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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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**XO COMMUNICATIONS, INC.,** )  
)  
)  
Application for Consent to Transfer of Control )  
of a Company Holding Licenses and )  
Authorizations Pursuant to Section 214 and )  
310(d) of the Communications Act and for )  
Declaratory Ruling Pursuant to Section )  
310(b)(4) of the Communications Act )

Non-Streamlined      ISP-PDR-20020221-00007  
XO Communications, Inc.

**APPLICATION FOR TRANSFER OF CONTROL  
AND PETITION FOR DECLARATORY RULING**

**I. INTRODUCTION AND SUMMARY**

XO Communications, Inc. ("XO" or "Company"), pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended (the "Act"),<sup>1</sup> hereby requests the Commission's consent to the transfer of control of XO from Craig O. McCaw and the existing shareholders of XO to the new shareholders of XO, which will include, as 10 percent or greater shareholders, Forstmann Little & Co. Equity Partnership-VII, L.P. ("Forstmann Little Equity VII"), Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P. ("Forstmann Little MBO VIII") (Forstmann Little Equity VII and Forstmann Little MBO VIII, collectively "Forstmann Little"), and an indirect wholly-owned subsidiary of Teléfonos de México, S.A. de C.V. ("Telmex"). XO also seeks a declaratory ruling pursuant to Section

<sup>1</sup> 47 U.S.C. §§ 214, 310(d).

310(b)(4) that it will not serve the public interest to prohibit indirect foreign ownership of XO's wireless licenses in excess of the statutory 25 percent foreign ownership benchmark by Telmex and a general partner of Forstmann Little, Gordon A. Holmes.<sup>2</sup>

XO is currently engaged in a corporate restructuring which entails, *inter alia*, the modification of XO's existing credit facility, the elimination of all equity, and the possible exchange of existing outstanding notes for new common stock. As a part of this restructuring, on January 15, 2002, XO entered into a Stock Purchase Agreement ("Purchase Agreement") with Forstmann Little and Telmex, pursuant to which XO will receive an investment of \$400 million from each party in exchange for new equity in XO. Following consummation of the transactions contemplated by the Purchase Agreement, Forstmann Little and Telmex will each hold a non-controlling minority interest of approximately 40 percent in XO. No single shareholder will control XO, and it is not anticipated that any other shareholder will hold more than a 10 percent interest in the Company. Because Mr. McCaw currently controls (primarily through control of Eagle River Investments LLC) or has rights to vote shares of common stock that in the aggregate represent more than 50 percent of the voting power of XO common stock, the proposed transaction will result in a transfer of control of XO from Mr. McCaw to the new shareholders of XO.<sup>3</sup> Consummation of the transactions contemplated by the Purchase Agreement is subject to a

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<sup>2</sup> 47 U.S.C. § 310(b)(4). Specifically, XO requests a ruling that (1) permits the requested indirect foreign ownership of XO by Telmex and Mr. Holmes (as described herein); and (2) allows XO to accept up to and including an additional, aggregate 25 percent indirect equity and/or voting interests from other unnamed non-U.S. investors, except that no single non-U.S. investor or entity – with the exception of Telmex and Mr. Holmes – may acquire indirect ownership of XO in excess of 25 percent without Commission approval under Section 310(b)(4).

<sup>3</sup> XO believes that, to the extent Mr. McCaw holds any equity interest in XO following consummation of the transactions contemplated by the Purchase Agreement, such interest will represent a very small percentage of its voting power (less than 10 percent), and Mr.

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number of conditions, including XO successfully completing a restructuring of its balance sheet and receipt of regulatory approvals.<sup>4</sup>

As discussed below, the investment of Forstmann Little and Telmex in XO will result in substantial procompetitive benefits to the American public. XO is one of a declining number of large competitive local exchange carriers ("CLECs"). It is a strong competitor to the incumbent local exchange carriers ("ILECs") in many markets, but like many other CLECs, its financial health is rapidly deteriorating. The proposed transaction will provide critical funding for XO and a substantial reduction in its debt that will preserve and strengthen the Company. XO will use the proceeds of the investment to fund on-going business operations and the continued development of its broadband telecommunications networks, and to complete the balance sheet restructuring. Once the investment and restructuring are complete, XO expects to have a fully funded business plan, as discussed below. As a result, the proposed transaction will preserve and strengthen competition in the telecommunications industry, to the ultimate benefit of the public.

At the same time, the procompetitive benefits of the transaction will not be diminished by any anticompetitive effects. Consummation of the proposed transaction will have no adverse impact on competition in local, long distance, or broadband services markets, since no competitors will be eliminated as a result of the transaction. In addition, the proposed foreign investment in XO is entirely consistent with the commitments made by the U.S. in connection with the World Trade Organization Basic Telecommunications Agreement ("WTO Basic

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McCaw will have neither control of XO's Board of Directors nor the right to elect any of its directors.

<sup>4</sup> The Applicants note that premerger notification and report forms were filed with the Federal Trade Commission on January 30, 2002, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a and 16 C.F.R. Part 803, and that early termination of the waiting (continued...)

Telecom Agreement”) and with the Commission’s decisions on foreign participation in the U.S. telecommunications market.<sup>5</sup>

The proposed transaction, therefore, serves the public interest, and is fully consistent with the Act and the Commission’s Rules. Because the continued operation and success of XO is dependent on the consummation of the investment contemplated by the Purchase Agreement and the related restructuring, XO asks that the Commission grant this Application as expeditiously as possible.

