KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
3050 K STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20007
(202) 342-8400

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ
BRUSSELS, BELGIUM
AFFILIATE OFFICES
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

DIRECT LINE: 202-342-8544
EMAIL: jheitmann@kelleydrye.com

September 19, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440; *Petitions of AT&T Inc., BellSouth Corp., the Embarq Local Operating Companies, the Frontier and Citizens Local Exchange Carriers and Qwest Under 47 U.S.C. §160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket Nos. 06-125, 06-147

Dear Ms Dortch:

NuVox Communications and XO Communications, LLC, by their attorneys, submit this letter to respond to a series of recently filed AT&T *ex partes.*[1] These recent *ex partes* do not tip the scales in favor of granting AT&T's petitions – or that of any other ILEC – in the above-captioned proceedings. Despite AT&T's submission "limiting" the scope of its

[1] Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 11, 2007)("AT&T Sept. 11 Letter"); Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 12, 2007)("AT&T Sept. 12 Letter"); Letter from Frank S. Simone, Executive Director, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 13, 2007)("AT&T Sept. 13 Letter").

forbearance request to special access services, the predicate for relief (the Verizon "deemed grant"), the case for it, and the services it would apply to remain impermissibly vague.[2]

Prior to limiting the scope of its petition, AT&T itself indicated that it made no effort to address the difference between the interexchange and exchange access services it addresses in its petitions.[3] Thus, the Commission reasonably can conclude that no evidence offered by AT&T prior to its September 12 letter supports its now more narrowly defined forbearance request. Indeed, the paltry "evidence" AT&T submitted – both before and after it limited the scope of its forbearance request – rarely, if ever, addresses the wholesale access products subject to the petition and critical to CLEC provision of enterprise or "business broadband services."[4] Dispositively, the record contains no evidence of sustainable and robust facilities-based competition throughout the entire geographic area – or even parts of it –

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2 The Commission repeatedly has denied forbearance petitions for a lack of specificity. *See Review of regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Memorandum Opinion and Order 17 FCC Rcd 27000, 27005-06, ¶ 9 (2002); *Petition of SBC Communications for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, FCC 05-95, ¶¶ 14-17 (rel. May 5, 2005); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* Memorandum Opinion and Order, FCC 05-170, ¶¶ 16, 111 (*"Qwest Omaha Order"*).

3 *See* AT&T Sept. 11 Letter at 2 (explaining that AT&T had not sought forbearance "based on whether the services listed in the forbearance petitions qualify as 'interstate interexchange services' or 'interstate exchange access services'" and explaining that none of the technology-based categories of services listed by AT&T was intended to equate with a specific interexchange or exchange access product). Notably, AT&T also asserts that the Commission's "court-approved broadband precedents" it relies upon also do not distinguish between interexchange broadband services and exchange access broadband services. *Id.* Thus, certainly none would appear to be controlling in this context.

4 AT&T's use of the term "business broadband services" ignores pertinent distinctions between customers who purchase such services. Carriers, small-to-medium sized businesses and large businesses purchase the services at issue here. Among businesses that purchase these services, small and medium sized businesses typically have dramatically different levels of purchasing "sophistication" than larger enterprise customers. In any event, the degree to which a carrier or business end user is "sophisticated" has no bearing whatsoever on whether a facilities-based competitor can readily provide an equivalent competitive service to those still un-identified service offerings at issue in this proceeding.

encompassed by AT&T's petition that could serve to discipline AT&T's behavior in the absence of common carrier regulation of the wholesale services that are subject to the petition.[5]

AT&T simply has not met its burden of proof here and the Commission, as a result, has no choice other than to deny AT&T's forbearance request. To the extent the Commission seeks to further address the appropriate level of regulation for the particular special access services at issue, it should do so in the ongoing special access rulemaking proceeding.

