; at 286, ll. 6-13.

15 *Georgia Order* at 5.

16 *Id.* at 6 (citations omitted).

found that BellSouth must demonstrate a concern for each converted circuit prior to being able to conduct an audit and must hire an AICPA-compliant auditor.[17]

BellSouth has brought these exact same claims before the Commission and the result required is one that comports with governing Georgia law, including the Georgia PSC's decisions. Again, the relevant terms of the Agreement do not mean different things in different states.

II. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS CASE

BellSouth spends the majority of its motion advocating its rejected positions regarding the legal issues in dispute, but makes no discernable attempt to demonstrate that it has satisfied the standard for summary judgment. In doing so, BellSouth has sought to obscure the significant factual issues in dispute, and to focus the Commission's attention on BellSouth's incorrect legal interpretation of the Agreement which the Georgia PSC already has rejected in evaluating the identical provisions of the parties' Agreement.[18]

Summary judgment is appropriate only when there is no genuine issue of material fact.[19] The movant must demonstrate that "the adverse party could not prevail under any circumstances."[20] When reviewing summary judgment motions, the Commission must view all facts and inferences in a light most favorable to the non-moving party.[21] BellSouth cannot satisfy this standard.

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17 *Georgia Order* at 8, 12.

18 *See id.*

19 *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991); *CTA Acoustics, Inc.*, Case No. 2003-00226, slip op. at 8 (KY PSC January 21, 2004).

20 *Id.* at 480.

21 *See Ogden v. Employers Fire Ins. Co.*, 503 S.W.2d 727 (1973); *see also Mitchell v. Jones*, 283 S.W.2d 716 (1995).

BellSouth cannot satisfy the burden necessary to grant summary judgment. To grant such a request requires that there be no genuine issue of material fact, and when viewing the issues in a light most favorable to NuVox, it is apparent that genuine issues of material fact exist. As an initial matter, the Commission must determine whether the parties intended to exclude or displace the *Supplemental Order Clarification's* concern and independent auditor requirements from the Agreement. Although that this is an issue of law already correctly decided by the Georgia PSC, if BellSouth is to prevail on this issue,[22] then it must, at least, demonstrate (a) that the Agreement is ambiguous in that there is another "plain meaning" of the language of the Agreement that the Georgia PSC erroneously dismissed, and (b) demonstrate that the then necessarily ambiguous contract language reflects an implicit intent to exclude or displace the *Supplemental Order Clarification's* concern and independent auditor prerequisites. BellSouth has not made the appropriate factual or legal showings. Nor can it. Moreover, the conflicting affidavits filed by BellSouth and NuVox demonstrate that it could not possibly prevail on its Motion based on the contested factual assertions made to date in this case.

Viewing the issues in a light most favorable to NuVox, the Commission also must evaluate whether BellSouth has demonstrated a concern with respect to each circuit it seeks to audit. This is a fact-specific inquiry and there is no record evidence upon which the Commission can reach a decision at this point. BellSouth offered nothing more than naked allegations in its complaint, and its affidavit simply regurgitates those naked, unproven, and contested allegations of fact. NuVox has made repeated requests for documentation to support BellSouth's claim that it has concerns with regard to the accuracy of NuVox's certifications, and BellSouth steadfastly has refused to provide any information to NuVox. In the proceeding before the Georgia PSC,

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[22] Again, NuVox submits that Georgia law, including the Georgia PSC decisions, effectively bars BellSouth from prevailing on this issue.

BellSouth similarly did not provide any documentation in support of its claim that it had a concern, until the eleventh hour (at which point it appeared that BellSouth's complaint would be denied completely).[23] The information that BellSouth provided in that case (confidential BellSouth billing materials) was specific to the circuits at issue in the Georgia case, and, therefore, is not sufficient to demonstrate a concern in this case.[24] All that is presently before the Commission are unsupported BellSouth statements alleging a concern and, based on the lack of support for those allegations, NuVox statements denying those factual assertions. This Commission cannot determine whether BellSouth has demonstrated a concern with respect to the Kentucky converted EEL circuits at issue based on what is currently before it. Summary judgment, as requested by BellSouth, therefore is inappropriate as a matter of law.

The Commission also must evaluate whether BellSouth has chosen an independent auditor. As the Georgia PSC found, the Agreement incorporates the *Supplemental Order Clarification* requirement that the BellSouth retain an independent auditor to conduct the proposed audit in accordance with AICPA standards.[25] BellSouth has selected ACA to conduct the proposed Kentucky audit (and all others). As the Georgia PSC recognized, NuVox has raised legitimate concerns about the independence of ACA. In the Georgia proceeding, BellSouth fully admitted to engaging in private dialog with ACA before and during ongoing audits without the

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23 BellSouth did not provide copies of relevant billing materials to either the Georgia Commission or NuVox until May 11, 2004, nearly two years after it filed its complaint, seven months after the hearing, and only a week before the Georgia Commissioners voted on this matter. Indeed, BellSouth kept changing its stated concern and until that point was unable or unwilling to produce any evidence to support various allegations regarding the level of local traffic carried by NuVox or alleged jurisdictional factor reporting difficulties (which were non-existent).

24 The process by which BellSouth generated its concerns in Georgia, and presumably, here in Kentucky, too, appears to involve blatant violations by BellSouth of Section 222 of the federal Communications Act, 47 U.S.C. § 222, and FCC rules promulgated under section 222 of the Act, regarding carrier and customer proprietary information. NuVox reserves all rights with respect to claims it has and may pursue in that regard.

25 *Georgia Order* at 12.

audited entity being present.[26] Additionally, BellSouth itself supplied testimony in the Georgia proceeding admitting that ACA could not itself certify AICPA compliance.[27] Thus, as long as BellSouth insists on ACA, there will be an unresolved issue of material fact regarding whether the consultants selected to act as auditors are independent and capable of complying with AICPA standards.

The Commission must determine whether BellSouth now seeks to audit circuits that were not converted at the time of its notice and, whether, as a result it sought an audit of circuits prior to their conversion. The numbers in Ms. Padgett's testimony simply do not square with the number in Mr. Russell's affidavit.[28]

Under Kentucky law, the presence of these factual issues precludes issuance of summary judgment as a matter of law. As demonstrated herein, BellSouth's Motion falls far short of carrying the heavy burden of demonstrating that there are no genuine issues of material fact in dispute in this proceeding. Furthermore, as discussed herein, NuVox indeed should prevail on the merits of this case (as it did in Georgia). Accordingly, BellSouth cannot demonstrate, as it must, that "the adverse party could not prevail under any circumstances."[29] Accordingly, the Commission must deny BellSouth's motion.

III. THE COMMISSION SHOULD ESTABLISH A PROCEDURAL SCHEDULE THAT ALLOWS THIS CASE TO BE DECIDED EFFICIENTLY

As demonstrated above, BellSouth's "argument" in support of its Motion fails to demonstrate satisfaction of the legal standard for granting summary judgment. Indeed BellSouth's arguments are essentially a re-hashing of arguments that were squarely and properly

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26 NuVox Post-Hearing Brief, Georgia PSC Docket No. 12778-U at 48 ("NuVox Post-Hearing Br.").

27 NuVox Post-Hearing Br. at 47-48 (citing transcript).

28 *Compare* Padgett Aff., ¶¶ 7-8, *with* Russell Aff., ¶ 16.

29 *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d at 480.

rejected by the Georgia PSC as being inconsistent with fact and governing Georgia law. Most notably, BellSouth neither acknowledges the Georgia PSC's decisions or makes any attempt to explain why they are wrong. To effectuate the efficient and fair disposition of this case, and to prevent the wasteful re-litigation of issues already decided, NuVox is filing concurrently herewith its own Motion for a Procedural Schedule. The premise of NuVox's Motion is that the relevant terms of the Agreement do not mean different things in different states and there already exists governing Georgia law on the majority of legal issues raised by BellSouth in its complaint. Those legal issues can and should be resolved quickly and in accordance with Georgia law (*i.e.*, the Georgia PSC Order and Order on Reconsideration). The lone new legal issue raised in BellSouth's complaint (interest) and Kentucky-specific factual issues then can be addressed via customary practice involving pre-filed testimony, a hearing and briefing.

In any event, NuVox stands ready to rebut again, if necessary, pursuant to a procedural schedule adopted by the Commission, the erroneous legal arguments and unsupported factual assertions made by BellSouth.

In the meantime, and so as not to add heft to this pleading by including extensive briefing that has been set forth elsewhere (and which may be required again pursuant to a procedural schedule adopted by the Commission), NuVox respectfully submits for incorporation into the record of this proceeding its post-hearing briefing from the Georgia proceeding.[30] As demonstrated in those pleadings, BellSouth's attempt to create a stand-alone agreement out of section 10.5.4 of Attachment 2 is misguided.[31] Contrary to BellSouth's argument, that provision

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30 Attached hereto are (a) NuVox Post-Hearing Brief (Dec. 23, 2003)[Exhibit B], (b) NuVox Reply to BellSouth's Petition for Review of Recommended Order (Mar. 24, 2004)[Exhibit C], (c) NuVox Opposition to BellSouth's Motion for Reconsideration (July 15, 2004)[Exhibit D], and (d) NuVox Reply in Support of Opposition to BellSouth's Motion for Rehearing, Reconsideration and Clarification (Aug. 5, 2004)[Exhibit E].

31 *See* BellSouth Motion at 12-14.

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"). Both Georgia law, designated in section 23 of the General Terms and Conditions, and the "applicable law" provision (section 35.1 of the General Terms and Conditions) make clear that the *Supplemental Order Clarification's* concern and independent auditor provisions are incorporated into the Agreement.[32] Section 10.5.4 neither excludes nor displaces those audit prerequisites.[33] Therefore, Georgia law carries a presumption that they are included as though expressly stated.[34] The Agreement's applicable law (section 35.1) provision confirms this principle by requiring compliance with applicable law not excluded.[35] Thus, NuVox's pleadings demonstrate that the "plain meaning of the Agreement" is not that which BellSouth implausibly suggests. The Georgia PSC agreed with NuVox and rejected BellSouth's arguments on this point.[36]

NuVox's pleadings also demonstrate that, although the Agreement was voluntarily negotiated and, as such, the parties *could have* negotiated to displace the *Supplemental Order*

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32 NuVox Post-Hearing Brief at 10-30; NuVox Reply to BellSouth's Petition for Review at 4-13; *see also Georgia Order* at 5-8.

33 NuVox Post-Hearing Brief at 10-11, 14-15, 18-21, 21-24; NuVox Reply to BellSouth's Petition for Review at 7-13; *see also Georgia Order* at 7-8 ("The Agreement, however, does not state that notice is the only precondition. . . . Without language evidencing an intent to vary from the requirement to show a concern, it is unreasonable to conclude that NuVox intended to waive its protection under federal law.").

34 NuVox Post-Hearing Brief at 15-17; NuVox Reply to BellSouth's Petition for Review at 7-10; *see also Georgia Order* at 6-8.

35 NuVox Post-Hearing Brief at 10-14, 17-18; NuVox Reply to BellSouth's Petition for Review at 6-13; *see also Georgia Order* at 6. Moreover, this case is not, as BellSouth claims, about a conflict between the specific and the general provisions of the Agreement. *See* BellSouth Motion at n. 7 & 17. BellSouth admitted in the Georgia proceeding that section 10.5.4 was silent with respect to the concern and independent auditor prerequisites. *See* NuVox Post-Hearing Brief at 20-21 (citing Hearing Transcript); *see also* NuVox Reply to BellSouth's Petition for Review at 13. Such silence does not produce a conflict or "apparent ambiguity", that would result in the need for one provision (those provisions of the General Terms and Conditions that incorporate the *Supplemental Order Clarification* concern and independent auditor requirements) to "trump" or "over-write" another (section 10.5.4). *See* NuVox Post-Hearing Brief at 19-20; *see also* NuVox Reply to BellSouth's Petition for Review at 12.

36 *Georgia Order* at 6-8.

Clarification's concern and independent auditor requirements,[37] the fact of the matter is that they did not.[38] The plain language of the Agreement makes this clear.[39] To the extent there is any ambiguity, NuVox's pleadings (supported by the only witness with actual knowledge of the contract present at the hearing) show that the parties did not intend to displace those prerequisites and that BellSouth's own conduct reveals that its attempt to liberate itself from the *Supplemental Order Clarification* concern and independent auditor requirements is merely a fanciful post-hoc creation of BellSouth attorneys seeking to support their client's ongoing efforts to harass NuVox.[40]

NuVox's pleadings also demonstrate the fallacy of various arguments BellSouth has concocted in support of its view that the *Supplemental Order Clarification* does not require a concern to be demonstrated prior to an audit of a converted EEL circuit.[41] Notably, BellSouth has not made this argument before the FCC and instead claims compliance with the concern requirement.[42] In any event, the Georgia PSC agreed with NuVox and rejected BellSouth's arguments in this regard, too.[43]

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37 *See* BellSouth Motion at 14-18.

38 NuVox Post-Hearing Brief at 23-24, n.11; NuVox Reply to BellSouth's Petition for Review at 7, 10-11; *see also Georgia Order* at 6-8.

39 NuVox Post-Hearing Brief at 24; NuVox Reply to BellSouth's Petition for Review at 7, 11; NuVox Opposition to BellSouth's Motion for Reconsideration at x-x;; *see also Georgia Order* at 6-8.

40 NuVox Post-Hearing Brief at 12-13, 21-28; *see also Georgia Order* at 7-8.

41 *Georgia Order* at 5-6; *see also* NuVox Post-Hearing Brief at 25, n.10, 26. BellSouth has argued that footnotes don't count; that the language of footnote 86 of the *Supplemental Order* is "aspirational" (the meaning and import of which is anything but clear), and that the language is of "lesser regulatory standing". None of these arguments, however, has any merit. The FCC affirmed in its *Triennial Review Order* that the *Supplemental Order Clarification* only permitted audits based on cause. *See Georgia Order* at 5 (citing *FCC Triennial Review Order*, ¶ 622). Thus, the "concern" requirement is real and is not merely surplus language without meaning or effect.

42 NuVox Post-Hearing Brief at 26.

43 *Georgia Order* at 5-6.

Finally, NuVox's pleadings demonstrate that it has good reason to doubt independence of the consultants retained by BellSouth to conduct the audit it seeks. Indeed, the Georgia Commission found that "NuVox raised serious concerns about the auditor's independence".[44] Notably, at the Georgia hearing, it was revealed that ACA, while conducting other EEL audits, had privately solicited BellSouth's help with respect to the audit.[45] The hearing also revealed that ACA's consultants were not actually professional auditors that could attest to AICPA compliance.[46] Questions also were raised with respect to BellSouth's training and discussions of the *Supplemental Order Clarification's* safe harbor requirements with the proposed auditor.[47] In determining that the auditor BellSouth selected must be compliant with the standards and criteria established by the AICPA, the Georgia Commission effectively out-ruled ACA, which is the same ILEC consulting shop that BellSouth oddly continues to insist will conduct its audit outside Georgia.[48]

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44 *Georgia Order* at 13; *see also* NuVox Post-Hearing Brief at 45-48.

45 NuVox Post-Hearing Brief at 47-48; *see also* Georgia Order at 13.

46 NuVox Post-Hearing Brief at 46-47; *also* Georgia Order at 13.

47 NuVox Post-Hearing Brief at 47; *see also* Georgia Order at 13.

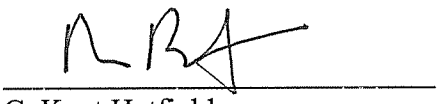
48 *See Georgia Order* at 12-14.

I. CONCLUSION

For the foregoing reasons, the Commission should reject BellSouth's Motion for Summary Disposition.

Respectfully submitted,

NuVox Communications, Inc.



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Counsel to NuVox Communications, Inc.

Certificate of Service

The undersigned hereby certifies that on this the 30th day of September, 2004, 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.

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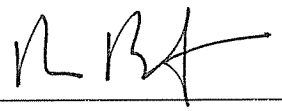

Douglas F. Brent

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In re:	)	
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Enforcement of Interconnection Agreement	)	Case No.: 2004-00295
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 the Regional Vice President of Regulatory and Legal Affairs for NuVox. In that capacity, I was responsible for negotiating 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 Kentucky 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. 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.

5. 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.

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

7. 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, which incorporates the concern and independent auditor requirements of the *Supplemental Order Clarification.*

8. 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.

9. 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.

10. 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.

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

12. 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.

13. 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.

14. Section 10.5.4 of the Agreement does not operate independently from the General Terms and Conditions of the Agreement.

15. 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 affidavit. 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 Commission.

16. 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 133 special access circuits to EELs in Kentucky.

17. 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 held several phone calls and exchanged extensive correspondence. The parties were unable to resolve many of these issues.

18. 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, for numerous reasons I need not address here, is insufficient to demonstrate a concern in either Tennessee or Florida. 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.

19. In the April 1, 2002, letter, BellSouth did not provide any information in support of its claim that it had a concern particular to Kentucky. NuVox and BellSouth have agreed that the percentage of local traffic factor for Kentucky is in the mid-ninety percent range.

20. More than a year after requesting an audit, BellSouth made unsupported allegations of a concern regarding various converted EEL circuits in Kentucky. 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, ¶¶18-21) without reviewing supporting documentation first.

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

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

23. 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.

24. 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.

25. 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 an independence.

26. 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.

27. These factors preclude ACA from qualifying as an independent auditor in this matter.

This concludes my affidavit.

Hamilton E. Russell, III

Affirmed to me this 29th day of September, 2004.

Notary Public

Before the
GEORGIA PUBLIC SERVICE COMMISSION

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

POST-HEARING BRIEF OF NUVOX COMMUNICATIONS, INC.

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December 23, 2003

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POST-HEARING BRIEF OF
NUVOX COMMUNICATIONS, INC.

NuVox Communications, Inc. ("NuVox"), by its attorneys, hereby files this Post-Hearing Brief, including the Proposed Order submitted herewith, in the above-captioned proceeding initiated by BellSouth Telecommunications, Inc. ("BellSouth"), as ordered on October 17, 2003 by Hearing Officer, Jeffrey Stair, Esq. Tr. p. 295, ll. 22-24 (Hearing Officer Stair).

I. INTRODUCTION

Two procedural issues and three substantive issues are addressed in this brief. On all issues, the facts and the law require a decision in favor of NuVox.

The first of the procedural issues is briefing on NuVox's Motion to Strike large parts of the testimony of BellSouth witness Shelley Padgett. Because Ms. Padgett's testimony with respect to the parties' intent was not based on personal knowledge it is not admissible. Ms Padgett also testified extensively on the requirements of the law relating to EELs audits. Because Ms. Padgett is not a lawyer, she is not competent to render such an opinion.

The second of the procedural issues is briefing on the Admissibility of NuVox Exhibit HER-12. Because BellSouth did not include the evidence upon which it seeks to rely in

its direct case, NuVox would have had no meaningful opportunity to respond absent the admission of Exhibit HER-12. The Commission has wide discretion to allow the exhibit and due process and fair play compel its admission.

