

Exhibit 1

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

_____ )	
In the Matter of )	
)	
Unbundled Access to Network Elements )	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling )	CC Docket No. 01-338
Obligations of Incumbent Local Exchange )	
Carriers )	
_____ )	

**DECLARATION OF CHRISTOPHER McKEE  
ON BEHALF OF XO COMMUNICATIONS, INC.**

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

1. I am employed by XO Communications, Inc. ("XO") as its Executive Director of Legal and Regulatory Affairs. My business address is 11111 Sunset Hills Road, Reston, VA, 22190. My primary job responsibilities include directing XO's advocacy efforts before federal regulators.

2. Following its acquisition of Allegiance Telecom last June, XO became the nation's largest facilities-based Competitive Local Exchange Carrier ("CLEC"). Based in Reston, Virginia, XO owns and operates fiber optic rings with associated switching and optronic equipment to serve 70 metro area markets in 26 states. XO now has almost 150 Class V circuit switches (Nortel DMS500 and Lucent 5ESS) and VoIP softswitches (Sonus). XO also has deployed 7,136 route miles of its own fiber optic facilities composed of 884,827 fiber miles of metro fiber transport facilities. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, Virtual Private Networking, Ethernet, Wavelength, Web Hosting and Integrated voice and data services. Services are

provided to more than 180,000 business customers by means of a combination of the company's own facilities, unbundled network elements ("UNEs") and services purchased from Incumbent Local Exchange Carriers ("ILECs"), facilities and services purchased from other competitive telecommunications carriers, and through XO's Tier One Internet peering relationships. The company also is one of the nation's largest holders of fixed wireless spectrum, potentially covering 95 percent of the population of the 30 largest US cities.

3. The purpose of this declaration is to explain the critical importance to XO of DS-1 loop UNEs. I will describe how XO utilizes DS-1 loop UNEs to provide last mile connectivity to buildings passed by our SONET metro fiber optic rings.

4. I want to make one thing perfectly clear. It is absolutely essential to the future of XO that we be able to obtain cost-based DS-1 loops from the ILECs, and I offer this declaration in support of the company's petition for an expedited FCC finding that the ability of CLECs to provide service would be impaired on a nationwide basis without universal access to DS-1 loops. However, I must stress that XO's ability to provide service also would be impaired without access to Enhanced Extended Links/Loop ("EEL") UNEs, DS-3 level UNE loops and high capacity interoffice transport UNEs in most geographic areas. Our patience in leaving a final decision on those facilities until later should not be misconstrued as a concession that they are not critically important to us in the areas where they are needed.

5. XO's base of more than 180,000 customers is primarily comprised of small and medium sized businesses. These businesses normally aggregate loops on their premises with a PBX or Key System. The vast majority of such customers (approximately 80%) subscribe to services which require that they connect to the backbone XO network over T-1 or Integrated Access PRI facilities. As a general matter, small and medium sized business customers are connected to the XO network with DS-1 loops, while we use higher capacity DS-3

and OcN facilities to serve large corporate users and other carriers. XO offers a suite of services (Business Trunks, ISDN PRI, Integrated Access, etc.) that are ideally suited for any small or growing company or office location with moderate bandwidth (128 Kbps to 1.024 Mbps) requirements. Such customers often select an integrated access product, in which the customer's local, long distance and internet access are delivered over the same loop facilities. Whenever the customer requires at least 6 lines/trunks with a minimum of 14 channels XO provides the service via DS-1 access. Since these are by far our most popular products with customers, we estimate that approximately 80 percent of the line equivalents used by XO to connect to our customers are over DS-1 level facilities.

6. From the foregoing, it is apparent that DS-1 level loop connectivity to customers is absolutely essential to XO's ability to deliver services to our small and medium sized business customers. We currently obtain these DS-1 level loop facilities in a number of ways. Sometimes we build our own fiber optic facilities into a building and create a DS-1 channel connecting to our backbone network. Other times we purchase loop facilities from other competitive carriers. However, as other XO representatives will explain in their Declarations, the availability of those options -- albeit preferred -- are extremely limited. Thus, in the vast majority of instances we must rely upon the use of legacy ILEC facilities to connect to customers at the DS-1 level.

7. The market for our business services is extremely competitive. We compete for customers based in large part upon our ability to provide superior service levels, new service options, route redundancy and attention to customer service. However, these service differentiating features are not sufficient to make sales unless we also are competitive on price. The bottom line is that XO is normally unable to convince customers to subscribe to its services unless it offers a lower price than the ILEC for comparable services. The need to price

aggressively is a simple fact of life when you are competing against an incumbent monopoly with established brand name recognition.

8. Our business services typically are offered on very tight operating margins. Unlike the ILECs, we have no monopoly services which can be used to cross subsidize unprofitable operations elsewhere in our business. We are unable to price below cost on any of our significant service offerings and remain economically viable. Thus, it is imperative that we control costs, and that critical inputs to our cost of service not exceed similar costs incurred by our primary competitors -- the ILECs.

9. As Wil Tirado explains in his Declaration, it simply is not economic for XO to build its own DS-1 loop facilities. Similarly, as Doug Sobieski explains in his Declaration, XO has determined that use of our LMDS spectrum to deploy wireless DS-1 loops is not an acceptable technical or economic solution for most customers. Thus, in the vast majority of cases, we must purchase DS-1 facilities from the ILECs to serve our large base of small and medium sized business customers.

