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August 15, 2007

VIA ELECTRONIC FILING (ECFS)

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

Re: WC Docket No. 05-25, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*

RM-10593, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

XO Communications, LLC, Covad Communications Group and NuVox Communications, through counsel, hereby submit for filing with the Commission their reply comments in the above-referenced proceedings. Please feel free to contact the undersigned counsel at (202) 342-8625 if you have any questions, or require further information.

Respectfully submitted,



Brett Heather Freedson

cc (via email): Pamela Arluk
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Federal Communications Commission
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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**REPLY COMMENTS OF XO COMMUNICATIONS, LLC,
COVAD COMMUNICATIONS GROUP, INC. AND NUVOX
COMMUNICATIONS**

**XO COMMUNICATIONS, LLC,
COVAD COMMUNICATIONS GROUP,
INC. AND NUVOX COMMUNICATIONS**

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August 15, 2007

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COVAD COMMUNICATIONS GROUP, INC. AND NUVOX
COMMUNICATIONS**

XO Communications, LLC (“XO”), Covad Communications Group, Inc. (“Covad”), and NuVox Communications (“NuVox”) (collectively “Joint Commenters”) hereby submit these replies to various comments filed in response to the Federal Communications Commission’s (“Commission’s”) Public Notice asking parties to refresh the record in the above-captioned dockets.¹

I. INTRODUCTION AND SUMMARY

Comments filed just one week ago to refresh the record in this proceeding confirm that the Commission must act expeditiously to curb the abuse of market power by incumbent local exchange carriers (“ILECs”) in the markets for special access services. The evidence of market failure is overwhelming. The latest round of comments again demonstrate conclusively that the ILECs’ abuse of their special access market power is highly detrimental both to competition and enterprise customers. The resulting

¹ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Public Notice, FCC 07-123 (July 9, 2007) (“*Public Notice*”).

wealth transfer from consumers and competitors to ILECs is staggering and must be abated.

The initial comments show that one needs to look no further than the ILEC special access rates themselves for proof that market forces have failed to constrain ILEC special access price-setting. It is self evident that prices should decline and margins compress when competition is effective in a declining cost industry. Yet, the initial comments show that precisely the opposite conditions prevail with respect to ILEC special access services -- prices are increasing where pricing flexibility has been granted, and the rates of return are truly soaring. The record also makes clear that the rising special access rates cannot be explained by concomitant increases in the cost of providing special access services. Initial commenters showed conclusively that ILEC special access prices are routinely set far above cost-based unbundled network element (“UNE”) rates, and that the spread is increasing. That is the behavior expected of an unregulated monopolist and not of an effectively competitive market.

The ILECs attempt to explain away their escalating special access prices by claiming that average revenue per unit for special access has declined. But the initial comments effectively put this claim to the lie. Commenters demonstrated that the ILEC metric is riddled with flaws, including that it confuses the notion of revenue versus price, ignores the role of declining costs, and improperly aggregates separate and distinct product markets (*i.e.*, the markets for DS1 channel terminations, DS3 channel terminations, DS1 channel mileage and DS3 channel mileage). The ILECs cannot escape the fact that their current special access prices have yielded truly shocking rates of return.

The response of ILEC commenters is limited to pouting over a Commission-prescribed methodology for computing rates of return they regard as outdated, but the ILECs tellingly offer no alternative measurement methodology. The reason is clear. No matter how you calculate the number, the returns would still far exceed those that could be realized in any reasonably competitive market.

The initial comments made clear that effective competitors to ILEC special access services are yet to appear in most areas of the nation. Indeed, the record demonstrates that special access competition has actually declined due to the absorption by Regional Bell Operating Companies (“RBOCs”) of the two largest potential suppliers of competitive special access -- MCI and the legacy-AT&T. As the merger conditions that at least partially constrain special access pricing by AT&T and Verizon expire in the near future, they can be expected to further hike special access rates as has been done by an unconditioned Qwest.

Finally, the ILECs attempt mightily in their initial comments to prove the existence of special access competitors by flooding the record with press releases, website print-outs, fiber route maps, and questionable tallies of competitors fiber rings and on-net buildings. All of this is just noise. The simple truth is that each of the RBOCs has enormous out-of-region operations, yet none of them were able to show statistically that non-ILEC carriers are bidding effectively for a substantial portion of their out-of-region special access needs.

The Commission's special access pricing flexibility framework was intended to facilitate a drop in special access prices. One need look no further than the actual prices

in the marketplace to assess the success of the experiment. Unfortunately, the record is now clear that the experiment has been a dismal failure -- ILECs are using market power to increase prices for critical bottleneck facilities to the enormous detriment of competitive carriers and enterprise customers alike. The GAO got it right when it determined that the system is broken, and it is past time for the Commission to fix it.

II. THE RECORD DEMONSTRATES UNDENIABLE EVIDENCE OF MARKET FAILURE IN SPECIAL ACCESS MARKETS, TO THE ULTIMATE DETRIMENT OF U.S. CONSUMERS

The Joint Commenters, other CLECs, and other commenters who depend on special access inputs have provided overwhelming and undeniable evidence of market failure in the special access markets. The evidence in the record not only supports a finding of market failure in the special access markets, it compels it.

A. ILEC Prices for Special Access Services Are So Far Above Cost that They Are Unjust and Unreasonable

The Joint Commenters showed in their initial comments that special access rates have increased dramatically since the Commission adopted its pricing flexibility rules.² Numerous commenters report the same finding.³ For example, the ATX Commenters

² *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications* (“Joint Commenters”) at 11.

³ *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of the AdHoc Telecommunications Users Committee* (“AdHoc”) at 11-14; *Comments of ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a Telepacific Communications* (“ATX Commenters”) at 10; *Comments of COMPTEL* (“COMPTEL”) at 7; *Comments of Global Crossing North America, Inc.* (“Global Crossing”) at 3; *Comments of Sprint Nextel Corporation* (“Sprint-Nextel”) at 16-17; *Comments of*

report that since June 2005, Qwest's Phase II pricing flexibility rates for critical last mile DS1 facilities increased by approximately 25% and are 47% higher than the price cap rates that would otherwise apply.⁴ The AdHoc Telecommunications Users group ("AdHoc") provides evidence that Verizon's prices for DS1 circuits (month-to-month, 10-mile circuit) in some locations subject to pricing flexibility are as much as 30% higher than rates allowable under price caps.⁵ While there presently is no price caps/pricing flexibility differential throughout AT&T's region, AT&T has made it clear that this is a temporary condition (a result of the AT&T/BellSouth merger conditions) and that its prices will revert to the previous, higher levels when the condition expires in June 2010.⁶ Most notably, studies of ILEC special access pricing done on behalf of AdHoc found *no* instances of lower prices being charged for generally available services in Phase II MSAs.⁷ As AdHoc notes, these results are fundamentally inconsistent with the outcome of a market with effective competition.⁸

Furthermore, considerable evidence comparing special access rates to rates for comparable UNE facilities demonstrates that the ILECs' special access rates are far above the forward-looking costs to which rates in competitive markets ordinarily are closely tied. In their initial comments, the Joint Commenters provided evidence comparing special access prices to forward-looking cost-based UNE rates for comparable

Time Warner Telecom Inc. and One Communications Corp. ("TWT/One") at 29-31.

⁴ *ATX Commenters* at 10.

⁵ *AdHoc* at Appendix 1 (p.21).

⁶ *AdHoc* at 11.

⁷ *AdHoc* at Appendix 1 (p.22).

⁸ *AdHoc* at 7.

services, and showed that the rates for special access channel terminations and mileage are, with rare exception, significantly higher than for rates for comparable TELRIC-based UNEs.⁹ Other commenters reach the same conclusion.¹⁰ For example, Sprint-Nextel's analysis shows that the prices for ten-mile DS1 special access circuits in AT&T's region are, on the average, 150% higher than the prices for comparable UNE circuits.¹¹ A similar analysis for special access circuits in Verizon's region shows that prices for Verizon's ten-mile DS1 special access circuits are on average 58% higher than Verizon's prices for comparable UNE circuits.¹²

A comparison of ILEC special access rates to rates for comparable Time Warner Telecom ("TWT") and BT Americas Inc. ("BT") facilities further establishes that ILEC special access pricing is above cost. TWT contends that ILEC discounted rates are at least 2-3 times higher than the rates TWT charges for special access services as a competitive wholesale special access service provider.¹³ BT provides extensive data showing that its charges for special access services in the U.K. are materially lower than comparable prices for special access services in the U.S.¹⁴

A comparison of ILEC prices for "short haul" special access services (*i.e.*, services such as channel terminations provided by carriers such as AT&T (SBC region) and legacy Verizon) and "long haul" special access services (*i.e.*, services such as

⁹ *Joint Commenters* at 16-17.

¹⁰ *See ATX Commenters* at 37-38; *COMPTEL* at 7-8; *TWT/One* at 29.

¹¹ *Sprint-Nextel* at 22-23.

¹² *Sprint-Nextel* at 23.

¹³ *TWT/One* at 31-32.

