BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of XO Florida, Inc. against BellSouth Telecommunications, Inc. for alleged refusal to convert circuits to UNEs; and request for expedited processing.	DOCKET NO. 041114-TP ORDER NO. PSC-05-0214-PHO-TP ISSUED: February 23, 2005

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on February 2, 2005, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

Vicki Gordon Kaufman, Esquire; McWhirter Reeves Davidson Kaufman & Arnold, P.A., 117 South Gadsden Street, Tallahassee, Florida 32301
On behalf of XO Communications Services, Inc.

Dana Shaffer, Vice President, Regulatory Counsel, 105 Molloy Street, Nashville, Tennessee 37201-2315
On behalf of XO Communications Services, Inc.

James Meza III, Esquire; Nancy White, Esquire; R.D. Lackey, Esquire
150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556
On behalf of BellSouth Telecommunications, Inc.

Jason P. Rojas, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On September 22, 2004, XO Florida, Inc. filed a complaint against BellSouth Telecommunications, Inc. for alleged refusal to convert special access circuits to UNEs and request for expedited processing. By Order No. PSC-04-1068-PCO-TP, XO's request for expedited processing was denied. Subsequently, pursuant to the complaint, this matter has been set for an administrative hearing.

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III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Service's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Witness	Proffered By	Issues #
Direct		
Gary Case	XO Florida	All
Eddie Owens	BellSouth	1, 2 and 3
Shelley Padgett	BellSouth	1, 2 and 3
Michael E. Willis	BellSouth	1, 2 and 3
Rebuttal		
Gary Case	XO Florida	All
Eddie Owens	BellSouth	1, 2 and 3
Shelley Padgett	BellSouth	1, 2 and 3
Michael E. Willis	BellSouth	1, 2 and 3

VII. BASIC POSITIONS

XO:

The issues in this case are simple ones. XO has requested that BellSouth convert XO zero mile special access circuits to UNE stand-alone cost-based pricing. As BellSouth admits, this does not require any physical change or work on the circuits. It can be done as merely a billing change.

BellSouth has the obligation under current law to process XO's conversion requests. While not denying that the special access to UNE conversion must be done at cost-based rates, BellSouth refuses to perform these conversions until XO accepts a far-reaching amendment to its interconnection agreement that not only encompasses many other issues -- issues that are in dispute as well as issues that are currently unsettled pending issuance of the permanent FCC rules – but also would not result in XO obtaining the conversions it has requested. The issue of BellSouth's obligations to perform these conversions, however, was not appealed and is not an unsettled issue.[1] The obligation is clear.

That BellSouth seeks to prevent XO from obtaining conversion of special access circuits to UNEs by "cooking up" an outrageous charge for the conversion is evident in BellSouth's own admission of the cost-based rates (contained in the confidential rebuttal testimony of XO witness Case) BellSouth would charge a CLEC that had amended its interconnection agreement. When these cost-based rates are compared to the almost $1,000 per circuit charge that BellSouth seeks to levy on XO for the very same activity (as well as the convoluted "process" BellSouth

[1] To the extent that the FCC permanent rules may impact UNE availability, there is no evidence that the circuits at issue here will be affected. Moreover, the fact that the FCC permanent rules are pending should not be allowed to delay these conversions anymore than it would be a proper basis for BellSouth to refuse to process new UNE orders.

describes to accomplish the change), it becomes obvious that the charge BellSouth seeks to apply to XO has no basis in reality. Every day that BellSouth refuses to perform these conversions at the cost-based rates results in the loss of thousands of dollars to XO and inhibits XO's ability to compete in Florida.

BellSouth's untenable position regarding a "required amendment" must be rejected for two reasons. First, no amendment to the interconnection agreement is required or necessary in this instance. As explained in XO's rebuttal testimony, the parties' current agreement contains a "switch as is" rate of $8.98. This process and this rate are applicable to the special access to UNE billing change (the same process used for special access to EEL conversion); thus no interconnection amendment is needed.[2]

BellSouth has not required such amendments for EEL conversions. Second, XO has made it clear, for more than one year, that it is willing to execute an amendment related to the special access to UNE conversion if BellSouth insists upon it. What XO is not willing to do is to execute the broad amendment BellSouth insists upon which deals with many issues outside the conversion question and forces XO to accept BellSouth's "self effectuating delisted UNE" language. XO is also not willing to continue to wait for FCC rules on other issues in order to avail itself of an obligation BellSouth has had since 2003 to perform these conversions.

To resolve this dispute, the Commission should require BellSouth to immediately begin processing XO's conversion requests at either the "switch as is" price in the parties' current agreement or at the cost-based rate established by BellSouth, as set out in Mr. Case's rebuttal testimony. In addition, the Commission should require BellSouth to true up the rates for all circuits for which conversion has been requested, effective 30 days, or one billing cycle from the initial conversion request. Finally, all new conversion requests should be processed within 30 days of submission.

BELLSOUTH:

Bellsouth has no obligation under the parties' current interconnection agreement ("Current Agreement") to convert special access circuits to stand-alone UNEs at TELRIC pricing. Not only is this fact supported by the clear language of the Current Agreement but it is also definitively established by the fact that, over the past 3 years, XO submitted three, separate New Business Requests ("NBRs") under the Current Agreement to request that BellSouth convert special access circuits to stand-alone UNEs. This conversion right at TELRIC only came into existence with the FCC's decision in Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, et al, FCC 03-36, 17 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"). In the TRO, the FCC held for the first time that incumbent local exchange carriers ("ILECS") had an obligation to convert special access circuits to stand-alone UNEs at TELRIC. TRO at 586-87.