In the remaining sections of this Application, XO sets forth a description of XO and its proposed 10 percent or greater shareholders (Section II); a description of the transaction (Section III); and an explanation of how the transaction will serve the public interest (Section IV). Simultaneous with the submission of this Application, XO is filing the necessary individual applications to effectuate the transfer of control of XO and its subsidiaries as holders of various licenses and authorizations.<sup>6</sup> Copies of these applications are provided as annexes to this Application. Specifically, attached are two applications to transfer control with respect to international Section 214 authorizations held by XO and by a wholly-owned subsidiary of XO, XO Long Distance Services, Inc. (“XO Long Distance”) (Annex A); an application to transfer control of XO, XO Long Distance, and other XO subsidiaries as holders of blanket domestic Section 214 authority (Annex B); and applications on Forms 603 and 602 to transfer control with

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period was granted on February 11, 2002.

<sup>5</sup> See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) (“*Foreign Participation Order*”); Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, 36 I.L.M. 366 (1997).

<sup>6</sup> The Form 602 is being sent to Gettysburg for filing via overnight messenger on the same  
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respect to 91 LMDS licenses and ten 39 GHz licenses, all held by XO LMDS Holdings No. 1, Inc. ("XO LMDS"), and with respect to one Industrial/Business Pool, Conventional license, held by XO (Annex C). A copy of the Purchase Agreement is provided in Annex D.

## **II. DESCRIPTION OF THE APPLICANTS**

### **A. XO**

#### **1. Current Ownership of the Company**

XO is incorporated in Delaware and maintains its headquarters in Reston, Virginia. XO's Class A common stock currently trades on OTC-Bulletin Board. XO is currently controlled by entrepreneur Craig O. McCaw through his ownership interest in Eagle River Investments LLC; through other direct and indirect holdings of XO securities; and pursuant to various voting arrangements, the primary one being with shareholder Wendy P. McCaw, his former spouse. A chart showing the current set of stockholders holding 10 percent or more of any class of XO's stock is attached as Annex E.

#### **2. Description of XO's Current Business**

XO is a full service provider of communications and information services to business customers. XO's product portfolio includes:

- Suites of voice offerings that include inbound and outbound local and interexchange services, calling card services and conferencing;
- Private data networking services;
- Integrated voice and data services;
- Internet access services; and
- Web hosting services.

XO delivers these services over its own network of metropolitan fiber rings and long haul

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day as this Application is being filed with the Commission.

fiber optic facilities and through the use of facilities and services leased or purchased from ILECs. Since 1994, XO has deployed metropolitan fiber networks in more than 63 markets in the U.S. and abroad. Today the XO network also includes:

- 2,000 on-network buildings;
- Access to an additional 63,000 buildings;
- Fixed wireless licenses (LMDS and 39 GHz) covering 95% of the top U.S. business markets;
- Five data centers and a 24/7/365 network operations center;
- More than 380 DSL access points;
- Over 200 Tier One peering Points of Presence (“POPs”);
- OC-12 backbone covering the U.S. and branching to Europe; and
- Approximately 22,398 route miles of total fiber.

At the heart of the XO network are XO’s Metro Area Networks, which provide access to end users as well as the ability to control customer traffic and transfer data efficiently to XO’s intercity network. XO’s intercity and Metro Area Networks span over 1 million fiber miles throughout 40 major U.S. cities, including the top 30.

In addition, XO is a Tier One Internet outbound provider in the U.S. and has over 200 public and private peering arrangements with other large Internet backbones. XO currently offers dedicated internet access in 36 metropolitan POPs in 31 markets and DSL in 45 markets.

XO also offers international long distance services through the resale of services it purchases on a wholesale basis from other carriers. This international long distance offering is incidental to the Company’s core domestic business.

**B. Forstmann Little & Co.**

Forstmann Little Equity VII, which proposes to hold 25 percent of the voting stock of XO, and Forstmann Little MBO VIII, which proposes to hold 15 percent of the voting stock of XO, are each Delaware limited partnerships. The general partner of Forstmann Little Equity VII is FLC XXXII Partnership, L.P., a New York limited partnership. The general partner of

Forstmann Little MBO VIII is FLC XXXIII Partnership, L.P., a New York limited partnership. The general partners of both of those general partner entities are: Theodore J. Forstmann, Sandra J. Horbach, Winston W. Hutchins, Thomas H. Lister, Jamie C. Nicholls, and Gordon A. Holmes. With the exception of Mr. Holmes, who is a citizen of the Republic of Ireland, all of the general partners are U. S. citizens. The limited partners of Forstmann Little Equity VII are comprised primarily of institutional investors, with some individual investors, while the limited partners of Forstmann Little MBO VIII are comprised of various institutional investors. Based on the Commission's methodology for determining the level of interests held indirectly, none of the limited partners in either Forstmann Little Equity VII or Forstmann Little MBO VIII will hold 10% or more of the equity of XO.

Forstmann Little Equity VII and Forstmann Little MBO VIII are affiliated with Forstmann Little & Co., a private equity firm formed in 1978. Since its formation, Forstmann Little & Co., through several limited partnerships ultimately controlled by individual general partners, has made 29 acquisitions and significant equity investments, focusing on high growth, high quality companies.<sup>7</sup> Included in these investments are existing investments in XO. Funds affiliated with Forstmann Little & Co. have made investments in XO of \$850 million in January 2000, \$400 million in July 2000, and \$250 million in the spring of 2001. As of the date of this Application, these Forstmann Little & Co. funds in the aggregate hold approximately 22.4 percent of XO's outstanding shares of common stock, on a fully-diluted, as-converted basis. Under the contemplated restructuring, these investments would be treated similarly to the other existing equity holdings in XO. Forstmann Little funds also have investments in the following FCC-regulated businesses:

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<sup>7</sup> Over time, the individual general partners have changed to some degree.

