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September 13, 2002

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th St. SW
Washington, D.C. 20554

Re: WC Docket 02-150

Dear Ms. Dortch:

This is to inform you that on September 12, 2002, the following persons representing BellSouth participated in an ex parte presentation with Commission staff concerning the proceeding identified above: Ernest Bush, Lisa Foshee, Beth Shiroishi, Parkey Jordan, John Ruscilli, Sean Lev, Kathy Levitz and Glenn Reynolds. Commission staff present for this discussion were Rich Lerner, Tamara Preiss, Greg Cooke, Josh Swift and Brent Olson of the Wireline Competition Bureau. Commission staff requested this meeting to discuss issues raised by NuVox, Inc. in comments and ex partes in this proceeding. The following discussion summarizes the positions put forth by BellSouth during this ex parte and is being filed at the request of the staff. Pursuant to Commission rules, I am filing copies of this notice and request that it be included in the record of this proceeding.

* * * * *

Nuvox has alleged that BellSouth refuses to provide CLECs with cost-based interconnection facilities. This allegation is not supported by the facts or the law as BellSouth will demonstrate. First, it is important to understand the facilities at issue and the nature of the dispute. The interconnection architecture that NuVox has chosen includes a 2-way transit trunk group that runs between NuVox and BellSouth; a BellSouth 1-way trunk group that runs from BellSouth to NuVox and carries intraLATA and local traffic, and a NuVox 1-way trunk group that runs from NuVox to BellSouth and can carry all types of traffic. This last trunk group is a switched dedicated trunk group

(although NuVox erroneously called it a special access circuit in the South Carolina 271 proceeding).

It is the billing for the last trunk group on which the parties disagree. In essence, NuVox contends that it is entitled to pay TELRIC rates for the facilities regardless of the type of traffic that it sends over the facilities. As BellSouth will demonstrate below, NuVox only is entitled to pay TELRIC rates for the portion of its traffic that is local; the remaining traffic is billed out of either BellSouth's interstate or intrastate tariffs. BellSouth has employed this method of billing for local and access since the adoption of cost-based rates for local services, and no carrier has arbitrated the use of factors.¹ At every opportunity, the Commission has preserved the distinction between access and local jurisdiction. In essence, the adoption of NuVox's position on this issue would render this distinction between access and local jurisdiction meaningless, and in the process would render meaningless Commission-approved interstate and intrastate tariffs by making all traffic and facilities local.

A hypothetical can help demonstrate how the traffic over NuVox's trunk group can, and should, be separated jurisdictionally, and thus separate the billing of the facilities. First, pursuant to BellSouth's interstate tariff, a CLEC will provide a factor to identify the percentage of interstate traffic on the trunk group. Assume that the reported factor is 10%. The remaining 90% of the traffic is now in an intrastate "bucket." It is this bucket of traffic that must be segregated between local traffic and intrastate traffic for billing purposes. This separation is done via a Percent Local Facility factor ("PLF"). Assume that the reported PLF is 97%. This means that of the 90% of the facilities in the intrastate bucket, 97% will be billed at local rates (bill and keep in Nuvox's case), and 3% will be billed out of the intrastate access tariff.

Nuvox contends that it is not obligated to report a PLF, and that instead it should pay local rates for the entire 90% intrastate bucket as well as the interstate bucket. This position is directly contradictory to the careful distinction the Commission has maintained between the access regime and the local regime. *See e.g. Local Competition Order*, para. 190. As the discussion below will demonstrate, there is no support in either the law or the parties' interconnection agreement for Nuvox's position. Moreover, irrespective of the merits of Nuvox's position, it is clear that BellSouth makes cost-based interconnection available to NuVox in its Agreement, and to all CLECs via its Standard Interconnection Agreement and individual agreements that are available for adoption. In addition, BellSouth's SGAT is in place, approved by the Five State commissions, and tracks the requirements of federal law by, among other things, offering interconnection at cost-based rates.

- A. BellSouth provides cost-based interconnection to CLECs pursuant to Checklist Item 1.

¹ Prior to the approval of cost-based rates by each state commission, pursuant to the direction of the Commission in the *Local Competition Order*, BellSouth used the tariff rates as surrogate rates.