10. Of course, XO is able to order such services out of the ILEC special access tariffs, but as Laura Inniss explains in her Declaration, use of ILEC special access to provide local telecommunications services is not economic. Since ILEC special access rates are not set in accordance with any cost-based pricing principles, and ILECs commonly build enormous profit margins into their special access rates, XO is simply unable to price retail services competitively when it must use ILEC special access services to connect to customers.

11. Thus, we must rely upon the availability of ILEC DS-1 loop UNEs priced based on total element long-run incremental cost ("TELRIC") costing principles to serve our customers economically. It is only when we have cost-based ILEC DS-1 loop facilities available

that we can compete for small and medium sized business customers based on a level economic playing field.

12. Notably, the DS-1 UNE loops that we lease from ILECs are of two types. We use both UNE Loops and EELs. In both cases, XO is required to establish collocation arrangements in ILEC central offices to obtain access to the DS-1 loop facilities. XO currently operates approximately 900 such collocation arrangements in 70 markets across the country. Such collocation arrangements are very costly. We estimate that XO incurs approximately \$500K over the first three years at each collocation site. These costs include building the collocation space, recurring charges for rent and power, plus the costs of purchasing and installing equipment to outfit the collocation space.

13. Thus, XO relies on the availability of cost based DS-1 loop UNEs to serve most of our customer base. Without access to ILEC provided DS-1 UNE loops priced at cost, our existing business would be jeopardized.

14. The importance of cost-based ILEC DS-1 UNE loops to XO cannot be overstated. We rely upon them to offer service to many thousands of small and medium sized business customers. It simply is not economically feasible for XO to build laterals to most buildings and self supply its own DS-1 loop facilities. Our fixed wireless spectrum holds promise for the future, but the technology is not yet ready, and will only be a solution for a subset of customers when it finally is ready. ILEC Special Access is not an economically feasible alternative because Special Access rates are priced far above cost already and increasing steadily. Importantly, these conditions hold true virtually universally across the nation, without regard to market or location. Thus, XO -- the nation's largest CLEC -- simply will not be able to provide competitive telecommunications services to small and medium business customers in most areas

unless the FCC acts to insure that we are able to continue obtaining cost-based DS-1 UNE loops on an uninterrupted basis.

A handwritten signature in cursive script that reads "Christopher McKee".

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Christopher McKee

Executed on: September 29, 2004

Exhibit 2

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

_____	)	
In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
_____	)	

**DECLARATION OF WIL TIRADO  
ON BEHALF OF XO COMMUNICATIONS, INC.**

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

1. I am employed by XO Communications, Inc. ("XO") as its Director of Transport Architecture. My business address is 11111 Sunset Hills Road, Reston, VA 20190. My primary job responsibilities include providing overall direction for the evolution of XO's network from both a technical and financial capabilities perspective. In other words I specify what technology is deployed and how we allocate our capital funds to expand the XO network. Previously I was employed by Bell Atlantic, now part of Verizon, in a similar function.

2. The purpose of this declaration is to explain the critical importance to XO of DS-1 loop Unbundled Network Elements ("UNEs"). In Part I hereof, I will explain how XO evaluates whether or not it is financially feasible to build its own loop facilities into buildings, and show how it typically is not financially feasible for XO or other Competitive Local Exchange Carriers ("CLECs") to construct their own wireline DS-1 loop facilities. In Part II, I will explain why cable television systems do not provide adequate substitutes for wireline DS-1 UNE loops.

### **XO Cannot Build its Own Wireline DS-1 Loop Facilities**

3. XO is a facilities-based CLEC. We build our own fiber optic transmission networks and install our own switching equipment wherever it is economically feasible for us to do so. We have invested very heavily in constructing such network facilities. Indeed, we have spent approximately \$5 billion to establish metro rings to serve 70 metropolitan areas, and currently operate 146 switches and 7,136 route miles composed of 884,827 fiber miles of metro fiber transport facilities.

4. Whether the service provided to customers is switched or dedicated, the loop facility is the most basic component of the network required to serve a particular customer. However, the economics of building loop facilities is fundamentally different than the economics of deploying switching and transport facilities. When XO installs switches and transport facilities, those network components are used in common (and paid for) by many customers. By contrast, loop facilities are dedicated to the use of one customer or in limited instances a very small group of customers. Given the very high cost of facilities construction, it can be financially feasible to build transport and switching facilities in areas where there simply is adequate aggregate potential demand in place, whereas for it to make financial sense to build loop facilities you must have the assurance that a particular customer or group of customers will contract with you to provide very high capacity services over an extended period of time.