- Citadel Communications Corporation ("Citadel"): In 2001, Forstmann Little funds acquired control of Citadel, a leading broadcaster operating radio stations primarily in mid-sized markets. Citadel owns over 200 radio stations in 42 states.
- McLeodUSA Incorporated ("McLeod"): McLeod provides local and long distance services to consumers in 28 states in the Midwest, West, Pacific Northwest, and Rocky Mountain regions. An investor in McLeod since September 1999, Forstmann Little funds recently agreed to invest \$175 million in the company in conjunction with a financial restructuring. Upon consummation of that proposed transaction, Forstmann Little funds would become McLeod's largest shareholder with a 58 percent share of McLeod's voting stock.

### C. Telmex

Telmex, a Mexican corporation, provides telecommunications services in Mexico. It has more than 13 million telephone lines in service, 1.43 million line equivalents for data transmission and more than 845,000 Internet accounts. Telmex offers telecommunications services in Mexico through a 68,000 km fiber optic digital network. Telmex and its subsidiaries offer a wide range of advanced telecommunications, data and video services, Internet, and integrated telecom solutions for corporate customers.

Telmex was privatized in 1990 and for nearly a decade has had no state ownership. It is controlled by Carso Global Telecom, S.A. de C.V., a Mexican holding company, and it is publicly traded on the New York Stock Exchange and other stock exchanges around the world. Through intermediate holding companies, Telmex wholly owns 100 percent of the capital stock of Teninver, S.A. de C.V., the Mexican entity through which Telmex proposes to make its investment in XO. Telmex's indirect, wholly-owned subsidiary, Telmex USA, L.L.C. ("Telmex USA"), is authorized to provide international switched resale services in the U.S.<sup>8</sup> Aside from

<sup>8</sup> See *Telmex/Sprint Communications, L.L.C. Application for Authority Under Section 214 of the Communications Act for Global Authority to Operate as an International Switched Resale Carrier Between the United States and International Points, Including Mexico*, (continued...)

Telmex USA, Telmex has no other FCC-regulated investments in the United States.

Telmex is considered to be affiliated under the Commission's Rules with America Movil, S.A. de C.V., under the Commission's Rules. America Telecom, S.A. de C.V., a holding company sharing the same ownership as Carso Global Telecom, controls America Movil, a Mexican telecommunications company that provides wireless communications services in Mexico and has investments in Guatemala, Ecuador, Argentina, Brazil, Colombia, and Venezuela. In particular, America Movil controls Telecomunicaciones de Guatemala ("Telgua"), the Guatemalan telecommunications company, and Techtel LMDS Comunicaciones Interactivas, S.A. ("Techtel"), a new Argentine competitor, both of which are authorized to provide international service. America Movil's U.S. investments include Tracfone Wireless, Inc. (a prepaid cellular reseller), Arbros Communications, Inc. (a provider of voice, data, and other telecommunications services to small- and medium-sized businesses and wholesale customers in the northeastern United States), and Comm South Companies, Inc. (a prepaid local wireline service provider controlled by Arbros). America Movil also formerly held a non-controlling interest in Cellular Communications of Puerto Rico, Inc. ("CCPR"), a Puerto Rico cellular carrier.

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Order, Authorization and Certificate, 12 FCC Rcd 17,551 (1997)(FCC File No. ITC-97-127). On June 30, 1999, the Commission granted consent to the transfer of control of Telmex/Sprint Communications, L.L.C. to Telmex International Ventures USA, Inc. ("Telmex International Ventures"). See *International Authorizations Granted*, Public Notice, DA 99-137 (rel. July 2, 1999). By letter filed December 10, 1999, Telmex International Ventures advised the Commission that, pursuant to Section 63.24 of the Rules, it had assigned the Section 214 authorization to its parent, Telmex International, Inc., and that pursuant to Section 63.21(i), Telmex USA, L.L.C., a wholly-owned subsidiary of Telmex International, would use the authorization.

### **III. DESCRIPTION OF THE TRANSACTION**

#### **A. The Restructuring**

The financial crises affecting the competitive telecommunications industry are now well-recognized. In order to assure the stability and continuation of XO's current operations and fund its business plan, XO is undertaking steps to restructure its balance sheet and recapitalize the Company to permit new investment. The restructuring will involve the negotiation of certain agreements, and the completion of certain transactions contemplated thereby, with holders of XO senior notes and lending institutions under XO's secured credit facility that will result in XO having no more than \$1 billion of senior secured debt in addition to other existing capital lease and secured obligations. The restructuring also contemplates the elimination of XO's existing stockholders' equity, including that of the current controlling shareholder, Craig O. McCaw, and the prior investments by Forstmann Little & Co funds. Up to \$200 million of the new investment discussed below may be used to carry out the restructuring.

XO has reached a preliminary agreement with the ad-hoc committee of lenders under its \$1 billion secured credit facility regarding modifications to that facility to extend the scheduled maturity dates and make other changes including amending certain financial and negative covenants. XO also is currently in discussions with representatives of the holders of approximately \$4 billion in senior notes regarding an exchange of those notes for a combination of cash and equity in XO.<sup>9</sup>

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<sup>9</sup> XO expects that it will file for bankruptcy under Chapter 11 of the Bankruptcy Code in order to effectuate any agreement reached with its creditors regarding XO's balance sheet restructuring or if it cannot reach agreement with its creditors. Should XO file for bankruptcy, XO will at that time file the appropriate *pro forma* applications with the Commission to transfer control of XO to XO as debtor-in-possession and make appropriate amendments to the pending transfer of control applications.

