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EX PARTE OR LATE FILED

REDACTED FOR PUBLIC INSPECTION

September 23, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

VIA HAND DELIVERY

Accepted / Filed

SEP 23 2015

Re: XO Communications, LLC Ex Parte Submission – Federal Communications Commission
WC Docket No. 05-25, RM-10593 Office of the Secretary

Dear Ms. Dortch:

XO Communications, LLC (“XO”), through its attorneys, hereby submits the two copies of a Redacted version of an ex parte correspondence outlining XO’s concerns and providing additional information regarding the long-term volume special access commitment plans of several price cap local exchange carriers.

The submission contains both Highly Confidential and Confidential Information. In accordance with paragraph 14 of the Wireline Competition Bureau’s (Bureau) October 28, 2010 *Modified Protective Order* (DA 10-2075) and paragraph 15 of the Bureau’s December 27, 2010 *Second Protective Order* (DA 10-2419), enclosed please find two copies of the redacted version of this filing. Copies of the Highly Confidential and Confidential versions of the filing are being submitted under separate cover.

Also enclosed is a duplicate copy of the submission. Kindly date-stamp the duplicate and return it to the courier.

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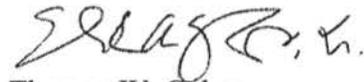
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Should you wish to discuss the filing further, please contact the undersigned.

Sincerely,



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**SUBJECT TO PROTECTIVE ORDER
IN WC DOCKET NO. 05-25, RM-10593**

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**Federal Communications Commission
Office of the Secretary**

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: XO Communications, LLC *Ex Parte* Submission –
WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

XO Communications, LLC (“XO”) takes this opportunity to reiterate its concerns and provide additional information regarding the long-term volume special access commitment plans (“Commitment Plans”) of several price cap local exchange carriers (“LECs”), such as Verizon and AT&T. These Commitment Plans contain provisions that effectively lock up virtually all of XO’s and other competitive carriers’ demand for special access services. As a result, these plans deter Commitment Plan Customers from building their own facilities to serve their customers (often with more advanced services) or from purchasing competing facilities from alternative providers. These plans also stifle the expansion of advanced IP-based services to more customers because XO’s Ethernet purchases from the price cap LECs do not count toward its minimum purchase commitments under the Commitment Plans. The anticompetitive nature of these Commitment Plans is further demonstrated by the fact that the market would not permit XO and other competitors to impose similar conditions on their customers. Because the Commitment Plans are so harmful to marketplace competition and consumers and act to thwart the technology transition to fiber and IP-based services, XO urges the Commission to examine and address this problem expeditiously and provide appropriate relief.

We provide examples here that illustrate how warped these so-called loyalty plans are by chilling fiber deployment and the expansion of IP-based services to end users and penalizing

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purchasing carriers through onerous provisions all while XO does not (indeed, cannot, since it lacks the price cap LECs' market power) pass along similar crippling terms to its own customers.

INTRODUCTION

XO is a national facilities-based competitive local exchange carrier ("CLEC") that complements its own network facilities by purchasing (leasing), on a wholesale basis, large volumes of special access circuits from price cap LECs and, where possible, from various competitive providers. XO provides a variety of services to business and enterprise customers, i.e., retail commercial customers, and to other carriers on a wholesale basis. As a provider, XO sells both "on net" and "off net" special access-type services, including "transport" (or "private line") – meaning transmission between customer-designated points excluding end user locations – and channel terminations – meaning network access to end user locations. XO has installed both Metro, i.e., metropolitan area, networks and an extensive nationwide network that XO continues to augment. In 2014, XO launched an initiative to invest \$500 million to expand its nationwide network under which it has completed fiber construction projects into nearly 550 enterprise buildings across 25 regional markets, including Boston, New York City, Washington, D.C., Atlanta, Houston, Dallas, Chicago, Denver, Southern California, San Francisco, and the Pacific Northwest, as well as other urban areas (XO's "On-Net Initiative").¹

However, XO's network facilities cannot reach all locations where it seeks to serve customers. Of necessity, many of XO's service arrangements depend upon inputs from other carriers, including use of special access and special access-like transport and channel terminations. XO relies most heavily on the facilities and services of the price cap LECs to reach customer locations and for interoffice transport and to a lesser extent on the facilities and services of other ILECs and competitive providers.²

When XO sells TDM-based transport and channel termination services "off net," [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of those sales consist solely of or incorporate price cap LEC special access circuits, which XO obtains directly from the price cap LECs or from competitive providers that resell price cap LEC special access, and unbundled network elements. Within that [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] price cap LEC special access predominates. In short, price cap LECs' special access facilities

¹ "XO Takes Success-Based Approach to On-Net Fiber Buildouts," Fierce Telecom, Sean Buckley (Sep. 3, 2015) found at <http://www.fiercetelecom.com/story/xo-takes-success-based-approach-net-fiber-buildouts/2015-09-03> on September 22, 2015.