¹⁴ *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of BT Americas Inc. ("BT")* at 16-17 and Attachment A.

intercity transport provided by carriers such as legacy AT&T and MCI) demonstrates further evidence of the ILECs' anti-competitive pricing practices. As TWT/One notes, high prices for short haul services stand in marked contrast to ILEC prices for long haul transmission services, where the ILECs face more competition and their prices are in line with those of competitors (*i.e.*, rates have fallen by more than 90% since 1999). Yet long haul services share many of the same basic technical characteristics as local transmission.¹⁵

B. RBOC Rates of Return for Special Access Services Are Unreasonably High and Harm Businesses and Consumers

Support for the conclusion that RBOC special access prices are supra-competitive is found in the excessive rates of return for special access services earned by them. In their initial comments, the Joint Commenters cited Commission data showing that from 2000 to 2006, AT&T's rate of return for special access services increased from 40% to 100%, Verizon's increased from 15% to 52%, and Qwest's increased from 38% to 132%.¹⁶ Numerous parties cite the same or similar statistics and share the Joint Commenters' view that such rates of return are unreasonably above competitive returns.¹⁷ The ATX Commenters note that even if the Commission's data are off by some percentage, the fact remains that the overall trend in the RBOCs' rates of return since 2000 has been steadily upward.¹⁸

¹⁵ *TWT/One* at 33-34; *see also Global Crossing* at 3-4.

¹⁶ *Joint Commenters* at 12 (based on combined legacy SBC and BellSouth data).

¹⁷ *See, e.g., AdHoc* at 5-6; *ATX Commenters* at 12; *BT* at 16; *COMPTEL* at 8; *Sprint-Nextel* at 8-9.

¹⁸ *ATX Commenters* at 12-13.

It also is clear from the economic analysis AdHoc included in its comments¹⁹ that the impact of these excessive earnings on the U.S. economy has been and continues to be staggering. Per the *ETI Analysis*, if a price reduction sufficient to bring the realized special access rates of return back to the Commission's last-authorized 11.25% level had become effective as of the beginning of 2007, the economy-wide benefit would have been 95,000 additional jobs and \$17.2 billion in additional GDP for 2007 alone. Assuming additional annual rate adjustments are made so as to maintain rates at the 11.25% level between 2007-2009, some 234,000 new jobs would be created through the end of 2009, and the GDP gain for the three years combined would be in the range of \$66 billion.²⁰ As such, it is not surprising that the U.S. Small Business Administration in its comments calls on the Commission to investigate and consider "the impact of the current special access pricing regime on small entities."²¹

C. The SBC/AT&T and Verizon/MCI Merger Conditions Do Not Adequately Address the Problem of Market Failure in the Special Access Market

While the mergers of SBC with legacy-AT&T and Verizon with MCI substantially lessened competition across multiple telecommunications markets, these mergers had a particularly significant impact on the markets for special access services. The SBC/AT&T and Verizon/MCI mergers eliminated the two largest competitors to the

¹⁹ "Special Access Overpricing and the U.S. Economy – How Unchecked RBOC market Power Is Costing U.S. Jobs and Impairing U.S. Competitiveness," Economics and Technology, Inc., provided at *AdHoc*, Appendix 1 ("ETI Analysis").

²⁰ *ETI Analysis* at 15.

²¹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of the Office of Advocacy, U.S. Small Business Administration* ("SBA") at 9.

ILECs – legacy-AT&T and MCI -- in the special access market. In addition, because legacy-AT&T and MCI were the largest purchasers of special access services and could extend their extensive fiber networks to new locations, these competitors exerted pressure on RBOC special access pricing. As such, the absorption of these competitors into AT&T and Verizon has only increased the ability and incentives of these ILECs to charge unreasonable rates for special access services and otherwise engage in anti-competitive behavior in the special access market.²²

The conditions imposed by the Commission on these mergers with respect to special access pricing are not the ultimate solution to the problem of market failure in the special access market. As the Joint Commenters noted in their initial comments, these conditions are limited in time, carrier-specific, and intended to address competitive harms arising from the mergers rather than from the more fundamental problem of the existence and abuse of market power in the special access market.²³ Record evidence that Verizon's and AT&T's pricing of special access services subject to the merger conditions has stabilized and that Verizon and AT&T pricing for special access services not subject to the merger conditions (*i.e.*, intrastate special access services) have increased lends credence to the fact that the merger conditions are insufficient to address the broader problem.²⁴ Numerous commenters agree with the Joint Commenters that the merger conditions are no solution to the problems with ILEC special access offerings.²⁵

²² See *Joint Commenters* at 3, 35-41; *ATX Commenters* at 18; *BT* at 19; *Sprint-Nextel* at 36-38; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of T-Mobile USA, Inc.* (“T-Mobile”) at 3-4.

²³ *Joint Commenters* at 20-21.

²⁴ *Joint Commenters* at 38-39; see *BT* at 19 (merger conditions have established special access price floor); also see *Special Access Rates for Price Cap Local*

D. Today There Are Still Few Competitive Alternatives to ILEC Special Access Services and Self-Supply Remains Uneconomic

It is clear from the comments filed by CLECs and other purchasers of ILEC special access facilities that the parties who purchase ILEC special access services rely almost exclusively on them for last-mile facilities.²⁶ For example, PAETEC notes that it is dependent on the ILECs for 98% of its special access lines in markets where Phase II pricing flexibility has been implemented.²⁷ Sprint-Nextel states that in 2006, it relied on ILEC special access services for 96.4% of all DS1 and DS3 customer terminating circuits in the top 50 MSAs for both its wireline and wireless businesses.²⁸ The commenters who rely on ILEC special access services are unanimous in the reasons for their dependence on the ILECs: suitable facilities-based alternatives simply are not available.²⁹ As COMPTTEL aptly states, “if purchasers truly had a choice, why would they pay the excessive special access rates offered by the Bells?”³⁰

Exchange Carriers, WC Docket No. 05-25 *Comments of Global Crossing North America, Inc., Declaration of Janet Fischer On Behalf of Global Crossing North America, Inc.* at 10-11 (filed August 8, 2007) (“*Fischer Decl.*”). (AT&T has largely offset any savings from merger freeze on special access rates through increases in rates for related services).

²⁵ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of PAETEC Communications, Inc. and US LEC Corp.* (“*PAETEC*”) at 14; *Sprint-Nextel* at 37-38; *T-Mobile USA* at 3-4; *TWT/One* at 42; *AdHoc* at 18; *Global Crossing* at 10-11.

²⁶ See, e.g., *ATX Commenters* at 25; *Global Crossing* at 2; *T-Mobile* at 6-7.

²⁷ *PAETEC* at 5.

²⁸ *Sprint-Nextel* at 30.

²⁹ See *AdHoc* at 9, 19; *ATX Commenters* at 25; *BT* at 6; *PAETEC* at 10-12; *Sprint-Nextel* at 31-32; *T-Mobile* at 7; *TWT/One* at 2, 11-17.

³⁰ *COMPTTEL* at 9.

As the Joint Commenters discussed in their initial comments, there are multiple reasons for this scarcity of alternatives.³¹ First, it is typically uneconomic for CLECs to build their own high-capacity facilities to their customers.³² There are inherent barriers to building and deploying fiber or copper special access facilities quickly and cheaply, including but not limited to the costs of trenching and the need to obtain conduit space, rights of way, and access to buildings. It is extremely difficult, and in most cases, impossible for a CLEC to accumulate enough demand to overcome these large sunk costs. Second, there often is little economic or operational benefit to interconnecting with the few competitive access providers (“CAPs”) that do exist. As the comments of TWT/One confirm, CAPs themselves rely heavily on ILEC special access facilities in providing their services.³³ As such, interconnecting with CAP facilities yields no significant cost savings and no end-to-end facility control.

Finally, neither wireless nor cable services today provides the degree of “ubiquity, reliability, and security” that users of special access services require.³⁴ Wireless broadband is not yet widely available as a special access substitute. Cable facilities do not offer sufficient bandwidth to serve large numbers of business customers that require telecommunications service and Internet access at DS1 and higher speeds. Also, there is

³¹ *Joint Commenters* at 22-25.

³² *See also ATX Commenters* at 25; *PAETEC* at 11; *TWT/One* at 13 (it is almost never possible for One to self-deploy loop facilities).

³³ *See TWT/One* at 2, 11 (TWT deploys its own loops more aggressively and extensively than any other competitor, but it relies on ILECs to connect to the vast majority of its customer locations).

³⁴ *BT* at 8; *see also PAETEC* at 12, 16.

limited deployment of cable infrastructure in business areas, and cable-based services and technologies raise severe security and reliability concerns.³⁵

E. Onerous and Exclusionary Conditions in ILEC Tariffs and Contracts for Special Access Services Have Multiple Pernicious Effects on the Market

Many of the terms and conditions of ILEC price-flexibility tariffs and contracts are onerous and exclusionary. For example, the Commission should prohibit ILECs from including the following anti-competitive and exclusionary terms:

- Volume purchase commitments that are much higher than any CLEC could reasonably expect to achieve,³⁶ that have one-way ratchets, and that include annual growth components with unrealistic growth rates for purchases of telecommunications service in general or special access services in particular.³⁷ These commitments prevent competitors from making rational business decisions to migrate circuits off of special access plans, and penalties related to the failure to meet or maintain such volume commitment hurdles are entirely punitive.
- Restrictions on satisfying volume commitments with services purchased from different operating companies of the ILEC (*e.g.*, Pacific Telesis Group and Ameritech for AT&T),³⁸ or on substituting one circuit for another to meet volume commitments.³⁹ These restrictions make it more difficult for competitors to satisfy their volume commitments and increase the likelihood of early termination penalties if circuits are disconnected before the end of the committed term.
- Term commitments with termination penalties that require the purchaser to pay the full contract amount or a large percentage of it even though the purchaser has terminated service.⁴⁰ These commitments do not reflect business realities and prevent competitors from managing their networks in an efficient and agile manner. Coupled with the difficulty or inability to

³⁵ *AdHoc* at 7; see *ATX Commenters* at 3, *BT* at 9, *TWT/One* at 14-16.