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[2] In discovery, BellSouth acknowledged that the charge for circuit conversions should be the same as for EELs.

Thus, in order to realize this right and others set forth in the TRO, XO was required to comply with its change of law obligations in the Current Agreement. However, because XO does not want to make the current agreement compliant with all current changes in the law, including the TRO, XO has refused to comply with its change of law obligations in the Agreement and instead has filed the instant Complaint. Simply put, XO is using litigation in an attempt to effectuate only those changes in the law that are beneficial to XO in violation of the Current Agreement.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions. Staff has no position at this time.

VIII. ISSUES AND POSITIONS

ISSUE 1: DOES BELLSOUTH CURRENTLY HAVE AN OBLIGATION TO CONVERT ALL XO SPECIAL ACCESS CIRCUITS TO STANDALONE UNE RECURRING PRICING?

POSITIONS

XO:

Yes. Those portions of the TRO relating to the conversion issue raised in this docket were not appealed and thus not affected by United States Telecom Assn v. FCC, 359 F.3d 554 (D.C. Cir. 2004 (USTA II). The pertinent sections of the TRO (¶¶ 585-589) require BellSouth to perform the conversions XO has requested at just and reasonable rates, as a billing change only, within one billing cycle of receipt of request for conversion. The charge of almost $1,000 per circuit that BellSouth seeks to apply fails to meet this standard. BellSouth's claim that it is entitled to charge this outrageous amount until XO agrees to BellSouth's proposed amendment to the parties' interconnection agreement is unfounded. The agreement contains a "switch as is" price of $8.98 for the same conversion process requested by XO; thus, no amendment is required. XO has long expressed its willingness to enter into an amendment on this issue if BellSouth insists, but XO is not willing to accept BellSouth's unilateral and unrelated amendments that have no bearing on the conversion issue and that would have the practical effect of denying XO the conversions it has requested by giving XO only a meaningless "contractual right" to the conversions, with offsetting right granted to BellSouth to deny XO access to UNEs.

BELLSOUTH:

No. For the reasons set forth above, BellSouth has no obligation under the Current Agreement to convert all XO special access circuits to stand-alone recurring UNE pricing.

STAFF:

Staff has no position at this time.

ISSUE 2: IF SO, WHAT NONRECURRING CHARGES SHOULD APPLY FOR PERFORMING SUCH CONVERSIONS?

POSITIONS

XO:

The Commission should apply the $8.98 charge for "switch as is" or the charge BellSouth claims it would apply to CLECs who amend their interconnection agreements. This charge, which BellSouth provided in discovery, is quoted in Mr. Case's rebuttal testimony.

BELLSOUTH:

The Commission need not address this issue because, as stated above, BellSouth has no obligation under the Current Agreement to convert special access circuits to stand-alone UNEs for XO. Further, it would not be appropriate for the Commission to set a rate for a service that is not required under the Current Agreement. Until XO amends the Current Agreement to make it complaint with all aspects of the law, granting XO's request for relief would result in the imposition of a rate on a professional service that is beyond the scope of the Commission's authority under Section 252 of the Act and would circumvent the parties respective obligations under the Current Agreement to amend that agreement consistent with applicable law.

Alternatively, if the Commission finds in favor of XO on Issue 1, BellSouth agrees that the current rate for EEL conversions from the parties' current agreement, including all nonrecurring charges associated with EEL conversions, shall apply unless and until a specific rate is established for special access to UNE conversions.

STAFF:

Staff has no position at this time.

ISSUE 3: IF SO, HOW SOON AFTER A REQUEST HAS BEEN SUBMITTED FOR PERFORMING A CONVERSION OF EACH TYPE OF CIRCUIT, SHOULD THE CONVERSION BE EFFECTUATED?

POSITIONS

XO:

Since this is just a billing change, the conversions should occur no later than 30 days after XO submits its request, or one billing cycle, as required by the TRO.

BELLSOUTH:

The Commission need not address this issue because, as stated above, BellSouth has no obligation under the Current Agreement to convert special access circuits to stand-alone UNEs for XO. In any event, any due dates for 15 or more circuits must be negotiated as standard intervals are not designed for such a large numbers of circuits

STAFF:

Staff has no position at this time.

IX. EXHIBIT LIST

Witness	Proffered By	I.D. No.	Description
Direct			
Gary Case	XO Florida	(GC-1)	Emails regarding NBR
		(GC-2)	Email regarding migration of Global Crossing's circuits
Shelly Padget	BellSouth	(SP-1)	Direct Panel Testimony Exhibits
Michael Willis	Bellsouth	(MEW-1)	Direct Panel Testimony Exhibits
Rebuttal			
Eddie Owens	BellSouth	(ELO-1)	December 14, 2004 Letter from XO to BellSouth

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

There are no proposed pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

None have been identified at this time.

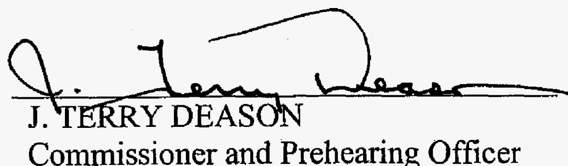
XIV. RULINGS

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 23rd day of February, 2005.



J. TERRY DEASON
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.