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MAY 25 2005

PUBLIC SERVICE
COMMISSION

May 24, 2005

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

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

Dear Ms. O'Donnell:

This letter is to urge the Commission to grant the pending petition for rehearing in this docket, and to briefly address the legal errors in BellSouth's opposition filing. Given BellSouth's unsupportable attempt to lull the Commission into *inaction* on the petition, and because the rehearing period will end one week from today, right after a Commission holiday, NuVox is compelled to again bring this matter to the Commission's attention.

On April 26, 2005, NuVox Communications, Inc. ("NuVox") sought the Commission's assistance in requiring BellSouth Telecommunications, Inc. ("BellSouth") to identify the fifteen converted enhanced extended link ("EEL") circuits that the Commission found BellSouth was entitled to audit pursuant to the Commission's April 15, 2005 order in the above-captioned docket.

Elizabeth O'Donnell
May 24, 2005
Page Two

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NuVox then filed a timely petition for rehearing on May 9, 2005.¹

¹ See NuVox Petition for Rehearing, BellSouth Telecommunications, Inc. v. NuVox Communications, Inc., Case No. 2004-00295 (filed May 9, 2005).

Today, NuVox received a copy of the Opposition BellSouth filed to NuVox's Petition. In its Opposition, BellSouth argues that the relief that NuVox requested cannot be granted because the case has been removed from the Commission's active docket and there is no pending case over which the Commission has jurisdiction to decide these issues. That cannot be right. It seems unlikely that the Commission would have issued its April 26, 2005 order removing the proceeding from its active docket with the intent to foreclose petitions for rehearing. Indeed, it couldn't have done so. Rehearing is a *statutory* right relating to any "determination" made by the Commission. It is black letter law that an agency may not limit a statute through internal policy or other form of action. KRS 13A.130; see *Kerr v. Kentucky State Bd. of Registration*, 797 S.W. 2d 714 (Ky. Ct. App. 1990) (internal agency policy not authorized by statute null and void, and of no effect whatsoever). The Commission can and should consider a timely filed Petition for Rehearing. In any event, NuVox will await further Commission order on these ambiguities. BellSouth also argues that NuVox's Petition should be rejected because NuVox raises no new additional evidence and that KRS 278.400 "contemplates" additional evidence that could not have been offered "on the former hearing". BellSouth Opposition at 1. BellSouth misreads KRS 278.400, the rehearing statute, which contains no prerequisite that additional evidence be offered as a basis for rehearing. The Commission has specifically rejected attempts to read KRS 278.400 in this strained way. See *Jackson Energy Cooperative Assoc.*, Case No. 2000-373, (Ky. PSC June 27, 2001) (rejecting Attorney General's claim that rehearing petition must fail because it presents no new evidence: "While the Commission acknowledges the language of KRS 278.400, that language does not limit the Commission's authority to make corrections to its initial findings and conclusions when appropriate.") This is such a case. Given that neither NuVox nor the Commission know which 15 circuits BellSouth apparently demonstrated a concern with respect to, NuVox requested that the Commission determine whether it had set the bar too low with respect to the concern requirement. With respect to the independent auditor requirement, NuVox submitted that the Commission had misinterpreted the Agreement in finding that NuVox can only complain of an unqualified auditor after suffering an audit by such an entity. Neither Section 10.5.4 nor the Agreement's dispute resolution provisions contain such a limitation. NuVox requested that the Commission correct this error.

BellSouth then argues that NuVox is not entitled to relief because the "Commission correctly decided matters raised in docket 2004-00295." In support of this assertion, BellSouth offers an implausible account of what the Commission actually ordered (see Opposition at 4 "A proper, harmonizing reading..."). NuVox sees no evidence in the Order giving any credit to BellSouth's position that the Agreement did not contain a "demonstration of concern" requirement (or an independent auditor requirement, for that matter). Moreover, BellSouth failed to explain how its use of NuVox customer and proprietary information was lawful or why its undocumented post-notice allegations of a concerns created after-the-fact were sufficient to demonstrate compliance with the Agreement.

BellSouth also argues that NuVox's challenge to the auditor's independence is premature. As explained below, in note 3, NuVox does not at this time challenge the independence of the auditor newly selected by BellSouth (Grant Thornton). NuVox, does, however, continue to seek reconsideration of the Commission's decision regarding when NuVox may dispute satisfaction of the independent auditor requirement. BellSouth asserts that "[t]he Agreement sets the timing for NuVox to make auditor-independence and related challenges." BellSouth Opposition at 5. NuVox's Agreement contains no such provision or