5. By way of background, when XO constructs a Metro Fiber (MF) Ring it does so in a manner that identifies geographically proximate commercial buildings that house as many potential customers as possible; if such customers are located in buildings that are reasonably close together, we attempt to design and build the metro ring to pass directly by as many of those buildings as possible. Buildings that are directly on XO's Metro Fiber Ring can be served with our own loop facilities. In some markets, as a result of growth or capacity issues

XO may build a smaller second fiber ring. In such cases, XO not only evaluates the building location of potential customers but it also evaluates the buildings that house its principal existing customers in an attempt to place as many buildings on the MF Ring as possible. I have included the map of XO's San Francisco Metro Fiber Ring to illustrate this point (Attachment A hereto.) The Metro Fiber Ring consists of interoffice fiber optic facilities deployed between XO's switch locations and the ILEC central offices, and collocation equipment installed in the ILEC central offices. Other than customers in the limited numbers of buildings on the XO MF Ring, XO serves its customers by ordering loops (UNE loops whenever available) from the XO collocation space at the ILEC central office to the end user. While XO has constructed MF Rings in most of the market areas in which we provide local exchange services deploying MF Rings is extraordinarily expensive and thus does not occur on a consistent basis. Consequently, connection to customers via an MF Ring is the exception, not the rule, and simply is not an economic alternative for the vast majority of potential customers

6. The final component is the Building Lateral. The vast majority of commercial buildings are NOT located on our MF Rings. Thus, if XO wishes to serve customers located in those buildings with our own loop facilities, we must construct a building "lateral", connecting the building to our MF Ring. Specifically, we must trench, install conduit, and pull fiber between the MF Ring and the building to be served; and then we must obtain and outfit equipment space in the building itself.

7. As noted, merely passing nearby a customer facility does not enable us to actually provide service to the customer. We estimate that there are 6.9 million commercial office buildings in the United States, and that around 2.3 million of those buildings are located in the cities where XO operates fiber rings. However, those 2.3 million buildings are unreachable

regardless of how close they are to the MF ring unless they are physically connected to it.

Today, our MF Rings connect to only 2,164 buildings, or less than 1% of the potential market.

8. The construction of laterals to connect office buildings to the XO network is extremely difficult, time consuming and costly, even when adding buildings to our MF Rings that are located in close proximity to our MF Rings. The average XO building entry is 500 feet long and on average costs \$141,000 in outside plant construction and building access plus \$79,000 for the associated electronics totaling \$220,000 per building assuming no significant space conditioning or internal end user wiring problems. It is important to realize that CLECs have no absolute right to build into the complexes at which customers reside. We must negotiate private Right of Way ("ROW") licenses, and building access agreements, which may or may not be available at economic prices and depending on the location of the building. Additionally municipal franchises may need to be negotiated. Often permits are required for trenching, and sometimes rezoning is necessary, both of which are uncertain prospects. Unless these hurdles are crossed -- and many times they cannot be -- we simply are unable to construct that lateral regardless of customer demand or desires. For example XO has faced recurring seasonal construction moratoriums imposed by municipalities during the winter months, construction bans in historic districts, multi-year construction bans in recently renovated city streets, building owner opposition and requirements to use city owned/operated conduit systems with limited access. In such instances, the ILEC loop facilities are the only route into the building and constitute an absolute monopoly bottleneck facility.

9. Just as important in addition to the capital cost of construction, the building of laterals is very time consuming. The time required to obtain all of the necessary legal clearances and then actually construct the lateral is a minimum of 4 to 6 months, but can take much longer than that. Customers with moderate telecommunications requirements, such as the

small and medium sized businesses that typically utilize DS-1 level access, normally are unable and/or unwilling to wait such a long time for the delivery of services.

10. The concerns and issues XO has experienced in deploying its own DS1 loops are consistent with the Federal Communications Commission's (Commission) findings in the *Triennial Review Order* that competitive LECs "face extremely high economic and operational barriers" in deploying DS1 loops. *See Triennial Review Order* at ¶ 325. The Commission also correctly recognized that DS1 level customers possess significantly different economic characteristics from that of large enterprise customers and have a general resistance to long term contracts. Taken together the Commission determined these factors make it economically infeasible for competitive LECs to deploy DS1 loops. *See Triennial Review Order* at ¶ 326.

11. Due to the extraordinary cost of constructing laterals, XO's cannot realistically add a building to its network unless customer demand at that location exceeds at least three DS-3's of capacity. The following table highlights the high cost of building laterals and that such builds are not financially justified until at least three DS-3 of capacity are under contract.

## Table 1

### Table 1 – Cash Flow Analysis (24-Month Present Values)

**Number of DS3 Installs in Month 1 (no DS3 installs in Months 2 through 24)**

		<b>1.0</b>	<b>1.5</b>	<b>2.0</b>	<b>2.5</b>	<b>3.0</b>
<b>Revenue per DS3 Per Month</b>	\$1,000	(\$204,900)	(\$197,100)	(\$189,300)	(\$181,500)	(\$173,600)
	\$2,000	(\$188,300)	(\$172,200)	(\$156,100)	(\$140,000)	(\$123,900)
	\$3,000	(\$171,700)	(\$147,300)	(\$123,000)	(\$98,600)	(\$74,200)
	\$4,000	(\$155,200)	(\$122,500)	(\$89,800)	(\$57,100)	(\$24,500)
	\$5,000	(\$138,600)	(\$97,600)	(\$56,700)	(\$15,700)	\$25,300
	\$6,000	(\$122,000)	(\$72,800)	(\$23,500)	\$25,700	\$75,000

- ❖ \$220,000 of fiber cost (based on the average length of XO's laterals -- 500')
- ❖ NPV over 24 months

XO utilizes a careful screening process to decide whether the investment in lateral construction is warranted. A high-level estimate of construction and electronics costs is developed and used to perform an Internal Rate of Return analysis against the revenue commitment the customer is willing to make. The customer revenue commitment is defined as the Non-Recurring Charge (NRC), if any, plus the Monthly Recurring Charge (MRC) times the number of months the customer is willing to commit to by signing a term contract. Regardless of potential future revenue no decision to build is made unless a signed customer contract is presented by the XO Sales team. In our experience, relatively few buildings survive such scrutiny, and "building adds" are the exception, not the rule. One thing can be said for sure, it would almost never make sense to construct a lateral to add a building to the XO network simply to add customers with DS-1 level demand.

