

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**SPRINT CORPORATION'S OPPOSITION TO
PETITION FOR DECLARATORY RULING**

Sprint Corporation, on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, opposes the Petition for a Declaratory Ruling filed May 17, 2002 by NuVox, Inc.

Introduction

Sprint brings a unique perspective to NuVox's petition. Sprint's competitive local exchange carrier/long distance division and its wireless division are "requesting carriers" entitled to secure unbundled network elements ("UNEs") under the Communications Act of 1934, as amended. Sprint's incumbent local division provides UNEs to requesting carriers.

Sprint understands the important role that UNEs are playing, and will continue to play, in the growth of local exchange competition and investment. Sprint also appreciates -- perhaps better than other carriers -- the balance that the Commission drew in the *Supplemental Order Clarification*¹ between the rights of CLECs and ILECs. CLECs are entitled to secure enhanced extended links ("EELs") without offering proof

¹ *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("Order").

that their circuits comply with the order's requirements. ILECs must presume the requested circuits qualify, but are expressly entitled to audit them.

NuVox's petition seeks to upset that balance. It is asking the Commission to create new conditions that would virtually eliminate an ILEC's right to audit.

The Supplemental Order Clarification

The *Supplemental Order Clarification* gives a requesting carrier the right to convert special access circuits to combinations of UNE loop and UNE transport elements -- otherwise known as EELs -- where it is "providing a significant amount of local exchange service" over those circuits.² In all but the rarest cases, the ILEC does not know whether a requesting carrier's traffic meets any of the Commission's safe harbor requirements for EELs.³ Yet the Commission did not require requesting carriers to provide evidence of significant local use as a precondition for access to EELs. Instead, it allowed requesting carriers to order EELs simply by asserting their own compliance with the local use requirements.⁴

² Order at ¶ 29. The merits of a policy requiring significant local use are not directly relevant here, but are under consideration in *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Docket CC No. 01-338.

³ The Commission outlined three situations in which a requesting carrier may claim significant local use: (1) where it is the customer's exclusive provider of local service, (2) where it handles at least a third of the customer's local traffic plus a certain amount of local voice traffic; and (3) where a high percentage of the traffic is local voice traffic. Order at ¶¶ 22(1)-(3). In each case, the carrier may not commingle traffic of long distance customers and local customers on a single dedicated transport line. *Id.* at ¶¶ 22(1)-(3), 28. Those "safe harbor" criteria are not at issue in NuVox's petition.

⁴ To facilitate an audit, requesting carriers are expected to maintain reasonable records to support their assertion that their traffic qualifies them for EELs. Order at ¶ 32.

At the same time, the Commission found it "reasonable" -- indeed, "necessary" -- to authorize an ILEC "to determine a carrier's compliance with the local usage options" by means of a limited, third party audit of those circuit records. Order at ¶ 29. This policy is consistent with standard industry and Commission practice. Sprint appreciates as well as anyone that audits can be an inconvenience. Sprint, for example, faces PIU factor audits as an interexchange carrier. Ultimately, however, limited audits are the price we pay as an industry to allow carriers' compliance with such regulatory rules to be presumed, instead of proven. All carriers and consumers benefit from the convenience and efficiency of this practice.

The Commission anticipated that the potential for audit will help ensure conversions to EELs are properly claimed, and that compliance remains a reality for those circuits. Requesting carriers understand that they must use care in ordering EELs, and have an obligation to maintain reasonable records sufficient to document past and ongoing compliance, even as their network needs and those of their customers change. For a requesting carrier making compliant use of EELs, the prospect of an audit is foreseeable and, if "unpleasant" (Petition at 7), should be of only limited concern.

