KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MANILA, THE PHILIPPINES
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 955-9888
EMAIL: jheitmann@kelleydrye.com

December 13, 2002

*BY ELECTRONIC FILING*

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 - *Ex Parte Notification*

Dear Ms. Dortch:

Today, December 13, 2002, the undersigned, along with Ed Cadieux, Vice President, Regulatory Affairs – Midwest Region of NuVox, Inc., met with Matthew Brill of Commissioner Abernathy's office to discuss unrestricted access to EELs. The conversation focused on the attached written *ex parte* presentations which were distributed at the meeting. NuVox stated that the record did not support the extension of use restrictions to new EELs or standalone UNEs and that the current constraints on circuits converted from special access to EELs were no longer needed.

If the FCC decided that the record supported extension of the use restrictions currently applicable to conversions of special access circuits to UNE combinations, NuVox suggested that the bright-line rule proposed by ALTS presented an alternative that is much more targeted and clear than the existing constraints applicable to circuits converted to EELs.

In accordance with the Commission's rules, this letter (with attachments) is being filed electronically for inclusion in the public record for each of the above-referenced docketed proceedings. A copy of this submission is being provided to Mr. Brill.

If you have any questions regarding this filing, please notify the undersigned.

Respectfully submitted,

John J. Heitmann

JJH/cpa
cc: Matthew Brill
Qualex International

ALTS / NuVox / SNiP LiNK /Xspedius

# Triennial Review / EELs

## Ex Parte Presentation

WC Docket Nos. 01-338, 96-98, 98-147

December 13, 2002

The ALTS/Allegiance/NuVox/SNiP LiNK/Xspedius Position

# Unrestricted Access to EELs

## November 25, 2002 ALTS/Allegiance/NuVox/ SNiP LiNK/Xspedius *Ex Parte* and November 14, 2002 ALTS *Ex Parte*

### "Plan A": Removal of Restrictions on Converted Circuits

- Experience has demonstrated the benefits of EELs.
- ILECs have abused and extended the interim use and co-mingling restrictions and audit provisions adopted in the *Supplemental Order Clarification.*
- The record contains no hard evidence that any use restrictions are still needed to protect (1) universal service subsidies built into the current transitional ILEC access charge regime, and (2) facilities-based competitive access competition.
- CALLS access regime transition is well underway.
- BOCs now benefiting from BILLIONS of dollars of new revenues as a result of 271 authority and UNE-based competition.
- Term plan commitments and termination penalties will continue to protect ILECs from sudden and swift revenue shifts.
- ILEC integrated T1 products and other local service offerings are not subject to any "local use" constraints.

## The ALTS/Allegiance/NuVox/SNiP LiNK/Xspedius Position
# Unrestricted Access to EELs

### "Plan A": Removal of Restrictions on Converted Circuits

### Refueling the ILEC Special Access Gravy Train Is Bad Policy

- Competitors and consumers pay a heavy price for the ILEC addiction to supracompetitive SPA pricing.
  - CLECs continue to be forced to order SPA instead of UNEs.
  - Provisioning problems and delays continue.
  - New policies created to impose barriers (*e.g.,* "no facilities") and isolate UNEs ("co-mingling").
- ILECs, in recent years, have realized tremendous growth in revenues and profits attributable to special access.
  - 2001 BOC SPA rates of return: SBC 54.6%, BellSouth 49.26%, Qwest 46.58%, Verizon 21.72%
  - 2001 returns exceeded amounts that would have produced an 11.25% rate of return by SBC ~$2.5B, BellSouth ~$1B, Verizon ~$1B, Qwest ~ $700M.
    *Source:* AT&T Special Access Petition.

## The ALTS/Allegiance/NuVox/SNiP LiNK/Xspedius Position
## Restrictions, If Any, Should Apply Only to SPA/EEL Conversions

### No Use Restriction Should Apply to New EELs or Standalone UNEs

- Since new EEL orders do not result in the substitution of UNE combinations for existing SPA, ILEC legacy SPA revenues are not implicated by new EELs.
  - No collapse in ILEC SPA revenues, universal service funding, or facilities-based exchange access competition in:
    - markets where new EELs have been available as a result of the circuit switching exemption.
    - states where PUCs have required unrestricted statewide access to new EELs.
  - New EELs have been provisioned without pre-certification or assurance of compliance with the FCC's "safe harbors".
    - The "impairment" test is restriction enough.
  - CLECs must remain able to convert SPA to standalone UNEs.
    - Carriers have been converting SPA circuits to standalone UNEs for years and ILEC SPA revenues have not fallen off a cliff; nor is there any evidence that universal service funding or facilities-based access competition have been compromised.
    - CLECs are often forced to order SPA instead of UNEs initially to ensure that customer need can be timely met with limited service interruption.
    - ILECs increasingly have replaced operational impediments with self-created policy impediments.

