February 7, 2003

Via Electronic Submission

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice
Triennial Review Proceeding — CC Docket No. 01-338

Dear Ms. Dortch:

Yesterday, February 6, 2003, Ed Cadieux of NuVox, Inc., John Heitmann of Kelley Drye and Warren LLP, Julia Strow of Cbeyond Communications, Patrick Donovan of Swidler Berlin Shereff Friedman, LLP, James Smith and Gary Phillips of SBC Telecommunications, Inc., met with William Maher, Jeff Carlisle, Michelle Carey, Brent Olson, Tom Navin, John Stanley, and Jeremy Miller of the Commission's Wireline Competition Bureau to discuss the attached proposed compromise solution to the impasse between ILECs and CLECs on whether and how to adjust the EEL safe-harbor mechanisms established in the *Supplemental Order Clarification* ("*Clarification*"). During the meeting, we discussed the specifics of the proposal and the legal basis therefor, as set forth in this letter and attachment.

Under the approach described below, the Commission would apply the same "significant local use" requirement to all carriers but would relax, for smaller CLECs, as defined herein, the evidentiary burdens of proving compliance with that standard. Whereas larger carriers and those with a substantial toll business would remain subject to the same safe-harbor requirements that the D.C. Circuit just upheld as reasonable, smaller CLECs could satisfy their evidentiary burdens by showing that they have (1) obtained CLEC certification and offer local services in the relevant market; (2) established collocation or that the ILEC has voluntarily established or agreed to establish "reverse collocation" arrangements in the relevant LATA; and (3) obtained sufficient local interconnection trunks within that LATA to demonstrate that they are using EELs to provide a significant amount of local services in the LATA to their customers. We urge the Commission to give full consideration to this compromise proposal, which would simultaneously enforce the core purposes of section 251(d)(2), address concerns associated with the potential for interexchange carriers to substitute EELs for special access circuits for the sole or primary purpose of providing exchange access services, and permit smaller CLECs to develop innovative new local services for their end users without facing undue administrative burdens. The Attachment to this letter provides a detailed description of this proposal.

Background:

In the *Clarification*, the Commission determined that "whether network elements should be made available for the sole or primary purpose of providing exchange access services" depends on "whether denying competitors access to that combination would in fact impair their ability to provide *those services*." ¶ 15 (emphasis added). Operating from the premise that UNEs are not needed for competition in the *long-distance* service market, in conjunction with the desire to avoid "undercut[ting] the market position of many facilities-based competitive access providers" (*id.* ¶ 18), the Commission thus took steps to ensure that EELs would be used for "a significant amount of local exchange service" (*id.* ¶ 21) and *not* for the "sole or primary purpose of providing exchange access service" (*id.* ¶ 15). Under the Commission's "safe harbor" rules, any carrier seeking access to an EEL must certify (*inter alia*) either that it is the sole provider of local service to a particular customer or that the amount of local exchange traffic flowing over the facilities at issue meets certain percentage thresholds. *See id.* ¶ 22.

The D.C. Circuit affirmed in all respects. *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") (emphasis added). It agreed that the language of section 251(d)(2) "seems to invite an inquiry that is specific to particular carriers and services" and concluded that "it is far from obvious to us that the FCC has the power, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Id.* at 12-14; *see also USTA v. FCC*, 290 F.3d 415, 425-26 (D.C. Cir. 2002). And it further rejected claims that "the safe harbor provisions [a]re too demanding on carriers." *CompTel*, 309 F.3d at 17. In this regard, the Court observed, "it is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *Id.*

This precedent in essence provides the Commission with its own "safe harbor" and the Commission could face significant litigation risks if it departed dramatically from it. To avoid these risks, the Commission should affirm that EELs should be used to provide a significant amount of local services. At the same time, the Commission may believe that marketplace developments since June 2000 warrant limited modifications to the existing safe-harbor rules to take account of any compliance burdens "specific to particular carriers," *id.* at 13, particularly smaller CLECs that have begun broadly providing integrated packages of voice and data services over the same circuits. This letter describes a means of accomplishing that objective without undermining what the D.C. Circuit described as "the essential and compelling" feature of the Commission's legal framework: a commitment to "'consider the markets in which a competitor "seeks to offer" services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services.'" 309 F.3d at 13 (quoting *Clarification* ¶ 15). Put differently, the Commission may reasonably enforce the "significant local use" requirement as to *all* carriers while alleviating the relatively large burdens *smaller* CLECs face in establishing their compliance with that requirement.

