Docket 04-00306 RC

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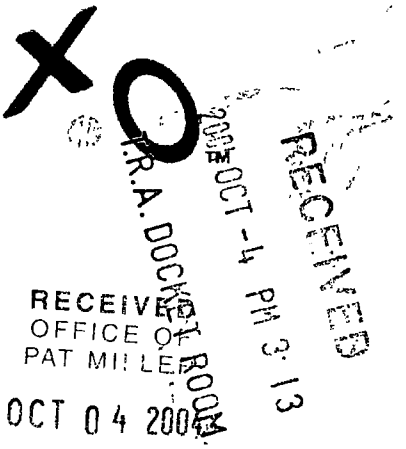

September 30, 2004

Patrick Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: XO's Emergency FCC Petition for Expedited Determination That Competitive Local Exchange Carriers are Impaired Without DS1 UNE Loops

Dear Mr. Miller:

I would like to bring to your attention that on September 29, 2004, XO Communications, Inc. (XO) filed with the Federal Communications Commission (FCC) the enclosed "Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired without DS1 UNE Loops".

XO has asked the FCC to immediately affirm its prior determination that the ability of Competitive Local Exchange Carriers (CLECs) to provide services is impaired on a nationwide basis unless Incumbent Local Exchange Carriers (ILECs) are required to make available DS1 Unbundled Network Element (UNE) loops.

XO has taken this action because the ILECs have demonstrated that they are not willing to participate in an orderly review of the Commission's UNE rules in light of the USTA II decision, and have elected instead to try and create chaos for their competitors by convincing the D.C. Circuit to invalidate the Commission's carefully reasoned interim rules. The ILECs have gone so far as to ask the D.C. Circuit that if the FCC "fails to make an affirmative finding with respect to any given element by the end of the year, it should be deemed to have found no impairment with respect to that element, and such determination should be binding on the states."

The potential impact of the ILECs' action upon CLECs cannot be overstated. XO and other facilities-based CLECs all rely upon the availability of enterprise UNE loops and dedicated UNE transport to be able to compete with the ILECs on a level playing field. There can be no doubt, however, that the uninterrupted availability of DS1 UNE loops in particular is essential to the ability of facilities-based CLECs to provide competitive local exchange service to the small and medium sized businesses. The ILECs clearly understand the importance of DS1 loops to

local competition and thus, are attempting to deliver a "knock out punch" to local competition in your state. Any support you can provide for this Petition before the FCC will go a long way to helping ensure that consumers of your state continue to have facilities-based competitive local exchange alternatives.

If you would like to discuss the Petition further or if you have any specific questions regarding the Petition, please do not hesitate to contact me at (614) 416-1468.

Sincerely,

Douglas W. Kinkoph

Douglas W. Kinkoph
Vice President of Regulatory & External Affairs

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

EMERGENCY PETITION
FOR EXPEDITED DETERMINATION THAT COMPETITIVE LOCAL EXCHANGE CARRIERS ARE IMPAIRED WITHOUT DS1 UNE LOOPS

Respectfully submitted,

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Summary

XO Communications, Inc. ("XO") requests that the Federal Communications Commission ("FCC") immediately reaffirm its determination that the ability of Competitive Local Exchange Carriers ("CLECs") to provide services is impaired unless Incumbent Local Exchange Carriers ("ILECs") are required to make DS1 loops available as Unbundled Network Elements ("UNEs").

XO applauds the FCC's determination that market certainty required the adoption of interim rules and preservation of the *status quo* during the remand proceeding. Unfortunately, by filing a writ of mandamus seeking to vacate the interim UNE rules, the ILECs have demonstrated that they are not willing to participate in an orderly review of the UNE rules. Making matters worse, the ILECs seek a determination that, if the Commission fails to make a finding with respect to an element by year-end, it should be deemed to have found no impairment.

The DS1 loop is an essential component of small and medium-sized business customer service offerings. It is not, however, economically feasible for XO to build its own DS1 loop facilities or to order these facilities at special access rates. An immediate reaffirmation of DS1 loop impairment will permit facilities-based CLECs to continue to offer DS1 services without significant service and economic disruption in the DS1 market and allow CLEC customers to receive services without significant cost increases.

The Commission may simply reaffirm the *Triennial Review Order* finding of DS1 loop impairment. The finding of impairment for DS1 loops complied with the Act and was supported by substantial evidence. Furthermore, the *USTA II* decision does not bar the reaffirmation of the Commission's determination of DS1 loop impairment because the FCC made its determination of DS1 loop impairment without delegating its authority to the states.

The FCC has acknowledged that the D.C. Circuit did not make a formal pronouncement regarding enterprise market loops in the *USTA II* decision and has taken the position in the mandamus proceeding that only rules concerning mass market switching and dedicated transport were vacated. The ILECs, however, have refused to accept that only rules pertaining to mass market switching and dedicated transport were vacated, and insist that DS1 loops somehow were magically vacated as well. In order to protect the market, the Commission should reaffirm that its nationwide impairment finding for DS1 loops is unaffected by *USTA II* and that rules requiring ILECs to provide DS1 loops remain UNEs effective.

Although XO is hopeful that the Commission will set new permanent rules at its December 2004 open meeting, XO is mindful that the ILECs have significant incentives to delay this process. If the rules are not in place, the ILECs will take the position that they are only required to continue to provide UNEs until the later of a grant of the mandamus or five months from now. Because even a slight delay works against any hope of a competitive marketplace, if necessary, the Commission should undertake a fresh DS1 loop nationwide impairment analysis on an expedited basis.

Initially, the Commission's prior impairment finding should act as precedent to immediately find impairment of DS1 loops. The Commission has already found that CLECs cannot self-deploy DS1 loops economically and that there is little evidence of wholesale alternatives. In addition, the Commission found that CLECs face extremely high economic and operational barriers in deploying DS1 loops.

The Commission's previous impairment finding still holds true today. For example, when XO constructs a Metro Fiber Ring it places the ring near commercial buildings that house as many potential customers as possible. Buildings that are directly on the ring can be served with XO loop facilities. The vast majority of commercial buildings, however, are *not* located on XO's rings. Specifically, XO's facilities connect to only 2,164 buildings, or less than 1% of the potential market.

If XO wishes to serve customers located in buildings not directly on the ring, it must construct a building lateral connecting the building to its ring. This means, among other things, trenching, installing conduit, and pulling fiber between the ring and the building. This is expensive and time-consuming and takes a minimum of four to six months to complete.

High cost and long lag times are barriers to self-deployment because CLECs are simply not able to obtain the service period commitment (revenue) from the small to medium-sized business customers. In addition, these business customers are not willing to wait for the construct to be completed in order to obtain service. Also, CLECs have no absolute right to build into the complexes at which customers reside.

It is almost never economic for XO to construct its own wireline DS1 loop facilities and there are no meaningful alternatives to unbundled DS1 loops. Although CLECs may purchase DS1 level special access, this service cannot be used to offer competitive services to customers. The reason is that DS1 special access is priced significantly higher than DS1 UNEs.

XO must purchase ILEC facilities to connect a vast majority of its small and medium-sized business customers. The cost of such facilities is the largest direct cost incurred when serving customers, making customer pricing extremely sensitive to the cost of DS1 level facilities. Having to pay special access across the board for DS1 loops would mean significant end user price increases, resulting in the loss of customers and an unsustainable business model.

Some ILECs have contended that CLECs already primarily rely on special access to deliver services. This simply is not true. XO purchases DS1 circuits to serve customers from incumbents LECs primarily through the use of UNEs. It is true that XO does order DS1 special access from the ILECs, but the reasons are not reflective of competition. XO only orders special access DS1 facilities from the ILECs as a last resort. XO's experience is that the ILECs continue to prevent CLECs from ordering UNEs and converting special access circuits to UNEs. As one example among many, XO was thwarted in its attempt to convert more than 1,000 DS1 special access circuits to UNE loops when BellSouth insisted 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.

XO does not believe special access rates will be reduced in the foreseeable future. Several ILECs have recently filed for major, across the board, increases in special access rates. Of course, the purpose of these increases is not just profit, but also to force the CLECs from the market. The ILECs are aware that CLECs rely on the availability of ILEC DS1 loop facilities to connect to customers and that CLECs must recover ILEC loop charges in their customer pricing. If the CLECs only option is to purchase special access, then the ILECs can substantially inflate the cost and force the CLECs from the marketplace because the CLEC will not be able to offer services at competitive rates.

While XO sometimes utilizes DS1 special access to connect to its customers, it does not do so by choice. The availability of DS1 loop UNEs is essential to XO's ability to serve many thousands of small and medium-sized business customers. Unless the Commission acts to ensure that XO continues to have uninterrupted access to DS1 loop UNEs, XO will not be able to provide competitive services to small and medium-sized business customers.

XO is in a unique position to understand intermodal alternatives to unbundled DS1 loop UNEs. XO is one of the nation's largest holders of fixed wireless spectrum and made this substantial investment in part on the expectation of using this spectrum as a fixed wireless local loop substitute. XO has attempted deployment in 30 markets and was unable to achieve performance levels required for commercial acceptance.

