

**NEW APPLICATION**



**ORIGINAL**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**JEFF HATCH-MILLER**  
Chairman  
**MARC SPITZER**  
Commissioner  
**WILLIAM A. MUNDELL**  
Commissioner  
**MIKE GLEASON**  
Commissioner  
**KRISTIN MAYES**  
Commissioner

2005 DEC 16 P 4: 56  
AZ CORP COMMISSION  
DOCUMENT CONTROL

T-04302A-05-0894

Notice of Intent and Request )  
For Expedited Approval of Internal )  
Corporate Restructuring by )  
XO Communications Services, Inc. )  
\_\_\_\_\_ )

Docket No. T-04302A-05-\_\_\_\_\_

**(Expedited Consideration Requested)**

**INTRODUCTION**

By this notice of intent and application, and pursuant to A.A.C. R14-2-803, XO Communications Services, Inc. ("XOCS") seeks approval from the Arizona Corporation Commission ("Commission") for the proposed internal restructuring of XO Communications, Inc. ("XO"), the parent of XOCS. As explained below, the proposed restructuring is purely internal and financial in nature, and will not impact the terms or conditions of services offered by XOCS, the certified telecommunications provider in Arizona. In the proposed parent company restructuring, Carl C. Icahn's equity and voting interest in XO will grow from 61% (current beneficial holding) to 100%. This will occur through the merger of XO and a newly formed entity, XO Communications, LLC ("XO LLC"). XO LLC will be wholly owned by Elk Associates LLC which is, in turn, wholly owned by Carl Icahn. XO LLC will merge into and replace XO. XOCS will then be a wholly owned subsidiary of XO LLC.

## **I. THE PARTIES**

### **A. XO**

XO Communications, Inc. is a Delaware corporation whose principal office and place of business is located at 11111 Sunset Hills Road, Reston, Virginia 20190-5339. XO is a leading national provider of local and long distance telecommunications services to businesses, large enterprises and telecommunications carriers. XO delivers its services over its own network of metropolitan fiber rings and long haul fiber optic facilities and through the use of facilities and services leased or purchased from third party carriers, including incumbent local exchange carriers. In addition, XO's wholly-owned subsidiary, LMDS Holdings, Inc. ("LMDS"), holds wireless licenses in the LMDS and 39 GHz bands as well as related fixed broadband wireless spectrum assets.

XO is authorized by the Federal Communications Commission to provide interstate and international telecommunications services. Through XOCS, and other subsidiaries, XO is authorized to provide intrastate interexchange services virtually nationwide, and to provide competitive local exchange services in 47 states.

At present, Cardiff Holding LLC ("Cardiff") holds a beneficial interest of approximately 61% of the equity and voting interests in XO. Cardiff is indirectly, wholly-owned and controlled by Carl C. Icahn, through his ultimate ownership and control of companies that hold ownership interests in Cardiff. In 2003, the Commission approved the transfer of control of XO to Cardiff not long after XO emerged from bankruptcy. *See* Decision No. 65520 (January 17, 2003). In the current proposed internal restructuring, the ultimate ownership will not change. After the pro forma restructuring, XOCS will continue to be majority owned and controlled by Mr. Icahn.

A verification of the information contained in this application from Heather Gold, XO Senior Vice President of Government Relations, is attached as Exhibit 1.

## **B. XOCS**

In Arizona, XO Communications Services, Inc. ("XOCS") is authorized to provide intrastate local exchange and interexchange services pursuant to authorizations issued by the Commission. See Docket No. T-03601A-98-0417, Decision No. 61373. XOCS is one of a small number of companies in Arizona that has invested in, rather than solely leased, telecommunications facilities to compete with the incumbent telephone service provider. XOCS provides services to approximately 5,000 customers in the Phoenix metro area and Tucson. XO has invested in two switches in Arizona and operates a fiber optic ring which encircles the Phoenix metro area, bounded by Camelback to the north, Elliot to the south, Pima/Price Road to the East, and 7<sup>th</sup> Avenue to the west. This network does not reach everywhere and, therefore, XO also provides services to many customers by way of facilities leased from Qwest. As evidenced by its Certificate of Convenience and Necessity, XOCS and its corporate parent, XO, have been found by this Commission to possess the requisite financial, managerial and technical qualifications necessary to operate as a provider of intrastate telecommunications services in Arizona.