Discussion:

The local usage certification requirements in the existing safe-harbors reflect a balance of costs and benefits: *i.e.*, the costs of measuring traffic patterns, as weighed against the benefits (and legal necessity) of giving substance to the "impairment" standard of section 251(d)(2). The Commission could reasonably decide to fine-tune that balance by distinguishing among the varying abilities of different carriers to shoulder the administrative costs and technical burdens of demonstrating compliance with the impairment standard, as well as the likely effectiveness of different compliance tests for different types of carriers.

Carriers incur fixed costs in deploying the systems needed to track and report traffic mix over given facilities. Those fixed costs have a more significant economic impact on a smaller carrier with smaller overall telecommunications revenues than on larger carriers. Those costs are therefore more likely to affect the decisions of smaller carriers about whether and when to enter particular telecommunications markets. As discussed below, the Commission may appropriately take that disproportionate competitive impact on smaller carriers into account by adjusting the details of its safe-harbor scheme for EELs.

Under the approach proposed here, small and large carriers alike would be subject to the same *underlying legal standard*. Small and large carriers alike would be permitted access to EELs provided they are used in the provision of "a significant amount of local exchange service." *Clarification*, ¶¶ 21, 15. And, because ILECs believe that the current certification rules remain necessary to provide full assurance of compliance with that underlying standard, those rules would continue to apply to the largest carriers, whose telecommunications revenues dwarf the administrative costs of such certification. Indeed, the DC Circuit observed, "it is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *CompTel*, 309 F.3d at 17. The record confirms that this is the case.[1]

Nonetheless, the Commission could appropriately strike a slightly different cost-benefit analysis in addressing what smaller CLECs must do to prove their compliance with the underlying legal standard. Under the proposal discussed here, a carrier would qualify as a "smaller CLEC" if its total telecommunications revenues do not exceed two percent of total telecommunications industry local and toll service revenues, and its gross annual toll service revenues do not exceed two percent of all toll service revenues.[2] Those carriers could satisfy their evidentiary burden of establishing compliance with the "significant local use" requirement on a LATA-by-LATA basis if they have (1) obtained CLEC certification to provide local services

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[1] *See*, *e.g.*, Letter to Hon. Michael Powell from William P. Barr (Verizon), Jan. 30, 2003, at 2 (indicating that CLECs have obtained more than 16,000 DS1 EELs or equivalents from Verizon).

[2] A determination of whether a carrier meets the two revenue thresholds will be based on the combined gross revenues of itself and all "affiliates," as the term "affiliate" is defined in the attachment to this letter. Industry revenue figures would be those set forth in the most recently published version of *Trends in Telephone Service* issued by the Wireline Competition Bureau.

and in fact offer local services in the LATA;[3] (2) established collocation or the ILEC voluntarily has established or agreed to establish "reverse collocation"[4] arrangements in the relevant LATA; and (3) obtained sufficient local interconnection trunks within that LATA to demonstrate that they are using EELs to provide a significant amount of local services in the LATA to their customers. A carrier would meet the interconnection trunk requirement if it has within the LATA at least one bona fide DS1 local service interconnection trunk per 24 DS1 EELs or the equivalent.

These three requirements would serve as a reasonable, albeit less granular, evidentiary proxy for concluding that a smaller CLEC has met the underlying "significant local usage" restriction with respect to most or all of the EEL facilities it obtains as UNEs.[5] In particular, the Commission could reasonably conclude that, in its expert judgment, the purchase and use of proportional and bona fide local interconnection capacity for every DS1 EEL (1) demonstrates a carrier's commitment to facilities-based entry into the *local exchange* market in the relevant LATA and (2) indicates a reasonable likelihood that a significant amount of local traffic is carried on given EEL facilities.

In the case of smaller CLECs, reliance on the foregoing evidentiary "proxy," rather than more direct proof that each individual EEL facility actually is being used to provide a significant amount of local services, is justified because such CLECs face a greater relative burden than larger CLECs in making that showing. Thus, the Commission could reasonably strike a different balance for smaller CLECs than for very large carriers and conclude that the special burdens imposed on smaller CLECs by such an evidentiary requirement outweigh the benefits.

