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May 28, 2004

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
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COMMISSION CLERK

Re: Docket No. 040167-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of US LEC of Florida Inc. and XO Florida, Inc. are an original and fifteen copies of their Comments in the above-referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:

Proposed Adoption of Rules 25-4.08, F.A.C.,)
Number Portability, and 25-4.083, F.A.C.,) Docket No. 040167-TP
Preferred Carrier Freeze; and Proposed)
Amendment of Rules 25-4.003, F.A.C.,) Filed : May 28, 2004
Definitions; 25-24.490, F.A.C., Customer)
Relations; Rules Incorporated; and 25.24.845,)
F.A.C., Customer Relations; Rules Incorporated)

COMMENTS OF
US LEC OF FLORIDA INC. and XO FLORIDA, INC.

US LEC of Florida Inc. ("US LEC") and XO Florida, Inc. ("XO") (collectively, the "Companies" or individually, the "Company") respectfully submit comments in response to the Notice of Rulemaking adopted by the Commission in the above-styled proceeding on April 20, 2004, and published in the Florida Annotated Weekly, May 7, 2004 edition. The Commission proposes to codify requirements that will mandate carriers to port telephone numbers to other carriers without regard to whether the customer has a balance due to the existing carrier and requirements for implementing a preferred carrier freeze and the method to authorize release of such freeze.

The Companies support the Commission's efforts to ensure that consumers are able to enforce their rights to be served by the provider of their choice. To the extent that the Commission's proposed rules governing preferred carrier freeze mirrors the FCC's rules, the Companies have no objection to their adoption. US LEC and XO, however, take the opportunity to discuss the Commission's proposed rules governing number porting.

Each Company works cooperatively with its customers and the customer's new carriers to port numbers upon the receipt of a local number port request. In certain

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instances, where the Companies have complied with the Commission's rules to suspend or disconnect a customer's number due to non-payment (and prior to any request by another carrier for a port of the number), each Company believes that it should be entitled to deny the port request. It is unclear under the proposed rule whether a number that has been suspended, rather than completely disconnected, is considered a working number or not. The Companies suggest that it should not be considered a working number.

Section 251(b)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"),¹ makes clear that each "local exchange carrier has the ... duty to provide, to the extent technically feasible, number portability in accordance with requirement prescribed by the [Federal Communications] Commission." Section 251(e)(1) of the Act² grants the Federal Communications Commission ("FCC") authority over the administration of telecommunications numbering and making such numbers available on an equitable basis. Congress did not preclude the FCC from delegating to State commission or other entities all or any portion of such jurisdiction.

The FCC has considered, in the context of the application of local number portability to wireless providers, what restrictions, if any, a carrier may impose on a customer's porting out request. In a Memorandum Opinion and Order adopted on October 3, 2003, the FCC concluded that a carrier may not hold a customer's number while trying to settle a customer's account.³ The Commission's rules appear to conform to the FCC's decision, as they require a carrier to facilitate the port of a "working

¹ 47 U.S.C. § 251(b)(2).

² 47 U.S.C. § 251(e)(1).

³ *Memorandum Opinion and Order, In the Matter of Telephone Number Portability and Carrier Request for Clarification for Wireless-to-Wireless Portability*, CC Docket 95-116, ¶¶ 11-18 (FCC 03-237, adopted October 3, 2003).

number” regardless of whether a balance is owed by the customer. The rule, however, does not define when a number is considered “working.”

There can be no dispute that a number that has been disconnected, either by the direction of the customer or after the carrier has complied with the Commission’s rules to disconnect a customer due to non-payment or other for cause reasons, is not considered a “working number.” When service is suspended rather than disconnected (again after compliance with the Commission’s rules for disconnection of service), the number may continue to have 9-1-1 or other emergency service number connectivity and connectivity to the company’s customer service office. Thus, the number has not been completely decommissioned, and may still be considered a “working” number, although limited in nature. US LEC and XO, however, consider the number to be “non-working.”

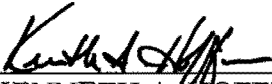
In such a situation where a carrier has validly placed a number in a “non-working” status by either suspending service associated with the number or disconnecting a number prior to a request for LNP of the number by another carrier, no port should be required to be completed. The Companies suggest that there is a difference between a consumer selecting a new provider on a voluntary basis, and being unable to have its number ported, and one who is attempting to avoid its obligations to a carrier after its service has been suspended or discontinued. In these situations, local competition is not being stifled by the customer being unable to port its number as the customer should not expect that its service could be restored simply by changing providers.

Accordingly, US LEC and XO ask that the Commission clarify that a “working number” does not include a number where the associated service has been suspended or

discontinued in compliance with the applicable Commission rules, prior to the request for LNP from another carrier.

Respectfully submitted,

US LEC OF FLORIDA INC.
XO FLORIDA, INC.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following this 28th day of May, 2004:

Samantha Cibula, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850



KENNETH A. HOFFMAN, ESQ.