12. As I explained above, it almost never is economic for XO to construct its own wireline DS-1 loop facilities. It is also worth noting that the same holds true for other

CLECs as well. Numerous CLECs such as AT&T, Worldcom, Nuvox, NewSouth and KMC have said so under oath in prior filings in these proceedings. XO's experience is consistent with these declarations. Because of limited building presence from other CLECs we rarely have been able to purchase DS-1 loop facilities from other CLECs. This is true of all of our markets across the nation. Indeed, we found that CLECs offer DS-1 loops on a wholesale basis to fewer than 5 percent of the buildings that XO seeks to serve.

### **Cable Television Facilities Cannot Replace DS-1 UNE Loops**

13. Some ILECs have suggested that CLECs could opt to use cable television systems for alternative DS-1 loop facilities. In our experience, that is just ILEC rhetoric. To my knowledge, no cable television company has ever offered to provide DS-1 level loops to XO over their cable television plant. That should not be surprising, since cable television systems simply were not designed to provide this type of service.

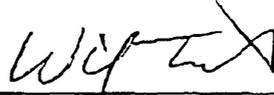
14. There is a substantial geographic incongruity between the build out plans of most cable television companies and the needs of facilities-based CLECs such as XO. Our target customers are businesses, and our fiber optic backbones are primarily routed in and around business districts. By contrast, most cable television systems were designed and built first and foremost to serve residential customers in suburban areas. Thus, commonly the cable television systems do not really reach the customers to which XO needs to connect.

15. Even where cable television networks reach our business customers, the cable television network facilities typically lack the capacity to serve large numbers of business customers that require telecommunications and internet services at DS-1 and higher speeds. While it is true that cable television systems often have been upgraded to support the provision of cable modem services, the design of the network commonly is such to support infrequent high-speed bursts of data to and from subscribers. This is much different than a system required

to support the "always on" and secure bandwidth demands of businesses. Our sense is that cable systems normally could not provide the service availability guarantees required by our business customers.

### Summary

16. The importance of cost-based ILEC DS-1 UNE loops to XO cannot be overstated. We rely upon them to offer service to many thousands of small and medium sized business customers. It simply is not economically feasible for XO to build laterals to most buildings and self supply its own DS-1 loop facilities. For the same reason, we are rarely able to purchase DS-1 loop facilities from other CLECs. And cable television systems are not designed in a manner that enables them to provide a wholesale wireline DS-1 loop alternative. Thus, XO - the nation's largest CLEC -- simply will not be able to provide competitive telecommunications services to business customers in most areas unless the FCC acts to insure that we are able to continue obtaining cost-based DS-1 UNE loops on an uninterrupted basis.



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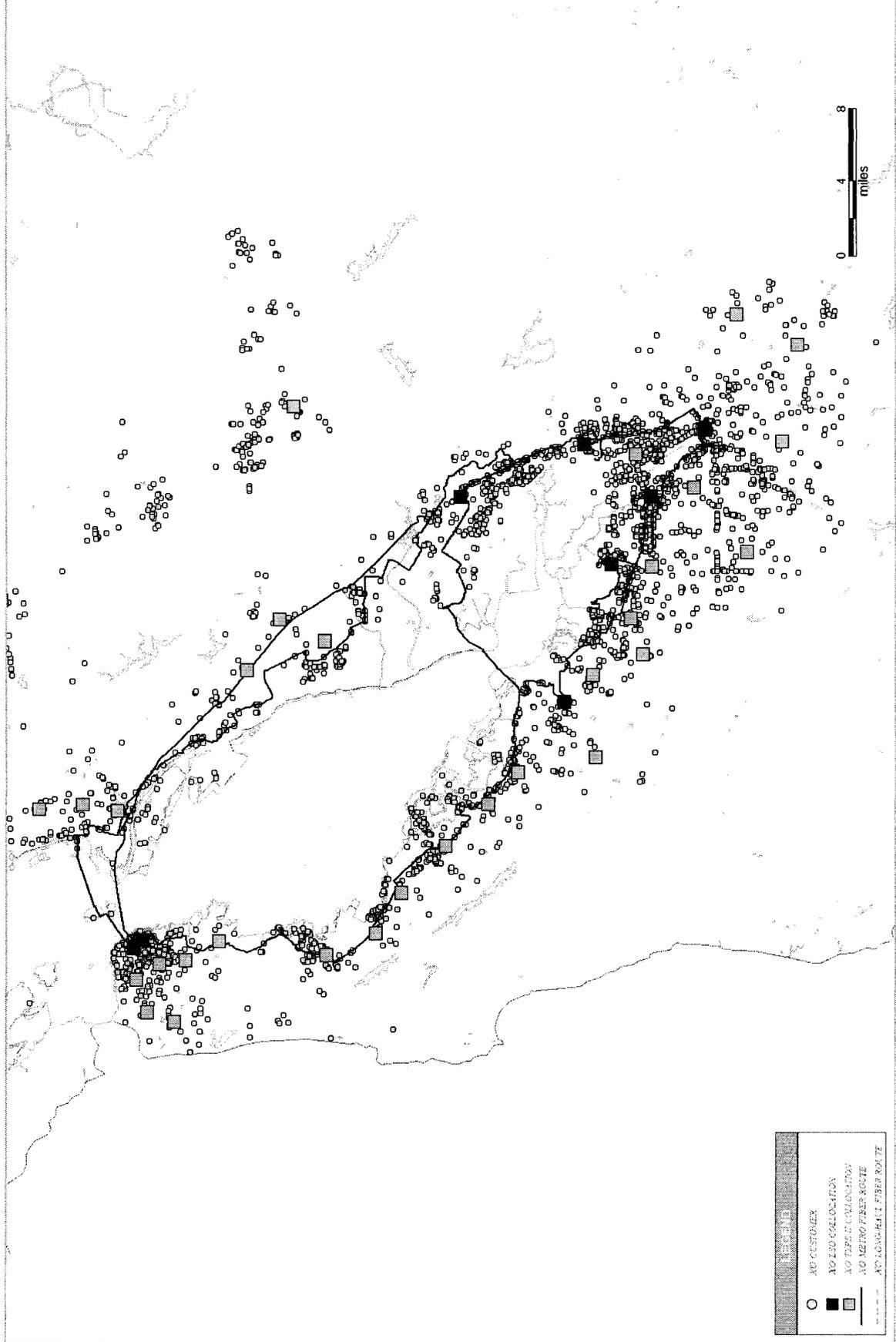
Wil Tirado