² Similar to XO, competitive providers of circuits to XO typically rely significantly on special access obtained from price cap LECs as inputs to their wholesale service offerings.

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are an essential component to XO's "off net" transport and channel termination services.³ Similarly, XO's non-TDM-based Ethernet services (typically 20 Mbps and above) that are sold "off net" are predominantly supplied using access services purchased from the price cap LECs.⁴ Approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the Ethernet services XO sells "off net" today come directly from price cap LECs, and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] come from alternative providers. Almost [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of XO's inputs for pure Ethernet service come from competitive carriers reselling price cap LEC Ethernet facilities.

While the demand for Ethernet is growing, the number of TDM circuits XO continues to order and use remains substantial, and the problems created by the terms and conditions of the Commitment Plans must be addressed. Although Ethernet channel terminations now constitute more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of all of XO's new install orders placed with price cap LECs and other wholesale providers,⁵ the decline in new orders for TDM-based services continues to be gradual. While declining, TDM has still accounted for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of all new installs XO has purchased over each of the three most recent six-month periods, in terms of dollars billed.⁶ Additionally, of XO's total off-net circuits in-service, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] were still TDM as of August 2015.⁷

**THE PRICE CAP LECs' COMMITMENT PLAN TERMS AND CONDITIONS
RESULT IN MULTIPLE HARMS**

Typically alternative vendors' facilities-based prices for special access or special access-like services are lower than those of the price cap LECs, and these alternative providers are markedly more responsive than price cap LECs to XO as a customer. Unfortunately, the geographic reach of the price cap LEC facilities are considerably more extensive, such that alternative sources of supply are often not currently available. This situation is exacerbated beyond what XO would expect in a competitive environment because of price cap LECs' Commitment Plans, which effectively lock up demand not only in areas where the price cap LECs provide the only facilities-based option (apart from a new build by XO itself) but extend into those areas where other providers do have network facilities. Commitment Plan Customers

³ The same is true of other incumbent LECs (ILECs) in those markets where XO competes with non-price cap ILECs.

⁴ Again, the same generally can be said of non-price cap ILECs, where XO competes with them.

⁵ See attached Confidential Exhibit 1.

⁶ See attached Confidential Exhibit 2.

⁷ See attached Confidential Exhibit 1.

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must commit to purchase a high percentage of their special access needs from the price cap LEC, both where there is some measure of competition as well as where there is no present facilities-based competition, or face much higher month-to-month rates that would render competitive providers' retail and wholesale service uneconomic.

The Commitment Plans of the major price cap LECs – including Verizon and AT&T – are offered under these carriers' access tariffs. Commitment Plan Customers are able to buy special access DS1 and/or DS3 service, both transport and channel terminations, at rates lower than the price cap LECs' month-to-month rates by committing to purchase a minimum volume of service for three, five, or more years.⁸ For each Commitment Plan Customer, that minimum commitment for a given service type, e.g., DS_n service, is based on a high percentage of the Customer's historic purchases of service – typically channel terminations – with the price cap LEC. Unlike normal loyalty plans, the discount is not based on the volume of services in terms of circuit count or dollars spent, whereby all Commitment Plan Customers that purchase a certain number of or dollars' worth of channel terminations receive a certain discount. Rather, the Commitment Plans take a customer with few or no alternatives in many locations and capture that customer's demand for an extended period in all locations, including where there is existing or nascent competition. The customer effectively checks in but cannot check out by building facilities or using another supplier, even after the Commitment Plans expire. For example, to qualify for Verizon's Commitment Plan discounted rates for DS1 and DS3 services, Verizon requires an initial minimum commitment of at least ninety percent (90%) of the total number of DS1 and DS3 channel terminations, respectively, that are in-service at the time of a Customer's subscription to its Commitment Plan.⁹ But as a loyalty plan, the price cap LECs' Commitment Plans are not based on the operations of a competitive market. Rather than resulting from competition among alternative providers, the Commitment Plans thwart competition by binding customers' demand to the dominant player in the marketplace for extended periods of time.