With respect to the first of the three substantive issues, record evidence clearly demonstrates that the "concern" and "independent auditor" requirements set forth in the FCC's *Supplemental Order Clarification, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, 15 FCC Rcd 9587 (released June 2, 2000) ("*SOC*"), are incorporated into the parties' June 30, 2000 Interconnection Agreement ("Agreement") by operation of the Georgia law and Applicable Law provisions of the Agreement's General Terms and Conditions (sections 23 and 35.1, respectively). Record evidence also firmly establishes that no exemptions from these requirements were agreed to or intended.

With respect to the second substantive issue, BellSouth has simply failed to provide credible evidence to support its allegation of a concern with respect to 44 circuits. BellSouth makes no allegation of concern with respect to other converted EELs audits in Georgia.

With respect to the third issue, BellSouth has failed to provide credible evidence necessary to establish the independence of the ILEC consulting boutique it has retained for its wide-ranging EEL audit initiative. Indeed, revelations about past and continuing private conversations between BellSouth and the proposed auditor (prior to and during at least one ongoing audit) raise more doubt than ever about the independence of ACA. Moreover, BellSouth's proposed solution of having an unnamed entity with a pre-existing "relationship"

with ACA attest to ACA's independence only raises additional concerns about whether this group of ILEC consultants is qualified to serve as an independent auditor.

II. THE PORTIONS OF MS. PADGETT'S TESTIMONY DESIGNATED IN NUVOX'S MOTION TO STRIKE SHOULD BE STRICKEN EITHER BECAUSE SHE LACKS PERSONAL KNOWLEDGE ABOUT THE SUBJECT OR BECAUSE SHE IS NOT COMPETENT TO TESTIFY TO THE SUBJECT MATTER

To support its demand for an audit, BellSouth attempts to use the testimony of Shelley Padgett to establish that (1) the parties, in their negotiation of the interconnection agreement, intended to allow for such an audit; and (2) the law allows such an audit. At the hearing, NuVox moved to strike a number of passages from the testimony of Ms. Padgett on the grounds that the testimony with respect to the first issue – the parties' intent – was not based on personal knowledge and therefore not admissible. NuVox also moved to strike Ms. Padgett's testimony on the second issue – the requirements of the law relating to EELs audits – because as a nonlawyer, she is not competent to render such an opinion. As set forth below, NuVox's motion should be granted.

NuVox requests that Ms. Padgett's testimony regarding the intent of the parties with regard to an audit be stricken because she has absolutely no personal knowledge related to that subject. That point is not in dispute. On cross examination, Ms. Padgett specifically conceded she that she did not negotiate the interconnection agreement between BellSouth and NuVox. Tr. p. 122, ll. 22-25 (Padgett). Ms. Padgett further testified that she was never involved in any calls or meetings between NuVox and BellSouth related to the negotiation of the interconnection agreement. Tr. 129, ll. 1-4 (Padgett). Ms. Padgett, in fact, agreed that having not been part of the negotiations, she could not testify under oath as to the parties' intentions in those negotiations. Tr. 124, ll. 24-25, p. 125, ll. 1-5 (Padgett).

Georgia law is clear that upon motion, testimony which is not based on personal knowledge should be stricken: "Where a witness testifies to certain facts upon his direct examination, but upon cross-examination shows that he has answered from hearsay and without any personal knowledge of the facts about which he has testified, his testimony should, as hearsay, be excluded from consideration, for the reason that hearsay evidence is without probative value." *Atlantic Coast Line Ry. Co. v. Collins*, 13 Ga. App. 759 (1913) "Where . . . testimony has been given, and it thereafter appears that the witness has answered without any personal knowledge of the fact about which he has testified, his testimony should be disregarded." *Salters v. Pugmire Lincoln-Mercury, Inc.*, 124 Ga.App. 414, 416 (1971) *citing Scott v. Kelly- Springfield Tire Co.*, 33 Ga.App. 297 (19). *See also Williams v. State,* 239 Ga. App. 30, 32 (1999) (trial court properly excluded testimony of witness who "had no personal knowledge of the encounter, but knew only what he had been told by others. These statements were nonprobative hearsay and not competent evidence."); *Haynes v. State*, 234 Ga. App. 272, 273 (1998).

Without dispute, Ms. Padgett never participated in the negotiation of the interconnection agreement and even recognized her own incompetence as a witness on the matter. Therefore, her testimony as to what the parties intended in the negotiations is not admissible and should be stricken from the record.[1]

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[1] At the hearing, BellSouth's response to the motion to strike was that it should have been filed earlier. However, as Mr. Walsh commented, while motions to strike are often filed two days before the hearing, there is no Commission rule that requires such motions be filed prior to the hearing, which presumably allows for a prepared response at the hearing. In fact, BellSouth's primary complaint with respect to the motion was that it did not have an adequate opportunity to respond. To the extent that there was any harm to BellSouth, the Hearing Officer remedied that situation by allowing the parties to argue the issue in this brief, thereby allowing BellSouth an opportunity to prepare a response over the period of two months versus two days.

Likewise, Ms. Padgett's testimony on the law with respect to audits of EELs circuits is also inadmissible and should not be allowed. Although Ms. Padgett's direct testimony goes on for pages regarding the whether BellSouth is legally obligated to state a concern, that issue is clearly a question of law for which Ms. Padgett is not qualified to render an opinion because the fact is undisputed that she is not a lawyer. Her testimony is clear that she is neither a lawyer nor a legal expert. Tr. p. 123, ll. 21-25 (Padgett). Furthermore, BellSouth's counsel stipulated, "[T]his witness is not a lawyer. . ."

In *McWilliams v. State*, 177 Ga. App. 447, 449 (1985), the trial court sustained the State's objection to a question that required a lay witness to give an opinion on a question of law. The Court of Appeals, affirmed, concluding that the objection was correctly sustained when the question "called for an opinion on a question of law, *i.e.,* what facts are sufficient to establish the elements of conspiracy. The opinion of Hay, a lay witness, on that issue is not admissible." BellSouth's counsel recognized that well-established principle, conceding that Ms. Padgett is "not qualified to render a legal opinion and is in no position to speak to what Georgia or federal law requires." Tr. 136, ll. 10-13 (Ross).

In summary, BellSouth simply chose the wrong witness to attempt to make its points. Without any personal knowledge of the negotiation of the interconnection agreement and the parties' intentions with respect to audits during that process, Ms. Padgett's testimony on that point must be excluded. Similarly, without being a lawyer, Ms. Padgett's testimony on legal issues is inadmissible.

Therefore, NuVox respectfully requests that its Motion to Strike those portions of Ms. Padgett's testimony set forth on pages 129-131 of the Transcript be granted.[2]

III. THE COMMISSION HAS WIDE DISCRETION TO ALLOW NUVOX EXHIBIT HER-12, AND DUE PROCESS AND FAIRNESS REQUIRE THAT EXHIBIT BE ALLOWED

Throughout this very long proceeding, NuVox has consistently and continually requested that BellSouth provide the information upon which it bases its allegation that NuVox allegedly is not the exclusive provider of local service to certain circuits in Georgia and therefore, BellSouth is entitled to an audit. When the case was previously before another Hearing Officer, BellSouth refused to produce any such information; in its post-hearing brief, however, it alleged that it had information related to Tennessee circuits. Despite NuVox's numerous requests for the information, BellSouth never shared it with NuVox.

In addition to the Tennessee information, NuVox also requested any information related to Georgia circuits but also to no avail. NuVox then requested discovery to obtain the information regarding which circuits BellSouth contended demonstrated that NuVox was not the exclusive local provider, but BellSouth objected. In its rebuttal testimony (rather than its direct), BellSouth attached information which it claimed supported that point but only in trade secret form (BellSouth Exhibit SWP-8). NuVox did not receive the actual information until about a week before the hearing and more than ten days after the deadline for submitting and serving rebuttal testimony and exhibits. Tr. 249, ll. 14-16; Tr. 166, ll. 5-12 .

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[2] BellSouth's counsel argued that the Commission should consider testimony at issue and give "it whatever weight it wants." Tr. 126, l. 21-25 to 127, l. 1-3. In the event that the testimony is not stricken, but considered with due weight accorded, the weight should be none, for the reasons outlined above, *i.e.*, lack of personal knowledge and lack of legal training.

Upon receipt of that information, NuVox began its verification process; NuVox Exhibit HER-12 summarizes the results of that process. By (1) not including the specific circuit information in its direct testimony, (2) attaching it to rebuttal testimony in trade secret form only; and (3) then stalling as long as possible before providing the information to NuVox (about a week before the hearing), BellSouth attempted to make it impossible for NuVox to respond to the information contained in BellSouth Exhibit SWP-8. However, because NuVox was able to check against the list and discovered it to be uniformly riddled with errors, BellSouth now claims that NuVox Exhibit HER-12 is too late and cannot be considered.

This Commission should not allow BellSouth to engage in such gamesmanship. The purpose of this proceeding, as all proceedings, is to uncover the truth. "[T]he judicial process, embracing, of course, the administrative hearing, is first and foremost an exercise in truth seeking. In pursuit of the truth, all of the pertinent avenues must be explored." *Williams v. Corby's Enterprise Laundry*, 166 A.2d 827, 830 (N.J. Super. 1960), *citing Gilligan v. Intl. Paper Co.*, 131 A.2d 503 (N.J. 1957).

While there is no Georgia case directly on point, a decision of the Wyoming Supreme Court on the very issue is instructive. In affirming the Wyoming Public Service Commission's decision to accept "late-filed exhibits," the Wyoming Supreme Court concluded that the same was proper because the WPSC did so "in order to obtain all the necessary information needed by PSC to make a complete and informed determination in this matter was appropriate in such regard." *Sinclair Oil Corp. v. Wyoming Public Svc. Commn.*, 63 P.3d 887, 902 (Wyo. 2003), *citing Majority of Working Interest Owners in Buck Draw Field Area v. Wyoming Oil & Gas Conservation Commn.*, 721 P.2d 1070, 1078 (Wyo. 1986) (holding an administrative agency may admit documentary evidence in a contested case after hearing).

In this case, a primary issue is whether the facts support BellSouth's demand for an audit. Under BellSouth's argument, it should be able to produce whatever evidence it wants, whenever it wants, without any opportunity for NuVox to engage in a meaningful cross-examination as to that evidence or to have any opportunity to rebut such evidence. Due process prohibits such a result.

This Commission has wide discretion to rule on evidentiary matters. O.C.G.A.§ 50-13-13(5); O.C.G.A.§50-13-15(1). Under the circumstances, *i.e.,* the late delivery of the actual content of BellSouth Exhibit SWP-8, the Commission should exercise its discretion and allow NuVox Exhibit HER-12 so as to permit a full development of the record. If the Commission is not inclined to allow NuVox Exhibit HER-12, then BellSouth Exhibit SWP-8 should also be stricken as being provided too late.

IV. ISSUE 1: THE PLAIN TEXT OF THE AGREEMENT, EVIDENCE REGARDING THE PARTIES' INTENT, AND BELLSOUTH'S COURSE OF CONDUCT DEMONSTRATE THAT BELLSOUTH IS NOT EXEMPT FROM THE "CONCERN" AND "INDEPENDENT AUDITOR" REQUIREMENTS

BellSouth has not and cannot point to any provision of the parties' Agreement that carves-out the exemption it claims from the *SOC's* "concern" and "independent auditor" requirements. Russell Rebuttal, p. 6, ll. 5-9, p. 7, ll. 21-24, p. 8, ll. 19-20, 25-28, p. 9, ll. 18-19; *accord* Tr. p. 133, ll. 10-14, p. 135, ll. 14-18 (Padgett). Certainly, there is no such exemption language in Section 10.5.4 of Attachment 2 of the Agreement. There also is no such exemption included in the provisions of the General Terms and Conditions of the Agreement which operate to make the *SOC* part of the Agreement. The *SOC* is not excluded from the body of "Applicable Law" made part of the Agreement via Section 35.1 of the General Terms and Conditions. Moreover, Section 23, of the General Terms and Conditions selects Georgia law as governing

law. Under Georgia law, contracting parties are presumed to have incorporated the laws that existed when they entered into the contract, unless they explicitly excluded those obligations from the contract. There is nothing in this provision that exempts the FCC's *SOC* in general or the concern and independent auditor requirements in particular.

If the absence of any express exemption were not enough, evidence in the record regarding the parties' intent resolves any ambiguity. Mr. Russell, the only witness with actual knowledge of the parties' negotiations, testified that the parties were fully cognizant of the FCC's *SOC* and its requirements pertaining to EEL audits. Russell Rebuttal p. 13, ll. 12-23; Tr. p. 278, ll. 15-18, p. 286, ll. 6-13 (Russell). Having already negotiated the General Terms and Conditions, including the Applicable Law and Georgia law provisions, Mr. Russell explained that there was no need to ensure that each requirement contained in the *SOC* was expressly included in Section 10.5.4 of Attachment 2, as all requirements were included unless explicitly exempted. Tr. p. 278, ll. 15-18 (Russell). Mr. Russell also testified that there was no intent to create exemptions from the requirements of the *SOC*. Tr. p. 278, ll. 1-4, p. 279, ll. 22-25, p. 280, ll. 1-2 (Russell). Indeed, Mr. Russell explained that the parties agreed to strike language originally proposed by BellSouth that would have allowed BellSouth to conduct audits at its "sole discretion". Tr. p. 278, ll. 1-4 (Russell). Mr. Russell recalled that the parties discussed and agreed that the proposed language was inconsistent with the requirements set forth in the *SOC*, including the "concern" requirement set forth in footnote 86 of that order. Tr. p. 278, ll. 24-25, p. 279, ll. 1-16, p. 280, ll. 15-16 (Russell).

BellSouth's witness had no actual knowledge of the parties' negotiations, as BellSouth decided to protect those with actual knowledge from having to testify under oath. Tr.

p. 122, ll. 23-25 (Padgett).[3] Nevertheless, Ms. Padgett did admit that BellSouth is required to comply with all Applicable Law, *see* Tr. p. 137, ll. 4-7 (Padgett), which includes the FCC's *SOC*. Ms. Padgett also agreed that the Agreement contained no express exemptions from the concern and independent auditor requirement. Tr. p. 133, ll. 10-14, p. 135, ll. 14-19. Ms. Padgett also admitted that the terms of Section 10.5.4 (in isolation) are "silent" with respect to the concern and independent auditor requirements. Thus, there is nothing specific in Section 10.5.4 that could "trump" the Applicable Law and Georgia law provisions of the General Terms and Conditions or the specific concern and independent auditor requirements set forth in the FCC's *SOC*. *Accord* Tr. p. 149, ll. 16-19, 25, p. 150, ll. 1-4. By BellSouth's own admission, the "silence" it found in Section 10.5.4 with respect to the concern, Tr. p. 138, ll. 15-19 (Padgett), and independent auditor requirements leads, *see* Tr. p. 138, ll. 1-14 (Padgett), by default, to the requirements of Applicable Law in general and the *SOC* in particular – and to NuVox's prevailing on Issue 1. *See* BellSouth Response to NuVox Application for Modification or Review, at 8, n.1.

Finally, BellSouth's conduct prior to and even while this proceeding has been pending undermines its position on the record (of this proceeding) that it is not required to comply with the requirements in the *SOC*. *E.g.*, Russell Rebuttal, p.11, ll. 11-21; *see generally* Tr. p. 150-157 (Padgett). The notification that BellSouth relies on to commence its requested EEL audit states repeatedly that the audit request is being made pursuant to and in conformance with the *SOC*. NuVox Exhibit HER-1. In attempting to explain away the significance of this letter by calling it a "form" letter, BellSouth's own witness explained the letter was crafted in the way that it was because all interconnection agreements had the *SOC* as their baseline and least

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[3] BellSouth previously had succeeded in shielding those individuals from discovery.

common denominator. Tr. p. 151, ll. 3-5, 152, 12-19 (Padgett). That claim, too, points to the need for an exemption that BellSouth was unable to prove existed. The record also contains evidence that BellSouth, in meetings with the FCC held subsequent to its filing of the complaint in this proceeding, has acknowledged the concern and independent auditor requirements and alleged that it was complying with both in its audit requests, even with respect to NuVox. Tr. p. 159, ll. 3-12 (Padgett); BellSouth Exhibit SWP-6.

If there is any doubt that BellSouth's conduct belies the position its attorneys have staked out on this issue in this case, it should be erased by the parties latest exchange of letters regarding the audit at issue in this proceeding.[4] Indeed, on December 1, 2003, in a letter from BellSouth's Parkey Jordan (an attorney that participated in the contract negotiations and who has been active in virtually every aspect of BellSouth's pursuit of its audit request prior to and during this proceeding – with the exception of the Hearing day) to John Heitmann (NuVox's outside counsel who has represented NuVox on this matter prior to and during this proceeding), BellSouth cited the FCC's *SOC* as the source of the document retention requirement it informed that NuVox was obligated to adhere to. Letter to John J. Heitmann, Kelley Drye & Warren LLP, Counsel to NuVox Communications, Inc., from Parkey Jordan, Senior Counsel, BellSouth Corporation, at 1 (Dec. 1, 2003)("Dec. 1, 2003 BellSouth Letter")(appended hereto as part of Attachment A). Notably, Ms. Jordan is in this instance correct. Section 10.5.4 contains no express exemption from that requirement, and by operation of Applicable law (and Georgia law) it applies (and NuVox never disputed it).

Thus, the plain text of the Agreement, evidence regarding the intent of the parties in negotiating the Agreement, and BellSouth's own course of conduct all affirm NuVox's

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4 These letters are attached hereto in reverse chronological order as **Attachment A**.

position and point to the inevitable conclusion that BellSouth is not exempt from, but rather, must demonstrate that it has complied with the concern and independent auditor requirements.

A. The Plain Text of the Agreement Incorporates the Requirements From Which BellSouth Claims to Be Exempt

The plain language of the Agreement, which does not conflict with prevailing Georgia and federal law and which explicitly incorporates all applicable federal and state law, incorporates the concern and independent auditor requirements set forth in the *SOC*. This is because the parties selected Georgia law as the governing body of contract law, and consistent with federal law, Georgia law holds that 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 *SOC* was existing law at the time the parties entered into the contract. The Agreement contains no expressly stated exemptions from it.

Although that alone should be enough, the Agreement also contains an "Applicable Law' provision, which expressly states that the parties will comply with all applicable federal and state law. The *SOC* is Applicable Law. Further, the Applicable Law provision bars the interpretation of this agreement in a manner that permits a party to contravene a requirement of Applicable Law. BellSouth has requested that this Commission do precisely that.

Finally, the text of Section 10.5.4 of Attachment 2 to the Agreement does not contain the exemptions BellSouth claims it is entitled to. Even if this section were to be viewed in isolation from the overarching provisions of the General Terms and Conditions (as BellSouth requests the Commission to do), the text reflects "silence" on and certainly no conflict with the

SOC's concern and independent auditor requirements. By BellSouth's own admission, that silence necessarily must result in a default to the requirements of the *SOC*.

1. The Requirements Set Forth in the *Supplemental Order Clarification* Are Incorporated into the Agreement by Operation of Georgia Law

There is no dispute that Georgia contract law governs how the Agreement will be construed and enforced in this proceeding. *See, e.g.*, NuVox Initial Brief, at 3-4 (stating that Georgia law governs and citing BellSouth Oral Argument statement in accord). Section 23 of the General Terms and Conditions expressly states that "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia."