Section 271(c)(2)(B)(i) of the Act requires BellSouth to provide “interconnection in accordance with the requirements of section 251(c)(2) and 252(d)(1).” BellSouth complies with this obligation by providing CLECs with interconnection at cost-based rates pursuant to interconnection agreements. Nuvox admits in its September 10, 2002 *ex parte* that “BellSouth has TELRIC rates.” Nuvox alleges, however, that BellSouth “refuses to allow CLECs access to interconnection trunks and facilities at those rates” by virtue of its use of jurisdictional factors. This is not correct. BellSouth’s Standard Interconnection Agreement, which Nuvox itself attaches to its *ex parte*, refutes this position, and demonstrates that BellSouth offers TELRIC-based rates to CLECs for local interconnection. Specifically, Sections 4.0 and 7.0 (including 7.3 on Jurisdictional Reporting) discuss interconnection trunks, and the rates applicable to such facilities. Of particular relevance, this agreement (as well as the interconnection agreements signed by AT&T² and Sprint, and other carriers without the need for arbitration as to this issue) ensures that CLECs obtain cost-based rates for local interconnection facilities by expressly discussing the use of the Percent Local Facility (“PLF”) factor. Section 7.3 provides that “[e]ach party shall update its PLF on the first of January, April, July and October of the year and shall send it to the other Party” In addition, Section 7.3 provides that “[r]equirements associated with PLF calculation and reporting shall be as set forth in BellSouth’s Jurisdictional Factors Reporting Guide, as it is amended from time to time.”

These agreements, as well as numerous other agreements containing this language, are available for adoption by Nuvox. Thus, even if Nuvox’s claim that BellSouth was not offering cost-based local interconnection under the specific terms of its interconnection agreement had any merit (which, as explained below, it does not), the issue is limited to a dispute between BellSouth and Nuvox and is not globally applicable to the CLEC community as a whole. NuVox is thus simply wrong in its assertion in its September 11 *ex parte* that this is not a contract dispute between particular parties. To the contrary, BellSouth is complying with its obligations in multiple agreements, a conclusion that is supported by the fact that no CLEC/IXC has ever sought arbitration on this issue to contest whether BellSouth’s standard agreement complies with federal law – as a major interexchange carrier such as AT&T surely would have if there were a significant issue on this score.

With respect to the Commission’s question on dedicated transport, consultation with the BellSouth technical SMEs confirmed that dedicated transport, if used for interconnection rather than a UNE, requires reciprocal activation of trunks by both parties and thus does not provide an efficient substitute for interconnection at issue here.³ As for dedicated and shared transport UNEs, the Commission held that a carrier may use those individual UNEs only to provide “access services to customers to whom it provides local exchange service.” *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange*

² In Attachment 3 of AT&T’s agreement, Section 5.3.8 provides for the use of a Percent Local Facility. Contrary to NuVox’s assertion in its *ex parte*, AT&T did not raise this issue in this proceeding.

³ Paragraphs 215-217 of the Virginia Arbitration Recommended Decision involve ordering UNE Dedicated Transport which is not at issue here.

Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, Third Order on Reconsideration and Further Notice Of Proposed Rulemaking, 12 FCC Rcd 12460, at 12483, 38 (1997) (“Shared Transport Order”). In that proceeding, the Commission sought further “comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.” That issue is still pending. *See* Supplemental Order Clarification, 15 FCC Rcd at 9588.

- B. The issue Nuvox has raised is an interconnection agreement dispute between the parties.

The issue Nuvox has raised regarding the use of the PLF is a billing dispute and should be handled in accordance with the dispute resolution provisions of the interconnection agreement. Nuvox argues that because Nuvox’s current interconnection agreement does not contain the explicit PLF language, that it is entitled to pay TELRIC rates for the entire interconnection facility. Nuvox’s own position demonstrates that this dispute focuses on the language of the specific Nuvox/BellSouth agreement – it does not in any way rise to the level of systemic non-compliance with the Act. Thus, it should be addressed pursuant to the terms of the contract itself. *See* Section 15, General Terms and Conditions, Resolution of Disputes; Attachment 7, Billing Disputes.