## **C. XO Communications, LLC**

XO Communications, LLC will be a Delaware limited liability company. With respect to internal organization and structure, XO LLC will generally duplicate XO, as it exists today. XO anticipates that the XO LLC executive team (officers) will be identical to the XO executive team. The company headquarters will remain Reston, Virginia. In the proposed transaction, XO will merge into XO Communications LLC and XO LLC will become the new parent holding company of XOCS.

## **II. DESCRIPTION OF THE RESTRUCTURING**

The restructuring of XO will occur in connection with a larger overall transaction whereby XO will spin off its wireless business from its wireline business. The businesses will be structurally

separate, but both will be ultimately majority owned and controlled by Carl C. Icahn. On November 4, 2005, XO entered into an Equity Purchase Agreement (“Equity Purchase Agreement”) with XO Holdings, Inc. (“Holdings”), a newly-formed subsidiary of XO, and Elk. Under the Equity Purchase Agreement, XO will sell its national wireline telecommunications business to Elk. To implement the sale, XO will create two new wholly-owned subsidiaries – Holdings, a Delaware corporation that is a direct subsidiary of XO, and XO LLC, a Delaware limited liability company that is a direct subsidiary of Holdings. XO will merge with and into XO LLC, with XO LLC emerging as the surviving entity. XOCS will then be a subsidiary of XO LLC (the “Restructuring Merger”).

Upon consummation of the Restructuring Merger, each share of common stock of XO that is outstanding immediately prior to the Restructuring Merger will be converted into the right to receive one share of common stock of Holdings, and each share of preferred stock, warrant, and stock option of XO outstanding immediately prior to the Restructuring Merger will be convertible at the option of the holder into shares of Holdings common stock on the same terms and conditions as applicable to such securities prior to the Restructuring Merger. Following these actions, all of the outstanding member interests in XO LLC will be sold to Elk for an aggregate purchase price of \$700 million in cash, subject to certain adjustments. Closing is contingent on receipt of all necessary regulatory approvals, among other things. Diagrams showing the corporate organizational structure before and after closing are appended hereto as Exhibit 2.

The “XO Communications” brand name will be transferred to XO LLC at closing and will therefore remain with the wireline business. Holdings will retain the fixed broadband wireless spectrum licenses and other assets through its ownership of LMDS Holdings, and will commence

operations under a new name.<sup>1</sup> The transactions contemplated by the Equity Purchase Agreement, including the Restructuring Merger and the LMDS Transfer, are *pro forma* in nature because they do not result in a change in the actual controlling party. Elk is an entity that is owned and controlled by XO's controlling shareholder, Mr. Icahn. XOCs notes that the proposed transaction will be effectively transparent to XOCs's customers. XOCs's ultimate ownership will remain the same, its authorization to provide telecommunications services will remain in place, and its customers will not be affected in any way as they will continue to be offered the same services by the same service provider with the same name at the same rates, terms and conditions as at present.

### **III. INFORMATION REQUESTED UNDER A.A.C. R14-2-803**

**1. *The names and business addresses of the proposed officers and directors of the holding company;***

A listing of the anticipated XO Communications, LLC Executive Management team is attached as Exhibit 3.

**2. *The business purposes for establishing or reorganizing the holding company;***

As described above, the internal restructuring will give the majority owner sole ownership of the wireline telecommunications company and greater flexibility in business planning.

**3. *The proposed method of financing the holding company and the resultant capital structure;***

XO LCC will be wholly owned by companies owned by Mr. Carl Icahn and have will have access to financing through affiliate companies and resources also owned by Mr. Icahn.

**4. *The resultant effect on the capital structure of the public utility;***

---

<sup>1</sup> In the Restructuring Merger, XO LLC will also distribute 100 percent of the outstanding shares of the common stock of LMDS Holdings to Holdings, at which time LMDS Holdings will become a wholly-owned subsidiary of Holdings (the "LMDS Transfer").

The identity and the resulting financial structure of the new holding company is described in Section II above.

5. ***An organization chart of the holding company that identifies all affiliates and their relationships within the holding company;***

Exhibit 2 is an organizational chart of the holding company which identifies the relevant affiliates and their relationships within the holding company.

