

1 BELLSOUTH TELECOMMUNICATIONS, INC.
2 REBUTTAL PANEL TESTIMONY OF
3 MICHAEL E. WILLIS AND SHELLEY W. PADGETT
4 BEFORE FLORIDA PUBLIC SERVICE COMMISSION
5 DOCKET NO. 041114-TP
6 JANUARY 20, 2005
7

8 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

9

10 A. My name is Michael E. Willis. My business address is 675 W. Peachtree Street,
11 Atlanta, Georgia, 30375.

12

13 Q. ARE YOU THE SAME MICHAEL E. WILLIS THAT FILED DIRECT
14 TESTIMONY IN THIS PROCEEDING?

15

16 A. Yes. I filed direct testimony on December 13, 2004.

17

18 Q. MS. PADGETT, PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

19

20 A. My name is Shelley W. Padgett. My business address is 675 W. Peachtree Street,
21 Atlanta, Georgia 30375.

22

23 Q. ARE YOU THE SAME SHELLEY W. PADGETT THAT FILED DIRECT
24 TESTIMONY IN THIS PROCEEDING?

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2 A. Yes. I also filed direct testimony on December 13, 2004.

3

4 Q. WHAT IS THE PURPOSE OF YOUR REBUTAL TESTIMONY?

5

6 A. The purpose of my Rebuttal Testimony is to rebut the assertions contained in the
7 Direct Testimony of Mr. Gary Case of XO Florida, Inc. ("XO"), filed with the
8 Florida Public Service Commission ("Commission") on December 13, 2004.

9

10 *Issue 1: Does BellSouth currently have an obligation to convert all XO special access*
11 *circuits to stand-alone recurring UNE pricing?*

12

13 Q. MR. CASE CLAIMS AT PAGE 3 OF HIS DIRECT TESTIMONY THAT
14 BELLSOUTH HAS AN OBLIGATION TO CONVERT ALL XO'S ZERO MILE
15 SPECIAL ACCESS CIRCUITS TO STANDALONE UNES CURRENT
16 PRICING, AND THAT, ALTHOUGH BELLSOUTH HAS REFUSED TO
17 PERFORM THESE CONVERSIONS, BELLSOUTH DOES NOT CONTEST
18 ITS OBLIGATION TO DO SO UNDER CURRENT LAW. PLEASE
19 RESPOND.

20

21 A. The parties' obligations under Section 251 of the Telecommunications Act of
22 1996 (the "Act") are governed by the rates, terms and conditions contained within
23 the Interconnection Agreement between the parties dated October 25, 2002

1 (“Current Agreement”). As stated in BellSouth's direct testimony, BellSouth does
2 not now, nor has it ever, had an obligation to convert special access circuit
3 services to individual UNEs under the Current Agreement. Rather, consistent
4 with the law at the time the parties entered into the Current Agreement,
5 BellSouth’s obligation in the Current Agreement is limited to the conversion of
6 special access circuits to EELs. See Attachment 2, Section 5.5 of the Current
7 Agreement. In *Review of the Section 251 Unbundling Obligations of Incumbent*
8 *Local Exchange Carriers*, CC Docket Nos. 01-338, et al, FCC 03-36, 17 FCC Rcd
9 16978 (Aug. 21, 2003) (“TRO”), the FCC held for the first time that Incumbent
10 Local Exchange Carriers (“ILECS”) had an obligation to convert special access
11 circuits to stand-alone UNEs at Total Element Long Run Incremental Cost
12 (“TELRIC”) rates. *TRO* at ¶¶ 586-87. In addition, the FCC very clearly in the
13 *TRO* deferred to the change in law procedures set forth in interconnection
14 agreements between parties for the process by which the obligations set forth in
15 the *TRO* were to be implemented: “We decline the request of several BOCs that
16 we override the section 252 process and unilaterally change all interconnection
17 agreements to avoid any delay associated with renegotiation of contract
18 provisions.” *TRO* at ¶ 701.

19
20 As evidenced by the undisputed fact that XO submitted 3 separate New Business
21 Requests (“NBRs”) pursuant to the terms and conditions of the Current
22 Agreement for the conversion of special access circuits to UNEs and by Mr.
23 Case's statement at page 8 as the reason why XO did not pursue the resolution of
24 this dispute with the Commission over the past three years, XO is aware of the
25 fact that BellSouth has no obligation to perform conversions of special access

1 circuits to stand-alone UNE under the Current Agreement. Tellingly, Mr. Case
2 states that XO did not take the dispute to the Commission at an earlier date
3 because, "the FCC had not yet confirmed an explicit obligation to provide special
4 access to UNE conversions within one billing cycle of request at cost-based
5 rates." Thus, there can be no question that BellSouth has no obligation under the
6 Current Agreement to convert special access circuits to stand-alone UNEs.

