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February 5, 2003

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

Re: UNE Triennial Review, CC Docket Nos. 01-338, 96-98, 98-147
Ex Parte Notification

Dear Ms. Dortch:

On Tuesday, February 4, 2002, Steve Augustino and John Heitmann of Kelley Drye & Warren LLP, on behalf of Ed Cadieux of NuVox, Rebecca Sommi of Broadview Networks, Jim Falvey of Xspedius, Anthony Abate and Joe Polito of SNiP LiNK, met with Lisa Zaina, Senior Legal Advisor to Commissioner Adelstein, to discuss the parties' positions on various issues raised in the above-captioned dockets. The conversation focused on unbundled transport and access to EELs and the extent to which and form of any use restrictions that might constrain such access. With respect to transport, the parties continued to emphasize the need for actual realtime alternatives to ILEC special access prior to delisting of a transport element. The parties also expressed the following core concerns: (1) the need for DS1 carve-out as no wholesaler sells DS1s and self provisioning at such a low level of capacity could not be economically justified, (2) the need for the Commission to state clearly that an ILEC must continue to provide unbundled access until a state commission makes a determination that results in its delisting as a UNE, (3) the need for a transition period of up to two years, after delisting, and the ability for a state commission to address the need for extensions on a case-by-case basis, and (4) a change in current UNE-P rules could result in a dramatic shift of UNE-P traffic onto alternative transport offerings currently available from some UNE-P providers, thereby reducing the availability of capacity on the wholesale market. With respect to EELs, the parties emphasized that there was no need for use restrictions and that the best policy would be for the Commission to monitor and detect the development of a problem before solving it. The parties expressed that the current restrictions and more recent attempts to craft a gating mechanism sufficiently tied to ILECs fears of a massive conversion by IXCs of their embedded special access base were over inclusive.

The attached draft – which is only a draft and does not reflect the position of any party[1] – was distributed at the meeting and served as a demonstration of a test more narrowly tailored than the existing use restrictions but still far too over inclusive. Indeed, Broadview and SNiP expressed opposition to use of a "stand-alone IXC offering" as a trigger for higher scrutiny, as both companies have such offerings, but nevertheless are predominantly CLECs. Xspedius also expressed opposition to the trigger suggested in the draft. NuVox, too, conveyed reservations that the draft, while more narrowly tailored than the current restrictions, still was too over inclusive.

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Respectfully submitted,

John J. Heitmann

JJH/cpa
cc: Lisa Zaina
Qualex International

[1] The footer of the document has been amended so as to make this point clear and to eliminate potential for misinterpretation.

DRAFT

EELs
CLEC Eligibility Criteria & IXC Safe Harbors

FCC Rule: **EELs may not be used exclusively for interexchange services.**

FCC Goals: (1) Ensure that facilities-based CLECs have access to EELs without unnecessary and unanticipated restrictions and burdens created by the current restrictions.
(2) Ensure that IXCs are not able to convert embedded special access base by adding a de minimis amount of LEC services[1] on end user circuits.

CLEC Goals: Work within FCC frameworks to craft gating mechanisms that reduce opportunities for IXC and ILEC gaming by focusing on the two goals set forth above.

Two-Tier Framework for EELs[2]:

(1) Eligibility criteria for facilities-based CLECs

1. collocation or reverse collocation in the LATA, and
2. interconnection trunks in the LATA (if carrier provides local voice service), and
3. CLEC certification and common carrier service offerings in the LATA

* pre-certification requirement
* no audits
* no commingling restrictions
* FCC and state commission enforcement options available

(2) Modified "Safe Harbors" for IXCs with stand-alone retail IXC offerings[3] (for DS1 and higher level EELs)

1. circuit terminates to a collocation or reverse collocation, exclusive provider of LEC services at time of conversion and that it will notify ILEC when and if it no longer provides LEC services to the customer; or
2. circuit terminates to a collocation or reverse collocation, loop facility carries on average at least 10% LEC service traffic; or
3. loop facility carries on average at least 33% LEC service traffic

* pre-certification requirement
* limited audits[4]
* no commingling restrictions
* expedited waiver procedure available (see note 1)
* FCC and state commission enforcement options available

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1 FCC and its Enforcement Bureau to determine what constitutes a de minimis amount of LEC services. Such determinations should be made on a case-by-case basis and may take into account measurement issues, product mix and other factors.

2 Wholesalers must certify that their carrier customer meets either the tier 1 or tier 2 criteria, whichever is applicable.

3 Stand-alone retail IXC offerings are interexchange services offered separate from a bundle of services that include LEC services (local voice, exchange access, internet access and point-to-point local data) or stand-alone LEC service offerings.

4 Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) 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); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review, per the request of either party, prior to any true-up or switch to SPA rates.

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John J. Heitmann

JJH/cpa
cc: Jordan Goldstein
Qualex International

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John J. Heitmann

JJH/cpa
cc: Dan Gonzalez
Qualex International