Since that time, on May 16, 2005, BellSouth sent a letter to NuVox in which BellSouth stated that it BellSouth *already had commenced* an audit of the fifteen converted circuits, and that BellSouth's chosen (and then unidentified) auditor would contact NuVox shortly.² Given that NuVox does not know the identity of the circuits being audited and did not at that time know the identity of the auditor hired³ – a different auditor than the consulting shop whose independence was attested to by Mr. Hendrix (*see* Order at 5) – BellSouth's announcement raises a legitimate and serious question: if the audit has already commenced, what has transpired? NuVox has requested that BellSouth provide an explanation.⁴ NuVox's request is intended to ensure the integrity of any audit that may result from this docket, without waiving any legal rights NuVox has before this Commission or elsewhere. As BellSouth would expect NuVox's cooperation in the conduct of any audit that may result from this docket, NuVox, in turn, fairly expects BellSouth's cooperation.

limitation. Section 10.5.4 of Attachment 2 contains no such explicit direction. Moreover, it contains no exception to the dispute resolution provisions contained in Section 15 of the General Terms and Conditions which definitely do not require NuVox to suffer an audit by an unqualified auditor and hold all complaints about it until BellSouth decides whether or not to file a post-audit complaint. While NuVox certainly could chose to raise such issues at that time, there is nothing in the Agreement that says it must hold all complaints until that time.

Finally, BellSouth argues that NuVox's Petition is moot, because the audit has commenced. This cannot be right either. If it is, then surely NuVox has been denied a right to due process before the Commission.

² Letter to Bo Russell, NuVox Communications, Inc. and John Heitmann, Kelley Drye & Warren LLP, from Jerry D. Hendrix, BellSouth (May 16, 2005). A copy of this letter is attached to BellSouth's Opposition to NuVox's request for rehearing.

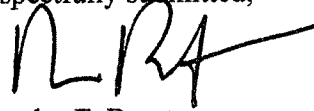
³ Subsequent to receipt of the letter, BellSouth's chosen auditor, Grant Thornton, notified NuVox that it had been retained to conduct the audit. Correspondence between Grant Thornton and NuVox is attached hereto as Exhibit 1. As the Commission will see, NuVox has indicated that it does not expect that Grant Thornton's independence will be an issue in the context of an EEL audit. However, NuVox and the Commission have the right to know what if anything has transpired in the audit that according to BellSouth already has commenced. Further, as indicated in NuVox's response to Grant Thornton, NuVox believes that it has a right to seek dispute resolution regarding the independence of an auditor at any time an issue in that regard arises. Thus, *NuVox's petition for rehearing on the independent auditor issue is not resolved by BellSouth's selection of alternative auditor.*

⁴ A copy of the letter making that request is attached hereto as Exhibit 2.

Elizabeth O'Donnell
May 24, 2005
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As is evident from this correspondence and those attached hereto, additional direction from the Commission is needed. NuVox respectfully requests that the Commission expeditiously grant NuVox's Petition for Rehearing, or effectuate the stay requested therein so that it can take any additional time it needs to properly and fairly consider NuVox's rehearing petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DLRA', with a long horizontal line extending to the right.

Douglas F. Brent

cc: Service List

EXHIBIT 1

Heitmann, John

From: Heitmann, John
Sent: Tuesday, May 24, 2005 7:23 AM
To: 'Tannenbaum, Gaye'
Cc: 'brussell@nuvox.com'; 'MCampbell@nuvox.com'; Kashatus, Jennifer M.; 'Padgett, Shelley'; 'parkey.jordan@bellsouth.com'
Subject: RE: NuVox 15 Kentucky EELs

Ms. Tannenbaum,

A typo has been corrected in the first paragraph of the e-mail sent to you yesterday. The corrected e-mail is included below.

Thanks.

John J. Heitmann

Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Office (202) 955-9888
Fax (202) 955-9792
Mobile (703) 887-9920
jheitmann@kelleydrye.com

-----Original Message-----

From: Heitmann, John
Sent: Monday, May 23, 2005 6:39 PM
To: 'Tannenbaum, Gaye'
Cc: brussell@nuvox.com; MCampbell@nuvox.com; Kashatus, Jennifer M.; Padgett, Shelley; parkey.jordan@bellsouth.com
Subject: RE: NuVox 15 Kentucky EELs

Ms. Tannenbaum,

Thank you for your inquiry (both times). As you may know, NuVox has requested that the Kentucky Public Service Commission reconsider its decision and the Company intends to reserve all of its rights in that respect and this response to your inquiry should in no way be considered a waiver of any kind. Until the legal status of all this is resolved and until further notice, you may direct audit related correspondence to those copied above (Mr. Fury, who had been copied on your e-mail, is not currently working on this matter). It is our hope that the Kentucky PSC will rule on our request and resolve open legal issues promptly.

As you may know, the Company does not even know the identity of the circuits for which the KPSC has ordered an audit. Curiously, this is a BellSouth secret. Clarification and reconsideration has been requested. The Company also has asked for reconsideration with respect to the independent auditor issue. In particular, it is the Company's position that it is entitled to dispute the independence of an auditor whenever it is that such a dispute arises. While the Company does not anticipate that disputes would arise with Grant Thorton in this context, the Company has been surprised before. It is evident to us that BellSouth has interjected itself in this process far too deeply and has had undue influence on and has placed undue pressure on others that it has engaged for other EEL audits. You should know that the Company is not prepared to have BellSouth involved in the audit process and will seek clarification with respect to BellSouth's involvement to date. NuVox expects any auditor accepting this type of engagement to do so without compromising its objectivity in any way.