Although a successful restructuring will greatly improve XO's debt posture and balance sheet, it will not provide the additional funds needed by the Company until it can become self-sustaining. To that end, XO also has arranged for a substantial infusion of funds from investors.

**B. New Equity Investment**

As noted previously, the Purchase Agreement between XO, Forstmann Little, and Telmex provides that XO will issue new common shares to Forstmann Little and Telmex, each of whom will pay \$400 million in cash for the shares, for a total aggregate investment in XO of \$800 million. Specifically, the Purchase Agreement contemplates that Forstmann Little will purchase 79,999,998 shares of Class A Common Stock, par value \$0.01 per share, of XO and two (2) shares of Class D Common Stock, par value \$0.01 per share, of XO. The shares of common stock to be acquired by Forstmann Little in the aggregate will equal approximately 40 percent of the total outstanding equity securities of XO.

The Purchase Agreement contemplates that Telmex, through an indirect wholly owned subsidiary, will purchase 80,000,000 shares of Class C Common Stock, par value \$0.01 per share, of XO. The shares of stock to be acquired by Telmex will equal approximately 40 percent of the total outstanding equity securities of XO. Although negotiations in connection with the restructuring of XO are ongoing, the respective interests of Forstmann Little and Telmex are not expected to exceed 40 percent. The purchase of the new shares by Forstmann Little and Telmex will occur at the closing of the transactions contemplated by the Purchase Agreement. Closing is subject to the satisfaction or waiver of certain conditions to the closing as set forth in the Purchase Agreement, including completion of the restructuring and receipt of certain regulatory approvals. A chart showing the XO ownership structure post-closing is provided in Annex F.

### **C. Description of Investor Protections**

Given the large size of the proposed investment and the risks attendant upon any investment in the competitive telecommunications industry in the current environment, XO has agreed with Telmex and Forstmann Little to provide them with certain rights of the type previously approved by the Commission as appropriate. There is no agreement between Forstmann Little and Telmex to vote their shares together, other than with respect to the election of each other's nominees for directors, or otherwise act in concert to control the day-to-day operations of XO. Indeed, reflecting the independence of the two investors, these provisions are carefully designed to prevent either Forstmann Little or Telmex from unilaterally exercising control over XO.

The Purchase Agreement provides that, in connection with the closing of the investments by Forstmann Little and Telmex, XO will adopt an amended and restated certificate of incorporation and restated bylaws, and will enter into a Stockholders Agreement with Forstmann Little and Telmex. Together, these documents will set forth various provisions with respect to the corporate governance of XO, including limited class voting rights for the Class C and Class D Common Stock, Board of Directors representation and approval rights, and the composition and powers of an Executive Committee of the XO Board of Directors. Forms of the Amended and Restated Certificate of Incorporation, Restated Bylaws, and Stockholders Agreement are attached to the Purchase Agreement as Exhibits B, D and E, respectively, and are referred to collectively herein as the "Corporate Governance Documents." Many of these protections will diminish or disappear if the investor's ownership percentage is reduced as set forth in the attached documents. For the purpose of this transfer of control proceeding, these rights are described as they exist at their highest level, immediately after the closing.

The Corporate Governance Documents provide that the holders of both Class C and Class D common stock, voting as separate classes, must approve any merger, consolidation, reorganization or recapitalization of XO or any sale of all or a substantial portion of the assets of XO and its subsidiaries. In addition, approval of the holders of the Class C Common Stock, voting as a separate class, is necessary to authorize the Company to acquire the equity or assets of any other person with a value greater than 20 percent of XO's net assets; issue any equity securities or incur indebtedness for borrowed money (in each case in excess of \$100 million); amend XO's certificate of incorporation or bylaws; or issue or agree to issue preferred stock.<sup>10</sup> The Commission has long found these types of approval rights to be appropriate for the protection of minority investors and to not confer control upon those investors.<sup>11</sup>

The Corporate Governance Documents also will govern the election of certain members of the Board of Directors. Pursuant to the Corporate Governance Documents, the members of XO's Board of Directors will consist of twelve persons, which will include the CEO of XO, an independent director acceptable to both Forstmann Little and Telmex,<sup>12</sup> and five individuals designated by each of Forstmann Little and Telmex. Until Telmex determines that certain events have occurred, but no later than the fourth anniversary of the closing, the Telmex designees will be individuals who are independent of, and not affiliated with, either Telmex or XO. In future elections, Forstmann Little and Telmex will be able to designate directors proportionate to their

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<sup>10</sup> These additional Class C rights will terminate once Telmex names persons affiliated with it to the XO Board of Directors, as discussed below. Both the Class C and Class D stock will convert to Class A stock and lose their approval rights no later than the fourth anniversary of the closing.

<sup>11</sup> See *Data Transmission Co.*, 44 FCC 2d 935 (1974) ("*Datran*"); *National Broadcasting Co., Inc.*, 6 FCC Rcd 4882 (1991) ("*NBC*").