6. ***The proposed method for allocating federal and state income taxes to the subsidiaries of the holding company;***

XO LLC does not intend, through the Restructuring Merger, to cause any material change in how state and federal taxes are allocated among itself and its operating subsidiaries. Once all transactions associated with the Restructuring Merger are complete, XO LLC will be a member of a larger consolidated group of affiliates owned by Mr. Carl Icahn and federal and state tax liabilities will be managed consistent with that consolidated ownership interest.

7. ***The anticipated changes in the utility's cost of service and the cost of capital attributable to the reorganization;***

The Restructuring Merger is not expected to adversely impact the regulated company's cost of service or cost of capital.

8. ***A description of diversification plans of affiliates of the holding company; and***

XO and XOCS have no current plans to diversify beyond the communications services and products currently offered (and planned).

9. ***Copies of all relevant documents and filings with the United States Securities and Exchange Commission and other federal or state agencies.***

A copy of the Equity Purchase Agreement and any other documents required to be filed with the Securities and Exchange Commission will be submitted to Commission Staff.

The two remaining Rule 803(A) requirements, 10 and 11, were designed for transactions involving regulated monopolies and unregulated business affiliates and are not relevant here. These questions are not applicable in a competitive environment where the provider is not guaranteed a return on plant investment and numerous providers are vying for the competitor's customer base. Additionally, investment projections and future capital expenditures for XOCS are not available at this time.

#### **IV. AFFILIATED INTEREST RULES APPROVAL**

The Commission's Public Utility Holding Company and Affiliated Interest Rules provide that the Commission will approve a proposed transaction unless: (1) it determines that it would impair the financial status of the public utility, (2) otherwise prevent it from attracting capital at fair and reasonable terms, or (3) impair the ability of the public utility to provide safe, reasonable and adequate service. A.A.C. R14-2-803(C). As explained above, the proposed Restructuring Merger will not change the financial status of the public utility (the ultimate ownership remains unchanged); will not impair its ability to attract capital; and will have no negative effect on service to its customers in Arizona. This internal restructuring is financial in nature and will not impact XOCS operations or services.

Further, this restructuring will not adversely affect the public interest. It involves no change in the name or identity of the entity providing service to customers nor does it propose any change to the rates, terms and conditions of such service. The restructuring does not affect management or the technical or financial qualifications of XOCS as all managerial, technical and financial resources previously available to it will continue to be available. Thus, this transaction will be entirely transparent to customers.

XOCS competes with numerous other interexchange carriers, enhanced network providers, competitive local exchange carriers, and Qwest Corporation. Because the public interest is best

served by assuring the presence of numerous telecommunications competitors, it is important to provide such competitors such as XO with the flexibility to arrange their ownership in the manner they deem most appropriate to carry on their business so long as there is no adverse impact on the public. To deny such flexibility would discourage new competitors from entering the state and would encourage existing competitors to seek a more favorable regulatory environment elsewhere, neither of which would enhance the public interest.

## V. CONTACT INFORMATION

The following contacts should be used for inquiries and correspondence concerning this notice of intent and application:

Doug Kinkoph  
Vice President Regulatory and External  
Affairs  
XO COMMUNICATIONS, INC.  
11111 Sunset Hills Road  
Reston, VA 20190-5339  
Tel: (614) 416-1468  
Fax: (614) 416-9268  
[doug.kinkoph@xo.com](mailto:doug.kinkoph@xo.com)

Rex Knowles  
Vice President – Regulatory  
XO COMMUNICATIONS, INC.  
111 East Broadway  
Suite 1000 Salt Lake City, UT 84095  
Tel: (801) 983-1504  
Fax: (801) 983-1667  
[rex.knowles@xo.com](mailto:rex.knowles@xo.com)

Joan S. Burke  
OSBORN MALEDON, P.A.  
2929 North Central Avenue, Suite 2100  
Phoenix, AZ 85012  
Tel: (602) 640-9356  
Fax: (602) 640-6074  
[jsburke@omlaw.com](mailto:jsburke@omlaw.com)

Brad Mutschelknaus  
Melissa Conway  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, DC 20036  
Tel: (202) 955-9667  
Fax: (202) 955-9792  
[Mconway@kelleydrye.com](mailto:Mconway@kelleydrye.com)

## VI. CONCLUSION

Based on the foregoing, XO respectfully submits that the public interest, convenience, and necessity would be furthered by a grant of this application. XO requests expedited review of this

application and asks that the Commission grant approval, and any other relief it deem necessary, on an expedited basis.

