

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the Local Competition)
Provisions of the)
Telecommunications Act of 1996)
Petition for Declaratory Ruling of)
Nuvox, Inc.)

CC Docket No. 96-98

OPPOSITION OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) opposes NuVox, Inc.'s (NuVox) petition for declaratory ruling regarding ILEC rights to audit CLEC compliance with the local usage requirements for the purchase of loop-transport combinations adopted in the *Supplemental Clarification Order*.¹ NuVox's request would significantly narrow the already limited audit rights of ILECs, and thus permit requesting carriers to circumvent the local usage requirements with impunity. In light of the "significant policy ramifications" raised by permitting requesting carriers "to use loop-transport combinations solely to provide exchange access services to a customer, without providing local exchange service,"² the Commission should reject NuVox's request.

I. BACKGROUND.

In the *Supplemental Order* and *Supplemental Clarification Order*, the Commission prohibited requesting carriers from using loop-transport combinations as a substitute for special access, unless the carriers use such combinations to provide a significant amount of local

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

² *Id.* at paras. 2, 5.

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exchange service.³ The Commission adopted these local usage requirements to preserve the status quo while it explored the “significant policy ramifications” raised by permitting carriers “to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service.”⁴ In particular, the Commission was concerned that allowing carriers to use loop-transport combinations in lieu of special access services would undermine “mature” facilities-based competition for access services,⁵ and universal service objectives.⁶ The Commission further acknowledged that, in requiring ILECs to unbundle loops and transport, it had not applied the impair standard to the exchange access market.⁷ It concluded that it had to gather evidence on the development of the market for exchange access before determining whether requesting carriers are impaired in their ability to provide special access services without access to UNEs.⁸

To ensure that requesting carriers would not circumvent the local usage requirements, and thus upset the status quo, the Commission authorized ILECs to conduct limited audits to verify CLEC compliance with those requirements,⁹ citing with approval a compromise audit

³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, 15 FCC Rcd 1760 (1999) (*Supplemental Order*); *Supplemental Clarification Order*, 15 FCC Rcd 9587.

⁴ *Supplemental Clarification Order*, at paras. 2, 5.

⁵ *Id.* at para. 18 (“We are reluctant to adopt a flashcut approach with potentially severe consequences for the competitive access market without first permitting the development of a fuller record.”).

⁶ *Id.* at para. 7.

⁷ *Id.* at para. 13.

⁸ *Id.* at para. 16.

⁹ *Id.* at para. 29.

proposal offered by ILECs and CLECs.¹⁰ The Commission agreed with the parties that such audits should be undertaken only when an ILEC “has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange traffic.”¹¹ The Commission further agreed that ILECs requesting an audit should retain an independent auditor to perform the audit, and that the CLEC should reimburse the ILEC if the audit uncovers non-compliance with the local usage restrictions.¹² In addition, the Commission agreed that ILECs should provide 30 days written notice to the CLEC, and, at the same time, send a copy of the notice to the Commission to permit it “to monitor implementation of the interim requirements.”¹³ Finally, the Commission agreed that requesting carriers must maintain records to support their local usage certifications, and that the audit rights approved by the Commission would not supercede any audit rights ILECs might have pursuant to their interconnection agreements with CLECs.¹⁴

¹⁰ *Id.* at para. 31, citing *February 28, 2000 Joint Letter*.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* The Commission stated that it would not take action to “approve or disapprove every audit,” but that it would use the notices to monitor the situation.

¹⁴ *Id.* at para. 32.

II. NUVOX'S PETITION WOULD UNDERCUT ILEC AUDIT RIGHTS AND THREATEN TO UPSET THE STATUS QUO.

Based on “one ILEC’s” purported “attempts to harass” with an audit request that NuVox claims does not meet the requirements of the *Supplemental Clarification Order*, NuVox seeks to radically restrict the already limited rights of ILECs to audit CLEC compliance with the local usage requirements for loop-transport combinations. Among other things, NuVox asks the Commission to declare that:

- When requesting an audit, an ILEC must state a specific concern regarding CLEC compliance with the local usage criteria, which must be “supported by evidence that would put the CLEC’s compliance in question.”¹⁵
- An ILEC must provide with its notification “documentation evidencing the independence of the chosen auditor,” including “copies of any contract, communications and descriptive material exchanged between the auditor and the ILEC.”¹⁶
- An auditor may not be deemed independent 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.”¹⁷
- An ILEC may not convert a circuit back to special access before a state commission reviews a determination by an auditor that the circuit does not comply with the local usage criteria if such review is requested by the CLEC.¹⁸
- An ILEC 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.
- “An ILEC may seek reimbursement from a CLEC for only a share of the audit costs proportionately attributable to circuits found to be non-compliant.”¹⁹

¹⁵ NuVox Petition at 5, fn. 18.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 8.

