

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

In the Matter of )  
 )  
Implementation of the Local Competition )  
Provisions of the ) CC Docket No. 96-98  
Telecommunications Act of 1996 )  
 )  
Petition for Declaratory Ruling of )  
NuVox, Inc. )

**REPLY COMMENTS OF VERIZON<sup>1</sup>**  
**TO NUVOX, INC.'S PETITION FOR DECLARATORY RULING**

NuVox asks the Commission to impose a series of unnecessary and onerous conditions on the audit rights the Commission granted to ILECs in the Supplemental Order Clarification.<sup>2</sup> Ignoring the safeguards the Commission already has in place for such audits, NuVox asks the Commission to adopt *additional* restrictions that would require ILECs, among other things, to identify a “bona fide and legitimately related concern” of non-compliance before initiating an audit and which would restrict the selection of independent auditors. Other parties that filed in response to the NuVox petition go even further by asking the Commission to overturn the Supplemental Order Clarification by eliminating these audits entirely.<sup>3</sup>

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<sup>1</sup> The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

<sup>2</sup> *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> Only two comments are filed in support of NuVox’s Petition: (1) Joint Comments of WorldCom, Inc. and the Competitive Telecommunications Association dated July 3, 2002 (“Joint Comments of WorldCom/CompTel”); and (2) Joint Comments of Cbeyond Communications, LLC, ITC^ DeltaCom Communications, Inc., KMC Telecom Holdings, Inc., New South Communications Corp., and XO Communications (“Joint CLEC Comments”).

Neither NuVox nor the commenters supporting its position justify eliminating what the Commission has repeatedly recognized as an extremely important protection for ILECs: the right to audit CLECs to verify compliance with local usage requirements. As the majority of commenters make clear, the Supplemental Order Clarification struck a careful balance between ILECs' and CLECs' rights and responsibilities.<sup>4</sup> This balance was intended to maintain the status quo pending the Commission's review of the "significant policy ramifications" caused by allowing CLECs to circumvent special access and "use loop-transport combinations solely to provide exchange service to a customer, without providing local exchange service." Supplemental Order Clarification at ¶¶ 2, 5. There is no evidence that ILECs as a whole have abused the audit rights the Commission carefully considered in the Supplemental Order Clarification. In fact, the opposite is true. NuVox's petition is based entirely on its own isolated dispute with BellSouth, a dispute that, regardless of its merits, says nothing about the conduct of ILECs in general and does not support drastic modifications to the Supplemental Order Clarification.

The Commission should reject these unwarranted attempts to modify the Supplemental Order Clarification and upset the status quo.

**I. The Supplemental Order Clarification Strikes The Proper Balance Between CLECs' Rights To Self-Certify Compliance And ILECs' Rights To Audit That Compliance**

In the Supplemental Order, the Commission affirmed that ILECs are not required to provide combinations of unbundled loops and dedicated interoffice transport unless the requesting carrier uses those elements to provide a substantial amount of local-exchange service. *Id.* at ¶ 7. The Commission underscored the policy concerns for this conclusion in the

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<sup>4</sup> See Comments of the United States Telecom Association; Opposition of SBC Communications Inc., Sprint Corporation's Opposition to Petition for Declaratory Ruling.

Clarification: permitting carriers to use loop-transport combinations “in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service” and would undermine existing facilities-based competition. *Id.*

The Commission correctly concluded that before it could determine the proper extent of a carrier’s need for loop/transport combinations, it needed to complete its “impair analysis.” *Id.* at ¶ 16. In the interim, however, the Commission took several important steps to preserve the status quo while it completed that analysis. During this provisional period, the requesting carrier may convert special access circuits to combinations of UNE loop and transport elements (or EELs) if it self-certifies it is providing a specified amount of local exchange service over those circuits. *Id.* at ¶ 29. As a protection against abuse of this right, however, ILECs were granted the right to audit the requesting carrier to “determine a requesting carrier’s compliance with the local usage options.” *Id.*

NuVox and the CLEC commentors seek to upset this carefully crafted status quo by narrowing ILECs’ audit rights out of existence. The Commission should reject these attempts. The ILECs’ audit rights are a critical counterweight to the rights of CLECs to self-certify compliance with the local usage requirements. Unless these rights have some force, there is a significant risk that the “substantial market dislocations” the Commission warned of in the Supplemental Order Clarification will come to pass. Without the threat of an audit, requesting carriers could certify compliance in order to use UNE loop-transport combinations for facilities that do not meet the Commission’s test.<sup>5</sup> CLECs could use the very limitations NuVox seeks to delay or even prevent audits entirely. Even more importantly, unduly restricting or eliminating

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<sup>5</sup> The Commission has recently addressed situations where the requesting carrier attempts to avoid the local usage requirements and convert circuits that do not meet these criteria. *See Net2000 Communications, Inc. v. Verizon*, Memorandum Opinion and Order, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002).