XO continues its development and testing of fixed wireless products and remains optimistic that a fixed wireless services could offer value to customers in the future. Unfortunately, widespread deployment is years away and when deployed it is anticipated that such fixed wireless solution will only be used for high-capacity transport, not DS1 level services. XO will not therefore be able to provide competitive services to small and medium-sized business customers without access to DS1 loop UNEs.

There is no meaningful wholesale market for DS1 loops. In XO's experience, it has rarely been able to purchase DS1 loops from other CLECs.

Even the most efficient CLECs serving small to medium-sized business customers *cannot* self-deploy DS1 loops economically. CLECs face extremely high barriers in deploying DS1 loops. Not only is it uneconomic to self-deploy DS1 loops, there are also no meaningful alternatives. All of these factors confirm what the Commission has already found -- that CLECs serving the small and medium-sized business market are impaired without access to unbundled DS1 loops.

Accordingly, XO hereby requests that the Commission issue an Order reaffirming its previous finding of nationwide DS1 loop impairment through: (i) reliance on its finding in the *Triennial Review Order*; (ii) declaratory ruling that the DS1 loop impairment finding was not vacated by the *USTA II* decision; and/or (iii) a new finding of nationwide impairment.

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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

EMERGENCY PETITION
FOR EXPEDITED DETERMINATION THAT COMPETITIVE LOCAL EXCHANGE CARRIERS ARE IMPAIRED WITHOUT DS1 UNE LOOPS

XO Communications, Inc. ("XO"), by its attorneys and pursuant to 47 C.F.R. §§ 1.2, 1.415, and 1.419, hereby requests that the Federal Communications Commission ("FCC" or "Commission") bifurcate its consideration of DS1 loops in the above-captioned proceeding and immediately reaffirm its prior determination that the ability of Competitive Local Exchange Carriers ("CLECs") to provide services is impaired on a nationwide basis unless Incumbent Local Exchange Carriers ("ILECs") are required to make available DS1 Unbundled Network Element ("UNE") loops.

I. INTRODUCTION

The ILECs have requested that the U.S. Court of Appeals for the D.C. Circuit issue a writ of mandamus that would effectively vacate the interim UNE rules adopted in the Commission's *Order and Notice of Proposed Rulemaking on Unbundled Access to Networks Elements.*[1] The *Order & Notice* requires ILECs to continue providing unbundled access to switching, enterprise

[1] *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking (released August 20, 2004)("*Order & Notice*").

market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[2] As the Commission stated in the *Order & Notice,* the purpose of this action was to advance the Commission's most important statutory objectives, which are the promotion of competition and the protection of consumers.[3]

XO applauds the Commission's determination that "the pressing need for market certainty"[4] required the adoption of interim rules, its finding that without FCC action "existing UNE arrangements might be terminated prematurely," a development that "would be inimical to competition and its benefits for consumers,"[5] and its leadership in promulgating interim rules that preserve the status quo while the remand proceeding is underway. Unfortunately, the ILECs have demonstrated that they are not willing to participate in an orderly review of the Commission's UNE rules in the light of the *USTA II* decision,[6] and have elected instead to try and create chaos for their competitors by convincing the D.C. Circuit to invalidate the Commission's carefully reasoned interim rules.[7] Indeed, the ILECs seek to make matters materially worse by asking in their mandamus petition that the D.C. Circuit prevent both federal and state regulators from fulfilling their own statutory obligations to require ILECs to unbundle facilities where CLECs would be impaired without them. Specifically, the ILECs made the

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2 *Id.* at ¶ 1.

3 *Id.*

4 *Id.* at ¶ 16

5 *Id.* ¶ 10.

6 *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)("*USTA II*"), *pets. for cert. filed* Nos. 04-12, 04-15, 04-18 (June 30, 2004).

7 *Petition for a Writ of Mandamus to Enforce the Mandate of this Court,* ("*Mandamus Petition*") filed by the Verizon telephone companies, Qwest Communications International Inc., and United States Telecom Association on August 23, 2004 in *USTA II.*

extraordinary plea that if the Commission "fails to make an affirmative finding with respect to any given element by the end of the year, it should be deemed to have found no impairment[8] with respect to that element, and such determination should be binding on the states."[9]

Should the ILEC mandamus gambit succeed, the very existence of many CLECs would be placed in immediate peril. This despite the nearly universal recognition that the Commission's review on remand almost surely will result in the re-establishment of many existing UNE arrangements and, in particular, DS1 loops.[10] As the federal government explained in its brief opposing the ILEC mandamus petition:

> [ILECs] apparently recognize that, in at least some markets, CLECs will be impaired without access to the UNEs at issue in this case. Yet, if [ILECs] have their way, CLECs in those markets will be unable to obtain those UNEs until the Commission adopts final rules. That outcome is inconsistent with Congress's intent to promote local competition by making UNEs available to CLECs who would be impaired without them. If those CLECs are deprived of access to all of

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8 The "impair" standard, which applies to non-proprietary elements, e.g., DS1 loops, instructs the Commission to consider whether "the failure to provide access to such network elements would impair the ability of telecommunications carriers seeking access to provide the services that it seeks to offer." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of the Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003)("*Triennial Review Order Errata*"), *vacated and remanded in part, affirmed in part, USTA II*, 359 F.3d 554 (2004) at ¶ 71, citing 47 U.S.C. § 251(d)(2)(B).

9 *Mandamus Petition* at p. 21.

10 Although all of the prior-designated UNEs are important to XO, in this Petition XO is requesting that the Commission take expedited action only with respect to DS1 loops. XO wishes to stress, however, that its ability to provide service also would be impaired without access to DS-3 level UNE loops and high capacity interoffice transport UNEs in most geographic areas. XO's patience in leaving a final decision on those facilities until later should not be misconstrued as a concession that they are not critically important. XO intends to file separate comments in response to the *Order & Notice*.

> the disputed UNEs during the interim period, they may go out of business before the Commission implements final unbundling rules that could possibly restore their right of access to some of those UNEs.[11]

It is particularly disturbing that the ILECs are trying to use the current state of confusion to drag even critical UNEs that were not vacated by the *USTA II* decision into the black hole they seek to create. As the government correctly stated in its brief in opposition to the mandamus petition, the D.C. Circuit "vacated the Commission's rules concerning mass market switching and dedicated transport."[12] The D.C. Circuit's concern did not extend to the FCC determination that CLECs are impaired without enterprise loops, yet as the Commission has observed the ILECs are steadfast in their insistence that rules pertaining to essential enterprise loop UNEs also have somehow been invalidated.[13] Not satisfied with the chaos they have created with respect to mass market switching and dedicated transport, the ILECs have devised a strategy to refuse supplying even critical loop UNEs that were not addressed by the D.C. Circuit, and some ILECs already have initiated state commission proceedings to amend virtually all existing interconnection agreements ("ICAs") to deny future access to enterprise market loops.[14]

As explained more fully below, the potential anticompetitive impact of this ILEC attempt at self-help on facilities-based CLECs cannot be overstated. XO and other facilities-based

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11 *Opposition of Respondents to Petition for a Writ of Mandamus ("FCC Opposition")* filed by the Federal Communications Commission and the Department of Justice on September 16, 2004 in *USTA II* at p. 16; *see also Order & Notice* ¶ 26.

12 *FCC Opposition* at ¶ 4.

13 *Order & Notice* at fn. 4.

14 *See, e.g., Public Utilities Commission of California Docket No. A-04-03-014; Public Service Commission of the District of Columbia Docket No. TAC 19; Public Services Commission of Florida Docket No. 040156-TP; Public Service Commission of New York Docket No. 04-C-0314 and Public Utilities Commission of Ohio Docket No. 04-1450-TP-CSS.*

CLECs all rely upon the availability of enterprise market UNE loops to be able to compete with ILECs on a level playing field. There can be no doubt, however, that the uninterrupted availability of DS1 UNE loops in particular is essential to the ability of facilities-based CLECs to provide competitive local exchange services to the small and medium-sized businesses that comprise most of their customer base. One can only surmise that, understanding the critical importance to CLECs of DS1 UNE loops, the ILECs intend to protect their market share and reduce the ability of CLECs to compete by imposing anticompetitive rate increases and unilaterally expanding the scope of the *USTA II* decision.

The recent actions of the ILECs place the Commission, the competitive industry, and consumers in an extremely precarious position. After a nearly decade-long effort to create a sustainable competitive marketplace, the rules necessary for a competitive market have yet to be fully established. As the Commission aptly stated in the *Order & Notice*, if it does not act, the $127 billion dollar telecommunications market will be placed at risk.[15]

XO believes that unless the Commission is vigilant and continues to act decisively to preserve access to UNEs, the *Order & Notice* proceeding will quietly but effectively bring an end to local telecommunications competition. This Petition presents the opportunity for such action with respect to DS1 loops. Because access to DS1 loops at cost-based UNE rates is critical to CLECs such as XO, and critical to the services received by consumers of competitive telecommunications offerings, this Petition asks the Commission to immediately reaffirm that the nationwide impairment finding and associated rules related to DS1 loops remain in effect.

