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Douglas J. Scheidt, Esq.  
Associate Director and Chief Counsel  
Division of Investment Management  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

**Re: No-Action Request under Section 7(d) of the Investment Company Act of 1940**

Dear Mr. Scheidt:

We are writing to request that the staff of the Division of Investment Management (the "Staff") confirm that it will not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action under Section 7(d) of the Investment Company Act of 1940 (the "1940 Act") if Xplornet Communications Inc. (f/k/a Barrett Xplore Inc.) ("XCI"), a corporation existing under the laws of and headquartered in the Province of New Brunswick, Canada, offers and sells its securities in the United States in transactions not involving any public offering without registering with the Commission as an investment company under the 1940 Act while operating its business in the manner described below.

XCI is Canada's largest broadband Internet access service provider focused on rural markets, based on number of subscribers as of December 31, 2010. XCI uses satellite and fixed wireless technologies to provide broadband Internet access services to households and small and medium-sized enterprises ("SMEs") in rural communities across Canada that it believes are either unserved or underserved by digital subscriber line ("DSL"), cable or other wireline technologies. XCI was organized in December 2004 and has operated its Internet access business continuously since then. XCI has no operations in the United States and is not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended.

XCI is a privately held company, and does not currently intend to conduct a public offering of its securities in the United States. However, XCI has in the past issued its securities in private capital raises and contemplates continuing to do so, including in the United States, in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act of 1933, as amended. If XCI were considered to be an investment company, it would have to limit its securities issuances in the United States or request permission from the Commission to register as an investment company which, given its status as a foreign operating company and the nature of certain of its business arrangements as described below, would not be practicable.

The nature of XCI's assets raises an issue as to whether XCI might be an investment company under the so-called "40 percent test" of Section 3(a)(1)(C) of the 1940 Act. However, because of the nature of its business, XCI believes that it is not an investment company. XCI also believes that its position is consistent with certain exemptive orders issued by the Commission, SEC staff no-action letters and court decisions, as discussed in more detail below.

I. Background

A. Business of XCI

XCI, through its Xplornet brand, is Canada's largest broadband Internet access service provider focused on rural markets, based on number of subscribers as of December 31, 2010. XCI's satellite network covers all of Canada, and its fixed wireless network covers a significant number of households and SMEs in rural Canada. XCI markets its broadband Internet access services through a national distribution network of dealers and installers. In 2010, XCI generated substantially all of its revenues from Internet services, primarily monthly subscriber fees and modem rental fees from its fixed wireless and satellite broadband Internet access services, as well as other Internet-related services. XCI derived a minor portion of its revenues in 2010 from the sale of telecommunications equipment and accessories, including networking solutions and fixed wireless equipment, to consumer electronic stores and dealers and installers of satellite and cable television equipment, as well as the sale of satellite customer premises equipment to its subscribers.

XCI has made and is continuing to make significant investments in its satellite and fixed wireless networks to bring broadband Internet access services to rural Canada. Recently, XCI secured all of the Ka-band capacity over Canada on two high throughput satellites, the first of which launched on October 19, 2011 and the second of which is scheduled for launch in 2012. XCI has successfully completed construction of all four ground stations in Canada for the first 4G satellite and, following the completion of system testing, service to customers is expected to commence in January 2012. In addition, XCI plans to roll out its 4G fixed wireless network to new areas in Canada over the next 18 months and upgrade a significant portion of its existing network sites to 4G wireless, thereby doubling the size of its fixed wireless network in Canada by the end of 2015.

XCI's business strategy has been strengthened by its work with municipal, provincial and federal governments in Canada (including through the Broadband Canada program discussed below) that have committed significant funding through government grants to extend broadband Internet connectivity to rural communities. XCI has been awarded numerous grants for which it has competed at the federal, provincial and municipal levels. XCI believes that these government grants, which help reduce its wireless network deployment costs and satellite expenses, enable it to accelerate deployment and make Internet services available to more Canadians at an affordable price.

## B. The Broadband Canada Program

As a prominent feature of its economic stimulus legislation (collectively referred to as the "Economic Action Plan"), Canada's federal government in 2009 launched a C\$225 million program, Broadband Canada: Connecting Rural Canadians ("Broadband Canada"). Aside from its significant role in Canada's response to the global recession, Broadband Canada's ultimate goal is to close "critical gaps" in broadband connectivity in certain remote and rural areas of Canada, not only to benefit Canadians living in those regions, but also to prevent the broader "economic, educational and cultural costs" to all of Canada that result from excluding rural Canadians from the digital economy.<sup>1</sup> According to the office of the Canadian Minister of Industry, the extension of Internet access to remote and rural areas comes with "important economic and social benefits, including telehealth, business opportunities and distance learning" and will "[m]ore broadly encourage economic development, spur innovation and improve the quality of life in hundreds of communities across Canada."<sup>2</sup>

