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December 7, 2004

BY HAND DELIVERY AND ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338

Dear Secretary Dortch:

This *ex parte* presentation, submitted on behalf of XO Communications, Inc. ("XO") and its operating subsidiaries, responds to continued calls by the incumbent local exchange carriers ("ILECs") in the above-referenced dockets that the Commission eliminate the obligations of ILECs to allow conversion of Special Access circuits to unbundled network elements ("UNEs"). As explained in previous submissions, where XO has ordered Special Access circuits from ILECs, it normally has done so unwillingly as a result of ILEC refusals to timely honor XO's request for UNE circuits at those locations. Indeed, XO orders DS-1 Special Access circuits instead of UNEs only when strong-armed into doing so by the ILECs to ensure that customers are not lost. Moreover, subsequent attempts to convert these Special Access circuits to UNEs, as the Commission confirmed that XO and other CLECs are entitled to do in the *Triennial Review Order,* are met with stubborn (and unlawful) resistance from the ILECs. Thus, in order to discourage the ILECs' anti-competitive antics and blatant disregard for the Commission's rules and guidelines, the Commission should reject any and all overtures to abandon its Special Access conversion requirements at this time, to the extent the Commission maintains the underlying obligations for ILECs to unbundle DS-1 loops and transport. The Commission should also reaffirm the availability of Special Access conversion and impose specific requirements and guidelines to ensure that the ILECs respond to and complete conversion requests in a timely and cost-effective manner.

1. The ILECs Have Refused to Honor Their Obligations to Make DS-1 UNE Loops Available

ILEC assertions that competitive carriers "choose" to order special access circuits even when UNEs are available are simply untrue. XO has purchased (and continues to purchase) Special Access circuits when compelled to do so by the ILECs, and even then intend to convert them to UNEs as early as possible. The problems XO has encountered in obtaining DS-1 loop UNEs have been well-documented in this proceeding. As set forth in the declaration of Wil Tirado, XO's Director of Transport Transportation, XO is rarely a willing purchaser of special access service and most often is forced to order Special Access circuits because the ILECs refuse to "'construct' facilities, including the installation of line cards or other minor electronic components."[1] Verizon in particular has adopted this anti-competitive "no facilities available" policy as a means of compelling CLECs to order Special Access instead of UNEs.[2] And while XO often acquiesces to the ILECs' demands and re-orders the requested UNE loops as Special Access circuits, it does so only to secure market entry and preserve its ability to meet its customers' demand for service while the iron is hot.[3] Thus, the level of use of Special Access by XO and other CLECs is not evidence that CLECs are not impaired without access to UNEs, and is certainly not a demonstration that there can be robust competition solely through reliance on Special Access. It is simply an indication of the eagerness of CLECs to enter markets and "serve customers when opportunities present themselves in the hopes of maintaining the customer in the long run by evolving to a fair lease price."[4]

Unfortunately, the problems experienced by XO in obtaining DS-1 loop UNEs outright have not been isolated occurrences and continue to this day in its experiences with all the major ILECs. For example, in recent months, XO has experienced a disturbing increase in the number of UNE orders involving routine network modifications that have been rejected by SBC on the basis that there are "no facilities available."[5] Equally as troublesome, it has come to

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1 *See* Docket No. 04-313, CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Wil Tirado on behalf of XO Communications, Inc., ¶¶ 45-46 (dated October 1, 2004) (listing five reasons XO ever orders special access circuits for DS-1 local loops).

2 *Id.*

3 *See* Docket No. 04-313, CC Docket No. 01-338, Loop and Transport CLEC Coalition Reply Comments, Declaration of Laura D. Inniss, Vice President, Telco Cost Management on behalf of XO Communications, Inc. ¶ 8 (dated October 19, 2004).

4 *Id.*

5 *See* Letter to Larry Cooper, Regional Vice President, Account Management, SBC, from Douglas Kinkoph, Vice President, Regulatory, XO Communications, Inc. (dated November 29, 2004) (appended hereto as ***Attachment A***).

XO's attention that SBC is in the process of adopting a "new" process for handling CLEC UNE orders involving routine network modifications, although there has been no recent change in the FCC's rules necessitating a new or revised process. Adding insult to injury, the last time SBC adopted a "new" process for handling routine network modifications, XO experienced a significant increase in DS1 UNE Loop rejects. In fact, under the more recent process, XO already has received rejects for DS1 Loop orders in California due to a claim of "no facilities." Not surprisingly, SBC was able to provision these same orders within the normal time interval when they were re-ordered as Special Access, showing that the requested facilities indeed were already in place and could have been provided as UNEs.