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15 *Order & Notice* at ¶ 1.

II. JUSTIFICATION FOR BIFURCATED AND EXPEDITED ACTION

The DS1 loop is an essential component of XO's core service offerings and its ability to deliver services to small and medium-sized business customers.[16] For XO and many other CLECs, access to unbundled DS1 loops at cost-based rates is imperative to maintaining their core service offerings during the *Order & Notice* proceeding. If DS1 loops are not available to CLECs as UNEs, then the facilities-based CLEC industry could be irreparably harmed, greatly reducing competition and hurting consumers by drastically limiting their ability to choose among service providers.

XO's base of approximately 180,000 customers is primarily comprised of small and medium-sized businesses. XO offers a suite of services *e.g.*, Business Trunks, ISDN PRI, Integrated Access, that are ideally suited for small or growing companies or office locations with moderate bandwidth requirements. Customers often elect an integrated access product, in which the customer's local, long distance, and Internet access are delivered over the same loop facilities.[17]

Whenever a customer requires at least six lines/trunks with a minimum of 14 channels, the services are provided via DS1 access. Approximately 80 percent of the line equivalents used by XO to connect to its local service customers are over the DS1 level facilities.[18] Although XO currently obtains these DS1 loop facilities in a number of ways, in the vast majority of instances, XO must rely on legacy ILEC facilities to connect to its customer at the DS1 level.[19] As

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16 *See* Declaration of Christopher McKee on behalf of XO Communications, Inc. ("McKee Declaration") at ¶ 6 attached hereto at Exhibit 1.

17 *Id.* at ¶ 5.

18 *Id.*

19 *Id.* at ¶ 6.

discussed more fully below and in the attached XO Declarations, the ILECs have monopoly control over the vast majority of existing last-mile facilities, and it is almost never economically feasible to replicate the ILECs' ubiquitous local networks.

The business services market is extremely competitive and XO competes for customers, in part, on the ability to provide superior service levels, new service options, route redundancy and attention to customer service. These service-differentiating features, however, are not sufficient to make sales unless XO is also price competitive. When competing against an incumbent monopoly, the need to price aggressively is a simple fact of life.[20]

Unlike the ILECs, XO has no monopoly services that can be used to cross-subsidize unprofitable operations elsewhere in its business and, as such, XO business services are offered on very tight operating margins. In order to remain an economically viable competitor, XO cannot price below cost on any of its significant service offerings. It is therefore imperative that XO control its costs and that critical cost inputs not exceed similar costs incurred by their primary competitors -- the ILECs.[21]

As is described in Sections IV.B.1 and IV.B.2 of this Petition, it is not economically feasible for XO to build its own DS1 loop facilities or to order these facilities under tariffs at special access rates. As such, XO relies on the availability of cost-based DS1 loop UNEs to serve a substantial portion of its customer base. Without access to unbundled DS1 loops priced based on cost, XO's existing business, and its future sales plans, would be jeopardized.[22] Moreover, given the ILECs' historical advantages, it is difficult to see how any CLECs could

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20 *Id.* at ¶ 7.

21 *Id.* at ¶ 8.

22 *Id.* at ¶¶ 9, 10, 11 & 13.

compete effectively in the small to medium enterprise market without DS1 loops on a UNE basis.

A recent economic study found that having to replace DS1 loops with special access services would significantly handicap the CLECs that supply DS1 services to small and medium-sized businesses.[23] The study found that if unbundled DS1 loops were no longer available, CLECs would either have to: (i) substitute the DS1 loop UNE with service obtained under special access tariffs at substantially higher rates; or (ii) exit the market.[24] Notably the *Micra DS1 Report* determined that substituting DS1 loop UNEs with special access services was tantamount to exiting the small business market because the substantially higher special access rates would make the CLEC DS1 level service offerings unattractive to existing and potential customers.[25]

The reason for this is that the Commission's 1999 deregulatory scheme for special access pricing resulted in substantial and sustained price increases where ILECs were afforded pricing flexibility.[26] The Phoenix Center analyzed the Bell Operating Companies tariffed rates for special access and found, on average, that rates subject to pricing flexibility were substantially higher than previously regulated rates, and such rates have been sustained over a significant

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23 *The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements* by Microeconomic Consulting & Research Associates, Inc. ("*Micra DS1 Report*") at 12 filed with the Commission in conjunction with the letter from H. Russell Frisby, Jr., CEO of CompTel/Ascent to Michael K. Powell, Chairman, FCC, CC docket Nos. 01-338, 96-98 and 98-147 (filed July 9, 2004).

24 *Id.* at 4.

25 *Id.*

26 George S. Ford, PhD & Lawrence J. Spiwak, Esq., Phoenix Center for Advanced Legal & Economic Public Policy Studies, *Phoenix Center Policy Paper Number 18: Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets* (July 2003) at 8 ("*Phoenix Center Paper*").

period.[27] The *Phoenix Center Paper* further showed that, while the amount of the increase varies substantially among ILECs, deregulated rates exceeded regulated rates.[28]

The result is equally unattractive for small and medium-sized business customers. With the importance of the Internet to small and medium-sized businesses, the ability to carry both voice and data traffic through DS1 service is an important offering to these customers. Small businesses have embraced DS1 service offerings from CLECs to migrate from ILEC voice grade lines to CLEC integrated voice and data services, with approximately one-quarter of small businesses being serviced by CLECs.[29] The elimination of unbundled DS1 loops would impose on customers substantial costs both in price increases for services and the loss of advantages with those services.[30]

The foregoing reasons form the justification for the Commission to take immediate action to preserve, reaffirm or reevaluate the unbundling of DS1 loops. Such a ruling by the Commission will permit facilities-based competitive providers such as XO to continue to offer DS1 services to its customers without significant service and economic disruption in the DS1 market. For DS1 customers, it will mean that they will continue to receive services from the CLECs without the imposition of significant increases to service cost.

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27 *Id.* at 23.

28 *Id.* at 25 & Table 1.

29 *Micra DS1 Report* at 3 (citing *A Survey of Small Businesses' Telecommunications Use and Spending* by Stephen B. Pociask, SBA Office of Advocacy, March 2004, p. 67).

30 *Id.* at 4.

III. THE COMMISSION SHOULD REAFFIRM ITS *TRIENNIAL REVIEW ORDER* NATIONWIDE IMPAIRMENT FINDING AND RELATED UNBUNDLING RULES FOR DS1 LOOPS

A. The FCC's Finding Of Nationwide Impairment For DS1 Loops Was In Conformance With The Act And Supported By The Evidence

The Commission should immediately reaffirm its *Triennial Review Order* finding of DS1 loop impairment.[31] There is nothing in the *USTA II* decision that requires the Commission to begin a new impairment analysis with regards to DS1 loops. The DS1 loop analysis complied with the Act[32] and was supported by substantial and largely uncontroverted evidence.

The *USTA II* discussion pertaining to mass market switching and dedicated transport should not obscure the fact that all five Commissioners agreed that CLECs are impaired nationwide without DS1 UNE loops. As the Commission stated, "[t]he record shows that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational barriers in deploying DS1 loops to serve these customers."[33] The Commission determined that the "much lower revenue opportunities" available from selling services to small businesses "make it economically infeasible for competitive LECs to self deploy DS1 loops, which require the same significant sunk and fixed costs of higher capacity loops."[34] The Commission went on to emphasize that "revenues generated from small and medium enterprise customers are not sufficient to make self-deploying DS1 loops economically feasible from a cost recovery perspective,"[35] and further that "[c]ompetitive LECs do not have the ability to recover

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31 *Triennial Review Order* at ¶¶ 325-27.

32 47 U.S.C. §§ 151 *et. seq.*

33 *Triennial Review Order* at ¶ 325.

34 *Id.*

35 *Id.* at ¶ 326.

sunk costs in self-deploying DS1 loops."[36] Nor could CLECs look elsewhere to purchase DS1 loops, as the Commission found "little evidence of wholesale alternative DS1 loop capacity."[37]

These findings were not difficult for the Commission to make. The evidence of DS1 loop impairment in the record was overwhelming and largely unrebutted. Indeed, as the Commission observed, the ILECs themselves admitted that impairment exists for DS1 loops and such facilities merited different treatment from other UNEs at issue.[38] Such a powerful and uncontroverted record provides ample basis for the Commission to simply reaffirm its prior findings.[39]

B. The Guidance Provided In The *USTA II* Decision Does Not Require Any Material Change To The FCC's DS1 Loop Nationwide Impairment Finding

USTA II did provide some measure of guidance to the Commission regarding future impairment findings. Specifically, potentially applicable to DS1 loops, the D.C. Circuit (i) found that the Commission should have considered alternative access arrangements and tariff offerings in its impairment evaluations,[40] (ii) questioned whether the Commission's consideration of "uneconomic market entry" was too open ended because it did not define "uneconomic" to whom;[41] and (iii) should not have delegated to state commissions the authority to engage in

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36 *Id.*

37 *Id.* at ¶ 327.

38 *Id.* at ¶ 325 & fn. 960 (citing to SBC Comments and SBC Reply Comments).

