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December 8, 2004

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 is submitted on behalf of XO Communications, Inc. ("XO") and its operating subsidiaries regarding the impairment test for DS3 loops. Specifically, because competitive carriers evaluate whether they may self-provision DS3 loops by analyzing the economics of such construction on a building-by-building basis, factors such as the number of lines in the incumbent LEC wire center in which the building is located do not establish an appropriate or adequate test of impairment for DS3 loops. Accordingly, rather than using an irrelevant metric such as the size of the serving wire center, the test for DS3 loop impairment should be the same as the test for DS1 loop impairment.

XO is not the only carrier that believes that the impairment test for DS3 loops must not be divorced from how competitive carriers evaluate whether they will self-provision DS3 loops. For example, in its *ex parte* presentation filed in the above-referenced dockets, Time Warner Telecom, Inc. ("TWT") noted that building access problems and the customer's limited willingness to tolerate the disruption associated with loop construction vary significantly from

customer to customer.[1] TWT properly concluded that any attempt to make "generalizations" about the level of relevant entry barriers are undermined by these location-specific variations.[2]

XO agrees with TWT that generalizations regarding the level of relevant entry barriers do not form an appropriate and considered basis for any loop impairment test. Considering that the analysis as to whether it is feasible to self-provision DS3 loops begins in every case at a specific building and the demand of the potential customers in that building, some of the alternatives under consideration as factors in the DS3 loop impairment test such as the number of lines in the wire center, competitive carrier construction in a nearby building, or competitive carrier collocation in an incumbent LEC wire serving center, are clearly nothing more than generalizations. This is because these factors are not relevant to the competitive carrier's ability to economically self-provision DS3 loops at a given building. Put another way, the size of the wire center, the decision of a competitive carrier to build a loop to a nearby building, or the decision of a competitive carrier to collocate in an incumbent LEC wire center, have no impact and no relationship to whether it is economically feasible to build loop to the building next door or any building connected to the wire center because these factors do not take in account the number of potential customers in the building, size of the building, building access, and the numerous other factors considered by the competitive carriers on a building-by-building basis.

As an illustration, consider two business buildings next to each other that are connected to a serving wire center in a Tier 1 city. One of the buildings is twenty stories high and filled with medium and small-sized businesses and the other building is one story with a single medium-sized potential customer. If the number of lines in the serving wire center were used as the impairment test, because both of these buildings are served by the Tier 1 serving wire center, DS3 loops would not be available to the competitive carrier on an unbundled basis for either building. The competitive carrier may find that the customer demand in the twenty story building justifies self-provisioning loop facilities to that building, but that would not be the case with the single story building. Even though the buildings are located in close proximity and even though they are connected to the same large serving wire center, it is still economically infeasible for the competitive carrier to self-provision loop facilities to the second smaller building. Therefore an impairment test that does not take into account the building-by-building analysis that the competitive carriers must undertake to determine whether is it economically feasible to self-provision would be detrimental to the ability of competitive carriers to provide services to a significant number of small to medium-sized business customers and thereby reducing the ability of these consumers to reap the benefits of competition in the marketplace.

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1 *Ex parte* letter submitted by Time Warner Telecom, Inc. dated December 1, 2004 (the "TWT *ex parte*") at 3.

2 *Id.* at 3.

While disagreeing that it should adopt such a test, the TWT *ex parte* argues that should the Commission adopt an impairment test for identifying customers or buildings to which competitors have not constructed loops but to which they could do so in the future, the anchor for such an impairment analysis should be the methodology competitors "actually use to identify buildings to which they could potentially construct loops."[3] This again reflects the fact that competitive carriers can only build loops to buildings in which it is economically feasible to do so. As such, each and every determination as to whether it is feasible to construct a building loop begins at the subject building itself.

Like TWT, XO has also provided for the record in this proceeding how, as a competitive carrier it evaluates self-provisioning loop facilities to buildings. As explained in the Declaration of Wil Tirado,[4] XO uses a careful screening process to decide whether the investment in loop construction is justified on a case-by-case basis.[5] The customer revenue commitment at the building in question must exceed the construction costs and the costs of the electronic equipment to be deployed in order for it to be economically rational for XO to build the loop. Because of the significant upfront costs of building loops[6], no decision to build a new loop to a building is made until a signed customer contract is in hand to insure that XO will be able to recoup its costs. XO's current policy is not to add a building to its network unless customer demand at that location exceeds at least 3 DS-3s of capacity.[7]

KMC Telecom Holdings, Inc. ("KMC") has also submitted information in the record in this proceeding that demonstrates that it, like other competitive carriers make the determination as to whether to construct a loop to a customer's premises on a case-by-case (building-by-building) basis. Like XO, KMC uses a screening process to decide whether an investment in loop construction is economically justified.[8] The business case for each individual proposal to

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3 *Id.*

4 WC Docket No. 04-313, CC Docket No. 01-338, Initial Comments of the Loop and Transport CLEC Coalition, Declaration of Wil Tirado, XO Communications, Inc., ¶ 14 (dated October 1, 2004) ("Tirado Declaration").

5 *Exhibit 2 to Emergency Petition For Expedited Determination That Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops,* filed by XO on September 29, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338 at 6.

6 *Id.*

7 Tirado Declaration ¶ 20.

8 *Declaration of Mike Duke on behalf of KMC Telecom Holdings, Inc. in Support of the Initial Comments of the Loop and Transport CLEC Coalition,* filed October 1, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338, at ¶ 11.

build new facilities must be reviewed and approved through KMC's Capital Appropriations Process to ensure that KMC will be able to recover the building costs.[9]

Similar submissions have been made by AT&T and NuVox, both of which clearly state that the decision to build fiber laterals into an office building is driven by customer demand and not by the size of the serving wire center. In fact, like XO, AT&T's business case is based on specific revenues actually committed by the individual customer at the particular business location and at least three DS3s of traffic is required to justify loop deployment in nearly all circumstances.[10] Similarly, NuVox's experience has been that third-party providers generally will not construct a lateral to a wire center unless it can commit to three to five DS3s worth of traffic.[11]

Not taking into account the competitive carriers' methodology while relying on factors that are irrelevant to the competitive carriers' determination as to whether to self-provision DS3 loops in order to fashion a DS3 loop impairment test would mean that such an impairment test by its very nature would be arbitrary and capricious. XO agrees with TWT that it does not make sense to use factors in an impairment test that have little or no relationship to the competitive carrier's decision to self-provision DS3 loops, such as the number of lines in the serving wire center to which the building is connected. In light of the fact that the same factors used by the competitive carriers to determine whether they will self-provision DS1 loops are also used to determine whether to self-provision DS3 loops, for DS3 impairment, XO believes that the Commission should simply utilize same test adopted for DS1 impairment.

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

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9 *Id.*

10 *See* WC Docket No. 04-313, CC Docket No. 01-338, Comments of AT&T Corp., Declaration of John D'Apolito and Milford Stanley ¶ 9-25 (stating, among other things, that in determining whether to complete a build-out to place a customer location on-net, "each business case must be based on the specific, *committed* revenues made by the individual customer under each individual contract proposal.") (October 4, 2004) (emphasis included); WC Docket No. 04-313, CC Docket No. 01-338, Comments of AT&T Corp., Declaration of Anthony Fea and Anthony Giovannuccii, AT&T Corp., ¶ 32.

11 *See* WC Docket No. 04-313, CC Docket No. 01-338, Initial Comments of NuVox, Inc., Declaration of Keith Coker, ¶ 8 (October 4, 2004).

Sincerely,

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