ILEC audit rights would effectively allow conversion without the necessary “impairment” finding by the Commission, a result that would violate Supreme Court precedent as well as the statute and this Commission’s prior orders. As this Commission previously explained, “the terms ‘necessary,’ ‘impair,’ and ‘proprietary’ in section 251(d)(2)” must be interpreted “in a manner that gives substance to those terms.” Thus, “in considering whether to unbundle a particular network element, [the Commission] look[s] first to what is occurring in the marketplace today.”<sup>6</sup>

NuVox and the CLEC commenters also ignore the safeguards the Commission already has in place to ensure this proper balance of rights and responsibilities. The Supplemental Order Clarification limits audits to once a year, requires ILECs to absorb the costs of all audits, unless the audit uncovers non-compliance, and requires ILECs to send a notice of each audit to the Commission.<sup>7</sup> The cost-shifting provision, for one, is a significant protection against potential abuse. There is no incentive for an ILEC to initiate an audit unless there is a valid cause for concern because the ILEC bears the cost of an audit when the CLEC has been proven to be in compliance. And, since the Commission is notified of each audit as it takes place, the Commission may monitor all audit activity to ensure it is used properly. In the absence of *any* evidence that the protections the Commission has adopted have failed, NuVox’s petition should be denied.

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<sup>6</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 at ¶ 21 (1999).

<sup>7</sup> Supplemental Order Clarification at ¶ 31; SBC Opposition at 5-6.

## **II. There Is No Widespread Abuse Of The Audit Process That Would Justify The Sweeping Relief NuVox Seeks**

There is no evidence that ILECs in general are abusing their audit rights. Although NuVox and the CLECs launch charges of wide scale “ILEC EEL audit abuse,” they do not support these charges with facts or affidavits. Joint CLEC Comments at 4. In fact, it is clear from their submissions that almost all of their complaints about the audit process stem from their isolated disputes with BellSouth. Regardless of the merits of their specific claims here, there is no proof that their experiences apply across the board to other ILECs and CLECs.

This paucity of facts in NuVox’s and the CLECs’ submissions is compelling. The CLECs’ argument is a red herring. There is no widespread abuse of the audit process. Verizon, for one, has not initiated a single audit of a CLEC to verify the local usage requirements. NuVox and the CLECs have seized upon BellSouth’s audits as an opportunity to attack the CLECs’ obligations to comply with audits in general. The Commission should reject their attempts to skirt these obligations.

Further, as other commenters make clear, NuVox’s request for declaratory relief is in effect a poorly disguised request for the Commission to amend the Supplemental Order Clarification. As the Commission is well aware, such extensive changes to existing rules cannot be enacted without a notice and comment rulemaking.<sup>8</sup> The Commission has already launched the Triennial Review and it is only in the context of that rulemaking that the Commission shall (or can) consider modifications to the existing rules.

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<sup>8</sup> Sprint Opposition at 8 (“To make such fundamental changes in existing rules would require a proper notice and comment rulemaking.”) (citing 5 U.S.C. § 551(5)); *see also* USTA Comments at 2-3.

### **III. WorldCom/CompTel's Request For A "Moratorium" On Audits Is Unnecessary and Extreme**

Despite the absence of evidence establishing *any* abuse, let alone widespread abuse, of ILECs' audit rights, WorldCom and CompTel jointly ask the Commission to reverse course entirely and suspend all EEL audits pending decisions by the United States Court of Appeals for the D.C. Circuit and the Commission on the validity of the use restrictions. Joint Comments of WorldCom/CompTel at 11, 12.

WorldCom and CompTel's call for a "moratorium" on audits is not only unwarranted, it is extreme. As discussed above, the audit rights WorldCom and CompTel seek to undo were *intended* to operate on an interim basis in order to preserve the status quo pending final resolution of the unbundling issues by the Commission. It makes no sense to argue, as WorldCom and CompTel do, that audits should be suspended because these issues are not yet resolved. The interim nature of these rules is why the Commission provided for audit rights in the first place.