39 In light of the fact that the Commission had a sufficient record to find nationwide impairment of DS1 loops, without having to rely on delegation to the states, the record that supported that findings should be considered in support of a reaffirmation of the nationwide DS1 loop impairment finding.

40 *USTA II,* 359 F.3d at 577; *see also id.* at 575-77, 592, 594.

41 *Id.* at 572.

further granular impairment analysis.[42] None of these considerations, however, would alter the Commission's finding of nationwide impairment for DS1 loops in the *Triennial Review Order*.

1. Alternative Access Arrangements And Tariff Offerings

Although XO and other CLECs are able to purchase DS1 level special access services out of ILEC tariffs, as described more fully in Section IV.B.2 below, special access pricing for DS1 level services is much too high to be used by CLECs such as XO to craft competitively-priced service offerings. What this means in the context of the Commission reaffirming its prior nationwide impairment finding for DS1 loops is that, even when considered as part of the impairment analysis, special access and other out-of-the-tariff DS1 level services are not an economically feasible alternative to DS1 loops on a UNE basis.

XO is aware that at least one ILEC asserts that CLECs rely on special access as their primary means of obtaining transmissions inputs and, for this reason, there is no need to require that these facilities be unbundled anywhere, even in areas where non-ILEC deployment of facilities would be inefficient.[43] Certainly CLECs are often forced by the ILECs into purchasing loops, transport, and combinations of loops and transport (EELs) as special access circuits because the ILECs preclude direct access to UNEs. XO cannot, however, implement its market entry plan and provide competitively-priced services if it is forced to rely exclusively on special access.

In the *Verizon Special Access Letter*, much is made of the notion that Time Warner Telecom ("TWT") uses special access in lieu of UNEs. The suggestion is that TWT's experience

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42 *Id.* at 565-68, 573-74, 594.

43 *See* Ex Parte Letter from Michael E. Glover, Verizon to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (July 2, 2004)("*Verizon Special Access Letter*") at 2.

is evidence that facilities-based CLECs can successfully utilize special access as UNE replacements, and thus CLECs are not impaired without cost-based UNEs. But Verizon carefully avoids several critical distinguishing factors that make clear that TWT's experience is not an appropriate measure of CLEC impairment. First, it is well known that TWT is an affiliate of Time Warner Cable, and thus likely has access to cable loop facilities which are not available to other CLECs. Second, TWT's is unusually reliant on carrier revenues, and is not as focused as other CLECs on the competition for end user customers that the Commission has repeatedly stated is its primary goal. Specifically, in its most recent SEC 10Q filing, TWT reported that approximately 50% of its total revenue is derived from carrier/ISP customers, intercarrier compensation, and related party transactions.[44] Third, TWT has not yet proven that its reliance on special access can succeed, as it lost approximately $66 million during the first half of 2004 on revenues of $324 million.[45] The same can be said of another CLEC that ILECs often point to as an example of a competitive carrier that uses special access in place of UNEs -- US LEC Corp. ("USL"). USL lost $29 million in 2003 on revenue of $311 million, and analysts are bearish on the company due to its past reliance on revenue derived from reciprocal compensation and switched access charges to CMRS carriers.[46]

2. Uneconomic To Whom; The Hypothetical CLEC

In the *USTA II* decision, the D.C. Circuit noted that in one important respect the Commission's definition of impairment is "vague almost to the point of being empty."[47] The

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44 Time Warner Telecom Inc. SEC Form 10-Q filed August 9, 2004 ("*TWT 10Q*") at p. 23.

45 *TWT 10Q* at p. 2.

46 David Mildenberg, *Analyst Sees Trouble Ahead at US LEC,* Charlotte Business Journal, July 26, 2004.

47 *USTA II*, 359 F.3d at 572.

D.C. Circuit was referring to the consideration of whether the enumerated operational and entry barriers make entry in a market uneconomic. The D.C. Circuit posited:

> 'Uneconomic by whom' by *any* CLEC, no matter how inefficient? By an 'average' or 'representative' CLEC? By the most efficient CLEC? By a hypothetical CLEC that used 'the most efficient telecommunications technology currently available,' . . .[48]

The D.C. Circuit went on to state that it need not resolve the significance of this uncertainty but was highlighting it because the issue of whether the standard was too open-ended is "likely to arise again."[49]

In this proceeding, one of the questions that the Commission will undoubtedly consider is whether its standard is too opened-ended and more specifically whether it has to create a hypothetical CLEC to apply the standard to. In the case of DS1 loops, this particular consideration should not prevent the Commission from reaffirming its previous findings. The fact is that no matter what CLEC the Commission would measure for the purpose of impairment, with respect to DS1 loops, it would reach the same conclusion. The Commission could examine each and every existing facilities-based CLEC providing DS1 services and find that there is impairment with respect to the DS1 loops. The record contains no evidence of any facilities-based CLEC that primarily markets to end-users that has succeeded without extensive reliance on cost-based DS1 ILEC loop facilities.[50]

As such, this particular inquiry, although appropriate to consider, would not change the DS1 loop impairment finding in the *Triennial Review Order*. Since this inquiry would not

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48 *Id.*

49 *Id.*

50 *See discussion* in Section III.B.1 of this Petition regarding TWT and USL.

change the nationwide impairment DS1 loop finding, the Commission should reaffirm the Commission's nationwide impairment finding in the *Triennial Review Order*.

3. The Role Of The States

In light of the D.C. Circuit's vacatur of the Commission's delegation of authority to the states to engage in further granular impairment analysis,[51] in the above-captioned proceeding, the Commission will consider what role remains for the states regarding the designation of UNEs. In its DS1 loop impairment analysis, the FCC found that it is not economically viable for CLECs to self-provision and refrained from delegating to the states the authority to consider whether CLECs could self-provision DS1 loops on a location-specific basis.[52] Since the states had no significant role in determining nationwide impairment for DS1 loops,[53] any role the Commission fashions for the states could not realistically unseat the Commission's prior finding of impairment.[54]

In the *Triennial Review Order*, noting that the record indicated little evidence of wholesale DS1 loop capacity,[55] the Commission anticipated the possibility that DS1 loop alternatives may exist now or in the near future in isolated instances and delegated to the states the authority to collect and analyze more specific evidence of wholesale alternatives to DS1 loops.[56] As described in the Tirado Declaration, this *anticipation of a possible* wholesale market

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51 *USTA II* at 565-68, 573-74, 594.

52 *Triennial Review Order* at ¶ 327.

53 *See* fn. 60 *infra* explaining why delegation to states of a theoretical application of a wholesale trigger test was not of concern to the D.C. Circuit.

54 *See* Section III.C.2 of the Petition.

55 *Triennial Review Order* at ¶ 337, fn. 985.

56 *Id.* at ¶ 327.

for DS1 loops is premature. Therefore, even if the Commission were to work with the states to identify locations as wholesale DS1 loop markets, because there was no evidence in the record of such DS1 loop wholesale markets, this search could not have a meaningful impact on the Commission's prior determination of nationwide impairment for DS1 loops.

The D.C. Circuit's determination that the Commission may not delegate its impairment authority to the states does not impact the Commission's previous DS1 impairment finding. As noted above, the Commission specifically determined not to delegate the DS1 loop impairment authority to the states. Accordingly, the D.C. Circuit's prohibition regarding delegation of authority to the states does not stand in the way of reaffirmation of the previous DS1 loop nationwide impairment finding.

C. The Commission's Nationwide Impairment Finding Regarding DS1 Loops Was Not Vacated In *USTA II*

As fully set forth above, following the guidance provided by the D.C. Circuit in *USTA II*, the Commission would clearly be warranted in reaffirming its nationwide impairment finding for DS1 loops. Reaffirmation of such impairment finding and adherence to the D.C. Circuit's guidance with regard to such reaffirmation, however, is unnecessary since the D.C. Circuit did not vacate the Commission's impairment finding with regard to DS1 loops. In the *Order & Notice* in the above-captioned docket, the Commission acknowledged that the D.C. Circuit did not make a formal pronouncement regarding enterprise market loops in the *USTA II* decision.[57] The FCC and U.S. Department of Justice went further in their joint Brief in opposition to the Mandamus Petition, stating there that the D.C. Circuit vacated only its "rules concerning mass

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[57] *Order & Notice* at fn. 4.

market switching and dedicated transport."[58] Unfortunately, the ILECs have refused to accept that only rules pertaining to mass market switching and dedicated transport were vacated, and insist that DS1 loops somehow were magically included in the penumbra of the vacated mass market switching and dedicated transport rules. The Commission understandably deferred on resolving the matter in the *Order & Notice,* since its establishment of a standstill with respect to all existing UNEs rendered the issue moot. But with the ILECs now seeking a mandamus order setting aside the FCC's interim rules, and seeking state commission orders amending ICAs to eliminate virtually all UNEs, the Commission must immediately clarify that its nationwide impairment finding for DS1 loops is unaffected by *USTA II*, and that rules requiring ILECs to provide DS1 loops remain effective.