None of NuVox's requests has any basis in the language or purposes of the audit provisions of the *Supplemental Clarification Order*. Rather, they would impose unnecessary and burdensome requirements, effectively preventing ILECs from exercising their rights, and threatening the very policy concerns that led the Commission to authorize audits. NuVox's request would eviscerate an ILEC's audit rights and permit CLECs to circumvent the local usage requirements for loop-transport combinations.

In light of the significant adverse effects of permitting carriers to use loop-transport combinations as a substitute for special access services, the Commission should not fundamentally re-write the audit rights of ILEC's as NuVox proposes. It certainly should not do so in response to bald allegations that "one" ILEC purportedly has failed to comply with the *Supplemental Clarification Order*, particularly when the Commission already is monitoring implementation of the local usage requirements (including the audit requirements), and re-considering its unbundling rules in light of the D.C. Circuit's remand requiring it to more rigorously define markets and examine the adverse effects of unbundling.

In particular, while ILECs may not undertake audits on a routine basis, there is no basis or need for requiring ILECs to state a specific concern, "supported by evidence," regarding CLEC compliance with the local usage criteria, before initiating an audit, as NuVox requests. In the first place, CLECs generally will be the only parties with evidence regarding compliance with the local usage requirements; indeed, if ILECs had evidence, there would be no need for an audit in the first place.²⁰ NuVox's request therefore effectively would prevent ILECs from ever

²⁰ As the Commission found in the *Net2000* decision, an ILEC is not required to convert special access circuits to loop-transport combinations when the circuits do not on their face meet the local usage requirements. *Net2000 Communications, Inc. v. Verizon*, File No. EB-00-018, Memorandum Opinion and Order, FCC 01-381 at para. 18 (rel. Jan. 9, 2002). Thus, an ILEC

auditing CLEC compliance with the local usage restrictions, thus undermining the Commission's efforts to maintain the status quo.

In addition, because an ILEC can conduct only one audit of a carrier in any calendar year and will bear the cost of the audit, unless the audit finds non-compliance,²¹ an ILEC has little, if any, incentive to abuse the limited audit rights established in the *Supplemental Clarification Order*. Rather, an ILEC will request an audit only when it reasonably and legitimately suspects a CLEC has failed to comply with the local usage requirements. In any event, because an ILEC must send a copy of any audit notice to the Commission, the Commission can monitor and prevent any abuse of the limited audit rights authorized in the *Supplemental Clarification Order*. NuVox's request thus is simply unnecessary.

Moreover, requiring ILECs to "state a specific concern, supported by evidence," would enable CLECs to forestall audits by quibbling about whether an ILEC's concern is sufficiently "specific" or adequately "supported by evidence." CLECs undoubtedly would use any such requirement to throw up roadblocks to legitimate efforts to ensure that they comply with the local usage requirements for loop-transport combinations. The Commission therefore should reject NuVox's request.

The Commission also should reject NuVox's requests that an ILEC provide, with its audit request, documentation evidencing the independence of the chosen auditor, including "copies of any contract, communications and descriptive material exchanged between the auditor and the

need not convert a circuit if it has evidence and knows the circuit does not meet the local usage requirements.

²¹ *Supplemental Clarification Order*, para. 31.

ILEC,”²² and that an auditor may not be deemed independent 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.” NuVox’s requests are unprecedented, and completely unwarranted.

In the first place, the Commission never has questioned auditor independence on the grounds suggested by NuVox,²³ nor could it. There is no reason to conclude that an auditor is not independent merely because its principals have been employed by an ILEC or a significant amount of its client base is comprised of ILECs. In fact, generally accepted auditing standards requires auditors to have “adequate knowledge of the subject matter” to undertake an engagement. And any auditor with significant experience in the telecommunications industry likely will have worked for an ILEC at some point — either as an employee or as an outside auditor. But the mere fact that an auditor has worked for an ILEC does not mean its impartiality has been compromised, particularly in light of the rigorous professional standards to which auditors are held. Consequently, that fact alone should not disqualify an auditor, and thus eliminate many, if not most, auditors with telecommunications experience.