For those reasons, it is remarkable that NuVox has refused to comply with BellSouth's audit request. Sprint shares NuVox's concern about potential abuse of audits, and of the RBOCs' resistance to UNE requests, including BellSouth's in particular.⁵

⁵ On May 23, 2002, Sprint filed a letter at the Enforcement Bureau seeking accelerated docket treatment of a complaint against BellSouth. Sprint's complaint arises from BellSouth's refusal to act on Sprint's request for stand-alone unbundled loops from an end user's premises to the requesting carrier's collocation cage in the same serving wire center, a UNE to which the local use restrictions simply do not apply. See Letter from Norina Moy to Alexander Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission (dated May 23, 2002).

Judging from the parties' respective papers, however, Sprint sees no obvious abuse by BellSouth in its particular request to NuVox. Regardless, NuVox will have full opportunity to raise its allegations in response to BellSouth's complaint at the Georgia Public Service Commission. BellSouth Opposition at 2. In the meantime, the petition's bare allegations are insufficient grounds for any change in audit rights or procedures.

Evidence of Noncompliance with Local Use Restrictions

NuVox asks the Commission to require the ILEC to provide the requesting carrier evidence of a "legitimate" or "bona fide" concern as a precondition for any audit of EELs compliance. Petition at 2, 3. However, the *Supplemental Order Clarification* sensibly incorporated no requirement that the ILEC explain the concern that prompted its request to audit. Although audits are not to be "routine practice" (Order at ¶ 31), the order does not preclude even random audits of EELs circuits "if the incumbent LEC has a concern that a requesting carrier has not met the criteria for provisioning a significant amount of local exchange service." Order at ¶ 31 n.86, *citing Feb. 28, 2000 Joint Letter* at 3.⁶ Some random audits may be warranted to ensure requesting carriers comply with the order. But as a protection against abusive audit requests, the order limits audits to one per year, absent a prior finding of noncompliance. Order at ¶ 32.

Granting a requesting carrier a right to review the reasons for the audit implies a right to reject those it deems not "legitimate." That policy would be unreasonable and

⁶ Letter from Gordon Evans, Bell Atlantic; Robert Blau, BellSouth; Richard Metzger, Focal Communications; Alan Ciamporcero, GTE Service Corp.; Heather Gold, Intermedia Communications; Priscilla Hill-Ardoin, SBC Communications; Don Shephard, Time Warner Telecom; Melissa Newman, U.S. West; and Russell Merbeth, WinStar Communications to Chairman Kennard and Commissioners, CC Docket No. 96-98 (filed Feb. 28, 2000) ("*Feb. 28, 2000 Joint Letter*").

inconsistent both with the order and with the purpose of the audit provision. The ILEC ordinarily knows nothing about the traffic passing through those circuits, which after all is why post-hoc audits are "reasonable" and "necessary" in the first place. Order at ¶ 29. Moreover, such a change in policy would only multiply disputes, and ironically could actually increase the number of audit requests.

Sprint agrees with NuVox that the order requires such audits to be properly limited in scope. Petition at 2; Order at ¶ 31. For example, an audit to confirm EELs' local use compliance may not properly be extended by the ILEC to examine stand-alone UNE loops or stand-alone UNE transport not subject to the use restrictions. Likewise, Sprint agrees that the audit should not be used to "harass a requesting CLEC" (Petition at 5), disrupt the requesting carrier's service, or to "impose an undue financial burden on smaller carriers that may not keep extensive records" (Order at ¶ 32). But NuVox has not shown such abuse here. The audit has not even begun.⁷

Choice of Independent Auditor

The order gives an ILEC the right to select its own independent auditor. Order at ¶ 31. NuVox asks the Commission to give requesting carriers essentially a "veto" (BellSouth Opposition at 3) over the ILEC's choice of auditor, and it seeks to disqualify any auditor whose principals have ILEC backgrounds. Petition at 6-7.

NuVox's position is completely unreasonable. There is no basis for invalidating an audit simply because audit personnel have experience working in the ILEC industry. Indeed, most CLECs themselves -- and most other North American carriers besides --

⁷ To date, Sprint's incumbent local division has made only one audit request to confirm EELs compliance, which it issued in March 2002. Like NuVox, that CLEC has so far refused to cooperate.

rely heavily on management and personnel drawn from the ILEC industry. Such career background is certainly no indication that an auditor cannot be sufficiently independent to fulfill the role set out in the order. Moreover, requiring any carrier to provide its competitor with "copies of any contract, communications, and descriptive material exchanged" with its retained auditors (Petition at 6) is completely beyond the pale.