The price cap LECs are the dominant providers of channel terminations to end user locations. In virtually all markets in which XO operates, price cap LEC facilities retain a unique level of network coverage such that the clear majority of XO's special access requirements must be obtained from the price cap LECs despite such efforts as its On-Net Initiative. This allows price cap LECs to extract the commitments in the Commitment Plans from XO and other

⁸ Notably, however, month-to-month rates are so high that the discounted rates under Plans are still much higher than those of competitive access providers and, thus, higher than what XO would experience in a fully competitive marketplace. Unfortunately, as explained herein, XO has limited opportunity to purchase from such providers in the territories of the price cap LECs with which it has a Plan. XO notes that not all price cap LECs offer Commitment Plans across all services types. AT&T, for example, does not offer a volume plan for DS3s.

⁹ Verizon Tariff FCC No. 1, § 25.1.3(A)(5) (emphasis added).

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competitive carriers to ensure they can reach the end user locations they wish to serve. Without receiving the discounts in the Commitment Plans, XO could not provide competitive services to end users in many locations. However, as a consequence of the minimum commitments, XO is often unable to serve customers using its own facilities – either existing or new – or by purchasing competitive offerings from other competitive providers (where such resources are available). As a result, XO is limited in its ability to offer customers lower prices or advanced service options such as Ethernet without facing severe shortfall penalties under the Commitment Plans.¹⁰ Indeed, even if XO were to purchase Ethernet service from a price cap LEC itself rather than maintain existing DS1 or DS3 special access service, XO would still face the shortfall penalties.¹¹ As a result, many customers are deprived of more cost effective service and of the promise of the technology transitions the Commission has worked so hard to foster. Indeed, because of their ubiquitous reach and the lockup effects of the Commitment Plans, the price cap LECs effectively hold the key to the pace of the technology transition to the detriment of business and enterprise customers.

At the same time, the Commitment Plans stifle the emergence of special access competition that could meet the DS1- and DS3-level transport and channel termination purchase requirements of Commitment Plan Customers. While there is considerable overall demand for special access circuits – which while decreasing will remain a key element to meeting customers' requirements for many years yet – special access competition simply has failed to emerge because most demand is locked up for long periods with the price cap LECs' Commitment Plans. Until special access purchasers as a group are able to obtain a significant portion of their requirements from competitive sources, too much of overall demand will be frozen in price cap LEC special access Commitment Plans, which will frustrate competition taking a firmer hold.

The nefarious effect of Commitment Plans can be exacerbated when a Plan Customer enters into a successor agreement with a price cap LEC. Because price cap LECs have ubiquitous geographic reach and have stifled the growth of competitive alternatives, XO, for example, has had no choice but to renew its Commitment Plans when they expire. Verizon's DS1 and DS3 plans, as noted above, require a commitment to purchase 90% of in-service circuits on the renewal date. As a result, only a limited amount of the Plan Customer's demand can be freed up for deployment of its own facilities, migration to a competitive provider's facilities (if available), or transition to advanced, non-TDM services, such as Ethernet, offered by the price cap LEC itself, and then only on a cycle of five or seven years. If a Plan Customer chooses not to renew its Commitment Plan, it would face a substantial increase in rates for

¹⁰ As XO discussed below, these penalties or "shortfall adjustments" are exorbitantly high and unreasonable in themselves.

¹¹ Only under very limited conditions under some Commitment Plans, which XO has found inapplicable to it or extremely impracticable, can certain Ethernet circuits count toward a TDM minimum commitment.

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circuits that remain with the price cap LEC and transition to month-to-month rates. For example, in [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] when XO renewed with Verizon, XO faced an increase in rates for DS1 and DS3 services of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] if it did not renew its lock-up Commitment Plan. Of course, by signing up for the Verizon Commitment Plan, XO tied up [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its demand within that price cap LEC's service territories in the old NYNEX and Bell Atlantic regions for another multi-year commitment. What makes the Verizon Commitment Plan so twisted is that XO, as a customer, did not have a competitive alternative to Verizon's Commitment Plan when XO renewed. The same can be said with respect to XO's Commitment Plans with other major price cap LECs.