Under Georgia law, contracting parties are presumed to have incorporated the laws that existed when they entered into the contract, unless they explicitly excluded those obligations from the contract. In *Magnetic Resonance Plus, Inc. v. Imaging Systems International*, the Supreme Court of Georgia stated that the

> [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.

Magnetic Resonance Plus, Inc. v. Imaging Systems, International, 273 Ga. 525, 543 S.E.2d 32, 34-5 (2001); *see also Van Dyck v. Van Dyck*, 263 Ga. 161, 429 S.E.2d 914, 916 (1993) (stating that "[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."). The parties did not enter into the Agreement until after the FCC issued the *Supplemental Order Clarification*. *See* Russell Rebuttal, p. 13, ll. 14-15; *see also* Tr. 291, ll. 1-8. Accordingly, by operation of Georgia law, that order became part of the Agreement.

Georgia law also holds that the parties are bound to comply with the law in existence when they entered into the contract unless they explicitly exclude the obligations under existing law from the contract. In *Jenkins v. Morgan*, the court declared that

> parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary unless provided by the terms of their agreement.

Jenkins v. Morgan, 100 Ga. App. 561, 562, 112 S.E.2d 23, 24 (1959). The court further stated that

> [p]arties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract.

Id. The plain text of the Agreement contains no language expressly exempting BellSouth from having to comply with the concern and independent auditor requirements. Russell Rebuttal, p. 16, ll. 17-21; *accord* Tr. p. 133, ll. 10-14, p. 135, ll. 14-19 (Padgett).

Indeed, it is black letter law that parties intending to negotiate away legal rights in a contractual arrangement must do so explicitly – and in the absence of such a specific exclusion or exemption, rights under the prevailing law are incorporated under the contract. As such, it is not at all surprising that the United States Supreme Court has found just as the Georgia courts have found on this issue. For example, the United States Supreme Court has held:

> Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and from a part of it, as fully as if they had been incorporated in its terms; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.

Norfolk and Western Ry. Co. v. American Train Dispatchers' Association, 499 U.S. 117, 129-30 (1991); *Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923). There is nothing in the plain text of Section 23 of the General Terms

and Conditions that indicates that the parties agreed not to follow Georgia law (and Black Letter law) with respect to incorporation of the FCC's *SOC.*

2. The Requirements Set Forth in the *Supplemental Order Clarification* Are Incorporated into the Agreement by Operation of the Applicable Law Provision

Dispelling any doubt as to the impact and meaning of their choice that Georgia law would govern, the Agreement also contains an "Applicable Law" provisions which expressly states that the parties agreed that they would comply with all applicable federal and state law that relates to the obligations addressed in the Agreement. Section 35.1 of the General Terms and Conditions states that (with emphasis added)

> 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.

Notably, this provision contains the word "all" and not "some" or even "all but the *SOC*". Thus, this provision eliminates any doubt that the parties, consistent with federal law and Georgia law, agreed that the Agreement would incorporate (and not supplant) all law related to the obligations under the Agreement – including the FCC's *SOC.*[5] Moreover, this provision instructs, consistent

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[5] Adding an elastic waste-band to the belt and suspenders already in place, NuVox notes that in the third whereas clause in the General Terms and Conditions, the parties specifically memorialized their intent to comply with federal and state law implementing Sections 252 and 252 of the 1996 Act and to incorporate that law into their Agreement. This provision provides,

> WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, for [NuVox] to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 (the "Act").

with Georgia law discussed above that "[n]othing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law.[6] Yet, this is precisely what BellSouth requests that this Commission do by allowing it to avoid compliance with certain provisions of Applicable Law (namely, the concern and independent auditor requirements set forth in the *SOC*).

3. The Parties Did Not Exclude the Requirements set forth in the *Supplemental Order Clarification*

Section 10.5.4 of Attachment 2 cannot bear the weight that BellSouth puts upon it. Indeed, BellSouth rests its entire case on the plain text of Section 10.5.4 of Attachment 2. That section provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox]'s records not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special

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This provision unambiguously sets forth the parties' intention of "fulfilling their applicable obligations pursuant to the Telecommunications Act of 1996." The FCC's *SOC* is one of a long series of orders that the FCC issued (and will continue to issue) to interpret and implement the obligations of sections 251 and 252 of the Act. Therefore, this order is incorporated into the Agreement by reference under the third whereas clause.

6 The *SOC's* concern and independent auditor requirements are "mandatory". The FCC did not make them optional. Although "requirements" are by their very nature mandatory, an example of an "optional" requirement contemplated by this language would be the *SOC's* so-called three safe harbors for EEL conversions. Requesting carriers have the option of certifying compliance with one of the three (making them "optional" requirements. Another example of an "optional" requirement would be the 1996 Act's statement that "bill-and-keep" is a permissible, but not required, substitute for cash-based reciprocal compensation in certain instances. *See* 47 U.S.C. § 252(d)(2)(B)(i).

> access services and may seek appropriate retroactive reimbursement from [NuVox].

Because the plain text of Section 10.5.4 does not contain language expressly exempting BellSouth from the concern and independent auditor requirements, BellSouth claim of such exemptions must be rejected.[7]

Even if this section were to be viewed in isolation from the overarching provisions of the General Terms and Conditions (as BellSouth requests the Commission to do), the text reflects "silence" on and certainly no conflict with the *SOC's* concern and independent auditor requirements. By BellSouth's own admission, that silence necessarily must result in a default to the requirements of the *SOC*.

First, it is abundantly clear that there is no conflict between the concern and independent auditor requirements set forth in the *SOC* (and incorporated into the Agreement via the General Terms and Conditions) and the converted EEL audit provisions set forth in the Section 10.5.4 of Attachment 2. BellSouth argues that the EELs provisions in the Agreement (section 10.5.4) "trump" the "more general" language in the General Terms and Conditions on the ground that the more specific trumps the general. *E.g.*, Padgett Surr., p. 2, ll. 9-21; *but see* Tr. p. 149, ll. 16-19, 25, p. 150, ll. 1-4. For this to be true, however, there would need to be a conflict between the two provisions. As BellSouth's own witness acknowledges, however, Section 10.5.4, does not expressly address the concern or independent auditor requirements and there is no conflict between the express terms of that provision and the requirements set forth in the *SOC*. Tr. p. 138, ll. 1-19 p. 149, ll. 16-19, 25, p. 150, ll. 1-4 (Padgett). Indeed, Ms. Padgett acknowledged that Section 10.5.4 (when viewed in isolation from the overarching General

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7 Pursuant to Georgia law, the parties must expressly state any exemptions to applicable law within the contract. As such, although parties *may* voluntarily agree to deviate from applicable law in their interconnection agreements, they must do so expressly. The plain text of Section 10.5.4 confirms that they did no such thing with respect to the concern and independent auditor requirements.

Terms and Conditions) is "silent" on the concern requirement, Tr. p. 138, ll. 15-19 (Padgett), and that it does not expressly address the independent auditor requirement (which is tantamount to silence). Tr. p. 149, ll. 25, p. 150, ll. 1-6 (Padgett). Accordingly, there is simply no conflict between the EELs provisions and General Terms and Conditions, such that one provision governs in lieu of the other. Instead, both provisions work in tandem, thus requiring BellSouth to state a concern and to hire an independent auditor in order to conduct an EEL audit. Russell Rebuttal, p. 5, ll. 21-23; Tr. p. 278, ll. 15-19, p. 286, ll. 6-18, p. 291, ll. 1-7 (Russell).

In light of BellSouth's witness's concession that Section 10.5.4 (when viewed in isolation from the overarching General Terms and Conditions) is silent with respect to the concern requirement (and, by deduction, the independent auditor requirement), BellSouth already has conceded Issue 1 to NuVox. Indeed, in its Response to NuVox's Application to Modify or Review (regarding the initial hearing officer's recommended decision), BellSouth stated that if Section 10.5.4 were silent with respect to its ability to conduct EEL 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 FCC's *Supplemental Order*." BellSouth Response to NuVox Application to Modify or Review, at 8, n.1. In this statement, BellSouth specifically admits that the *Supplemental Order Clarification* is "applicable law".[8] Moreover, BellSouth's witness (with respect to the concern requirement) and its attorney (with respect to the *SOC's* notice and one-per-year limit requirements) seemed to agree that the general and specific EEL audit requirements set forth in Section 10.5.4 did not somehow make the agreement anything other than silent with respect to

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8 Notably, this contradicts a prior statement made by BellSouth in its initial Brief filed last fall. *Compare* BellSouth Initial Brief at 8, n.2 (claiming that the *SOC* is not "applicable law"). Further revealing BellSouth's confusion, Ms. Padgett claims that only parts of the *SOC* are Applicable Law. Tr. p. 152, l. 25, p.153, ll. 1-4.

particular requirements not specifically set forth therein.[9] Accordingly, because Section 10.5.4 is silent with respect to the concern and independent auditor requirements, BellSouth essentially has admitted that the requirements set forth in the *SOC* (which are in any event incorporated into the Agreement by reference) apply.

B. Evidence of the Parties' Intent Eliminates Any Ambiguity and Affirms That the Parties Did Not Agree to the Exemptions BellSouth Claims

There is no evidence in the record that the parties intended to exempt BellSouth from the concern and independent auditor requirements. Russell Rebuttal, p. 16, ll. 17-21; Tr. p. 278, ll. 1-4, p. 286, ll. 6-13 (Russell); *accord* Tr. p. 133, ll. 10-14, p. 135, ll. 14-19 (Padgett). Indeed, the reverse is true: as stated above, the plain language of the Agreement memorializes the parties' intent to incorporate Applicable Law, including the *Supplemental Order Clarification*, into the Agreement. Moreover, the plain text Sections 23 and 35.1 of the General Terms and Conditions and Section 10.5.4 of Attachment 2 provides no indication whatsoever of an express exemption from the concern and independent auditor requirements.

In case the plain text was not enough, NuVox presented evidence regarding the parties' intent behind those contract provisions. Notably, Mr. Russell was the only witness to testify based on actual knowledge of the parties' negotiations. Russell Rebuttal, p. 2, ll. 7-9; *accord* Padgett Direct, p. 5, l. 18; Tr. p. 122, ll. 23-25, p. 129, ll. 1-4 (Padgett); Tr. p. 126, ll. 16-18 (Ross). BellSouth deliberately chose to keep individuals with first-hand knowledge of the negotiations off the stand, Tr. p. 123, ll. 4-11 (Padgett), and thus, offered no credible testimony with respect to the parties' intent.

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[9] *See* Tr. 132, 138 (Padgett, confirming that Section 10.5.4 was silent with respect to the concern requirement), 283 (Ross, seeking – and receiving – confirmation that BellSouth's original proposed Section 10.5.4 was "silent" with respect to the *SOC's* notice requirement and the requirement that EEL audits be limited to one per year).

In his undisputed testimony, Mr. Russell stated that the parties were fully cognizant of and had discussed the FCC's *SOC* and its requirements – including the concern and independent auditor requirements – pertaining to EEL audits. Russell Rebuttal, p. 16, ll. 17-22, p. 17, ll. 11-15; Tr. p. 277, ll. 18-25, p. 278, ll. 1-4, 19-25, p. 281, ll. 1-6, p. 286, ll. 6-13 (Russell). Indeed, Mr. Russell testified that it was the parties' intent to incorporate and not exclude the *SOC's* EEL audit requirements, including the concern and independent auditor requirements, and that they already had done so (by agreeing on the language in Sections 23 and 35.1 of the General Terms and Conditions) prior to settling on the final language of Section 10.5.4 of Attachment 2. Russell Rebuttal, p. 16, ll. 17-27; Tr. p. 277, ll. 18-25, p. 278, ll. 1-4, 19-25, p. 281, ll. 1-6, p. 286, ll. 6-13 (Russell). Thus, as Mr. Russell testified, there was no need to propose or expressly include language regarding those requirements in Section 10.5.4. Tr. p. 278, ll. 15-18, p. 286, l. 6-13 (Russell).

Mr. Russell also testified that, during the negotiation process, the parties never discussed potential exemptions from the *SOC's* EEL audit requirements. Russell Rebuttal, p. 16, ll. 17-22; Tr. p. 279, ll. 22-25, p. 280, ll. 1-2 (Russell). The parties, however, did discuss and agreed that BellSouth must state a valid concern prior to initiating an audit. Russell Rebuttal, p. 16, ll. 17-22; Tr. p. 278, ll. 19-25, p. 279, ll. 1-4 (Russell). Accordingly, the parties agreed to strike inconsistent language originally proposed by BellSouth that would have allowed BellSouth to conduct an audit at its "sole discretion." Russell Rebuttal, p. 18, ll. 10-12; Tr. p. 278, ll. 1-4 (Russell). As Mr. Russell explained repeatedly and consistently under cross-examination by BellSouth's attorney, the "sole discretion" language was inconsistent with the concern requirement and other EEL audit requirements set forth in the *SOC,* and so the parties agreed to strike it. Tr. p.278, ll. 1-4, 24-25, p. 279, ll. 1-4 (Russell).

BellSouth did not present any evidence, or even a witness with firsthand knowledge of the Agreement, to counter Mr. Russell's statements. Even BellSouth's own witness had to concede that there is nothing in the Agreement that expressly exempts BellSouth from complying with the concern and independent auditor requirements. On this point, Ms. Padgett specifically stated "[n]o, the agreement does not explicitly state that BellSouth is not required to have a concern or state a concern." Tr. p. 133, ll. 12-14 (Padgett). Ms. Padgett also admitted that there is no explicit statement in the Agreement that the parties agreed to exempt BellSouth from the requirement that it hire an independent auditor. Tr. p. 135, ll. 14-19 (Padgett). Ms. Padgett also conceded that the idea of exemptions from the concern and independent auditor requirements were never agreed to or discussed. *See* Tr. p. 133, ll. 10-14, p. 135, ll. 14-19, p. 142, ll. 14-19 (Padgett).

Notably, Ms. Padgett also put to rest purely fabricated arguments made by BellSouth in the initial round of this proceeding by confirming that NuVox did not "trade" or negotiate away the concern of independent auditor requirements in exchange for a similar concession from BellSouth. *See* Tr. p. 49-50 (Ross). Ms. Padgett explicitly stated that there is no evidence that NuVox was offered anything or agreed to accept anything in order to give up those rights of having BellSouth state a concern and hire an independent auditor. Tr. p. 142, ll. 14-19 (Padgett).

Ms. Padgett also admitted that it would be unreasonable for NuVox to have had to include within the confines of the Agreement every aspect of the law with which it expected BellSouth to comply. Tr. p. 221, ll. 22-25, p. 222, ll. 1-3 (Padgett). Thus, Ms. Padgett agreed with NuVox's position that it is more reasonable to exclude that which the parties agree won't apply rather than expressly include all Applicable Law that will apply. *Id.* On this point, it is

critical to note that contracting parties *may* voluntarily agree to be governed by provisions different than those contained in Sections 251 and 252 of the Act, and the rules and orders of the FCC and this Commission created to implement those provisions. However, Georgia law requires that any agreement to do something different and to create exemptions from Applicable Law must be explicit. As discussed above, there are no express exclusions from the concern and independent auditor requirements contained in the plain text of the Agreement. Moreover, there is absolutely no evidence that the parties intended to voluntarily agree to any. And so, although the parties "may" have agreed to different requirements, the evidence on record proved definitively that they did not. Russell Rebuttal, p. 16, ll. 17-21; Tr. p. 278, ll. 1-4, p. 286, ll. 6-13.

C. BellSouth's Course of Conduct Affirms That BellSouth Is Required to Comply With the Concern and Independent Auditor Requirements

In addition to the lack of any express exemptions from the concern and independent auditor requirements in the plain text of the Agreement, and the lack of any evidence that the parties intended and agreed to such exemptions during the negotiations that culminated in the execution of the agreement, BellSouth's own course of conduct (prior to and since it filed its complaint in May 2002) demonstrates that the parties agreed to be bound by the concern and independent auditor requirements set forth in the *SOC* and incorporated into the Agreement by Sections 23 and 35.1 of the General Terms and Conditions.

Much already has been made of the fact that in the March 15, 2002 letter (NuVox Exhibit HER-1) in which BellSouth notified NuVox that it was requesting an audit pursuant to and in compliance with the FCC's *SOC*. In that two-page letter, BellSouth cites the *SOC* no less than a half-dozen times, using such phrases as "[c]onsistent with the FCC Supplemental Order Clarification," "requirements of the FCC Supplemental Order," "per the Supplemental Order,"

and "as required in the Supplemental Order." BellSouth's attempt to distance itself from and downplay the importance of that letter by calling the letter a "form letter" has always rung hollow.[10] Indeed, it is belied by the very fact that BellSouth copied the Chief of the FCC's Competition Policy Division of the Wireline Competition Bureau – even though that notification requirement is not expressly included in Section 10.5.4 of the Agreement and appears only in the *SOC* (which is incorporated into the Agreement via the General Terms and Conditions). Unconvincingly, Ms. Padgett held to the BellSouth "form letter" argument and attempted to explain away repeated references to the *SOC* as a "poor choice in words". Ms. Padgett then explained that the *SOC* was repeatedly referenced in the form letter (which the March 15, 2002 letter to NuVox was the first actual variant thereof) because the *SOC* was the baseline or lowest common denominator ("LCD") across all Agreements. Given the proven lack of any exemption from the *SOC* baseline/LCD, it makes perfect sense that the actual letter to NuVox retained all the references to the *SOC*.

The record also contains evidence in the form of calls and e-mail exchanges between the two parties that further demonstrate that BellSouth thought the *SOC* concern and independent auditor requirements applied until it realized that NuVox would actually insist that BellSouth actually had to comply with them. Russell Rebuttal, p. 12, ll. 5-22, p. 13, ll. 1-7 (referring to NuVox Exhibit HER-2); p. 18, ll. 21-23, p. 19, ll. 1-6 (referring to NuVox Exhibit HER-5).

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[10] Quite frankly, it is as silly as BellSouth's argument that the concern requirement is not really a requirement of the *SOC*, because it appears only in a footnote of that order. If BellSouth disowned all form letters and the FCC disowned all footnotes, what a dramatically different world it would be. The reality is, however, that BellSouth's cannot walk-away from statements on grounds that they were made in a form letter and the FCC's footnotes (to the extent that they are adopted by a majority of that fractured agency) constitute Applicable Law.

Record evidence also reveals that BellSouth, in *ex parte* presentations before and submitted to the FCC has acknowledged that it is not exempt from the concern and independent auditor requirements in this case (or presumably in any other). Indeed, BellSouth Exhibit SWP-6 provides evidence that while BellSouth is telling this Commission that it is exempt from the concern and independent auditor requirements, BellSouth is telling the FCC that the requirements apply and that it is complying with them. *E.g.*, Tr. p. 159, ll. 3-15 (Padgett). When asked on cross examination about the assertions BellSouth made to the FCC, Ms. Padgett confirmed that it did not make its assertions to the FCC with the caveat that they excluded the current case with NuVox. Tr. p. 156, ll. 14-17 (Padgett). Instead, Ms. Padgett offered a simply implausible explanation which essentially amounted to a statement that BellSouth's assertion of compliance with the concern requirement was not an admission that the concern requirement was a concern requirement. Tr. p. 159, ll. 6-25, p. 160, ll. 1-22 (Padgett). At bottom, however, Ms. Padgett could not find her way around the fact that BellSouth's own FCC filing called the concern requirement a requirement – and further, that it stated that BellSouth complied with it (in all cases).