Another key industry reality supports the same distinction between larger and smaller CLECs for these limited purposes. Without a rigorous enforcement mechanism in place designed to keep carriers from using EELs "for the sole or primary purpose of providing exchange access services," larger carriers, by virtue of their greater resources and market share, and as the largest purchasers of ILEC access services, have a greater incentive and potential than smaller carriers to thwart the objectives of EEL restrictions identified in the *Supplemental*

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[3] A CLEC could demonstrate that it offers local exchange service in the LATA by showing that it has local exchange tariffs or public price lists and/or customer contracts for local services in the LATA.

[4] Reverse collocation refers to any ILEC-provided facility installed in premises controlled by a CLEC, or any other ILEC-provided interconnection facility connecting to a CLEC POI, which is used to provide access to unbundled network elements pursuant to Section 251(c)(3). Reverse collocation includes physical or virtual collocation at a CLEC end office as well as other mutually agreed upon methods of interconnection for the purposes of accessing unbundled network elements.

[5] A smaller CLEC meeting these requirements would be deemed to meet the "significant local service" test and would not be subject to audit for compliance with the relaxed safe harbor mechanism for smaller carriers. In the event that an ILEC believes that a smaller CLEC is not complying with the relaxed safe harbor mechanism for smaller carriers, the ILEC may file a complaint, during which the CLEC would be required to produce appropriate documentation needed to demonstrate compliance. While any complaint or enforcement action is pending, the ILEC would be required to continue to provision EELs, subject to applicable true-up if the complaint or enforcement action was granted in favor of the ILEC.

Clarification Order by attempting to substitute EELs for special access circuits used for their long-distance businesses. It is thus critical to define "smaller carrier" not just in terms of a carrier's total revenues, but also in terms of its toll revenues. The carriers whose annual total or toll revenues would preclude them from taking advantage of the relaxed safe-harbor mechanisms described here consist primarily of those carriers that offer stand-alone long-distance services. Those are the carriers with the most significant potential to engage in the type of arbitrage that the existing safe-harbor mechanisms are designed to prevent and for which the Commission may reasonably find that the streamlined test recommended herein for smaller CLECs would not be a sufficient safeguard. For that reason alone, the Commission would be more than justified in continuing to hold such carriers to the current rigorous standard of proof in demonstrating that they are not using EELs "for the sole or primary purpose of providing exchange access services."

Finally, it is beyond serious question that the Commission has statutory authority, from multiple sources, to accommodate the special needs of smaller carriers who pose less risk of non-compliance in fine-tuning the details of how its unbundling rules will be applied. Indeed, section 257 of the Act requires the Commission to review its rules periodically to identify and eliminate, *inter alia*, regulations that pose "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). More generally, the Commission has routinely exercised its inherent statutory discretion to lessen regulatory burdens on smaller entities.[6] Finally, as the Commission itself observed in the *Triennial Review* NPRM itself (¶¶ 91-132), several different statutory schemes emphasize Congress's overall goal of accommodating the special needs of small entities.[7]

The parties have agreed to this proposal in the interest of compromise. In the event the Commission adopts some, but not all, aspects of this compromise proposal, no party waives its right to appeal that decision.

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We hope that the Commission gives serious consideration to this compromise proposal, which balances the need for strict enforcement of the "impairment" standard against the special

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[6] *See*, *e.g.*, Memorandum Opinion and Order and Second Report and Order, *In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 17 FCC Rcd. 9614 ¶¶ 180, 251-52 (2002); Order on Reconsideration, *In the Matter of 2000 Biennial Regulatory Review--Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, 17 FCC Rcd 4766 ¶ 11 (2002); Second Report and Order And Third Notice Of Proposed Rule Making, *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204, ¶¶ 165-70 (rel. Nov. 20, 2002); *1998 Biennial Regulatory Review – Review of Accounting and Cost Allocation Requirements,* 14 FCC Rcd 11396 ¶¶ 11-14 (1999).

[7] *See*, *e.g.*, 5 U.S.C. § 610(a) (Regulatory Flexibility Act); 15 U.S.C. § 632(a)(1) (Small Business Act).

needs of smaller CLECs. Please do not hesitate to contact us if you would like to discuss the details of this proposal further.