Assuming for the moment that the Commitment Plans were otherwise defensible, these lock-up provisions cannot be explained by the need of price cap LECs to recover investments in their TDM network. Price cap LECs have not made any meaningful capital expenditures in recent years in TDM facilities or plant and the previous investments should be largely, if not fully, depreciated. Notably, AT&T, Verizon, and the other major price cap LECs have highlighted their transition, in terms of new investment, away from TDM facilities and plant. XO, in fact, has seen an overall increase in the past two-plus years in the instances of Verizon special construction quotes when it places orders for DS1 and DS3 channel terminations.¹² The quoted special construction charges, which are imposed both in copper and fiber build situations, are sufficiently large that XO loses a significant percentage of the customers that would face these added costs. In 2015, 60% of the potential XO customers facing special construction charges that to date have made a decision whether to proceed despite the special construction charge have opted to decline service. To win a customer facing special construction, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

Pursuant to the applicable tariffs, XO cannot reduce its minimum commitments mid-contract so as to avoid the shortfall penalties that would apply if it fails to meet those commitments. Nor can XO move circuits from TDM to price cap LEC-provided Ethernet service and count those purchases toward its minimum commitments. Increasingly XO customers look to transition to Ethernet services because they want a fiber-based service or their capacity needs are higher than what can be provided with TDM-supported Ethernet, yet the

¹² This overall rise in frequency of special construction quotes within Verizon territory (which are very rare on behalf of the other major price cap LECs) when XO seeks to purchase DS1 and DS3 circuits is independently unreasonable given that the Commitment Plans force Plan Customers to buy DS1 and DS3 circuits in many instances – or potentially face substantial shortfall penalties.

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Commitment Plans discourage XO from transitioning customers to advanced Ethernet services in an effort to satisfy its minimum commitment under the Commitment Plans.¹³ But in so doing, XO faces losing customers that want that Ethernet service.

Demand for “pure” Ethernet services is growing steadily, both among commercial as well as carrier customers, as XO’s own numbers discussed above reveal. Consequently, where XO does not have facilities in place or cannot economically justify building such facilities, XO would like to increase the circuits it can obtain from alternative Ethernet providers which typically offer better rates, terms, and conditions than price cap LECs. Having said that, in some cases, because the transition to pure packet-based service often requires a considerable investment in new equipment by a customer, XO is able to leverage existing equipment if it can service a customer through TDM-based Ethernet over Serial (“EoS”) (i.e., using DS1s), provided that the customers’ bandwidth requirements are not in excess of 10 Mbps. Moreover, because EoS uses special access DS1s as an input, having a customer on EoS would count toward any minimum commitments under a Commitment Plan. Nonetheless, maintaining a customer over TDM circuits in this way can only be a short-term solution as the customer’s capacity needs grow.

XO does not have a practicable opportunity to migrate any material number of circuits to other providers when a Commitment Plan expires in order to avoid the lock-up provisions. A threshold obstacle is that no competitor or group of competitors could provision the circuits required by XO within a major price cap LEC’s operating territory covered by a Commitment Plan. Only the price cap LEC has the facilities in place to meet XO’s needs satisfactorily in the varied locations subject to a Commitment Plan.¹⁴ Moreover, the transition would be lengthy, from a number of months to a few years, during which XO would face either the price cap LEC’s undiscounted month-to-month rates if XO did not renew its Commitment Plan or another long term agreement with the price cap LEC. In the latter case, of course, XO would face the

¹³ XO possesses a very limited ability under its Commitment Plans with Verizon and AT&T to move TDM circuits to Ethernet platforms to meet the increasing demand and have the Ethernet purchases count against its volume commitments. Provided that the customer and the customer address remains the same, a new Ethernet circuit could count toward minimum commitments, but in XO’s experience that rarely happens. As a practical matter, XO has found opportunities to count Ethernet toward minimum commitments to be negligible to non-existent, despite being theoretically available.

¹⁴ If a competing provider (or group of such providers) in a given geographic area or region could handle all or a significant portion of a Plan Customer’s demand, it would do so by reselling price cap LEC circuits for a significant proportion of the demand. For this reason, the other carrier may have a disincentive to ratchet up potentially its own minimum commitments to the underlying price cap LEC(s) to support a Plan Customer whose Plan is expiring. Like the Plan Customer, the would-be wholesale carrier would face the same sort of provisions that penalize a failure to meet the minimum commitments or exceeds the maximum numbers of circuits when penalties apply based on the price cap LEC’s high month-to-month rates.