Moreover, even were the Commission to feel it necessary to look at the merits of the issue, BellSouth’s position on the contract is reasonable and defensible. The Nuvox Agreement includes a provision for bill and keep on non-transit trunks and facilities for local traffic. The remaining traffic is billed out of the appropriate tariff. Factors are utilized to apportion the different jurisdictions of usage and services to ensure that each portion of traffic over the trunk is billed from the appropriate source (i.e. interstate access tariff, intrastate access tariff, or interconnection agreement). CLECs were notified of the use of the PLF factor by Carrier Notification Letter SN91081790, dated June 1, 2000. Two additional follow-up Carrier Notification Letters (SN91082013 and SN91082918) were sent on October 27, 2000 and March 13, 2001 respectively.

While Nuvox is correct that its agreement does not specifically provide for the use of the PLF, it is clear that the terms of the agreement (and the rates contained therein) apply only to local traffic and facilities. For example, in the General Terms and Conditions, Part B (Definitions), the parties agreed to a definition of Local Interconnection. The terms and conditions set forth in Attachment 3 to the Agreement address Local Interconnection (which, as in the FCC rules and Orders, remains a separate section from UNEs). Section 1.7 of the Agreement provides that the parties will apply bill and keep for local interconnection. Finally, Section 2.3 of Exhibit A clearly states that if there is no rate in Exhibit A, the rates, terms and conditions default to the tariff.

Given that the rates, terms and conditions of the Agreement apply only to local interconnection, it is necessary to have an operational mechanism to separate the local and the access portion of the facilities. The operational mechanism used by BellSouth is the factors described above. While the factors are not detailed explicitly in the

Agreement, they do represent the logical means by which the parties can implement the intent of the Agreement, namely that the rates, terms and conditions of the Agreement apply only to local interconnection.

BellSouth will only bill access through this factor arrangement when NuVox is acting as an interexchange carrier and terminating calls to a BellSouth end-user or originating calls from a BellSouth end-user. This is no different arrangement from that involving a third party interexchange carrier. If, on the other hand, the traffic is local, BellSouth will charge local TELRIC rates. These arrangements are reciprocal and the factors that the parties provide to one another are the mechanism by which traffic is jurisdictionally allocated. This concept of separating traffic by jurisdiction is consistent with the application of interstate and intrastate access charges applied to the joint use of facilities for inter- and intrastate long distance service, a practice which has been in effect since the implementation of the Commission's access charge tariffs. The question here thus involves only whether BellSouth may charge some or any access charges under its tariffs when it is providing interexchange access to NuVox acting as an interexchange carrier. Access issues do not implicate checklist requirements under this Commission's precedents. *See Texas Order*, para. 335 (Commission does "not consider the provision of special access services pursuant to a tariff for purposes of determining checklist compliance").

Simply put, NuVox's claim is that, under section 251(c)(2), it should not have to pay established access charges *when it is acting as an interexchange carrier*. That is incorrect. In fact, both this Commission, in the *Local Competition Order*, and the Eighth Circuit in *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), rejected that position.

The *Local Competition Order* states (at ¶ 190) that carriers may obtain interconnection under section 251 "for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls)." (emphasis added). Thus, the Commission said unequivocally that "access charges" -- not some subset of access charges, but "access charges" generally -- "are not affected by our rules implementing section 251(c)(2)." *Local Competition Order* ¶ 176. In the same vein, the Commission has explained in its rules that, when a carrier is interconnecting "solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network" -- as NuVox would be doing when it is transmitting interexchange calls to BellSouth for termination to BellSouth customers -- it is not entitled to interconnection under section 251. 47 C.F.R. § 51.305(b). The Commission has long recognized that a carrier can operate in different capacities based on difference circumstances. *See Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, ¶ 5 (2001) ("The interconnection regime that applies in a particular case depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, a CMRS carrier or an enhanced service provider; and whether the service is classified as local or long-distance, interstate or intrastate, or basic or enhanced.") (emphasis added). Moreover, even if 305(b) were understood to apply only when a carrier provides exclusively interexchange service to all customers everywhere, which it does not say, no

where does it state that CLECs that also act as interexchange carriers can avoid access charges for what is plainly interexchange traffic and facilities and thus for which they are acting solely as an interexchange carrier. In fact, and importantly, the *Local Competition Order* could not have definitively resolved questions about the proper treatment of flat-rated access charges where interexchange and local traffic is exchanged on the same interconnection trunks, given that, two years later, in the 1998 *Second Louisiana Order* (para. 79), the Commission concluded that it was not “technically feasible” to “mix different classes of traffic on the same interconnection trunk groups.”

