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May 17, 2002

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**VIA HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

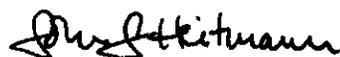
**Re: Petition for Declaratory Rulemaking of NuVox, Inc.**

Dear Ms. Dortch:

Please find attached, an original and four copies of the Petition for Declaratory Ruling of NuVox, Inc. NuVox seeks a declaratory ruling with respect to certain issues that stem from the Commission's June 2, 2000 *Supplemental Order Clarification* in CC Docket 96-98, 15 FCC Rcd. 9587 (2000). An extra copy of this Petition has been provided for stamp and return service.

Additional copies of this Petition have been delivered, via courier, to Dorothy Attwood, Michelle Carey and Jodie Donovan-May of the Commission's Wireline Competition Bureau.

Respectfully submitted,



John J. Heitmann  
Counsel for NuVox, Inc.

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Before the  
Federal Communications Commission  
Washington, DC 20554

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MAY 17 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Implementation of the Local Competition )  
Provisions of the ) CC Docket No. 96-98  
Telecommunications Act of 1996 )

**PETITION FOR DECLARATORY RULING OF  
NUVOX, INC.**

NuVox, Inc. (“NuVox”), by its attorneys, hereby petitions the Federal Communications Commission (“Commission”) for a declaratory ruling pursuant to Section 1.2 of the Commission’s Rules<sup>1</sup> regarding issues stemming from the Commission’s *Supplemental Order Clarification*, in the above-referenced proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

In its *Supplemental Order Clarification*, the Commission took several important steps to clarify the incumbent local exchange carriers’ (“ILECs”) obligation to convert special access circuits to combinations of unbundled network elements (“UNEs”) for competitive carriers (“CLECs”) under Section 251 of the Telecommunications Act (“the Act”). Specifically, in clarifying an ILEC’s obligation to convert special access circuits to combinations of UNE loop and transport elements (commonly referred to as enhanced extended links or “EELs”) for a requesting CLEC, the Commission determined that an ILEC “must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service” over UNE combinations.<sup>3</sup> However, the Commission also found that it was “reasonable to allow [an ILEC] to subsequently

<sup>1</sup> 47 C.F.R. § 1.2

<sup>2</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000) (“*Supplemental Order Clarification*”).

<sup>3</sup> *Id.* ¶¶ 1, 29.

conduct *limited* audits by an independent third party to verify the [requesting] carrier’s compliance with the significant local usage requirements.”<sup>4</sup> In its *Supplemental Order Clarification*, the Commission made clear that (1) audits will not be routine practice and may only be conducted under limited circumstances and only when the ILEC has a concern that a requesting carrier is not meeting the qualifying criteria;<sup>5</sup> and (2) that such an audit must be performed by an independent third party hired and paid for by the ILEC.<sup>6</sup>

Unfortunately, the *Supplemental Order Clarification* may not have been explicit enough regarding the procedures that must be followed by an ILEC requesting an audit, as NuVox currently is facing down one ILEC’s attempts to harass with an audit request that simply does not comply with the letter or spirit of that order. Therefore, NuVox requests that the Commission declare:

- Audits may be undertaken only after *notification* by the ILEC of a specific, bona fide and legitimately related concern that a CLEC is not meeting any of the three “safe harbors” specified in the *Supplemental Order Clarification*;
- Upon meeting the standard set forth above, the ILEC must provide the requesting carrier proof that it has hired and paid (or will pay) for an *independent third party* to conduct the audit;
- A consulting shop comprised of principals with ILEC backgrounds that serve predominantly ILEC clients and who sell their services with claims that their “successful” audits have won millions of dollars for their ILEC clients does not satisfy the independent auditor requirement;
- In the event that a particular circuit is deemed noncompliant with any of the three safe harbors, (1) an ILEC may not convert the circuit back to special access prior to state commission review of the determination – if required by the parties’ interconnection agreement or sought by one of the parties – and (2) an ILEC may not charge special access nonrecurring charges for the conversion, but may only charge the same cost-based billing-change/conversion charge that was imposed to convert the circuit from special access to UNEs in the first place; and

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<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> *Id.* ¶ 31, n.86.

<sup>6</sup> *Supplemental Order Clarification* ¶ 31.

- With respect to shifting the cost of the audit from an ILEC to a CLEC, interconnection agreement terms govern, or, in the absence of such terms, an ILEC may seek reimbursement from a CLEC for only the share of the audit costs proportionally attributable to circuits found to be non-compliant.