7
8 Q. ON PAGE 4 OF HIS TESTIMONY, MR. CASE DESCRIBES XO'S THIRD
9 REQUEST FOR BELL SOUTH TO PROVIDE THE EXTRA-CONTRACTUAL
10 SERVICE OF CONVERTING SPECIAL ACCESS CIRCUITS TO STAND-
11 ALONE UNES. DO YOU AGREE WITH HIS DESCRIPTION OF XO'S
12 REQUEST?
13

14 A. No. Although it is not entirely clear, I believe Mr. Case is referring to XO's July
15 2004 request to convert Global Crossing special access circuits to XO UNEs. In
16 order to accomplish this task, BellSouth advised XO that it would first have to
17 transfer responsibility for the subject special access circuits from Global Crossing
18 to XO and then convert the circuits from XO special access to XO UNEs. *See*
19 *Exhibit No. MEW/SP-7*. XO was clear on this two-step process as evidenced by
20 the fact that XO executed a Special Assembly Contract for after normal business
21 hours performance of physically transferring the Global Crossing special access
22 circuits to XO. Further evidence of this knowledge on XO's part is the fact that,
23 in addition to executing the Special Assembly Contract, XO was also negotiating
24 a Professional Services Agreement for project management of this after normal
25 business hours physical transfer from Global Crossing to XO as well as for the

1 project management of the conversion of those newly-transferred XO special
2 access circuits to stand-alone UNEs. During the negotiations of the Professional
3 Services Agreement, BellSouth discovered an error in its price quote.
4 Specifically, BellSouth advised XO that the \$135 price quote originally provided
5 by BellSouth in the Professional Services Agreement was only for professional
6 services provided for the after normal business hours “hot cut” necessary to
7 migrate Global Crossing special access circuits to XO special access circuits.
8 BellSouth made it abundantly clear in its July 21, 2004 letter that this \$135 price
9 quote was only for the transfer of the Global Crossing special access circuits to
10 XO special access circuits and *not* for the ultimate conversion of these circuits to
11 XO UNEs. *Id.* Further, because Mr. Case claims that all XO wants to convert to
12 stand-alone UNEs are XO special access circuits (page 13 of Direct Testimony), it
13 is not clear why he focuses on this third NBR, other than to unnecessarily confuse
14 the facts surrounding the conversion issues and highlight the fact that XO
15 requested that this service be performed post-*TRO* via a NBR pursuant to the
16 Current Agreement and that XO understood that the pricing would not be
17 TELRIC.

18
19 Q. ON PAGE 5 OF HIS TESTIMONY, MR. CASE REFERS TO BELLSOUTH’S
20 PROJECT MANAGEMENT FEE. CAN YOU PLEASE DESCRIBE THIS FEE
21 IN DETAIL?

22

23 A. Yes. The Professional Services project management fee that XO inartfully
24 describes is an optional fee that XO could purchase from BellSouth in lieu of XO
25 having to expend its own resources to conduct the migration of its special access

1 circuits to UNEs. To effectuate the replacement of a special access circuit with a
2 standalone UNE, a "D" (disconnect) order must be submitted to BellSouth's
3 Access Customer Advocacy Center ("ACAC") to remove the special access
4 circuit from the access systems and stop billing at the special access rates. At the
5 same time, an "N" (new) order must be submitted to BellSouth's Customer
6 Wholesale Interconnection Network Service ("CWIN") group to add a record of
7 the new UNE. This "N" order is what adds the UNE circuit to the system and
8 results in billing at the UNE rate. Because the "D" order could be processed prior
9 to the "N" order, coordination of the orders is available to minimize the
10 possibility of loss of service to the end user during the conversion. The project
11 management service offered by BellSouth's Professional Services group operates
12 to insure, to the extent possible, that the "D" and "N" orders would be coordinated
13 such that physical disconnection would not occur. This service is purely optional
14 as XO could provision, submit, and coordinate its "D" and "N" orders to
15 effectuate the conversions without Professional Services involvement; XO
16 elected not to perform this function but, instead, to request that BellSouth perform
17 this function for XO. Thus, BellSouth offered three alternatives to XO for the
18 migration of XO's special access circuits to standalone UNEs: 1) XO could
19 provision, submit, and coordinate its own "D" and "N" orders for the price of the
20 Access Service Request ("ASR") service order and disconnect fees in BellSouth's
21 access tariff and the applicable Local Service Request ("LSR") Operational
22 Support Systems fee and installation fees consistent with the Current Agreement;
23 2) XO could provision and submit its own orders to BellSouth and only have
24 BellSouth's Professional Services project manage the orders for \$347.48 to
25 minimize any interruption of service; or 3) XO could use BellSouth's Professional

Services group to provision, submit, and project manage its "D" and "N" orders
for \$635.83.