The very latest letter from BellSouth should definitively erase any doubt that BellSouth simply cannot keep a firm handle on the bogus and fact-free legal argument that it has created expressly for this case (and presumably onslaught of other state commission complaint cases that will follow). On December 1, 2003, just six weeks after the Hearing in this proceeding, Ms. Jordan, Counsel to BellSouth, specifically identified the *SOC* as the source of the legal requirement (asserted by BellSouth in a July 2003 letter from Ms. Padgett to Mr. Russell) that NuVox was obligated to retain records supporting its EELs conversion requests for

use in an audit. Dec. 1, 2003 BellSouth Letter at 1 (appended hereto as part of Attachment A). Specifically, BellSouth stated:

> [p]aragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to provide compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question.

Id. Thus, with regard to the potential EELs audit that is the subject of this proceeding, BellSouth has insisted that NuVox maintain records in accordance with requirements set forth the *SOC*. Notably, NuVox already had indicated that its would comply with all applicable record retention requirements. Letter to Shelley Padgett, BellSouth Telecommunications, Inc., from John J. Heitmann, Kelley Drye & Warren LLP, Counsel to NuVox Communications, Inc. (Nov. 24, 2003)("Nov. 24, 2003 NuVox Letter")(appended hereto as part of Attachment A). NuVox agrees that those requirements set forth in the *SOC* are those that are applicable. This is the case because Section 10.5.4 contains no express exemption from that requirement, and by operation of Applicable Law (and Georgia law) it applies.

It also is significant to note that Ms. Jordan's letter was not a form letter sent to all CLECs, but instead was directed solely to NuVox. Indeed, BellSouth drafted and sent the letter in response to a question from NuVox regarding the applicable record retention requirements. Dec. 1, 2003 BellSouth Letter at 1; *see also* Nov. 24, 2003 NuVox Letter at 1. BellSouth previously had sent a letter to NuVox requesting that NuVox retain certain records. Letter to Hamilton E. Russell, III, NuVox Communications, Inc. from Shelley Padgett, BellSouth Telecommunications, Inc. (July 31, 2003)(appended hereto as part of Attachment A). "In

response, NuVox stated that "it intends to comply with applicable requirements for record retention in connection with the proposed audit." Nov. 24, 2003 NuVox Letter at 1. NuVox also stated, however, that "to avoid additional conflict, NuVox asks that BellSouth identify all such requirements that it believes are applicable and the source thereof." *Id.* Ms. Jordan's letter came in response to that request, and it should indeed serve to avoid additional conflict, as it is now clear that, except when presenting is case to the Commission in this proceeding, BellSouth believes that the requirements set forth in the *SOC* do indeed apply to any potential audit of NuVox's converted EEL circuits.

D. BellSouth's Reliance on Antitrust Cases From Other Jurisdictions Is Inapposite to This Georgia Contract Case

The cases upon which BellSouth has previously relied to support of its contention that applicable law is somehow excluded from the Agreement are inapposite to the present case. *See* BellSouth Initial Brief, at 4-6. Specifically, 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. *See* BellSouth Initial Brief at 4-6; *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). 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. *See Trinko*, 305 F.3d at 94.

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." *Id.* at 104.[11] 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 *SOC*. As such, under the Agreement, BellSouth is required to comply with both the terms of the Act and the *SOC*, 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

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[11] 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 record contains no evidence whatsoever that the parties to this case did any such thing with respect to the concern and independent auditor requirements.

performance, in part, due to the provision of paper, not electronic, bills. *Verizon New Jersey*, 219 F.Supp.2d at 630-31. The present situation is distinct; in this case, NuVox seeks to defend its rights – and enforce BellSouth's obligations – squarely incorporated into the Agreement. NuVox is not seeking an "end run" around the provisions of the Agreement.

Furthermore, the cases upon which BellSouth relies -- *Trinko*, a second circuit decision, and *Verizon New Jersey*, a New Jersey District Court case, are not controlling precedent. Indeed, BellSouth conveniently overlooks *Covad v. BellSouth*, 299 F.3d 1272 (11th Cir. 2002), which is controlling precedent in this jurisdiction. In Covad, the Court concluded that Covad's antitrust violations could proceed, and that nothing in the 1996 Act precluded an antitrust claim as a matter of law. The Court recognized that the parties had an interconnection agreement, but did not find -- or consider -- the interconnection agreement to be a bar to proceeding with its claims. *See id.*

V. ISSUE 2: BELLSOUTH HAS FAILED TO DEMONSTRATE A CONCERN

Although BellSouth finally has asserted a Georgia specific concern with respect to as many as 44 circuits that would, if based on sufficient evidence, satisfy the requirement, it has failed to produce such evidence. Indeed, the record contains no evidence that BellSouth provides local voice/local exchange services to the thirty-or-so customers served by the 44 converted EEL circuits for which BellSouth has alleged a concern.

A. BellSouth Deserves No Reward for Inventing an Allegation of Concern for Which It Has Provided No Credible Record Evidence to Support

On March 15, 2002, when BellSouth issued its notice of intent to audit NuVox's certification for circuits converted from special access to EELs, BellSouth did not have a concern with respect to NuVox's use of the circuits in Georgia. Tr. p. 157, ll. 14-15 (Padgett).[12]

BellSouth had no concerns specific to Georgia circuits when oral argument was held in August 2002.[13]

BellSouth had no concerns specific to Georgia circuits when it briefed the issue in October 2002. *See* BellSouth Initial Brief, at 11.[14]

When the parties met with Staff on January 9, 2003, not only did BellSouth not have concerns specific to Georgia circuits, it became clear that allegations of concerns based on changes in factors were based on BellSouth's unauthorized assignment of "default factors" – and not on any that NuVox had in fact reported. Russell Rebuttal, p. 21, ll. 12-14.[15] It also became clear that the percentage of local traffic figure relied on by BellSouth to assert a concern pertained to certain trunks (as opposed to end user circuits) in Tennessee and Florida – and had

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12 BellSouth's complaint should be denied for this reason alone. A concern is required and it simply had none when it noticed its audit.

13 Although the initial Hearing Officer found differently, later it became clear that it was a case of misplaced reliance on a false claim that BellSouth made in a post-oral argument brief that turned out to have nothing to do with EELs in general or the converted EEL circuits in Georgia that are the target of BellSouth's audit request.

14 Although BellSouth's brief was crafted to make it seem as though BellSouth's still mysterious traffic reports pertained to Georgia, it later became clear that the secret reports relied on related to Tennessee and Florida – not Georgia.

15 The parties were able to settle privately issues that evolved from BellSouth's wrongful invention and application of factors to NuVox's traffic.

nothing to do with NuVox's EELs or the converted EEL circuits in Georgia. Russell Rebuttal, p. 21, ll. 4-12.[16]

On several occasions, BellSouth has conceded that it had no concerns specific to Georgia circuits. Tr. p. 191, ll. 23-25, p. 192, ll. 1-2 (Padgett); Russell Rebuttal, p. 21, ll. 12-14.[17]

When the Commission itself took up the matter in March 2003, BellSouth still had no concerns specific to Georgia circuits, although Staff and at least one Commissioner indicated that concerns based on circumstances outside Georgia would not suffice.

To this date, BellSouth claims that it has never had a concern with respect to the level of local traffic carried by NuVox in Georgia. Padgett Direct p. 14, ll. 4-5 ("NuVox's traffic patterns in Georgia do not appear to be unusual in any respect.").

Nevertheless, in August 2003, BellSouth created and alleged concerns specific to Georgia circuits. It had to. Its argument that the *SOC's* concern requirement is inapplicable simply does not square with the operation of Georgia law, the language of the contract, the intent of the parties, or BellSouth's own course of conduct. Even those that crafted this novel legal argument for BellSouth cannot keep it straight, as they, too continue to point to the *SOC* EEL audit requirements to flesh-out the requirements of the contract. *See* Dec. 1, 2003 BellSouth Letter (appended hereto as part of Attachment A).

And so that it could continue harassing NuVox, BellSouth expended certain resources in order to create a concern that did not exist before. Notably, it asserted (but without credible evidence to support it) precisely the concern that NuVox indicated it would accept.

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16 At the meeting with staff, it also became clear that the so-called factors relied on by BellSouth were not "PLUs", as BellSouth claimed them to be in its post-oral argument brief.

17 This is not surprising, since the parties have long agreed that their individual analysis of NuVox's traffic consistently pointed to local traffic percentages of higher than 90%. Russell Rebuttal, p. 21, ll. 9-12.

From the very beginning, NuVox has been clear and consistent with respect to what it believes would be a concern it could accept. At the oral argument and in the brief from the first round of this proceeding, NuVox had stated that if BellSouth found that NuVox had converted circuits serving customers for whom it was not the exclusive provider of local service, that would constitute a legitimate and reasonable concern regarding NuVox's certification of compliance with *SOC* "Safe Harbor Option No.1". NuVox Initial Brief, Oct. 4, 2002, at 17 (citing Aug. 13, 2002 Oral Argument Transcript at 38-39).[18] In Mr. Russell's Rebuttal Testimony, Mr. Russell affirmed that if BellSouth produces sufficient (*i.e.*, verified and credible) evidence that it provides voice and other local services to the thirty-or-so customers in question, NuVox would likely respond by instructing BellSouth to hire an independent auditor to proceed with an audit of the certifications made by NuVox with respect to those circuits. Russell Rebuttal, p. 23, ll. 1-8.

The only problem for BellSouth (with respect to this issue), however, is that the record contains no credible evidence to support its allegations. Just like BellSouth could have provided a contract witness and a witness to defend the claimed independence of the ILEC consulting boutique hired to perform the audit, BellSouth did not provide actual proof that they

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18 NuVox notes that evidence to support such an allegation would call into question NuVox's certification of compliance under Option 1, which uses an exclusive provider criterion as a proxy for providing a "significant amount of local service". *See SOC*, ¶22. Such evidence, however, would not prove that NuVox certified incorrectly or that it is not meeting the significant local use requirement. The parties continue to have a difference of opinion with respect to how the safe harbor options work and as to whether the FCC intended for CLECs to have to police the day-to-day communications purchases and usage of end users. NuVox maintains that its certifications were accurate when made and that there is no reason to think that a "significant amount of local services" are not being provided to end users who have not altered dramatically their purchases of local services from NuVox. BellSouth now contends that NuVox must take on some sort of policing role to ensure that its end users are denied the freedom to choose other local service providers for some of their local telecommunications needs. Notably (but not surprisingly), BellSouth's latest position is inconsistent with that it took at the time it issued its audit request. Then, BellSouth indicated that all it needed to verify compliance with Option 1 would be signed LOAs. Even if BellSouth's latest attempt to trap its competitors is correct (which it isn't), BellSouth ignores the simple fact that NuVox could easily recertify under the less stringent standards set in FCC Safe Harbor Option 2 (even though BellSouth currently does not have a process in place for recertification). A final wrinkle in all this is that the FCC has replaced the Safe Harbors with less burdensome criteria. The effective date of the parties' move to that regime has yet to be determined.

too provided local service to the thirty-or-so customers served by the forty-or-so EELs in question. In response to a direct question as to why BellSouth failed to provide actual proof that it provided local services to NuVox customers served by converted EELs, Ms. Padgett explained that such an exhibit would be "voluminous" and assumed that we all should take her word regarding BellSouth's legacy billing system (a system she has no direct access to or experience with). Tr. p. 240, l. 25; p. 241, ll. 1-5 (Padgett).

Little BellSouth has had to offer to date regarding its chameleon-like allegations of concerns has ended up being true or relevant. In the absence of sufficient evidence to prove BellSouth's latest allegations, the only reasonable conclusion that NuVox and the Commission could make is that these allegations, too, are baseless.

B. The "Evidence" Offered by BellSouth Is Not Credible and It Does Not Support the Asserted Concerns

In her Direct Testimony, BellSouth's "EEL expert", Ms. Padgett, asserted that BellSouth had gathered information "which indicates that NuVox has EEL circuits in place that are not being used to provide 'a significant amount of local exchange service' consistent with NuVox's certification." Padgett Direct, p. 15, ll. 15-17. However, BellSouth failed to put any of this claimed information into the record. The record contains no evidence whatsoever that NuVox does not provide a significant amount of local services, as required, to customers served via converted EELs. Indeed, BellSouth offered contradictory statements that it had no issue with the amount of local service that NuVox was providing in Georgia. Padgett Direct, p. 14, ll. 4-5; Tr. p. 191, ll. 23-25, p. 192, ll. 1-2 (Padgett); *see also* Russell Rebuttal, p. 21, ll. 9-14.

1. BellSouth Exhibit SWP-2 Contains No Evidence that BellSouth Provides Local Exchange Services to Customers of NuVox Served Via Converted EELs

What BellSouth did enter into the record (as BellSouth Exhibit SWP-2) is an unsubstantiated and unverified list of customer names, circuit IDs, and service addresses.[19] That list contains no evidence of local exchange services provided by BellSouth – or by NuVox, for that matter. As Mr. Russell demonstrated in his Rebuttal, BellSouth Exhibit SWP-2 proves nothing and provides no evidence to support BellSouth's alleged concern that it provides local exchange services to the various customers identified therein or that those same customers are NuVox's customers served via the forty-or-so converted EELs circuits in question. Russell Rebuttal, p. 21, ll. 18-24, p. 22, ll. 1-14.

Compounding matters further is the fact that in order to create the list, BellSouth broke the law. NuVox provided BellSouth with certain customer-proprietary information in order for BellSouth's wholesale unit to provision the circuit. BellSouth then, for entirely different purposes, provided this information to its retail unit. Section 222(b) of the Federal Communications Act bars such activity. 47 CFR§222(b). BellSouth retail and BellSouth wholesale then colluded to facilitate the current warfare against its much smaller competitor. This activity appears to violate several aspects of antitrust and competition law.[20]

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19 NuVox notes that BellSouth claimed to have identified "at least 45 EELs in Georgia that NuVox is using to provide local exchange service to end users who also receive local exchange service from BellSouth." Padgett Direct, p. 14, ll. 11-13. Original Exhibit SWP-2 listed 45 circuits and Revised Exhibit SWP-2 listed 44. Further, BellSouth claims to have reviewed all converted EELs in Georgia. At the Hearing, we also learned from BellSouth that an additional customer listed is not a BellSouth customer. Thus, the "at least" used in Ms. Padgett's Direct Testimony should really have been "at most".

20 NuVox anticipates that it soon will provide BellSouth with notice of its intent to file a complaint or complaints with respect to BellSouth's unlawful activity.

2. Exhibits Introduced by BellSouth on Surrebuttal Contain no Evidence That BellSouth Provides Local Exchange Services to Customers of NuVox Served Via Converted EELs

In Surrebuttal Testimony sponsored by Ms. Padgett, BellSouth responded by updating, correcting and shortening its list of EELs circuits for which it had created a concern. Padgett Surr., p. 15, n.1.[21] Ms. Padgett also supplemented her list with print-outs of selected excerpts and "dummy bill pages" from BellSouth's retail unit's legacy billing system (BellSouth Exhibit SWP-8), and a new chart indicating dates for "First Date of BellSouth Installation" and "NuVox EEL Circuit Conversion Date" (BellSouth Exhibit SWP-9). In so doing, BellSouth repeated its previously unsuccessful tactic of attempting to make its case with information and assertions upon which it thought NuVox would have no opportunity to respond.[22]

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21 Note that BellSouth makes no attempt to explain which corrections were made or to identify the customer deleted from the list – presumably, NuVox and the Commission are supposed to waste time discerning and deciphering BellSouth's revised Exhibit to determine the impact and significance of the changes.

22 In the first phase of this proceeding, BellSouth introduced for the first time in a simultaneously filed post-hearing brief, the assertion that NuVox's circuits in a then unidentified state other than Georgia carried only 25% local traffic (which, despite being unfounded and wrong, is in any event a significant amount of local traffic). Adding to the unfair and otherwise questionable nature of BellSouth's continued reliance on such tactics is the fact that BellSouth failed to provide NuVox with same day service or electronic copy of its Surrebuttal Testimony (which NuVox did not receive until September 29 – 3 days after it was due) and then insisted that NuVox execute protective agreement (which BellSouth presumably knew for weeks that it would require). NuVox did not even receive a draft of the proposed Protective Agreement until October 6 (10 days after BellSouth's testimony was due). By the time a suitable Protective Agreement was negotiated and BellSouth provided a copy of Exhibit SWP-8 to NuVox's local counsel (BellSouth refused a request to provide a copy directly to NuVox's national counsel or to NuVox directly – effectively adding yet another day of delay into the process) it was October 8 – almost two weeks after it was due to NuVox and little more than a week prior to the Hearing. In short, BellSouth deliberately conducted itself in a manner intended to delay NuVox's access to its complete Surrebuttal Testimony (including proprietary exhibits).

Despite the game of hide-and-seek and the theatrical protestations that would (and did) ensue at the Hearing, NuVox did its best to respond in the very brief period of time it had between receiving BellSouth's brand new Exhibits SWP-8 and SWP-9 and the Hearing.[23] At the Hearing, NuVox demonstrated that the "evidence" offered by BellSouth provided no proof of local service being provided to NuVox's converted EEL customers.

a. BellSouth Exhibit SWP-8 Contains No Evidence That BellSouth Provides Local Exchange Services to Customers of NuVox Served Via Converted EELs

Indeed, at the Hearing, BellSouth was unable to support its hollow claim that it had offered "evidence" that it provided local exchange service to thirty-or-so NuVox customers served by the forty-or-so converted EEL circuits for which BellSouth had alleged a concern. Ms. Padgett did not even attempt to rely on BellSouth Exhibit SWP-9 and instead rested her case squarely on the unauthenticated and unverified print-outs of hand-selected excerpts and dummy bill pages from BellSouth's retail unit's legacy billing system at some undocumented time and presented as BellSouth Exhibit SWP-8. *See* Tr. p. 167, ll. 20-23 (Padgett). Ms. Padgett's reliance on BellSouth Exhibit SWP-8 was misplaced, as the print-outs included do little more than raise doubts about Ms. Padgett's claim that they stand for the proposition that BellSouth provides or provided (at the relevant time) local exchange service to certain customers at certain service addresses that she claims match those of thirty-or-so NuVox customers served by converted EEL circuits in Georgia.

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[23] NuVox considered requesting that the Hearing be postponed, but it anticipated that BellSouth would accuse it (unfairly) of dilatory tactics. NuVox wanted to avoid that sort of baseless accusation and needless distraction. In addition, without another round of testimony, the Hearing presented the best (and only) opportunity for NuVox to respond to BellSouth's attempt to introduce brand new evidence in its Surrebuttal Testimony.