The Eighth Circuit’s decision in *CompTel* confirms that NuVox is not entitled to obtain interconnection when it is acting as an interexchange carrier. That decision makes plain that section 252(d)(1)’s pricing requirements for interconnection were not intended to disturb the access charge regime: “[T]he LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates.” *Id.* at 1073. Indeed, the court specifically rejected the claim that it was improper to treat local and interexchange traffic differently for these purposes: “[T]he two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC’s network to route long-distance and the newcomer LEC seeks use of the incumbent LEC’s network in order to offer a competing local service. Obviously, the service sought, while they might be technologically identical . . . are distinct. And if the IXC wants access in order to offer local service (in other words, wants to become a LEC), then there is no rate differential.” *Id.* (emphasis added).

The Commission itself has made clear that it understands *CompTel* to confirm that section 251(c)(2) does not affect the access charge regime:

At least one court has already affirmed the principle that the standards and obligations set forth in section 251 are not intended automatically to supersede the Commission’s authority over the services enumerated under section 251(g). This question arose in the Eighth Circuit Court of Appeals with respect to the access that LECs provide to IXCs to originate and terminate interstate long-distance calls. Citing section 251(g), the court concluded that the Act contemplates that “LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the *pre-Act* regulations and rates.” In *CompTel*, the IXCs had argued that the interstate access services that LECs provide properly fell within the scope of “interconnection” under section 251(c)(2), and that, notwithstanding the carve-out of section 251(g), access charges therefore should be governed by the cost-based standard of section 252(d)(1), rather than determined under the Commission’s section 201 authority. *The Eighth Circuit rejected that argument, holding that access service does not fall within the scope of section 251(c)(2), and observing that “it is clear from the Act that Congress did not intend all access charges to move to cost-based pricing, at least not immediately.” . . . [b]y its underlying rationale, CompTel serves as precedent for establishing that pre-existing regulatory treatment of the services enumerated under section 251(g) are carved out from the purview of section 251(b).*

ISP Remand Order, 16 FCC Rcd 9151, ¶ 38 (2001) (emphasis added in part; footnotes and citations omitted), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). That understanding of *CompTel* is directly inconsistent with NuVox's argument here that it is entitled to pay TELRIC rates, not access charges, when it is acting as an interexchange carrier, not as a CLEC.

Nor is it correct that, as NuVox apparently believes, the Commission's understanding that "access charges are not affected by our rules implementing section 251(c)(2)," applies only to *per-minute of use* access charges. *Local Competition Order* ¶ 176. The Commission's statements refer to access charges generally, and the Commission plainly understands that access charges involve both flat-rate charges and usage-sensitive charges. As the Commission has stated, "access charges may have different rate structures—*i.e.*, they may be flat-rated or traffic-sensitive." *Intercarrier Compensation NPRM* ¶ 7.

The rate structure and application of flat rate and per minute of use charges for local is nothing more than a continuation of the same rate structure established by the Commission for access. Specifically, there is no legal difference between recovering transport on a per minute of use or flat rate basis. This fact points out the arbitrariness of NuVox's position in that NuVox concedes that per minute of use is jurisdictionally separate and subject to a separate pricing scheme while it contends at the same time that flat rate is all TELRIC.

Nor are any of the specific rules that NuVox asserts were violated here applicable. Nuvox cites Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505. NuVox August 29, 2002 *ex parte* at 2; Sept. 9, 2002 *ex parte* at 1. Rule 305(a)(3) deals with interconnection service quality. Rule 51.309(b) addresses uses of UNEs, which are not at issue here. Finally, Rules 51.503(b) and (c) and 51.505 simply establish the TELRIC standard, without resolving the questions at issue here. NuVox's own submission thus fails to identify an FCC rule that has even arguably been violated here.