Further, WorldCom and CompTel's request for a "moratorium" on audits is nothing more than an attempt to make an end-run around the normal rulemaking process. WorldCom and CompTel want to do away with EEL audits and limitations on related UNEs immediately, before these issues are fairly and fully decided. Obviously, WorldCom and CompTel cannot know when or how these issues will be resolved, either by the appellate court or the Commission. Until they are, the Commission should maintain the careful balance between ILECs and CLECs that it struck in the Supplemental Order and its Clarification.

Recognizing the weakness of their position, WorldCom and CompTel argue that, even if the courts and the Commission uphold the current limits, the Commission should nonetheless suspend all EEL audits until it addresses "unresolved" questions concerning the safe harbor

requirements. *Id.* at 12, 13. Again, as with the audit rights themselves, neither cites to any evidence that the safe harbors and temporary local usage requirements are “arbitrary” or unworkable, as they claim. These generalized assertions do not justify the “moratorium” on audits they seek.

#### **IV. The Commission Should Not Place Unreasonable Restrictions On The ILEC’s Choice Of Third-Party Auditors**

Verizon agrees with USTA, Sprint and SBC and objects to NuVox’s attempts to place unreasonable requirements on the use of third-party auditors. NuVox requests a declaration that a proposed auditor may not be considered “independent” if the auditing firm’s principals have been employed by or even associated with an ILEC. NuVox Petition at 6-7; Joint Comments of WorldCom/CompTel at 10-11. Verizon agrees with USTA, as well as other commenters, that it is unreasonable to assume that an auditor is not independent merely because of a prior relationship with an ILEC.<sup>9</sup> And, such a strict limitation is not only unnecessary, it is counterproductive. Given that ILECs bear the cost of all audits, they have a strong incentive to employ auditors who can produce thorough and accurate results.

Nor should ILECs be required to provide to a CLEC, with its audit request, documentation regarding the “independence” of a third-party auditor as well as copies of “any contract, communications and descriptive material exchanged between the auditor and the ILEC.” NuVox Petition at 6. Requiring ILECs to provide such information to a CLEC before initiating an audit would not only be unduly burdensome, it would provide CLECs the perfect opportunity to delay and obstruct audits by mounting unfounded challenges to the auditor’s independence. The Commission should not countenance such tactics.

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<sup>9</sup> USTA Comments at 3-4; SBC Opposition at 6-7; Sprint Opposition at 5-6; BellSouth Opposition at 5.

**V. NuVox's Remaining Requests For "Additional" Declaratory Relief Should Be Rejected**

Verizon agrees with the other objecting commenters that, for the same reasons discussed above, the Commission should reject NuVox's "additional" requests for relief, *i.e.* its request for state commission review of the audit findings, its request that the cost-shifting provision be apportioned according to the number of non-complying circuits discovered during an audit, and its request that in converting a circuit back to special access, an ILEC charge only the same "billing-change/conversion" charge that was imposed initially. NuVox Petition at 7, 8.

All of these requests lack merit and should be rejected.<sup>10</sup> First, the Supplemental Order Clarification says nothing about state commission review of audit findings. There is no reason to add yet another unnecessary layer of review that would only delay conversion of non-compliant circuits. Nor is there any basis in the Supplemental Order Clarification for apportioning audit costs based on the number of non-complying circuits found. Such a requirement would eliminate an important incentive for CLECs to self-certify only when local usage requirements are met. Finally, the Commission should reject NuVox's proposal with respect to "billing-change/conversion" charges. There is no justification for a rule that would prevent ILECs from recovering the full cost of reconvertng non-complying circuits.

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<sup>10</sup> Sprint Opposition at 5-6; SBC Opposition at 8-9.

VI. **CONCLUSION**

The dramatic changes to the Supplemental Order Clarification that NuVox seeks are unwarranted and unwise. Accordingly, its petition for a declaratory ruling should be denied.

Respectfully submitted,



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July 18, 2002

## THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

- Contel of the South, Inc. d/b/a Verizon Mid-States
- GTE Midwest Incorporated d/b/a Verizon Midwest
- GTE Southwest Incorporated d/b/a Verizon Southwest
- The Micronesian Telecommunications Corporation
- Verizon California Inc.
- Verizon Delaware Inc.
- Verizon Florida Inc.
- Verizon Hawaii Inc.
- Verizon Maryland Inc.
- Verizon New England Inc.
- Verizon New Jersey Inc.
- Verizon New York Inc.
- Verizon North Inc.
- Verizon Northwest Inc.
- Verizon Pennsylvania Inc.
- Verizon South Inc.
- Verizon Virginia Inc.
- Verizon Washington, DC Inc.
- Verizon West Coast Inc.
- Verizon West Virginia Inc.