In recognition of the disincentives to building broadband networks in rural and remote parts of Canada due to geography and population patterns, Broadband Canada aims to make expansion into these areas financially attractive to Canadian telecommunications companies.<sup>3</sup> Under the auspices of Broadband Canada, the Minister of Industry grants matching funds to selected Internet service providers based on their proposals for bringing reliable Internet service at a speed of at least 1.5 Mbps to as many households as possible in rural and remote areas, while minimizing the costs to the federal government. XCI was approved for eight separate regional Broadband Canada projects and commenced construction and deployment in November 2010. As of November 30, 2011, the new networks had been substantially completed and final review and testing were being done. Based on information published as of May 25, 2011 by Industry Canada, XCI estimates that it is the largest single recipient of Broadband Canada grants since the program's launch.<sup>4</sup> According to the same source, XCI's approved projects account for nearly 40% of all of the households that Broadband Canada expects to reach through the projects approved to date, which represents more than twice as many households anticipated to be served by any other current grant recipient.<sup>5</sup> XCI believes that its

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<sup>1</sup> Prime Minister Stephen Harper, Press Conference at Adstock, Québec (Jul. 30, 2009); Broadband Canada: Connecting Rural Canadians, Application Guide, Industry Canada (Sep. 1, 2009).

<sup>2</sup> Press Release, Industry Canada, Office of the Honourable Tony Clement, Government of Canada Announces Third Round of Broadband Canada Funding (Nov. 6, 2010) (available at <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06045.html>).

<sup>3</sup> In its 2010 *Communications Monitoring Report*, the Canadian Radio-television and Telecommunications Commission estimates that in 2009, only 5% of all Canadian households, but 16% of rural Canadian households, lacked broadband Internet access (<http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2010/cmr.htm>).

<sup>4</sup> Industry Canada's Broadband Canada website (at <http://www.ic.gc.ca/eic/site/719.nsf/eng/00050.html>) provides a list of all Broadband Canada projects and the estimated number of households that will gain broadband access as a result of each project.

<sup>5</sup> *Ibid.*

successful participation in Broadband Canada highlights how closely XCI's business model aligns with Broadband Canada's policy goals of extending broadband connectivity to communities nationwide that have otherwise been unserved or underserved by Canada's Internet service providers.

C. Regulatory Requirements in the Canadian Telecommunications Industry

Telecommunications service providers in Canada are subject to extensive regulation, the most significant being the Telecommunications Act and the Radiocommunication Act, and the regulations, policies and decisions issued pursuant to such statutes. The Telecommunications Act empowers the Canadian Radio-television and Telecommunications Commission (a federal agency) to regulate Canadian telecommunications common carriers and, to a lesser degree, other telecommunications service providers, with a view to implementing a number of specified policy objectives. Under the Radiocommunication Act, the Canadian Minister of Industry grants authorizations for the use of radio apparatus and spectrum, determines the terms and conditions of such authorizations, establishes technical requirements and standards applicable to radiocommunication equipment, and plans the allocation and use of spectrum in accordance with domestic and international policies. Recipients of such authorizations, including grants of spectrum licenses, from the Minister of Industry must comply with the Minister's terms and conditions and the Radiocommunication Act.

The Telecommunications Act and the Radiocommunication Act both require that telecommunications carriers that own and operate terrestrial transmission network facilities in Canada be Canadian owned and controlled. This means that a carrier must be incorporated in Canada, 80% of the carrier's board of directors must be Canadian, Canadians must own at least 80% of the carrier's voting securities, and the carrier must not be controlled in fact by non-Canadians (collectively, the "Ownership Requirements"). Although Canadians own more than 50% of the voting power in XCI, it does not satisfy the Ownership Requirements. Consequently, XCI is not eligible to hold the spectrum licenses or own and operate the terrestrial transmission facilities that are a necessary part of the fixed wireless Internet services network that constitutes a key portion of its business.<sup>6</sup> For the reasons set forth in the following two paragraphs and Section I.D of this letter, XCI believes that it would not be practicable to restructure either its shareholder base or its operations to comply with the Ownership Requirements. As a result, XCI's ability to deliver these Internet services depends upon its access to spectrum and facilities held by a separate entity that is able to comply with the Ownership Requirements.

XCI has raised capital in a number of private placements in order to meet its cash needs for operational and expansion purposes. XCI's current shareholder base and capital structure are the cumulative result of several heavily negotiated rounds of equity and debt capital raises that have involved investments from numerous Canadian and non-Canadian investors. XCI has not been able to satisfy all of its capital requirements through investments by Canadians, and has at times accepted investments from non-Canadian

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<sup>6</sup> XCI also provides Internet services through satellite and IP networks to which the Ownership Requirements do not apply.

investors, including investors in the United States, in transactions exempt from, or not subject to, the registration requirements of Section 5 of the 1933 Act.