Foremost among the problems with Ms. Padgett's reliance on BellSouth Exhibit SWP-8 is the fact that Ms. Padgett did nothing to verify -- and the documents themselves do nothing to prove -- that BellSouth actually did (or does) provide local exchange services to the customers listed. Tr. p. 67, ll. 17-19 (Padgett). Although she provided vague references to unnamed others that may have checked various screens in BellSouth's legacy system, we do not know what the process entailed or what information was found. *See* Tr. p. 163, ll. 16-25, p. 164, ll. 1-5 (Padgett). Ms. Padgett herself confessed that she personally had done nothing to confirm that the documents did indeed stand for the proposition she had presented them for. Tr. p. 163, ll. 7-8 (Padgett). Notably, Ms. Padgett did not call any of the customers to confirm that they were indeed receiving BellSouth local exchange service and that the legacy BellSouth system was indeed accurate. Tr. p. 167, ll. 17-19 (Padgett).

If Ms. Padgett had made such calls, she might have encountered the array of non-working and disconnected telephone numbers, "fast-busies", and modem tones that NuVox did when NuVox made the calls to numbers included on the billing sheets. *E.g.*, Tr. p. 166, ll. 19-24, p. 167, ll. 5-11, p. 169, ll. 5-10 (Padgett); NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187 (Padgett). In other cases, she might have realized that the numbers supplied actually belonged to NuVox and were associated with NuVox service. Tr. p. 166, l. 25, p. 167, ll. 1-4 (Padgett); NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187. Ms. Padgett simply could not explain why NuVox customers and NuVox numbers were listed in a BellSouth retail system. *See generally* Tr. pp. 164-187 (Padgett).[24]

Ms. Padgett also could not confirm that the customer names and service addresses listed on the legacy system printouts matched those of NuVox. Tr. p. 168, ll. 5-20, p. 169, ll. 5-

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[24] This, too, appears to be a matter for another day. Obviously, this would not be the first time that a CLEC discovered that BellSouth's retail unit likely had inappropriate access to information about its competitors.

10; p. 176, ll. 19-25 (Padgett); NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187 (Padgett). Had she taken that step, she would have encountered a large number of mismatches all suggesting that the customers and service addresses do not match. *Id.* NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187 (Padgett). Indeed, Ms. Padgett conceded that residential customers and business customers at the same address were different. Tr. p. 178, ll. 13-24; p. 179, ll. 671 (Padgett); NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187 (Padgett). She also conceded that different service addresses could signify different customers. Tr. p. 168, ll. 10-20 (Padgett); NuVox Exhibit HER-12; *see generally* Tr. pp. 164-187 (Padgett).

Ms. Padgett also was unable to explain numerous other deficiencies plainly evident in the legacy billing system printouts included in BellSouth Exhibit SWP-8. For example, she could not explain how a balance of $3 constituted evidence that BellSouth provided local service to the customer identified. Tr. p. 172, ll. 9-12 (Padgett); NuVox Exhibit HER-12. Indeed, she confirmed the she was unaware of BellSouth local exchange service offerings at that price. *Id.* In response to questioning about whether customer accounts stayed on BellSouth's billing system on account of them having something other than a zero final balance with BellSouth, Ms. Padgett unconvincingly retorted that it was not possible. Tr. p. 173, ll. 22-25, p. 174, ll. 1-17 (Padgett). Fueling additional doubt, Ms. Padgett later conceded that non-BellSouth customers remained in BellSouth's billing system in certain instances (resale was offered as an example). Tr. p. 237, ll. 15-20 (Padgett). Thus, it is unclear, for example, whether NuVox customers that have ported numbers from BellSouth would remain in the legacy billing system. Notably, Ms. Padgett gave this testimony despite not having personal access to or any level of professed expertise with those legacy BellSouth systems (which likely were designed and built

back in the day when all customers in a given area were BellSouth customers). Tr. p. 113, ll. 7-9 (Padgett).

Ms. Padgett also was unable to defend BellSouth Exhibit SWP-8 in several other notable respects. For example, Ms. Padgett was unable to explain how the comment "dummy bill screen, this account has no bills" constituted evidence of BellSouth's provision of local exchange service. Tr. p. 183, ll. 4-16 (Padgett); NuVox Exhibit HER-12. Indeed, it is counterintuitive to suggest that it does. Ms. Padgett also was unable to explain how one print-out that showed an $11,000 credit due to a customer provided evidence of BellSouth's provision of local exchange services to that customer at a relevant time. Tr. p. 182, ll. 2-23 (Padgett); NuVox Exhibit HER-12. For effect, NuVox sought confirmation from this customer that they had no BellSouth local exchange services and the customer indeed confirmed. Tr. p. 182, ll. 17-23 (Padgett); NuVox Exhibit HER-12.

The absence of working telephone numbers and the receipt of computer modem tones in response to calls to others were two more things that Ms. Padgett was unable to explain away successfully. Tr. p. 183, ll. 7-25, p. 184, ll. 1-20 (Padgett); Tr. p. 165 ll. 15-16 (Ross)/Tr. p. 165, ll. 17-20 (Heitmann); NuVox Exhibit HER-12. With guidance from her attorney, Ms. Padgett claimed that certain numbers were not telephone numbers, but were instead billing numbers. Tr. p. 234, ll. 1-8, 15-22. How this provides proof of BellSouth's provision of local exchange services to these customers is anything but clear. And, although her attorney, on redirect, was quick to guide her to the fact that the DSL services operated in a manner that would enable voice calls to be handled simultaneously, Ms. Padgett still was unable to explain why voice calls simply would not go through as dialed. Tr. p. 236, ll. 1-12 (Padgett); NuVox Exhibit

HER-12. Indeed, Ms. Padgett offered no evidence that the type of service allegedly provided by BellSouth actually was local voice/local exchange service.

b. BellSouth Exhibit SWP-9 Contains No Evidence That BellSouth Provides Local Exchange Services to Customers of NuVox Served Via Converted EELs

Although Ms. Padgett professed to be relying on the print-outs from her BellSouth's legacy billing system included in BellSouth Exhibit SWP-8, it is important to note that BellSouth's Exhibit SWP-9 also provides no evidence with respect to the provision of local exchange service to listed customers by either BellSouth or NuVox. Expanding upon information supplied in BellSouth Exhibit SWP-2, this chart contains dates under the headings "First Date of BellSouth Installation" and "NuVox EEL Circuit Conversion Date". It is not at all clear how the unsubstantiated and unverified information provided under those headings has anything to do with demonstrating BellSouth's claim that it also provides local exchange service to a small minority of NuVox local exchange service customers served via converted EEL circuits in Georgia.

Indeed, even if we are to take as valid BellSouth's asserted date of installation (which NuVox has every reason to doubt, given the dubious nature of information supplied and claims made by BellSouth in this case), we have no idea what was installed or why it is relevant to or demonstrative of BellSouth's provision of local exchange service to particular end users on the date that NuVox certified it was the sole provider of local exchange services to such customers (or on any other date). For example, BellSouth may have installed facilities, on the date claimed, but we have no idea whether BellSouth ever provided local exchange services to the customer over them. Indeed, another carrier, such as NuVox could have ordered and leased

those facilities from BellSouth to provide local exchange service or could have provided resold local exchange services over such facilities.

Along the same lines, even if we are to take as valid the "NuVox EEL Circuit Conversion Date" supplied by BellSouth (which, for the same reasons, NuVox would not accept without additional due diligence), that date tells us nothing about BellSouth's provision of local exchange services to particular customers on that date or, for that matter, on the date that NuVox made its certification (which is most assuredly a different date).[25] Finally, no attempt was made to establish that the customers listed on Exhibit SWP-9 actually represent a match between NuVox and BellSouth customers. *See* NuVox Exhibit HER-12 (indicating that certain customers identified by BellSouth do not appear to be NuVox customers and, thus, would not be served by the EELs in question).

C. SUB-ISSUE 2A: The Scope of Any Audit Should Be Limited to the Scope of the Demonstrated Concern

BellSouth's request to audit all converted circuits based on concerns that it is unable to demonstrate with respect to even a small fraction of them must be firmly rejected. The absurdity of BellSouth's request is highlighted by the fact that it is in effect no different than a recidivist fare-dodger posing to transit police the following question: "if I don't jump the turn-style and pay the fare today, can I have your permission to jump the turn-style (and avoid paying the fare) for the next two weeks?" Obviously, the fare-dodger's or BellSouth's ability to negotiate minimal or token compliance with the law in a limited instance (or instances) should not buy it a "hall-pass" for other instances. BellSouth has sought enforcement here, and NuVox

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25 NuVox has a complaint pending at the FCC regarding unreasonable and unlawful delay by BellSouth in converting special access circuits to EELs.

firmly believes that is what is required. This is not another opportunity for BellSouth to negotiate some form of minimal, partial or intermittent compliance with the Agreement.

Further, it is quite clear that BellSouth's allegation of a concern with respect to 44 circuits does not apply to any of the other converted EEL circuits used by NuVox in Georgia. BellSouth could find nothing in its retail unit's legacy billing system to implicate those circuits. And, by its own admission, NuVox's traffic patterns in Georgia raise no concerns whatsoever.

Moreover, the *SOC* permits only *limited* audits. *See SOC,*¶29, 31-32. Using concerns alleged with respect to certain circuits as a spring-board for an audit of other circuits is entirely inconsistent with the *SOC* (and BellSouth's own admission that the *SOC* requires that audits be limited in scope[26]).

In sum, BellSouth cannot shoe-horn into an audit all circuits, based on what appear to be baseless allegations of concerns with respect to 44 of them.

D. SUB-ISSUE 2B: The Commission Should Decline BellSouth's Request for Cover with Respect to Past and Future Violations of Section 222(b) of the Federal Act

Finally, the Commission should rebuff BellSouth's attempt to seek cover for its violation of Section 222(b) of the Act via affirmative authorization for subsequent violations.

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26 BellSouth made this argument in its Response to NuVox's Application for Review. BellSouth Response at 10, n.2 ("the FCC's reference to 'limited audits' pertains to the scope of the audit"). When questioned about how BellSouth intended to limit the scope of its audit request, Ms. Padgett unconvincingly responded that BellSouth was limiting its audit by not seeking an audit "anything else that has to do with the relationship between BellSouth and NuVox". Tr. p. 143, ll. 19-22 (Padgett); *see also* Tr. p. 75, ll. 19-24 (Heitmann). Obviously, that is no limitation at all.

47 USC§222(b). Section 222(b), in relevant part,[27] requires that "[a] telecommunications carrier [such as BellSouth] that receives or obtains proprietary information from another carrier [such as NuVox] for the purpose of providing any telecommunications service [such as provisioning special access circuits or converting those circuits to EELs] shall use such information only for such purpose". *Id.* Clearly, Ms. Padgett's use NuVox's proprietary information for purposes other than provisioning the ordered circuits constitutes use in a manner for which the proprietary information was not provided. Thus, BellSouth has unlawfully abused its access to information made possible only due to its monopoly control over bottleneck "last mile" facilities.

The Commission should avoid lending the imprimatur of its approval to BellSouth's already committed infractions and should in no way grant BellSouth permission to commit further violations using the proprietary information of third parties.[28] Indeed, if it wasn't wrong for BellSouth to use NuVox's proprietary information in the way it already has done, BellSouth presently would not be seeking the Commission's permission to do it again (with other carriers' proprietary information) in the future.

VI. ISSUE 3: BELLSOUTH HAS FAILED TO DEMONSTRATE THAT THE FIRM IT HAS HIRED FOR THE AUDIT IS INDEPENDENT

Given that NuVox and more than a half-dozen other CLECs continuously have challenged and rejected BellSouth's claims that ACA, the ILEC consulting boutique it has retained for EEL audits, is independent, it is surpassing strange that BellSouth did not produce a

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27 Section 222(b) also prohibits a telecommunications carrier that receives proprietary information from another telecommunications carrier from using that information for its own marketing efforts. It does not at this point seem to be the case that Ms. Padgett shared NuVox proprietary information with BellSouth's retail group to further their marketing efforts (although we do not yet know whether any measures were taken to prevent such use). In addition, although Ms. Padgett is employed by BellSouth's interconnection services marketing group, she admitted that she does not consider the instant harassment of NuVox to be part of her so-called "marketing" efforts. Tr. p. 122, ll. 20-22 (Padgett).

28 Given BellSouth's dominant market share position, it is worthwhile noting that third party carriers represent a very small share of the local services market within BellSouth's Georgia service territory.

witness capable of demonstrating ACA's qualifications as an independent auditor. Instead, BellSouth continues to insist that NuVox and all others take its word for it.[29] But NuVox won't, as there is more reason than ever before to doubt BellSouth's claim of independence for the auditor it privately screened and hand-picked for EEL audits.

To be sure, and as Mr. Russell testified, it remains the case that ACA is a small consulting shop completely dependent on ILECs, such as and including BellSouth, for virtually all of its revenues. Russell Rebuttal, p. 24, ll. 16-23.[30] ACA's client/engagement list provides proof of that dependence. NuVox Exhibit HER-8 (ACA's client/engagement list).[31] And, as Mr. Russell testified, "[i]f ACA is dependent on incumbent LECs such as BellSouth for virtually all of its revenues, it cannot at the same time be *in*dependent." Russell Rebuttal, p. 24, ll. 18-20. Indeed, based on ACA's virtually all ILEC client list, it is eminently reasonable to doubt whether ACA could provide an independent and unbiased review, regardless of whether it stated an intention to do so. Russell Rebuttal, p. 24, ll. 21-23.

As Mr. Russell testified, it also remains the case that in its marketing materials, ACA touts as "highly successful" its audits that have recovered millions of dollars for its ILEC clients. NuVox Exhibit HER-9, at 4 (ACA's Proposal to BellSouth); Tr. p. 199, ll. 4-7, 15-25. If ACA measures success based on its ability to generate audit revenue (*i.e.*, "revenue hunt") for ILECs such as BellSouth, it simply is not reasonable to characterize that firm as an independent auditor suitable to serve in an unbiased audit of a CLEC. An independent auditor certainly

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29 BellSouth, it seems, has not even done its own reasonable due diligence to establish this small and relatively unknown consulting shop's independence. For example, BellSouth has never asked whether ACA is affiliated with any of its ILEC clients. Tr. p. 206, ll. 12-13 (Padgett).

30 At the Hearing, Ms. Padgett was unable to identify a single entity on ACA's client list that was, like NuVox, a facilities-based CLEC with no ILEC affiliation. Tr. p. 198, ll. 14-16 (Padgett).

31 Ms. Padgett concurred that a substantial amount of ACA's revenues must come from ILECs. Tr. p. 206, ll. 16-21. Moreover, Ms. Padgett declined to testify that ACA is not dependent on BellSouth and other ILECs for the bulk of its revenues. *See* Tr. p. 207, ll. 6-23 (Padgett).

would not include the generation of millions of dollars of revenue for its clients as an indicia of a successful audit.

As Mr. Russell also noted, NuVox repeatedly has requested that BellSouth retain a nationally recognized independent auditing firm (*e.g.*, one of the "Big Four" national accounting firms) to conduct an audit and BellSouth repeatedly has refused. Russell Rebuttal, p. 25, ll. 10-12. Upon receiving BellSouth's Surrebuttal Testimony, NuVox learned that it was BellSouth's "understanding that ACA can and is willing to supply the **requisite** 'showing and attestation of compliance with the AICPA standards'." Padgett Surr., p. 18, ll. 11-12 (emphasis added).[32] BellSouth's qualified statement (offering only Ms. Padgett's "understanding" of what may or may not be a fact) contrasts markedly with its remarkable claim (made in the same paragraph) that it and ACA previously had offered to make this showing and attestation to NuVox at some point in the past. Padgett Surr. 18, ll. 14-16; Tr. 209-10. Neither NuVox nor its outside counsel had ever previously received such an offer from BellSouth or ACA. When questioned about the alleged offer, Ms. Padgett could not recall precisely how, when or to whom such an offer was made and could only state that the offer was made verbally "last summer". Tr. p. 209, ll. 13-25, p. 210, ll. 1-23 (Padgett).

In any event, Ms. Padgett made clear at the Hearing that it was not actually ACA that was prepared to make the "requisite" showing and attestation of compliance with AICPA standards, but rather it was some other undisclosed "auditing firm" with a "relationship" with

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32 Just as the FCC's *Triennial Review Order* erased any doubt that a "concern" was required in its *SOC*, *see* Russell Rebuttal, p. 20, ll. 7-25 (citing *TRO* ¶ 622) it eliminated the parties' dispute over whether compliance with AICPA auditing standards was required by the *SOC*. *Id.* at 26, ll. 1-5 (citing *TRO*, n. 1905. By acknowledging that the AICPA auditing standards are applicable and compliance with them is required, BellSouth erases any doubt that the auditor selected must be independent and that it must comply with all auditing requirements set forth in the *SOC*. In short, BellSouth's acknowledgement of the "requisite" showing and attestation that must be made by an independent auditor is squarely at odds with its untenable argument that the concern and independent auditor requirements do not apply.

ACA that would be making the showing and attestation. Tr. p. 208, ll. 15-19 (Padgett). This, however, only adds to the mystery of BellSouth's unwavering devotion to ACA and raises a whole new set of unanswered questions regarding ACA's unidentified affiliate (*i.e.*, the party with the "relationship" with ACA).[33] In the end, the Commission must conclude that it simply is not reasonable to allow a firm whose independence is doubtful to hire an undisclosed affiliate to affirm that it is independent.

More disturbing still were revelations that came forth regarding BellSouth's own relationship with ACA. At the Hearing, Ms. Padgett admitted that she had in fact had conversations with ACA regarding the requirements set forth in the FCC's *SOC*, before and during ongoing audits, with and without the audited party being present. Tr. p. 195, ll. 14-25, p. 196, ll. 1-5, p 201, ll. 8-25, p. 202, ll. 1-16 (Ms. Padgett even discussed with ACA an EEL audit that did not even involve BellSouth (it was initiated and withdrawn by Sprint-Nevada and is the only non-BellSouth EEL audit request of which NuVox is aware)). An independent auditor would certainly refuse to have such conversations.[34] Ms. 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 aid in getting the target to comply with requests for information (that likely were generated by BellSouth in the first place). Tr. p. 195, ll. 14-25, p. 196, ll. 1-5, p 201, ll. 8-25, p. 202, ll. 1-16 (Ms. Padgett could not recall whether she ever made requests for ACA to additional work during these mid-audit private conversations). An independent auditor likely would not have such conversations, and if they did, certainly would not have them without the targeted party being present.

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33 BellSouth does not even know the name of this entity. Tr. p. 211, ll. 7-10.

34 BellSouth has in the past stated that it did not want to replace ACA because doing so might involve extensive training. NuVox believes that independent auditors should be well trained, but not by BellSouth or with respect to BellSouth's view of how the requirements of the *SOC* are supposed to be interpreted.

And so, it is now clearer than ever before that BellSouth has not established ACA's independence and that there are compelling reasons to doubt it. ACA cannot serve as an independent auditor. BellSouth's revelations with respect to getting a company with a "relationship" with ACA make the requisite showing and attestation of compliance with AICPA standards raises far more doubt than it erases. Further, BellSouth's past and apparently ongoing efforts to privately train ACA on these matters suggests that ACA is strangely unaware of the difference between being a mercenary and an independent auditor and that it simply cannot qualify for the latter position in this context.