1. The Plain Language Of *USTA II* Only Vacated The FCC's Finding Regarding DS1 Transport, Not DS1 Loops

The issue of whether the D.C. Circuit vacated the UNE rules with respect to DS1 loops can be resolved within the plain language of the *USTA II* decision and the *Triennial Review Order*. In *USTA II*, when vacating the national impairment findings with respect to mass market switching and DS1, DS3 and dark fiber dedicated transport,[59] the D.C. Circuit clearly did not include enterprise loops as an item subject to the vacatur. Put simply, if the D.C. Circuit did not identify DS1 loops when vacating the national impairment findings regarding other elements, it follows inexorably that the finding of nationwide impairment in the *Triennial Review Order* regarding DS1 loops and applicable unbundling rules have *not* been vacated.

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58 *FCC Opposition* at p. 4.

59 *USTA II* at 574.

Any notion that the *USTA II* decision vacated the nationwide impairment finding and related unbundling rules for DS1 loops is not only contrary to the plain language of the *USTA II* decision, but contrary to the Commission's own evaluation of loops and transport in the *Triennial Review Order*. For the argument that the nationwide impairment finding for DS1 loops was vacated based on the D.C. Circuit's vacatur of the DS1, DS3, and dark fiber transport to succeed, the impairment evaluation of loops and transport must have been conducted by the FCC as if loops and dedicated transport were a single element. It is well settled that loops and dedicated transport are separate elements, and there is no question that the Commission conducted separate impairment evaluations of them.[60]

Put another way, if loop and transport are distinct elements and were evaluated separately by the Commission in the *Triennial Review Order*, it is not reasonable to assume or argue that the D.C. Circuit's explicit evaluation and vacatur of the transport impairment finding implicitly includes vacatur of the DS1 loop impairment finding. If the D.C. Circuit had intended to vacate the nationwide impairment finding for DS1 loops, it would have stated that holding in the *USTA II* decision. The vacatur of the DS1 loop impairment determination is not a holding of *USTA II* and the Commission is not required to extrapolate the invalidation of its findings and rules absent a clear mandate from the D.C. Circuit to do so.

In fact, the D.C. Circuit was quite specific about what it was vacating. The D.C. Circuit stated:

> We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for *mass market* ***switching*** *and certain dedicated* ***transport*** *elements (DS1, DS3, and dark fiber)*

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60 *See Triennial Review Order* at ¶¶ 197-341 for loops and ¶¶ 359-417 for transport.

> We also vacate and remand the Commission's nationwide impairment determination with respect to *these elements*.[61]

The D.C. Circuit was careful and specific in explaining the scope of its actions. The D.C. Circuit plainly did not intend that its determination apply to all impairment findings, but only for mass market switching and dedicated transport elements. DS1 loops are noticeably absent from the list and, therefore, the Commission's nationwide impairment finding regarding DS1 loops was not vacated and remains valid.

2. The *USTA II* Rationale Does Not Apply To DS1 Loops

In evaluating this issue, the Commission may also look to the rationale used by the D.C. Circuit in vacating the national impairment finding for dedicated transport elements. Specifically, the D.C. Circuit objected to the FCC's sub-delegation to state commissions of authority to make location specific impairment determinations.[62] Having determined that the Commission could not sub-delegate its Section 251(d)[63] authority to the states in the mass market switching context, the D.C. Circuit vacated the Commission's national impairment findings with respect to DS1, DS3, and dark fiber transport elements because the Commission had again delegated its Section 251(d) authority to the states by giving them the ability to vary the nationwide impairment findings for these transport elements by applying "competitive triggers."[64]

There is a crucial distinction here between the Commission's evaluation of DS1 loops versus its treatment of DS1, DS3 and dark fiber dedicated transport. In the *Triennial Review*

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61 *USTA II* at 594 (*emphasis added*).

62 *See USTA II* at 574.

63 47 *U.S.C.* § 251(d).

64 *See USTA II* at 574.

Order, the Commission made a general nationwide impairment finding for DS1, DS3, and dark fiber dedicated transport, but also acknowledged that CLECs were able to self-provision these facilities to some locations. The Commission determined that it did not itself need to resolve where such self-provisioning was feasible, and instead delegated the task of making more geographically granular impairment determinations to the states holding:

> [B]ecause we recognize that the record is insufficiently detailed to make more precise findings regarding impairment, we delegate to the states, subject to appeal back to this Commission if a state fails to act, a fact finding role to determine on a route-specific basis where the alternatives to the incumbent LECs' networks exist such that competing carriers are no longer impaired.[65]

Essentially, the Commission determined that impairment existed in most areas of the nation for dedicated transport, but also found that there was record evidence that there could be pockets where CLECs would not be impaired without one or more types of dedicated transport. The FCC assigned to states the task of identifying any specific inter-office routes where impairment was lacking.

The Commission, however, handled the impairment finding for DS1 loops very differently. For DS1 loops, *the Commission did not delegate to the states the authority to determine whether LECs could self-provision DS1 loops in specific locations.*[66] The Commission stated:

> Because the record does not demonstrate that carriers can economically self-provision at the DS1 level, *we do not delegate to the states the authority to*

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65 *Triennial Review Order* at ¶ 398. In its rationale for vacating the impairment finding for DS1, DS3, dark fiber transport, the D.C. Circuit also quoted this passage. *See USTA II* at 574.

66 *Id.* at ¶¶ 325-27.

consider DS1 loop impairment on a location-specific basis based on a self-provisioning trigger.[67]

Unlike DS1, DS3, and dark fiber dedicated transport, the Commission made a finding of nationwide impairment for DS1 loops solely based on the record in the Triennial Review proceeding and *did not delegate* to the states this key role in completing that determination.[68]

Thus, the D.C. Circuit's decision to vacate impaired findings for dedicated transport elements rests on its determination that the FCC cannot subdelegate its decision-making authority to state commissions. There was no meaningful subdelegation with respect to DS1 loops. Accordingly, the D.C. Circuit's decision to exclude DS1 loop from its recitation of vacated UNEs follows logically, and there is no reason now to try to "put words in the mouth" of the D.C. Circuit by adding DS1 loops to the list.

3. Reaffirmation Is Appropriate And Necessary

Signaling their intention not to provide DS1 loops as UNEs, and without citing specific legal authority for their actions, the ILECs have indicated that they believe the *USTA II* decision

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67 *Id.* at ¶ 327.

68 The FCC found "scant evidence of wholesale alternatives for serving customers at the DS1 level." *Triennial Review Order* at ¶ 325. But "although the record indicates little evidence of wholesale alternative DS1 loop capacity," the Commission did delegate to the states an ability to apply the "wholesale trigger" to make location-specific non-impairment findings in recognition of the "possibility that non-incumbent LEC DS1 loop alternatives may be available now or in the near future at particular customer locations." *Id.* at ¶ 327. But this situation is starkly different than the one criticized by the D.C. Circuit with respect to mass market switching and dedicated transport. The Commission clearly expected that application of the wholesale trigger to mass market switching and dedicated transport would result in the delisting of those UNEs in many places, whereas the wholesale trigger applied to DS1 loops acted simply as a safety valve which the Commission did not anticipate would see significant use. The D.C. Circuit took account of this practical difference in its analysis and decision.

vacated the nationwide impairment finding regarding DS1 loops.[69] Clearly, at least some ILECs intend to use their erroneous interpretation of the *USTA II* decision as a pretext to discontinue offering DS1 loops as UNEs should the D.C. Circuit grant their mandamus petition. The resulting rate increases could significantly adversely affect the ability of switch-based CLECs to compete for small and medium-sized business customers and derail their ability to gain access to capital.

The impact on small and medium-sized businesses that subscribe to CLEC services would be similarly devastating. Comptel/ASCENT recently filed with the Commission the comprehensive *Micra DS1 Report* that measured the impact on small and medium-sized businesses if DS1 loops and DS1 transport were no longer available at cost-based rates. Comptel/ASCENT reported that:

> The study found that replacing DS1 loops and EELs with special access would increase carrier costs by more than 100% on average. In some states costs would increase tenfold. Cost increases of this magnitude invariably would lead to increased costs to small business consumers, resulting in a cost to small and medium-sized business customers of approximately $4.9 billion annually [70]

Facing the uncertainty caused by the D.C. Circuit's decision to vacate the dedicated transport impairment findings is daunting enough, and facilities-based CLECs and their customers should not be subjected to the same challenge with respect to UNEs (*i.e.* DS1 loops) with which the D.C. Circuit expressed no concern. Section 1.2 of the Rules provides that the Commission may on motion or on its own motion issue a declaratory ruling to terminate a

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69 *Order & Notice* at fn. 4.

70 *See* Letter from H. Russell Frisby, Jr., CEO of CompTel/Ascent to Michael K. Powell, Chairman, FCC, CC docket Nos 01-338, 96-98 and 98-147 (filed July 9, 2004) at 4.

controversy or remove an uncertainty.[71] XO respectfully submits that because of what is at stake, the future of competition in the small and medium-sized business market, either in conjunction with an order reaffirming its nationwide impairment for DS1 loops or separately, it is both appropriate and necessary for the Commission to use its authority to declare valid its nationwide impairment finding for DS1 loops and associated UNE rules.

