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November 13, 2007

VIA HAND DELIVERY

Ms. Ashley Becker
U.S. Department of Justice
Antitrust Division
City Center Building, Suite 8000
1401 H Street, N.W.
Washington, D.C. 20530

Re: Comments of Covad Communications, NuVox Communications and XO Communications, LLC, for inclusion in the 2007 Telecommunications Symposium – “Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers”

Dear Ms. Becker:

Covad Communications, NuVox Communications and XO Communications, LLC (collectively, the “Commenters”), by their attorneys, submit this letter and its attachments for inclusion in the record of the U.S. Department of Justice Antitrust Division’s 2007 Telecommunications Symposium, “Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers” (the “2007 Telecommunications Symposium”).

Commenters are competitive local exchange carriers (“CLECs”) engaged in the provision of voice and broadband services to residential and small, medium and enterprise business customers nationwide. As CLECs, Commenters are greatly and directly affected by the levels of competition in the telecommunications marketplace and welcome this opportunity to present their views on several issues relevant to the state of competition in the telecommunications/broadband marketplace. Specifically, Commenters highlight below, their positions on three issues that impact entry into and the sustainability of facilities-based competition in the telecommunications/broadband marketplace. These issues, which have been addressed by or are pending in dockets currently before the Federal Communications Commission (“FCC”), are: (i) incumbent local exchange carrier (“ILEC”) requests for forbearance from regulations and obligations regarding unbundled network elements (“UNEs”)

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and broadband services; (ii) rates, terms and conditions applicable to the provision of special access services; and (iii) the retirement of existing copper loop facilities.

Each of these issues has the potential to impact dramatically both the prices consumers pay and the choices they have for voice, data and broadband services. Indeed, according to a study released by QSI Consulting,¹ the annual impact of a grant of forbearance from Section 251 unbundling in the six MSAs subject to Verizon's latest forbearance request alone, in terms of increased telecommunications expenses incurred by consumers for retail mass market, enterprise and broadband Internet services would be \$1.054 billion, \$747 million and \$565 million, respectively, or a combined impact of \$2.4 billion annually. This amounts to a rate increase of \$114 annually for an average household. With respect to copper loop retirement, Verizon regularly dismantles copper loop plant so that consumers have a more difficult time switching from its new fiber-based product to competitors' copper-based products.² Another study produced by Economics and Technology, Inc. and filed in the FCC's ongoing special access rulemaking,³ explains that "sustained overpricing of special access results in an economic 'deadweight loss' that undermines the efficiency and competitiveness of the US economy overall." The ETI study concludes that "[t]he inflated price of special access ... as an input is passed onto consumers in higher prices for the final product they purchase.... Consumers lose in two ways: they are able to purchase less and they pay more than they should for what they buy." The bottom line is simple: less competition leads to higher prices, less innovation and fewer choices for consumers.

As a complement to the following summary position statements provided below, and in an effort to provide the Antitrust Division with more detailed discussions of the issues, Commenters provide in the attached binders copies of several of their key filings in the relevant FCC proceedings.

¹ A copy of this study is appended to the October 29, 2007 *Ex Parte* Letter contained in the Attachments to this letter (Tab 17 under "Forbearance").

² See, e.g., Reply Comments of XO Communications, et al., FCC WCB Docket No. RM-11358 (filed Apr. 2, 2007) (contained in the Attachments to this letter at Tab 2 under "Retirement of Copper...").

³ *Special Access Overpricing and the US Economy, How Unchecked RBOC Market power Is Costing US Jobs and Impairing US Competitiveness*, Economics and Technology, Inc., Aug. 2007 (filed as Appendix 1 to the Comments of AdHoc Telecommunications Users Committee, FCC WCB Docket No. 05-25, Aug. 8, 2007).

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Recent FCC Grants of Forbearance Requests Harm Competition in the Target Telecommunications/Broadband Markets

In the past two years, numerous ILECs and other carriers, including but not limited to, Qwest, AT&T, BellSouth and Verizon have sought forbearance from FCC rules and obligations governing the provision of UNEs and/or broadband services. Several of these petitions have been granted, including a Verizon petition regarding certain broadband services which was deemed granted, not on an evaluation of the merits, but rather because the FCC failed to act in a timely manner.

The Commenters consistently have opposed FCC grant of these forbearance petitions on grounds that the various ILEC petitioners have failed to produce sufficient and reliable evidence that the target markets are competitive, that the regulations at issue are not necessary to protect consumers, or that a grant of forbearance is in the public interest.

UNE Forbearance Requests

Facilities-based CLECs often rely on UNEs obtained from ILECs in order to obtain "last mile" loop access to their customers. In September, 2006 Verizon sought forbearance from UNE requirements in six markets, including the major markets of Boston, New York and Philadelphia. Verizon's forbearance request could impact over 34 million consumers across ten states. In April 2007, Qwest sought similar forbearance for the Denver, Minneapolis-St. Paul, Phoenix and Seattle MSAs. If the FCC were to grant these requests for UNE forbearance, those facilities-based CLECs already participating in the relevant markets would encounter nearly insurmountable barriers to their provision of services and few, if any, new CLECs would be able to enter these markets.