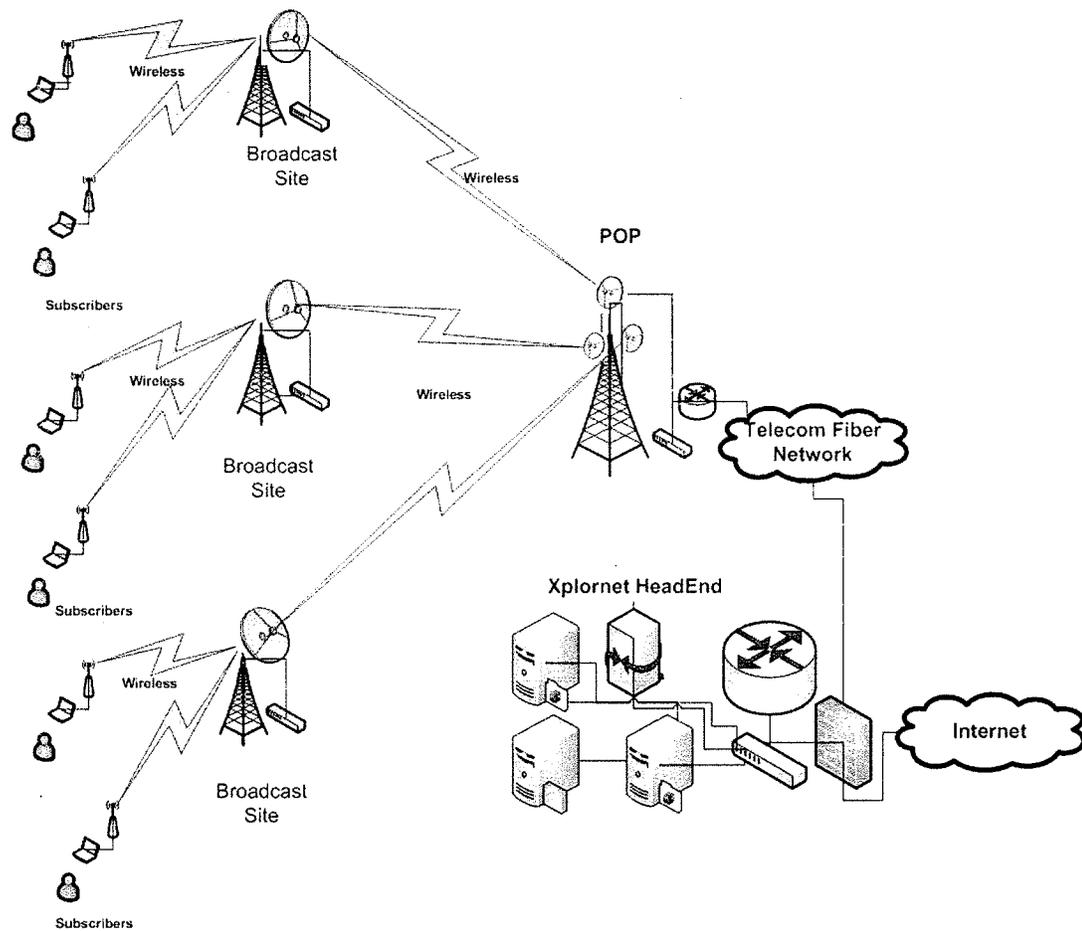
In light of its large shareholder base and the extensive negotiations in prior rounds of capital raises, XCI does not believe that it would be practicable for XCI to change its capital structure to comply with the Ownership Requirements. Such a change would require XCI's existing non-Canadian shareholders to agree to transfer their existing voting securities and corresponding ownership rights to Canadian shareholders, or for XCI to otherwise dilute the holdings of its existing non-Canadian shareholders by seeking additional equity investments from Canadian investors. Based on previous negotiations with its existing shareholders, XCI does not believe that its current non-Canadian shareholders would agree to lower levels of voting or equity ownership rights. Any attempt to modify XCI's capital structure might necessitate the repurchase by the company of the issued and outstanding shares, resulting in the loss of capital and crucial investors. XCI also believes that, given the continuing volatile and uncertain conditions in the equity capital markets, attempting to raise additional equity capital in the near future would not be in the best interest of the company and its shareholders.

D. XCI's Relationship with Xplornet Broadband Inc.

XCI's business relationship with Xplornet Broadband Inc. (f/k/a Barrett Broadband Networks Inc.) ("XBI"), a Canadian-controlled entity existing under the laws of New Brunswick, Canada, provides XCI with access to federally regulated spectrum and terrestrial transmission facilities. XCI and XBI own no equity interests in one another; the terms of their business relationship are defined by a wholesale services agreement, a network management agreement and a credit agreement. The two companies have the same group of institutional shareholders (but at different ownership levels) and some of the same directors. However, in compliance with the Ownership Requirements, Canadian shareholders own 80% of XBI's outstanding voting equity and 80% of XBI's directors are Canadians. Because it meets the Ownership Requirements, XBI is permitted to hold the spectrum licenses and own and operate the terrestrial transmission facilities.