³⁶ *Joint Commenters* at 27; *BT* at 10-11; *COMPTEL* at 11; *Global Crossing* at 8-9; *PAETEC* at 12-13; *Sprint-Nextel* at 26; *TWT/One* at 36, 38-40.

³⁷ *Joint Commenters* at 27; *BT* at 10-11; *Sprint-Nextel* at 26-27; *TWT/One* at 36, 40.

³⁸ *Joint Commenters* at 28.

³⁹ *Joint Commenters* at 28.

⁴⁰ *Joint Commenters* at 28-30; *COMPTEL* at 11; *Sprint-Nextel* at 26, 28.

“port” circuits among customers in many areas, such term commitments are an unreasonable and anti-competitive aspect of special access agreements.

- Requirements that the purchaser’s UNEs be converted to special access to qualify for discounts.⁴¹ These requirements force competitors to forgo their rights to purchase UNEs at lower cost-based rates and instead rely almost entirely on higher-priced and virtually unregulated special access. There is no cost justification for these requirements.
- Requirements that a percentage of the services be switched over from a non-ILEC provider.⁴² These requirements undermine a competitor’s ability to offer discounts to customers for a particular service by forcing the competitor to give up discounts it had obtained on other services and discourage the deployment of competitive special access facilities.
- Restrictions on the purchaser’s ability to dispute charges or prevent any disputed charges from counting toward minimum commitments even if the competitor later pays the charges.⁴³ These restrictions drive up a competitor’s costs and are clearly punitive.
- Restrictions on the purchaser’s right to participate in regulatory proceedings that challenge the ILEC’s special access rates.⁴⁴ This requirement bears no rational relationship to the provision of service and is simply intended to stifle dissent and preserve above-cost pricing. The fact that the ILECs have the audacity to include this provision in their contracts speaks volumes about the ILECs’ market power.

These terms and conditions perpetuate ILEC market power and retard the growth of facilities-based competition.⁴⁵ As many commenters recognize, unreasonable volume commitments and term commitments with onerous penalties for early termination increase wholesale costs for ILEC competitors. They discourage and prevent competitors from seeking out competitive alternatives or self-provisioning because doing so means

⁴¹ *Joint Commenters* at 31-32; *COMPTTEL* at 12; *TWT/One* at 36, 38.

⁴² *Joint Commenters* at 30; *TWT/One* at 36; *Sprint-Nextel* at 28.

⁴³ *Joint Commenters* at 34.

⁴⁴ *Joint Commenters* at 34.

⁴⁵ *Joint Commenters* at 26-34.

incurring the significant financial penalties associated with terminating a contract early or missing volume commitments.⁴⁶ Potential customers for competitive service offerings are also locked-in to the ILECs as a result of these provisions.⁴⁷ CLEC customers are discouraged from purchasing services from competitive service providers because of the financial ramifications of failing to satisfy the volume or term provisions in their agreements with the ILECs. As the *ETI Analysis* makes clear, the downstream impact of these anti-competitive terms and conditions on businesses of all sizes and consumers is enormous: they have cost the U.S. economy billions of dollars annually, have resulted in a loss of hundreds of thousands of jobs, and represent an even larger drag on the economy going forward.⁴⁸

III. THE ILECS FAIL TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT CONTINUATION OF THE CURRENT PRICE-FLEX REGIME

It is both ironic and telling that the ILECs have chosen to withhold some of the most useful data that could have been supplied to the Commission in this docket. They supply no cost, pricing or rate of return data – all crucial factors bearing on the extent of the ILEC’s market power. Accordingly, the Commission is entitled to infer that such data would discredit their claims that the Commission’s pricing flexibility (“PRICE-FLEX”) regulations are working exactly as intended.⁴⁹

⁴⁶ *Joint Commenters* at 30, 32; *COMPTTEL* at 11; *Sprint-Nextel* at 28-29; *T-Mobile* at 12-13; *TWT/One* at 36-37.

⁴⁷ *Joint Commenters* at 30; *PAETEC* at 13; *TWT/One* at 39, 41.

⁴⁸ *ETI Analysis* at 10-13.

⁴⁹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Supplemental Comments of AT&T Inc.* (“*AT&T*”) at n. 118.

Instead of providing useful data, the ILECs focus on an average revenue per unit metric that has been discredited even by their own expert. They attempt to conflate separate special access markets into one, so as to mask the absence of competitive alternatives for channel terminations in particular. They grossly overstate the availability of competitive alternatives and the utility of self-provisioning.⁵⁰ Finally, they fail to produce for the Commission very relevant information about their local private line purchases outside their territories. From all of these lapses, the Commission can only conclude that the ILECs have failed to meet their burden of producing sufficient information to support the retention of the current regulatory scheme.

A. Channel Terminations and Channel Mileage Are Separate Product Markets

The RBOCs comments continue to improperly define the special access product market as a combination of all circuits without distinction between channel terminations and channel mileage circuits.⁵¹ Rather, channel terminations and channel mileage circuits are two, very separate markets. This is the case both from the viewpoint of customers and suppliers. Sprint-Nextel in its comments sets forth the customer's perspective:

A CT is required to provide a circuit from a customer's premise (e.g., a Sprint Nextel cell site) to the serving wire center. CM service is required to extend that circuit from the serving wire center to a more distant wire center or central office, from which it can then be connected to a

⁵⁰ The Joint Commenters also wish to correct the record regarding the competitive facilities they provide and use. Verizon's is inaccurate in claiming that Covad has lit buildings in each of the New York-New Jersey-Long Island, Philadelphia-Camden-Wilmington, and Washington-Arlington-Alexandria MSAs. (See Attached *Reply Declaration of Michael Clancy of Covad Communications* at ¶ 8 ("Clancy Reply Decl.")).

⁵¹ See, e.g., *AT&T* at n. 79.

customer's point of interconnection...For the customer, CTs and CMs are not substitutes. A small increase in the price of CMs by a hypothetical monopolist will not lead customers to increase their purchases of CTs so as to render that price unprofitable. Similarly, a small increase in the price of CTs will not lead customers to increase their purchases of CMs. This is so because CTs connecting cell sites to serving wire centers cannot substitute for CMs connecting BOC central offices, and vice versa. CT and CM services are therefore distinct product markets.⁵²

In the *Pricing Flexibility Order*, the Commission reached the very same conclusion from the perspective of suppliers:

We find that channel terminations between a LEC end office and a customer premises warrant different treatment than other special access and dedicated transport services...Entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport all involve carrying traffic from one point of concentration to another. Thus, entering the market for these services requires less investment per unit of traffic that is required, for example, for channel terminations between an end office and customer premises.⁵³

CLECs also produced evidence in their comments that carriers commonly purchase channel terminations separately. Numerous CLEC declarations submitted in this docket consistently state that it is uneconomic and often times infeasible to build the last mile connections at the DS0, DS1, or DS3 capacity level to individual premises.⁵⁴ By using

⁵² See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Sprint-Nextel, Declaration of Bridger M. Mitchell* at ¶ 14 (filed August 8, 2007) (“*Bridger Decl*”).

⁵³ *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶¶ 77-83 (1999) (“*Pricing Flexibility Order*”), *aff'd WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). This viewpoint is further supported in AT&T's Comments (n. 99) when it refers to interoffice transport having scale economies while channel terminations have “no significant economies of scale associated with” it.

⁵⁴ See *Bridger Decl.* at ¶¶ 22-23; see also *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a*

their collocation facilities, these CLECs can choose to purchase only channel terminations. For instance, a substantial majority of Covad's purchases of special access circuits from Qwest and Verizon are channel terminations without corresponding transport,⁵⁵ and XO "often purchases stand-alone channel terminations...[and] does so in almost every instance because UNE loops are no longer available."⁵⁶ Thus, because there are separate markets for channel terminations and channel mileage, the Commission in determining the state of competition in the market for special access services will need to analyze each separately.

B. RBOCs Continue to Mislead the Commission by Employing a Flawed Metric to Demonstrate a Putative Lack of Market Power

Verizon, AT&T and Qwest continue to insist that the Commission should base its decision to modify its existing special access regulations on the dubious proxy metric of average revenue per special access circuit. They argue that a decrease in average special access revenues per unit is indicative of a competitive marketplace.⁵⁷ For numerous reasons, this proxy is an inappropriate measure.

First, as has been pointed out to the Commission in previous filings:

The limitations of measures similar to the Average Revenue per Special Access Line are well-known. Indeed, in his published work on the long-distance market, Dr. Taylor [Verizon's Declarant in its Comments] pointed out several flaws with a related measure of price – the Average

Telepacific Communications Declaration of Don Eben at 2 (filed August 8, 2007); *Declaration of Kevin J. Albaugh* at 2,3 (filed August 8, 2007); *Declaration of Steven H. Brownworth* at 2 (filed August 8, 2007).

