

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by XO Florida,  
Inc. for arbitration of  
unresolved issues with BellSouth  
Telecommunications, Inc.

DOCKET NO. 011119-TP  
ORDER NO. PSC-02-0665-PHO-TP  
ISSUED: May 15, 2002

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on May 6, 2002, in Tallahassee, Florida, before Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer.

APPEARANCES:

DANA SHAFFER, Vice President, Regulatory Counsel, XO Communications, Inc., 105 Molloy Street, Suite 300, Nashville, Tennessee 37215; JOHN A. DOYLE, JR., Parker, Poe, Adams & Bernstein, Post Office Box 389, 1400 First Union Capital Center, Raleigh, North Carolina 27602-0389 and VICKI GORDON KAUFMAN, McWhirter, Reeves, McGlothlin, Davidson, Decker, Kaufman, Arnold & Steen, P.A., 117 South Gadsden Street, Tallahassee, Florida 32301  
On behalf of XO Florida, Inc.

JAMES MEZA III, Esquire, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301; and PATRICK W. TURNER, 675 W. Peachtree Street, Northeast Suite 4300, Atlanta, Georgia 30375  
On behalf of BellSouth Telecommunications, Inc.

JASON K. FUDGE, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Commission.

PREHEARING ORDER

DOCUMENT NUMBER-DATE

05213 MAY 15 02

FPSC-COMMISSION CLERK

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

Pursuant to a petition by XO Florida, Inc. (XO) for arbitration of unresolved issues in an agreement with BellSouth Telecommunications, Inc. (BellSouth), this matter is currently set for an administrative hearing.

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements arrived through compulsory arbitration. Specifically, Section 252(b)(1) states:

(1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than nine months after the date on which the local exchange carrier received the request under this section. The parties have, however, waived that requirement in this docket.

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 the hearing for which no ruling has been made, must be prepared to present their justifications at the hearing, so that a ruling can be made at that time.

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 Services'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

Each witness will only take the stand once and present all of their testimony (direct and rebuttal) at the same time.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and Rebuttal</u>		
Rex Knowles	XO Florida, Inc.	4, 7 and 8
John Seaton	XO Florida, Inc.	11
John A. Ruscilli	BellSouth	4, 7, 8 and 11

VII. BASIC POSITIONS

**XO:** There are four issues that remain to be decided in this case. The first deals with whether, once XO orders a loop from BellSouth, BellSouth can unilaterally modify that loop without XO's consent. Once XO has determined that a BellSouth loop meets XO's needs and has ordered that loop, BellSouth should not be able to modify that loop or do anything to the loop that would disrupt service to an XO customer. BellSouth's "solution" -- that XO be required to order a particular type of loop -- is no solution at all. First, ordering the loop BellSouth wants suggests XO use does not guarantee that service will not be disrupted. Second, and equally important, XO has serious concerns about loop quality and BellSouth's ability to provision the loop BellSouth suggests (the UCL-ND loop).

Second, XO contends that it is entitled to reciprocal compensation at the tandem interconnection rate because, pursuant to the Commission's ruling in 000075-TP, XO's switch serves an area geographically comparable to BellSouth's tandem. BellSouth's position appears to be that XO has not provided enough information on this issue. However, XO has clearly demonstrated, through its testimony and its discovery responses, that its switch serves a comparable area.

Third, it is XO's position that subsequent tariff changes by BellSouth cannot serve to modify the interconnection agreement. It is the agreement that governs the parties'

relationship. Unilateral modifications through tariff changes should not be permitted.

Fourth, BellSouth refuses to accept the very same credit and deposit requirements that it wants to impose on XO. XO simply wants symmetry; if BellSouth thinks its credit and deposit policy is reasonable as to ALECs, it should be applicable to BellSouth.

**BELLSOUTH:**

The Commission's goal in this proceeding is to resolve each issue in this arbitration consistent with the requirements of Section 251 of the Telecommunications Act of 1996 ("1996 Act"), including the regulations prescribed by the Federal Communications Commission ("FCC"). BellSouth and XO Florida, Inc. ("XO") have continued to negotiate in good faith, and have resolved a significant number of issues since XO's request for arbitration was filed with this Commission.

Nevertheless, there remain a number of issues for which the parties have not been able to reach a solution. BellSouth believes that XO's positions on these issues will not withstand close scrutiny. BellSouth believes that its positions are both reasonable and fair. The Commission, therefore, should adopt BellSouth's position on each of the remaining issues in this proceeding.

**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.

VIII. ISSUES AND POSITIONS

**ISSUE 1:** Under what circumstances should BellSouth be permitted to charge XO for cancellation of an order for services or network elements?

This issue has been resolved.

**ISSUE 2:** Under what circumstances should BellSouth be permitted to charge XO for expediting an order for services or network elements?

This issue has been resolved.

**ISSUE 4:** After XO has ordered a loop, should BellSouth be allowed to modify that loop without XO's consent?

**XO:** No. Once XO has ordered a loop, BellSouth should not be permitted to make any modifications to it without XO's consent. To permit BellSouth to unilaterally modify the loop could result in disruption to XO customers.

**BELLSOUTH:**

From time to time, BellSouth must perform loop modifications in the course of properly maintaining and upgrading its network facilities. BellSouth is willing to work with ALECs in a good-faith effort to coordinate the timing of such modifications. ALECs, however, should not have the option to veto loop modifications. When BellSouth performs loop modifications, the loop will retain the same service characteristics and will retain the same technical characteristics as are outlined in BellSouth's Technical Reference 73600 ("TR 73600").

**STAFF:**

Staff has no position at this time.