2. The ILECs Have Refused to Honor Their Obligations to Convert DS-1 Special Access Loops to UNEs

In addition to understanding that the RBOCs continue to frustrate XO's attempts to order DS-1 UNE loops, the Commission must recognize the great lengths the ILECs have taken to avoid converting Special Access circuits to DS-1 loop UNEs. In XO's experience, the ILECs simply are not fulfilling requests to convert special access circuits to UNEs, prolonging the timeframe for completing conversion requests, or attempting to charge astronomical rates for doing so. As verified by Mr. Tirado, the ILECs generally have been dilatory with regard to converting Special Access circuits to stand alone UNEs and 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."[6]

XO most recently has encountered such resistance from Verizon, Sprint and BellSouth. Verizon, for example, has refused to convert existing Special Access circuits until XO submits separate "disconnect" and "new" orders for each of the circuits XO wants converted to UNE pricing.[7] Moreover, Verizon "slow rolls" the conversion process by claiming it can only process five to seven circuits per LATA per day. Considering that there are over 2000 UNE conversion circuits outstanding in 18 LATAs, Verizon's proposed UNE conversion process will be both lengthy, time consuming and result in the continued application of higher special access rates for UNEs until the conversions are completed.

Sprint also refuses to complete special access conversion requests by XO. Although XO has been requesting that Sprint convert a number of existing Special Access loops

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6 Tirado Declaration at ¶ 45.

7 *See* Letter to John Pricken, Vice President, Carrier Sales and Service, Verizon, from Laura Inniss, Vice President, Carrier Management, XO Communications, Inc. (dated July 12, 2004) (appended hereto as ***Attachment B***).

in Las Vegas to UNE pricing since September 9, 2004, Sprint has refused to complete the requested conversion until XO verifies that the circuits will be local with telephone numbers assigned, involve no commingling and connect to end user equipment.[8] The requirements Sprint unilaterally is applying for XO to qualify for unbundling loops through conversion do not exist under federal law or the parties' interconnection agreement.

Using a different tactic, BellSouth has effectively denied XO access to requested Special Access conversions by requiring XO to pay for full disconnection and reconnection of each circuit, as well as exorbitant project management fees in order to "minimize" service disruption (a thinly veiled threat since no physical change to the circuit is required).[9] Although BellSouth is legally required under existing law to covert existing wholesale DS-1 Special Access loops to DS-1 UNE loops service purchased by XO to appropriate UNE pricing, it has refused to do so at a reasonable cost. Instead, BellSouth is demanding $963.79 to convert existing Special Access DS-1 loops to DS-1 UNEs (instead of the $130.00 special projects fee earlier agreed to by the parties), although it only charges $5.70 per circuit to convert a Special Access circuit to an EEL (or a combination of loop and transport UNEs), which is an undertaking comparable to the DS-1 conversion.[10]

3. The Obligation of ILECs to Convert DS-1 Special Access Loops to UNEs Must Be Maintained

The ILECs' unwillingness to quickly convert Special Access circuits to UNEs clearly violates the Commission's mandate in the *Triennial Review Order*. The FCC made clear in the *Triennial Review Order* that Special Access conversion was needed to ensure that competitive carriers obtained DS-1 UNEs as permitted under 251(c)(3) on rates, terms, and conditions that were nondiscriminatory. Of particular significance, the Commission recognized and concluded that "converting between wholesale services and UNEs or UNE combinations should be a seamless process."[11] To that end, the Commission prohibited ILECs from assessing unwarranted termination, re-connect and disconnect fees, or non-recurring charges usually associated with establishing a service for the first time and concluded that such charges are inconsistent with Section 202 of the Act, which prohibits carriers from discriminating against

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8 *See* Letter to Ed Phelan, Field Services Director, Sprint Business Solutions, to J. Gary Case, Director Carrier Management for XO Communications, Inc. (dated December 3, 2004) (appended hereto as ***Attachment C***).

9 *See e.g., Complaint of XO Georgia, Inc. Against BellSouth Telecommunications, Inc. and Request for Expedited Ruling and for Interim Relief*, Docket No. 14360-U (filed September 22, 2004).