<sup>12</sup> After completion of their terms on the initial Board, directors to fill the seats held by the CEO and independent director will be selected by majority vote.

then-current equity interests. The directors designated by Forstmann Little and Telmex will serve at the pleasure of, and may be removed and replaced by, the party which designates them. A majority of the directors, including at least one designee of each of Forstmann Little and Telmex, is required for a quorum.

Certain actions proposed by XO will require the approval of at least one director appointed by each of Forstmann Little and Telmex. These actions include amending the Certificate of Incorporation or Bylaws of XO; engaging in transactions with entities other than wholly-owned affiliates or "insiders;" filing for bankruptcy; adopting anti-takeover provisions; and issuing preferred stock. These again are the types of corporate actions which potentially would have a critical effect upon minority investors and are therefore appropriate subjects for minority approval rights.<sup>13</sup>

The Corporate Governance Documents further provide for the formation of a five-member Executive Committee of the Board of Directors. The Executive Committee will have responsibility for the strategic direction of the Company. Until Telmex has exercised its right to appoint affiliated persons to the Board, three directors designated by Forstmann Little will serve on the Executive Committee along with the CEO and one independent director designated by Telmex. Thereafter, the Executive Committee will be comprised of XO's CEO and two board members designated by each of Forstmann Little and Telmex. The approval of two-thirds of the members of the Executive Committee (three-fifths until such time as Telmex has exercised its right to appoint affiliated persons to the Board) is required for the Company to take certain

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<sup>13</sup> *Datran, supra; NBC, supra; News International, PLC*, 97 FCC 2d 349 (1984). These cases do not specifically address filing for bankruptcy or adopting anti-takeover provisions but, like the sale of the business or purchase of a new business, which have been specifically approved, these actions can dramatically affect value of the minority investment.

significant actions.<sup>14</sup> Executive Committee approval by a two-thirds vote essentially requires that both Forstmann Little and Telmex agree on the measure. If they do not agree, any member of the Executive Committee may take the matter before the entire Board of Directors where it would be decided by majority vote. As the ultimate power to approve these actions resides in the Board of Directors, the Executive Committee cannot itself block XO from taking these actions. Even actions approved by the Executive Committee, moreover, may also be subject to any approval normally required by the full Board of Directors.

#### **IV. THE INVESTMENT OF FORSTMANN LITTLE AND TELMEX IN XO WILL SERVE THE PUBLIC INTEREST.**

In considering the proposed transaction under Sections 214 and 310(d) of the Act, the Commission must determine whether consent to the requested transfer of control serves the public interest. In making this determination, the Commission must weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that, on balance, the proposed transfer of control serves the public interest, convenience and necessity.<sup>15</sup> Since the transaction proposes that an ownership interest be held by foreign

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<sup>14</sup> The following types of actions will require a super-majority vote:

Adopt or modify a business plan; a sale of XO; acquisition of an equity interest in or assets of any other person with a value greater than \$100 million; issuance of any equity securities with a value in excess of \$100 million; purchase any shares of XO capital stock; dividends or distributions in respect of its capital stock; retire or change any material term of outstanding long-term debt; incur indebtedness in excess of \$100 million; make any material change in its accounting principles or change XO's outside auditors; and appoint or terminate or modify the terms of the employment of any member of XO's senior management.

<sup>15</sup> See, e.g., *Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc. and Telenor Satellite, Inc., Assignee, Applications for Assignment of Section 214*

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concerns, the Commission's rules and policies on foreign participation in U.S. telecommunications markets, as adopted in the Commission's *Foreign Participation Order*, are a factor in this public interest analysis. The Commission's foreign participation rules and policies will also guide the Commission's decision, pursuant to Section 310(b)(4) of the Act, on whether Telmex and Mr. Holmes should be allowed to hold indirectly an ownership interest in XO's wireless licenses in excess of the statutory 25 percent foreign ownership benchmark.

As shown below, the proposed investment by Forstmann Little and Telmex in XO will yield substantial public interest benefits and will not pose any potential for harming the public. Furthermore, the proposed foreign investment in XO is fully consistent with the Commission's rules and policies on foreign participation in the U.S. telecommunications market. Accordingly, grant of this Application for transfer of control of XO will serve the public interest.

- A. The investment of Forstmann Little and Telmex in XO will produce substantial procompetitive benefits for the American public, as it will enable XO to continue to compete in the U.S. telecommunications market.**

The investment by Forstmann Little and Telmex will yield affirmative, tangible and substantial public interest benefits. In brief, the proposed investment is necessary for XO to survive in the U.S. telecommunications market. XO has been widely recognized as one of the best operating companies in the emerging telecommunications sector. It has consistently achieved solid revenue growth as a result of its unique and diverse product portfolio of voice and data services. In the fourth quarter 2001, despite a challenging economic climate, XO posted a

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*Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization, FCC 01-369, rel. Dec. 18, 2001, at ¶ 13 ("Comsat Mobile Order").*

nearly 36 percent year-over-year revenue gain. Through intense focus on operational efficiencies and expense controls, XO decreased its reported EBITDA loss in each of the four quarters of 2001.

XO and other emerging telecommunications companies have suffered over the past year amid the downturn in the technology and communications markets, slowing demand, and a marked tightening of capital markets as investors shied away from funding enterprises that were not generating net profits or had unfunded business plans. XO's results of operations have remained relatively strong. However, XO has not had access to the capital markets to address its funding needs, because XO's business plan is not fully funded and its operations do not yet generate positive cash flow as of the date of this Application. Without the new investment and balance sheet restructuring, XO's financial stability could be significantly compromised. At that point, services to customers could be adversely affected.