Executed on September 29, 2004

# XO Communications

San Francisco

9-2004



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Exhibit 3

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

_____ )	
In the Matter of )	
)	
Unbundled Access to Network Elements )	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling )	CC Docket No. 01-338
Obligations of Incumbent Local Exchange )	
Carriers )	
_____ )	

**DECLARATION OF LAURA D. INNISS  
ON BEHALF OF XO COMMUNICATIONS, INC.**

I, Laura D. Inniss, hereby declare under penalty of perjury, that the following is true and correct:

1. I am employed by XO Communications, Inc. ("XO") as its Vice President, Telco Cost Management. My business address is 11111 Sunset Hills Rd, Reston, VA 20190. One of my primary areas of responsibility includes the cost analysis and requirements for and management of off-network access to XO's customers. This includes purchases from the ILECs of unbundled network elements (UNEs) and special access services as well as negotiations and purchases of comparable elements from non ILEC providers.

2. The purpose of this declaration is to explain the critical importance to XO of DS-1 loop Unbundled Network Elements ("UNEs"). Specifically, I will explain why Incumbent Local Exchange Carriers ("ILEC") special access services are not an economic substitute for DS-1 UNE loops, and resale of ILEC special access services cannot sustain competitive entry.

3. I offer this declaration in support of XO's petition for an expedited FCC finding that the ability of Competitive Local Exchange Carriers ("CLECs") to provide service

would be impaired on a nationwide basis without universal access to DS-1 loop and Enhanced Extended Link/Loop ("EEL") UNEs. As I explain in this declaration, the availability of cost-based DS-1 loops from the ILECs is essential to allow XO to continue to provide services to its small and medium size business customers. Nevertheless, I must emphasize that in most geographic areas XO's ability to provide service also would be impaired without access to cost-based DS-3 loops and cost-based high capacity interoffice transport. XO's patience in leaving a final decision on those facilities until later is in no way a concession that such facilities are not critically important to us in the areas where they are needed.

4. CLECs are entitled to purchase DS-1 level special access services out of current ILEC tariffs. However, such DS-1 special access services commonly are priced much higher than DS-1 UNEs. That should not be a surprise since entirely different standards apply to how the prices for each are established. Most special access services are subject to pricing flexibility and, as a practical matter, can be priced however high the ILECs wish to price them. By contrast, UNE prices are established by the state commissions and must be established in accordance with FCC prescribed total element long-run incremental cost ("TELRIC") costing principles. Accordingly, UNE prices are set at something approaching the cost incurred by ILECs in providing the facilities, while it is reported that the ILECs' profit margins on their special access services have increased on average from 8.25% in 1996 to over 40% at present as a result of ILEC price increases.

5. The differential in the pricing of special access services as compared to UNEs is a very significant factor for XO and other CLECs. I have attached a chart, Attachment A, which shows a variety of ILEC pricing plans currently available to XO for DS-1 level special access channel terminations in representative states. The chart also states the amount that we

currently pay for DS-1 UNE loops in the corresponding states. As the attachment shows, even under term and volume commitment plans, XO commonly must pay 20 percent to almost 75 percent more to purchase connections to buildings as DS-1 special access versus DS-1 UNEs. Further, term and volume commitment plans require XO to continue to purchase circuits for the **entire** period of the plan or face steep early termination penalties, thus greatly restricting XO's ability to take advantage of the best term and volume discounts offered by many ILECs. For example, if XO signs a customer up to a two year term contract for DS-1 services, but is required to purchase the underlying DS-1 circuit from the ILEC for a period of 5 years in order to get the best monthly price possible, it does not make economic sense for XO to commit to the 5-year term plan when its revenue stream to cover the cost of the circuit is only guaranteed for two years. In order to have the unrestricted ability to disconnect circuits and mirror its underlying end user customer commitments comparable to that enjoyed in the purchase of UNEs, XO must pay up to 300% more for such special access circuits than for UNEs, as evidenced in Attachment A.