XCI owns most of the components of its fixed wireless network, including the end users' modems, the network towers and a backbone network that routes data to the Internet, while XBI owns the licensed spectrum and transmission facilities necessary to transmit the data from the end users to the fiber network that connects the network towers to XCI's backbone network. The following is a simplified diagram of XCI's fixed wireless network:

## Fixed wireless



XCI must bring together all of the elements of a fixed wireless network in order to provide Internet services to its customers. Although XCI owns and operates most of the components of its fixed wireless network, a few elements require specialized capabilities or facilities that may not be practical for XCI itself to have or operate. Among these special elements is data transmission, both from XCI's POP to its headend (see diagram) over telecom fiber networks owned by separate telecom fiber providers, and from XCI's broadcast sites to its customers over the licensed spectrum and radio transmission facilities owned by XBI. XCI's customer data is transmitted by XBI over XBI's licensed spectrum using XBI's radio transmission facilities between a fixed wireless broadcast site (typically on XCI's network tower) to an access point radio (on the roofline of a customer's house or business) that is connected to equipment (e.g., a modem) at the customer's location that is owned and operated by XCI. XBI provides this essential component of transmitting customer data to and from XCI's network pursuant to a non-exclusive wholesale services agreement with XCI. Under a network management agreement between the two companies, XCI's field operations staff assists XBI in maintaining its facilities in rural and remote areas of Canada where XBI's personnel are not readily available.

XCI also provides XBI with a credit facility up to a fixed principal amount to finance XBI's acquisition of spectrum licenses and network equipment as described below. Loans made under the credit agreement currently bear interest at a fixed rate per annum calculated and compounded quarterly, in arrears. XBI must repay any loans in full at XCI's request upon the earliest of certain events specified in the credit agreement. The loans are secured by a general security agreement over all of XBI's present and after-acquired personal property and a moveable hypothec over all of XBI's present and after-acquired personal property located in the Province of Quebec. The credit agreement contains certain information undertakings and general undertakings, including limitations on XBI's ability to make distributions or incur other debt or liens, a negative pledge covenant and certain events of default.

Although XCI does not hold any ownership interest in XBI and XCI has no subsidiaries, XCI is required under Canadian GAAP to prepare its financial statements on a consolidated basis as if XBI were a wholly or majority-owned subsidiary of XCI. Therefore, transactions between XCI and XBI are not reflected in XCI's consolidated financial statements. However, substantially all of XCI's unconsolidated revenues in 2010 were derived from Internet services and equipment and accessories sales. Under Canadian GAAP XCI's interest income from the XBI credit facility is not accounted for as "revenue," but rather as an offset to interest expense. Even if XCI did account for this interest income as revenue, such interest income would have comprised only about 6.7% of XCI's unconsolidated revenue for 2010 (assuming for purposes of this calculation that such interest income is included in revenue).

#### E. XCI's Capital Needs

XCI has historically funded its growth and operations by issuing equity and debt securities in private placements in Canada and the United States and by incurring debt under credit facilities. Because the wireless Internet business is a capital intensive industry, XCI maintains a substantial cash position that is available on short notice, regardless of its business cycle, for operations and to finance the expansion of its network, including the acquisition of assets such as network towers, Internet Protocol ("IP") network equipment (e.g., routers and servers) and subscriber contracts. XCI's ability to grow and expand its fixed wireless network is dependent upon its ability to extend all elements of its network, including the regulated portion provided through XBI's facilities. XBI's ability to meet XCI's expanding needs on an ongoing basis is dependent upon XBI's ability to acquire spectrum licenses. XBI has entered into a letter of intent to acquire additional spectrum licenses for cash with an option to purchase future licenses. XBI intends to finance these spectrum license acquisitions with loans from XCI.

At June 30, 2011, XCI had cash and cash equivalents constituting approximately 43.7% of its total assets calculated on an unconsolidated basis. XCI's cash and cash equivalents consist of unrestricted cash held by the company in operating and savings accounts at Canadian banks, and also restricted cash held by the trustee under a trust indenture as prefunded interest for certain outstanding indebtedness of XCI and cash collateral held in savings accounts at Canadian banks for letters of credit issued to

Canadian governmental organizations as required under the terms of certain provincial and municipal government initiatives to expand rural broadband in Canada.

## II. Reason for Requesting No-Action Relief

The offer and sale by XCI of its securities in the United States could raise issues under Section 7(d) of the 1940 Act if XCI were an investment company.<sup>7</sup> For the reasons set forth below under the caption "Legal Analysis," XCI believes that it is not an investment company.

As described above, XCI has since its inception engaged continuously in the business of providing broadband Internet access services to households and SMEs in sparsely populated areas across Canada. To compete effectively, XCI requires ready access to private capital markets in Canada and the United States and a substantial amount of highly liquid assets available on short notice for commitment to capital expenditures, acquisitions and operations.

The services agreements and the financing arrangement between XCI and XBI give each company distinct functions and obligations. Because XCI has no equity interest in XBI, XBI is neither a subsidiary nor a controlled company of XCI under the applicable provisions of the 1940 Act. As a result, the loans made by XCI to XBI under their financing arrangement may be deemed to be investment securities for purposes of the 1940 Act. On that basis, XCI calculates that its investment securities constituted approximately 31% of its assets as of June 30, 2011 and will likely exceed 40% upon the consummation of future acquisitions of spectrum licenses that will require additional loans to be made to XBI beginning in 2012. For the critical business reasons discussed herein, XCI desires to continue financing future acquisitions of spectrum licenses and network equipment by XBI through its credit facility arrangement with XBI, while at the same time being able to access the U.S. capital markets through Rule 144A offerings and other private placements to sophisticated institutional investors to provide it with the capital necessary to fund its growth.