The Scope of the Relief Sought by AT&T Remains Impermissibly Vague

Despite AT&T's recent submission to "crystallize" the relief it seeks in the above-captioned docket, it still insists that it must have the relief Verizon received by virtue of the so-called "deemed grant."[6] The problem with this, of course, is that the relief Verizon received is still unclear.[7] Indeed, one could extrapolate from Commissioner statements regarding the deemed grant[8] and the Commission's own analysis in the ACS Broadband Forbearance Order[9] and come away with a very different picture of the relief obtained than that portrayed by Verizon itself in its predictably recalcitrant August 31, 2007 letter filed in response to the Bureau Chief's request for local market data.[10] For example, in the ACS Broadband Order, the Commission flatly rejects ACS's request for forbearance regarding un-specified future services.[11] Yet,

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5 *See Qwest Omaha Order,* ¶ 50 (denying forbearance with respect to enterprise services due to a lack of "serving area-wide information" consistent with the geographic scope of the petition); *see also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended 47 U.S.C. § 160(c), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area,* Memorandum Opinion and Order, WC Docket No. 06-109, ¶¶ 82-92 (rel. Aug. 20, 2007) (denying forbearance requested for special access services") ("*ACS Broadband Forbearance Order*").

6 AT&T Sept. 11 Letter at n.2.

7 *See, e.g.,* Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440 (filed Jul. 25, 2007).

8 *See Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services Is Granted by Operation of Law,* FCC Press Release (Mar. 20, 2006).

9 *See ACS Broadband Forbearance Order,* ¶¶ 17, 93-137.

10 Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos, 04-440, 06-125, 06-147, n.2 (filed Aug. 31, 2007) ("Verizon Aug. 31 Letter").

11 *ACS Broadband Forbearance Order,* ¶¶ 93, 112.

Verizon baldly claims that the forbearance it received includes complete regulatory relief for virtually any special access product – current or future – that does not use TDM multiplexing.[12] To the extent the Commission seeks to achieve "regulatory parity" in this instance, the rational and responsible way to proceed is to treat Verizon like the others and not the others like Verizon.[13]

With respect to AT&T, it remains impossible to discern the particular special access products for which it seeks relief. Based on Verizon's lead, AT&T continues to rely on broad technology-based categories of services that employ or will some day employ some form of optical or packet functionality. As the Commission correctly realized in its ACS Broadband Forbearance Order, the test for forbearance is not satisfied by the mere fact that the service at issue uses or will use a particular technology.[14] Instead the proper analysis must be performed with respect to specific service offerings and a relevant geographic market. The fact that AT&T's petition seeks forbearance on the basis of technologies attached to bottleneck loop and metro transport transmission facilities rather than on the basis of particular special access transmission products renders its petition impermissibly vague, as the Commission cannot with certainty determine the specific service offerings encompassed in AT&T's forbearance request. Indeed, it would be impossible to square the Commission's ACS Broadband Forbearance Order with the undefined and open-ended forbearance grant AT&T seeks here.[15]

The Evidence Offered Does Not Support a Grant of Forbearance

AT&T couples its still vague forbearance request with a paltry evidentiary offering that is itself so vague that cannot form the basis for a grant of relief under Section 10. Indeed, much of what AT&T offers as evidence is platitudes and citations to inapplicable precedent that amounts to no evidence at all. Other materials offered by AT&T – purportedly as evidence – fall far short of providing the Commission with the necessary foundation for determining that sufficient competition exists to prevent a forbearance grant from having a detrimental effect on consumers and competition.

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12 *See* Verizon Aug. 31 Letter at 1-2.

13 *See,* Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440 (filed Jul. 25, 2007).

14 *See ACS Broadband Forbearance Order,* ¶¶ 112, 115, 119 (declining to grant forbearance to future services employing the same technologies as the specific services for which forbearance was granted), ¶105 (premising forbearance relief for OCn-level services based on the capacity of the service).

15 *See id.,* ¶¶ 112, 115, 119.