Respectfully submitted December 16<sup>th</sup>, 2005.

**XO COMMUNICATIONS SERVICES  
INC.**



Joan S. Burke  
OSBORN MALEDON, P.A.  
2929 North Central Avenue, Suite 2100  
Phoenix, AZ 85012  
Tel: (602) 640-9356  
Fax: (602) 640-6074

Brad E. Mutschelknaus  
Melissa S. Conway  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, DC 20036  
Tel: (202) 955-9600  
Fax: (202) 955-9792

Of Counsel to XO

**Original and thirteen copies** filed this  
16<sup>th</sup> day of December, 2005 with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

**Copies** of the foregoing mailed  
this 16<sup>th</sup> day of December, 2005, to:

Maureen Scott  
Legal Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

Ernest Johnson  
Director, Utilities Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

---

1

STATE OF VIRGINIA )  
 )  
 )  
COUNTY OF FAIRFAX )  
 )  
 )

ss.

VERIFICATION

I am Heather Burnett Gold, Senior Vice President of Government Relations of XO Communications, Inc. ("XO"). I am authorized to make this verification on behalf of XO.

The information in the attached application has been compiled from relevant sources inside and outside XO, including but not limited to legal counsel.

To the best of my knowledge, information and belief, the representations set forth in the application are true and accurate.



Heather Burnett Gold  
Senior Vice President of Government Relations  
XO Communications, Inc.

Subscribed and sworn to before me on this 15<sup>th</sup> day of December, 2005, by Heather Burnett Gold.



Notary Public

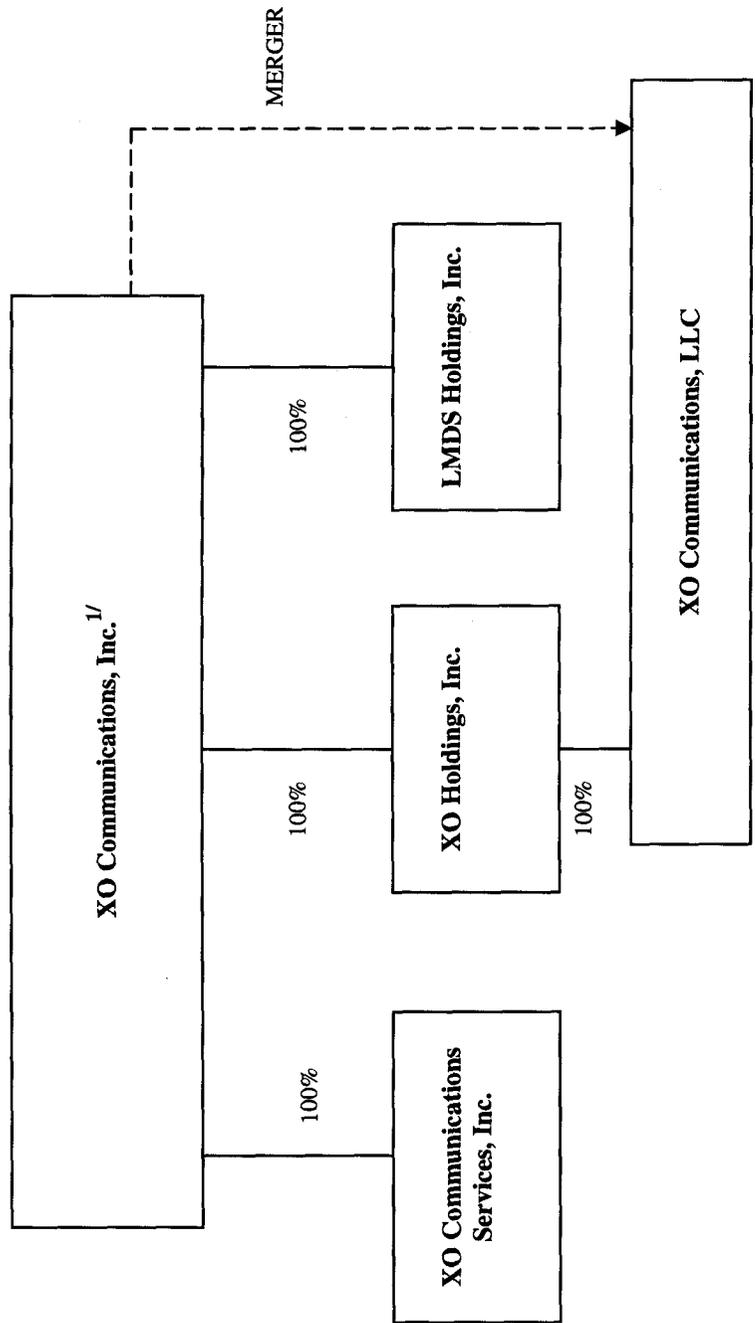
I was commissioned a notary public as Erin Ann <sup>FAM</sup> Conusally