The ALTS/Allegiance/NuVox/SNiP LiNK/Xspedius Position

# "Plan B": A New Restriction that Promotes (1) Facilities-Based Competitors' Access to UNEs and (2) Consumer Broadband Access

## Tailoring Use Restrictions to Better Serve their Intended Purpose

- Any constraints must be easily understood and applied.
  - Any constraints must not work to the detriment of the FCC's important policy goals of promoting facilities-based local competition and access to broadband.
  - Concerns that the big "IXCs" can skirt the legacy access charge regime are best addressed by the ALTS bright-line rule that provides them with the incentive to engage in facilities-based local competition.
- Any use restriction adopted could avoid snaring facilities-based CLECs by focusing on those carriers that use SPA end user circuits exclusively for legacy interexchange voice traffic.
- A presumption of compliance must be adopted – no pre-provisioning audits.
  - Circuits must be provisioned first – eligibility disputes must be resolved after provisioning.
  - Post-provisioning audits must be not be routine or random.

The ALTS/Allegiance/NuVox/SNiP LiNK/Xspedius Position

# "Plan B": A New Restriction that Promotes (1) Facilities-Based Competitors' Access to UNEs and (2) Consumer Broadband Access

## A Bright-Line Rule Grounded in Court-Approved FCC Precedent

- Any new constraint on SPA to EEL conversions should be consistent with the Commission's rules regarding cost-based interconnection under Sections 251 and 252 which were designed to serve the same policy goals.
  - Local Competition Order: a carrier is not entitled to cost-based interconnection at TELRIC rates, if it seeks such interconnection exclusively for the exchange of interexchange traffic.
    - Affirmed by the Eighth Circuit.
    - No notable ILEC claims of abuse by IXCs.
- For the same reasons underlying that decision, the Commission could restyle its current use restriction so that it bars the conversion of end user SPA circuits used by carriers that function exclusively as IXCs with respect to those end users.
  - **The proposed "Plan B" restriction: A requesting carrier may not convert SPA circuits to EELs that: (1) are served by switching equipment used exclusively to provide interexchange voice services (registered in the LERG as a Class 4-only switch); or (2) that are used to serve a customer for which the requesting carrier provides no local or broadband services.**
    - No "co-mingling" restriction.
    - No anti-broadband, anti-wholesale "local voice" requirement.

# ALTS/NuVox/SNiP LiNK/Xspedius
# Responses to Staff's Questions

## Collocation

- A collocation requirement would not present a barrier to many CLECs using EELs today.
- Such a requirement, however, would disadvantage certain facilities-based CLECs that have developed their networks without collocations.
  - It is not clear how such a requirement would serve the FCC's policy goals or be consistent with other FCC rules, including the requirement that UNEs be accessible at any technically feasible point.
- Thus, collocation could at most be considered a non-mandatory, affirmative indicator of compliance with the ALTS test.
  - The Commission could develop other non-mandatory indicia of compliance that alleviate the need for burdensome auditing and reduce the likelihood of disputes over audits.
- Alternatively, the Commission could incorporate such indicia of compliance into the ALTS test.
  - For example, a new tiered restriction or prerequisite could read like this: **A requesting carrier may not convert SPA circuits to EELs if such circuits are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.** Compliance with this standard can be demonstrated by pre-certification that the circuit is (1) not served by a Class 4-only switch; **or** (2) is connected to a collocation in an ILEC end office.
    - Other non-mandatory indicia of compliance can be tacked on using **"or"** as a connector.

ALTS/NuVox/SNiP LiNK/Xspedius
# Responses to Staff's Questions

## Qwest's November 14, 2002 *Ex Parte*

- **Qwest Alternative #1**
  - This "51% local traffic" proposal is more burdensome than the current constraints and solves none of the measurement problems that plague them.
    - A LEC is a LEC, regardless of the percentage of local traffic carried over a circuit.
    - If the goal is to prohibit qualification based on a token or de minimis amount of local service – this criterion is sets too high a mark (customers may not generate this much local traffic).
  - Qwest's "Comments" indicate an anti-broadband purpose which is contrary to FCC policy and the has no relation to the purposes identified by the FCC in adopting the current constraints.
    - Qwest alleges that Internet access should not count toward the "local" traffic criterion, despite that most carriers cannot distinguish it from local traffic, and that it counts toward current local use criteria, if the conditions in note 64 of the *Supplemental Order Clarification* are satisfied.
  - Qwest's Alternative #1 is more anti-broadband than the current constraints which permit an all broadband EEL.
  - No parity: ILEC integrated T1 service offerings would be subject to no similar restriction.
  - **A Better Alternative:** We do not endorse any percentage of local traffic requirement because the ILECs don't have one and the requirement would entail measurement and auditing problems. However, if any percentage is to be chosen, it should be that which signifies a more than de minimis (*i.e.,* 10% or more) share of the customer's local dial tone lines.