Sincerely yours,

/s/ Julia O. Strow

Julia O. Strow
Vice President - Regulatory
& Industry Relations
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, Georgia 30339
(tel) 678 424 2429
(fac) 678 424 2509
julia.strow@cbeyond.net

/s/ James C. Smith

James C. Smith
Senior Vice President

SBC Telecommunications, Inc.
1401 Eye Street, NW
Suite 400
Washington, D.C. 20005
Phone: 202-326-8836
Fax No: 202-289-3699
js5891@sbc.com

/s/ Edward J. Cadieux

Edward J. Cadieux
Vice President Regulatory – Midwest
NuVox, Inc.
16090 Swingley Ridge Road
Suite 500
Chesterfield, MO 63017
(tel) 636-537-5743
ecadieux@nuvox.com

/s/ Anthony Abate

Anthony Abate
President
SNiP LiNK LLC
100A Twinbridge Drive
Pennsauken, NJ 08110
(tel) 856-662-8600
aabate@snipmail.net

Attachment

cc:

Chairman Powell	Matthew Brill	Michelle Carey
Commissioner Abernathy	Jordan Goldstein	Thomas Navin
Commissioner Adelstein	Dan Gonzalez	Brent Olson
Commissioner Copps	Lisa Zaina	John Stanley
Commissioner Martin	William Maher	Jeremy Miller
Christopher Libertelli	Jeffrey Carlisle	John Rogovin

The parties agree and recommend to the Commission that, until the next Triennial Review, incumbent LECs should be required to make available enhanced extended links (EELs)[1] only to the extent those facilities are used to provide a significant amount of local traffic. The parties further agree and recommend to the Commission that there be two separate evidentiary tests for determining whether EELs are being used to provide "significant local" traffic. Separate tests are proposed to reflect a balancing of costs and benefits. Specifically, we propose separate tests to distinguish among the varying abilities of different types of carriers to shoulder the administrative costs and technical burdens of complying with tests designed to assure that they are using EELs to provide a significant amount of local traffic and also to reflect the greater risk of noncompliance posed by carriers with large interexchange businesses.

I. EEL Proposal for Larger Carriers or Those With Substantial Interexchange Traffic

Larger carriers/IXCs (those who do not qualify as a smaller CLEC under the criteria established below) would satisfy the "significant local services test" if they meet one of the three safe harbors established in paragraph 22 of the *Supplemental Order Clarification*, FCC 00-183, released June 2, 2000. The audit provisions established in that order would continue to apply.

II. EEL Proposal for Smaller CLECs

A. Definition of "Smaller CLEC"

1. In order to qualify as a "smaller CLEC," a carrier must meet both of the following: (a) The gross annual telecommunications revenues of itself and its affiliates (see section IIA.2) may not exceed two percent of total telecommunications industry local and toll service revenues, as set forth in the most recently published version of *Trends in Telephone Service*; and (b) the gross annual toll service revenues of itself and its affiliates may not exceed two percent of all toll service revenues, as set forth in that same report.[2] Whether a CLEC qualifies as a "smaller CLEC" will be determined in accordance with these revenue thresholds.

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[1] An EEL is a UNE loop/transport combination with or without multiplexing. Requesting carriers are entitled to obtain EELs under this proposal if they meet the criteria established herein, but only if the ILEC is otherwise required to provide each of the underlying loop, transport, and multiplexing unbundled network element components of the EEL where the EEL is requested. Nothing in this proposal is intended to create any obligation to provide or combine unbundled network elements or services where not required by law.

[2] In the most recent version of *Trends in Telephone Service,* this data is set forth in Table 16.1 *See Trends in Telephone Service,* Industry Analysis and Technology Division Wireline Competition Bureau, May 2002. As set forth therein, total industry local and toll service telecommunications revenues are currently $230.8 billion. Total toll revenues are $109.6 billion.

2. A determination of whether a carrier meets the two revenue thresholds described above will be based on the combined gross revenues of the carrier and its affiliates. As used herein, the term "affiliate" means individuals or entities that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with the carrier. Control means the possession directly or indirectly of the power to direct or cause the direction of the management and policies of a company through whatever means exercised, and may be *de jure* or *de facto*. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control will be determined on a case-by-case basis consistent with Commission precedent. As a superseding principle, it is the intention of the parties that changes in corporate structure shall not be used to circumvent the purposes of the framework proposed herein.