5/24/2005

As information, you should know that NuVox requires appropriate non-disclosure agreements to be in place prior to the exchange of information. Compliance with NDAs will be expected and enforced (there is litigation pending against KPMG related to this issue).

With this said, we request that GT not force any new issues at this juncture and that it refrain from making any document requests until the KPSC has had the opportunity to address in a written order the pending legal issues it has before it. Until the KPSC addresses pending issues, NuVox requests that you and your colleagues adopt a neutral posture. As you can no doubt appreciate, if an audit is to proceed further, the Company wants very much for there to be no issues regarding the integrity and objectivity of the auditor.

Thank you.

Best regards,

John J. Heitmann

Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Office (202) 955-9888
Fax (202) 955-9792
Mobile (703) 887-9920
jheitmann@kelleydrye.com

-----Original Message-----

From: Tannenbaum, Gaye [mailto:Gaye.Tannenbaum@GT.com]

Sent: Monday, May 23, 2005 3:21 PM

To: brussell@nuvox.com; Heitmann, John; MCampbell@nuvox.com; JFury@NuVox.com

Cc: Padgett, Shelley

Subject: FW: NuVox 15 Kentucky EELs

Importance: High

Mr. Russell, Mr. Heitmann, Ms. Campbell, Mr. Fury:

We have received no response to date from this email, sent last Wednesday.

Please respond with the name and contact information for the person(s) to whom we may direct our Document Requests.

Thank you,

Gaye Tannenbaum

Manager, Economic Advisory Services

Grant Thornton LLP

Kansas City, MO

T 816.412.2563

F 816.412.2404

E gaye.tannenbaum@gt.com

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From: Tannenbaum, Gaye
Sent: Wednesday, May 18, 2005 2:28 PM
To: 'brussell@nuvox.com'
Cc: Padgett, Shelley
Subject: NuVox 15 Kentucky EELs

<<Bo Russell Nuvox Letter 05 18 2005.pdf>>

Gaye Tannenbaum
Manager, Economic Advisory Services
Grant Thornton LLP
Kansas City, MO
T 816.412.2563
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May 18, 2005

Mr. Bo Russell
NuVox Communications, Inc.
2 North Main Street
Greenville, SC 29601

*Re: BellSouth Telecommunications, Inc. v. NuVox Communications, Inc.
[Case No. 2004-00295 before the Public Service Commission of the Commonwealth of
Kentucky]*

Dear Mr. Russell:

BellSouth Telecommunications, Inc. has selected Grant Thornton LLP to perform an analysis of 15 Enhanced Extended Links ("EELs") circuits, pursuant to an order of the Public Service Commission of the Commonwealth of Kentucky.

You are listed as a Notices contact for NuVox Communications, Inc. in the February 2005 Amendment to the Agreement between NuVox Communications, Inc. and BellSouth Telecommunications, Inc. dated June 30, 2000. Accordingly, we are addressing this initial communication to you.

We will be preparing a document request list and anticipate being onsite in Greenville, South Carolina, if necessary. Please provide contact information (name, title, mailing address, telephone number and email address) for the person(s) to whom we should direct our requests and further communications.

Thank you.

Very truly yours,



Gaye Tannenbaum, CPA, CIRA
Manager, Economic Advisory Services

cc: Ms. Shelley Padgett, Assistant Director, BellSouth Telecommunications, Inc.

EXHIBIT 2

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

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AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

May 24, 2005

VIA EMAIL AND U.S. MAIL

Mr. Jerry Hendrix
Ms. Parkey Jordan
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street
Atlanta, Georgia 30375

Re: Audit of 15 NuVox Converted EELs in Kentucky

Dear Jerry and Parkey:

NuVox is in receipt of your letter dated May 16, 2005, in which you state that “the audit of 15 EEL circuits in Kentucky has commenced” and that “[a]s part of the audit, the auditor will contact you shortly.” To date, despite NuVox’s repeated requests, BellSouth has not identified the circuits that it believes are subject to the audit, nor has the auditor commenced the audit of NuVox’s records. Accordingly, NuVox requests that BellSouth explain precisely what has transpired in the part of the audit that did not involve NuVox or NuVox’s records. We

KELLEY DRYE & WARREN LLP

Mr. Jerry Hendrix
May 24, 2005
Page Two

request that your response include records of all correspondence between BellSouth and its selected auditor, all documents exchanged as well as any engagement or other agreement related to the above-captioned audit.¹

Best regards,



John J. Heitmann

cc: Hamilton E. Russell
Jennifer Kashatus

¹ As you may know, NuVox has requested that the Kentucky Public Service Commission reconsider its decision and the Company intends to reserve all of its rights in that respect and this response to your letter should in no way be considered a waiver of any kind.