6. The exorbitant pricing of special access services has serious adverse and anticompetitive consequences. As described in the declaration of Christopher McKee, XO simply must purchase ILEC facilities to connect to the vast majority of our small and medium sized business customers. The cost of these facilities is by far the largest direct cost we incur in serving such customers. Indeed, the cost of leasing a local loop for XO's various DS-1 products ranges from 54 percent to 93 percent of our direct cost to serve our DS-1 service customers. Given the prevalent use of ILEC loop facilities to supplement our network, all such loop costs must be recovered from our customers in XO's charges. Since as a practical matter, we must undercut ILEC retail prices in order to succeed, we operate on extremely thin margins. Our analysis shows that if we were required to replace DS-1 UNE loops with special access services

across the board, our margin on our DS-1 based services would be completely wiped out. Indeed, the price increase required to yield a profit would cause us either to raise our retail prices above ILEC rate levels, a competitively unsustainable position, or more likely to abandon service where costs would not permit us to compete on price. This would make new sales difficult if not impossible, and our existing customer base would quickly be lost to attrition. The business model for serving small and medium businesses with ILEC facilities would simply be unsustainable.

7. Several ILECs have contended that CLECs already rely primarily on special access to deliver their services. I cannot speak for other CLECs, but I can report without reservation that the ILEC suggestion is untrue with respect to XO, the nation's largest CLEC. To the extent that XO purchases DS-1 circuits from ILECs to serve our local service end user customers, we do so primarily through the use of UNEs, not special access. Indeed, less than 25 percent<sup>1</sup> of the DS-1 circuits purchased by XO from the ILECs for use as local loops is special access; conversely, more than 75 percent of such DS-1 loops are purchased as UNEs.

8. Nonetheless, it is worth explaining why XO ever orders DS-1 special access from ILECs for use as local loops. There are several reasons. First, XO often has been forced to order special access because ILECs refused to "construct" facilities, including the installation of line cards or other minor electronic components. Verizon in particular adopted this anti-competitive "no facilities available" policy as a means of compelling CLECs to order special access in place of UNEs. Second, historically ILECs were not required to combine UNEs, and consequently CLECs that wished to use ILEC facilities to serve end users out of an ILEC central

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<sup>1</sup> The percentage of special access circuits does not reflect special access circuits that are subject to pending requests by XO that the relevant ILEC convert them to UNE pricing or disconnect them nor does it include circuits that are required by law to be ordered as special access.

office at which they did not have a collocation arrangement were forced to order such facilities as special access. Even upon reinstatement of the FCC's UNE combinations rules, the ILECs were intransigent in permitting CLECs to order such combinations, known as EELS. Third, the ILECs have then been dilatory with regard to converting special access circuits to stand alone UNEs. When requesting conversion from special access to UNE/EEL, XO has experienced endless negotiations and foot dragging, delayed conversion requests, requirements for circuits to be disconnected and reconnected, and threats from the ILECs to impose exorbitant conversion charges, and overly long provisioning intervals. Fourth, we are required to order special access for certain circuits that are not eligible for UNE treatment (e.g. to order loop/transport UNE combinations (EELs), the circuits must meet certain local usage tests under XO's interconnection agreements with most ILECs). Fifth, the ILECs historically prohibited commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLECs ordering UNEs.

9. Just to provide one example among many, XO's attempt over a 12 month period beginning in 2002 to convert more than 1000 DS-1 special access circuits, consisting solely of a channel termination, to UNE loops was thwarted due to BellSouth's insistence that the circuits be disconnected and reconnected, and that XO pay per circuit conversion charges that were 30 times higher than BellSouth's allegedly "cost based" rates for conversion of special access circuits consisting of a channel termination and interoffice transport to EELs.

10. XO's experience is that ILECs have continued to engage in these anti-competitive practices designed to prevent CLECs from ordering UNEs, or converting special access circuits to UNEs. Verizon continues to impose its "no facilities" policy on CLECs, refusing to recognize that the FCC's Routine Network Modifications ("RNM") requirements are

self effectuating and insisting that CLECs must amend their interconnection agreements to include new RNM non-recurring charges that would double recover costs already included in TELRIC based UNE rates. Similarly, notwithstanding the FCC's self-effectuating prohibition on unnecessary charges to convert special access to UNEs, XO continues to face ILEC imposition of such charges. For example, XO is currently embroiled in a dispute with BellSouth over that ILEC's insistence that it may impose upon XO a per circuit charge related to conversion of DS-1 special access circuits to UNEs that is roughly equivalent to the non-recurring charge for the underlying special access Circuit. In addition, many ILECs, including Verizon, continue to impose minimum monthly service commitments on all special access circuits so that CLECs must wait a minimum of 90 days before converting a DS-1 special access circuit to UNE pricing (and a minimum of one year before converting a DS-3 special access circuit to UNE rates). The ILEC's processes to convert special access circuits to UNE's are both cumbersome and time consuming. For example, SBC, Verizon and BellSouth require that XO must place two orders (a new and a disconnect) to convert a SA circuit to a UNE circuit. For large conversions, these conversion activities are typically coordinated as a project, and the ILEC's then commit through negotiations the number of circuits that will be worked per day. In addition, strict volume limitations restrict the number of special access circuits that can be converted to UNEs within a given timeframe. For example, with regard to a current XO DS1 conversion request, Verizon will only allow XO to convert 5 to 8 circuits per LATA from special access to UNE pricing each day.