To begin, AT&T itself has chosen the scope of its forbearance request. Unlike ACS, which chose to proceed on the basis of a single ILEC study area, AT&T seeks forbearance on a "nationwide" basis. Thus, it is incumbent upon AT&T to demonstrate the presence of sufficiently robust and sustainable competition for each product subject to its petition in each relevant market across the nation.[16] AT&T's reliance on inapposite Commission precedent, the capabilities of a particular CLEC that, with a few exceptions for "on-net" buildings, uses special access to provide *some* alternative offerings to *some* of the products at issue in *some* markets,[17] and a summary pie chart showing "port shares" for what appears to be in whole or in part interexchange Ethernet services comes nowhere close to meeting the rather high bar AT&T set for itself.

AT&T's claim that "the services at issue here – regardless of whether they can be classified as interexchange services or exchange access services – are subject to intense competition" lies in stark contrast to the evidence it has put into the record.[18] Indeed, there is no evidence of "intense competition" or even sufficient competition for any product in any market arguably at issue here. Thus, the situation here lies in stark contrast to the one that was before the Commission in the ACS "me too" forbearance petition. There, the Commission relied in one instance on a competitor's share of 50-60% of the relevant product in the local geographic market the Commission deemed appropriate, and on market characteristics unique to the

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16 The Commission has indicated that the relevant geographic markets for the local access products at issue are local. *See* Letter from Thomas J. Navin, Wireline Competition Bureau Chief, to Susanne A. Guyer, Senior Vice President, Verizon et al., WC Docket Nos. 04-440, 06-125, 06-147 (Aug. 23, 2007); *see also ACS Broadband Forbearance Order,* ¶¶ 97-98, 100. Since the relevant geographic market for a particular product cannot be determined in a vacuum, but rather must be discerned with respect to how particular products are offered and purchased, the Commission easily could deny AT&T's petition for failing to provide information sufficient for the Commission to proceed with an appropriate assessment of whether the Section 10 forbearance standard is met. In the absence of a rational basis for proceeding differently – and none has been supplied by AT&T – the Commission is bound to apply to AT&T the same analytical framework it so recently applied to ACS. Thus, for each product and in each market encompassed by the petition, the Commission must conduct a Section 10 forbearance analysis.

17 The availability of "Type II" service offerings cannot reasonably be used as the basis for determining that Commission should forbear from imposing common carrier regulation on the special access inputs used by CLECs to make competitive broadband services available.

18 AT&T Sept. 11 Letter at 2.

Anchorage market in another.[19] In this proceeding, no product-specific and market-specific evidence has been offered.

AT&T's evidentiary proffer with respect to "business Ethernet services" – the only group of packet-switched broadband services it addresses directly – is neither product nor market specific. First, AT&T fails to define the products it includes under the banner of "business Ethernet services." Although AT&T has withdrawn interexchange end-to-end retail products from the scope of its forbearance request, it is anything but clear that these products have been excluded from the summary statistics AT&T still offers as support for its petition. For example, AT&T claims that a "recent analyst report" concludes that "no provider of business Ethernet services had even a 20% market share as of mid-2007."[20] Since this is the same evidence AT&T offered before crystallizing its forbearance request, it is not at all clear the extent to which, if any, this information pertains to particular business Ethernet products in relevant geographic markets subject to AT&T's petitions.

Indeed, it is reasonable to read the statistic as one that pertains extensively or even exclusively to finished interexchange retail products.[21] It is also reasonable to read the statistic offered as one that is weighted by activity in markets not relevant here. For example, information pertaining to markets outside the scope of AT&T's petition – those markets where AT&T is not subject to dominant carrier regulation – is irrelevant here. To illustrate further, whether GCI has a 60% product share in Anchorage or a .01% product share on a nationwide basis, has no bearing on whether the Commission can grant forbearance to AT&T with respect to specific exchange access Ethernet products in Atlanta or San Antonio (or portions thereof) where AT&T's offering of such critical wholesale products is subject to dominant carrier regulation. Thus, the fact that a press release cited to by AT&T can be read by AT&T to enable it to claim that "the leading cable provider (Cox) together with the leading CLEC (Time Warner Telecom) have a larger combined share of the Ethernet market than the post-merger combined share of AT&T and BellSouth" is irrelevant. Even if it were based on something credible – which it is

