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September 22, 2004

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COMMISSION
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Via Hand Delivery

Ms. Blanca S. Bayo
Florida Public Service Commission
4075 Esplanade Way
Tallahassee, FL 32399

Re: Docket No. 041114-TP In re: Complaint of XO Florida, Inc. Against
BellSouth Telecommunications, Inc. for Refusal to Convert Circuits to UNEs and
for Expedited Processing

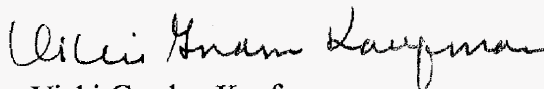
Dear Ms. Bayo:

On behalf of XO Florida, Inc. (XO), enclosed for filing and distribution are the original
and 15 copies of the following:

- Complaint of XO Florida, Inc. against BellSouth Telecommunications, Inc. and Request for Expedited Processing;
- Direct Testimony of Gary Case.

Please acknowledge receipt of the above on the extra copy of each and return the stamped
copies to me. Thank you for your assistance.

Sincerely,


Vicki Gordon Kaufman

Encls.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of XO Florida, Inc.
Against BellSouth Telecommunications,
Inc. for Refusal to Convert Circuits to
UNEs and for Expedited Processing

Docket No. 041114-TP

Filed: September 22, 2004

**COMPLAINT OF XO FLORIDA, INC. AGAINST
BELLSOUTH TELECOMMUNICATIONS, INC.,
AND
REQUEST FOR EXPEDITED PROCESSING**

XO Florida, Inc. (XO), pursuant to section 364.01(g), Florida Statutes, and rules 25-22.0365, 25-22.036(2) and 28-106.201, Florida Administrative Code, files the following Complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking (1) an emergency order requiring BellSouth to immediately process XO's request for conversion of circuit pricing from special access to UNE at the "switch as is" rate of \$8.98 and; (2) an order setting an expedited schedule for the processing of this Complaint pursuant to rule 25-22.0365, Florida Administrative Code.

COMPLAINT

PARTIES

1. XO is a certified local exchange carrier providing service in competition with BellSouth in various locations throughout Florida. XO's business address is:

XO Florida, Inc.
5904A Hampton Oaks Parkway
Tampa, Florida 33610

All documents filed, served or issued in this docket should be served upon the following:

Dana Shaffer
XO Florida, Inc.
Vice President, Regulatory Counsel
105 Molloy St., Suite 300
Nashville, TN 37201
615.777.7700

DOCUMENT NUMBER-DATE

10255 SEP 22 8

FPSC-COMMISSION CLERK

615.850.0343 (fax)
dana.shaffer@xo.com

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, FL 32301
850.222.2525
850.222.5606 (fax)
vkaufman@mac-law.com

2. BellSouth is an incumbent local exchange carrier providing telecommunications services in a nine-state region, including Florida. BellSouth's business address is:

BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

JURISDICTION

3. The Commission has jurisdiction to hear this Complaint pursuant to Chapters 120 and 364, Florida Statutes, and Chapters 25-22 and 28-106, Florida Administrative Code.

FACTUAL BACKGROUND

4. XO has repeatedly requested that BellSouth process the billing change required to convert special access lines (loops obtained from BellSouth pursuant to BellSouth's special access tariffs) to UNE loops (loops obtained from BellSouth as unbundled network elements). This change does not require any physical change to the circuit and should be priced at a cost-based rate established by the Commission.¹

5. BellSouth responded that before it would process the conversions, XO would be required to pay the full nonrecurring charges for disconnect (D order) of the special access circuit, the full nonrecurring charges for installation of the UNE circuit (N order) and a "Project

¹ Such pricing is consistent with the requirements of the *TRO*, discussed below, which find that conversions like the ones at issue in this Complaint are a billing change only, which must be made at a just and reasonable rate.

Management Fee” to make what amounts to a billing change. In fact, BellSouth acknowledged that the actual D and N orders are not required, and that the project management fee was required so that the BellSouth Professional Services group could “coordinate these orders so that the “D” order is not physically worked...and the “N” order flows through the systems so that XO can reuse the [same] facility.”² BellSouth’s proposed charge per circuit for the conversion, including project management with order provisioning, as explained in the testimony of XO witness Gary Case, is almost one thousand dollars (\$1,000.00)!