B. Smaller CLEC Criteria for Obtaining EELs

A carrier that qualifies as a smaller CLEC based on the criteria described above would be deemed to satisfy the "significant local services test" within a LATA and would be authorized to obtain EELs in that LATA if it meets each of the criteria set forth in the paragraphs below.

1. The requesting carrier certifies to the FCC and the relevant ILEC that it has obtained authorization to provide local services, and offers local service to end users in the LATA (*i.e.*, has local exchange tariffs, price lists and/or customer contracts for local services).

2. The requesting carrier certifies to the FCC and the relevant ILEC that it has obtained and is occupying physical or virtual collocation in the LATA from the ILEC that will be providing the EEL unless the ILEC has voluntarily established or agreed to establish reverse collocation arrangements at the premises of the requesting carrier within the LATA in lieu of physical or virtual collocation at the ILEC premise.[3]

3. The requesting carrier has obtained sufficient *bona fide* local service interconnection trunks in the LATA to demonstrate that it is using EELs to provide a significant amount of local services within the LATA to its end user customers.

[3] Reverse collocation refers to any ILEC-provided facility installed in premises controlled by a CLEC, or any other ILEC-provided interconnection facility connecting to a CLEC POI, which is used to provide access to unbundled network elements pursuant to section 251(c)(3). Reverse collocation includes physical or virtual collocation at a CLEC end office as well as other mutually agreed upon methods of interconnection for the purposes of accessing unbundled network elements.

(a) A requesting carrier would meet the interconnection trunk requirement if, within the LATA, it has obtained or ordered from the ILEC at least one DS1 local service interconnection trunk for every 24 DS1 EELs or the equivalent it has obtained or ordered from the ILEC. The foregoing ratio is premised on use of current technologies deployed on interconnection trunks. Different ratios or an entirely different approach may be warranted if new technologies are deployed on interconnection trunks. The ILEC and the requesting carrier will negotiate in good faith a new ratio or approach, and the ILEC will continue to provision EELs subject to all other applicable requirements pending a new agreement if new technologies are deployed.

(b) Each local service interconnection trunk relied upon to meet the interconnection trunk requirement must be used to exchange bona fide local traffic with the ILEC's network. If the requesting carrier strips off the calling party number (CPN) on calls exchanged over a local interconnection trunk, that trunk shall not be counted for purposes of the local service interconnection trunk/DS1 EEL ratio in subsection (a) above. An ILEC must assume that local interconnection trunks are bona fide local service interconnection trunks until such time as the Commission, upon complaint or request for enforcement action by the ILEC, finds to the contrary. During any such enforcement action, the Commission may consider, among other things, whether the aggregate local traffic terminating on the ILEC's switch over all of the CLEC's local interconnection trunks in the LATA from which CPN has not been stripped is sufficient to demonstrate that the CLEC is using its EELs in the LATA to provide a significant amount of local traffic, consistent with the purpose of the interconnection trunk ratio required above.

C. Overarching Principles

1. In the situation where the purchaser of an EEL from the ILEC seeks to use the EEL for wholesale purposes[4], the retail carrier (*i.e.,* the customer of the wholesaler) must comply with the small carrier standards or general standards, as applicable to the retail carrier. When purchasing an EEL for wholesale purposes, the wholesale carrier shall notify the ILEC and provide the ILEC the identity of the retail carrier. The retail carrier shall be responsible for providing the ILEC with any certification required by the applicable standards. The EEL will be attributed to the certifying (retail) carrier for purposes of calculating its interconnection trunk/DS1 EEL ratio.

2. A smaller CLEC deemed to meet the "significant local service" requirement under the foregoing criteria would not be subject to audit for compliance with those criteria. In the event an ILEC believes that a smaller CLEC is not complying with the above criteria, it may file a complaint or request for

[4] For purposes of this paragraph, wholesale includes any arrangement in which one carrier procures an EEL on behalf of or for the benefit of another carrier, including traditional wholesale/retail arrangements, as well as joint or cooperative ventures.

enforcement action with the FCC, during which the carrier would be required to produce appropriate documentation that it has complied with the foregoing criteria. While any complaint or enforcement action is pending at the FCC, the ILEC is required to continue to provision EELs, subject to true up if the complaint or enforcement action is granted in favor of the ILEC.