The proposed infusion of capital by Forstmann Little and Telmex will allow XO to build upon its solid foundation with a strengthened balance sheet, significantly reduced debt and a fully funded business plan.<sup>16</sup> Once the investment is completed, XO expects to have enough money to fund its operations until it can generate cash from its own operations.

Thus, the proposed investment serves the public interest, because it will strengthen XO and enable it to meet its contractual and service obligations over the longer term. The simple fact is that, without additional funding, XO may be forced to decrease services and investment, and perhaps cease operations altogether. By contrast, the proposed transaction will enable XO to continue investing in the expansion of its network and providing high quality local, long

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<sup>16</sup> Specifically, XO expects to have sufficient funds and cash generated in operations to pay for its capital expenditures and operating expenses through the time at which the business is self-sustaining.

distance, and broadband services to its customer base. The Commission has previously recognized that a transfer of control that increases the financial ability of a licensee with respect to its operations serves the public interest.<sup>17</sup>

The proposed investment will also yield meaningful public interest benefits because it will foster greater competition in the provision of local telecommunications services, one of the central goals of the Telecommunications Act of 1996. The Commission has held in the past that the public interest is served if a proposed transaction would increase competition among market participants.<sup>18</sup> As the Commission is all too cognizant, a disturbing number of major CLECs have failed or filed for bankruptcy over the past year,<sup>19</sup> resulting in a potentially serious diminution in competition in local telecommunications markets. An infusion of capital into XO will allow XO to continue as a fierce competitor to the ILECs, by providing XO with the necessary funding to support its proposed business plan and to expand its operations and services. Simply put, the public will benefit directly from the continued ability to choose XO as a service provider in the telecommunications market, and indirectly from the general competitive pressure that XO exerts upon the incumbent carriers.

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<sup>17</sup> See *In-flight Phone Corp. for Transfer of Control to MCI Telecommunications Corp., Declaratory Ruling and Order*, 10 FCC Rcd 10448 (1995); *Application of the Transfer of Control of American Satellite Co.*, Memorandum Opinion and Order, File No. ENF-85-50, rel. Oct. 16, 1985.

<sup>18</sup> See *In-flight Phone Corp. for Transfer of Control to MCI Telecommunications Corp., Declaratory Ruling and Order*, 10 FCC Rcd 10448 (1995); *Execuline of Sacramento, Inc., Transferor, and American Sharecom, Inc., Transferee*, Memorandum Opinion and Order, 6 FCC Rcd 5964 (1991).

<sup>19</sup> Examples include Northpoint, GST, ICG, e.spire, JATO, Net2000, Winstar, and Teligent, to name a few. See "With Finances Floundering, Are CLECs Worth the Risk? The \$64,000 Question ...and More," TELECOM MANAGER'S VOICE REPORT, Vol 22, Issue 23, Dec. 3, 2001.

**B. Consummation of the proposed transaction will not violate the Act or the Commission's rules or policies, and thus will not result in harm to the public interest.**

**1. There is no basis for concluding that the proposed transaction will adversely affect competition or that Forstmann Little and Telmex are not qualified to make the proposed investment.**

There is no basis for concluding that the proposed transaction could potentially harm the public if consummated. Rather, the proposed investment of Forstmann Little and Telmex in XO is entirely consistent with the Act and the Commission's rules and policies.

The proposed transaction will have no adverse impact on competition in any of the telecommunications markets in which XO provides service. No competitors will be eliminated or otherwise unduly affected as a result of this transaction. Telmex and Forstmann Little are both affiliated in some fashion with entities that provide or are authorized to provide service in some or all of the same geographic or product markets as XO. These entities will not be adversely or positively affected by the proposed transaction. The Purchase Agreement expressly permits Forstmann Little and Telmex to compete with XO and does not obligate either investor to present business opportunities to XO.<sup>20</sup> If either Telmex or Forstmann Little attempts to leverage its interest in XO for the benefit of its affiliated company, the other investor could block such action through XO's Board of Directors.

Furthermore, both Forstmann Little and Telmex are fully qualified to make this investment. Forstmann Little is a current investor in XO, and there is no basis for contending that its continued involvement in XO would run afoul of the Commission's requirements. Telmex is one of the leading providers of telecommunications services in Mexico and thus is also fully qualified to make its proposed investment in XO.

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<sup>20</sup> See Annex D at Exhibit B (Stockholders Agreement), Section 9.2.

**2. There is no basis for rebutting the strong presumption that the proposed foreign investment in XO does not raise competitive concerns.**

More importantly, the proposed foreign investment in XO is consistent with the Commission's rules and policies as set forth in the *Foreign Participation Order*. The Commission adopted the *Foreign Participation Order* to implement the U.S. commitments made pursuant to the WTO Basic Telecom Agreement and promote foreign carrier investment in the U.S. by entities from WTO member countries.<sup>21</sup> Accordingly, the Commission adopted, as a factor in its public interest analysis under Section 214 of the Act, a rebuttable presumption that competitive concerns are not raised by an international Section 214 application that proposes ownership by entities from WTO member countries, unless granting the application would pose a very high risk to competition in a U.S. market and such risk cannot be addressed by conditions.<sup>22</sup> The Commission employs the same rebuttable presumption in considering indirect ownership by entities from WTO member countries in common carrier radio licensees where the proposed ownership level exceeds the statutory benchmark in Section 310(b)(4) of the Act.<sup>23</sup>