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19 *See ACS Broadband Forbearance Order,* Statement of Commissioner Robert M. McDowell (noting "special characteristics of that market that are not duplicated in any other market in the country" and basing relief on the apparently extraordinary level of competition in the Anchorage market).

20 AT&T Sept. 12 Letter at 2.

21 The "Press Release & Stat Flash" AT&T offers as evidence of robust competition for Ethernet products fails to define the thing it measures: "port share." Further, it does not define the "business Ethernet Services market" it discusses in terms of products or geographic scope. The document contains no information regarding methodology used or inputs employed. The only clear conclusion the Commission can make based on this document is that the document provides no useful evidence upon which the Commission could base or base in part a grant of forbearance.

not – the claim says nothing about any of the particular products at issue here or the particular markets in which AT&T seeks relief. If anything, AT&T's claim of "robust competition" appears still to be tied to the end-to-end retail interexchange services for which it already has been granted de-regulatory relief and that are no longer the subject of its petitions.

AT&T's inability to produce any evidence of robust competition for any of the un-specified business Ethernet services that remain at issue in this proceeding in any geographic market is highlighted by its ongoing spat with Time Warner Telecom ("TWTC") over what TWTC suggests to potential investors and customers it can provide in terms of business Ethernet offerings (subject to availability, of course). Website postings and press releases simply do not constitute evidence of actual, sustainable and robust competition. The documents cited by AT&T in its various filings do not demonstrate where TWTC provides business Ethernet services or the degree to which its provisioning of such services relies on the very loop products AT&T seeks to deregulate in this proceeding.[22] Accordingly, the Commission must reject this attempt by AT&T to cover its inability to meet its burden to produce real, reliable evidence of competition for the services it seeks to deregulate in each market within the scope of its "nationwide" petition.

AT&T's suggestion that TWTC and other CLECs can do just fine with the "traditional" TDM based DS1 and DS3 special access products that are outside the scope of this proceeding is both self-serving and erroneous. Although certain business class Ethernet products often can be provisioned by layering technologies on a TDM-based circuit, the "overhead" bandwidth loss, costs and service degradation associated with such an approach would leave CLECs playing on a field sharply tilted in the ILECs' favor. Notably, metro Ethernet services increasingly are being used to replace DS1 services and to fill the bandwidth gap that previously existed between the DS1 and DS3 capacity levels. These are not large enterprise, OCn-level products. As has become the norm, CLECs are leading the way in bringing these services to the small and medium-sized businesses that drive the American economy. By denying AT&T's petitions (and the others like it), the Commission can spur both CLEC and ILEC investment by maintaining the cycle of CLEC innovations followed by competitive ILEC responses.

AT&T's "evidence" of robust competition for another similarly ill-defined clump of services it refers to as "optical-level services" – presumably OC and SONET-based services – similarly fails. First, AT&T fails to recognize that loop/channel terminations and dedicated transport/channel mileage at varying capacities ranging from OC-1 to OC-192 are distinct

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22 *See Qwest Omaha Order* at n.185 (explaining that granting an ILEC forbearance from rules based on competition that exists only because of those rules would be circular and declining to embrace such a justification) and ¶ 1 (explaining that the Commission's grant of forbearance in that case was based on the demonstrated presence of robust facilities-based competition).

products. AT&T offers no evidence to support its claim of robust competition for any of these OCn and SONET products in any relevant geographic market. Second, AT&T's reliance on the Commission's dated observation of "substantial deployment of competitive fiber loops at OCn capacity" ignores the fact that since this observation was made, legacy AT&T, MCI and other competitive providers of such loops have disappeared. Thus, the Commission's prior observation has no bearing on the inquiry here because it bears no relation to the current market dynamics with respect to particular products and geographic markets at issue in this proceeding.