IV. THE COMMISSION MAY UNDERTAKE AN EXPEDITED NEW DS1 LOOP IMPAIRMENT ANALYSIS

In Section III of this Petition, XO demonstrated that the Commission could ensure that CLECs continue to have access to DS1 loop UNEs by reaffirming its previous nationwide impairment finding or by issuing a declaratory ruling clarifying that the *USTA II* decision did not vacate the Commission's nationwide impairment finding for DS1 loops in the *Triennial Review Order*. The Commission may wish to both reaffirm the DS1 nationwide impairment finding and declare that the *USTA II* decision did not vacate such finding in order to fortify this critical UNE against additional challenge by the ILECs. In addition to these measures, this Section IV of the Petition provides the Commission yet another basis to either reaffirm its previous DS1 nationwide impairment finding or to make a fresh DS1 nationwide impairment finding in the above-caption proceeding on an expedited basis.

Although XO remains hopeful that the Commission will achieve its stated goal of adopting new permanent rules at its December 2004 open meeting, XO is mindful that ILECs have significant incentives to delay the day of decision. Assuming their mandamus petition is granted, a delay beyond year end is their roadmap to end the UNE regime once and for all. Should the mandamus be denied, ILECs will still take the position that they are only required to

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71 47 C.F.R. § 1 2.

continue to provide enterprise switching and dedicated transport as UNEs until March 13, 2005.[72] If the process anticipated by the Commission in the *Order & Notice* is even slightly delayed, there will be a significant disruption in the small to medium-sized business market as the ILECs force the CLECs away from UNE pricing to special access pricing. What hangs in the balance for XO and other CLECs is their very ability to serve their core customers at competitive rates. If XO, and other CLECs, cannot serve their small and medium-sized business customers at competitive pricing, even for a short period, competition in this market will be severely jeopardized.

Accordingly, notwithstanding the fact that the Commission may reaffirm it previous DS1 impairment finding,[73] if the Commission desires to undertake a new impairment analysis of DS1 loops, XO requests that the Commission undertake such analysis on a bifurcated and expedited basis. The following establishes a basis for a new finding of nationwide impairment of DS1 loops.

A. The Commission's Previous DS1 Impairment Finding

Initially, XO wishes to reiterate that the *USTA II* decision does not require the Commission to begin with a clean slate when evaluating DS1 loop impairment. The Commission's prior impairment finding is sufficient and should act as precedent to immediately find impairment of DS1 loops.[74] Specifically, the Commission has already found that CLECs cannot self-deploy DS1 loops and that there is little evidence of wholesale alternatives.[75] In

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72 *Order & Notice* at ¶ 1.

73 Substantive agency regulations have the force and effect of law. *See, e.g., Chrysler Corp. v. Brown,* 441 U.S. 281, 295 (1979); *Batterton v. Francis,* 482 U.S. 416, 425 (1977).

74 *Triennial Review Order* at ¶¶ 325-27.

75 *Id.* at ¶ 325.

addition, the Commission found that CLECs "face extremely high economic and operational barriers" in deploying DS1 loops.[76]

The Commission also previously recognized that customers seeking DS1 level services possess significantly different economic characteristics from large enterprise customers and generally resist long-term contract obligations. The result is a high rate of customer turnover, which makes CLECs unable to rely on a long term DS1 revenue stream. The Commission correctly determined that, taken together, these factors make it economically infeasible for CLECs to deploy DS1 loops.[77]

Nothing in the *USTA II* decision would require that the Commission alter these existing findings. As such, based on its findings in the *Triennial Review Order* alone, the Commission may simply reaffirm its nationwide finding of impairment for DS1 loops, based exclusively upon the prior record and conclusions in the *TRO* proceeding. Since the Commission's prior determination in the *Triennial Review Order* is sufficient, the Commission may act immediately to find DS1 impairment, particularly when failure to do so would stamp out competition in this market.

B. CLECs Are Impaired Without Access To Unbundled DS1 Loops

There is no reason why the Commission must or should take new evidence to reaffirm its nationwide finding of impairment for DS1 loops. Should the Commission desire to refresh the record before acting, however, it will find that conditions have not changed over the past year. CLECs still cannot self deploy DS1 loops, and there still is no adequate or effective substitute available for them.

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76 *Id.*

77 *Id.*

1. CLECs Cannot Self-Deploy DS1 Loops Economically

XO is a facilities-based CLEC. Wherever it is economically feasible to do so, XO builds its own fiber optic transmission networks and installs its own switching equipment. Demonstrating this fact, XO has expended approximately $5 billion to construct fiber rings in 70 metropolitan areas and currently operates 146 switches and 7,136 route miles composed of 884,827 fiber miles of metro fiber transport facilities.[78] If it were economically feasible to do so, XO would also construct its own DS1 loops to the facilities.

Loop facilities are a basic component of networks required to serve a particular customer. The economics of building the loops, however, is fundamentally different than the economics of deploying switching and transport facilities. For example, when XO installs switches and transport facilities, those facilities are used in common and paid for by many customers. In the loop context, such facilities are dedicated to the use of, and paid for by, one or a very small number of customers.[79]

In light of the very high cost of facilities construction, it may be sensible to build transport or switching where there is adequate aggregate demand. The same would not be true, however, of loop facilities because it only makes sense to build such facilities where you have assurance that a particular customer or group of customers will contract with you for very high-capacity services over an extended period.[80] CLECs simply are not able to obtain such assurances from small and medium-sized customers.

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78 *See* Declaration of Wil Tirado on behalf of XO Communications, Inc. ("Tirado Declaration") at ¶ 3 attached hereto as Exhibit 2.

79 *Id.* at ¶ 4.

80 *Id*

When XO constructs a Metro Fiber Ring it does so in a manner that places the ring near commercial buildings that house as many potential customers as possible. 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. Buildings that are directly on XO's Metro Fiber Ring can be served with XO loop facilities.[81]

The vast majority of commercial buildings are *not* located on XO's Metro Fiber Rings. Thus, if XO wishes to serve customers located in those buildings with our own loop facilities, XO must construct a building "lateral," connecting the building to our Metro Fiber Ring. Specifically, XO must trench, install conduit, and pull fiber between the Metro Fiber Ring and the building to be served; and then it must obtain and outfit equipment space in the building itself.[82]

There are approximately 6.9 million commercial office buildings in the United States, and XO estimates that approximately 2.3 million of them are located in the cities where XO operates fiber rings. XO's building laterals, however, connect to only 2,164 buildings, or less than 1% of the potential market. Merely passing nearby a customer facility does not enable XO to actually provide service to the customer. Although there are millions of commercial office buildings in the cities where XO has metro networks, XO cannot serve those buildings unless they are physically connected to our Metro Fiber Ring.[83]

The construction of building laterals is both time-consuming and costly even when the building is located in close proximity to XO's Metro Fiber Ring. An average entry is 500 feet

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81 *Id.* at ¶ 5.

82 *Id.* at ¶ 6.

83 *Id.* at ¶ 7.

long and costs $220,000 assuming no significant space conditioning or internal end user wiring problems.[84]

It is important to realize that CLECs have no absolute right to build into the complexes at which customers reside. XO must negotiate municipal franchises, private Right of Way ("ROW") licenses, and building access agreements, which may or may not be available at economic prices. 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, XO simply is unable to construct that lateral regardless of customer demand or desires. In such instances, the ILEC loop facilities are the only route into the building, and constitute an absolute monopoly bottleneck facility.[85]

Importantly, 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 longer. XO has found that customers with relatively modest telecommunications requirements, such as the small and medium-sized businesses that typically utilize DS1 level access, normally are unable and/or unwilling to wait such a long time for the delivery of services.[86]

Due to the extraordinary cost of constructing laterals, *XO cannot realistically add a building to its network unless customer demand at that location exceeds at least 3 DS-3's of capacity.* Where XO believes that customer demand could exceed the three DS-3 threshold, XO utilizes a careful screening process to decide whether the investment in lateral construction is

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84 *Id.* at ¶ 8.

85 *Id.*

86 *Id.* at ¶ 9.

warranted. In XO's experience, relatively few buildings survive such scrutiny, and "building adds" are the exception not the rule. *XO has found that it almost never makes sense to construct a lateral to add a building to the XO network simply to add customers with DS1 level demand.*[87]

In light of the foregoing it is almost never economic for XO to construct its own wireline DS1 loop facilities. The same holds true for other CLECs such as AT&T, Worldcom, Nuvox, NewSouth, and KMC.[88]

2. There Are No Meaningful Alternatives To Unbundled DS1 Loops

a. Special Access Is Not An Adequate Substitute

Although CLECs are entitled to purchase DS1 level special access service out of the ILEC tariffs, such service cannot be used to offer competitive services to end user customers. The reason is that DS1 special access is priced significantly higher than DS1 UNEs. Specifically, special access services are subject to pricing flexibility permitting the ILEC to price such service as high as it wishes and are now set to provide the ILEC profit margins over 40% on average.[89]

Since UNE pricing is established by state commissions and in accordance with TELRIC costing principles, these prices are set at the ILECs' costs in providing the facilities. As reflected in Attachment A to the Inniss Declaration identifying the price XO currently pays for DS1 level special access services and DS1 UNEs, in representative states, XO must pay 20% to 314% more

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87 *Id.* at ¶ 11.