6. BellSouth’s demand that XO pay these exorbitant fees for a billing conversion (conversion of special access billing for a circuit to UNE billing for that same circuit) without interruption in service has resulted in denial of access to these conversions. This denial of access costs XO tens of thousands of dollars each month that such denial is permitted to continue.

7. Further, despite the fact that XO has raised the conversion billing issue with BellSouth and clearly noted that it disagrees with BellSouth on this issue, BellSouth has refused to process XO’s conversion requests and then permit XO to dispute such charges before this Commission. Instead, prior to processing the conversions, BellSouth has insisted that XO sign a contract with BellSouth in which it requires XO to waive its right to dispute such charges. BellSouth has further implied that if XO does not accede to this demand, XO’s actions may affect XO’s access to service. Thus, BellSouth is attempting to hold XO and its customers hostage to these unreasonable demands and to preempt XO’s right to bring such disputes to this Commission. In addition, BellSouth is attempting to force XO to execute an amendment to its interconnection agreement before it will process the conversion orders. BellSouth’s proposed

² See July 21, 2004 letter from Scott Kunze to Dana Shaffer, p. 1, par. 3, attached as Exhibit A.

amendment, however, would eliminate the very UNEs for which XO seeks conversion, rendering the conversion requests meaningless.

8. BellSouth's conduct is anticompetitive and discriminatory and has caused and continues to cause irreparable harm to XO.

COUNT ONE

9. XO incorporates paragraphs 1-8 above, as if fully set forth herein

10. Sections 364.01(1), (2), Florida Statutes, give this Commission broad jurisdiction to regulate telecommunications companies. The Commission has jurisdiction, pursuant to such authority, to remedy BellSouth's anticompetitive behavior, described herein.

COUNT TWO

11. XO incorporates paragraphs 1-10 above, as if fully set forth herein

12. Pursuant to section 364.01(4)(g), Florida Statutes, the Commission shall exercise its jurisdiction to:

Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

13. BellSouth's refusal to convert the special access circuits, as described herein, is anticompetitive and has caused and will continue to cause XO irreparable harm. The Commission should immediately order BellSouth to convert the special access lines at issue.

DISCUSSION

The Special Access Conversion Process Should be a Seamless Billing Change Only

14. **It is critical to remember that there is no *physical* disconnection or installation required to convert a circuit from special access billing to UNE billing as XO has requested.** The FCC has found that the ability to convert between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's

perception of service quality.³ In this instance, however, BellSouth is attempting to extract a premium for what should be a “seamless process.” This has the practical effect of denying XO access to conversions, while permitting BellSouth to maintain higher special access revenue for those circuits.

15. Even if, as BellSouth claims, its current processes require a “D” order and an “N” order to be entered into its separate systems, but not physically worked, XO should not be charged the full nonrecurring charges for what are, in essence, “phantom” orders necessitated by BellSouth’s inefficient systems.⁴ The nonrecurring charges for “D” and “N” orders recover the actual charge for a *physical* disconnection and installation, which, as BellSouth admits, is not required here. BellSouth simply requires two orders to reflect the nature of the circuit in its billing systems. This is not unlike the conversion of a special access mileage circuit to a UNE loop/transport combination, for which the BellSouth “switch as is” charge is \$8.98.

The Rate for a Billing Change Conversion Should be Just and Reasonable

16. The rate for converting between wholesale services and UNEs or UNE combinations must be “just and reasonable.” The FCC recognized that incumbents do not have to perform conversions to serve their customers, but that they might attempt to deter such CLEC conversions and unjustly profit from them:

We recognize, however, that a once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or

³ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, Federal Communications Commission (“FCC”) 03-36 (rel. Aug. 21, 2003) (*TRO*), ¶ 587, fn 1809: “We note that no party seriously contends that it is technically infeasible to convert UNEs and UNE combinations to wholesale services and vice versa.”