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potential for a shortfall penalty (and possibly early termination penalties) as it moved its circuits to a competitor.

The shortfall penalties assessed under the Commitment Plans are not always just and reasonable, and they are often discriminatory. In the case of Verizon's Commitment Plans, for example, the minimum commitment is based upon channel terminations. XO submits that just and reasonable shortfall penalties under a Commitment Plan would make the price cap LEC whole, compensating the price cap LEC for the channel terminations not purchased under the Plan in the relevant period. Indeed, more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the DS3 channel terminations, for example, that XO purchases from Verizon are standalone channel terminations, the remainder having some mileage transport added (but not multiplexing).¹⁵ Verizon, however, assesses its shortfall penalties not on the basis of the channel terminations that a Commitment Plan Customer would have had to purchase to make up any shortfall.¹⁶ Rather, Verizon seeks to impose a shortfall penalty that assumes that the Plan Customer would purchase not only channel terminations to make up the shortfall but also additional transport mileage and multiplexing, even though these rate elements do not contribute to the minimum commitments. As a result, for example, in the past two years Verizon has assessed against XO shortfall penalties over two-and-one-half times the additional amount that XO would have paid to satisfy its minimum commitments of channel termination purchases – the unreasonably excessive penalty amounting to several million dollars.

Perhaps most significantly, these shortfall penalties have a chilling effect on XO's plans to deploy new fiber to buildings. By replacing an XO customer's TDM-based services with XO-fiber based service in a building, XO stands to not only bring more advanced services to customers in the building, but to lower its costs as well. As part of XO's On-Net Initiative, as with its previous network construction programs, the company reviews the net cost savings that it can expect to achieve by building and lighting fiber to a building (often XO would be the first provider to do so) rather than relying on wholesale inputs from other providers, most often price cap LECs, to serve customers. However, the resulting decrease in XO's purchase of DS1 and DS3 services at that location may jeopardize its ability to meet its minimum commitments under the Commitment Plans. Consequently, XO frequently must consider the impact from shortfall penalties if XO serves the building with its own facilities rather than using a price cap LEC's TDM channel terminations, which sometimes leads XO not to build into that building. As noted

¹⁵ In an anomalous handful of cases involving DS3s, involving no more than five DS3 circuits in all of Verizon North and South, Verizon bills XO multiplexing in connections with channel terminations.

¹⁶ XO disagrees with Verizon over the proper interpretation and application of the shortfall penalty provisions in its tariff, an issue that is currently being litigated in the U.S. District Court for the Eastern District of Virginia. *Verizon Virginia, LLC, et al. vs. XO Communications, LLC et al.*, Civil Action No. 3:15CV171 (E.D. Va).

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above, XO's minimum commitments were imposed on XO based on its historic spend, not chosen by XO based on its future deployment and service plans.

In New York City, for example, following XO's On-Net Initiative reviews in September 2014 and February/March 2015, XO has made the decision to not to construct fiber to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] buildings, which would have replaced [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] DS3 channel terminations currently purchased from Verizon. These locations otherwise met XO's criteria to build fiber and bring them on-network. On these buildings, XO estimated that its cost savings over the course of the next [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] years – the remainder of XO's Commitment Plan term with Verizon – from bringing the buildings on-line would have been approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. However, XO has approximated the potential net shortfall penalties (under Verizon's unreasonable interpretation of its tariffs) that the builds would have triggered to exceed [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] over the same period. Indeed, the impact of XO not putting in the fiber in these instances extends beyond the buildings in question: had XO been able to justify the build to the target buildings, the construction would have created the future opportunity for XO to bring fiber to additional buildings that would have been passed by the new construction at less marginal cost.

