REDACTED FOR PUBLIC INSPECTION

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

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XO Communications, LLC ("XO"), Covad Communications Group ("Covad"), and NuVox Communications ("NuVox") (collectively "Joint Commenters") hereby file these comments in response to the Commission's Public Notice asking parties to refresh the record in the above-captioned proceedings.[1]

I. INTRODUCTION AND SUMMARY

Rapidly approaching three years since initiating this proceeding to examine the regulatory framework and rates that apply to price cap local exchange carriers' ("LECs'") special access services and despite overwhelming evidence of market failure, the Commission has yet to take meaningful long-term action to address the Regional Bell Operating Companies' ("RBOCs") and other incumbent local exchange carriers' ("ILECs") detrimental exercise of market power in the markets for special access services. The competition that was predicted and used to justify deregulation has 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 (July 9, 2007).

materialized. In the absence of competitive or regulatory discipline, ILECs have used and continue to abuse their market power to command unjust and unreasonable rates for special access far in excess of those seen in competitive markets and to impose onerous and anti-competitive limitations in discount plans. Through the continuing use of exorbitant pricing and anti-competitive practices, RBOCs and other ILECs stifle competition and inflict harm on competitors and other consumers of special access services. All this, of course, has a significant detrimental impact on small businesses and consumer welfare. As some already have documented in this proceeding, the dead-weight costs to the national economy resulting from excessive special access pricing alone are staggering.

Since the 2005 filing of initial comments and replies in this proceeding, the evidence of market failure continues to mount with the gap between special access rates (either effectively or in real terms) and costs widening where Phase II pricing flexibility ("PRICE-FLEX") has been granted. As a result, the RBOCs' rates of return on special access services continue to ascend to supra-competitive levels, with two of them near or above a 100% rate of return. For 2006, rates of return for the RBOCs were 132.2% for Qwest, 99.6% for AT&T, and 57.4% for Verizon. Tellingly, the RBOCs continue to criticize these numbers as being "not right" without providing pricing comparisons or rate of return information they claim *is* right. Instead, the RBOCs' rely on inapt average revenue per unit figures, grossly distorted representations of the current state of facilities-based competition, and wildly inflated estimates of competition that may never materialize.

Meanwhile, current comparisons of special access prices to state commission approved cost-based rates for unbundled network elements ("UNEs") show special access

rates significantly above those for corresponding UNEs. Price comparisons and analysis conducted by Joint Commenters in these comments provide compelling evidence that the market has failed to work as the Commission had hoped it would. Contrary to the expectation that competition would develop to drive special access rates to competitive levels, under the Commission's PRICE-FLEX regime, special access pricing has moved away from forward-looking costs rather than toward them.

Exacerbating this market failure is the fact that, since the initial comments and replies were filed, the RBOCs have absorbed through mergers the two largest (by far) competitive providers of special access. The only competitive providers with special access market shares that were at or near 10%, AT&T and MCI, are now part of the RBOCs. Further, the ability of remaining competitors to discipline ILEC pricing tactics for metro dedicated transport special access (channel mileage) is exceptionally limited, especially for DS1 circuits. The ability of competitors to discipline ILEC pricing tactics in the markets for various special access channel terminations is virtually nonexistent. Indeed, competitive local exchange carriers ("CLECs") are unable economically to self-supply or to obtain competitively provisioned alternatives to sub-OCn-level ILEC special access circuits.

Other recent regulatory developments have further increased the ILECs' market power in the provision of special access services. For instance, during the past two years, state commission implementation of the Commission's *Triennial Review ("TRO")* and *Triennial Review Remand Orders ("TRRO")* has resulted in significant limitations on CLECs' access to UNEs priced at forward-looking costs. Lacking virtually any competitive alternatives, competitors have had to convert nearly every high-capacity UNE loop (DS1 and above) lost to a non-impairment decision to unreasonably priced

ILEC-provided special access, much to the detriment of their customers and their businesses.

The manner in which Section 271 of the Act has been implemented in many states also serves to increase the market power of ILEC special access providers. In most states, ILECs have prevailed in largely equating Section 271 loop and transport checklist items with special access thus rendering Congress's enactment of the checklist a nullity. Only a few states have acted to give Section 271 teeth by ensuring that checklist items are priced at just and reasonable rates and then, the RBOCs immediately sought to reverse those decisions. Several of these states have been reversed in federal court and the others remain embroiled in litigation. One state, Georgia, requested guidance from the Commission on these matters. The Commission has not responded and its inaction continues to fuel the very regulatory uncertainty it repeatedly has acknowledged undermines the development of competitive markets. This inaction also fuels the growth of RBOC market power in the special access markets.

Notably, the market failure that has resulted in part from the Commission's decision to deregulate special access by granting pricing flexibility based on predicted competition rather than actual or effective competition recently was observed in a November 2006 study and report by the Government Accountability Office ("GAO").[2] In its report to the House Committee on Government Reform, the GAO determined that the Commission's pricing flexibility orders have resulted in increasing prices (in a declining cost industry) characterized by scant to non-existent competitive supply. The

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2 *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, United States Government Accounting Office, Report to the Chairman, Committee on Government Reform, House of Representatives, GAO-07-80 (released Nov 2006) ("*GAO Report*").

GAO recommended that the Commission take action to better define effective competition and to consider additional data to measure competition. The Commission's unconvincing response to the report is that the costs of regulating special access are greater than those associated with the current PRICE-FLEX regime and that measuring actual competition somehow would be impractical or infeasible.

Today, all evidence points to the fact that the Commission must remedy its unrealized prediction of competition and premature deregulation of special access by eliminating Phase II pricing flexibility and by reinitializing special access rates. While re-initialization at forward-looking costs that approximate the pricing that would occur in a competitive market is one desirable solution, it may be more expedient, at least on an interim basis, to reinitialize special access pricing through the restoration of price caps based on an 11.25% rate of return. The Commission also should restore the X-factor, using 5.3% as the X-factor on an interim basis subject to further consideration. Immediate price relief is not the only relief that is essential to meaningful special access reform. The Commission also must act to proscribe exclusionary pricing practices and other anti-competitive terms and conditions in special access agreements, as such practices and terms deter facilities-based competition and diminish consumer welfare.

II. BACKGROUND

The Commission established price cap regulation of special access rates in 1991 to allow LECs to recover their costs and a reasonable profit while, at the same time, curbing the perverse incentives of more traditional rate-of-return regulation.[3] Rather than

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[3] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20, ¶¶ 257-59 (1990)