⁴ BellSouth’s letter of July 21, 2004 (Exhibit A) clearly indicates that the “disconnect” is processed in one service center while the “install” is processed in another and BellSouth wants to charge XO to “manage” these paper changes so the order is not “physically worked.” BellSouth attempts to complicate what is just a billing change.

UNE combination to a wholesale service.⁵ Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions.⁶ Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.⁷

17. The FCC further stated: "We recognize, however, that converting between wholesale services and UNEs (or UNE combination) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request."⁸

18. Thus, the language of the *TRO* discussed above, which was not affected by the vacatur of *USTA II*⁹, is clear -- conversion of special access circuits to unbundled network elements is a billing change only, and the charge for such a change must be at a just and reasonable rate.

19. BellSouth has ignored these precepts and is attempting to charge XO for these conversions at rates that are so high that XO is unable to make the conversions at all.

20. The FCC also noted that "conversions should be performed in an expeditious manner. . . ."¹⁰ BellSouth's failure to provide conversions at a just and reasonable rate prevents conversions altogether.

⁵ *TRO*, ¶ 587, citing AT&T Reply at 296-300; AT&T Nov. 23, 2002 *Ex Parte* Letter at 12-13.

⁶ *TRO*, ¶ 587, citing 47 U.S.C. § 251(c)(3).

⁷ *TRO*, ¶ 587, citing 47 U.S.C. § 202(a).

⁸ *TRO*, ¶ 588 (emphasis added).

⁹ *United States Telecom Assn v. FCC*, 359 F.3d 554 (D.C.Cir. 2004) (*USTA II*).

¹⁰ *TRO*, ¶ 588.

21. As described above and in the testimony of XO witness, Gary Case, XO is effectively prohibited from processing any conversions due to the exorbitant rates BellSouth has demanded as well as BellSouth's veiled threats to discontinue service if such rates are not paid. Also as noted above, every day that XO cannot process these orders costs XO thousands of dollars. Thus, it is necessary for the Commission to immediately order BellSouth to process conversions at the "switch as is" rate of \$8.98. This is the current "switch as is" charge for the conversion of special access mileage circuits to Enhanced Extended Loops (EELs), or UNE loop/transport combination. This rate is reflected in the Parties' current interconnection agreement rate amendment, dated December 16, 2002.

REQUEST FOR EXPEDITED PROCESSING

22. Pursuant to rule 25-22.0365, Florida Administrative Code (Expedited Dispute Resolution for Telecommunications Companies), XO requests that this Complaint be processed on an expedited basis according to the time frames set out in the rule. XO has complied with the requirements of the Expedited Dispute Resolution Rule by filing with its Complaint and Request for Expedited Processing, the testimony of XO witness, Gary Case. XO has simultaneously served its Complaint and Request for Expedited Processing and its testimony and exhibits on BellSouth.

23. The specific issue to be litigated is:

Should BellSouth provide conversion of special access circuits to UNE pricing as a billing change only, within one billing cycle of such request? If so, what is the appropriate rate for such billing change?

24. XO seeks the following relief:

- a. An order that BellSouth immediately process the requested conversions, and process any future requests within one billing cycle of such request(s) at the "switch as is rate" of \$8.98;

- b. An order confirming that the rate for processing these conversions is the “switch as is” rate of \$8.98;
- c. An order requiring BellSouth to provide a true-up of its charges to XO for the affected circuits subject to conversion request effective to the date of XO’s first request for conversion;
- d. A procedural order reflecting that this matter be processed using the Expedited Dispute Resolution Process set out in rule 25-22.0365, Florida Administrative Code;
- e. Any statutory or other fines, as appropriate, assessed against BellSouth for its behavior; and
- f. Such other relief as the Commission finds appropriate.

25. XO has diligently attempted to resolve this issue with BellSouth. XO has engaged in numerous conference calls with BellSouth as well as extensive correspondence on this issue. The parties have been unable to resolve this dispute informally.