Moreover, NuVox has not cited a single Commission decision since *CompTel* that supports its understanding that only some access charges, but not others, have been preserved, nor does it point to a section 271 decision that states that NuVox's understanding is a prerequisite to checklist compliance. Indeed, NuVox's argument for access charges would lead to absurd results that this Commission could not have intended. It would mean that BellSouth could charge no flat-rate access charges for use of a facility even if 99% of the NuVox traffic on that facility were interexchange access. This Commission has not established -- much less clearly established, as would be necessary for NuVox to prevail here --such a perverse rule. Indeed, such a rule would be inconsistent with the Commission's repeated attempt to maintain a legal distinction between access and UNEs. *See, e.g.*, EELs Supplemental Order Clarification, 15 FCC Rcd 9587; *Local Competition Order* ¶ 1033 ("[A]s a legal matter, . . . transport and termination of local traffic are different services than access service for long distance telecommunications").

It is also important to note that BellSouth's longstanding policy on this issue has never been challenged in an arbitration (or a complaint proceeding) in any of BellSouth's nine states. Surely, if there were a clear legal right to TELRIC rates for interconnecting for interexchange traffic, there would have been every incentive for an IXC/CLEC to raise the issue in one of these forums over the last several years. Instead, carriers such as AT&T have mutually agreed with BellSouth's understanding on this point, as reflected in BellSouth's standard interconnection agreement and the AT&T agreement itself.

Nor has the Commission found a checklist problem in prior applications where BOCs did not adopt the policy that NuVox claims is plainly mandated by law. For instance, in the *Arkansas/Missouri* proceeding, Southwestern Bell's Affiant W.C. Deere stated that Southwestern Bell would allow CLECs to send both access traffic and local traffic over the same facilities only "provided such combination of traffic is not solely for the purpose of avoiding access charges and facility charges associated with dedicated transport used to carry interLATA and intraLATA traffic originated by or terminated to a customer who is not the CLEC local exchange service customer." Southwestern Bell Deere Aff.-Missouri ¶ 32, CC Docket 01-194, August 20, 2001. If NuVox were correct, this policy would have precluded checklist compliance, because Southwestern Bell would not have been able to assess *any* access charges on facilities that carry some local traffic.

Furthermore, Nuvox raised this issue before the South Carolina Commission in the 271 case. The South Carolina Commission rejected the argument, ruling as follows:

NuVox asserts that BellSouth is not in compliance with checklist item 1 because BellSouth does not provide cost-based interconnection for transmission and routing of NuVox's interexchange traffic. NuVox believes that its interexchange traffic is "exchange access" traffic. The FCC, however, has held that interexchange traffic is not telephone exchange service or exchange access. As the FCC stated, "all carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to Section 251(c)(2) for the purpose of terminating calls originating from their customers *residing in the same telephone exchange (i.e. non-interexchange calls)*. Although NuVox does not provide interexchange service exclusively, the Commission concludes that it is not entitled to cost-based access for all of its services.

Order, Docket No. 2001-209-C, 2/14/02, at 34 (citations omitted).

Finally, we emphasize that the Commission need not definitively resolve this issue in this proceeding. Indeed, to the extent there is any doubt as to the correctness of BellSouth's position, under this Commission's precedents, it would be inappropriate to do so. *See GA/LA Order* ¶ 114 ("As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."); *Texas Order* ¶ 24 ("There may be other kinds of statutory

proceedings, such as certain complaint proceedings, in which we may bear an obligation to resolve particular interpretive disputes raised by a carrier as the basis for its complaint. But the section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.”); *KS/OK Order* ¶ 19 (“[T]here will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations to its competitors -- disputes that our rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.”). Indeed, NuVox itself, as demonstrated above, could not cite one accurate legal precedent in support of its position. Thus, at worst, this is an open question that need not be, and should not be, resolved in the context of this proceeding.

BellSouth has relied in good faith on the many Commission statements that section 251(c)(2) does not disturb the access charge regime, and it would be both unfair and improper for the Commission to reject this application based on a novel reinterpretation of prior rulings.

Of course, not deciding this issue in this proceeding does not mean NuVox lacks a forum to raise any issues it may have. It can file a complaint with this Commission or a state commission, as appropriate, at any time (and could have done so for a long time, if it truly desired prompt resolution of its claims).

Sincerely,



Ernest Bush

cc: William Maher
Jeff Carlisle
Rich Lerner
Tamara Preiss
Josh Swift
Michelle Carey
Brent Olson
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Aaron Goldberger
Dan Gonzalez
Matt Brill
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