In addition to being unwarranted, NuVox’s requests are overly burdensome,²⁴ and would enable CLECs to prevent legitimate ILEC audits, contrary to the *Supplemental Clarification Order*, by raising specious challenges to the independence of the chosen auditor. So long as an

²² NuVox Petition at 6.

²³ Indeed, SBC has retained Ernst & Young to conduct numerous audits of SBC’s compliance with the Commission’s rules (including compliance with the *SBC/Ameritech Merger Conditions* and the requirements of section 272), and the Commission never has questioned their impartiality or integrity.

²⁴ NuVox places no limit on its request for documentation, and thus seems to request contracts, communications and other documents that may have nothing to do with an audit.

ILEC uses an auditor that has been certified by the AICPA, and which applies generally accepted auditing standards (GAAS), there is no basis for requiring ILECs to provide the documentation NuVox requests.²⁵

The Commission also should reject NuVox's proposal that ILECs may not convert a circuit back to special access before a state commission reviews any audit findings that the circuit did not comply with the local usage criteria. Nothing in the *Supplemental Clarification Order* provides for state commission review of auditor's findings, and for good reason. An ILEC may not audit a CLEC request to purchase loop-transport combinations or to convert special access circuits to UNEs prior to provisioning. Permitting state commissions to review the findings of independent auditors thus would invite CLECs to engage in abusive and dilatory litigation to retain as long as possible their ill-gotten gains of violating the local usage restrictions.

In addition, NuVox's proposal is premised on the false notion that independent auditors' findings will be biased or inaccurate. As discussed above, there is no basis to believe that independent auditors will fail to comply with professional standards and render opinions that are biased or incorrect. In any event, the special access circuits that carriers like NuVox seek to convert to UNEs primarily are interstate, and therefore outside the jurisdiction of state commissions. For these reasons as well, NuVox's proposal should be rejected.

NuVox's proposal that an ILEC may seek reimbursement only for the share of audit costs reasonably attributable to circuits found to be non-compliant also has no basis in the

²⁵ At most, an ILEC should be required to provide a copy of the audit engagement letter (which should stipulate the auditor's independence, and compliance with GAAS and the requirements of the *Supplemental Clarification Order*) and the audit program (which sets forth the scope of audit testing) to the subject CLEC upon reasonable request.

Supplemental Clarification Order. Paragraph 31 of that order provides that “the competitive ILEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options.”²⁶ Nowhere does it suggest that an ILEC should recover only a portion of the costs of the audit. Moreover, under GAAS, an auditor only would make a finding of non-compliance if such non-compliance were material, and thus more than *de minimis*. Where an auditor makes such a finding, the ILEC’s concerns plainly were justified, and the CLEC was guilty of either intentional or negligent disregard of the local usage requirements. In either case, the CLEC should reimburse the ILEC for the full costs of the audit.

Finally, the Commission should reject NuVox’s request that, in converting a circuit back to special access, an ILEC may charge only the same “billing-change/conversion” charge that was imposed to convert the circuit from special access to UNEs in the first place. In most, if not all, circumstances, converting a circuit entails more than just a change in billing. Typically, an ILEC must, among other things, re-label the circuits in the central office and move the circuit from one inventory system to another. ILECs should be permitted to recover the full costs associated with converting a circuit back to special access, particularly since, in such a scenario, the circuit never should have been converted to UNEs in the first place.²⁷

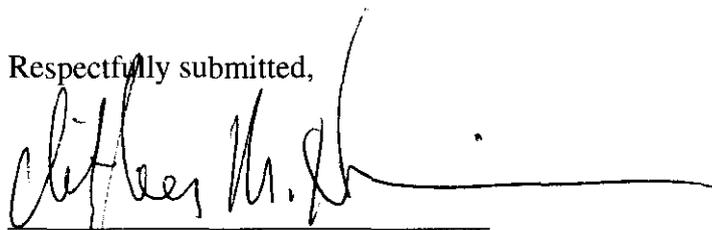
²⁶ *Supplemental Clarification Order* at para. 31.

²⁷ SBC does not anticipate that it would cost any more to convert a circuit back to special access than it did to convert the circuit to UNEs. But, if it does, ILECs should be able to recover the full cost of reconverting the circuit.

III. CONCLUSION.

For the foregoing reasons, the Commission should reject NuVox's petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher M. Heimann", with a long horizontal line extending to the right.

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July 2, 2002

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of this Opposition of SBC Communications, Inc. to Petition for Declaratory Ruling has been served on the party below via first class mail – postage prepaid on this 2nd day of July 2002.

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