THE TERMS AND CONDITIONS OF OTHER PROVIDERS' WHOLESALE ARRANGEMENTS ARE MATERIALLY DIFFERENT THAN THOSE OF THE PRICE CAP LECs' COMMITMENT PLANS

In contrast to the lock-up Commitment Plans, the service agreements of competitive providers do not contain the same sorts of provisions that cause harm. Facilities-based alternative providers, who reach a fraction of business locations with their own facilities, are struggling to gain a toe-hold in the market. Accordingly, they cannot effectively force customers to sign onto unjust and unreasonable terms and conditions. XO normally does not have to commit to terms with other competitors longer than one year (sometimes two or three years) to get their best rates, compared to five or seven years of a minimum commitment under the price cap LECs' Commitment Plans. Moreover, other providers' plans generally do not have minimum commitments or shortfall penalties. Despite this, the circuit rates offered by competitors are typically lower than what XO obtains from price cap LECs even given the discounts in the Commitment Plans. The difference in rates from competitors can be as much as 40-60% less than the discounted price cap LEC rates.

When agreements with competitors other than price cap LECs expire, month-to-month rates may apply. But, typically, these rates are at the same level as those in the expired deal under evergreen provisions that apply while new arrangements are negotiated. In XO's

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experience, even where the contract with a competitive provider would allow the assessment of higher rates upon termination, competitive providers often do not invoke those provisions to increase the rates upon expiration. This prevalent practice stands in sharp contrast to the provisions of price cap LECs which use escalated month-to-month rates at the time of Commitment Plan expiration to force a new long-term commitment tying up the bulk of a carrier's special access requirements.

Unlike with the Commitment Plans, XO does not impose volume commitments or lock-up provisions in retail and wholesale arrangements offered to its own customers. That is not to say that XO never negotiates larger discounts as a customer's overall volume increases or for longer terms, but, like other competitive providers, XO does not impose unreasonable minimums, maximums, or penalties as with price cap LEC's tariffed Commitment Plans. XO's arrangements with its retail and wholesale customers reflect what one would expect from providers under competitive conditions, where better prices reflect larger volumes of purchases (or the potential for future additional purchases). The fact that price cap LECs do not offer such reasonable terms and conditions strongly suggests that, unlike XO and other competitive providers, they do not feel competitive pressure from their rivals in the market. This is predictable given that in a significant majority of cases within their operating territories price cap LECs wield market dominance and offer the only facilities-based channel terminations but can also require minimum commitments even where the price cap LECs face some level of competition. Competitors do not have this same ability.

XO's terms and conditions differ markedly from price cap LEC Commitment Plans. As a supplier to business and enterprise customers, XO has standardized terms which it posts on its website which govern most service order arrangements. With carrier and large enterprise customers, XO may enter into national master service agreements ("MSAs"), which are individually negotiated and often have customer-specific terms and conditions. Once the MSAs are in place, XO's customers can place orders for particular circuits at particular locations, the term and price of which may be individually negotiated as well. XO's commercial and carrier customers may commit to buy a certain number of circuits for a certain period to obtain a given price, but the terms and conditions of the arrangement are materially different than the price cap LECs' Commitment Plans. Unlike the Plans that XO has with price cap LECs, the arrangements XO enters into with its customers involve rather short term commitments (typically one to three years), and customers do not face punishing shortfall penalties for failure to meet minimum commitments like those the price cap LECs impose. That said, to get the prices they negotiated, XO's customers must make the purchases for which they bargained. Further, XO never requires a customer making a volume commitment to purchase a certain percentage of its total requirements from XO or a percentage of its in-service circuits in place at the start date of an MSA. Rather XO negotiates the price at new locations based on the number of circuits the customer purchases at the locations, without reference to what its overall requirements are or its

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prior purchase history has been. XO does not have loyalty agreements. Where there is a deal involving a certain volume or term purchase, XO has no ability in negotiations to impose down-turn provisions of the sort XO is subject to in its agreements with price cap LECs. Indeed, to the contrary, XO's may [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

Significantly, there is typically a disconnect between the circuit contract XO enters into with its customers and the Commitment Plan that XO has with a price cap LEC for the same circuit. XO cannot pass through onerous terms of the price cap LEC Commitment Plans onto its own customers. In particular, the terms under which XO buys its wholesale inputs are less advantageous than the terms under which it sells the very same inputs to its customers. XO's carrier customers demand short terms from XO – typically one-year – because technology, equipment, and other aspects of the communications environment change so rapidly that anything longer would be imprudent. Moreover, customers wish to retain their ability to move to other providers on a short turn-around basis if they feel XO (or another provider) does not continue to offer the best deal. This dichotomy prevents XO from fully covering the risks of the underlying circuits due to the Commitment Plans. This may be because, reflecting the market conditions in which XO competes, the duration of the term of XO's agreements with its customers is shorter than that of the underlying circuits XO purchases from the price cap LECs under the special access commitment plans. This is to say nothing of the additional risk under the Commitment Plans associated with failure to meet volume minimums. XO, unlike the price cap LECs, does not have the market leverage to impose such terms.