For its part, Sprint has full confidence in the independence and professional integrity of BellSouth's chosen auditor, American Consultants Alliance. BellSouth Opposition at Attachment 2. Sprint has retained the same company, and the same individual lead auditor, in connection with PIU audits and other issues.

State Commission Review

NuVox asks that the Commission prohibit an ILEC from reconverting noncompliant EELs to special access if the requesting carrier seeks state commission review of the audit finding. Petition at 7. Sprint opposes this request.⁸

The purpose of an audit is to confirm that a requesting carrier's EEL circuits do in fact meet one or more of the order's safe harbor criteria. If the independent auditor finds they are noncompliant, those circuits should be reconverted to special access and the carrier should be charged appropriately. It is not "unilateral ILEC action and abrogation of interconnection agreement protections" (Petition at 7) to adjust the requesting carriers' charges to reflect the degree of compliance with the local use safe harbors. The requesting carrier always retains the right to contest the determination, and to raise any alleged abuses or violations of the parties' interconnection agreement, at the state

⁸ Sprint takes no position with respect to NuVox's claim that its interconnection agreement with BellSouth gives it the right to state commission review. Petition at 8.

commission. If the state commission subsequently finds the audit and the reconversion were in error, or that the ILEC acted improperly, it has ample authority to order remedial measures.

Cost of the Audit

The *Supplemental Order Clarification* provides that any audit of EELs compliance shall be at the ILEC's expense. Order at ¶ 31. However, to provide a further incentive for compliance with the order's requirements, that cost is shifted to the requesting carrier if the audit finds it is noncompliant. The Commission noted that "[t]here is broad agreement among the LECs and the competitive LECs on auditing procedures," including, "[i]n particular," on the audit cost-shifting provision. *Id.*

NuVox asks the Commission to modify this rule to allow a noncompliant requesting carrier to apportion the cost of the audit among its EELs circuits and reimburse the ILEC only for the portion that are found to be noncompliant. Petition at 8. Sprint believes this is inappropriate and impractical, for several reasons. First, when a requesting carrier orders EELs, it is asserting its compliance for all circuits converted, and should be accountable on that basis. Second, NuVox's approach would likely increase the scope and complexity of audits, by discouraging ILECs from limiting any audit to particular geographic areas or representative wire centers. Third, it would certainly increase disputes over allocation and apportionment of costs. Finally, it could reward requesting carriers that have been careless, or even dishonest, about their compliance with the Commission's local use restrictions.

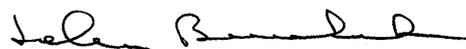
Rulemaking Requirements

Although NuVox suggests its merely asking the Commission to make the *Supplemental Order Clarification* more "explicit" about audit procedures (Petition at 2), clearly its petition seeks substantive changes to the existing rules adopted by the Commission two years ago. Every one of NuVox's five proposed new audit conditions requires findings that were not made in the original proceeding. Taken together, they would upset the balance between ILECs and requesting carriers, by virtually eliminating any compliance audits. To make such fundamental changes in existing rules would require a proper notice and comment rulemaking. 5 U.S.C. § Section 553(b),(c); 47 C.F.R. § 1.413(c) (2001). *See also* 5 U.S.C. § 551(5) (defining "rule making" to include the process by which agencies amend existing rules).

Sprint believes such effort would be wasted. NuVox has failed to show that its drastic changes in audit procedures are warranted. NuVox's dispute with BellSouth will soon be heard in the Georgia Public Service Commission. Its petition here should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon Kirby, do hereby certify that this 3rd day of July 2002 copies of Sprint Corporation's Opposition to Petition for Declaratory Ruling in CC Docket No. 96-98 were delivered as indicated below to the following parties:


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