My Commission expires:

January 31, 2008

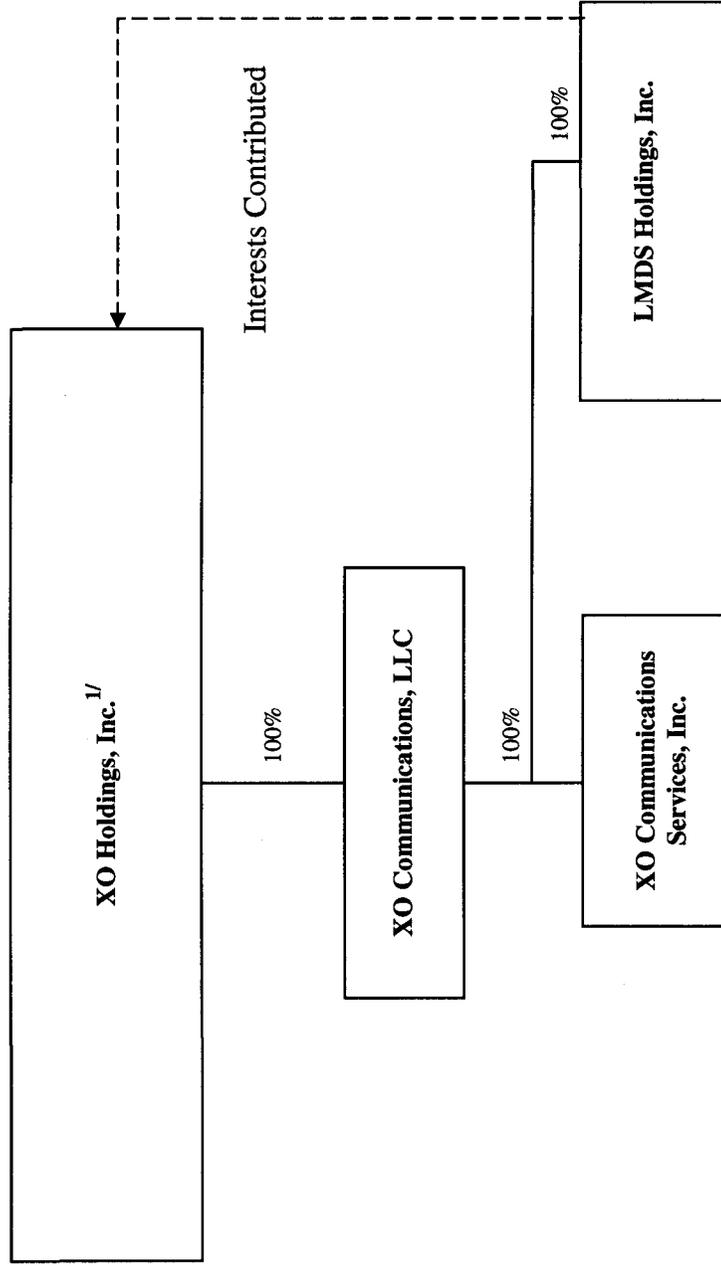
2

**STRUCTURE PRIOR TO RESTRUCTURING MERGER**



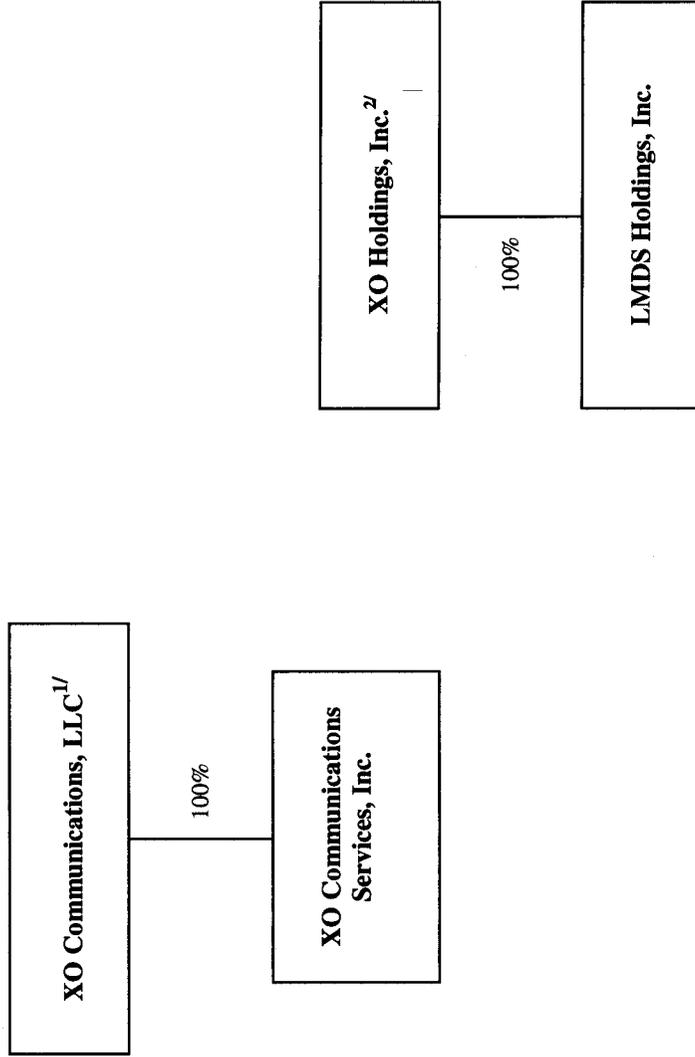
1/ Cardiff Holding LLC ("Cardiff") beneficially holds approximately 61% of the equity and voting interests in XO Communications, Inc. Cardiff is indirectly, wholly owned and controlled by Carl C. Icahn through his ownership and control of various intermediary companies that hold ownership interests in Cardiff.

**STRUCTURE UPON CONSUMMATION OF RESTRUCTURING MERGER**



1/ Cardiff will beneficially hold approximately 61% of the equity and voting interests in XO Holdings, Inc. Cardiff is indirectly, wholly owned and controlled by Carl C. Icahn through his ownership and control of various intermediary companies that hold ownership interests in Cardiff.

**STRUCTURE FOLLOWING LMDS TRANSFER  
AND XO COMMUNICATIONS SALE TO ELK ASSOCIATES**



<sup>1/</sup> Elk Associates LLC ("Elk") will hold 100% of the issued and outstanding membership interests of XO Communications, LLC. Elk is wholly owned and controlled by Carl C. Icahn. Thus, Carl C. Icahn will retain ultimate majority ownership and control of the XO operating subsidiaries.

<sup>2/</sup> Cardiff will beneficially hold approximately 61% of the equity and voting interests in XO Holdings, Inc. Cardiff is indirectly, wholly owned and controlled by Carl C. Icahn through his ownership and control of various intermediary companies that hold ownership interests in Cardiff.

3

**XO Communications, Inc.**

The following individuals are the officers of XO Communications, Inc. and each of its subsidiaries, unless specifically recorded to the contrary in the books and records of one of such corporations or entities.

Carl J. Grivner	President & Chief Executive Officer
Wayne Rehberger	Executive Vice President & Chief Operating Officer
Bill Garrahan	Acting Chief Financial Officer and Senior Vice President, Corporate Development
Heather Gold	Senior Vice President, Government Relations
Simone Wu	Secretary, Vice President and Acting General Counsel
Terri Burke	Vice President, Human Resources
Rob Geller	Chief Information Officer
Matt Harty	President, Commercial Sales
Ernie Ortega	President, Carrier Sales
James Delis	President, Indirect Sales
Ron Scott	Senior Vice President
Gregory Freiberg	Vice President and Controller
Kristi Jung	Treasurer
Benjamin Preston	Assistant Secretary