10 *See id.* at ¶ 13.

11 *Triennial Review Order* at ¶ 586.

any person or class of persons. Despite the guidelines established for Special Access conversion, the processes established by the ILECs have been anything but seamless and include numerous requirements designed to delay or undermine CLECs' conversion requests.

Given that CLECs like XO have been forced by most of the major ILECs to order many loops and transport facilities as Special Access DS-1 rather than purchase them on an unbundled basis, as well as the roadblocks employed to obstruct conversion, conversion rights must be confirmed in the present rulemaking. The Commission should reiterate that Special Access conversions must be provided upon request and on a timely and cost-effective basis without extraneous and extra-legal requirements. XO's experiences make clear that if the ILECs do not have an obligation to convert Special Access to UNEs, their incentives to frustrate providing unbundled loops in the first instance will increase immeasurably. The Commission should not reward the ILECs for their dilatory and anti-competitive practices.

Please do not hesitate to contact the undersigned if we can provide additional explanation or responses to additional questions or concerns.

Sincerely,

Brad E. Mutschelknaus
Counsel for XO Communications, Inc.

BM:APE
Enclosures

cc: Chris Libertelli
Matt Brill
Dan Gonzales
Jessica Rosenworcel
Scott Bergmann
Jeffrey Carlisle
Michelle Carey
Tom Navin
Jeremy Miller
Russell Hanser
John Rogovin
John Stanley

ATTACHMENT A

XO Communications

Two Easton Oval
Suite 300
Columbus, OH 43219
USA

November 29, 2004

Mr. Larry Cooper
Regional Vice President, Account Management
SBC
311 South Akard, Room 840
Dallas, TX 75202

RE: Process for Routine Network Modifications

Dear Larry:

XO Communications, Inc. and its operating subsidiaries, including but not limited to subsidiaries recently acquired from Allegiance Telecom, Inc., (collectively, "XO") have recently seen a disturbing increase in the number of orders we have placed for unbundled network elements ("UNEs") that have been rejected by SBC on the basis that there are "no facilities available." In addition, it has come to XO's attention that SBC is in the process of adopting a "new" process for handling competitive local exchange carrier ("CLEC") UNE orders involving Routine Network Modifications ("RNM")[1] which would clearly violate the Federal Communications Commission's ("FCC's") Triennial Review Order ("TRO") and the Interconnection Agreements ("ICAs") in effect between our respective companies, as well as other applicable state and federal law. In light of the recent increase in SBC's rejections of XO's UNE loop orders referenced above, XO is gravely concerned that SBC may have already implemented unlawful changes in its procedures for provisioning UNEs requiring RNM.

The FCC could not have been clearer in the TRO that incumbent local exchange carriers such as SBC must perform routine network modifications for CLECs. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"), par. 632. Routine network modifications include "those activities that incumbent LECs regularly

[1] *See*, SBC Accessible Letter No. CLECALL04-175, (MEETING) Proposed Process for Routine Network Modification (November 11, 2004). The participation of XO personnel in CLEC User Forum meetings does not in any way constitute a waiver of XO's position that the Proposed Process for Routine Network Modification is improper and illegal. Indeed, XO hereby expressly reserves all rights, remedies and arguments it may have at law and in equity to challenge SBC's adoption or implementation of such a Process.

undertake for their own customers." *Id.* The FCC's requirements regarding RNM were self- executing, and any failure by SBC to comply with them in policy and practice constitutes a violation of federal law.

XO's recent experience with SBC indicates that history may be repeating itself. For example, in the fall of 2002, SWBT implemented a change in its policies regarding the provisioning of RNM. This led to a substantial increase in the number of DS1 UNE Loop rejects in Texas. XO, joined by a number of other CLECs who had suffered the same results of SWBT's policy change, filed a complaint against SWBT with the Texas Public Utility Commission on November 22, 2002, alleging that SWBT's actions violated nondiscrimination provisions of state and federal law, the ICAs in effect between the complainants and SWBT, and SWBT's 271 obligations.