Telmex is a foreign carrier from Mexico, and is affiliated under the Commission's Rules with America Movil, the controlling shareholder of carriers from Guatemala and Argentina. As noted above, Gordon A. Holmes, one of the six general partners of FLC XXXII Partnership, L.P. and FLC XXXIII Partnership, L.P., the general partners of the Forstmann Little entities proposing to invest in XO, is a citizen of the Republic of Ireland. Mr. Holmes's indirect interest in XO and its subsidiaries will be held as follows: FLC XXXII Partnership, L.P. holds a 2.56

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<sup>21</sup> *Foreign Participation Order, supra note 5, at 23940.*

<sup>22</sup> *Foreign Participation Order, supra note 5, at 23913-23914.*

<sup>23</sup> *Foreign Participation Order, supra note 5, at 23940-23942.*

percent interest in Forstmann Little Equity VII,<sup>24</sup> while FLC XXXIII Partnership holds a less than one percent interest in Forstmann Little MBO VIII.<sup>25</sup> Mr. Holmes' partnership interest in both FLC XXXII Partnership, L.P. and FLC XXXIII Partnership, L.P. is less than 20 percent. Mexico, Guatemala, Argentina, and Ireland are all members of the WTO. As such, XO is entitled to a strong presumption that the proposed foreign investment raises no competitive concerns.

There is no basis for rebutting this presumption with respect to the international Section 214 authorizations held by XO and XO Long Distance. Telmex's investment in XO will not pose a risk, much less a very high risk, to competition on the U.S.-Mexico, U.S.-Guatemala, or U.S.-Argentina routes. Following Telmex's privatization and the subsequent enactment of Mexico's Federal Telecommunications Law in 1995, the Mexican government introduced facilities-based competition in August, 1996 and required interconnection beginning in January, 1997. As a consequence, Telmex faces substantial competition in the Mexican telecommunications market. There are 21 long distance concessionaires in Mexico (with 10 currently operating). U.S.-affiliated carriers – led by the AT&T-affiliated Alestra and the WorldCom-affiliated Avantel – have captured approximately 32 percent of Mexico's long distance market and approximately 42 percent of the outgoing traffic on the U.S.-Mexico route. With this level of competition in the Mexico telecommunications market, there is no basis for believing that Telmex's investment in XO will threaten competition in the U.S.

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<sup>24</sup> Based on percentage of capital contribution. FLC XXXII also has certain profit sharing incentives that reach 21.25 percent of partnership profits.

<sup>25</sup> Based on both percentage of capital contribution and participation in profits.

Indeed, Telmex's wholly-owned subsidiary, Telmex USA, has been authorized to provide service in the U.S. on the U.S.-Mexico route (as well as the U.S.-Guatemala and U.S.-Argentina routes) for several years, and there has never been any evidence that Telmex USA, though its Section 214 authority, has ever harmed competition in the U.S. Telmex's interest in XO, if the transaction is consummated as proposed, would be a non-controlling, minority interest, and thus there is even less reason to believe that Telmex's presence in the U.S. market as an investor in XO would constitute a threat to competition. To provide even greater assurance, both XO and XO Long Distance have agreed to dominant carrier regulation on the U.S.-Mexico and the U.S.-Guatemala routes, as set forth in the attached international Section 214 transfer of control applications in Annex A.<sup>26</sup>

Similarly, there is no basis for rebutting this presumption with respect to the indirect ownership interest of Telmex and Mr. Holmes in XO's radio licensees in excess of the 25 percent foreign ownership benchmark set forth in Section 310(b)(4) of the Act. The Commission has already recognized that Mexico, a WTO member country, is Telmex's home market for purposes of Section 310(b)(4) analysis, and approved Telmex's (and subsequently America Movil's) previous non-controlling 50 percent interest in a holding company for CCPR.<sup>27</sup>

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<sup>26</sup> Telmex's affiliate in Argentina, Techtel, is a new competitor in that market and is therefore not considered to be dominant in Argentina. Accordingly, the Commission has not imposed dominant carrier treatment on Telmex USA on the U.S.-Argentina route. See File No. FCN-NEW-20000908-00051.

<sup>27</sup> See *Wireless Telecommunications Bureau and International Bureau Complete Review of Proposed Investment by Teléfonos de México, S.A. de C.V. in Parent of Cellular Communications of Puerto Rico*, Public Notice, 15 FCC Rcd 1227 (1999); see also *Cellular Communications of Puerto Rico Inc.*, Petition for Declaratory Ruling, Grant of Authority, File No. ISP-PDR-20010606-00056, Report No. TEL-00488 (released Jan. 11, 2002) (consenting to transfer of control of non-controlling interest in holding company of licensees from Telmex to America Movil, and subsequently to transfer of control of America Movil from Carso Global Telecom to America Telecom, pursuant to Section (continued...))

Telmex's proposed investment in XO does not raise any additional issues. As for Mr. Holmes, other than through Forstmann Little, he has no significant interest in any telecommunications company, foreign or domestic. As such, there is absolutely no reason to believe Mr. Holmes' involvement in XO would present any competitive concerns. The Commission has permitted many entities from WTO Member countries, including entities with substantial foreign government ownership, to acquire controlling interests, or interests well in excess of the 25 percent benchmark, in U.S. carriers holding common carrier radio licenses.<sup>28</sup> There is no basis for departing from that precedent now.<sup>29</sup>

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(...continued)

310 (b)(4)). In January 2002, America Movil transferred its interest to SBC, which already controlled the other investor in the licensees.