11. Notably, in an effort to further minimize its reliance on special access, XO has sought to implement the TRO's requirements regarding commingling and new EEL criteria by amending our interconnection agreements with ILECs. To date, the only major ILEC with which XO has been able to negotiate such an amendment is Qwest. After failing to engage in any

substantive negotiations with XO to implement a TRO amendment, Verizon filed for consolidated arbitrations across the country with virtually every CLEC with which it had an interconnection agreement. Shortly after the DC Circuit issued its USTA II decision in early March, Verizon determined that it would be in its best interest to put the entire arbitration process on hold and sought abeyance orders from the relevant state commissions. XO and other CLECs opposed Verizon's abeyance motions as they related to issues unaffected by the USTA II decision, such as the TRO's commingling, EEL certification, and RNM requirements. These CLECs requested that the affected state commissions bifurcate the arbitrations so that the parties could resolve such issues. Verizon, not surprisingly, has vehemently opposed this effort by XO and other CLECs, thus attempting to preserve further its ability to engage in anti-competitive policies that force CLECs to order and maintain high capacity circuits as special access.

**12.** I must observe that there is no reason to believe that ILECs will reduce special access rates in the foreseeable future to be more closely aligned with cost-based UNE prices. Indeed, the market evidence is that the reverse is true. Over the past two months several ILECs have filed for major, across the board increases in special access rates. In addition, ever since UNE rules were vacated by the DC Circuit last March, XO has observed reluctance by the major ILECs to negotiate meaningful commercial contracts as directed by the FCC. Thus, what we are observing in the real world is a steady increase in special access pricing, despite the fact that ILECs already are realizing incredible profit margins of 40% or more on average on the service.

**13.** The ILEC determination to drive special access prices through the roof should not be surprising. They know that XO and other CLECs rely upon the availability of ILEC DS-1 loop facilities to connect to customers, and that we must be able to recover all ILEC loop charges in our pricing to our customers. Thus, if our only option is to purchase special access services,

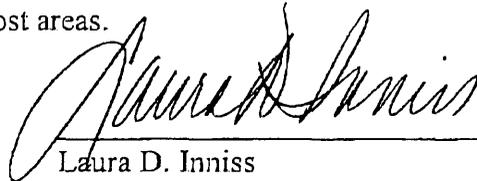
the ILECs can inflate our cost of service substantially -- and create a classic "cost/price squeeze." Whereas the availability of cost-based UNEs as an alternative previously provided CLECs an option to avoid being caught in the squeeze, the elimination of UNEs (or even the prospect of it) provides an incentive and an opportunity for ILECs to raise special access prices to even greater uneconomic levels. One must recognize that the ILECs profit more by CLECs exiting the market than they do by CLECs purchasing their special access services.

14. Finally, I understand that ILECs have suggested that pervasive use of special access by CMRS carriers is powerful evidence that wireline CLECs such as XO do not require the use of UNEs. The differences between the business of CMRS carriers and wireline CLECs are fundamental and too numerous to go through here. But one key distinction is worth mentioning in the context of XO's petition regarding the need for DS1 UNE loops. CMRS carriers do NOT use ILEC special access services as loop facilities to connect to end user customers. Their use of special access service is limited to interoffice transport, backhaul and entrance facilities. CMRS carriers use their own wireless technology to provide a "loop" connection to the end user. Thus, the experience of CMRS providers is fundamentally different, and largely irrelevant, to the question of whether XO's ability to provide service is impaired without access to cost based ILEC DS-1 UNE loops.

15. As set forth above, while XO utilizes DS-1 special access facilities to reach its end user customers, it does not do so by choice. We strongly prefer DS-1 UNEs and have consistently tried to order loop and combination loop/transport facilities as UNEs/EELs, and to convert them to UNEs/EELs where we have been forced by ILEC restrictions to order them first as special access. Indeed, the evidence is clear. If XO were compelled to order all of its DS-1

loop facilities as special access, our ability to provide integrated voice and data services to existing small and medium sized customers would be significantly impaired.

16. I cannot overemphasize the critical importance of cost-based ILEC DS-1 UNE loops to XO. The availability of DS-1 UNE loops is essential to our ability to serve many thousands of small and medium sized business customers. ILEC special access is not an economically feasible alternative because special access rates are priced far above cost already and increasing steadily. Importantly, these conditions hold true virtually universally across the nation, without regard to market or location. Unless the FCC quickly acts to ensure that we are able to continue obtaining cost-based DS-1 UNE loops on an uninterrupted basis, XO -- the nation's largest CLEC -- simply will not be able to provide competitive telecommunications services to small and medium business customers in most areas.