⁵⁵ *Clancy Reply Decl.* at ¶ 7.

⁵⁶ Attached *Reply Declaration of Ajay Govil on behalf of XO Communications, LLC* at ¶ 7 ("*Govil Reply Decl.*").

⁵⁷ See *AT&T* at 21-23; see also *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Verizon* ("*Verizon*") at 10-13; *Comments of Qwest* ("*Qwest*") at 44-47.

Revenue per Minute (ARPM) for long distance calls. Dr. Taylor constructs a simple example with two products in which “ARPM declines despite the fact both of the component usage prices have increased.” Dr. Taylor constructs other simple examples to illustrate deficiencies of average revenues as measures of prices, and points out that “while AT&T reporter ARPM has declined, competition has not brought benefits of lower prices to low-volume users.”⁵⁸

The RBOCs are misleading the Commission not only by their reliance on this flawed proxy but also by how they conflate and misuse the terms “price” and “revenue.” Qwest, for instance, refers to the GAO Report and claims that “the average price for DS1 channel terminations” has decreased.⁵⁹ But, the GAO’s chart –Table 9 – is entitled “Summary Statistics of Average Revenue for Channel Termination.”⁶⁰ There is no mention of price in the GAO’s Table. AT&T, too, would have the Commission believe it is presenting price data by setting forth “average price per unit” claims in its comments.⁶¹ However, AT&T’s own declarant makes no mention of price and uses the

⁵⁸ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Reply Comments of CompTel, Global Crossing North America, Inc. and NuVox Communications, Reply Declaration of Joseph Farrell On Behalf of CompTel* at ¶ 38 (filed July 29, 2005) (“*Farrell Decl.*”) In his Declaration for Verizon, Dr. Taylor (*Special Access Rates for Price Cap Local Exchange Carriers, Comments of Verizon, Supplemental Declaration of William E. Taylor On Behalf of Verizon* at n.5) seeks to justify the use of average revenue unit as a surrogate for price by referring to the shift by customers to “lower-priced contract services.” However, this one sentence claim is insufficient to rebut his own prior claims and the evidence provided by Farrell and others in this docket; see also *Ex Parte* of CompTel/Ascent, November 23, 2004, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, (2005) (“*Triennial Review Remand Order*”), *aff’d*, *Covad Communications Co. v. FCC*, 450 F3d 528 (DC Cir 2006).

⁵⁹ *Qwest* at 45.

⁶⁰ See *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, GAO-07-80 at 65 (Nov. 2006) (“*GAO Report*”).

⁶¹ *AT&T* at 22.

“average revenue per unit” metric in his declaration.⁶² Verizon also refers to prices paid for special access services, but these too are “average revenue per unit” statistics.⁶³

Particularly as used by the RBOCs, the “average revenue per unit” statistic is subject to additional, grave problems – beyond those stated by Dr. Taylor – which make that proxy metric unreliable. For example, the RBOCs’ statistic improperly lumps two product markets (with two different price offerings) – channel terminations and channel mileage – together. It aggregates prices in “pricing flexibility” and “price cap” MSAs, masking the effect in each. It provides no evidence of how the mileage-sensitive component has changed on a mileage-constant basis.

Even assuming the metric has some value as an indicator of price, it cannot be used to determine the extent of market power (whether the ILECs prices are supra-competitive) because it has no reference to cost, an especially crucial factor in a declining cost industry:

Even a monopoly will reduce price if marginal costs fall or if demand becomes inelastic. In addition a firm with decreasing, but still very substantial market power will reduce prices for that reason. While there are pitfalls in using price-cost data to make inferences about the state of competition, it is clear that in any such endeavor it logically is the *relative levels* of price and cost, not the *rate of change* of price, that matter. Moreover, the Commission is concerned about whether prices are just and reasonable.⁶⁴

⁶² See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Supplemental Comments of AT&T Inc., Supplemental Declaration of Parley C. Casto* at ¶¶ 56-57 (filed August 8, 2005) (“*Casto Supp. Decl.*”).

⁶³ *Verizon* at 12; *Taylor Decl.* at ¶ 7.

⁶⁴ *Farrell Decl.* at ¶¶ 41-42.

Dr. Taylor, in fact, has recognized the problems with analyzing pricing trends without reference to costs.⁶⁵ Yet, neither Dr. Taylor nor any of the other RBOC commenters chooses to make the proper analysis. In contrast, the Joint Commenters and others produce extensive evidence of the relationship between special access prices for a variety of offerings and cost-based rates (as seen in rates for UNEs).⁶⁶ This evidence demonstrates the ILECs have substantial market power in the provision of special access services, which urgently needs to be brought under control so businesses and consumers are not further harmed.

C. The RBOCs Provide No Meaningful Evidence to Support their Claims of Special Access Competition

In its Public Notice, the Commission specifically asked for information on such issues as the price and cost of special access services and the effect of the major RBOC mergers of the past two years on “the availability of competitive special access facilities.”⁶⁷ As stated in the previous section, the Joint Commenters and other competitors and users produced a wealth of information on these and other issues. In contrast, the RBOCs evaded the issues and produced inapt and insufficient information, seeking to sway the Commission with mere anecdotes and outdated and insufficient fiber maps the Commission has already found to have shortcomings. It is no wonder that the RBOCs in the end rest their case in this proceeding on the claim that the Commission does not have the authority or capability to re-regulate special access services.

⁶⁵ *Id.* at ¶ 44.

⁶⁶ *See Joint Commenters* at 16-20.

⁶⁷ *Public Notice* at 2.

1. The RBOCs Present No Evidence that the Substantial Competitive Presence of Legacy AT&T and MCI Has Been Replaced

Despite the claims of AT&T and Verizon,⁶⁸ their recent mergers were a major reversal to the development of facilities-based competition, harming significantly the development of facilities-based competitive alternatives to their special access services. Prior to the SBC/ATT and Verizon/MCI mergers, legacy-AT&T and MCI each held special access market shares that were at or near 10% of the market.⁶⁹ Indeed, numerous commenters noted that legacy AT&T and MCI were the largest source of alternative special access circuits, as well as the largest purchasers of special access services from the ILECs.⁷⁰ It took AT&T and MCI over a decade to build their local networks and become the two largest competitors to the RBOCs; yet, the RBOCs now want the Commission to believe that other competitors have in two short years replaced the market presence of the two largest competitors. The RBOCs, of course, do not provide any hard evidence to reach this unbelievable conclusion. Instead, they provide high-level, anecdotal information gleaned from websites and selected excerpts from a single consulting report.⁷¹

The only useful and reliable evidence in the comments about post-merger competition is presented by competitors, and it demonstrates that there are fewer options

⁶⁸ *AT&T* at 45-46; *Verizon* at 2, 12, 39.

⁶⁹ *See Ex Parte* Letter from Thomas W. Cohen, Kelley, Drye & Warren, LLP, Counsel for XO Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-65 and 05-75 (filed Sept. 21, 2005) (Enclosing Wholesale Communications Strategies, The Yankee Group, Prepared for XO Communications, January, 2004).

⁷⁰ *See ATX Commenters* at 17; *PAETEC* at 3; *TWT/One* at 10-11.

⁷¹ *See Casto Decl.* at ¶¶ 14-18.

available to competitive providers than in the pre-merger market. For instance, Sprint-Nextel points out that prior to the mergers, 12% of the DS1 circuits and 26% of the DS3 circuits Sprint-Nextel purchased for its wireline business were obtained from the CLECs.⁷² In contrast, by 2006 Sprint-Nextel relied on ILEC's special access services for all but 3.6% of its DS1 and DS3 customer terminating circuits in the top 50 MSAs.⁷³ Similarly, despite its best efforts, today TWT can only purchase a limited number of loops at DS1 levels or above from competitive providers, and the rest must be purchased, at exorbitantly high rates, from the ILECs.⁷⁴ Finally, in their initial comments the Joint Commenters cited to record evidence in the Tunney Act review of these mergers that, as a result of the mergers, "unreasonable price increases for special access services occurred."⁷⁵

2. The RBOCs Continue to Misperceive Reliance on Fiber Maps

Each of the RBOCs bases much of its case about competition on the fiber maps provided by GeoTel.⁷⁶ From these maps, AT&T concludes that "the fiber networks deployed by CLECs continue to blanket the areas that comprise the vast majority of AT&T's special access demand."⁷⁷ Once again, there are so many flaws in the fiber map data presented by the RBOCs, especially as it pertains to loop plant, that the Commission has no choice but to greatly discount it and ignore AT&T's baseless conclusion. First, the fiber maps of GeoTel only indicate whether a fiber runs down the middle of the street

⁷² *Id.*

⁷³ *Sprint-Nextel* at 4.

⁷⁴ *TWT/One* at 11.

⁷⁵ *Joint Commenters* at 38.

⁷⁶ *See Verizon* at 16; *Casto Decl.* at ¶ 20; *Qwest* at 25-27.

⁷⁷ *Casto Decl.* at ¶ 12.

and not whether the fiber enters a building. AT&T seeks to dismiss this flaw, alleging that is not difficult to serve buildings with 1000 feet of known CLEC facilities,⁷⁸ but the Joint Commenters have already countered this argument by providing detailed evidence that the “construction of laterals to connect offices buildings...is extremely difficult, time consuming and costly, even when...[they] are located in close proximity to our MF Rings.”⁷⁹ It is because of the difficulty that competitors do not build laterals unless demand at a location exceeds 3 DS-3s of capacity.⁸⁰ This means that locations with less demand will not have facilities-based alternatives even if fiber runs nearby.