88 *Id.* at ¶ 12.

89 *See* Declaration of Laura D. Inniss on behalf on behalf of XO Communications, Inc. ("Inniss Declaration") at ¶ 4 attached hereto at Exhibit 3.

for DS1 special access versus the DS1 UNEs.[90] This exorbitant special access pricing has a significant adverse impact on competition.[91]

There are other significant competitive limitations regarding acquisition of circuits through special access. In order to take advantage of the best pricing, term and volume commitments force XO to buy the DS1 special access for a period longer than the small and medium-sized business customer is willing to commit to XO. It does not make economic sense, especially in light of steep early termination penalties, for XO to commit to the ILEC for a period of service much longer than the customer is willing to commit to XO.[92]

Like all other CLECs, XO must purchase ILEC facilities to connect a vast majority of its small and medium-sized business customers. For XO, the cost of such facilities is the largest direct cost incurred when serving customers, which, depending upon the service, constitutes 54% to 93% of XO's direct cost in serving the customer. As such, XO's customer pricing is extremely sensitive to the cost of DS1 level facilities and any increases in such costs must be recovered through its pricing to its customers.[93]

In order to compete against the ILECs, XO must be able to undercut ILEC retail pricing and, in doing so, XO operates on very thin margins. If CLECs were required to replace DS1 UNE loops with special access services, these margins would be completely wiped out. If XO then raised its pricing to yield a profit, its rates offered to end user customers would probably exceed the ILEC retail rates. The result would be that XO would be operating within an

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90 *Id.* at Attachment A.

91 *Id.* at ¶ 6.

92 *Id.* at ¶ 5.

93 *Id.* at ¶ 6.

unsustainable business model, new sales would be difficult if not impossible to make, and existing customers would be expected to erode over time. This business model for serving small and medium-sized businesses with ILEC special access would be unsustainable.[94]

XO is aware that the ILECs have contended that CLECs already primarily rely on special access to deliver services. This suggestion is certainly untrue with respect to XO, the nation's largest CLEC and many other CLECs. To the extent XO purchases DS1 circuits to serve customers from incumbent LECs, it does so primarily through the use of UNEs.[95]

Of course, it is true that XO does in some cases order DS1 special access from the ILECs, but the reasons are not reflective of competition. One reason XO orders special access DS1 facilities from the ILECs is that the ILECs have forced XO to do so. Examples of this are Verizon's "no facilities available" policy or the ILECs refusal to "construct" facilities, such as line cards and other minor electronic developments, which force the CLECs to order the facilities as special access services.[96]

Another reason is that historically the ILECs were not required to combine UNEs. This meant that CLECs that wanted to use ILEC facilities to serve end users out of ILEC central offices without a collocation arrangement were forced to order facilities as special access. Even the reinstatement of the Commission's UNE combination rules has not resolved this issue and, of course, when seeking conversion from special access to UNE/EEL, XO has experienced endless negotiations and foot dragging, delayed conversion requests, requirements for circuits to be

94 *Id.*

95 *Id.* ¶ 7.

96 *Id.* ¶ 8.

disconnected and reconnected, and threats from the ILECs to impose exorbitant conversion charges, and overly-long provisioning intervals.[97]

Other reasons include: (i) the requirement that CLECs order special access for certain services that do not qualify for UNE treatment, such as the restriction in many of XO's ICAs that it cannot order EELs if it cannot certify local usage, and (ii) the ILEC prohibition of commingling of access services and UNEs on the same facilities to serve end user customers.[98]

XO's experience is that the ILECs continue to engage in practices designed to prevent CLECs from ordering UNEs and converting special access circuits to UNEs. As one example among many, beginning in 2002, XO attempted to convert more than 1,000 DS1 special access circuits, consisting solely of a channel termination, to UNE loops, but BellSouth insisted 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 term and interoffice transport to an Enhanced Extended Loop (EEL) UNE combination.[99] Many ILECs 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 DS1 special access circuit to UNE pricing. SBC, Verizon and BellSouth require that XO place two orders (a new and disconnect) to convert a special access circuit to a UNE circuit. There are also volume limitations that restrict the number of special access circuits that may be converted to UNEs within a given timeframe.[100]

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97 *Id.*

98 *Id.*

99 *Id.* at ¶ 9.

100 *Id.* at ¶ 10.

XO has attempted to minimize its forced-reliance on special access by seeking to implement the *Triennial Review Order's* requirements regarding commingling and new EELs criteria by amending its ICAs with the ILECs. To date, the only major ILEC to negotiate such an amendment with XO is Qwest.[101]

With respect to special access rates, XO does not believe those rates will be reduced in the foreseeable future to align with cost-based UNE prices. Over the past months several ILECs have filed for major, across the board, increases in special access rates. This unhindered ability to raise rates is a strong indication of the absence of any effective form of competition for DS1 loops, especially when compared to falling prices for interexchange service. XO has observed a steady increase in special access pricing, despite the fact that ILECs are already realizing incredible profit margins of 40% or more on average.[102]

Of course, the purpose of these increases is not just profit, but also to force the CLECs from the market. The ILECs are fully aware that XO and other CLECs must rely on the availability of ILEC DS1 loop facilities to connect to customers and that CLECs must recover all ILEC loop charges in their customer pricing. If the CLECs only option is to purchase special access, the ILEC can substantially inflate the cost of the CLEC services creating a classic cost/price squeeze and force the CLECs from the marketplace because the CLEC will not be able to offer services at competitive rates.[103]

The ILECs also have suggested that the use of special access by CMRS carriers is evidence that CLECs such as XO do not require UNEs. Obviously there are fundamental

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101 *Id.* at ¶ 11.

102 *Id.* at ¶ 12.

103 *Id.* at ¶ 13.

differences between the businesses of CMRS carriers and wireline CLECs. One key distinction is that, unlike CMRS carriers, XO and other CLECs require DS1 loops to connect to their customers. CMRS carriers use their own wireless technology to provide the local loop that connects to their customers. The requirements and experience of CMRS carriers is therefore fundamentally different, and largely irrelevant to whether XO and other CLECs are impaired without access to DS1 loops.[104]

While XO utilizes DS1 special access to connect to its customers, it does not do so by choice. XO has consistently tried to order loop and combination loop/transport facilities as UNEs/EELs, and to covert them to UNEs/EELs where they have been forced by the ILECs to order them first as special access. There is no question, however, that if XO were compelled to order all of its DS1 loop facilities as special access, its ability to provide services to its existing small and medium-sized business customers would be significantly impaired. [105]

The availability of DS1 loop UNEs is essential to XO's 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. Unless the Commission acts to ensure that XO continues to have uninterrupted access to DS1 loop UNEs, XO will not be able to provide competitive services to small and medium-sized business customers.[106]

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104 *Id.* at ¶ 14.

105 *Id.* at ¶ 15.

106 *Id.* at ¶ 16.

b. Intermodal Alternatives To DS1 Loops Are Not Meaningful

XO is in a unique position to understand intermodal alternatives to unbundled DS1 loop UNEs. Specifically, XO is one of the nation's largest holders of fixed wireless spectrum and has invested nearly $1 billion in acquiring LMDS spectrum in the 28, 31, and 39 GHz bands, which covers 95 percent of the population of the 30 largest U.S. cities. XO made this substantial investment in part on the expectation of using this spectrum as a fixed wireless local loop substitute.[107]

Reflecting a serious commitment to the use of this spectrum, XO attempted deployment in 30 markets. Using equipment from as many as four manufacturers, XO was unable to achieve performance levels required for commercial acceptance. Based on this experience, and having tested and tried the technology, XO has concluded that widespread deployment of DS1 level fixed wireless local loops will not occur in the near future.[108]

It should be noted that XO's experience with wireless deployment as a local loop substitute is not unique. Teligent and Winstar also invested hundreds of millions of dollars attempting to deploy wireless technologies as local loop alternatives. Like XO, these companies found significant barriers in making fixed wireless commercially viable.[109]

Although technology presented some of the difficulties, there are also several other significant problems. One such problem experienced by XO was severe difficulty in obtaining rooftop rights in commercial office buildings. Building owners will either not permit roof access

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107 Declaration of Douglas Sobieski on behalf of XO Communications, Inc. at ¶ 3 attached hereto at Exhibit 4.

108 *Id.* at ¶¶ 4, 5. XO has not abandoned its plans for the use of this spectrum. It is currently testing point-to-multipoint technology in San Diego and Los Angeles and continues to look for ways to serve customers with this spectrum.