Shortly thereafter, the parties entered into a settlement agreement under which, among other things, SWBT agreed 1) to reinstate the DS1 UNE loop conditioning and provisioning procedures that were in practice prior to the institution of SWBT's new construction and engineering methods and procedures, and 2) convert the special access circuits, which were ordered as a result of UNE DS1 loop orders having been rejected for the reason that there were "no facilities available", to UNEs.[2]

We are now seeing the same pattern emerge in California. SBC is again announcing the formation of new procedures that would restrict the provision of RNM, and is continuing to reject UNE orders that require only RNM to complete. I have attached the details from two recent DS1 UNE loop orders in California. These orders were rejected for the reason that there were no facilities available. Yet, SBC was able to provision the facilities within the normal interval when they were re-ordered as special access.

Please provide by December 8th, 2004 a complete explanation of the work that allowed the two circuits shown on the attachment to be provisioned as special access immediately after SBC was unable to provide as a UNE. At the same time, please also provide an explanation of SBC's *current* policy and practices with regard to handling CLEC UNE orders that involve RNM.

As did XO in its Texas complaint in 2002, XO insists that SBC continue to provide all RNM, that SBC compensate XO for circuits improperly rejected on the basis that there are "no facilities available" and promptly convert any circuits that SBC forced XO to order as special access due to these rejections. Additionally, XO is prepared to take all necessary actions to seek recourse if SBC continues to reject UNE orders on the basis that "no facilities are available" when in fact only RNM are required, or if SBC

[2]Public Utility Commission of Texas, Order No. 2, Order Approving Settlement to Request for Interim Relief, Docket No. 2701 (December 5, 2002), p. 4.

implements its proposed non-TRO compliant RNM process which will only continue SBC's unlawful rejection of these orders.

Sincerely,

Douglas Kinkoph
Vice President, Regulatory

cc: Paul O'Sullivan

ATTACHMENT B

Laura Inniss
VP, Carrier Management
11111 Sunset Hills Road Reston, VA 20190
Phone: 703-547-2096
Email: laura.d.inniss@xo.com

July 12, 2004

John Pricken
Vice President - Carrier Sales and Service
1095 Avenue of Americas
Rm 2619
New York, New York 10036

Re: Conversion of XO Special Access Circuits to UNE Pricing and Placement of Remaining Special Access Circuits on Commitment Discount Plan

John:

XO Communications, Inc. on behalf of its operating subsidiaries, including but not limited to those subsidiaries recently acquired from Allegiance Telecom, Inc. (collectively "XO"), has requested that Verizon convert all circuits identified on the spreadsheets attached to the e-mail from Gary Case, XO's Director of Carrier Management, to David Russell dated November 19, 2004 (the "UNE Conversion Circuits") from special access to UNE pricing effective as of the December, 2004 billing cycle. In addition, XO has requested that Verizon immediately place on a five year Commitment Discount Plan ("CDP") all DS-1 and DS-3 special access circuits that XO currently purchases from Verizon, except for the UNE Conversion Circuits.

It's my understanding that Verizon has indicated to XO that XO will have to submit "D" and "N" orders for each one of UNE Conversion Circuits that XO wants Verizon to convert to UNE pricing. Moreover, Verizon will only process "D" and "N" orders for approximately five to seven circuits per LATA per day based on jurisdiction. Since XO has over 2000 UNE Conversion Circuits, Verizon's UNE conversion process will be lengthy and time consuming. In addition, Verizon has informed XO that unless and until Verizon has completed the actual billing changes necessary to convert the UNE Conversion Circuits to UNE pricing, through the "D" and "N" process outlined above, such UNE Conversion Circuits would be included in calculation of the of XO's minimum commitment and, therefore, would subject to any CDP entered into by XO. XO has notified Verizon that it wants the UNE Conversion Circuits converted effective within one billing cycle of XO's request, i.e., no later than December 2004. Consequently, these UNE circuits should not be included for purposes of calculating XO's minimum commitment under the CDP.

The process that Verizon has proposed for the UNE conversion requested by XO is in direct contravention of requirements set forth by the Federal Communications Commission ("FCC") in its Triennial Review Order. The FCC has made clear that special access to UNE conversions are to be made in an expeditious manner, that such conversions are largely a matter of billing modifications, and that these billing changes should be processed within one billing cycle of the request. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"), par. 586 - 589.

If Verizon continues to require XO to submit "D" and "N" orders to effectuate the requested billing conversion, XO will do so under protest and will dispute any charges associated with those orders that exceeds a just and reasonable billing change charge. Moreover, to the extent that Verizon requires XO to submit "D" and "N" orders or limits the number of orders that Verizon will process per day, such requirements and limitations should in no way delay the UNE billing change becoming effective for all UNE Conversion Circuits as of the December billing cycle, even if this requires a true-up by Verizon at such time that the billing change is completed.