In addition, XCI needs to be able to maintain substantial amounts of highly liquid assets to finance the build-out of its network assets, acquire other assets, including subscriber contracts, and meet operational needs. In light of its history of net losses and the extremely competitive nature of the telecommunications industry, maximizing the amount of assets available for these purposes is fundamental to XCI's operations. Due to concern regarding the 40 percent test stemming from its financing arrangement with XBI, XCI currently maintains most of its cash in bank deposit accounts. If XCI's loans to XBI were deemed to be investment securities, XCI's only investment alternatives to bank deposits would be U.S. government securities or U.S. money market funds, neither of which is attractive to a Canadian company operating exclusively in Canada. For several

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<sup>7</sup> Section 7(d) prohibits public offerings by non-U.S. investment companies, except upon application to the Commission for permission to register under the 1940 Act. See Touche Remnant, SEC Staff No-Action Letter (August 23, 1984); Investment Funds Institute of Canada, SEC Staff No-Action Letter (February 6, 1996).

reasons, XCI would prefer to invest its available cash in Canadian money market securities (generally, short-term debt securities such as Canadian federal and provincial government treasury bills (T-bills), bankers' acceptances, certificates of deposit and commercial paper), all of which are denominated in Canadian dollars,<sup>8</sup> that would be consistent with its objectives of capital preservation and ready access to cash resources. First, because XCI's operating currency is the Canadian dollar (i.e., its revenues and expenses are in Canadian dollars) investing in Canadian rather than U.S.-dollar denominated money market securities is easier and more convenient for XCI. Additionally, investing in U.S.-dollar denominated securities would expose XCI to exchange rate risk, which could increase its operating costs (either as a result of adverse changes in the U.S./Canadian dollar exchange rate or from the costs of any hedging activities employed in to manage that risk). Further, holding non-Canadian investments may have adverse Canadian tax consequences for XCI. Should, however, XCI invest its cash other than in U.S. government securities, such as in Canadian government securities, the value of its investment securities could, particularly if the loans made to XBI are deemed to be investment securities under the 1940 Act, exceed 40% of its total assets on an unconsolidated basis.

XCI has considered devising an alternative arrangement that would enable XBI to continue to satisfy the Ownership Requirements while at the same time receiving additional funds from XCI (the capital-raising entity) for future spectrum license acquisitions without obtaining the relief requested herein from the SEC Staff, but has concluded that it is not feasible to do so. Because XBI holds spectrum licenses and other restricted telecommunications properties, it could not become a majority or wholly owned subsidiary of XCI. Under Canadian regulations, it is unlawful for XCI to own 20% or more of the voting securities of XBI or any other entity that must satisfy the Ownership Requirements.<sup>9</sup> Further, restructuring XCI as a majority-owned subsidiary of XBI would not resolve the 1940 Act issue. In that scenario, XCI would continue to be the capital-raising entity, and the loans made by XCI to XBI might be deemed investment securities under the 1940 Act. Similarly, organizing a new holding company with XBI and XCI as its subsidiaries would not resolve the 1940 Act issue faced by XCI, and the issuance by the new parent holding company of more than 20% of its outstanding equity securities to non-Canadians could cause XBI to indirectly violate the Ownership Requirements. Accordingly, XCI's current structure is the only practicable means to maintain its required capital levels while still being able to use the spectrum licenses and other telecommunications facilities held by XBI.

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<sup>8</sup> In the Wilkie Farr & Gallagher SEC Staff No-Action letter (October 23, 2000), the Staff advised that it would not object if an issuer, in calculating the amount of its total assets and investment securities for purposes of the 40 percent test of Section 3(a)(1)(C), or in calculating its total assets and adjusted investment securities for purposes of the 45 percent test of Rule 3a-1, did not include the shares of a registered investment company that holds itself out as a money market fund and seeks to maintain a stable NAV of \$1.00 per share. It is unclear, however, whether the Staff's position would be the same with respect to securities issued by unregistered Canadian money market funds.

<sup>9</sup> Ownership by XCI of less than 20% of XBI's voting securities would not resolve the 1940 Act concern because the XBI voting securities held by XCI would be considered investment securities (as defined in Section 3(a)(2) of the 1940 Act), and similarly the loans made by XCI to XBI may also be deemed to be investment securities for purposes of the 1940 Act.

### III. Legal Analysis

#### A. The 40 Percent Test

Section 3(a)(1)(C) of the 1940 Act defines an investment company as any issuer engaged or proposing to engage in the business of investing, reinvesting, holding, owning or trading securities and owning or proposing to acquire "investment securities" with a value exceeding 40 percent of its total asset value on an unconsolidated basis (the "40 percent test"). "Government securities" and "cash items" are not included in the numerator or the denominator of this ratio.