Conclusion

Based on the foregoing, NuVox respectfully requests that the Commission grant NuVox's Motion to Strike, overrule BellSouth's objection to the admission of NuVox Exhibit HER-12, find in favor of NuVox on substantive issues 1, 2 and 3, and deny BellSouth's complaint with prejudice.

Respectfully submitted,

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Date: December 23, 2003

Before the
GEORGIA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Docket No. 12778-U
Between BellSouth Telecommunications, Inc.	)	
and NuVox Communications, Inc.	)	

POST-HEARING BRIEF OF
NUVOX COMMUNICATIONS, INC.

ATTACHMENT A

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December 8, 2003

VIA E-MAIL AND U.S. MAIL

Parkey Jordan, Esq.
General Attorney
BellSouth Telecommunications, Inc.
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30075

Dear Parkey:

I am in receipt of your December 31, 2003 letter re EEL audit document retention requirements. As a preliminary manner, please forgive my oversight in not ensuring that you or Bennett were copied. It was not intentional. I have had perhaps hundreds of communications with BellSouth since receiving Mary Jo's request and, as I indicated in my March 28, 2003 letter to Mary Jo, I will continue to do my best to meet it. In any event, Shelley is well trained and brought the letter directly to your attention.[1] If ever such an oversight or error happens again, please instruct your clients to do the same or ask me to resend it with an attorney copied.

As for the substance of your letter, NuVox appreciates BellSouth's identification of the source of the so-called document retention requirement. NuVox shall certainly consider that and BellSouth's expectations when necessary and appropriate. For now, NuVox's position has been stated and it reserves all rights.

Best regards,

John J. Heitmann

JJH:cpa

cc: Hamilton E. Russell III
Anne Lewis

---

1 Please forward the enclosed original to Shelley for her records. I do not know why it was returned.

BellSouth Corporation
Legal Department
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375-0001

parkey.jordan@bellsouth.com

Parkey D. Jordan
Senior Counsel

404 335 0794
Fax 404 658 9022

December 1, 2003

VIA ELECTRONIC MAIL
and Via First Class Mail

John J. Heitmann
Kelley Drye & Warren LLP
1200 19th St, NW
Suite 500
Washington, DC 20036

Dear John:

Shelley Padgett has provided me with a copy of your November 24, 2003 letter. As a preliminary matter, last spring Mary Jo Peed sent you a letter specifically instructing you not to correspond directly with our clients. Shelley's letter to which you were responding was addressed to Bo Russell, and while we have no objection to your responding on your client's behalf, we expect you to respond to me or Bennett Ross, as you are well aware of our involvement in the EEL audit matter.

As for the substance of your letter, BellSouth cannot identify the internal Nuvox records that Nuvox should retain in order to support its certification that the EEL circuits in question meet the Interconnection Agreement's requirements. Paragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to prove compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question.

Sincerely,

Parkey Jordan

Parkey Jordan

cc: Shelley Padgett, Interconnection Marketing
Bennett Ross, Senior Counsel

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TOKYO, JAPAN

November 24, 2003

Via Electronic Mail and U.S. Mail

Shelley W. Padgett, Manager
Regulatory and Policy Support
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE, Room 34S91
Atlanta, GA 30075

Dear Shelley:

In reviewing our files, it has become apparent that NuVox neglected to respond to your July 31, 2003 letter concerning BellSouth's proposed audit of the circuits NuVox has converted from special access to EELs. NuVox apologizes for the oversight. Please note that NuVox intends to comply with applicable requirements for record retention in connection with the proposed audit. In an effort to avoid additional conflict, NuVox asks that BellSouth identify all such requirements that it believes are applicable and the source thereof.

Best regards,

John J. Heitmann

JJH:cpa

cc: Hamilton E. Russell, III
Anne Lewis

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Shelley W. Padgett
Manager – Regulatory and Policy Support

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e-mail: shelley.padgett@bellsouth.com

July 31, 2003

VIA ELECTRONIC MAIL

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc.
301 North Main Street, Suite 500
Greenville, SC 29601

Dear Mr. Russell:

On March 15, 2002, BellSouth notified NuVox of its intent to audit NuVox's Enhanced Extended Links (EEL) for compliance with the local usage restrictions contained in the Interconnection Agreement pursuant to Section 10.5.2 of Attachment 2. Although the parties are currently disputing the terms of the audit and the audit has thereby been delayed, BellSouth requested to audit the EELs currently in place under the terms of the existing Interconnection Agreement. In the event the dispute is ultimately resolved in BellSouth's favor, NuVox will need to make available data applicable to the time period for which the audit has been requested. Therefore, BellSouth expects that NuVox will retain the appropriate data applicable to this time period as necessary to demonstrate that the EELs subject to the audit comply with the requirements of the existing Interconnection Agreement.

Depending on the option under which NuVox maintains that each EEL qualifies, the data required may include call detail records and/or documentation that NuVox is the only provider of the end user's local telephone service. However, if NuVox has other documentation to demonstrate compliance, there may be other data or records that need to be retained. Please ensure that the appropriate records are retained so that NuVox may make them available if the dispute concerning the audit is resolved in BellSouth's favor.

Please feel free to call me, if there are questions

Sincerely,

Shelley W. Padgett
Manager – Regulatory and Policy Support
Interconnection Services

CERTIFICATE OF SERVICE

I, Anne W. Lewis, hereby certify that on this 23rd day of December 2003, a copy of the foregoing **POST-HEARING BRIEF OF NUVOX COMMUNICATIONS, INC. AND PROPOSED ORDER** were served via United States Mail, with adequate postage attached thereto and by electronic mail, on the following parties:

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[Hearing Officer]

NUVOX COMMUNICATIONS, INC.

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Counsel to NuVox Communications, Inc.

Before the
GEORGIA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Docket No. 12778-U
Between BellSouth Telecommunications, Inc.	)	
And NuVox Communications, Inc.	)	

REPLY TO BELLSOUTH TELECOMMUNICATION, INC.'S PETITION FOR REVIEW OF RECOMMENDED ORDER

NuVox Communications, Inc. ("NuVox"), through its attorneys, respectfully submits this reply to BellSouth Telecommunication, Inc.'s ("BellSouth") Petition for Review of the Recommended Order ("Recommended Order").[1]

BellSouth's petition is a study in "smoke and mirrors" advocacy. BellSouth has sought to distract the Commission from the true legal issues before it by (1) focusing on the records of third party carriers, (2) disputing a conclusion invented by BellSouth and not made in the Recommended Order, and (3) trying to disguise applicable black letter law through a long and tedious restatement of fact patterns that do not serve to render the cited case law inapplicable. This exercise in distraction is unavailing.

For the reasons set forth below, the Commission must reject BellSouth's request for authorization to provide the auditor with BellSouth records containing other carriers' proprietary information. The *Supplemental Order Clarification*, Section 10.5.4 of the Attachment 2 to the Agreement, BellSouth's Notice of Audit and BellSouth's Complaint all speak to the audit of NuVox's records and not those of BellSouth or any other carrier.

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[1] On March 12, 2004, NuVox filed its Objections and Application for Commission Review of Recommended Order and Complaint in this proceeding. In this opposition, NuVox solely responds to BellSouth's objections to the Hearing Officer's order and will not reiterate the arguments raised in its own petition.

Moreover, as BellSouth already has violated 47 U.S.C. § 222(b) with respect to NuVox's records, there is no need encourage the similar misuse of other carriers' proprietary information. The Commission also must deny BellSouth's request to reverse the Hearing Officer's correct conclusions that the *Supplemental Order Clarification* requires BellSouth to demonstrate a concern prior to conducting an audit, and that the requirements in the *Supplemental Order Clarification* that BellSouth demonstrate a concern and hire an independent auditor are incorporated into the parties' Agreement. Although the parties could have, the record clearly shows that the parties did not negotiate any exemptions to the concern and independent auditor requirements. Accordingly, the Commission should reject BellSouth's petition in its entirety.

I. THE COMMISSION MUST DENY BELLSOUTH'S REQUEST TO SUPPLY THE AUDITOR WITH PROPRIETARY INFORMATION OF OTHER CARRIERS

The Commission should deny BellSouth's request for authorization to provide its auditor with records containing proprietary information of third party carriers (and Georgia consumers) for the purpose of having that auditor use such information in what is supposed to be an audit of NuVox's records. First, the use of such records would serve no purpose. The audit BellSouth has asked the Commission to approve is an audit of NuVox's records – not those of third parties. Indeed, the *Supplemental Order Clarification* (¶ 32 (requiring CLECs to maintain appropriate records that they can rely on to support their local usage certification and finding that verification will be based on the records that smaller CLECs, such as NuVox, keep during the normal course of business)), Section 10.5.4 of Attachment 2 to the Agreement (referring to an audit of NuVox's records), BellSouth's Notice of Audit (requesting to audit "NuVox's supporting records") and BellSouth's Complaint (requesting an order requiring NuVox to allow an audit of its records) all speak to the audit of NuVox's records and not those of BellSouth or

any other carrier. Moreover, NuVox did not make its certifications based on the records of third party carriers and it is not at all clear the extent of the mischief BellSouth hopes to create by attempting to bring such records into the parties' continuing and still evolving fray.

Second, BellSouth's request to use proprietary information of others in a manner for which it was never intended is not something the Commission should grant lightly. As already stated, doing so would serve no purpose as the records of others have no bearing on whether NuVox provides a significant amount of local services to customers it serves via converted EEL circuits. Moreover, BellSouth's use of the proprietary information of NuVox and Georgia consumers already has been unlawful. NuVox Brief at 44-45. The Commission should avoid lending the imprimatur of its approval to BellSouth's already committed infractions and should in no way grant BellSouth permission to further misuse the proprietary information of others.

Pursuant to Section 222(b) of the Act and the FCC's implementing rules, a "telecommunications carrier that receives or obtains proprietary information from another carrier for the purpose of providing any telecommunications service shall use such information only for such purpose." 47 U.S.C. § 222(b) (emphasis added). The information that BellSouth already has used – customer proprietary network information (CPNI) and NuVox carrier proprietary information (CPI) – and the information that BellSouth seeks to use – more CPNI and third party CPI – was provided solely for the purpose of BellSouth providing UNEs and other services; it was not provided for the purpose of aiding and abetting BellSouth's efforts to harass NuVox. Under the Act, BellSouth is not permitted to use this information for any purpose other than for

providing the telecommunications services requested.[2] The Commission thus should not grant BellSouth the pardon it seeks.

Finally, BellSouth's assertion that a grant of its request is likely to uncover additional violations by NuVox is baseless and provides no support for a grant of the pardon BellSouth seeks. BellSouth Petition at 3. Not once in this proceeding has BellSouth demonstrated or the Commission determined that NuVox certified in error or committed any violations of the parties' Agreement. Thus, the false pretense BellSouth provides cannot serve as the basis for BellSouth's further misuse of proprietary information that it has in its possession only by virtue of its monopoly legacy and incumbent status. The Commission should be vigilant in rebuking such attempts by BellSouth to use the proprietary information it has access to by virtue of its legacy control over the public's network for the purpose of attacking its competitors.

II. THE HEARING OFFICER CORRECTLY CONCLUDED THAT BELLSOUTH IS REQUIRED TO DEMONSTRATE A CONCERN PRIOR TO CONDUCTING AN AUDIT

The Hearing Officer correctly found, that (1) under the *Supplemental Order Clarification* BellSouth is required to demonstrate a concern prior to conducting an audit, and (2) the parties incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* into their Agreement. Recommended Order at 8-9. Without a legitimate legal or rational basis, BellSouth asks this Commission to ignore record evidence in this proceeding confirming that the parties incorporated the *Supplemental Order Clarification's* concern and independent auditor requirements into their Agreement. BellSouth Petition at 2. BellSouth presented no evidence to the contrary (it refused to present a witness with knowledge

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[2] There is no merit to BellSouth's naked claim that providing the auditor with proprietary information of third party carriers is "arguably" permissible under the Act. *See* BellSouth Petition at note 1.

of the parties' interconnection agreement negotiations), and its attempt to re-write Georgia law and discard Section 35.1 of the Agreement are unavailing. Thus, the Commission should affirm the Hearing Officer's findings on these issues.

A. The *Supplemental Order Clarification* Establishes a Concern Requirement

Having received an unfavorable ruling, BellSouth now claims that the *Supplemental Order Clarification* does not require BellSouth to demonstrate a concern prior to conducting an audit. BellSouth Petition at 4. BellSouth provides no legal or other rational basis for this assertion. Instead, BellSouth argues that the *Supplemental Order Clarification* must be interpreted so that the concern requirement has no meaning. 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 and gets to keep secret. That argument is nonsensical and the Commission should reject this latest attempt by BellSouth to exempt itself from the obligations imposed by the FCC in the *Supplemental Order Clarification*.

In an apparent effort to divert attention its attempt to gut and render meaningless the "concern" requirement, BellSouth reads into the Recommended Order a decision requiring BellSouth to participate in "a 'probable cause' hearing by which the Commission must 'approve' every audit request". BellSouth Petition at 5. The Recommended Order makes no such finding. Moreover, the Commission conducted this proceeding per BellSouth's request, as BellSouth was the party that filed a complaint seeking approval of its audit request from the Commission.

Nevertheless, in this case, and in likely all others involving BellSouth requests to audit converted EEL circuits, BellSouth is required to demonstrate a concern. Recommended Order at 7-9; NuVox Brief at 10-30. Whether the Commission gets involved in determining if BellSouth has satisfied that requirement is a matter left to the parties. As Mr. Russell explained

at the Hearing, had BellSouth demonstrated a valid concern two years ago, this proceeding may have never happened. Tr. at 290. But, BellSouth has been slow to accept that others have the right to insist on compliance and BellSouth has been punishing NuVox (and the Commission) ever since.[3]

Thus, the issue BellSouth raises in its Petition is whether the concern requirement should be gutted so that BellSouth may have one and keep it a secret. As stated above, there is no legal or rational basis for rendering the concern requirement meaningless. The "pre-approval of audits" issue raised by BellSouth is its own strange invention, as the Recommended Order merely responds to BellSouth's complaint seeking such approval and does not establish a general rule that approval by the Commission is required in all instances.

B. The Parties Incorporated the *Supplemental Order Clarification* into Their Agreement

Given that BellSouth repeatedly has acknowledged that the *Supplemental Order Clarification's* audit requirements are incorporated into the Agreement and are binding upon the parties, it is simply incredible that BellSouth continues to argue to this Commission that they are not. From BellSouth's initial Notice (NuVox Exhibit 1) to its most recent letter to NuVox on the subject matter (NuVox Brief Attachment A), and at several points in between, BellSouth has been unable to avoid the fact that it, too, has regarded the *Supplemental Order Clarification* as Applicable Law incorporated into the Agreement and binding upon the parties. *See* NuVox Brief at 10-31. Indeed, as recently as December 2003, in a post-hearing letter, BellSouth cited the *Supplemental Order Clarification* as the source of the audit record retention obligations that

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[3] BellSouth's exercise in distraction also includes a discussion of an *ex parte* letter cited in the *Supplemental Order Clarification* and attached to its petition. BellSouth Petition at 5-6. This letter, regardless of what it says – good, bad or indifferent, is not part of either the *Supplemental Order Clarification* or the parties' Agreement.

NuVox had to comply with. *See* NuVox Brief at 14, 27-29, Attachment A. Notably, Section 10.5.4 of Attachment 2 to the parties' Agreement is *silent* on the audit record retention requirement, just as it is *silent* on the concern and independent auditor requirements. NuVox Brief at 20-21 (citing Tr. p. 138, ll. 1-19, p. 149, ll. 16-19, 25, p. 150, ll. 1-4 (Padgett)).

Despite this, BellSouth continues to regurgitate the fact that parties legally "may" negotiate interconnection agreements without regard to the requirements of Section 251. BellSouth Petition at 6. What BellSouth continues to ignore is the fact that the record firmly establishes that the parties did not do so in the context of EEL audits. Recommended Order at 8; NuVox Brief at 12 (citing Tr. p. 278, ll. 1-4, p. 279, ll. 22-25, p. 280, ll. 1-2 (Russell)). In particular, the parties did not negotiate any exclusion from the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* and incorporated into the Agreement by operation of the General Terms and Conditions and Georgia law. Recommended Order at 8; NuVox Brief at 12 (citing Tr. p. 278, ll. 1-4, p. 279, ll. 22-25, p. 280, ll. 1-2 (Russell)); NuVox Brief at 19-21. Accordingly, the Hearing Officer correctly concluded that the concern and independent auditor requirements are incorporated into the Agreement.

1. *The Supplemental Order Clarification is Incorporated into the Agreement Under Georgia Law*

The Hearing Officer correctly concluded that the *Supplemental Order Clarification* is included in the Agreement under Georgia law. Recommended Order at 8. The Hearing Officer agreed with NuVox's demonstration that, under Georgia law, contracting parties are presumed to have contracted with the law in effect at the time that they entered into the contract. NuVox Brief at 15-18. In its post-hearing brief, NuVox quoted several decisions by Georgia courts that explicitly state this rule of law. *See* NuVox Brief at 16-18. For example, in

Magnetic Reasonance Plus, Inc. v. Imaging Systems International et al., 273 Ga. 525 (2001), the Georgia Supreme Court states:

> The laws which 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.

Magnetic Resonance Plus, 273 Ga. at 543 (quoting *McKie v. McKie*, 213 Ga. 582, 100 S.E.2d 580 (1957)). As this language is directly pulled from the court's opinion, BellSouth's claim that "*Magnetic Reasonance Plus* says no such thing..." is simply wrong. BellSouth Petition at 8.

BellSouth's further attempts to invalidate decades of black letter law, based on assertions that factual scenarios in the cases upon which NuVox relies are not identical to the facts at issue in this case, are no more successful. BellSouth spends several paragraphs challenging the applicability of *Magnetic Reasonance Plus* on the ground that the case concerned the interpretation of the term "prevailing party" in a contract, and the court looked to "judicial constructions" of the phrase to determine its meaning. *See* BellSouth Petition at 8-9. Differences in the particular factual situation in *Magnetic Reasonance Plus* do not render the rule of law inapplicable to this case; BellSouth admits that *Magnetic Reasonance Plus* is a "contract interpretation case", BellSouth Petition at 9, just like the present dispute. Additionally, numerous courts addressing various contracts and differing factual scenarios have reiterated the rule that the law that is in effect when the parties entered into the contract is incorporated into the contract.[4]

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[4] *See, e.g., Horton v. Johnson et al.*, 192 Ga. 338, 15 S.E.2d 605, 614 (Sup.Ct. Ga. 1941) (stating that "[i]t is elementary that the law of the place, of force when and where a contract is entered into, is as definitely a part of the contract as though it were expressly incorporated in or referred to therein.") (citations omitted); *Federal Land Bank of Columbia v. Shingler et al.*, 174 Ga. 352, 162 S.E.815, (Sup.Ct. Ga. 1932) (stating that "it is an established principle that parties dealing upon a subject controlled by federal law are presumed to contract with reference to the provisions of that law. Especially would this be true in Georgia, under Civil Code 1910 § 1, which provides: 'The laws of general operation in this State are—1. As the supreme law: The Constitution of the United States, the laws of the United States in pursuance thereof. . . .'").