XO reserves its right to bring appropriate action against Verizon for its refusal to provide these conversions in a manner compliant with FCC Orders and will seek all appropriate relief, including retroactive billing adjustments and punitive damages for anticompetitive conduct. Towards that end, this letter serves as an official notice of dispute

under the terms of the notice section of the parties' interconnection agreements.[1] Further, XO reserves its right to seek resolution of this dispute by the appropriate regulatory authority.[2]

To reiterate, XO requests that Verizon convert all UNE Conversion Circuits to UNE pricing effective as of the December billing cycle and that a five year CDP that excludes the UNE Conversion Circuits go into effect as soon as possible. If Verizon refuses to exclude the UNE Conversion Circuits and implement the CDP for the remaining circuits immediately, then XO requests that Verizon promptly provide XO a five-year CDP form that excludes the UNE Conversion Circuits and agree to implement the five-year CDP as of the December billing cycle when UNE pricing should be in effect for the UNE Conversion Circuits. Please advise by November 29, 2004 whether Verizon intends to comply with XO's requests.

Sincerely,

Laura Inniss

Cc: Karen Potkul
Gary Case
Kathryn Kalajian

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[1] *See e.g.*, the XO and Verizon Pennsylvania and New Jersey interconnection agreements at Section 24, Dispute Resolution Procedures as well as Section 16, Dispute Resolution Procedures, of the Massachusetts interconnection agreement.

[2] *Id.*

ATTACHMENT C

J.Gary Case
Director, Carrier Management
11111 Sunset Hills Road Reston, VA 20190
Phone: 703-547-2854
Case.gary@xo.com

December 3, 2004

Ed Phelan – Field Service Director
Sprint Business Solutions
Carrier Markets Regional Sales
330 S. Valley View Blvd.
Las Vegas, NV 89152

Ed:

As you know, since September 9, 2004, XO has been requesting that Sprint convert a number of existing Special Access circuits to unbundled network element ("UNE") pricing. All of these circuits are zero mileage loops. Sprint has informed XO that it will not act on XO's conversion request until XO has verified "that the circuits that XO is requesting be moved have a telephone number assigned to each T1, that the traffic over these circuits will be only local, no co-mingling, that these circuits connect to end user equipment . . . "[1] Sprint's position is inconsistent with the parties' interconnection agreement ("ICA") and is contrary to state and federal law.

Section 43 of our ICA unequivocally requires that "Sprint shall offer UNEs to XO for the purpose of offering Telecommunication Services to XO subscribers." No one has questioned that XO is using the circuits at issue to provide "Telecommunications Services."[2] Moreover, nothing in the ICA requires that XO verify that only local traffic be provided over its zero mileage UNE loops, that a telephone number be assigned, or that any of the other criteria outlined by Sprint have been met.

Simply put, there is no requirement under our ICA or applicable state or federal law that requires us to provide answers to the certification-type questions that Sprint is asking in order to complete the Special Access to UNE conversions we are seeking. Certainly, these questions are not asked when UNE loop orders are placed in the first instance, and there is nothing about the fact that this is a conversion, rather than an initial order, that imposes additional qualifying obligations.

Sprint's delay in converting XO's circuits is in direct contravention of Federal Communications Commission ("FCC") mandates. The FCC has clearly stated that conversion of circuits from special access to UNE pricing should be performed "in an expeditious manner" and that any pricing changes should "start the next billing cycle following the conversion request."[3]

Accordingly, XO is again submitting an initial list of Special Access circuits to be converted to UNE loops, and will supplement that list further in the future. We are seeking a kick-off meeting be held as quickly as possible to get this project moving. In addition, consistent with FCC directives, we expect that Sprint will adjust its billing for the affected circuits such that XO only incurs UNE charges as of the October billing cycle.

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[1] E-mail message from Teresa Harper to Sue Wright dated October 1, 2004 e-mail to Sue Wright.

[2] The ICA provides that Telecommunications Services are defined as in the Act, which provides the following: "The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"), par. 588.

XO requests that we receive a response and have this meeting by November 5, 2004. Please contact me if you have questions.

Sincerely,

Gary Case