After giving effect to expected future acquisitions of spectrum licenses by XBI commencing in 2012, as described above, and the extension of the additional loans by XCI to XBI to finance those acquisitions, the value of XCI's investment securities may exceed 40 percent of its total unconsolidated assets.<sup>10</sup> This does not, however, mean that XCI is in fact an investment company for purposes of the 1940 Act. Instead, to determine whether XCI is an investment company, the nature of its business must be examined. Section 3(b)(1) of the 1940 Act provides that, notwithstanding Section 3(a)(1)(C) (which contains the 40 percent test), an issuer is not an investment company if it is primarily engaged, directly or through a wholly owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

Section 3(b)(2) of the 1940 Act provides that an issuer is not an investment company if the Commission finds that it is primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities, a standard that is identical to Section 3(b)(1) except for the nature of the subsidiaries through which the business may be conducted (wholly owned in Section 3(b)(1), majority owned or controlled in Section 3(b)(2)).<sup>11</sup> As discussed below, whether an issuer is "primarily

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<sup>10</sup> It is arguable that under the "family resemblance" test for notes adopted by the Supreme Court in *Reves v. Ernst & Young*, 494 US 56 (1990), the loans made by XCI to XBI are not "securities" under the 1940 Act, and thus not investment securities for purposes of the 40 percent test.

Although the loans do not resemble the types of notes that the court held not to be securities (*i.e.*, (i) a note made for consumer financing, (ii) a note secured by a home mortgage, (iii) a short-term note secured by a lien on a small business or (iv) a note evidencing a "character" loan by a bank), application of the *Reves* factors suggests that the loans should not be considered securities. Three of the four factors—plan of distribution, expectations of the investing public, and the need for the protection of the U.S. securities laws—are clearly not applicable and thus support a determination that the loans are not securities. Application of the fourth factor, *i.e.*, the motivations of the parties and whether the seller's (borrower's) purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer (lender) is interested primarily in the profit the note is expected to generate, is perhaps not as certain, but we believe that the essentially commercial, as opposed to investment, character of the asset in the hands of XCI supports the view that the loans are not securities. Nevertheless, we are not asking for and do not seek a response from the Staff on whether the loans from XCI to XBI, as described in this letter, would be securities under Section 2(a)(36) or 3(a)(1) of the 1940 Act, nor is XCI admitting that the loans are "securities" under the federal securities laws.

<sup>11</sup> The Commission has granted a number of orders under Section 3(b)(2), such as Yahoo! Inc., SEC Release Nos. IC-24459 (May 18, 2000) (notice of application) and IC-24494 (June 13, 2000) (order) (an Internet

engaged" in a non-investment business for purposes of Section 3(b)(1) or 3(b)(2) is based on analysis of the same five factors.

B. Analysis under Rule 3a-1

The Commission has recognized that there are circumstances in which a company might be a prima facie investment company under the 40 percent test but nonetheless is not in a business that should be regulated under the 1940 Act. Rule 3a-1 under the 1940 Act (entitled "Certain Prima Facie Investment Companies") provides that an issuer is deemed not to be an investment company if no more than 45% of its total assets consist of, and not more than 45% of its net total income over the last four quarters is derived from, securities other than U.S. government securities and securities of majority owned subsidiaries and companies primarily controlled by it that are not investment companies and through which it engages in a non-investment business (the "45 percent test").

XCI may not always be able to rely on the exclusion from the definition of investment company in Rule 3a-1. If the XBI loans are considered investment securities, XCI believes that it will approach or possibly exceed the 45 percent asset threshold upon completion of expected future acquisitions of spectrum licenses by XBI in 2012 and thereafter. Additionally, XCI has historically incurred net losses, thus making satisfaction of the Rule 3a-1 income test unlikely, at least in the near term.<sup>12</sup> More importantly to XCI, even if it currently qualifies for the Rule 3a-1 safe harbor, XCI bears a significant risk of failing the 45 percent test in the future as its business model contemplates additional loans to XBI to finance acquisitions of transmission equipment and spectrum licenses. Determining XCI's status as an investment company on the basis of such a variable situation, particularly as its business grows and the amount of financing provided to XBI increases, would not be practicable. XCI could not count on a favorable outcome of these uncertainties, especially given that its business success and growth would tend to increase the likelihood of its failing the 45 percent test.

C. Analysis under the Tonopah Mining Factors

XCI believes it is not an investment company regardless of whether it complies with Rule 3a-1 because its business is not that of being an investment company. The Commission and the courts have for many years defined the criteria for determining when a company is primarily engaged in a business other than investing in securities within the meaning of Sections 3(b)(1) and 3(b)(2) of the 1940 Act. In the 1947 Tonopah Mining case,<sup>13</sup> the Commission set out five factors to be used in making this

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new media company) and Bill Gross' idealab!, SEC Release Nos. IC-24642 (Sept. 15, 2000) (notice of application) and IC-24682 (Oct. 10, 2000) (order) (a network of interactive communications businesses).

<sup>12</sup> Even if XCI could satisfy the alternative income test for Rule 3a-1 set forth in DRX, Inc., SEC Staff No-Action Letter (January 28, 1988), applicable when an issuer has net losses for the preceding four quarters, reliance by XCI on Rule 3a-1 would still be problematic due to the anticipated substantial increase in the amounts of loans to be made to XBI.

<sup>13</sup> *Tonopah Mining Co. of Nevada*, 26 S.E.C. 426 (1947).

determination: (1) the company's historical development; (2) its public representations of policy; (3) the activities of its officers and directors; (4) the nature of its assets; and (5) the sources of its income.