Because larger enterprise customers often have competitive choices and XO does not have market power, XO's customers are able to push more and more of the risk onto XO, which has minimum commitments with the underlying price cap LECs. Customers treat XO's off-net service no differently than on-net service provided using XO's own facilities. XO cannot offer its off-net services, with the increased costs and risks under the Commitment Plans, at different rates, terms, or conditions than on-net services in an effort to pass through those underlying costs and risks. If XO does attempt differentiation, customers tend to "cherry pick" the on-net services, making it that much more difficult to meet its minimum commitment.¹⁷

This discontinuity of terms between XO's wholesale purchases from price cap LECs and its retail or carrier sales puts tremendous economic pressure on XO. In fact, XO opts not to offer services to a potential customer because the benefits of serving the customer do not justify the assumption of the risks and potential penalties governing its underlying inputs, whether it be early termination liabilities or other onerous terms and conditions in the price cap Commitment

¹⁷ XO has slightly more success with bifurcated rates on the wholesale side.

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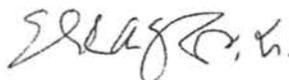
Plans. XO tries to cover those risks where it can. But frequently, the impacts of the Commitment Plans are detrimental to XO's ability to serve end user customers.

* * *

XO appreciates this opportunity to discuss the harms to customers, the technology transition, and to competition resulting from the unjust and unreasonable terms and conditions of the price cap LEC Commitment Plans. As noted above, TDM purchases still represent a significant percentage of XO's in-service DS1 and DS3 circuits as well as its new installs. Further, in contrast with the price cap LEC Commitment Plans, XO cannot impose similar terms and conditions on its own customers. As a result, XO is often at risk due to the dichotomies between the provisions of the Commitment Plans upon which it relies for wholesale inputs and the terms and conditions under which it may offer its own wholesale and retail services.

Please contact the undersigned if there are any questions or if further information is required.

Respectfully submitted,



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CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM 10593, BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

XO Total Base of Off-Net TDM and Ethernet Circuits

Amount Billed to XO by Month for Total Base

Circuit Type	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15
Ethernet	[REDACTED]																							
TDM	[REDACTED]																							
Grand Total	[REDACTED]																							

% Total Base Billing to XO by Month

Circuit Type	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15
Ethernet	[REDACTED]																							
TDM	[REDACTED]																							
Grand Total	[REDACTED]																							

XO New Installs of Off-Net TDM & Ethernet Circuits

Amount Billed to XO for New Installs (First Month's Billing)

Circuit Type	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15
Ethernet	[REDACTED]																							
TDM	[REDACTED]																							
Grand Total	[REDACTED]																							

% of First-Month Billing for New Installs by Month

Circuit Type	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15
Ethernet	[REDACTED]																							
TDM	[REDACTED]																							
Grand Total	[REDACTED]																							

XO Total Base of Off-Net TDM & Ethernet Circuits

Amount Billed to XO for Total Off-Net Base for 6-Month Period

Circuit Type	Sept. 2013 — Feb. 2014	Mar. 2014 — Aug. 2014	Sept. 2014 — Feb. 2015	Mar. 2015 — Aug. 2015
Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TDM	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Grand Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

% of 6-Month Billing for Total Off-Net Base

Circuit Type	Sept. 2013 — Feb. 2014	Mar. 2014 — Aug. 2014	Sept. 2014 — Feb. 2015	Mar. 2015 — Aug. 2015
Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TDM	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Grand Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

XO New Installs of Off-Net TDM & Ethernet Circuits

Amount of First-Month Billing for New Installs over 6-Month Period

Circuit Type	Sept. 2013 — Feb. 2014	Mar. 2014 — Aug. 2014	Sept. 2014 — Feb. 2015	Mar. 2015 — Aug. 2015
Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TDM	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Grand Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

% of First-Month Billing for New Installs over 6-Month Period

Circuit Type	Sept. 2013 — Feb. 2014	Mar. 2014 — Aug. 2014	Sept. 2014 — Feb. 2015	Mar. 2015 — Aug. 2015
Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TDM	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Grand Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]