109 *Id.* at ¶ 6.

or demand sitting prices that are uneconomic. In addition, XO was generally unable to negotiate roof top rights at ILEC Central Offices in all but three states.[110]

XO continues its development and testing of a fixed wireless access product and remains optimistic that fixed wireless could offer value to customers in the future as a form of high capacity transport, but fixed wireless does not look like a suitable DS1 level replacement service. Unfortunately, widespread deployment is years away and when deployed it is anticipated that such fixed wireless solution will only be for very large customers requiring high capacity transport. XO will not therefore be able to provide competitive services to small and medium-sized business customers without access to DS1 loop UNEs.[111]

ILECs have suggested that CLECs could use cable television systems as an alternative to DS1 loop facilities. In XO's experience, this is not the case and no cable company has ever offered XO DS1 level facilities over their cable systems. Frankly, the cable systems were not designed for this type of service and there is a substantial difference in the build-out of cable systems and the needs of facilities-based CLECs. Specifically, XO's target customers are businesses and its fiber is routed through business districts. Cable company systems were built first and foremost to serve residential customers in suburban areas.[112]

Finally, even when cable systems reach XO's customers, their network facilities typically lack the capacity to serve large number of business customers that require services at DS1 and higher speeds. While cable systems can be upgraded to support high-speed bursts, this is

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110 *Id.* at ¶ 8.

111 *Id.* at ¶¶ 9, 10.

112 Tirado Declaration at ¶¶ 13, 14.

different from a system required to support "always on" and secure bandwidth demands of businesses.[113]

c. The Wholesale Market Is Nearly Non-Existent

There is no meaningful wholesale market for DS1 loops. In XO's experience, it has rarely been able to purchase DS1 loops from other CLECs. XO has found that, on a nationwide basis, CLECs offer DS1 loops on a wholesale basis to fewer than 5 percent of the buildings that XO seeks to service.[114]

V. CONCLUSION

The information provided by XO in this Petition is consistent with the Commission's previous finding of nationwide impairment of DS1 loops. As the Commission has already found, even the most efficient CLECs serving small to medium-sized business customers *cannot* self-deploy DS1 loops economically. Like all CLECs serving this market, in a vast majority of cases, XO cannot self-deploy DS1 loops.

The Commission's finding that CLECs face extremely high barriers in deploying DS1 loops still holds true. As described by XO in this Petition, these barriers include cost of construction, access to buildings and acquisition of the necessary permits, zoning, rights of way, and the unwillingness of small to medium-sized business customers to wait the minimum of four to six months for the construction of such loop facilities in order to receive service. Indeed, in light of the fact that small to medium-sized business customers resist long term obligations, CLECs are not in a position to be able to rely on a long term DS1 revenue stream. These factors

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113 *Id.* at ¶ 15.

114 *Id.* at ¶ 12.

confirm what the Commission has already determined -- that it is economically infeasible for CLECs to deploy DS1 loops.

Not only is it uneconomic to self-deploy DS1 loops, there are also no meaningful alternatives. Although CLECs such as XO are often forced to purchase DS1 loops through special access before converting these circuits to UNEs, XO and other facilities-based CLECs will have difficulty offering competitive services to small and medium-sized business customers by acquiring DS1 loops at special access pricing. XO has substantially invested in and tested fixed wireless intermodal alternatives to DS1 loops and found that deployment of a commercial quality wireless DS1 substitute is years away and would only be feasible for uses involving the largest customers. At present, there is also no significant wholesale market for DS1 loops. All

of these factors confirm what the Commission has already found -- that CLECs serving the small and medium-sized business market are impaired without access to unbundled DS1 loops.

WHEREFORE, for the foregoing reasons, XO hereby requests that the Commission issue an Order on an expedited basis reaffirming its previous finding of nationwide DS1 loop impairment through: (i) reliance on its finding in the *Triennial Review Order*; (ii) declaratory ruling that the DS1 loop impairment finding was not vacated by the *USTA II* decision; and/or (iii) a new finding of nationwide impairment.

Respectfully submitted,

XO COMMUNICATIONS, INC.

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Date: September 29, 2004

CERTIFICATE OF SERVICE

I, Beatriz Viera-Zaloom, hereby certify that on this 29th day of September 2004, a true and correct copy of the foregoing **Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops**, on behalf of XO Communications, Inc., was delivered via email upon the following:

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Beatriz Viera-Zaloom

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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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.

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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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)

		1.0	1.5	2.0	2.5	3.0
Revenue per DS3 Per Month	$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.

Wil Tirado

Executed on September 29, 2004

XO Communications

San Francisco

9-2004

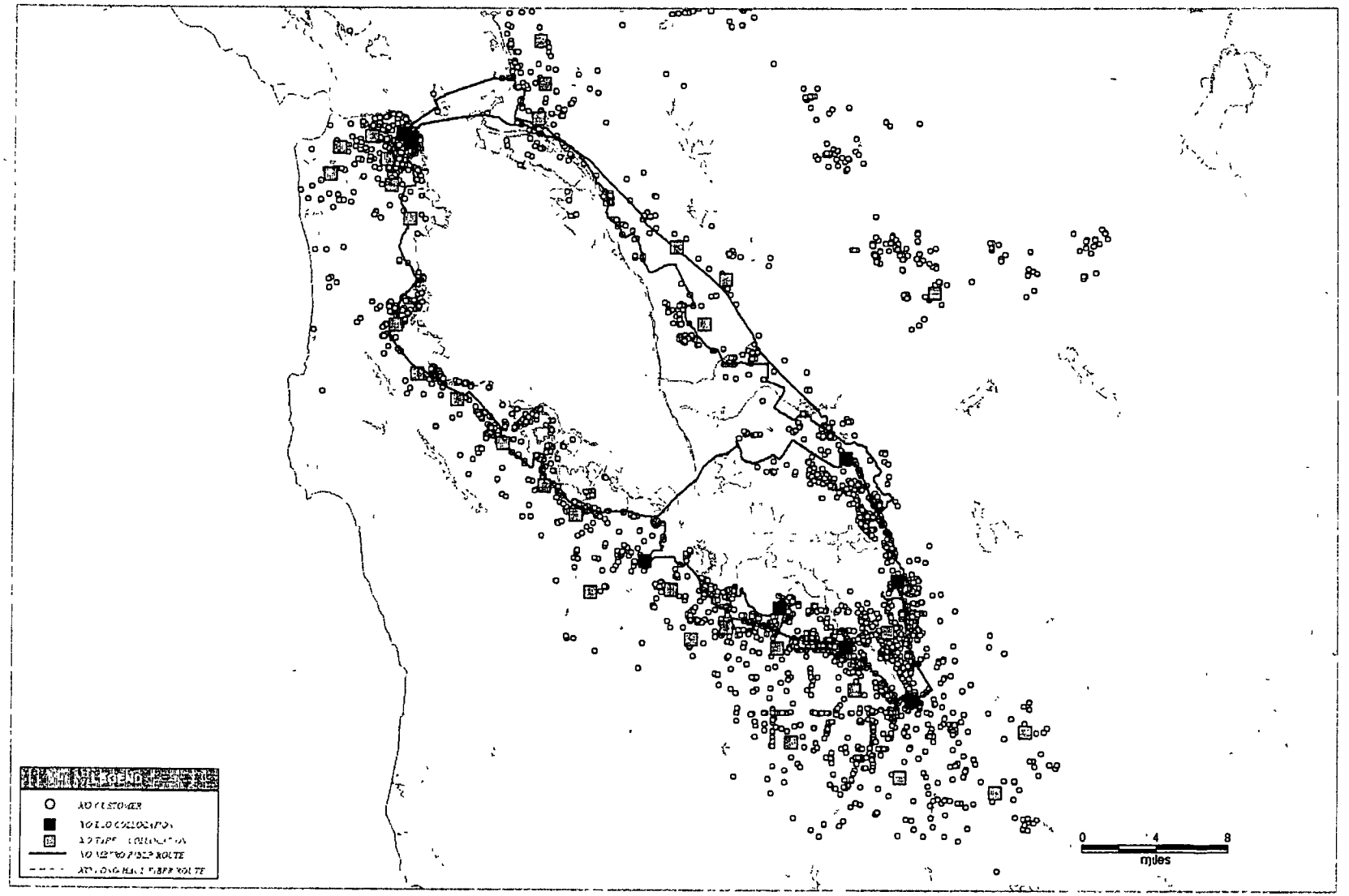


Exhibit 3

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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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 Christoper 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[1] 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

[1] 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 meets 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,

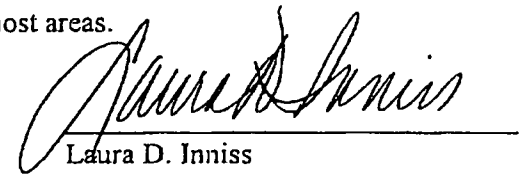
the ILECs can inflate our cost of service substantially -- and create a classic "cost/price squeeze." Whereas the availability of cost-based UNEs as an alternative previously provided CLECs an option to avoid being caught in the squeeze, the elimination of UNEs (or even the prospect of it) provides an 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.



Laura D. Inniss

Executed on September 29, 2004

– DS1 Examples - SPA vs. UNE Rate Comparison

RBOC	State	Special Access: Month to Month	Special Access: 2 Year Term Plan	Special Access: 5 Year Term Plan	UNE	% Special Access Greater than UNE: Month to Month	% Special Access Greater than UNE: 2 Year Term Plan	% Special Access Greater than UNE: 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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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.

Douglas Sobieski

Executed on: September 29, 2004