By taking these steps, the Commission will promote local competition by ensuring that CLECs have access to EELs from ILECs, as contemplated by its orders.<sup>7</sup>

## II. AUDITS SHOULD BE PERMITTED ONLY AFTER NOTIFICATION BY THE ILEC OF A SPECIFIC, BONA FIDE AND LEGITIMATELY RELATED CONCERN REGARDING COMPLIANCE WITH THE LOCAL USAGE CRITERIA

As explained in paragraph 29 of the *Supplemental Order Clarification*, the Commission allows an ILEC to conduct *limited* audits only because the Commission extended the *temporary* constraint regarding the use of circuits converted from special access to EELs.<sup>8</sup> In allowing an ILEC to undertake such audits, the Commission stated that:

- the ILEC cannot require a CLEC to submit to an audit prior to provisioning the requested EELs;<sup>9</sup>
- the ILEC cannot undertake audits as a routine practice;<sup>10</sup>
- the ILEC must have a concern that a requesting CLEC has not met the qualifying criteria;<sup>11</sup>
- the ILEC must hire and pay for an independent auditor to perform the audit;<sup>12</sup>

<sup>7</sup> See e.g., *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999); and *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd. 1760 (1999) (“*Supplemental Order*”).

<sup>8</sup> The Commission originally did not allow the ILECs to conduct audits because the Commission’s temporary constraint on the use of UNEs to provide special access services was “so limited in duration.” *Supplemental Order Clarification* ¶ 29, citing the *Supplemental Order* at n.9.

<sup>9</sup> *Supplemental Order Clarification* ¶ 31.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* n.86.

<sup>12</sup> *Id.* ¶ 31.

- the ILEC must provide the affected CLEC 30 days written notice that an audit may be conducted and may not subject the same CLEC to more than one audit in any calendar year unless an audit finds non-compliance;<sup>13</sup>
- the ILEC cannot use an audit to “impose an undue financial burden on smaller requesting carriers that may not keep extensive records.”<sup>14</sup>

Furthermore, the Commission noted that the parties may be subject to additional auditing guidelines contained in their interconnection agreements.<sup>15</sup>

The numerous limitations placed on the auditing process suggest that the Commission was concerned that ILECs might otherwise effectively block access to EELs by imposing burdensome or skewed audit requests. To be sure, the Commission, in note 86 of the *Supplemental Order Clarification*, stated that:

The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that **audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.** *February 28, 2000 Joint Letter* at 3. **We agree that this should be the only time that an incumbent LEC should request an audit.**<sup>16</sup>

Indeed, it is this language in particular with respect to which NuVox seeks a declaratory ruling. Despite the clarity of this language, BellSouth has made a regional (multi-state) audit request to NuVox<sup>17</sup> without notifying NuVox of the concern that justifies its request. Although BellSouth initially agreed with NuVox that the language of

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<sup>13</sup> *Id.* ¶ 32.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* n.86 (emphasis added).

<sup>17</sup> BellSouth’s request was served on NuVox Communications, Inc., NuVox’s southeast region operation entity.

footnote 86 required it to disclose to NuVox its “concern” that prompted its request for the audit, BellSouth then stated that it would disclose the reason to NuVox, only if NuVox would keep it a secret. NuVox disagreed. Then, BellSouth provided NuVox with its “reason” (*i.e.*, “concern”) for the audit. That reason was a vague reference to two traffic studies performed on statewide traffic in Tennessee and Florida. NuVox rejected the concern offered, as it had nothing to do with the converted circuits at issue in those states, or for that matter, in any other.

Moreover, it is NuVox’s understanding that BellSouth has initiated or intends to initiate EEL audits with 40 CLECs – many encompassing multiple states. NuVox also has learned that BellSouth has indicated that it intends to audit every CLEC that has converted special access circuits to EELs. Thus, CLEC EEL audits certainly appear to have become “routine” at least with respect to one major ILEC, BellSouth.

This behavior obviously is contrary to, and in direct conflict with, the language in the *Supplemental Order Clarification*, and footnote 86, in particular. Yet, at least one major ILEC believes that it is not. Accordingly, NuVox requests that the Commission declare that, at the time an ILEC requests an audit of a CLEC, the ILEC must notify the CLEC a specific, bona fide and legitimately related *concern* regarding the requesting CLEC’s conformity with local usage criteria.<sup>18</sup> This requirement will ensure, as contemplated by the Commission’s *Supplemental Order Clarification*, that an ILEC is not able to use the *limited* audit authority granted by the Commission to harass a requesting CLEC or otherwise drain its resources.

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<sup>18</sup> The specific concern should be particular to the requesting CLEC and should be supported by evidence that would put the CLEC’s compliance in question. A general statement of concern regarding compliance with local usage criteria should not be sufficient.

