

**Dinsmore & Shohl** LLP  
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June 23, 2005

RECEIVED

JUN 23 2005

PUBLIC SERVICE  
COMMISSION

**via Hand Delivery**  
Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
P. O. Box 615  
Frankfort, KY 40601

**Re: *BellSouth Telecommunications, Inc v. Nuvox Communications, Inc.***  
***Case No. 2005-00217***

Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case is the original and ten copies of NuVox Communications, Inc.'s (Nuvox") Motion to Dismiss Complaint with Prejudice.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



Holly C. Wallace

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**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**  
JUN 23 2005  
PUBLIC SERVICE  
COMMISSION

In the Matter of )  
 )  
Enforcement of Commission's Order in Case )  
No. 2004-00295, Dated April 15, 2005 ) Case No. 2005-00217  
\_\_\_\_\_ )

**MOTION TO DISMISS COMPLAINT WITH PREJUDICE**

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel, respectfully submits this motion to dismiss the complaint of BellSouth Telecommunications, Inc. ("BellSouth") filed in the above-captioned proceeding. In its complaint, BellSouth seeks an order from the Kentucky Public Service Commission (the "Commission") that NuVox has violated the Commission's Order in Case No. 2004-00295 and requiring NuVox to be compelled to comply with that order. *See BellSouth Telecommunications, Inc. v. NuVox Communications, Inc.*, Case No. 2004-00295, Order (Apr. 15, 2005) ("Order"). BellSouth's complaint is based wholly on the erroneous premise that NuVox is obstructing BellSouth's chosen auditor (Grant Thornton) from conducting the audit authorized by the Commission in Case No. 2004-00295. BellSouth, however, has failed to establish any obstruction on NuVox's part. Accordingly, the Commission should grant NuVox's motion to dismiss BellSouth's complaint with prejudice.

**ARGUMENT AND ANALYSIS**

Pursuant to KRS 278.310, "[a]ll hearings and investigations before the Commission or any commissioner shall be governed by rules adopted by the Commission, and in the conduct thereof, neither the Commission nor the commissioner shall be bound by the technical rules of legal evidence." Although proceedings before the Commission are governed by rules adopted by the Commission, the standard utilized by Kentucky courts in determining whether to grant a

motion to dismiss for failure to state a claim is persuasive. The Commission has the same interest in dismissing meritless claims as do the courts when the circumstances so warrant. The circumstances so warrant in this case.

Civil Rule 12.02(f) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. When the pleading party can prove no set of facts to support its claims, its claims must be dismissed under CR 12.02(f). *Pari-Mutuel Clerk's Union of Ky. Local 541, SEIU, ALFCIO v. Ky. Jockey Club*, Ky., 551 S.W.2d 801, 803 (1977). In the present case, BellSouth's sole cause of action is that "NuVox is in violation of the Commission's April 15, 2005 Order." (Complaint ¶36.) BellSouth alleges that "NuVox is involved in a campaign to threaten and intimidate the auditor, Grant Thornton, and to erect undue and unfair obstacles to the orderly process of the audit ordered by this Commission." (Complaint ¶38.) NuVox takes exception to these baseless allegations. NuVox has engaged in no such action; and BellSouth can prove no set of facts to support its claim. Accordingly, the Commission should dismiss BellSouth's complaint.

**I. NuVox Has Fully Complied With All of Grant Thornton's Requests.**

Notably absent from BellSouth's complaint is any allegation that NuVox failed to provide Grant Thornton with requested documentation. Nonetheless, BellSouth alleges that NuVox is obstructing the audit. In support of its allegations, BellSouth relies on the following documents: 1) Grant Thornton's letter to NuVox dated May 18, 2005; 2) Grant Thornton's e-mail to NuVox dated May 23, 2005; 3) NuVox's reply to Grant Thornton's e-mail dated May 23, 2005; and 4) Grant Thornton's letter to NuVox dated June 1, 2005. A review of all three of Grant Thornton's communications to NuVox reveals that Grant Thornton has requested nothing more than NuVox's contact information. (*See* Attachments 2, 3, and 5 to the Complaint.) NuVox provided

its contact information on May 23, 2005 in an email from John Heitmann, counsel to NuVox, to Gaye Tannenbaum, Manager of Economic Advisory Services at Grant Thornton. Specifically, Mr. Heitmann informed Ms. Tannenbaum that she "may direct audit related correspondence to those copied above." (E-mail from John Heitmann to Gaye Tannenbaum, May 23, 2005 (the "May 23rd email"), attached as Exhibit 1.) For reasons unbeknownst to NuVox, Grant Thornton reiterated its request for contact information in a letter dated June 1, 2005 although NuVox had already provided it a week earlier. This is the only information that Grant Thornton has requested. Given NuVox has provided Grant Thornton with all the information it has requested to date, BellSouth's claim that NuVox has failed to comply with the Commission's *Order* is baseless. BellSouth cannot be heard to complain of NuVox failing to provide information that was never requested.