Second, even if fiber runs near a location, there is no evidence that the entity controlling the fiber is the entity seeking to provide service to a customer. There also is no evidence that the entity controlling the fiber is willing to wholesale the capacity or has sufficient capacity to wholesale. Finally, the GeoTel maps do not distinguish between transport fiber, which seeks to connect major network facilities, or access fiber, from which laterals can be constructed. When taken together, these problems are so substantial that the fiber maps cannot serve as reliable evidence to indicate the competitive presence of facilities-based providers. This conclusion is already shared by

⁷⁸ *AT&T* at 11 and *Casto Decl.* at n.3.

⁷⁹ *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, Declaration of Ajay Govil on Behalf of XO Communications, LLC* at ¶ 16 (filed August 8, 2007) (“*Govil Decl.*”). The information in this Declaration responds directly to the Commission’s request about providing detailed data on the customer demand a supplier needs to construct new facilities and counters the AT&T claim in its comments (at 50) that competitors have refused to provide this information.

⁸⁰ *Id.* at ¶ 19.

the Commission when it found that “the value of these maps” are “undermined by several shortcomings.”⁸¹

3. Cable and Fixed Wireless Networks Are Not Yet Adequate Substitutes for ILEC Special Access Services

The ILECs Comments contain a litany of anecdotes and contentions about the supply of local private line services by cable providers and fixed wireless network providers.⁸² The Joint Commenters have submitted evidence that these providers do not yet have sufficient market presence to supply even a small percentage of services as replacement circuits for the ILECs’ special access offerings.⁸³ This is confirmed in the declarations attached to these comments:

- Because cable’s “coaxial systems use different forms of modulation not compatible with our equipment types...XO uses no loop facilities provided over cable infrastructure.”⁸⁴
- “XO currently is unable to rely on wholesale wireless loop alternatives to replace incumbent LEC wireline DS1 and DS3 facilities.”⁸⁵
- “NuVox...uses no loop facilities provided over cable company infrastructure...[because they] are not optimized for the delivery of DS1 and DS3 services due to the limitations imposed on upstream bandwidths in most systems.”⁸⁶

⁸¹ *Triennial Review Remand Order* at n. 445.

⁸² See, e.g., *AT&T* at 14; *Verizon* at 29; *Qwest* at 29-39.

⁸³ See *Govil Decl.* at 11-12; see also *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, Declaration of Michael Clancy On Behalf of Covad Communications Group* at 4-6 (filed August 8, 2007) (“*Clancy Decl.*”); *Declaration of Keith Coker On Behalf of NuVox Communications* at 2-3 (filed August 8, 2007) (“*Coker Decl.*”).

⁸⁴ *Govil Reply Decl.* at ¶ 6.

⁸⁵ *Id.* at ¶ 4.

⁸⁶ Attached *Reply Declaration of Keith Coker on behalf of NuVox Communications* at ¶ 6 (“*Coker Reply Decl.*”).

- “NuVox...does not use competitive wireless loop facilities as it has not found them to be viable...the spectrum allocated by wholesale providers is not adequate to handle the aggregate volume of a competitive provider’s needs.”⁸⁷
- “Covad...uses no loop facilities provided over cable company infrastructure, and is not aware of any cable facilities that are available to meet our customers capacity and quality of service requirements”⁸⁸

In the instance of fixed wireless services, the Joint Commenters noted that some of them supply such services but the implementation of this alternative has been extremely difficult and not nearly as widespread as the ILECs would lead the Commission to believe.⁸⁹ Thus, while the Joint Commenters do not disagree with AT&T’s factual statement about the wireless backhaul links provided by FiberTower,⁹⁰ this example has no real meaning unless it is viewed in the context of the total market. FiberTower currently serves less than 1% of all backhaul sites, and it has taken it five years to reach this level.⁹¹ Moreover, all alternative fixed wireless backhaul providers have captured only about 6% of the total revenues of the wireless backhaul market.⁹²

Finally, the Joint Commenters note that one of the ILECs that cites Nextlink Wireless as an alternative provider of special access circuits, justifying maintaining the current broken special access regime, is the same ILEC that has blocked XO’s efforts to obtain key elements necessary to make a wireless access solution work – microwave entrance facilities and access to roofs.⁹³

⁸⁷ *Id.* at ¶ 5.

⁸⁸ *Clancy Reply Decl.* at ¶ 6.

⁸⁹ *See, e.g., Govil Decl.* at ¶ 14.

⁹⁰ *AT&T* at 16-17.

⁹¹ *Second Govil Decl.* at ¶ 5.

⁹² *Id.*

⁹³ *Id.* at ¶ 4.

Thus, because these alternative competitive facilities currently lack the ubiquity or scale of the ILEC special access services and the level of interconnection enjoyed by the ILECs, there is no way the Commission can draw the conclusion that they provide an adequate market check on the provision special access services by the ILECs.

4. The RBOCs Control Key Data Which They Have Not Produced

While the RBOCs try to place the onus of information production on competitors,⁹⁴ the fact is that the RBOCs control perhaps the largest amount of critical information about special access competition in markets outside of their local operating territory and have yet to provide it other than in an occasional anecdote. As an example, AT&T has both wireline and wireless affiliates that operate out-of-territory.⁹⁵ The wireline affiliate is associated with the legacy-AT&T's long distance entity, which was the largest procurer of special access circuits prior to its merger. Legacy-AT&T also had extensive local facilities, many of which were used to supply local private lines to other entities. AT&T Mobility is the largest wireless company in the United States, and it requires an extensive local network in each of its out-of-region markets. In its comments, AT&T makes much of the fact that it has procured local private lines from alternative vendors and provides an example.⁹⁶ But, nowhere in its comments does AT&T provide systematic evidence of the special access circuits it procures and supplies out-of-territory. Neither does Verizon, which has very extensive out-of-territory operations through

⁹⁴ See, e.g., *AT&T* at 25, 51.

⁹⁵ See AT&T Inc., Annual 10-K Report, at 1-7 (Feb.26, 2007).

⁹⁶ *AT&T* at 16.

Verizon Wireless and the legacy-MCI⁹⁷ – nor does Qwest which also operates throughout the United States⁹⁸ and which submitted to the Commission evidence about onerous special access practices of AT&T in its comments in the SBC/AT&T merger proceeding.⁹⁹

In sum, in the case of AT&T and Verizon, their out-of-territory operations far surpass that of any CLEC, and Qwest is a major operator as well. Because of their substantial market presence, they control key evidence, which would have an important bearing on this proceeding. AT&T notes that “[w]hen a party has relevant evidence within its control that it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party.”¹⁰⁰ The Commission should treat the failure of the RBOCs to produce such evidence accordingly.

IV. THE COMMISSION IS OBLIGATED TO CURB SPECIAL ACCESS MARKET POWER ABUSES

The comments submitted to refresh the record in this proceeding overwhelmingly demonstrate that the current framework for regulation of special access services has failed to ensure that pricing of those services is just and reasonable. Given substantial proof that market competition has not developed adequately to discipline current pricing of, and terms and conditions applicable to special access services under the

⁹⁷ See Verizon Communications Inc., Annual 10-K Report, at 1-10 (March 1, 2007).

⁹⁸ See Qwest Communications International Inc., Annual 10-K Report, at 1-11 (Feb. 8, 2007).

⁹⁹ *Joint Commenters* at 39-40.

¹⁰⁰ *AT&T* at n.118.

Commission's PRICE-FLEX rules,¹⁰¹ the Joint Commenters have proposed two-pronged relief.

- First, the Commission should eliminate Phase II pricing flexibility, reinstate an effective system of price cap regulation, and reinitialize price cap rates at just and reasonable levels.¹⁰²
- Second, the Commission should ban the now pervasive anti-competitive and exclusionary pricing practices of many ILECs, including but not limited to “percent-spend,” “convert from UNE,” “convert from competitor,” and “percent-growth” commitments, in addition to volume and term commitments, with discounts that bear no relation to efficiencies realized, and that are tethered to excessive termination penalties.¹⁰³

Each of the remedies proposed by the Joint Commenters was endorsed by other parties to this proceeding¹⁰⁴ and is justified by the facts now before the Commission.

The Commission can and should take immediate action to address the adverse effects of market failure in the special access markets.¹⁰⁵ The Commission is required to

¹⁰¹ See *supra* Section I.

¹⁰² For purposes of reinitializing price cap rates, the Joint Commenters have proposed an X-Factor of 5.3%. *Joint Commenters* at 45. Other commenters have proposed re-initialization using a higher X-Factor or establishing special access rates at UNE levels. See, e.g. *TWT/One* at 45 (proposing that the Commission utilize an X-Factor of 6.5%); *ATX Commenters* at 42, 44. These too are reasonable proposals.

¹⁰³ *Joint Commenters* at 44.