ALTS/NuVox/SNiP LiNK/Xspedius
# Responses to Staff's Questions

## Qwest's November 14, 2002 *Ex Parte*

- **Qwest Alternative #2 (actually 2 proposals – 2A & 2B)**
  - **2A.** A "local telephone number" requirement would bar an all-broadband data EEL currently permitted under safe harbor Option 1.
    - Qwest's Alternative #2A is anti-broadband and, at least in some respects, more restrictive than the current constraints.
    - A "local telephone number" criterion may be considered as one of several non-mandatory indicia of compliance.
      - If restrictions are imposed on new EELs, CLECs may not be able to provide the local telephone number to an ILEC at the time of ordering because some assign numbers later.
      - Proof can be supplied, upon request (no need to create unnecessary reporting requirements), 30 days after provisioning by the CLEC.
  - **2B.** Qwest's "Comments" include a cryptic requirement regarding "2-6 codes", points of interconnection ("POIs"), and local interconnection trunks ("LIS trunks"). CLECs need have only one POI in a LATA and it need not be at an ILEC end office. CLECs typically have EELs terminating to many points in a market or LATA. If Qwest is suggesting that having a POI in a LATA and LIS trunks (identified by 2-6 codes) should be a prerequisite to EELs in a LATA, we do not object to this as one of several non-mandatory indicia of compliance, provided it be made clear that the EEL termination point not be required to be at the POI and that no reporting is required (the ILEC already knows where the POIs and LISs are).

## ALTS/NuVox/SNiP LiNK/Xspedius
# Responses to Staff's Questions

### Qwest's November 14, 2002 *Ex Parte*

- **Qwest Alternative #3**
  - A requirement that a requesting carrier have LIS trunks in place in a LATA and PLUs on file may be considered as one of several non-mandatory indicia of compliance.
    - Not all CLECs report PLUs on all LISs (some use meet-point rather than trunking arrangements).
    - A specified PLU level requirement would revert to measurement and line-drawing problems.
  - There should be no requirement that an EEL terminate at a POI, as such a policy would create a completely new batch of anticompetitive effects.
    - EELs often terminate to collocations in end offices that are not designated POIs or end points for LISs.

ALTS/NuVox/SNiP LiNK/Xspedius

# Responses to Staff's Questions

## Qwest's November 14, 2002 *Ex Parte*

- **Qwest on Audits**
  - Qwest proposes audit provisions that are highly intrusive and burdensome.
  - Seeks billing records, audits every 6 months, AMA formatted data, reimbursement of ILEC costs.
- **Our Proposal on Audits**
  - Post-provisioning audits must be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance. No random or routine audits.
  - Required proof limited to demonstrating compliance with the test or any one of the alternative criteria unless self-evident.
  - Require an AICPA-compliant independent third party auditor acceptable to both parties.
  - May not require burdensome production or record keeping.
  - Must be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance).
  - Must be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible.
  - Must be subject to state PUC or FCC review prior to any true-up or switch to SPA rates.

ALTS/NuVox/SNiP LiNK/Xspedius

# Responses to Staff's Questions

## Qwest's November 14, 2002 *Ex Parte*

- **Qwest on Co-Mingling**
  - Without justification, Qwest proposes a series of co-mingling restrictions that are more burdensome than the current restriction.
    - No co-mingling (ratcheted transport billing) in zone 1.
    - No co-mingling of an OCn IOT facility with DS3 UNE loops.
    - Qwest may not permit a co-mingled facility with an end point other than a collocation.
- **Our Proposal on Co-Mingling**
  - Both forms of co-mingling restrictions (no mixed use/ratcheting of transport and muxing and no connection to or combination with tariffed services) should be eliminated.
    - Co-mingling restrictions are entirely unjustified and anticompetitive.
    - Co-mingling restrictions add to impairment.
  - ILEC "billing issues" defense is a red herring.

ALTS/NuVox/SNiP LiNK/Xspedius

# Responses to Staff's Questions

## The *CompTel* Decision

- The *CompTel* decision imposes no affirmative requirement on the Commission.
  - The Court did not rule on the propriety of the use restrictions, but merely found that the Commission had not overstepped the bound of its authority when it imposed them on a temporary basis.
  - The Court does not require a service-by-service impairment analysis.
    - Even if one is considered, the ALTS proposal addresses any perceived lack of impairment in the interexchange service market (must provide something other than interexchange service).
      - Unbundling provisions of the 1996 Act are not limited to "local" or "voice" services.
      - LEC "local" services include telephone exchange, exchange access, and broadband services (no 271 authority needed for any of these).
      - If CLECs cannot offer broadband over UNEs or bundled packages of local and other services (including exchange access and Internet access), they cannot compete.
    - CLECs do not seek to offer their end users "special access" -- they offer their end users a mix of services including local, long distance and broadband.

ALTS / Allegiance / NuVox / SNiP LiNK / Xspedius

# Unrestricted Access to EELs

## Ex Parte Presentation

WC Docket Nos. 01-338, 96-98, 98-147

**November 25, 2002**

# Post UNE Remand
# EELs Benefits and Barriers

## Benefits of EELs

- Addresses impairment by extending the reach of facilities-based CLEC networks – allowing competition with the ILEC on a more timely, ubiquitous, operationally supportable and cost-effective basis.
- Expands competitive choices and affordable broadband to a significantly greater number of end users.
- Small business customers have upgraded from ILEC analog service to CLEC broadband services provisioned over an "integrated T1" using UNEs and CLEC-provisioned facilities.
- Another case of UNEs spurring innovation, tangible end user benefits and ILEC competitive response.
- Enhances CLECs' ability to make more efficient use of existing facilities and to justify additional expenditures on new facilities.
- Eases the burdens that collocation places on both ILECs and CLECs.