**ISSUE 5:** What are the appropriate definitions of "Common Transport" and "Tandem Switching"?

This issue has been resolved.

**ISSUE 6:** Under what circumstances is XO entitled to symmetrical compensation for leased facility interconnection?

This issue has been resolved.

**ISSUE 7(A):**

Is XO entitled to the tandem switching rate for the exchange of local traffic?



**XO:** Yes. In its decision in Docket No. 000075-TP, the Commission found that an ALEC is entitled to compensation at the tandem rate when it shows that its switch serves an area geographically comparable to the ILEC tandem. XO has made such a demonstration in its testimony and discovery responses.

**BELLSOUTH:**

FCC Rule 51.711(a)(3) provides that "where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." XO has not demonstrated that it is entitled to the tandem switching rate in Florida.

**STAFF:**

Staff has no position at this time.

**ISSUE 8:** Should BellSouth be able to change the rates, terms and conditions of this agreement by referring to the jurisdictional report requirements, rules and regulations for Interexchange Carriers specified in BellSouth's Intrastate Access Services Tariff?

**XO:** No. The interconnection agreement governs the parties' relationship. BellSouth should not be able to unilaterally modify the parties' agreement through tariff changes.

**BELLSOUTH:**

Any modifications to the Intrastate Access Services Tariff should automatically apply to XO. To do otherwise would lead to discriminatory application of BellSouth's Intrastate Access Services Tariff among the ALECs using that tariff. ALECs could accuse BellSouth of offering discriminatory behavior if some rates, terms and/or conditions provided via an Interconnection Agreement were better than the tariff prices, or vice versa.

**STAFF:**

Staff has no position at this time.

**ISSUE 9:** When one or both parties have the technology to automatically identify the jurisdiction of traffic, what is the appropriate process for transitioning to the use of such technology for message recording and billing purposes?

This issue has been resolved.

**ISSUE 10:** Attachment 6, 2.3 of the Parties' Interconnection Agreement provides that

"Upon XO's request, and subject to execution of a testing agreement, the Parties shall work cooperatively to test newly implemented interface versions on a mutually agreeable schedule. Each Party shall be responsible for building its side of the interface prior to testing."

Should this section of the Agreement also provide that:

"BellSouth shall provide reasonable notice of any such new release and freeze date, and shall act in good faith to grant any reasonable request of XO to support the prior industry standard version of the interface pending appropriate testing of the current industry standard interface"?

This issue has been resolved.

**ISSUE 11:** Should BellSouth be subject to the same credit and deposit requirements as XO when purchasing services from XO?

**XO:** Yes. If BellSouth believes its policy to be reasonable for ALECs, it should be reasonable for application to BellSouth.

**BELLSOUTH:**

BellSouth should not be subject to the same credit and deposit requirements as XO when BellSouth purchases services from XO. BellSouth is legally obligated to make available resold services and UNEs to any ALEC, at nondiscriminatory rates, terms and conditions. Because ALECs have varying degrees of assets and credit worthiness, it is entirely appropriate for BellSouth to seek some protection against uncollectible debts by requiring ALECs to pay deposits on a nondiscriminatory basis. On the other hand, a deposit should not be required from BellSouth, on an indiscriminate basis, just because BellSouth purchases services from the ALEC (in this case XO) and requires a deposit from the ALEC for services the ALEC purchases from BellSouth.

**STAFF:**

Staff has no position at this time.

**ISSUE 12:** What type of equipment may XO collocate in the BellSouth premises?

This issue has been resolved.

**ISSUE 13:** May XO directly connect with other interconnectors within the BellSouth Premises through co-carrier cross connects?

This issue has been resolved.

**ISSUE 14:** May BellSouth require XO to use a separate entrance to collocation space?

This issue has been resolved.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Rex Knowles	XO Florida, Inc.	_____ (RK-1)	R a t e Centers/XO N P A / N X X (Confidential)
		_____ (RK-2)	XO Florida LATA 460 Rate Centers Miami L A T A (Confidential)
<u>Rebuttal</u>			
Rex Knowles	XO Florida, Inc.	_____ (RK-3)	Affidavit of Tom Whitaker
Rex Knowles <sup>1</sup>	XO Florida, Inc.	_____ (RK-4) (Stipulated)	Number and P h y s i c a l Location of XO end user c i r c u i t s (Confidential)

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

X. STIPULATIONS

XO will withdraw the supplemental testimony of witness Knowles, but the parties have agreed that Exhibit RK-4 attached thereto may be entered into the record by stipulation. BellSouth reserves the right to cross-examine witness Knowles on the exhibit.

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<sup>1</sup>This confidential exhibit is part of Mr. Knowles Supplemental Testimony, which was withdrawn, but the exhibit remains by stipulation.

XI. PENDING MOTIONS

There are no pending motions.

XII. PENDING CONFIDENTIALITY MATTERS

On May 3, 2002, XO filed a Notice of Intent to Request Confidential Classification of Document No. 04846-02. A request for which a ruling would be necessary has not yet been filed.

On May 7, 2002, XO filed a Request for Specified Confidential Classification and Motion for Protective Order of Document No. 04232-02. This request will be addressed by separate Order.

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

The parties have identified no decisions that may impact our resolution of these issues.

XIV. RULINGS

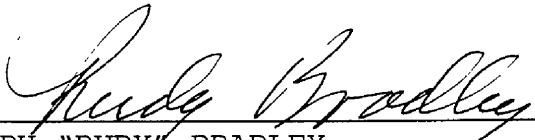
Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

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By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 15th Day of May, 2002.

  
\_\_\_\_\_  
RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

( S E A L )

JKF

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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.

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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.