¹⁰⁴ See *AdHoc* at 21; *ATX Commenters* at 39, 44, 51-52; *Sprint-Nextel* at 39-40; *T-Mobile* at 14. In addition to those remedies, the Joint Commenters also support the following remedies proposed by Time Warner Telecom and One Communications: (1) the Commission should eliminate the existing triggers for Phase I pricing flexibility, immediately initiate a proceeding to determine under what circumstances the ILECs may be permitted to enter into volume and term contracts for special access services, and for the present, permit Phase I pricing flexibility only within MSAs where such pricing flexibility already exists, subject to proposed limitations on exclusionary pricing practices; and (2) the Commission should mandate that the ILECs reduce their prices for Ethernet cross-connects by 50%, as of January 1, 2008, and Ethernet end user circuits to equal their lowest retail prices anywhere in the RBOCs' territory. *TWT/One* at 43-44, 46.

¹⁰⁵ *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313; Second Report and Order, FCC 90-314, 5 FCC Rcd 6786, ¶ 401 (1990) (“*ILEC Price Cap Order*”); *Policy and Rules Concerning Rates for*

establish regulations that ensure just and reasonable pricing of special access services.¹⁰⁶

To the extent it bases pricing regulations on predictive judgments and those regulations fail to yield special access prices within the zone of reasonableness, the Commission can and must revisit its failed pricing framework.¹⁰⁷

The Commission should not be deterred from fulfilling this clear obligation simply because the RBOCs (in particular, AT&T) threaten litigation or second-guess the competence of the Commission to establish special access pricing regulations that will withstand judicial appeal.¹⁰⁸ The Commission has engaged in difficult and complex proceedings in the past to establish and implement price cap regulations.¹⁰⁹ It is thus fully capable of doing so again in the context of special access services. As demonstrated

Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, ¶ 882 (1989) (“*AT&T Price Cap Order*”) (“We reaffirm our conclusion contained in the Further Notice of Proposed Rulemaking that...the substantive mandate under which we operate requires only that we select a ratemaking approach that is capable of keeping rates in the zone of reasonableness, or of detecting and correcting for the failure of market forces to do so”).

¹⁰⁶ See *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking of AT&T Corp. at 33-34 (Oct. 15, 2002) (“*Legacy-AT&T Petition*”); see also 47 U.S.C. § 201(b); see also, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶ 134 (2000) (“It is well established that the Commission has broad authority to regulate the practices of LECs in connection with their provision of interstate communications services. In addition to the general authority specified in Title I of the Communications Act, Title II provides a specific, substantive framework for the Commission’s regulation of such practices.”).

¹⁰⁷ See *SWBT v. FCC*, 153 F.3d 523, 547 (8th Cir. 1998); *CELLNET v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *AFL-CIO v. Brock*, 835 F.2d 912, 916-17 (D.C. Cir. 1987).

¹⁰⁸ See, e.g., *AT&T* at 30-31, 32, 33, 34, 40, 42, 43.

¹⁰⁹ *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 257-59 (1990) (“*LEC Price Cap Order*”), *aff’d Nat’l Rural Telecom Ass’n b. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

herein and in other comments, the Commission's efforts would yield tremendous public interest benefits.

The Commission also should reject proposals by the RBOCs for further deregulation of special access services, through expanding the scope of both Phase I and Phase II PRICE-FLEX rules to encompass more products and larger geographic areas.¹¹⁰ Indeed, those proposals are far more aggressive than the remedies proposed by the RBOCs in 2005¹¹¹ and are not supported by any new showing based on the past two years' experience. To the contrary, against the extensive record of market failures, the Commission cannot validate further relief from its pricing regulations before those regulations are modified to bring existing special access charges and pricing practices within the zone of reasonableness.

A. The Commission is Required to Address Failings of the Current Framework Through Modifications to its PRICE-FLEX Rules for Special Access Services

Legacy-AT&T's original petition for special access reform makes clear that, against a backdrop of market failure, the Commission must take affirmative steps to ensure that special access rates are just and reasonable.¹¹² Moreover, the Commission may take steps within its own discretion, even to the extent that it reverses its earlier remedies. The Commission has ample precedent to determine that price cap regulation,

¹¹⁰ See *AT&T* at 26-30; *Qwest* at 58-62; *Verizon* at 45-50.

¹¹¹ See *Legacy-AT&T Petition* at 5-6 (requesting the Commission re-impose and annual productivity adjustment), 6-8 (requesting that the Commission clarify that volume discounts should not be subject to unreasonable and restrictive conditions) (filed June 13, 2005); see also *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Verizon* (filed June 15, 2005), *Comments of Qwest* (filed June 13, 2005).

¹¹² *Legacy-AT&T Petition* at 33-39.

consistent with the remedies proposed by the Joint Commenters, “fulfills the Communications Act’s substantive requirement of ensuring just, reasonable and nondiscriminatory rates.”¹¹³ It should do so again now in the case of special access.

1. The Commission is Obligated to Ensure that Pricing of Special Access Services is Just and Reasonable

In its comments, AT&T argues that the Commission lacks authority to reinstate price cap regulation of special access services now subject to the Commission’s PRICE-FLEX regime, and threatens that any undertaking by the Commission to do so will be met with protracted litigation and ultimately judicial reversals.¹¹⁴ The Commission should not be persuaded by AT&T’s self-serving remarks. Legacy-AT&T’s Petition demonstrates that the Commission is both authorized and obligated to reform its special access regulations to address the market failure that has been demonstrated in this proceeding.

As set forth in legacy-AT&T’s Petition, the Act vests in the Commission the obligation to ensure that all charges for communications services, including special access services offered by the ILECs, are just and reasonable.¹¹⁵ The Commission’s broad discretion to regulate interstate communications services necessarily includes the authority to reverse its own precedent to the extent that existing regulations do not serve the purposes intended.¹¹⁶ As stated in the Commission’s Notice of Proposed Rulemaking

¹¹³ *AT&T Price Cap Order* at ¶ 883.

¹¹⁴ *AT&T* at 30-31, 32, 33, 34, 40, 42, 43.

¹¹⁵ 47 U.S.C. §§ 201(b); *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (D.C. Cir. 1982). *See also Legacy-AT&T Petition* at 33.

¹¹⁶ *Bell Atlantic Tel Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996); *see also Legacy-AT&T Petition* at 34.

in this proceeding, the existing PRICE-FLEX rules are designed “to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry, or engage in exclusionary pricing behavior; and (2) price cap LECs do not use pricing increase rates to unreasonable levels for customers that lack competitive alternatives.”¹¹⁷ The current record before the Commission instead reflects that the ILECs continue to exercise monopoly control over the market for special access services and to engage in market power abuses, including pricing special access services at supra-competitive levels.¹¹⁸ Therefore, the Commission must modify its PRICE-FLEX rules to cure such market failures.

As explained in legacy-AT&T’s Petition, where, as here, Commission regulations are based on predictive judgments of the Commission that fail to materialize, the Commission can and must take steps to remedy its failed regulations.¹¹⁹ Indeed, “the courts have made clear that where the Commission regulates on the basis of predictive judgments, it is imperative that the Commission...vigilantly monitor the consequences of its rate regulation rules... and, if in light of actual market developments, the Commission determines that competition is not having the anticipated effect on access charges, the

¹¹⁷ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25 and RM-10593, Order and Notice of Proposed Rulemaking, FCC 05-18 at ¶ 18 (citing *Pricing Flexibility Order* at ¶ 3).

¹¹⁸ *See supra* Sections II and III; *see also id.* at ¶ 19. Indeed, even in 2005, AT&T acknowledged that “the predictive judgment at the core of the *Pricing Flexibility Order* has not been confirmed by market developments, and that BOC special access rates are at supracompetitive level that are unjust and unreasonable in violation in section 201 of the Communications Act.” *Id.* (citing *Legacy-AT&T Petition* at 1-6, 20, 34-35).

¹¹⁹ *Legacy-AT&T Petition* at 35.

[Commission] must revisit the issue.”¹²⁰ The record evidence in this proceeding demonstrates that market forces do not discipline pricing levels for special access services or otherwise ensure that the charges by ILECs for such services are just and reasonable.¹²¹ Accordingly, “it would be unlawful for the Commission to decline to modify its regulatory scheme in order to check the RBOCs’ market power abuses.”¹²²

2. The Commission Is Authorized to Re-Instate Price Cap Regulation and Reasonably May Do So

In prior proceedings on the pricing of special access services, the Commission repeatedly affirmed its own authority to select among different pricing frameworks, including price cap regulation.¹²³ In particular, the Commission determined that price cap regulation of special access services is both lawful and fulfills the duty of the Commission to ensure that special access services are priced at just and reasonable levels.¹²⁴ The authority of the Commission to establish price cap regulation of special

¹²⁰ *Legacy-AT&T Petition* at 35-36 (quoting *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 325 (5th Cir. 2001) (internal quotations omitted); *see also*, *SWBT v. FCC*, 153 F.3d 523, 547 (8th Cir. 1998); *CELLNET v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (“If the FCC’s predictions about the level of competition do not materialize, then it will of course need to reconsider its [regulations]...in accordance with its continuing obligation to practice reasoned decisionmaking.”); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“It is now well settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision...has been removed.”); *AFL-CIO v. Brock*, 835 F.2d 912, 916-17 (D.C. Cir. 1987) (“[C]ourts recognize that agencies must response to changed circumstances to carry our Congress’ purposes.”).

¹²¹ *See supra* Sections II and III.

¹²² *Legacy-AT&T Petition* at 36.