# Post UNE Remand
# EELs Benefits and Barriers

## Barriers to EELs

- FCC imposed barriers
  - Temporary use restrictions currently in place are the primary reason why realization of the benefits of converting SPA circuits to EELs has been limited.
  - Restrictions have blocked many C LECs from converting circuits despite the fact that such circuits are used to provide local services to end users.
  - Restrictions have fostered burdensome network grooming.
    - Some facilities-based CLECs have groomed their networks to achieve compliance with the co-mingling restrictions.
    - Some facilities-based CLECs have determined that grooming and additional construction was not practical or could not be cost justified.
  - "Voice" requirements in the safe harbors result in a patently anti-broadband and anti-wholesale bias.
- ILEC imposed barriers
  - Artificial collocation and circuit switch requirements.
  - Conversion processes that are cumbersome and even service-degrading.
  - Attempts to extract grossly excessive non-recurring charges.
  - Open ended conversion process designed to prolong SPA billing.
  - Refusal to enter into reasonable interconnection agreement terms.

Plan A

# Removal of Restrictions on Converted Circuits

## Time is now more than "up" on the temporary use restrictions

- The record contains no hard evidence that ANY use restrictions are still needed to protect (1) universal service subsidies built into the current transitional ILEC access charge regime, and (2) facilities-based competitive access competition.
- The SPA circuits that facilities-based CLECs seek to convert to UNEs have no apparent impact on universal service subsidies today or on the ability of facilities-based CAPs to compete for the business of the large IXCs.
- CALLS access regime transition is well underway.
- BOCs now benefiting from BILLIONS of dollars of new long distance revenues as a result of 271 authority.
- BOCs now benefiting from BILLIONS of dollars of new broadband revenues as a result of UNE-based competition.
- Term plan commitments and termination penalties will continue to protect ILECs from sudden and swift revenue shifts.

Plan A

# Removal of Restrictions on Converted Circuits

## Refueling the ILEC Special Access Gravy Train Is Bad Policy

- Competitors and consumers pay a heavy price for the ILEC addiction to supracompetitive SPA pricing.
- CLECs continue to be forced to order special access instead of UNEs.
  - Provisioning problems and delays.
    - "Cadillacs" and "Chevrolets".
  - "No facilities".
    - "Modification", "construction" and "parity".
- ILECs, in recent years, have realized tremendous growth in revenues and profits attributable to special access.
  - 2001 BOC SPA rates of return:
    - SBC 54.6%, BellSouth 49.26%, Qwest 46.58%, Verizon 21.72%
  - 2001 returns exceeded amounts that would have produced an 11.25% rate of return by:
    - SBC ~$2.5B, BellSouth ~$1B, Verizon ~$1B, Qwest ~ $700M.
      *Source:* AT&T Special Access Petition.

# Plan B
# Tailoring Use Restrictions to Better Serve their Intended Purpose

## The current constraints have had unintended, deleterious and unnecessary consequences

- Any constraints must:
  - be more tailored and less burdensome,
  - be easily understood and applied,
  - not work to the detriment of the FCC's important policy objectives of promoting facilities-based local competition and access to broadband.
- CLECs that provide telephone exchange, exchange access and advanced/broadband services to their customers in direct competition with ILECs often have been unable to avail themselves of the existing "safe harbors".
  - The "safe harbors" work as a weapon for the ILECs.
  - Waiver process turns out to be empty option.
  - "Mad science" criteria ignore the way in which services are sold and provisioned to, and used by end users.
  - "Voice" requirements are anti-broadband.
  - Co-mingling and collocation requirements unwarranted.
- BellSouth has harassed CLECs with unauthorized audit requests.
  - NuVox Petition remains pending.
  - PUC litigation ongoing.
- ILECs have expanded the scope of the restrictions to standalone UNEs and new EELs.

# Plan B
# Tailoring Use Restrictions to Better Serve their Intended Purpose

## The focus must change from what a CLEC must do to what it cannot do

- ILEC/FCC goal has been to protect legacy access charge revenues associated with legacy IXC long distance voice services which support universal service and present competitive opportunities for facilities-based CAPs.
- "IXC" is too broad a term to be used without qualification.
  - "CLECs" and "ILECs" are almost always "IXCs" – "IXCs" are not always "LECs".
    - CLECs, ILECs and CAPs provide exchange access to themselves and others.
    - IXCs that are not also CAPs or LECs buy exchange access.
- Concerns that "IXCs" can skirt the legacy access charge regime are best addressed by a bright-line rule that states what cannot be done, rather than by the current constraints which include varying concoctions of what must be done.
  - Any use restriction adopted could avoid snaring facilities-based CLECs by focusing on those carriers that use SPA end user circuits exclusively for legacy interexchange voice traffic.