## **II. The May 23rd Email Does Not Constitute Obstruction of the Audit.**

Given BellSouth cannot claim that NuVox failed to provide requested information, BellSouth alleges that the May 23rd email constitutes obstruction. In support of its allegation, BellSouth points to NuVox's reservation of rights. The implication that NuVox's reservation of rights constitutes obstruction is so absurd that it barely merits a response; nonetheless, NuVox will respond to this ridiculous allegation.

In its May 23rd email, NuVox explained to Grant Thornton that, "[a]s 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." (Exhibit 1, May 23rd e-mail). At the time, NuVox's petition for reconsideration was pending before the Commission. NuVox simply informed Grant Thornton of the petition, and that its response should not be deemed a waiver of

its rights. NuVox's reservation of rights in no way supports BellSouth's claim that NuVox violated the *Order*.

Similarly, BellSouth alleges that NuVox's statement regarding independent auditors supports its claim. It does no such thing. NuVox's statement, when read within the context of the May 23rd email, simply explains the bases for its petition for reconsideration, and its position with regard to the issue of independent auditors.

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 Thornton 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.

(Exhibit 1, May 23rd e-mail (emphasis added).) The mere explanation of its position, and the basis for that position, with regard to an issue still pending before the Commission should in no way be viewed as threatening or intimidating by a professional agency such as Grant Thornton. Moreover, there is no evidence of record that Grant Thornton took it as such. Accordingly, NuVox's statement regarding independent auditors does not support BellSouth's claim.

In yet another vain effort to support its meritless claim, BellSouth alleges that requesting Grant Thornton to execute a non-disclosure agreement constitutes obstruction.<sup>1</sup> In support of its allegation, BellSouth argues that NuVox cannot protect its confidential information or its customers' confidential information because the *Order* does not explicitly state that it can. BellSouth's argument is ludicrous. The execution of a non-disclosure agreement is a process issue. The *Order* does not address any issues with regard to *the process* of the audit, and for

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<sup>1</sup> The ridiculous nature of this claim is underscored by the fact that BellSouth attached a non-disclosure agreement to its March 15, 2002 letter requesting an audit.

good reason. It is unreasonable to assume that the Commission could address in advance all the possible issues that might arise during an audit. Moreover, under BellSouth's theory, Grant Thornton would have no right to request documents from NuVox because the *Order* does not specifically state that it may do so.

In addition, the *Order* does not require NuVox to disclose its customers' confidential information without providing for the protection of that information. NuVox takes its responsibility to its customers seriously, and it is not willing to casually disclose their confidential information without taking precautionary measures. BellSouth should applaud NuVox's concern for its customers, rather than condemn it.

Finally, BellSouth mischaracterizes NuVox's request in the May 23rd email that Grant Thornton "refrain from making a document request until the KPSC has had the opportunity to address in a written order the pending legal issues it has before it." (Complaint ¶29.) As stated above, NuVox's petition for rehearing was pending before the Commission as of May 23, 2005. In addition, pursuant to KRS 278.400, the petition would either be granted or denied no later than May 30, 2005.<sup>2</sup> Therefore, NuVox merely requested that Grant Thornton refrain from requesting documents for seven days until the petition for rehearing was resolved. Such a request in no way constitutes obstruction. Moreover, the seven days expired nearly a month ago. To date, however, Grant Thornton has yet to issue a single document request.

### **CONCLUSION**

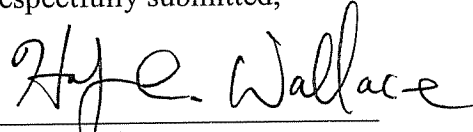
In conclusion, NuVox has complied with all the requests received to date from Grant Thornton. BellSouth has not, and cannot, refer to any request by Grant Thornton with which

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<sup>2</sup> Pursuant to KRS 278.400, a petition for rehearing is deemed denied if not acted upon by the Commission within twenty days. The petition was filed May 9, 2005, therefore, the statutory twenty-day period expired May 30, 2005.

NuVox has failed to comply. In addition, nothing within the May 23rd e-mail supports BellSouth's claim that NuVox violated the Commission's *Order*. Accordingly, BellSouth has failed to state a claim upon which relief can be granted, and the Commission should dismiss its complaint with prejudice.

Respectfully submitted,



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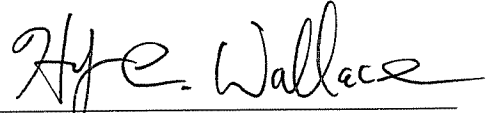
John J. Heitmann  
Jennifer M. Kashatus  
Stephanie A. Joyce  
KELLEY DRYE & WARREN LLP  
1200 19th, N.W., Suite 500  
Washington, D.C. 20036  
Tel. (202) 955-9600  
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*Counsel for NuVox Communications, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served on this 23rd day of June, 2005, via electronic mail and first-class United States mail, postage pre-paid, on the following:

Dorothy J. Chambers  
BellSouth Telecommunications, Inc.  
601 W. Chestnut Street, Room 410  
PO Box 32410  
Louisville, Kentucky 40232  
dorothy.chambers@bellsouth.com



\_\_\_\_\_  
Counsel to NuVox Communications, Inc.

101288v1





**Heitmann, John**

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**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 Thornton 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**

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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  
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E gaye.tannenbaum@gt.com

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5/24/2005

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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***

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