Furthermore, as BellSouth even acknowledges, Georgia courts have held that the parties are bound to comply with the law in existence when they entered into their contract unless they explicitly exclude the obligations under existing law from the contract. *See* BellSouth Petition at 11. As NuVox previously has stated, and as BellSouth acknowledges in its petition, BellSouth Petition at 12, in *Jenkins v. Morgan*, the Court found that:

> Parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary unless provided by the terms of their agreement.

Jenkins v. Morgan, 100 Ga. App. 561, 562, 112 S.E.2d 23, 24 (1959). The court further stated that:

> [p]arties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract.

Id. (emphasis added). The plain text of the Agreement contains no language expressly exempting BellSouth from having to comply with the concern and independent auditor requirements. As NuVox explained at length in its brief, NuVox Brief at 18-24, and the Hearing Officer agreed, there is nothing in the parties' Agreement that explicitly excludes the requirement that BellSouth demonstrate a concern prior to conducting an audit or that it hire an independent auditor to conduct the audit. NuVox Brief at 17 (citing Russell Rebuttal, p. 16, ll. 17-21; *accord* Tr. p. 133, ll. 10-14, p. 135, ll. 14-19 (Padgett)).

In addition to *Jenkins v. Morgan*, NuVox cited *Van Dyck v. Van Dyck,* 263 Ga. 161 (1993), along with several other cases, for the proposition that "[p]arties 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." NuVox Brief at 16. NuVox explained, and the Hearing Officer agreed, by operation of Georgia law the *Supplemental Order Clarification* became part of the Agreement. The precise factual background in which the

court reached this general and oft-stated rule of law does not render the case inapplicable to the present situation. Furthermore, nothing in *Van Dyck* supports BellSouth's claim that NuVox did not incorporate the requirements of the *Supplemental Order Clarification* unless it included the same language verbatim from the order. Because the *Supplemental Order Clarification* already was incorporated into the Agreement not only by operation of Georgia law, but also explicitly through Section 35.1 (as discussed below), it was unnecessary to enumerate every single provision stated in the *Supplemental Order Clarification* into the parties' Agreement. Indeed, as the Hearing Examiner recognized, it is not practical to list every single provision of all relevant rules of law into an agreement. *See* Recommended Order at 9.

2. *The Supplemental Order Clarification Is Incorporated Into the Agreement through Section 35.1 of the Agreement*

The Hearing Officer also correctly concluded that the *Supplemental Order Clarification* is incorporated into the Agreement through Section 35.1 of the Agreement. As the Hearing Officer found, Section 35.1 obligates the parties to comply with all applicable laws, which include the *Supplemental Order Clarification*. As stated above, the *Supplemental Order Clarification* was the law in effect governing EEL audits when the parties entered into the Agreement, and, therefore, it is Applicable Law that is incorporated into and relates to the obligations the parties have under the Agreement. Recommended Order at 8.

There is no merit to BellSouth's argument that the Hearing Officer's conclusion that Section 35.1 incorporates the *Supplemental Order Clarification* is inconsistent with Section 252(a)(1) of the Act. Under Section 252(a)(1) of the Act, as BellSouth acknowledges, parties "may" negotiate an interconnection agreement "without regard to" the rules and regulations under the Act. The operative word is "may"; although parties are permitted to agree to terms and conditions outside of the scope of, or contrary to, the rules and regulations under the Act, the

evidence in this case proves that the parties did not do so in this context. To the contrary, as set forth above, and as the Hearing Officer found in this case, the parties explicitly agreed to incorporate applicable law, including the *Supplemental Order Clarification,* into their Agreement. Recommended Order at 8. In no way did NuVox agree to exempt BellSouth from the concern and independent auditor requirements of the *Supplemental Order Clarification. See id.; see also* NuVox Brief at 19-20.

Indeed, NuVox presented evidence at the hearing demonstrating that the parties intended to comply with applicable law, including the *Supplemental Order Clarification.* On this point, NuVox presented testimony of Mr. Russell, who personally negotiated the Agreement. *See* NuVox Brief at 12-13 (stating that Mr. Russell testified that the parties were fully cognizant of the FCC's *Supplemental Order Clarification* and its requirements pertaining to EELs audits) (citing Russell Rebuttal p. 13, ll. 12-23 (Tr. 263); Tr. p. 278, ll. 15-18, p. 286, ll. 6-13 (Russell)). BellSouth did not present any witnesses who were involved with the negotiation of the Agreement nor has it presented any credible evidence to rebut Mr. Russell's first-hand knowledge that the parties intended to incorporate the *Supplemental Order Clarification's* concern and independent auditor requirements into their Agreement.

Furthermore, there is no merit to BellSouth's argument that the *Supplemental Order Clarification* is not incorporated into the Agreement because it is in conflict with Section 10.5.4. Section 35.1 of the Agreement, which incorporates the *Supplemental Order Clarification,* in no way conflicts with the requirements in Section 10.5.4, which address certain requirements of the EELs audit process. Section 10.5.4 is *silent* with respect to the concern and the independent auditor requirements. Instead, these requirements are incorporated through

Section 35.1 of the Agreement (and, independently, by operation of Georgia law). Thus, there is no conflict between Section 10.5.4 and Section 35.1 or the *Supplemental Order Clarification.*

BellSouth's argument that Section 35.1 does not incorporate the *Supplemental Order Clarification* on the ground that specific provisions in a contract govern over the more general provisions is simply wrong. As BellSouth acknowledges, this rule of law – that a specific provision controls over the more general provision – applies where there is a conflict between these two provisions. *See* BellSouth Petition at 7 (citations omitted). There is nothing in Section 35.1 that conflicts with the requirements in Section 10.5.4. These provisions are intended to work in tandem with one another. Moreover, as the Hearing Officer appropriately concluded, "there was no need to ensure that each requirement contained in the *Supplemental Order Clarification* was expressly included in Section 10.5.4 of Attachment 2, as all requirements were included unless explicitly exempted." Recommended Order at 9. Thus, there also is no conflict between Section 10.5.4 and the *Supplemental Order Clarification.*

Despite BellSouth's contention to the contrary, BellSouth Petition at 12-13, the court's decision in *Jenkins v. Morgan* further supports NuVox's argument that the parties were "presumed to contract under existing laws, and no intent will be implied to the contrary unless so provided by the terms of their agreement." *Jenkins v. Morgan*, 100 Ga. App. 561 (1959). This is precisely what the parties did: the parties entered into an agreement with knowledge of the existing law, including the *Supplemental Order Clarification,* and incorporated that order, including the concern and independent auditor obligations stated therein, into their Agreement.

Furthermore, the basis upon which BellSouth attempts to distinguish *Jenkins v. Morgan* actually supports NuVox's position, *not* BellSouth's position. BellSouth claims that *Jenkins v. Morgan* is inapplicable to the present case, because the contract at issue in *Jenkins* was

silent on the material term in dispute in that case. As BellSouth even admits, the same is true in this case: Section 10.5.4 is *silent* with respect to the requirements that BellSouth demonstrate a concern and hire an independent auditor. In its petition, BellSouth claims that Section 10.5.4 addresses the auditor requirement. BellSouth Petition at 12. It does not. It is in fact *silent* with respect to the concern and independent auditor requirements (as well as the one for record retention). BellSouth conceded this point at the hearing. *See* NuVox Brief at 19-22; *see also* Tr. p. 138, ll. 1-19, p. 149, ll. 16-19, 25, p. 150, ll. 1-4 (Padgett). As the Agreement is *silent* on both the audit and concern requirements, BellSouth's argument that *Jenkins v. Morgan* is inapplicable is without merit.

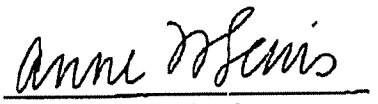
Despite the pages BellSouth devotes to attempting to distinguish the cases upon which NuVox relies, BellSouth has not done so successfully nor has it presented any authority to support a contrary rule of law. Thus, the Commission should affirm the Hearing Officer's conclusion that the *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the Agreement by operation of law.

III. CONCLUSION

BellSouth has not demonstrated any basis for rejecting the Hearing Officer's accurate conclusions that the *Supplemental Order Clarification* requires BellSouth to demonstrate a concern prior to conduct an audit, and that the *Supplemental Order Clarification* – including both the auditor and the concern requirement – are included in the Agreement. For all the foregoing reasons, BellSouth's Petition for Review should be denied.

Respectfully submitted,

NUVOX COMMUNICATIONS, INC.



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Date: March 24, 2004

CERTIFICATE OF SERVICE

I, Anne W. Lewis, hereby certify that on this 24th day of March 2004, a copy of the foregoing REPLY TO BELLSOUTH TELECOMMUNICATION, INC.'S PETITION FOR REVIEW OF RECOMMENDED ORDER were served via United States Mail, with adequate postage attached thereto and by electronic mail, on the following parties:

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BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Docket No. 12778-U
Between BellSouth Telecommunications, Inc.	)	
And NuVox Communications, Inc.	)	
	)	

OPPOSITION OF NUVOX COMMUNICATIONS, INC. TO BELLSOUTH'S MOTON FOR RECONSIDERATION

NuVox Communications, Inc. ("NuVox"), through its counsel, respectfully submits its opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Rehearing, Reconsideration, and Clarification. The Georgia Public Service Commission ("Commission") should deny BellSouth's motion in its entirety. The Commission already has reviewed the issues in the above-referenced proceeding in great detail. Indeed, the Commission issued its decision after considering all of the evidence in the record, the parties' numerous briefs and pleadings, post-hearing billing materials produced by BellSouth, the reports of two hearing officers, and the Staff's recommendation. Clearly, BellSouth already has had more than ample opportunity to present evidence and to make its case. There is simply no basis – and no need – for the Commission to rehear or reconsider its decision as BellSouth requests it to do. Additionally, the Commission must reject BellSouth's request that the Commission clarify its ruling regarding the use of customer proprietary network information ("CPNI"); granting the requested relief solely would serve to rewrite – and to sidestep – the Commission's explicit prohibition against the use of CPNI absent carrier consent.

I. THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION CONCERNING THE SCOPE OF THE AUDIT

The Commission should deny BellSouth's request to reconsider its decision concerning the scope of the audit. The Commission carefully considered a comprehensive record in reaching its decision to limit the scope of an initial audit to the forty-four circuits for which the Commission found that BellSouth had demonstrated a concern. BellSouth is now asking the Commission to once again evaluate this same information. BellSouth already has had more than ample opportunity to produce evidence and plead its case in support of an audit broader than the forty-four circuits. BellSouth has not presented any new evidence, and the Commission should not entertain BellSouth's request to re-litigate this issue. The Commission already has reached a reasonable decision in limiting the scope of the audit, and its decision should stand.

The bases that BellSouth offers in support of its request for reconsideration are without merit. There is no inconsistency between the Commission's vote and its *Order* or within the *Order* itself, as BellSouth alleges.[1] At the Administrative Session, as BellSouth acknowledges, the Commission voted to limit the scope of the audit to "forty-four circuits which BellSouth has provided the billing information."[2] The Commission then proceeded to state that "depending upon the outcome of that audit, then the *Commission* would authorize ...."[3] In adopting this conclusion, the Commission reasonably determined that it would wait to address any potential expansion of the scope of the audit until *after* it had a chance to review the results of an audit of the forty-four circuits for which it had found BellSouth to have demonstrated a concern. Contrary to BellSouth's claims, the Commission did not in any manner decide whether it would

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1 BellSouth Motion at 2-3.

2 *Id.* at 2 (quoting Administrative Session Tr. at 17).

3 *Id.* (emphasis added).

permit BellSouth to conduct an audit of any circuits beyond the forty-four circuits if BellSouth's audit revealed any (or a particular set degree of) non-compliance.[4] Instead, the Commission reasonably determined that its decision at that later point in time would depend on the outcome of the audit. In so doing, the Commission judiciously and reasonably refrained from prejudging a potential controversy that is simply not ripe at this time.

Furthermore, contrary to BellSouth's motion,[5] the Commission's rationale for limiting the scope of the audit is fully consistent with its reservation on the potential expansion of the scope of the audit. Although NuVox believes that the grant of an audit of the initial forty-four circuits was generous given BellSouth's now obvious failure to provide record evidence to support its allegations of concerns regarding those forty-four circuits, the Commission reasonably decided to withhold addressing the issue of whether BellSouth could broaden the scope of the audit until after it had the opportunity to review the outcome of the initial audit. The Commission's decision does not put BellSouth in an "impossible situation," as BellSouth claims.[6] If BellSouth finds non-compliance, then it may attempt to raise additional concerns and it may approach the Commission to request that it be permitted on that basis to broaden the scope of the audit.[7] At that time, the Commission can evaluate all of the evidence and determine whether a broader audit is appropriate. This approach is fully consistent not only with the *Order* but also with the FCC's determination that audits should be limited and should not be routine. BellSouth continues to pursue, without legal justification, a right to audit every circuit converted. As the

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4 BellSouth's pronouncement regarding the "obvious import of Commissioner Burgess' amendment" is a misguided attempt to rewrite and undermine the amendment offered by Commissioner Burgess and unanimously adopted by the Commission. *See id* at 2.

5 *Id.* at 3.

6 *Id.*

7 As confirmed by the Commission's decision in this case, NuVox's response to BellSouth's request for an audit consistently has been lawful and reasonable. Thus, it remains a possibility – albeit seemingly remote – that the Parties may some day be able to resolve their differences on their own.

Commission correctly has determined, neither the FCC nor the Parties contemplated or adopted such an unlimited audit regime.

II. THE COMMISSION CORRECTLY DETERMINED THAT BELLSOUTH MUST PAY FOR THE AUDIT

In the *Order*, the Commission correctly concluded that, under the Agreement, BellSouth is required to pay for an audit that complies with AICPA standards.[8] Throughout this proceeding, BellSouth repeatedly and steadfastly has maintained that, consistent with the plain language of the Agreement, which states that the audit will be conducted "at BellSouth's sole expense"[9], it will pay for the audit. For example, among others admissions, BellSouth explicitly has stated:

- "... BellSouth has to bear the cost of that audit."[10]
- "The audit will not cost NuVox anything, since, under the terms of the Agreement, BellSouth must bear all the audit costs."[11]
- "The Parties also agreed that any audit would be conducted at BellSouth's sole expense."[12]

BellSouth did not condition its statements regarding which party would bear the cost of the audit on whether it was required to hire an auditor that complied with AICPA standards.

Furthermore, BellSouth repeatedly has admitted that it is required to pay for the cost of the audit *regardless of the outcome of the audit.* For example, BellSouth has stated,

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8 *Order* at 14.

9 Agreement, Att. 2, § 10.5.4.

10 Tr. at 49 (Oral Arg. Before Initial Hearing Officer, Argument by B. Ross)(Aug. 13, 2002); *see also* BellSouth Post Oral Argument Brief at 11 (Oct. 4, 2002).

11 BellSouth Response to NuVox Application for Review at 2 (Dec. 11, 2002).

12 BellSouth Post-Hearing Brief at 12 (citation omitted)(Dec. 29, 2003); *see also* BellSouth Proposed Findings of Fact and Conclusions of Law at 3 (citation omitted)(Dec. 29, 2003); *see also* Hearing Officer's Recommended Order on Complaint, Finding of Fact No. 7 (Feb. 11, 2004).

- "... the Parties agreed that BellSouth would pay for the audit regardless of its findings..."[13]
- "The parties also agreed that BellSouth must pay for the cost of any audit regardless of what the audit uncovers..."[14]
- "BellSouth recognized that it was obligated to pay the entire cost of the NuVox audit, regardless of the outcome of the audit..."[15]
- "Q Your position is, however in this case, that you're going to pay for the cost of the audit regardless of what happens, correct?

  A That's correct, because that's what the parties agreed to in the interconnection agreement."[16]

Accordingly, given BellSouth's admission that it is required to pay for the audit (regardless of the outcome) and assurances provided to both the Commission and NuVox that the audit would cost NuVox nothing, the Commission's conclusion regarding the costs of an audit is both reasonable and legally sustainable. Indeed, it would have been arbitrary and capricious for the Commission to rule in any other way. Thus, now that the Commission has authorized an audit, it cannot let BellSouth renege on commitments and assurances provided to and considered by the Commission regarding which party would pay for the audit.

III. THE COMMISSION SHOULD NOT CLARIFY ITS DECISION CONCERNING THE RELEASE OF CPNI IN THE MANNER THAT BELLSOUTH REQUESTS

The Commission should reject BellSouth's requested "clarification" of the *Order* (which adopts the Staff's recommendation) with regard to the use of customer proprietary network information ("CPNI"). Once again, BellSouth appears to be seeking Commission approval to use the information that it has obtained from competitive local exchange carriers

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13 Tr. at 93 (Padgett Direct at 9).

14 BellSouth Response to NuVox Application for Review at 6 (Dec. 11, 2002).

15 Tr. at 115-16 (Padgett Surrebuttal at 12-13).

16 *Id.* at 155-56.

("CLECs") for the purpose of placing service orders for another unauthorized purpose. In the *Order*, the Commission explicitly stated that BellSouth only may use CPNI if it obtains approval from the carriers to whom it pertains.[17] The Staff's recommendation (adopted without revision on the CPNI issue[18]) contains the same broad pronouncement that was not limited to release under a particular subsection of Section 222 (BellSouth now tries to distinguish release under various subsections of Section 222 in an attempt to get another bite – or bites – at the apple).[19] These pronouncements comport in all respects with the letter and intent of Section 222 and need not be "clarified" so as to provide BellSouth with an opportunity to sidestep them and use CPNI in a manner for which it was not intended and for which no exceptions apply.

Carriers have provided information to BellSouth for the purpose of obtaining particular services from BellSouth (usually those that they cannot get from any other source) – not for facilitating EEL audits. Under the Act, the FCC's CPNI rules and orders, and consistent with the Commission's *Order*, BellSouth can use that information only for the purpose of providing the requested service; BellSouth cannot use this information in the course of its EELs audits, without having obtained explicit approval for such use. Although BellSouth claims not to challenge the Commission's conclusion in this regard, BellSouth's request for clarification appears to be a misguided attempt to raise a new argument as to why it should be granted (or at least not denied) the ability to claim an "exception" to the rule. BellSouth, however, has not demonstrated why a Section 222(d) exception would apply to any disclosure of CPNI to an independent auditor. Accordingly, if the Commission is to issue any clarification regarding the appropriate use of CPNI, then it should be to clarify that BellSouth is *not* permitted to use the information that it

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17 *Order* at 11.

18 *Id.* at 12.

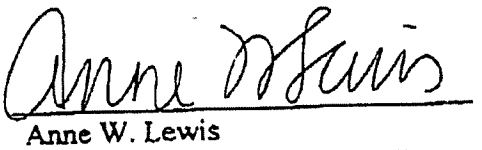
19 *Staff Recommendation* at 5 (Apr. 23, 2004).

obtained from CLECs for the purpose of providing service for any means other than to provide service absent express approval from the carrier and that BellSouth has made no showing that any of the "exceptions" contained in Section 222 apply.