¹²³ *AT&T Price Cap Order* at ¶ 882 (We reaffirm our conclusion contained in the Further Notice that...the substantive mandate under which we operate requires only that we select a ratemaking approach that is capable of keeping rates in the zone of reasonableness, or detecting and correcting for the failure of market forces to do so.). *Id.* *See also ILEC Price Cap Order* at ¶ 401.

¹²⁴ *AT&T Price Cap Order* at ¶ 883.

access services never has been challenged by the federal courts, and the RBOCs present no reason why such authority should be challenged here.

AT&T's claims that reinstating price cap regulation in areas where Phase II PRICE-FLEX already has been granted would be cumbersome or administratively infeasible are without merit. These arguments are directly undermined by the fact that the Commission once before successfully regulated pricing of the ILECs' special access service offerings via price caps – the same framework proposed by several commenters in this proceeding and proposed by legacy-AT&T's Petition for Rulemaking. AT&T has offered no reason why the Commission cannot once again implement price cap regulation. The Commission's duty to remedy market failure is clear, and the Commission should not be deterred in its efforts to fulfill statutory mandates simply because AT&T claims that doing so would not be feasible.

Similarly unavailing are AT&T's claims that the Commission cannot effectively measure competition within the market for special access services.¹²⁵ Regardless, the remedies proposed by the Joint Commenters and supported by parties to this proceeding may eliminate the need to do so.¹²⁶ As explained by AdHoc, price cap regulation, coupled with downward pricing flexibility, allows the Commission to shield consumers from excessive rates for special access services, and at the same time, allows the ILECs

¹²⁵ *AT&T* at 30-31, 32, 33, 34, 40, 42, 43. The Joint Commenters agree that existing “triggers” do not accurately measure where competition exists and therefore should be eliminated or substantially altered by the Commission in this proceeding. Importantly, any modified triggers adopted by the Commission here, because of differing legal standards, should not mirror the framework established by the Commission for purposes of determining impairment, under Section 251. *Joint Commenters* at 21-22.

¹²⁶ *See Joint Commenters* at 45-46; *see also AdHoc* at 26-27.

to compete in areas where the ILECs deem necessary, without continual marketplace assessment.¹²⁷ The Commission is fully capable of periodically evaluating competition in special access markets at the requisite level of granularity. Such monitoring would ensure that deregulation occurs only where it is justified by actual marketplace developments.

B. The Commission Should Eliminate Pricing Practices that Impede the Growth of Competition and Order “Fresh Look”

Purchasers of special access services often must accept onerous or exclusionary terms and conditions to receive discounted arrangements for special access services offered by the ILECs.¹²⁸ Specifically, such arrangements can include one or more of the following conditions that impede competition and are contrary to public policy: (1) tying of discounted prices to very high term and volume commitments, with excessive termination penalties; (2) requiring customers to convert all or some existing UNEs to special access services to guarantee a certain percentage of “spend” on special access services; (3) requiring customers to purchase only special access services (in lieu of lower priced UNEs) going forward; and (4) requiring customers to refrain from taking positions contrary to the ILECs in Commission proceedings.¹²⁹ The Commission should prohibit such conditions as a part of its comprehensive reform of special access pricing regulations.¹³⁰

¹²⁷ *AdHoc* at 26-27.

¹²⁸ *Joint Commenters* at 26-35, 46-49; *see also ATX Commenters* at 51-52; *COMPTEL* at 9-16; *TWT/One* at 48-49; *PAETEC* at 21.

¹²⁹ *Joint Commenters* at 26-35, 46-49.

¹³⁰ *Joint Commenters* at 46-49.

Importantly, other commenters agree that exclusionary pricing practices will permit the ILECs to maintain market power in the provision of special access services and will perpetuate the need for regulation of those services.¹³¹ Accordingly, those commenters propose and the Joint Commenters concur that the Commission should prohibit the ILECs from conditioning discount pricing of special access services on commitments that are not related to the efficiencies yielded by the term or volume commitment at issue.¹³² As set forth in the initial comments of TWT, a condition is “reasonably related” to the efficiencies yielded by the term or volume commitment if “(1) the ILEC can show that a purchaser’s agreement to the condition directly and quantifiably results in a reduction in the costs of providing the special access services that are the subject of the increased discount; and (2) the discount offered in return for the purchaser’s commitment to meet the condition causes the ILEC to pass through to the purchaser at least 75 % of its reduced costs.”¹³³ Applying this framework, and a “fresh look,” as discussed below, the Commission may now begin to mitigate the harmful effects of arrangements that have long have frustrated competition and choice within the market for special access services.

To ensure that all purchasers of special access services may avail themselves of such relief going forward, the Commission also should adopt a “fresh look” policy for special access service arrangements that presently are in effect. As set forth in the initial comments of the Joint Commenters, such a policy is essential to curing the effects of

¹³¹ *TWT/One* at 48-49; *see also ATX Commenters* at 51-52.

¹³² *TWT/One* at 48-49; *see also ATX Commenters* at 51-52.

¹³³ *TWT/One* at 48.

unequal bargaining power between ILECs and their customers under the current pricing framework.¹³⁴ Moreover, such relief is within the authority of the Commission and has been adopted in context of prior changes to its special access pricing regulations.¹³⁵

C. The Record Before the Commission Does Not Support Greater De-Regulation of Special Access Services

The Commission should reject proposals by the RBOCs to expand the scope of the existing flexible pricing framework for special access services. Specifically, the comments submitted by AT&T, Qwest and Verizon each request that the Commission further de-regulate special access services, through: (1) expanding Phase I pricing flexibility to all special access services within all geographic markets; (2) adopting lower thresholds to obtain Phase II pricing flexibility; and (3) de-regulating all OCn and packet-switched services.¹³⁶ Indeed, those proposals are far more aggressive than the remedies proposed by the RBOCs in 2005,¹³⁷ and are not supported by any new showing that competition exists within the market for special access services. To the contrary, against the extensive record of market failures, the Commission cannot validate further

¹³⁴ *Joint Commenters* at 46-47; *see also PAETEC* at 21.

¹³⁵ *Joint Commenters* at 47-48.

¹³⁶ *See AT&T* at 26-30; *Qwest* at 58-62; *Verizon* at 45-50. In addition to these remedies, Verizon proposes that the Commission eliminate so-called “growth discounts” (i.e., “pricing plans that offer reduced per unit access prices to customers that commit to purchase a certain percentage above their past usage, or plans that offer reduced prices based on growth in traffic placed over an incumbent LEC’s network”), and existing restrictions on banded mileage pricing structures. *See Verizon* at 46-47, 50. For the same reasons, Verizon’s additional requests for relief should be rejected by the Commission.

¹³⁷ *See Legacy-AT&T Petition* at 5-6 (requesting the Commission re-impose and annual productivity adjustment), 6-8 (requesting that the Commission clarify that volume discounts should not be subject to unreasonable and restrictive conditions) (filed June 13, 2005); *see also Comments of Verizon* (filed June 15, 2005), *Comments of Qwest* (filed June 13, 2005).

relief from its pricing regulations before those regulations are modified to bring existing special access charges the zone of reasonableness.

CONCLUSION

The Commission should expeditiously act to modify existing regulations governing ILEC special access pricing and pricing practices in the manner consistent with these replies and Joint Commenters' comments filed with the Commission on August 8, 2007.

Respectfully submitted,

**XO COMMUNICATIONS, LLC,
COVAD COMMUNICATIONS GROUP, INC.
and NUVOX COMMUNICATIONS**

By:



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Their Counsel

August 15, 2007

**Declaration of Michael Clancy
on behalf of Covad Communications Group**

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Special Access Rates for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	
)	
AT&T Corp. Petition for Rulemaking to)	
Reform Regulation of Incumbent Local)	RM-10593
Exchange Carrier Rates for Interstate Special)	
Access Services)	

**REPLY DECLARATION OF MICHAEL CLANCY OF
COVAD COMMUNICATIONS**

I, Michael Clancy, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Michael Clancy. I currently am employed in the position of External Affairs Business Partner for Covad Communications ("Covad"). My business address is 149 Margaret Boulevard, Merrick, NY 11566. My primary job responsibilities for Covad include: (a) interfacing with Verizon and Covad customers as a technical, operational, and policy liaison for Covad for all of the states in the Verizon region; (b) advising Covad on technical issues related to communications networks in the Verizon region; and (c) participating in Covad's Government and External Affairs group on the technical aspects of communications policy.

2. I have been employed in the telecommunications industry since 1970. I began my career at New York Telephone Company as a Switching Equipment Technician. I took on assignments of increasing responsibility, including leading a team that designed private networks for the Securities and Banking Industry while at NYNEX. I left Bell Atlantic in July 1998 as the

Director of Interoffice Network Provisioning and Process Management. I began working at Covad in August 1998 as the Vice-President Operations for the New York Metropolitan region. I was responsible for building out the collocation facilities and acquiring network facilities including transport between collocation arrangements. In my current role as Business Partner, two specific business areas in which I contribute are partnering with our network planning teams to make decisions about what vendor to use for transport facilities, and with our Product teams for new product development.

