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July 21, 2004

ELECTRONIC FILING

Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Communication CC Docket No. 01-338

Dear Sir or Madam:

On Tuesday, July 20, 2004, Jake Jennings, Vice President Regulatory Affairs and Industry Relations for NuVox Communications, and the undersigned, met with Christopher Libertelli, Legal Advisor to Chairman Powell to discuss interim rules for access to unbundled network elements. We discussed providing continued access to DS1 loops and DS1 EELs at TELRIC rates pending adoption of final rules consistent with the points identified on the attached presentation.

In accordance with Section 1.1206(b) of the FCC's Rules, an original and two copies of this letter are being filed with your office for inclusion in the public record of the above-referenced docket.

Very truly yours,


Michael H. Pryor

MHP/kms

cc: Christopher Libertelli, Sr. Legal Advisor, Chairman Powell Staff
Michelle Carey, Chief, Competition Policy Division
Thomas Navin, Deputy Chief, Competition Policy Division
Austin Schlick, Deputy General Counsel
John Stanley, Assistant General Counsel

DS1 Loop/EEL Carve Out

Freeze rates for DS1 loops and DS1 EELs pending adoption of new UNE rules.

Rates equal those available under interconnection agreements as of the date of *USTA II* Order (March 2, 2004).

FCC Has Authority to Preserve UNE Rates for DS1 Loops and EELs on an Interim Basis.

The Commission has authority under the Communications Act to establish a transitional regime to avoid market disruption (*e.g.*, Sections 201(b), 4(i), 271).

The Commission has often set interim rates pending the resolution of broader rulemakings.

ISP Remand Order 16 FCC Rcd 9151, ¶¶ 77-88 (establishing interim ISP rate regime pending resolution of broader intercarrier compensation issue).

Local Competition Order, 11 FCC Rcd 15499, ¶ 726 (requiring purchasers of unbundled local switching to pay non-cost-based rates for interim period), *aff'd Competitive Telecommunications Association v. FCC* 117 F.3d 1068, 1073-74 (8th Cir. 1997) (noting “substantial deference” accorded by courts to agency “when the issue concerns interim relief”) *quoting MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984).

Supplemental Order Clarification, 15 Fcc Rcd 9587, ¶ 7, 18., (establishing interim restrictions on use of EELs) *aff'd, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002)

See generally, December 19, 2002 SBC Ex Parte in CC Docket 01-338, identifying authority to prescribe interim rates for network elements, December 19, 2002.

The Commission may re-adopt on an interim basis rules previously vacated where, in the Commission’s broad discretion, it determines that continuation of the rules is necessary to prevent market disruption. *Capital Cities v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994) (“The precise timetable on which the Commission executes a major turn in regulatory policy is a matter of judgment and prudence rather than logic and measurement, and it is confided to the discretion of the Commission within broad limits here exceeded”)(reinstating on an interim bases certain regulations the Court previously vacated).

Maintaining DS1 Loop and EEL UNE Rates Pending Final Rules Is in the Public Interest

- The TRO record overwhelmingly demonstrates impairment.
 - “Economically infeasible for competitive LECs to self-deploy DS1 loops” to small business customers. TRO ¶ 325.
 - “Scant evidence” of wholesale alternatives. TRO ¶ 325
 - ILECs recognized DS1 distinction.. TRO ¶ 325 (citing SBC Comments at 101; SBC Reply Comments at 156 (proposing DS1 carve out).
 - Commission recognized “dependency that smaller business customers and their carriers have on DS1 capacity loops.” TRO, n. 961.
- Strong record on impairment makes it unlikely that interim rules requiring continued DS1 UNE rates would result in unbundling where there is no impairment. *See* TRO ¶ 298 (“the record contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops.”)
- Commission also found that availability of DS1 loops mitigated harm due to unavailability of hybrid fiber loops. TRO ¶ 291; *USTA II*, 359 F.3d 554 (D.C. Cir. 2004) (sustaining Commission finding that availability of loop alternatives mitigate negative impact of hybrid fiber rule)(citing TRO ¶ 291).
- Conversely, requiring impaired carries to pay special access rates for new customers will stop or retard growth.
- Impairment findings for DS1 loops are fully applicable to DS1 EELs. CLECs must recover cost of EELs from single small business end user. As with DS1 loops, revenue opportunity from such customers makes it economically infeasible to self-deploy. *Compare* TRO ¶ 371, n. 1133 (noting economic characteristics of transport are different than for loops because, for transport, carrier not dependent on revenue from single customer).
- The Commission found that EELs “facilitate the growth of facilities-based competition” and promote innovation. TRO ¶ 576.

Preserving DS1 UNE rates pending final rules would have minimal economic impact on BOCs, while imposing special access pricing on CLECs will have a significant and detrimental impact on CLECs.

- No significant BOC revenue loss for continuation of DS1 EELs during interim period because EEL restrictions remain in place.
- Requiring carriers to use special access services results in substantial and unwarranted price increases. See NewSouth October 3, 2002 ex parte:

	EEL Rate ^{1/}	2-Year SPA	5-Year SPA
Asheville NC	\$164.58	\$348 .00	\$310.00
Knoxville	\$159.57	\$348.00	\$310.00
Savannah	\$149.43	\$348.00	\$310.00

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^{1/} Assumed 10 mile interoffice channel.