IV. CONCLUSION

For the foregoing reasons, NuVox respectfully requests that the Commission deny BellSouth's Motion for Rehearing, Reconsideration, and Clarification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this15th day of July, 2004, a copy of the foregoing OPPOSITION OF NUVOX COMMUNICATIONS, INC. TO BELLSOUTH'S MOTON FOR RECONSIDERATION were served via United States Mail, with adequate postage attached thereto and by electronic mail, on the following parties:

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BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. And NuVox Communications, Inc.	)	Docket No. 12778-U

NUVOX COMMUNICATIONS, INC.'S REPLY IN SUPPORT OF OPPOSITION TO BELLSOUTH'S MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

NuVox Communications, Inc. ("NuVox"), through its counsel, respectfully submits this Reply in support of its Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Rehearing, Reconsideration and Clarification. The Commission should deny BellSouth's motion in its entirety. In doing so, the Commission should confirm that BellSouth is prohibited from using any carrier proprietary information ("CPI") and from using customer proprietary network information ("CPNI") absent customer consent.

II. DISCUSSION

A. The Commission Should Not Reconsider Its Decision Concerning the Scope of the Audit

For the reasons set forth in NuVox's Opposition, the Commission should deny BellSouth's request to reconsider its decision regarding the scope of the audit. In its Reply, BellSouth again attempts to prejudge the circumstances under which the Commission might expand the scope of the audit it has authorized. BellSouth challenges the Commission's decision to reserve final judgment on the scope of the audit by advancing its implausible "understanding" of Commission Burgess's motion regarding the scope of the audit and the wording of the

Commission Order that resulted.[1] Although BellSouth now retreats from its assertion that the Commission Order does not reflect the decision of the Commission,[2] BellSouth's apparent misunderstanding of the Order does not present a sound foundation upon which to grant rehearing, reconsideration or clarification resulting in the adoption (as BellSouth requests) of (1) that same apparent misunderstanding, or (2) the "full audit" BellSouth seeks, which would eviscerate the limited auditing scheme and concern requirement that the FCC imposed and to which the Parties agreed in their interconnection agreement.[3] In short, the apparent misunderstanding BellSouth proffers does not provide a sound basis for the Commission to modify its decision regarding the scope of the audit.

In addition to the misunderstanding offered in its Reply, BellSouth supplies no new legal or factual basis upon which the Commission could or should reverse itself. In its Reply, BellSouth attempts to unsettle the Commission by postulating as to what NuVox might do in response to an audit that finds a violation with respect to every converted circuit and by posing a hypothetical regarding service by US LEC.[4] Neither NuVox nor the Commission need to respond to either of BellSouth's speculative assertions. The Commission can address NuVox's arguments if and when they are made in response to a BellSouth post-audit complaint or motion that may or may not some day be filed. BellSouth's supposition that the Commission may later adopt NuVox's position regarding the scope of the audit in its entirety does not provide a basis for the Commission to reconsider its decision now.

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1 BellSouth Reply at 2, BellSouth Motion at 2.

2 BellSouth Motion at 2.

3 *See* BellSouth Reply at 4-5.

4 *Id.* at 2, 4.

With respect to BellSouth's insistence that it be afforded an extra-contractual exception to the concern requirement to account for the fact that it is not legally entitled to use for concern-generating purposes information (CPI) provided to it by carriers (such as US LEC) placing orders for UNEs and other services,[5] the Commission should continue to deny BellSouth's overtures, as it cannot create exceptions to the Parties' Agreement to which the Parties themselves did not agree. To the extent that such information is CPNI, the FCC, the Parties and this Commission have long been cognizant that in demonstrating a concern, BellSouth would not be entitled to use such information without the permission of the carrier to which it pertains. As audits were never intended to be unlimited or routine, and the Parties' Agreement contains no provisions that state otherwise, the fact that BellSouth is unable to mine additional information in its possession only by virtue of its incumbent and historical monopoly status should not be regarded as a problem in need of an extra-contractual fix. The routine and unlimited audits that BellSouth has sought to conduct of NuVox's records and those of various other CLECs are simply inconsistent with the limited audit scheme adopted. This proceeding is not one in which BellSouth's limited audit rights can be expanded.

BellSouth also seeks to divert attention from the fact that there is no legal basis to liberate it from the concern requirement by incorrectly asserting that NuVox cites no authority to support its position that the scope of the audit must be limited to those circuits for which BellSouth has demonstrated a concern.[6] Both sides, however, have briefed this issue and NuVox

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5 As explained in Section II, C, BellSouth has not demonstrated that it is entitled to any disclosure/release exceptions under Section 222.

6 BellSouth Reply at 3.

supplied citations, which the Commission already references in its Order.[7] This briefing demonstrates that it is BellSouth that has failed to provide a legal foundation upon which it can have the unlimited audit of all converted circuits it seeks. Indeed, in this same proceeding BellSouth argued that the limitation contemplated by the FCC's "limited audit" language was a limitation as to scope.[8] Now BellSouth argues otherwise. But, the FCC never said a concern with respect to some circuits could authorize a "full" or "unlimited" audit of all circuits, and the Parties never agreed otherwise. In its Reply, BellSouth does nothing more than dance around the fact that after two years and several different formulations of its supposed concern, it has to date managed to convince the Commission that it has a concern with respect to only 44 circuits.

At bottom, the Commission already has generously allowed to BellSouth an audit of 44 circuits for which there is no evidence of a concern in the record, but rather only a post-hearing filing of billing materials. On that basis alone, the Commission could have denied BellSouth's audit request altogether. The Commission's decision to defer consideration of any potential expansion of the scope of the audit should not be replaced with either of the formulations that BellSouth seeks to persuade the Commission into adopting whereby BellSouth would get to conduct an unlimited fishing expedition without demonstrating the prerequisite concern.

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7 *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, at 11 (June 30, 2004) ("Order").

8 BellSouth made this argument in its Response to NuVox's initial Application for Review. BellSouth Response at 10, n.2 ("the FCC's reference to 'limited audits' pertains to the scope of the audit").

B. The Commission Should Not Reconsider Its Decision Concerning Who Pays for the Audit

In its Reply, BellSouth urges the Commission to ignore BellSouth's consistent and repeated assurances that it would pay for the audit regardless of the outcome.[9] BellSouth's plea is backed by a new and completely unsupported assertion that BellSouth made its commitments only in the context of an audit conducted by BellSouth itself, as opposed to an audit conducted by independent third party auditor. During this entire proceeding, however, BellSouth has insisted that the audit would be conducted by an entity that it asserted was an independent third party. BellSouth never sought a decision authorizing it to conduct an audit itself. Thus, BellSouth's attempt to reconfigure the context in which it made its unconditional commitment to pay for the audit and its assurances that NuVox would not pay for the audit is unfounded and should be dismissed.

BellSouth's suggestion that the Commission must, to be consistent, let BellSouth reverse representations and renege on commitments is no more compelling. BellSouth steadfastly and repeatedly asserted that the "at BellSouth's sole expense" language in the Agreement required it to pay for an audit regardless of the outcome and thus represented an express agreement to do something different from the cost-shifting scheme adopted in the FCC's *Supplemental Order Clarification*.[10] NuVox did not object to BellSouth's commitment to pay regardless of the outcome. The fact that no other express exceptions were asserted or found does not yield any inconsistency in the Commission's decision. Thus, the arguments proffered by BellSouth do not supply a basis upon which reconsideration is required or warranted.

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9 BellSouth Reply at 5.

10 *See e.g.*, NuVox Opposition to BellSouth Motion at 4-5, notes 10-16 (citing examples of BellSouth's assertions regarding the cost of the audit); *see also, e.g.*, BellSouth Brief at 12, 15 (Dec. 29, 2003).

C. The Commission Should Not Clarify Its Decision Concerning the Release of CPI/CPNI In the Manner that BellSouth Requests

Pursuant to the Communications Act of 1934, as amended (the "Act"), BellSouth is prohibited from using CPNI to conduct an audit of NuVox's EELs absent approval from each carrier that has submitted that CPNI to BellSouth, and from using CPI for any purpose other than to provision the requested service. In accordance with the prohibitions in the Act on the use of proprietary information, the Commission correctly concluded that BellSouth is prohibited from using CPNI to conduct the EELs audit absent carrier consent.[11] In doing so, the Commission denied BellSouth's request to authorize the disclosure of any information that BellSouth deemed appropriate, including the records of other carriers.[12]

BellSouth has raised numerous arguments in support of its claim that it should be permitted to use CPNI. Having lost on this issue, BellSouth now requests that the Commission clarify that BellSouth may use CPNI consistent with the exceptions in section 222(d), while arguing that the Commission does not have the authority to evaluate the applicability of those exceptions. BellSouth cannot have it both ways. As an initial matter, the information that BellSouth seeks to use is CPI, not CPNI, as BellSouth claims. Under section 222(b) of the Act, BellSouth is prohibited from using CPI for any purpose other than to provide the requested service. Assuming arguendo the information is CPNI, the Commission's broad conclusion encompasses – and rejects as inapplicable – BellSouth's reliance on the exceptions in sections 222(c) and (d) of the Act. To the extent that the Commission believes that it has not explicitly rejected BellSouth's argument that it is permitted to use CPNI under the exceptions set forth in

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11 *See* Order at 11-12.

12 *See id.*; *see also* BellSouth Petition for Review of Recommended Order at 3 & n.1 (stating that "the Commission should clarify the Recommended Order to authorize BellSouth to provide the auditor with whatever records the auditor may reasonably require in conducting the audit, including records that may contain proprietary information of another carrier.").

section 222(d), the Commission should reject BellSouth's latest attempt to use other carriers' information to conduct an EELs audit, because the exceptions set forth in section 222(d) are inapplicable in this case.

1. *BellSouth Is Prohibited from Using the Requested Information Under Section 222(b) of the Act*

Under the Act, BellSouth is not permitted to use the information from carriers for any purpose other than to provision the requested service. Although BellSouth has danced around the issue of precisely which information it intends to use from NuVox and other carriers, it appears that the information constitutes CPI, not CPNI.[13] Pursuant to section 222(b) of the Act, as NuVox previously has stated,[14] a carrier that receives CPI is not permitted to use CPI for any purpose other than to provision the requested service: a "telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information *only for such purpose*...."[15] This is precisely the information that BellSouth seeks to use: information that carriers, including NuVox, have provided to BellSouth for the purpose of obtaining UNEs and other services. Under the Act, this information constitutes CPI – not CPNI – and BellSouth is prohibited from using this information for any purpose other than to provide the requested service; the Act does not provide any exceptions to this absolute prohibition. Accordingly, the Commission must reject BellSouth's latest claim that it is permitted to use the information under section 222(d), which applies only to CPNI, not CPI.

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13 CPI is distinct from CPNI in that CPI pertains to information that a carrier provides to another carrier for the purpose of obtaining a telecommunications service whereas CPNI pertains to information about the services that the customer purchases and the customer's use of those services.

14 NuVox Reply to BellSouth Telecommunications, Inc.'s Petition for Review of Recommended Order at 3.

15 47 U.S.C. § 222(b).

2. *Even if the Requested Information is CPNI, BellSouth Is Precluded from Using that Information under Sections 222(c) and (d) of the Act*

To the extent that the information that BellSouth seeks to use constitutes CPNI, BellSouth also is prohibited, under the Act and as the Commission concluded, from using the information for any purpose other than to provide the requested service absent carrier consent. BellSouth requested that the Commission authorize it to use CPNI under section 222(c), which prohibits carriers from using CPNI "[e]xcept as required by law...."[16] The Commission denied BellSouth's request, and concluded that BellSouth is not permitted to use CPNI unless it obtains carrier consent.[17] BellSouth has not challenged this aspect of the Commission's decision.

Having lost its battle to use CPNI unless authorized by the carrier, BellSouth claims that it is permitted to use CPNI without such authorization under two of the exceptions to the prohibition on the use of CPNI, which are enumerated in sections 222(d)(1) and (d)(2) of the Act.[18] The Commission must reiterate that no exceptions apply and that BellSouth is not permitted to use CPNI absent carrier consent. The Commission's conclusion encompasses BellSouth's claims under section 222(d) of the Act. In addition, if the Commission finds that it has not fully considered the exceptions under section 222(d), then it must conclude that BellSouth has waived its right to bring a claim under that section. Even if the Commission reaches the merits of BellSouth's claim, then it must conclude that the exceptions in sections 222(d)(1) and (2) do not apply in this case.

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16 *Id.* at § 222(c)(1).

17 *Id.*

18 In its Post-Hearing Brief, BellSouth referred to section 221(d)(1) and 221(d)(2) of the Act; NuVox assumes that this reference to section 221 is meant to be BellSouth's assertion that the exceptions in section *222* – not 221 – are applicable. *See* BellSouth Post-Hearing Br. at note 8 (Dec. 29, 2003).

a. The Commission Has Concluded Correctly That No Exceptions Apply

The Commission already has rejected BellSouth's argument that it should be able to use CPNI under the exceptions set forth in sections 222(d)(1) and (d)(2) of the Act. In its Order, the Commission acknowledged that "the federal statute prohibits the release of CPNI, which certain exceptions."[19] The Commission then concluded that the exceptions do not apply and stated, "[i]t does not appear consistent with the intent of the law to authorize release of this information in this instance."[20] This decision, and the underlying rationale, encompasses exceptions to the prohibition on disclosure of CPNI under sections 222(c) and (d) of the Act, regardless of whether the Commission has referenced each of those exceptions explicitly.

b. BellSouth Has Waived Any Arguments that it May Have Had Under Section 222(d) of the Act

BellSouth has waived its right to now argue that it is entitled to use CPNI under the exceptions set forth in section 222(d) of the Act. If the Commission finds that its broad ruling prohibiting BellSouth from using CPNI absent customer consent does not encompass BellSouth's claims under section 222(d), then the Commission should conclude that BellSouth has waived any argument that it might have had under that section. In its Petition for Review of the Recommended Order, BellSouth specifically asked the Commission to grant it access to CPNI under section 222(c), stating "rather than becoming embroiled in a dispute about the scope of Section 222(d)(2), the Commission should grant BellSouth's request to authorize disclosure of such information consistent with Section 222(c)(1)...."[21] In doing so, BellSouth chose not to pursue an argument under section 222(d), and, therefore, has waived its right to assert a new

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19 Order at 11.

20 *Id.* at 12.

21 BellSouth Telecommunications, Inc.'s Petition for Review of Recommended Order at note 1.

argument at this time. Now that the Commission has denied BellSouth's request that the Commission authorize it to use CPNI under section 222(c), BellSouth has attempted to resurrect its argument that it can use CPNI under an exception to section 222(d) of the Act. The Commission must reject BellSouth's latest attempts as untimely and unfounded.

c. The Exceptions Set Forth in Sections 222(d)(1)-(2) Are Inapplicable in this Case

The exceptions to the prohibition on the use of CPNI absent customer consent in sections 222(d)(1) and (d)(2) are inapplicable in this case. As an initial matter, the Commission has the authority to evaluate whether the exceptions in section 222(d) are applicable in this case. BellSouth's interpretation of the Commission's role is implausible: BellSouth would have the Commission grant BellSouth the authority to disclose and use other carriers' CPNI under section 222(c) while prohibiting the Commission from rendering a decision under section 222(d).[22] BellSouth cannot have it both ways. Furthermore, under BellSouth's theory, BellSouth would be the decision-maker of whether the CPNI exception was applicable, and NuVox would have to challenge BellSouth's application of the exception in a different forum. The Commission has the authority to determine whether section 222(c) should be applied, and it has the authority to determine whether the exceptions in section 222(d) are applicable. There is nothing in the Act that preempts the Commission from applying section 222(d) to the facts of this case.

Substantively, under section 222(d)(1), carriers are permitted to use their customers' CPNI without customer consent "to initiate, render, bill, and collect for telecommunications services."[23] BellSouth's assertion that this section is applicable is without merit for several reasons. First, NuVox and other carriers provided information to BellSouth for

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22 *See* BellSouth Motion at 7.

23 47 U.S.C. § 222(d)(1).

the purpose of obtaining particular EELs, UNEs and other services. BellSouth already has initiated, rendered, billed, and collected for those services. Whatever right BellSouth may have had to use this information under the exception contained in section 222(d)(1) already has ceased; BellSouth cannot now use this information to conduct an EELs audit. Second, the exception applies so that BellSouth can bill each particular customer for the services. For example, BellSouth only can use the information that AT&T provides to BellSouth for the purpose of initiating, rendering, and billing services to AT&T. BellSouth cannot use that information to bill NuVox for services. Third, NuVox, in this instance ordered EELs from BellSouth, not special access. BellSouth cannot use the information provided for one purpose to determine whether it can bill for another service.

Nor is BellSouth authorized to use CPNI under section 222(d)(2) of the Act. Pursuant to section 222(d)(2), carriers can use CPNI without customer consent "to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services."[24] In this case, there has been no proof of fraudulent, abusive or unlawful use of or subscription to services, and, therefore, this provision is not triggered. In this regard, it is significant to note that "Section 222(d)(2) was not directed at disclosure in litigation but to allow telecommunications companies 'to use CPNI in limited fashion for credit evaluation to protect themselves from fraudulent operators who subscriber to telecommunications services, run up large bills, and then change carriers without payment.'"[25] This situation is inapplicable to the present case.

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24 *Id.* at § 222(d)(2).

25 *ICG Communications, Inc. v. Allegiance Telecom*, 211 F.R.D. 610, 614 n.5 (U.S.N.D. Cal. 2002) (quoting H.R. Conf. Rep. No. 458, at 205).

Moreover, even if one of these exceptions were to be applicable to the present case, the exception would apply only to the disclosure of NuVox's CPNI, not CPNI related to other carriers. From day one, BellSouth has requested an audit of *NuVox's records*, not those of any other carrier.[26] This complaint proceeding is not about an audit of BellSouth's or any other carrier's records. In addition, Attachment 2, section 10.5.4 of the parties' Agreement permits an audit only of NuVox's records – not any other carrier's. Furthermore, in the *Supplemental Order Clarification*, the Commission requires carriers to maintain records in support of their own EELs conversions.[27] In doing so, the FCC contemplates only a limited audit of a carrier's own records; the FCC does not contemplate or in any way authorize BellSouth to use any other carrier's records to conduct an audit. For these reasons, the Commission must once again deny BellSouth's latest attempt to argue that it is permitted to use CPNI absent carrier consent. The Commission already has stated clearly that BellSouth is not permitted to use CPNI absent carrier consent; it is too late for BellSouth to reopen an argument it effectively waived. BellSouth cannot use CPNI for the audits absent carrier consent, and the exceptions do not provide BellSouth any relief.

WHEREFORE, NuVox requests that the Commission deny BellSouth's Motion for Rehearing, Reconsideration, and Clarification of the Commission's Order.

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26 *See* BellSouth Complaint at 3.

27 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, 15 FCC Rcd 9587, 9604, ¶ 32 (2000) (stating "[w]e expect that requesting carriers will maintain appropriate records that they can rely on to support *their* local usage certification.") (emphasis added).

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August 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2004, a copy of the foregoing NUVOX COMMUNICATIONS, INC.'S REPLY IN SUPPORT OF OPPOSITION TO BELLSOUTH'S MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION were served via United States Mail, with adequate postage attached thereto and by electronic mail, on the following parties:

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