# Plan B
# Tailoring Use Restrictions to Better Serve their Intended Purpose

## A bright-line rule grounded in court-approved FCC precedent

- Any new constraint on SPA to EEL conversions should be consistent with the Commission's rules regarding cost-based interconnection under Sections 251 and 252 which were designed to serve the same policy goals.
  - Local Competition Order: a carrier is not entitled to cost-based interconnection at TELRIC rates, if it seeks such interconnection exclusively for the exchange of interexchange traffic.
    - Affirmed by the Eighth Circuit.
    - No notable ILEC claims of abuse by IXCs.
  - For the same reasons underlying that decision, the Commission could restyle its current use restriction so that it bars the conversion of end user SPA circuits used by carriers that function exclusively as IXCs with respect to those end users.

# Plan B
# Tailoring Use Restrictions to Better Serve their Intended Purpose

## A bright-line rule grounded in court-approved FCC precedent

- The proposed bright-line restriction setting forth what a requesting carrier could not do is this:
  - **A requesting carrier may not convert SPA circuits that are connected to switching equipment used exclusively to provide interexchange voice services or that are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.**
    - **No "co-mingling" restriction.**
      - There is no need to prevent sharing facilities with tariffed services *or* connection to a tariffed service.
      - A co-mingling restriction would:
        - inhibit the efficient use of network inputs,
        - create perverse incentives for the construction of inefficient and balkanized networks,
        - protects tariffed services for which there are no competitive alternatives and that do not generate contributions to universal service.
    - **No collocation requirement.**
      - The restriction would not apply when a circuit terminates to a requesting carrier's collocated facilities.
        - This would be a rebuttable presumption, whereby an ILEC could overcome the presumption by demonstrating that a requesting carrier operates exclusively as an interexchange voice carrier.
    - **No "local voice" requirement.**
      - A local voice requirement ignores the needs of consumers and is patently anti-broadband.

# Additional Concerns
# New EELs and Standalone UNEs

## No use restriction should apply to New EELs or Standalone UNEs

- A new use restriction should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs.
  - Since CLEC new EEL orders do not result in the substitution of UNE combinations for existing SPA, ILEC legacy SPA revenues are not implicated by new EELs.
  - No collapse in ILEC SPA revenues, universal service funding, or facilities-based exchange access competition in markets where new EELs have been available as a result of the circuit switching exemption.
    - The record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs.
  - No collapse in ILEC SPA revenues, universal service funding, or facilities-based exchange access competition in states where PUCs have required unrestricted statewide access to new EELs.
    - The record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs.

Additional Concerns

# SPA to Standalone UNE Conversions

## CLECs must remain able to convert SPA to standalone UNEs

- The Commission must reject ILEC attempts to restrict or deny CLECs' ability to convert SPA circuits to standalone loops or transport UNEs.
  - CLECs remain impaired without access to high cap UNE loops and transport.
    - No compelling need or policy justification for imposing restrictions on conversions of SPA to standalone UNEs.
    - Carriers have been converting SPA circuits to standalone UNEs for years.
      - ILEC SPA revenues have not fallen off a cliff.
      - No evidence that universal service funding or facilities-based access competition have been compromised.
  - CLECs are often forced to order SPA instead of UNEs initially to ensure that customer need can be timely met with limited service interruption.
    - UNE provisioning is not uniformly predictable or reliable.
    - ILECs increasingly have replaced operational impediments with self-created policy impediments.
      - "No facilities".
      - No connection to or combination with "tariffed services".

## A Final Note

*Facilities-based CLECs do not support the imposition of restrictions on circuits converted from SPA to EELs – or on new EEL combinations, conversions of SPA to standalone UNE loops and transport, or any other UNEs.*

*This ex parte merely suggests a way in which the existing use restrictions could be more narrowly tailored (thereby limiting the adverse effects on facilities-based competition and end users), if the Commission supports the continued imposition of use restrictions on conversions of SPA to EELs.*

ALTS

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

November 14, 2002

William F. Maher, Jr.
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte Letter*
WCB Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Maher:

In paragraphs 70-71 of the UNE Triennial Review NPRM, the Commission sought comment on the "co-mingling" and "significant local usage" restrictions currently applicable to circuits converted from special access to UNE combinations. In response, numerous parties called for the removal of such restrictions citing a variety of legal and policy positions.[1] This letter is intended to provide additional support for this position, as well as our views on how, if imposition of certain use restrictions on converted circuits was still deemed necessary by the Commission, such use restrictions may be more tailored to better serve the purposes previously identified by the Commission and to avoid unintended consequences that run counter to important Commission policy objectives. Thus, in plain terms, this letter reaffirms our support for the removal of all use restrictions ("Plan A"), but also offers some insights into a "Plan B", in case our "Plan A" position does not prevail. This letter also reaffirms our position that, even if the Commission deems it necessary to apply some sort of modified use restrictions on conversions of special access to enhanced extended links ("EELs"), use restrictions should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs.

**Plan A – Removal of Restrictions on Converted Circuits**

---

1 *See* Comments of NuVox, KMC Telecom, e.spire, TDS MetroCom, MFN and SNiP LiNK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 49-52, 98-101 and Cadieux Affidavit (attached thereto) ¶¶ 14-17; Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNiP LiNK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 46-52 and Cadieux Reply Affidavit (attached thereto) ¶ 7; Comments of Competitive Telecommunications Associations, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 90-103; Comments of WorldCom, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 80-81 and Reply Comments (filed Jul. 17, 2002) at 30-36; Reply Comments of NewSouth, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jul. 17, 2002) at 33-38. *See also* Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, Pac-West, Paetec, RCN Telecom, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 99-106, Comments of NewSouth, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 37-46.