26. Use of the Expedited Dispute Resolution Process is appropriate because the issue presented is straightforward and has been clearly addressed by the FCC.: whether BellSouth must process these conversions as the billing change that they are, and what the appropriate rate should be for such billing changes. The policy implications of this issue, from the perspective of the Florida Commission, are minimal, as this issue was not only squarely addressed by the FCC, but also was not the subject of any appeal or further proceedings.

27. XO plans to conduct discovery (interrogatories and requests for production) on the cost to BellSouth to perform a billing change for the circuits at issue. XO would expect such discovery to encompass a fairly targeted amount of information, as the issue is narrow and straightforward.

28. The specific measures taken to resolve the dispute with BellSouth are described above as well as in the testimony of XO witness, Gary Case.

29. This dispute is particularly appropriate for Expedited Dispute Resolution because, as described in the testimony of XO witness, Gary Case, XO continues to be irreparably harmed each day that BellSouth denies it the ability to process these conversions. Typical Commission proceedings can take 8 to 12 months. If this dispute is not processed more quickly, XO will continue to be unable to convert its special access lines, and BellSouth will be allowed to continue to artificially inflate XO's costs, thereby impacting XO's ability to compete. In addition, BellSouth continues to refuse to act reasonably to process the conversions and allow the parties to present the rate issue to the Commission; instead, BellSouth insists that, in order to obtain access to the conversions, XO must sign a contract waiving its rights to dispute the charges BellSouth seeks to impose.

CONCLUSION

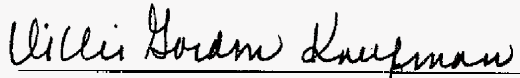
30. Under the circumstances set forth above, XO is entitled to relief via an order: (1) requiring BellSouth to immediately process the requested conversions, and process future conversions within one billing cycle of request; (2) setting a rate of \$8.98 for such billing changes; and (3) an expedited ruling on the merits of the Complaint.

WHEREFORE, XO requests that the Commission enter an Order:

1. Utilizing the Expedited Dispute Resolution Process to process this Complaint;
2. Requiring BellSouth to immediately provide the pending conversions described in this Complaint, and any requests during the pendency of this Complaint within one billing cycle of the conversion request, at a rate of \$8.98;
3. Requiring BellSouth to charge XO appropriate UNE pricing for the converted circuits on a permanent basis;

4. Requiring BellSouth to true-up special access rates charged for the requested circuits to appropriate UNE billing rates, retroactive to 30 days, or one billing cycle, from date of XO's first request;

5. Granting such further relief as the Commission deems just and proper.



Dana Shaffer
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Attorneys for XO Florida, Inc.

July 21, 2004

Ms. Dana Shaffer
Vice President
XO Communications
105 Molloy Street
Suite 300
Nashville, Tennessee 37201

Dear Dana:

This is in response to your e-mail dated July 13, 2004, regarding XO Communications' (XO) request to migrate thirty (30) Global Crossing Special Access (SPA) DS1s to XO Unbundled Network Element (UNE) DS1s.

Let me first address your statement, "XO should be able to do the conversion of GC [Global Crossing] SPA to XO SPA, then have Bell simply convert the pricing on the new XO circuit from SPA to UNE for a simple billing change charge." BellSouth has neither stated that XO cannot, on its own, provide a "D" order and "N" order to move GC's SPA DS1s to XO's DS1s, nor that XO cannot provide a "D" order and an "N" order to move XO's SPA DS1s to XO's UNE DS1s. BellSouth does, however, disagree with your assessment that BellSouth simply "converts" the pricing of the XO circuit from SPA to UNE as a DS1. The purpose of my previous correspondence was to inform you that BellSouth could not sign the Professional Services agreement as it stood with a misquoted price for the services discussed. I provided to you that notice and the additional pricing for Professional Services to coordinate both the GC SPA DS1 to XO SPA DS1 and the XO SPA DS1 to XO UNE DS1.

