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May 9, 2005

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PUBLIC SERVICE
COMMISSION

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

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

Dear Ms. O'Donnell:

Please find enclosed the original and 10 copies of Nuvox Communications, Inc.'s Petition for Rehearing.

An extra copy of this filing is enclosed. Please indicate receipt of this filing by your office by placing your file stamp on the extra copy and returning to me via our runner.

Thank you for your assistance in this matter.

Sincerely yours,



Douglas F. Brent

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MAY 9 2005

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of)
)
 BellSouth Telecommunications, Inc.,)
)
 Complainant)
)
 v.)
)
 NuVox Communications, Inc.,)
)
 Defendant.)
 _____)

Case No. 2004-00295

PETITION FOR REHEARING

NuVox Communications, Inc. (“NuVox”), through its undersigned counsel and pursuant to KRS 278.400, respectfully petitions for rehearing of the Kentucky Public Service Commission’s (“Commission”) Order in the above-referenced proceeding.¹ In the Order, the Commission granted BellSouth’s complaint and motion for summary disposition in part, allowing BellSouth to audit the fifteen converted enhanced extended link (“EEL”) circuits for which the Commission found that BellSouth had demonstrated sufficient concern and preventing NuVox from challenging BellSouth’s selection of an auditor until after the auditor had completed its audit of the fifteen circuits. NuVox respectfully seeks rehearing of the Commission’s decision that (1) BellSouth demonstrated sufficient concern for the fifteen circuits at issue; and (2) NuVox may not dispute the independence of an auditor until after an audit has been completed. NuVox also seeks a stay of the Commission’s Order, and, thus, the audit, pending resolution of this petition for rehearing.

¹ *BellSouth Telecommunications, Inc. v. NuVox Communications, Inc.*, Case No. 2004-00295, Order (rel. Apr. 15, 2005) (“Order”).

I. THE COMMISSION ERRED IN CONCLUDING THAT BELL SOUTH HAD DEMONSTRATED A CONCERN FOR THE FIFTEEN CIRCUITS AT ISSUE

The Commission erred in concluding that BellSouth had demonstrated a concern for the fifteen circuits for which the Commission has permitted the audit to proceed.² For the following reasons, the Commission should reconsider and modify its decision.

Neither the Commission nor NuVox knows which 15 circuits BellSouth is entitled to audit per the Commission's April 15, 2005 Order. This fact alone makes clear that the Commission has set too low the bar for demonstrating a concern.³ Because BellSouth could not have demonstrated sufficient concern with respect to unknown circuits, the Commission should reverse its finding that BellSouth has shown sufficient concern.

Moreover, BellSouth has not provided any record evidence to support its allegations of concern.⁴ Rather, BellSouth merely asserts that in January 2004 it conducted a review of circuits and determined that it provided local service to customers that are also served by NuVox via the 15 EELs in question.⁵ This unsupported allegation of concern with respect to those unidentified 15 circuits also demonstrates that BellSouth did not have the requisite concern when it issued its notice on March 15, 2002. Instead, BellSouth unlawfully used NuVox customer and carrier proprietary information to create a concern (in 2004) that it did not have as of the date it issued its audit notice (2002). BellSouth should not be permitted to take advantage

² See Order at 5.

³ Indeed, NuVox has sought the Commission's assistance in requesting that BellSouth identify the circuits that it believes are at issue. See Letter to Elizabeth O'Donnell, Executive Director, Kentucky Public Service Commission, from Douglas F. Brent, Counsel to NuVox (Apr. 26, 2005).

⁴ In a sworn affidavit, NuVox personnel stated that it repeatedly has requested supporting documentation from BellSouth, but that BellSouth had refused to provide any support for its alleged concern. Affidavit of Hamilton B. Russell, ¶ 20 (appended to NuVox's Opposition to BellSouth's Motion for Summary Disposition at Exh. A).

⁵ See Order at 2, BellSouth Complaint at 5, ¶ 23.

of its own unlawful acts. Because the record is empty with respect to BellSouth's allegations of concern (either at the time it issued its notice or more recently), the Commission should reverse its finding that BellSouth has shown sufficient concern.

For these reasons, the Commission should reconsider its decision with respect to the concern requirement and find that BellSouth has failed to demonstrate sufficiently a concern for any of NuVox's converted EELs circuits. Alternatively, the Commission should order BellSouth to produce evidence in support of its allegations regarding the 15 circuits for which the Commission has authorized an audit and provide NuVox with a meaningful opportunity to review and comment thereon.

II. THE COMMISSION ERRED IN PRECLUDING NUVOX FROM CHALLENGING THE AUDITOR'S INDEPENDENCE

The Commission erred in precluding NuVox from disputing the independence of the auditor prior to the audit and in granting summary judgment on this issue in favor of BellSouth. For the following reasons, the Commission should reconsider and modify its decision.

The Agreement incorporates the independent auditor requirement from the FCC's *Supplemental Order Clarification*.⁶ For that requirement to have any meaning, an auditor must be and remain independent at the outset of and during the audit. Accordingly, if challenged, independence must be established *prior* to conduct of an audit (and it must be maintained throughout). While it is certainly true that issues regarding independence may arise at any point during an audit engagement, if the independence of an auditor is challenged prior to conducting an audit, that dispute should be resolved prior to subjecting one party to what would be (if that

⁶ See NuVox Communications, Inc. Opposition to Motion for Summary Disposition at 4-5.

party's allegations were proven correct) an unlawful audit by an auditor that was not independent. Disputes that develop subsequently should be addressed when they are raised.

An audit conducted by an unqualified auditor that is not independent is a violation of both the Agreement and federal law. Section 15 of the Agreement's General Terms and Conditions entitles a party to seek dispute resolution before this Commission. It does not require either party to suffer harms or to endure noncompliance with the Agreement's requirements prior to requesting the Commission to address the dispute.⁷ The issue raised is not one of Commission or NuVox approval of an auditor, but is instead about whether BellSouth has demonstrated compliance with the Agreement's independent auditor requirement. There is no contractual or other legal requirement that NuVox must suffer the consequences of such an alleged or known contract violation first and seek dispute resolution only after actual harms result.

Moreover, the parties' factual dispute over the independence of BellSouth's proposed auditor cannot be resolved by grant of summary disposition in favor of the moving party. NuVox sponsored an affidavit that raises serious questions about the auditor's independence.⁸ Just as it is not appropriate to allow a party to proceed based on a contract

⁷ Audits, even on a modest scale, are intrusive and disruptive. In this case, they allow a direct and dominant competitor to divert a much smaller competitor's resources away from daily operations and the business of attracting and keeping customers satisfied. The opportunity costs involved with such diversions are significant. And NuVox makes these claims based on actual experience with an EEL audit in Georgia. Not only has NuVox devoted significant resources to that audit which commenced in November 2004 and which has not yet concluded, NuVox has had to deal with complications resulting from the auditor's breach of a non-disclosure agreement and BellSouth's public misrepresentations of the status of that audit. These events have led to additional proceedings before the Georgia Commission and a suit against BellSouth's auditor (KPMG) in South Carolina.

⁸ See Affidavit of Hamilton Russell, ¶¶ 20-22 (appended to NuVox's Opposition to BellSouth's Motion for Summary Disposition at Exhibit A).

provision with which it has failed to demonstrate compliance, summary judgment is not appropriate when there are material facts in dispute.⁹

In evaluating a motion for summary judgment, the Commission is required to view facts and inferences in a light most favorable to NuVox.¹⁰ In this case, conflicting affidavits demonstrated that there were material questions of fact in dispute regarding the proposed auditor's independence. In its opposition to BellSouth's motion for summary disposition, NuVox explained that the Georgia Commission previously had found that NuVox had "raised serious concerns about [ACA's] independence."¹¹ NuVox sponsored an affidavit in this proceeding raising the same concerns that led the Georgia Commission to essentially reject BellSouth's claims regarding the proposed auditor's independence.¹² This Commission addressed the auditor's independence absent a hearing and despite the conflicting affidavits. Indeed, rather than giving the Georgia Commission's finding any weight or evaluating the conflicting statements of fact made in BellSouth's and NuVox's affidavits in a light favorable to the non-moving party (NuVox), the Commission appears to have relied on BellSouth's naked assertion (which NuVox contests) that its proposed auditor is independent.

Because there are significant issues regarding BellSouth's compliance with the independent auditor requirement, which include questions of compliance with the Agreement and contested issues of fact, the Commission should reconsider its decision in this regard and find that BellSouth has failed to demonstrate compliance with the independent auditor requirement.

⁹ See *Steelvest, Inc. Scansteel Service Center, Inc.*, 807 S.W. 2d 476 (Ky. 1991).

¹⁰ See *id.*

¹¹ NuVox Opposition at 13 (quoting Georgia Order at 13).

¹² Affidavit of Hamilton B. Russell, ¶¶ 20-22 (attached to NuVox Opposition to BellSouth Motion for Summary Disposition at Exhibit A).

III. THE COMMISSION SHOULD STAY ITS ORDER

The Commission should modify or stay its Order pending resolution of NuVox's petition for rehearing. NuVox has requested rehearing of the Commission's Order that permitted BellSouth to proceed with an audit of fifteen converted EEL circuits. If the Commission does not stay its order, then BellSouth will proceed to audit the fifteen converted EEL circuits that are the subject of the petition for rehearing, thus precluding the relief that NuVox seeks in its petition. Accordingly, the Commission should grant a stay of its Order until it addresses NuVox's petition for rehearing.¹³ Alternatively, the Commission should modify its April 15, 2005 Order to make clear that the audit may not proceed until the Commission has fully considered and ruled on NuVox's petition for rehearing.

¹³ The Commission has authority to modify or stay its order in the manner requested by NuVox. *See* KRS 278.390 (providing that orders continue in force until expiration, revocation, or modification by the Commission); *see also Union Light Heat & Power Co. v. Public Service Comm'n*, 271 S.W. 361, 365-66 (1954) (explaining that an administrative agency, like a court, may reconsider and change its orders "during the time it retains control over any question under submission to it").

IV. CONCLUSION

For the foregoing reasons, NuVox respectfully requests that the Commission grant the relief requested herein.

Respectfully submitted,

NuVox Communications, Inc.

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Certificate of Service

The undersigned hereby certifies that on this the 9th day of May, 2005, 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.


Douglas F. Brent

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