Since EELs became available through the process of converting existing special access circuits to UNE combinations, a number of competitive LECs have had some success using converted EELs to extend the reach of their networks and thereby expanding competitive choices and broadband to a significantly greater number of end users that could not be reached otherwise. Through this process, small business customers have upgraded from incumbent LEC analog service to competitive LEC broadband services provisioned over an "integrated T1" using UNEs and competitive LEC-provisioned facilities.[2] Circuits converted to EELs also contribute to competitive LECs' ability to make more efficient use of existing facilities and to justify the business case for additional expenditures on new facilities. Converted EELs also ease the burdens that collocation places on both incumbent LECs and competitive LECs. These, and other benefits, however, have been only partially realized. Indeed, realization varies by competitive LEC and by incumbent LEC, with some competitive LECs being able to take advantage of the three enumerated "safe harbors" – at least some of the time – while other competitive LECs could not; and with the incumbent LECs complying with their conversion obligations to varying degrees and at various times.

The temporary use restrictions currently in place are the primary reason why realization of the benefits of converting special access circuits to EELs has been limited. The restrictions have blocked many competitive LECs from converting circuits despite the fact that such circuits are used to provide local services to end users. In some cases, competitive LECs have groomed their networks to engineer around the co-mingling restrictions but, in other cases, competitive LECs have determined that such re-engineering and additional construction was not practical or could not be cost justified. In some cases, customer need for broadband data services also have prevented conversions of special access to EELs, since the "voice" requirements in the safe harbors result in a patently anti-broadband and anti-wholesale bias.

Then, of course, are the numerous incumbent LEC ploys to deny conversion requests or to make them so problematic that a competitive LEC would have to "think twice" before requesting them. These ploys have come in various forms, including but not limited to: artificial collocation requirements, conversion processes that are cumbersome and even service-degrading for what should be a simple billing/records change, and attempts to extract grossly excessive non-recurring charges.[3]

Time is now more than "up" on the temporary use restrictions the Commission put in place to protect (1) ILECs from reductions in special access revenue from long distance carriers and an alleged loss of universal service subsidies built into the current transitional ILEC access charge regime, and (2) facilities-based competitive access competition. There is no compelling evidence that the existing restrictions remain necessary or that even more narrowly tailored restrictions are needed.

---

2 ILECs have responded (albeit, belatedly), by launching their own integrated T1 offerings. *See, e.g.,* "SBC Introduces Flexible, Cost-Effective Unified Voice and Data Access for Business", SBC Communications, Inc, Press Release, Oct. 8, 2002. Thus, this is yet another case of where unbundling has led to innovation, facilities investment and end user broadband access.

3 Comments of NuVox, KMC Telecom, e.spire, TDS MetroCom, MFN and SNiP LiNK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 51-52 and Cadieux Affidavit (attached thereto) ¶ 12.

The special access circuits that most competitive LECs seek to convert to UNEs have no apparent impact on universal service subsidies today or on the ability of facilities-based competitive access providers to compete for the business of the large IXCs. We are now well into the CALLS access regime transition and Bell companies are now poised to receive 271 authority in roughly two-thirds of all states by year end (states representing a far more significant proportion of the population).[4] In addition to new interLATA revenues,[5] incumbent LEC revenues also have been bolstered by a variety of policies (at least some of which are patently unlawful) that have forced competitive LECs to order special access instead of UNEs.[6] In practice, the restrictions have forced continued reliance on special access by competitive LECs and increased reliance on special access by incumbent LECs. As a result, incumbent LECs, in recent years, have realized tremendous growth in revenues and profits attributable to special access.[7] Neither competition nor consumers benefit from this, as the boon in demand for incumbent LEC special access services has kept incumbent LEC revenues, profits and prices artificially high, and has had no direct impact on universal service goals or the competitive access market. In short, having received far more than the anticipated benefit of their 1996 Act bargain, the Bells' special access gravy train – which has become a runaway gravy train in recent years – should be called into the station as it no longer needs nor merits regulatory protection.[8]

**Plan B – Tailoring Use Restrictions to Better Serve their Intended Purpose**

Now, if the Commission determines that the record compels retention of certain restrictions on competitive LECs' ability to convert special access to UNE combinations (in spite of competitors' being impaired without access to such UNE combinations[9]), it seems undeniable that practical experience confirms that the "significant local usage" and "co-mingling"

---

4 Term plan commitments also have preserved incumbent LEC revenues, as associated termination penalties would for some competitive LECs outweigh the benefit to be achieved by converting special access circuits to UNEs.

5 For Verizon alone, Section 271 authority has resulted in more than a billion dollars in new revenues. AT&T *Ex Parte* CC Docket Nos. 01-338, 96-98 and 98-147, at 2 (Oct. 29, 2002).

6 *See, e.g.*, Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, Pac-West, Paetec, RCN Telecom, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 107-117 (arguing that Verizon's "no facilities" policy is unlawful), *see* also Response of Allegiance, to Verizon *Ex Parte* in Docket Nos. 01-338, 96-98, 98-147 (Sep. 30, 2002), Response of ALTS, Allegiance, Focal, XO, and MPower to Verizon *Ex Parte* in Docket Nos. 01-338, 96-98, 98-147 (Sep. 12, 2002).

7 For 2001, the Bells' special access rates of return were 54.6% for SBC, 49.26% for BellSouth, 46.58% for Qwest, 37.08% for Verizon (excluding NYNEX), and 21.72% for Verizon. SBC's special access returns in 2001 exceeded amounts that would have produced an 11.25% rate of return by at least $2.5 billion. For the same year, Verizon reaped such special access windfalls of more than $1 billion; BellSouth's special access windfall was nearly $1 billion; and Qwest's special access windfall was more than $700 million. AT&T Special Access Petition, RM No. 10593 at 8 (filed Oct. 15, 2002).

8 The Bells' special access revenues have more than tripled since 1996. *Id.* at 4. Indeed, the Bells' revenues and returns have risen in every year since 1996 and have done so most dramatically since the FCC adopted it's EEL conversion restrictions in 1999. *Id.* at 8, 14-15.

9 *See, e.g.*, Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNiP LiNK at 46-52.

constraints adopted by the Commission have had unintended, deleterious and unnecessary consequences.[10] Competitive LECs that provide telephone exchange, exchange access and advanced/broadband services to their customers in direct competition with incumbent LECs often have been unable to avail themselves of the existing safe harbors. Moreover, many of those that have availed themselves of the safe harbors have been harassed by unauthorized audit requests that serve no purpose other than to drain competitors' scarce resources.[11] Thus, it would be imperative for the Commission to establish more tailored and less burdensome restrictions that are easily understood and applied and which do not work to the detriment of the Commission's important policy objectives of promoting competition and access to broadband.

To create a more narrowly tailored rule to serve the Commission's stated goals, the Commission should change the focus away from a demonstration of certain percentages of "local" service or an exclusive provider of local service benchmark and instead define the restriction so that it does no more than protect the legacy access charge revenues associated with legacy long distance voice services. In the UNE Remand decision and its progeny, the Commission's stated concerns appeared directly related to how interexchange carriers ("IXCs") must obtain and pay for exchange access. Presumably, the access revenues generated by such carriers (special and switched) supported universal service and presented facilities-based competitors with an opportunity to compete for such revenues. Competitive LECs (like competitive access providers and incumbent LECs), however, provide their own exchange access or provide it jointly with other LECs. Unlike a carrier that is exclusively an IXC, competitive LECs seek to use UNEs to provide both telephone exchange and exchange access services, unless access to UNEs is sought to provide broadband services that may be classified as exchange access services, rather than telephone exchange services. Yet, concerns were raised that "IXCs" could skirt the legacy access charge regime by acquiring UNE combinations between their own switches and those of the incumbent LECs.

Since most competitive LECs are also IXCs (often via resale), any use restriction adopted should more appropriately focus on those carriers that use special access exclusively for legacy interexchange voice traffic. This approach would be consistent with the Commission's rules regarding cost-based interconnection under Sections 251 and 252. In that context, the Commission has found that a carrier is not entitled to cost-based interconnection at TELRIC rates, if it seeks such interconnection exclusively for the exchange of interexchange traffic.[12] The Commission's ruling was affirmed by the Eighth Circuit.[13] Following that model, the Commission could restyle its current use restriction so that it bars the conversion of circuits used by carriers that are exclusively IXCs. In anticipation of LEC objections that an IXC can obtain status as a competitive LEC without having to provide local exchange services (regardless of a

---

10 *Id.*

11 BellSouth has taken to harassing its competitors with frivolous EEL audit requests that simply do not comply with the constraints imposed on such audits by the Commission. *E.g.*, NuVox Inc. Petition for Declaratory Ruling, CC Docket 96-98 (filed May 17, 2002).

12 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, cc Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 191; *see also id.* ¶¶ 176; 184-85, 190 ("*Local Competition Order*").

13 *See Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997)("*CompTel*").

lack of validity), such a restriction can be tightened by styling the restriction as one that bars conversions of circuits that are connected to switching equipment used exclusively to provide interexchange voice services or that are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.

This restriction would not include a co-mingling restriction. The current co-mingling restriction is not needed to serve the Commission's stated goals. Indeed, this two-headed malevolent monster (two headed in the sense that the co-mingling restriction has morphed into a restriction that bars (1) sharing facilities with tariffed services and (2) connection to a tariffed service) – is anti-competitor overkill. Moreover, it inhibits the efficient use of network inputs, creates perverse incentives for the construction of inefficient and balkanized networks, and protects tariffed services for which there are no competitive alternatives and that do not generate contributions to universal service.

The restriction also would not include a collocation requirement. Subject to a rebuttable presumption, whereby an incumbent LEC could overcome the presumption by demonstrating that a requesting carrier operates exclusively as an interexchange voice carrier, the restriction would not apply when a circuit terminates to a requesting carrier's collocated facilities.

Critically, even if the Commission deems it necessary to apply some sort of modified use restrictions on conversions of special access to EELs, such use restrictions should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs. Since competitive LEC new EEL orders do not result in the substitution of UNE combinations for existing special access, incumbent LEC legacy special access revenues are not implicated by new EELs. Indeed, we now have had several years experience with incumbent LECs providing unrestricted access to EELs in markets where they have made EELs available as a result of their election to avail themselves of the circuit switching exemption and in a number of states that have ordered statewide access to new EELs without imposing the use restrictions that the FCC imposed on conversions from special access to EELs. That experience demonstrates that there has been no resulting collapse in ILEC special access revenues, universal service funding, or facilities-based exchange access competition in those markets. In fact, the record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs. Thus, without evidence of need for restrictions or substantial detriment in their absence, it is clear that competitive LECs face impairment and must continue to have unrestricted access to new EELs and standalone UNEs.[14]

---

[14] In the wake of the Supreme Court's *Verizon* decision, *Verizon Communications v. FCC*, 122 S. Ct. 1646, 1661 (2002) ("*Verizon*"), several incumbent LECs have attempted to impose the use restrictions adopted by the Commission in the *Supplemental Order Clarification* to new EELs, even though they had not previously required certification with one of the three safe harbors for new EELs made available pursuant to the Commission's circuit switching exemption or state proceedings. The Commission, however, has never imposed use restrictions on new EELs, as its circuit switching exemption requirement for the provisioning of new EELs was instituted without condition and the "new" combinations rules restored by the Supreme Court had also been adopted without condition. Accordingly, incumbent LECs' unilateral efforts to impose the *Supplemental Order Clarification* use restrictions to new EELs and standalone UNEs are in violation of Rule 51.309(a), which bars incumbent LECs from placing restrictions on UNEs. *See, e.g.*, Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNiP LiNK at 48-50. More recently, at least one incumbent LEC has suggested that the DC Circuit's recent opinion affirming the

Finally, ALTS requests that the Commission reject incumbent LEC attempts to limit or deny competitive LECs' ability to convert special access to standalone UNE loops or transport segments. Six years into the unbundling regime, it remains the case that competitive LECs are often forced to order special access instead of UNEs initially to ensure that customer need can be timely met. Although incumbent LEC provisioning of UNEs has improved over the past six years, it is by no means uniformly predictable or reliable. In addition, incumbent LECs increasingly have replaced operational impediments with self-created policy impediments. The most recent and famous of these is the "no facilities" gambit developed by Verizon and embraced by its siblings.[15] Regardless of the reason for ordering special access, competitive LECs must continue to have the ability to convert such circuits to UNEs and their subsequent use of UNEs must remain unrestricted. Again, there is no compelling need or policy justification for imposing restrictions on the use of UNEs where impairment exists. Carriers have been converting special access circuits to standalone UNEs for years and ILEC special access revenues have not fallen off a cliff, nor is there any evidence that universal service funding or facilities-based access competition have been compromised.

* * *

ALTS would welcome any questions the Commission has with respect to this submission and respectfully request that the Commission recognize that ALTS does not support the imposition of restrictions on circuits converted from special access to EELs – or on new EEL combinations, conversions of special access to standalone UNE loops and transport, or any other UNEs. Indeed, ALTS opposes use restrictions on numerous grounds, and merely suggests a way in which the existing use restrictions could be more narrowly tailored (thereby limiting the adverse effects on competitors and end users), if the Commission supports the continued imposition of use restrictions on conversions of special access to EELs.

---

FCC's *Supplemental Order Clarification* and the use restrictions imposed therein, *Competitive Telecomms. Ass'n v. FCC*, No. 00-1272, 2002 WL 31398290, (D.C. Cir. Oct. 25, 2002)(*"CompTel-DC"*) lends support to its view that those restrictions apply outside the context of special access conversions to UNE combinations. However, that simply cannot be the case. In *CompTel-DC*, the DC Circuit merely affirmed the FCC's imposition of use restrictions in the limited context in which they were imposed. The DC Circuit did nothing to expand their application to new EELs. Nor could it have done so, because the Commission in its UNE Remand proceedings (including the *Supplemental Order* and *Supplemental Order* Clarification) refused to address new combinations outside the context of the voluntary circuit switching exemption. *See, e.g.*, Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel, and SNiP LiNK at 48-50.

15 *See, e.g.*, Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, Pac-West, Paetec, RCN Telecom, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 107-117.

Respectfully submitted,

/s/

Jonathan Askin
General Counsel
Association for Local Telecommunications Services
888 17th St., NW
Suite 900
Washington, DC 20006
(202) 969-2597
jaskin@alts.org

cc: Christoper Libertelli
Matthew Brill
Jordan Goldstein
Dan Gonzalez
William Maher
Jeffrey Carlisle
Jessica Rosenworcel
Scott Bergmann
Michelle Carey
Brent Olson
Tom Navin
Rob Tanner
Jeremy Miller
Julie Veach
Ian Dillner
Daniel Shiman
Michael Engel