The Tonopah Mining factors have been cited by the Commission and the courts on many occasions over the years.<sup>14</sup> For example, in the Rule 3a-1 proposing release, the Commission stated that "[t]he determination of a company's primary engagement is a factual issue concerning the nature of its business" and cited the Tonopah Mining factors as the appropriate criteria to use in making this determination.<sup>15</sup> Additionally, a research and development company seeking to benefit from the safe harbor of Rule 3a-8 under the 1940 Act must, among other things, be primarily engaged in a business other than investing in securities, as demonstrated by factors that largely resemble those of Tonopah Mining.<sup>16</sup>

The Commission has applied the Tonopah Mining five-factor test in granting exemptive relief under Section 3(b)(2) to operating companies that would otherwise be investment companies as a result of complying with non-U.S. regulatory requirements or business practices. Foreign countries often restrict the level of non-local ownership in regulated industries, particularly the telecommunications industry, and even where non-local ownership is not restricted by law or regulation, compliance with local business customs and practices may produce the same effect. Consequently, operating companies often acquire minority non-controlling ownership positions in ventures with home country partners with the result that more than 40% of the operating companies' total assets are comprised of investment securities. The Commission has granted exemptive relief under Section 3(b)(2) in these instances, particularly where the operating companies provided management, technical and other assistance to their investee companies, and were directly involved in their day-to-day operations, such that the operating companies "controlled" the local ventures even in the absence of a majority or controlling equity position.<sup>17</sup> Although XCI does not own any equity interest in XBI and does not claim to "control" XBI, XCI submits that its situation is substantively similar to the companies that have been granted such exemptive relief. As discussed above, for Canadian regulatory reasons, XCI and XBI own and operate different components of the infrastructure necessary to deliver Internet access services to consumers. XBI is organized to comply

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<sup>14</sup> In its 2007 decision in the National Presto case, the United States Court of Appeals for the Seventh Circuit used the Tonopah Mining factors to determine that the company that was the subject of the case was not an investment company. *Securities and Exchange Commission v. National Presto Industries, Inc.*, 486 F.3d 305 (7th Cir. 2007). See also Yahoo! Inc. notice of application and order and Bill Gross' idealab! notice of application and order, *supra* note 11.

<sup>15</sup> Certain Prima Facie Investment Companies, Proposed Rule, SEC Release No. IC-10937, 44 Fed. Reg. 66608, 66610 (November 20, 1979).

<sup>16</sup> Investment Company Act Rule 3a-8(a)(6).

<sup>17</sup> See, e.g., UIH Latin America, Inc., SEC Release Nos. IC-23367 (July 30, 1998) (notice of application) and IC-23399 (August 25, 1998) (order); United International Holdings, Inc., SEC Release Nos. IC-19275 (February 18, 1993) (notice of application) and IC-19337 (March 16, 1993) (order). Russian Telecommunications Development Corporation c/o MCT Corp., SEC Release Nos. IC-25249 (October 31, 2001) (notice of application) and IC-25298 (November 26, 2001) (order).

with the corresponding Canadian restrictions on ownership of terrestrial transmission facilities and spectrum licenses, while XCI, by operating satellite and IP networks that do not have stringent Canadian ownership restrictions, may continue to access U.S. (and other) capital markets for critically needed financing.

Because the nature of XCI's business is that of an operating company, and not an investment company, we discuss each of the Tonopah Mining factors as applied to XCI's situation.

1. XCI's historical development

XCI today operates the same Internet access services business in which it has been engaged continuously since 2004. In this way, the business of XCI can be distinguished from that of the Tonopah Mining Company, which had at one time been an operating company, but had evolved such that at the time its non-investment company status was challenged it was merely investing in the securities of companies in the industry in which it used to operate. Unlike the Tonopah Mining Company, XCI has always been, and continues to be, an operating company. As a result, its situation under this factor is more favorable than that of the Tonopah Mining Company.

2. The manner in which XCI holds itself out to the public and investors

XCI holds itself out to the public as a broadband Internet service provider and has never represented that it is involved in any other business. The content of its press releases and its website, [www.xplornet.com](http://www.xplornet.com), are devoted exclusively to its operations as a provider of high-speed wireless Internet access to residential and business customers, and XCI has always otherwise held itself out to its subscribers, suppliers and others with whom it does business as being directly and actively engaged in the business of providing broadband Internet access. XCI has never publicly disclosed the details of its financing arrangement with XBI or provided any information about its holdings of securities for investment purposes or made any public representations to the effect that it is engaged in the business of an investment company.<sup>18</sup> XCI believes that the value of its business and its securities will be determined exclusively on the basis of its prospects for growth and development of its Internet service business.