<sup>28</sup> See, e.g., *Comsat Mobile Order; Motient Services Inc. and TMI Communications and Co., LP, Assignors, and Mobile Satellite Ventures Subsidiary LLC, Assignee, Order and Authorization*, DA 01-2732, rel. Nov. 21, 2001; *General Electric Capital Corp., Transferors, and SES Global, S.A., Transferees, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Order and Authorization, DA 01-2100, rel. Oct. 2, 2001; *Application of VoiceStream Wireless Corp., Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act*, Memorandum Opinion and Order, 16 FCC Rcd 9779 (2001).

<sup>29</sup> XO is aware that, on February 13, 2002, the United States Trade Representative ("USTR") requested a WTO dispute resolution panel to rule on certain Mexican telecommunications issues. See Office of the United States Trade Representative, "U.S. Requests WTO Panel to Rule on Mexican Telecom Restrictions," rel. Feb. 13, 2002. On the same day, the FCC reiterated its policy "to open the U.S. market to telecommunications carriers from all other WTO members because of its commitment to competition, regardless of any particular member's market structure." *Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, IB Docket No. 02-18, Notice of Proposed Rulemaking, RM-9249 (rel. Feb. 13, 2002). The Commission's precedent in the *Foreign Participation Order*, and XO's agreement to be classified as dominant on the U.S.-Mexico and U.S.-Guatemala routes, make it clear that this Application should not be delayed because of the pendency of the USTR proceeding. This is particularly true in view of XO's need for  
(continued...)

**3. The proposed transaction should raise no concerns regarding national security, law enforcement, foreign policy, or trade policy.**

Finally, the proposed investment of Forstmann Little and Telmex should raise no concerns with the Executive Branch regarding national security, law enforcement, foreign policy, or trade policy. As noted previously, Forstmann Little is already an investor in XO, and entities wholly owned by Telmex have previously been authorized to provide international service and hold indirect ownership interests in wireless licensees. Should the Executive Branch raise any concerns, XO will work diligently and cooperatively to address them.

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(...continued)

the expeditious restructuring of its operations in order to ensure the continued competitive delivery of services to its customers.

**V. CONCLUSION**

For these reasons, XO respectfully requests that the Commission grant this Application for transfer of control of XO as well as the requested petition for declaratory ruling pursuant to Section 310(b)(4) of the Act as expeditiously as possible.

Respectfully submitted,

**XO COMMUNICATIONS, INC.**

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Date: February 20, 2002

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William F. Caton  
Secretary  
Federal Communications Commission  
445-12th Street, N.W.  
Washington, D.C. 20554

Re: XO Communications, Inc.

Attn: Jeffrey Tobias  
Wireless Telecommunications Bureau

Dear Mr. Caton:

Enclosed for filing, on behalf of XO Communications, Inc. ("XO"), are the original and 10 copies of an Application for Transfer of Control and Petition for Declaratory Declaratory Ruling. As explained in the Application and Petition, XO requests the Commission's consent to the transfer of control of XO from Craig O. McCaw and the existing shareholders of XO to the new shareholders of XO, which will include, as 10 percent or greater shareholders, Forstmann Little & Co. Equity Partnership-VII, L.P. ("Forstmann Little Equity VII"), Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P. ("Forstmann Little MBO VIII") (Forstmann Little Equity VII and Forstmann Little MBO VIII, collectively "Forstmann Little"), and an indirect wholly-owned subsidiary of Teléfonos de México, S.A. de C.V. ("Telmex"). XO also seeks a declaratory ruling pursuant to Section 310(b)(4) that it will not serve the public interest to prohibit indirect foreign ownership of XO's wireless licenses in excess of the statutory 25 percent foreign ownership benchmark by Telmex and a general partner of Forstmann Little, Gordon A. Holmes.

William F. Caton  
Secretary  
Federal Communications Commission  
February 21, 2002  
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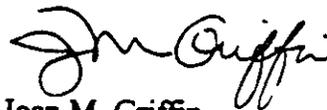
Simultaneous with the submission of this Application and Petition, XO is filing the necessary individual applications to effectuate the transfer of control of XO and its subsidiaries as holders of various licenses and authorizations.<sup>1</sup> These applications are:

- Two applications to transfer control with respect to international Section 214 authorizations held by XO and by a wholly-owned subsidiary of XO, XO Long Distance Services, Inc. ("XO Long Distance");
- An application to transfer control of XO, XO Long Distance, and other XO subsidiaries as holders of blanket domestic Section 214 authority;
- Applications on Forms 603 and 602 to transfer control with respect to 91 LMDS licenses and ten 39 GHz licenses, all held by XO LMDS Holdings No. 1, Inc. ("XO LMDS"); and
- An application on Form 603 to transfer control with respect to one Industrial/Business Pool, Conventional license, held by XO.

XO has previously advised the Commission staff in the Wireless Telecommunications Bureau (Jeff Tobias and Brian O'Donnell), International Bureau (Jackie Ruff, Imani Ellis-Cheek, and George Li), Office of General Counsel (Neil Dellar and Jim Byrd), and Common Carrier Bureau (Henry Thaggert and Elizabeth Yockus) about this Application and Petition. It is XO's understanding that Jeff Tobias will take the lead on the Application and Petition. Copies of these filings are being served on the listed staff members via email.

Please contact the undersigned counsel if you have any questions.

Sincerely,



Joan M. Griffin  
Its Attorney  
*(not admitted in Virginia)*

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<sup>1</sup> The Form 602 is being sent to Gettysburg for filing via overnight messenger on the same day as this Application is being filed with the Commission.