AT&T's reliance on the Commission's prior observation that "services offered over OCn loops produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with loop construction" also is completely off-the-mark. Whether or not the statutory test that determines cost-based unbundling under Section 251(c)(3) is met is a completely different inquiry than the one required under Section 10.[23] Indeed, the fact that OCn and SONET facilities are not available as "UNEs" under Section 251(c)(3) indicates that OCn and SONET loop/channel termination and transport/channel mileage special access products are the only means available to competitors to ensure a "real time" ability to compete with AT&T. Even if the costs of construction can be justified, it is difficult to overcome AT&T's advantages associated with its legacy plant and access rights. If access to reasonably priced special access inputs is not assured, CLECs will have fewer opportunities to invest in their own business broadband facilities even where construction may be feasible but will take time.[24]

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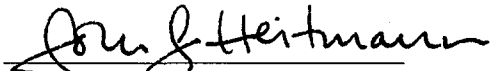
23 The "necessary" and "impair" tests for unbundling UNEs at cost-based prices is set forth in Section 251(d)(2). As COMPTEL has indicated in its September 12, 2007 *ex parte*, it is a test that focused on "barriers to entry" and to make forward-looking judgments about competitive entry. Letter from Jonathan Lee, General Counsel, COMPTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 12, 2007). By contrast, the test for forbearance established in Section 10 requires the Commission to assess whether a petitioner has produced sufficient and reliable evidence upon which the Commission can determine, for the particular product in the particular geographic market at issue, whether there *presently* is sufficient and robust competition to ensure that consumers, competitors purchasing the subject services as wholesale inputs to their own broadband offerings, and competition will not be harmed absent enforcement of the rules in question. *See, id.*

24 AT&T's claim that dominant carrier regulation of its special access service offerings hinders its ability to invest in new networks is dubious. *See* Sept. 12 Letter at 3. Under this regulation, AT&T realized a rate of return on special access of nearly 100% in 2006. FCC Report 43-01, Table I Cost and Revenue, Column(s) Special Access, Row 1915 Net Return divided by Row 1910 Average Net Investment. *See also, e.g., Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, at 12 (filed Aug. 8, 2007). For the Commission to further deregulate so that AT&T can seek even greater returns would be unconscionable and inconsistent with Section 10.

The Special Access Services Are More Appropriately Addressed in the Commission's Special Access Rulemaking

While AT&T claims robust competition, CLECs and end users large and small have claimed "market failure" with respect to the "business broadband" special access services that are at issue in the above captioned forbearance dockets. To be sure, neither AT&T nor any other ILEC petitioner has met their burden of proof and the records in these proceedings to date simply do not contain evidence of robust and sustainable facilities-based competition necessary to support a Commission grant of forbearance. Although the Commission has no choice other than to deny the pending forbearance requests, the Commission is free to consider de-regulatory proposals in the context of its ongoing special access rulemaking. In a forbearance proceeding, the choice faced by the Commission is largely one between existing regulations and no regulation. The Commission has far more flexibility to both de-regulate and to re-regulate by modifying its existing regulations through the standard notice and comment rulemaking it already has commenced regarding special access.

Respectfully submitted,



Brad E. Mutschelknaus
John J. Heitmann
KELLEY DRYE & WARREN LLP
Washington Harbour
3050 K Street, NW, Suite 400
Washington, DC 20007
Phone: 202/342-8544
Fax: 202/342-8541
jheitmann@kelleydrye.com

Counsel for NuVox Communications and XO Communications, LLC

cc: Dan Gonzalez
Ian Dillner
Scott Deutchman
Scott Bergmann
Chris Moore
John Hunter
Dana Shaffer