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Laura D. Inniss

Executed on September 29, 2004

– DS1 Examples - SPA vs. UNE Rate Comparison

RBOC	State	Special Access			UNE	% Special Access Greater than UNE		
		Month to Month	2 Year Term Plan	5 Year Term Plan		Month to Month	2 Year Term Plan	5 Year Term Plan
Bell South	Florida	\$ 168.00	\$ 126.00	\$ 123.00	\$ 70.74	137%	78%	74%
SBC	Texas	\$ 215.00	\$ 145.00	\$ 92.00	\$ 76.96	179%	88%	20%
Verizon(East)	New York	\$ 193.99	\$ 184.29	\$ 145.49	\$ 83.50	132%	121%	74%
SBC	Illinois	\$ 255.00	\$ 152.00	\$ 93.00	\$ 61.56	314%	147%	51%
Qwest	Washington	\$ 132.25	\$ 120.74	\$ 105.80	\$ 68.86	92%	75%	54%

- Assumptions
  - Rates are Monthly Recurring Charge
  - Channel Termination rate element only
  - Rates are MSA Zone 1
- Key Points
  - Term Plans impose significant financial penalty for early termination

Exhibit 4

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

_____	)	
In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
_____	)	

**DECLARATION OF DOUGLAS SOBIESKI  
ON BEHALF OF XO COMMUNICATIONS, INC.**

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

1. I am employed by XO Communications, Inc. ("XO") as its Vice President of Broadband Services. My business address is 111 East Broadway, Suite 1000, Salt Lake City, Utah, 84111. My primary job responsibilities include all aspects of managing XO's Broadband Wireless Services.

2. The purpose of this declaration is to explain the critical importance to XO of Incumbent Local Exchange Carrier ("ILEC") wireline DS-1 loop Unbundled Network Elements ("UNEs"), and how fixed wireless technology is not an adequate substitute for such facilities. Specifically, I will demonstrate that wireless loop technology suffers from technical frailties and economic problems that preclude its use as a substitute for wireline DS-1 UNE loops for the vast majority of our small and medium-sized business customers.

3. XO is one of the nation's largest holders of fixed wireless spectrum. Indeed, we have invested nearly \$1 billion in acquiring LMDS spectrum at the 28, 31 and 39 GHz frequencies, which in combination potentially covers 95 percent of the population of the 30

largest US cities. We made this investment in the hope and expectation that we eventually will be able to use fixed wireless technology as a local loop substitute, and be able to connect many customer buildings directly to our landline network.

4. XO previously tried to deploy equipment in approximately 30 markets that would enable us to use our LMDS spectrum to self provision wireless DS-1 local loops between our network and customer buildings. Despite our best efforts, the roll-out was a failure. We deployed and tested equipment from four leading manufacturers and none of it performed at a level required for commercial acceptance, forcing us to abandon our initial roll-out plan. However, we continue to look for ways to use our extensive spectrum assets to reach our customers directly. Consistent with that desire, we have been testing the point-to-multipoint fixed wireless technology in San Diego and Los Angeles.

5. The results of our testing show that we have made a sound investment, and that at some indeterminate future point, wireless loops likely will be able to function as substitute for more than five T1s or DS-3 local loops in some situations. However, it is very clear that widespread commercial deployment of wireless local loops at the DS-1 level will not occur in the near future. In addition, when it does happen, the wireless local loop solution will only be useful in isolated situations which are conducive to use of the technology.

6. It is notable that the two companies that made by far the most aggressive attempt to deploy and sell fixed wireless technology as bypass loop alternatives have both failed. The two companies were Teligent and Winstar, both of which invested hundreds of millions of dollars in failed efforts to deployed fixed microwave systems. They discovered, as has XO, that there are very real barriers to be overcome in making fixed microwave systems commercially practical.

7. Fixed microwave systems are only useful for short haul applications.

They require a direct line of sight between the customer location and the provider's network node. Moreover, signal strength fades with distance and is further attenuated by precipitation. As a consequence, microwave systems are not usable at ranges of more than 1-5 miles depending upon topography.

8. Even where these problems can be overcome, the technology can work

only where impediments to antennae placement can be overcome. As did Winstar and Teligent before us, XO has experienced severe problems in obtaining the rooftop rights in commercial office buildings necessary to place the antennae equipment required to provide service. Many building owners simply refuse to provide roof access under any conditions, while others will do so only at prices that are plainly too high for us to provide service economically. Our models require that total roof top cost have to be a very small percentage of monthly revenue or the company does not earn a reasonable return on its investment. The past industry mistakes have set an unrealistic price point in the market place. The market has also been jaded by past promises about the value of having wireless sites developed on their property. This has created a situation where many owners are unwilling to provide access or are unrealistic about the value of the access. Similarly, our attempts to negotiate access to rooftops of ILEC central offices, so that we could connect antennas with our collocation equipment, have been unsuccessful in all but three states.

9. XO is moving ahead with its development and testing of a fixed wireless

access product. We remain optimistic that a fixed wireless access alternative could offer real value to customers in the future as a form of high capacity transport, but fixed wireless does not appear to offer a suitable DS1 level replacement. However, it is quite evident that we remain years away from any sort of potential widespread deployment, AND that fixed wireless will not

provide a connectivity solution for the majority of our customer base that uses less than four DS-1s of capacity for the foreseeable future. Consequently, the potential future deployment of wireless loop technology does not currently reduce our essential need for cost-based wireline DS-1 loop UNEs from the ILECs.

10. Our fixed wireless spectrum holds promise for the future, but the technology is not yet ready as a loop alternative, and will only be a solution for very large customers when it finally is ready. Thus, XO will not be able to provide competitive telecommunications services to small and medium business customers in most areas without continued access to DS-1 UNE loops.



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Douglas Sobieski

Executed on: September 29, 2004