3. The activities of XCI's officers and directors

The officers and directors of XCI spend substantially all of their time managing and developing XCI's business of providing high-speed Internet service. Its senior management team has extensive experience in the communications industry, especially in satellite and wireless broadband deployments, with a collective experience of more than 100 years. John Maduri, XCI's Chief Executive Officer and President, has more than 20 years of telecommunications industry experience. Additionally, Mr. Maduri has been involved in a number of industry and economic development initiatives. From 2004

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<sup>18</sup> As noted, XCI is privately held, and thus does not file financial or other reports with the Commission or any securities regulator in Canada.

to 2007, he served on the board of directors of Calgary Economic Development and was chair of its Business Investment Advisory Committee. From 2003 to 2004, he was a member of the Executive Committee of the Canadian E-Business Initiative. In 2001 and 2002, Mr. Maduri co-chaired the "Wireless City" initiative to drive growth in the wireless sector in Calgary, Alberta. The backgrounds of XCI's other officers reflect a similar focus on communications technology, with a heavy emphasis on the telecommunications industry.

To the extent that XCI's management or employees spend time in connection with financial matters, such as the credit facility with XBI or other cash management activities, such work is generally incidental to XCI's telecommunications network services. In addition, none of XCI's officers has experience as an investment manager or adviser, and none of them holds himself or herself out as an expert in those areas. XCI does not employ any securities analysts and does not engage in the trading of securities for short-term speculative purposes, investment purposes or otherwise.

#### 4. The nature of XCI's assets

The assets of XCI are consistent with the nature of its sole business. Its physical assets include property and equipment used in providing its Internet services, accounts receivable and equipment inventories, deposits against satellite leases and deferred financing costs, and its intangible assets are comprised of purchased subscriber contracts, subscriber activation charges and computer software. As of June 30, 2011, most of XCI's available cash was held in bank deposits intended to ensure that XCI would be able to fund its operations and finance the acquisition of subscriber contracts and other assets in a timely manner. As described above, XCI would prefer to invest its available cash in Canadian government securities and other highly liquid, short-form, high quality bank issued and/or Canadian money market securities that would be consistent with its objectives of capital preservation and ready access to cash resources. These investments would not be held for trading purposes and would be in the same currency in which XCI's obligations are denominated. For XCI, earning a return is secondary to the principal objective of ensuring that its financial obligations are properly funded.

The fact that the loans to XBI and the short-term highly liquid instruments in which XCI would prefer to invest its available cash could be considered "investment securities" under the 1940 Act, and that as a result XCI might exceed the 40 percent threshold of Section 3(a)(1)(C) (as well as the 45 percent threshold of Rule 3a-1), does not change the fundamental nature of XCI's assets. It is precisely because these thresholds may be exceeded that the five-factor analysis is performed. According to Tonopah Mining, "[m]ore important . . . [is whether] the nature of the assets and income of the company, disclosed in the annual reports . . . and in reports sent to stockholders, was such as to lead investors to believe that the principal activity of the company was trading and investing in securities."<sup>19</sup> This is clearly not the case for XCI.

##### (i) The sources of XCI's income

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<sup>19</sup> *Tonopah Mining Company of Nevada*, 20 S.E.C. at 430.

The source of substantially all of XCI's revenues has been, and is anticipated to continue to be, primarily Internet service revenues and (to a much lesser extent) revenue from equipment and accessories sales. Subscription fees have grown steadily over each of the past three years, reflecting a corresponding increase in the number of subscribers during this period. Neither XCI nor its investors are relying on the income derived from the loans made to XBI or the returns on its short-term investments as a significant driver of the business. As indicated above, under Canadian GAAP XCI's interest income under the XBI credit facility is not accounted for as "revenue," but even if it were, then such interest income would have comprised only about 6.7% of XCI's unconsolidated revenue for 2010 (assuming for purposes of this calculation that such interest income is included in revenue).

#### IV. Conclusion/Relief Requested

XCI believes that no-action relief is warranted because it is primarily engaged in a business other than that of investing, reinvesting, owning, holding, or trading in securities. Application of the five-factor Tonopah Mining test, particularly in view of previous Commission exemptive orders and the National Presto case, supports XCI's status as an operating company for purposes of the 1940 Act.<sup>20</sup> Only one of the Tonopah Mining factors – the nature of the company's assets – might be construed as indicating otherwise because of the ongoing financing arrangement between XCI and XBI. The loans made by XCI to XBI, however, are not made for investment purposes, but rather to allow XBI to expand its operations and provide services to XCI so that XCI may, in turn, operate as an Internet service provider in accordance with Canadian regulatory requirements and at the same time finance its growth and expansion through private capital raises in the United States and elsewhere.

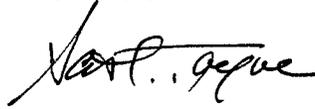
Based on the facts presented and representations in this letter, we respectfully request confirmation from the Staff that if XCI offers and sells its securities in the United States without registering as an investment company under the 1940 Act, the Staff will not recommend that the Commission bring an enforcement action under Section 7(d) of the 1940 Act.

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<sup>20</sup> See notes 11, 13 and 16, *supra*.

Should the Staff have any questions or need any additional information regarding this request, please contact the undersigned at (212) 588-5520 or my colleague, Jeffrey Nadler, at (212) 588-5505.

Very truly yours,

A handwritten signature in black ink, appearing to read "Scott M. Tayne". The signature is written in a cursive style with a prominent horizontal line across the middle.

Scott M. Tayne