As you are well aware from previous requests to migrate XO's single Special Access (SPA) circuits to UNEs, the process to fulfill XO's request is not "simply" a billing change. To refresh your recollection, I have attached documentation exchanged between BellSouth and XO since as early as May 13, 2002, regarding XO's previous requests to migrate individual SPA circuits to UNE circuits. This process, as previously described to you, entails provisioning the special access disconnect ("D") in the Access Customer Advocacy Center (ACAC), while the provisioning of the unbundled loop new connect/add order is performed by the Customer Wholesale Interconnection Network Services (CWINS). For this process, Professional Services can coordinate these orders so that the "D" order is not physically worked. Moreover, the "N" order flows through the systems so that XO can reuse the facility. Because these two classes of service are maintained in two separate systems, and provisioning and maintenance is conducted by two different centers, the steps to migrate from SPA to UNE cannot be achieved with a "simple billing change" as you indicate in your letter. BellSouth Professional Services can coordinate this process in addition to the process of coordinating the "N" and "D" orders related to moving Global Crossing's SPA DS1s to XO's network.

As BellSouth understands it, XO is requesting an after normal business hours migration of thirty (30) of Global Crossing's SPA DS1s to XO as UNEs. As explained in my July 13, 2004 letter, the executed Special Assembly was to achieve the after hours migration of Global Crossing's SPA DS1s to XO SPA DS1s. The price quoted in the Professional Services Agreement currently being negotiated, is solely to project manage the migration of XO's 30 new SPA DS1s to UNE DS1s. As detailed in my previous letter, there was an error in

the price quoted to perform the work necessary to achieve migration of XO's SPA DS1s to UNE DS1s. It took BellSouth four weeks to respond to XO's redline because due diligence was needed to address XO's changes and review all of the appropriate documentation germane to XO's request as it was an unusual request where it is not a like-for-like migration from one CLEC to another CLEC (i.e., SPA to SPA). The process for this is to migrate the SPA circuits to the second CLEC's SPA arrangement and then move from SPA to UNE. At this time, this can only be done through "N" and "D" orders as your Interconnection Agreement does not allow for a conversion from SPA to UNE; however, you can coordinate the "N" and "D" orders with a Professional Services agreement.

I would like to point out that Professional Services offers this service in lieu of XO having to expend its own resources to conduct the migration of services. Such migrations of services can be handled through XO's issuance and coordination of its own disconnects and new connect orders, without BellSouth's facilitation;

BellSouth has now provided quotes to XO to project coordinate both the SPA-to-SPA and the SPA-to-UNE migrations. Please respond within seven (7) calendar days to accept or reject BellSouth's current price quote as follows:

1. GC SPA to SPA -- \$135.00 per circuit
2. XO SPA to UNE -- \$347.48 per circuit
3. XO SPA to UNE with order provisioning -- \$635.83 per circuit

Consistent with your comments concerning updating XO's Interconnection Agreement, I have discussed this with your contract negotiator, Dorothy Farmer. It is my understanding that an amendment to your existing interconnection agreements to incorporate the Federal Communications Commission's (FCC) Triennial Review Order (TRO)¹ was sent by BellSouth to XO on December 9, 2003. Subsequent to sending these amendments, on February 18, 2004, BellSouth and XO agreed to negotiate a regional Interconnection Agreement to replace XO's existing Interconnection Agreements. As a part of the agreement reached on February 18, 2004, the parties agreed to negotiate Attachment 2 – Unbundled Network Elements ("UNEs") - first so that the agreed-upon TRO provisions could be used to amend the parties' existing Interconnection Agreements. BellSouth stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders (including the TRO and the D.C. Circuit Court's vacatur Order²).

Please feel free to call me, if there are additional questions.

Sincerely,

Scott Kunze
BellSouth Account Manager
Interconnection Sales

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., **FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003)** ("TRO").

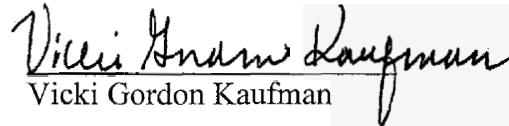
² **UNITED STATES TELECOM ASSOCIATION v. FEDERAL COMMUNICATIONS COMMISSION** and United States of America (359 F.3d 554) March 2, 2004 ("DC Circuit Court Order")

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint and Request for Expedited Processing was served on the following by (*) hand delivery and U.S. Mail this 22nd day of September, 2004:

(*) Beth Keating
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(*) Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman