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December 16, 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:

On December 13, 2002, the undersigned counsel, along with Ed Cadieux, Vice President, Regulatory Affairs – Midwest Region of NuVox, Inc.; Jim Falvey, Senior Vice President, Xspedius Management Company; Anthony Abate, President and CTO, SNiP LiNK; and Joe Polito, Director, Telecommunication Products, SNiP LiNK (collectively, the "Parties") met with Bill Maher, Wireline Competition Bureau Chief; Jeff Carlisle, Wireline Competition Bureau Deputy Chief; Michelle Carey, Wireline Competition Bureau, Competition Policy Division Chief; Tom Navin, Wireline Competition Bureau, Competition Policy Division Deputy Chief; Jeremy Miller Wireline Competition Bureau, Competition Policy Division Attorney Advisor; and Mike Engle, Wireline Competition Bureau, Competition Policy Division Attorney Advisor to discuss the issue of unrestricted access to EELs currently being considered in the Commission's Triennial Review of UNEs. The conversation focused on the attached written *ex parte* presentation which was distributed at the meeting. The Parties 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, the Parties 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. The Parties also offered several non-mandatory indicia of compliance with the ALTS standard that would serve to alleviate doubts as to compliance and significantly reduce the need for cumbersome and resource intensive audits.

In accordance with the Commission's rules, this letter (with attachment) 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. Maher, Mr. Carlisle, Ms. Carey, Mr. Navin, Mr. Miller, and Mr. Engle.

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

Respectfully submitted,

John J. Heitmann

JJH/cpa
cc: William Maher
Jeff Carlisle
Michelle Carey
Tom Navin
Jeremy Miller
Mike Engle
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.