As is demonstrated in the attached FCC filings, grant of these forbearance requests simply is not warranted. The data provided to support the Verizon and Qwest petitions is grossly inadequate. Both ILEC petitioners have failed to provide sufficient and reliable wire center-specific data regarding the state of facilities-based competition in the relevant markets. CLECs themselves have filed ample data to demonstrate that the markets at issue are not sufficiently competitive. Indeed, the records of these FCC proceedings plainly show that grant of these forbearance requests would be contrary to the public interest and would actually harm consumers as competition would be diminished and consumers would have even fewer competitive options for their voice, data and broadband services.

Broadband Forbearance Requests

Also troubling is the recent spate of FCC grants of forbearance from enforcing rules affecting the provision of certain special access services sometimes referred to as

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“enterprise broadband services.” Since August of this year, the FCC has granted four ILEC requests for forbearance from enforcement of certain requirements of Title II of the Act and other rules applicable to the provision of the relevant broadband services. Commenters and other competitive providers of broadband services often rely on ILECs for the local broadband transmission component necessary to reach the CLECs’ retail customers because there are few or often no competitive alternatives to these ILEC products. The forbearance granted to the petitioners will enable them to effectively foreclose access to these critical wholesale inputs and in so doing will greatly diminish the ability of facilities-based CLECs to compete effectively, and will result in fewer competitive broadband service options being made available to consumers.

The deficiencies Commenters identified in the broadband forbearance requests mirror those found in the UNE forbearance requests. Specifically, petitioners consistently failed to produce sufficient and reliable evidence to demonstrate that the relevant products and product markets were sufficiently competitive to justify a grant of forbearance.

The Availability of Copper Loop Facilities is Critical to Widespread Broadband Availability

Copper loop plant, including feeder and subloop components, is being retired by the ILECs at an alarming rate. Facilities-based CLECs, including the Commenters, oppose the routine retirement of these facilities for a number of reasons. First, the copper facilities have significant value based on their line-powered capability which enables them to function when power failures disable other transmission facilities. This feature and the redundant nature of copper loops subject to retirement notices can prove to be important in times of public safety or homeland security crises. Second, copper loop facilities can be used to provide ultra-high-speed broadband services and this functionality, combined with the nearly ubiquitous presence of copper facilities, makes it an excellent vehicle for the provision of broadband services nationwide. Thus, the inherent beneficial features of copper loop facilities and the ubiquity of the facilities render them crucial to the continued development of competition in the telecommunications/broadband marketplace. The retirement of copper facilities erects yet another barrier to competitive entry and inhibits the ability of existing facilities-based CLECs to continue to access and service their residential and business customers.

As a result of these concerns, the Commenters, in conjunction with another carrier, filed a petition for rulemaking requesting that the FCC revise its rules governing ILEC retirement of copper loop facilities. Commenters assert that the current rules are too permissive in that they do not allow the FCC to block retirements or consider important factors, such as whether retirement will decrease competition, will eliminate redundant infrastructure, or will serve the public interest. Until the current copper facility retirement rules are changed, CLECs

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will continue to lose a ready means of providing broadband services and consumers will suffer from the inability to obtain those services on a competitive basis.

Current Special Access Rules Have Resulted in Market Failure

In the absence of the availability of UNEs, facilities-based CLECs often obtain loops from the ILECs as special access. Under the current special access pricing regime, ILECs have been granted pricing flexibility liberally, permitting them to set their own prices, on the theory that the relevant special access market is competitive and that anticompetitive prices and conduct will be restrained by the market. This theory has been proven false as ILECs have raised prices and realized spectacular rates of return under this regulatory regime. The FCC must reevaluate its pricing flexibility rules and take action to curb the ILECs' abuse of their market power. Until such action is taken, CLECs will face significant obstacles to entering and remaining in the telecommunications/broadband market due to the unjust and unreasonable special access service prices they incur while serving their existing subscribers or attempting to serve new subscribers.

Specifically, Commenters have demonstrated that special access prices under the pricing flexibility granted to ILECs greatly exceed the ILECs' costs and are unjust and unreasonable. The ILECs also impose onerous and exclusionary conditions on their special access service which negatively impacts the market. There are few, if any, competitive alternative sources of the necessary special access services and it is typically uneconomical for CLECs to self-provision these services. Consequently, CLECs are forced to obtain special access services from the ILECs at anticompetitive rates and terms and, as a result, are at a distinct disadvantage when trying to compete with those ILECs.

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Commenters hope the above discussion, and attached documentation, will highlight for the Antitrust Division some of the issues currently impacting the level of competition in the nation's telecommunications/broadband market.

For further information on any of the issues discussed in this letter, kindly contact the undersigned at (202) 342-8450.

Respectfully submitted,



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Denise Smith

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NuVox, Inc. and XO Communications, LLC*

Enclosures