3. This Reply Declaration is made on behalf of Covad, and in support of the comments and reply comments filed jointly by Covad, XO Communications, LLC and NuVox Communications to refresh the record in the above-captioned proceeding, and to urge the Commission to eliminate Phase II special access pricing flexibility, and to reinitialize ILEC rates for special access.¹

4. Covad is a facilities-based competitive local exchange carrier (“CLEC”) that provides (either directly or indirectly through wholesale partners) voice, data, and digital subscriber line (“DSL”) broadband services to residential customers and DSL, voice over internet protocol (“VoIP”), and integrated T1 services to small, medium and large businesses, and to other carriers on a wholesale basis. The company’s network covers 44 states.

5. This Reply Declaration is divided into three sections. In Section I, I explain why Covad does not buy wholesale inputs from cable providers. In Section II, I address the RBOCs’ false claims that no carriers purchase standalone channel terminations. Finally, in

¹ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Public Notice, FCC 07-123 (July 9, 2007).

Section III, I offer clarification regarding some of the data placed into the record by others about Covad.

I. Use of Wholesale Inputs from Cable

6. ILECs have suggested that CLECs could opt to use cable television systems for alternative DS1 and DS3 loop facilities to serve their small to medium-sized business and carrier customers. Covad, however, uses no loop facilities provided over cable company infrastructure, and is not aware of any cable facilities that are available to meet our customers' capacity and quality of service requirements.

II. ILEC Claims Regarding CLEC Special Access Purchases

7. ILECs have suggested that CLECs rarely purchase stand-alone channel terminations. In Covad's experience, this is not the case. For example, a substantial majority of the special access Covad purchases from Qwest and Verizon are channel terminations without any corresponding transport.

III. Clarifications Regarding Data Submitted by Other Commenting Parties

8. Verizon represents that Covad has one lit (on-net) building with one circuit in each of the New York-New Jersey-Long Island, Philadelphia-Camden-Wilmington, and Washington-Arlington-Alexandria MSAs. These statements are inaccurate. Covad has no lit buildings in the Philadelphia-Camden-Wilmington, market. In the New York-New Jersey-Long Island and Washington-Arlington-Alexandria MSAs, we utilize dark fiber rings leased from third parties that are not used to reach any end-users.

9. This concludes my Reply Declaration.


Michael Clancy, Covad Communications

Dated: August 15, 2007

**Declaration of Keith Coker
on behalf of NuVox Communications**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**REPLY DECLARATION OF KEITH COKER
ON BEHALF OF NUVOX COMMUNICATIONS**

I, Keith Coker, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Keith Coker and I am Chief Technology Officer for NuVox Communications ("NuVox"). My business address is 301 N. Main Street, Suite 5000 Greenville, SC 29601. My primary job responsibilities are planning and managing NuVox's network.

2. NuVox is a competitive local exchange carrier providing numerous services including local voice and data, domestic and international long distance, dedicated high-speed Internet access and voice over Internet protocol ("VoIP"), generally in bundled service offerings. NuVox operates in 16 states, including each of the states in the former BellSouth region and several of the states in the pre-BellSouth merger AT&T region. NuVox provides innovative and cost effective communications services to small and medium-sized businesses.

3. This Reply Declaration is made on behalf of NuVox, and in support of the comments and reply comments filed jointly by NuVox, Covad Communications Group, and

XO Communications LLC to refresh the record in the above-captioned proceeding, and to urge the Commission to eliminate Phase II special access pricing flexibility and to reinitialize incumbent LEC rates for special access.¹

4. This Reply Declaration is divided into two sections. In Section I, I explain why NuVox does not presently use wholesale wireless loop substitutes. In Section II, I explain why NuVox does not buy wholesale inputs from cable providers.

I. Use of Wholesale Wireless Loop Substitutes

5. The incumbent LECs have suggested that competitive LECs such as NuVox could use fixed wireless technology as an alternative to special access DS1s and DS3s that NuVox currently uses for customer loop access facilities. NuVox, however, does not use competitive wireless loop facilities, as it has not found such facilities to be viable. Although technology now exists to provide a fixed wireless alternative to wireline loop facilities, the spectrum allocated by wholesale providers is not is not adequate to handle the aggregate volume of a competitive providers needs.

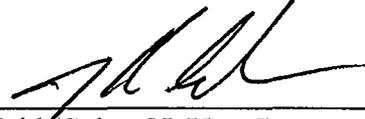
II. Use of Wholesale Inputs from Cable

6. The incumbent LECs have suggested that competitive LECs could use cable television systems for alternative DS1 and DS3 loop facilities to serve their small to medium-sized business customers. NuVox, however, uses no loop facilities provided over cable company infrastructure as it has not found them to be viable to meet NuVox's needs. NuVox has found that the hybrid fiber-coaxial infrastructures in use by cable companies are not

¹ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Public Notice, FCC 07-123 (Jul. 9, 2007).

optimized for the delivery of DS1 or DS3 services due to the limitations imposed on upstream bandwidths in most systems.

7. This concludes my Reply Declaration.



Keith Coker, NuVox Communications

Dated: August 15, 2007

**Declaration of Ajay Govil
on behalf of XO Communications, LLC**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**REPLY DECLARATION OF AJAY GOVIL
ON BEHALF OF XO COMMUNICATIONS, LLC**

I, Ajay Govil, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Ajay Govil. I am employed by XO Communications, LLC (“XO”) as Director of Transport Architecture & Technology. My business address is 11111 Sunset Hills Road, Reston, Virginia 20190. My primary job responsibilities include providing overall direction for the evolution of XO’s network from both a technical and financial perspective. I specify what technology is deployed and how we allocate our capital funds to expand the XO network. Previously I was employed by Qwest Communications.

2. This Reply Declaration is made on behalf of XO, and in support of the comments and reply comments of XO, Covad Communications Group and NuVox Communications, to refresh the record in the above-captioned proceeding,¹ and to urge the Commission to eliminate Phase II special access pricing flexibility and to reinitialize incumbent LEC rates for special access.

¹ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of*

3. This Reply Declaration is divided into three sections. In Section I, I explain the limited extent to which XO uses wholesale wireless loop substitutes. In Section II, I explain why XO does not buy wholesale inputs from cable providers. In Section III, I address RBOCs' false claims that no carriers purchase standalone channel terminations.

I. Use of Wholesale Wireless Loop Substitutes

4. The incumbent LECs have suggested that competitive LECs such as XO could use fixed wireless technology as an alternative to special access DS1s and DS3s that XO currently uses for customer loop access facilities. As explained in my initial Declaration, XO's widespread use of self-deployed wireless loops has not taken shape as quickly as XO would have preferred. In particular, as XO recently explained to the Commission, building access disputes between XO and AT&T have precluded XO from obtaining essential microwave entrance facilities.² Under those circumstances, XO is currently unable to rely on wholesale wireless loop alternatives to replace incumbent LEC wireline DS1 and DS3 facilities.

5. The results reported by FiberTower Corporation ("FiberTower") for the second quarter of this year, ending June 30, 2007, indicate that FiberTower now provides wireless backhaul services to 1,848 cell sites,³ of approximately 195,000 total cell sites within the United States.⁴ Therefore, as one of the leading providers of alternative wireless backhaul services, FiberTower captured less than one percent (1%) of the total market for those services, over its

Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Public Notice, FCC 07-123 (Jul. 9, 2007).

² *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of XO Communications, LLC (filed Jul. 30, 2007).

³ Press Release, FiberTower Reports Second Quarter 2007 Results (Aug. 7, 2007) at <http://biz.yahoo.com/prnews/070807/latu202.html?v=3&printer=1>.

⁴ See CTIA's Wireless Industry Indices: 1985-2006 (incorporating the results of CTIA's semi-annual wireless industry survey for the third and fourth quarters of 2006).

five years of operations. FiberTower also reported to investors that its 2006 revenues, in combination with the 2006 revenues of other fixed wireless service providers, make up only 6 percent (6%) of the total \$3.5 billion wireless backhaul market, and that such market share likely will diminish as the total number of cell sites continues to grow at its current rapid pace.⁵

II. Use of Wholesale Inputs from Cable

6. The incumbent LECs have suggested that competitive LECs could opt to use cable television systems for alternative DS1 and DS3 loop facilities to serve their small to medium-sized business and carrier customers. Many cable companies now construct much of their networks using SONET and DWDM architectures, and have the ability to sell unused portions of their networks, but only in a limited number of locations. Those locations are core to the cable companies' networks, primarily head-ends and hub locations, where XO employs common network architectures and equipment types. However, those locations do not include the delivery to the end user premises (local loops) over the same coaxial cable traditionally employed by cable companies to deliver TV and cable-modem services. Those coaxial systems use different forms of modulation not compatible with our equipment types. For these reasons, and the reasons set forth in my initial Declaration, XO uses no loop facilities provided over cable company infrastructure.

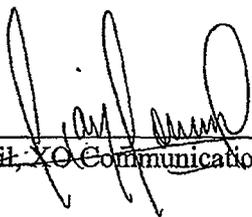
III. Incumbent LEC Claims Regarding CLEC Special Access Purchases

7. The incumbent LECs have suggested that competitive LECs rarely purchase stand-alone channel terminations. In XO's experience, this simply is not the case. XO often purchases stand-alone channel terminations as special access from the incumbent LECs. XO does so in

⁵ FiberTower Analyst Day Presentation (March 27, 2007), <http://www.fibertower.com/corp/investors-home.shtml>.

almost every instance because UNE loops no longer are available, and no Type I competitive alternatives are available.

8. This concludes my Reply Declaration.



Ajay Govil, XO Communications, LLC

Dated: August 15, 2007