**III. AUDITS SHOULD BE ALLOWED ONLY AFTER THE ILEC PROVIDES THE CLEC WITH PROOF THAT IT HAS RETAINED AN INDEPENDENT AUDITOR TO PERFORM THE REQUESTED AUDIT**

The language in the *Supplemental Order Clarification* is most clear in requiring an ILEC to “hire and pay for an *independent auditor* to perform the audit.”<sup>19</sup> However, NuVox already has encountered difficulty with one ILEC, again BellSouth, in efficiently obtaining information necessary to ascertain the independence of the proposed auditor. Although NuVox eventually did obtain information necessary to assess the independence of the proposed auditor, BellSouth has wrongly attributed the delay involved in getting that information to NuVox.

Accordingly, NuVox requests that the Commission ensure that an ILEC is abiding by the *Supplemental Order Clarification* by requiring it to provide documentation evidencing the independence of the chosen auditor *with its notification*. Such documentation must include copies of any contract, communications and descriptive material exchanged between the auditor and the ILEC.

**IV. A CONSULTING SHOP COMPRISED OF PRINCIPALS WITH ILEC BACKGROUNDS WHO SERVE PREDOMINANTLY ILEC CLIENTS AND WHO SELL SERVICES BASED ON CLAIMS THAT THEIR AUDITS HAVE WON MILLIONS OF DOLLARS FOR ILEC CLIENTS DOES NOT SATISFY THE INDEPENDENT AUDITOR REQUIREMENT**

The *Supplemental Order Clarification* does not specify what qualifies as an independent auditor. However, what does not qualify as an independent auditor should be fairly obvious. Nevertheless, NuVox currently is faced with an ILEC EEL audit request wherein the ILEC proposes to use what appears to be a fine group of ILEC consultants as auditors. Specifically, for its audits of NuVox (and other CLECs), BellSouth has proposed to use a consulting enterprise whose principals each have had prior careers with ILECs and whose client base appears to be comprised almost entirely

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<sup>19</sup> *Supplemental Order Clarification* ¶ 31 (emphasis added).

of ILECs. Moreover, in its proposal to BellSouth, this entity touts its success in using audits to recover millions of dollars for its ILEC clients. Surely, these circumstances suggest a bias that would be difficult to overcome, notwithstanding the best of intentions.

Accordingly, NuVox seeks a declaratory ruling that a proposed auditor may not be deemed independent in cases where its principals have spent a significant amount of their careers in the employ of an ILEC, or where a significant amount of its client base is comprised of ILECs.

## **V. ADDITIONAL DECLARATIONS ARE NECESSARY**

NuVox's brief, but sufficiently unpleasant, experience with EEL audit requests, suggests that additional declaratory rulings would significantly reduce disputes engendered by the limited audit rights afforded to ILECs under the *Supplemental Order Clarification*. Most critically, in the event that a particular circuit is deemed non-compliant with any of the three safe harbors, NuVox Requests that the Commission declare that an ILEC (1) may not convert the circuit back to special access prior to state commission review of the determination – if required by the parties' interconnection agreement or sought by one of the parties, and (2) may not charge special access nonrecurring charges for the conversion, but may only charge the same billing-change/conversion charge that was imposed to convert the circuit from special access to UNEs in the first place.

These declarations are necessary to (1) forestall unilateral ILEC action and abrogation of interconnection agreement protections, and (2) forestall ILEC attempts to impose special access nonrecurring charges for what should simply be a billing change. NuVox's ongoing EEL audit experience with BellSouth demonstrates that these actions

are necessary. For example, despite a provision in the parties' interconnection agreement that requires the party seeking to act upon an audit finding of non-compliance to follow the dispute resolution provisions contained in the interconnection agreement and file a complaint with the relevant state commission, BellSouth has indicated that it would seek to convert circuits deemed non-compliant back to special access without the state commission review to which the parties previously had agreed. Moreover, BellSouth has notified NuVox that it would impose a special access nonrecurring charge on any circuits found to be non-compliant rather than the billing-change charge that applied to the conversions in the first place.

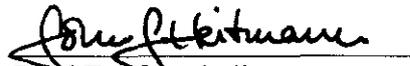
NuVox also requests that the Commission make a declaratory ruling regarding the circumstances under which an ILEC may shift the costs of an audit to a CLEC. In this regard, NuVox requests that the Commission declare that interconnection agreement terms govern, or, in the absence of such terms, that an ILEC may seek reimbursement from a CLEC for only the share of the audit costs proportionally attributable to circuits found to be non-compliant.

## VII. CONCLUSION

Consistent with the foregoing, the Commission should grant this declaratory ruling request in accordance with the discussion contained herein.

Respectfully submitted,

NUVOX, INC.



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*Its Attorneys*

Dated: May 17, 2002

**Certificate of Service**

I, Heather Wilson, hereby certify that I have caused a copy of the foregoing *Petition for Declaratory Ruling of NuVox Communications, Inc.*, to be delivered, this 17<sup>th</sup> day of May 2002, to the following individuals:

Dorothy Attwood, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Michelle Carey, Chief  
Competition Policy Division  
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Marlene H. Dortch  
Secretary  
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