2

3

4 Q. IF XO AMENDS ITS AGREEMENT TO BE COMPLIANT WITH THE
5 CURRENT STATUS OF THE LAW, WOULD BELL SOUTH BE OBLIGATED
6 TO PROVIDE THESE PROFESSIONAL SERVICES WITH ITS TELRIC
7 PRICE?

8

9 A. No. BellSouth is not obligated to provision, submit and project manage a CLEC's
10 orders for them. Professional Services is a premium service that exceeds
11 BellSouth's obligations under both the Current Agreement and the Act. Whether
12 or not a CLEC wants this additional layer of service is purely an optional business
13 decision of the requesting carrier.

14

15 Q. MR. CASE ATTEMPTS TO EXPLAIN-AWAY XO'S NBR NEGOTIATIONS
16 FOR THE CONVERSION OF SPECIAL ACCESS CIRCUITS TO STAND-
17 ALONE UNEs ON PAGE 6 OF HIS TESTMONY? HOW DO YOU
18 RESPOND?

19

20 A. Mr. Case attempts to camouflage XO's multiple negotiations with BellSouth for
21 the extra-contractual service of converting special access circuits to UNEs under
22 the guise that BellSouth did not negotiate the NBRs pricing in good faith. This is
23 not true. At all times during the negotiations of the three separate NBRs,
24 BellSouth negotiated with XO in good faith and provided XO with several

1 different pricing options that were fair and reasonable for this extra-contractual
2 service. Simply because BellSouth did not agree to provide a service at TELRIC
3 that it was not obligated to provide under the Act does not mean that BellSouth
4 acted in bad faith. Additionally, simply because the parties could not come to
5 agreement on the rate to be applied to the NBR services, does not mean that either
6 party acted in bad faith – contractual negotiations in all industries break down
7 every day based on the parties being unable to reach mutually agreeable rates,
8 terms and conditions.
9

10 Again, it is noteworthy that Mr. Case effectively admits on page 8 of his
11 testimony that BellSouth has no obligation under the Current Agreement to
12 perform special access to UNE conversions at TELRIC. And, whatever the
13 reason XO now provides as to why it attempted to obtain the service via a NBR, it
14 defies logic to suggest that XO would engage in three separate NBR negotiations
15 for the same service if it believed that BellSouth had an obligation to provide the
16 requested service under the Current Agreement at TELRIC.
17

18 Q. MR. CASE AT PAGE 9 CLAIMS THAT BELLSOUTH UNILATERALLY
19 CANCELLED THE OCTOBER 2003 NBR. HOW DO YOU RESPOND?
20

21 A. I disagree. Consistent with the Attachment 12, Section 5.0 of the parties' Current
22 Agreement, XO may either accept or reject the preliminary analysis provided by
23 BellSouth following XO's submission of an NBR. These provisions also require
24 XO to decide whether it wishes to proceed or cancel the NBR based on its review

1 of the preliminary analysis to avoid any charges imposed upon XO for the
2 services requested via the NBR. With each of the three NBRs XO submitted to
3 BellSouth for the conversion of XO special access circuits to XO UNEs, XO
4 informed BellSouth that it either intended to pursue alternative avenues (including
5 making unfulfilled threats to seek Commission involvement) (*see* Exhibit
6 MEW/SP-1) or simply refused to respond. For instance, as to Mr. Case's
7 statements on page 9 of his testimony regarding the NBR submitted by XO in
8 2003, neither Mr. Case nor anyone else at XO responded to my October 2003
9 email asking that XO confirm in writing his statement on a voice mail message
10 that XO no longer wished to proceed with the subject NBR. Ironically, it was not
11 until Mr. Case's direct testimony that XO indicated to BellSouth that it does not
12 agree that its NBRs have been cancelled.

13
14 Q. ON PAGE 10, MR. CASE STATES THAT HAD XO EXECUTED THE *TRO*
15 AMENDMENT PROVIDED BY BELLSOUTH IN DECEMBER 2003, XO
16 WOULD HAVE GIVEN UP ACCESS TO OTHER UNES. HOW DO YOU
17 RESPOND?

18
19 A. In his testimony, Mr. Case states: "had XO signed the amendment BellSouth
20 proffered, XO not only would not have obtained the requested conversions, but
21 would also have given up all access to DS1 and other high capacity UNEs." Mr.
22 Case is absolutely incorrect. In December 2003, BellSouth provided XO an
23 amendment to reflect all findings from the *TRO* ("*TRO* Amendment"), including

1 the specific right to convert special access circuits to stand-alone UNEs. Contrary
2 to Mr. Case's statements, however, this amendment did not in any way limit XO's
3 then-current ability to obtain access to DS1 and other high-capacity UNEs that
4 were required by the *TRO*.¹

5
6 Q. MR. CASE STATES ON PAGE 14 THAT XO HAS MADE EVERY ATTEMPT
7 TO NEGOTIATE AN AMENDMENT WITH BELLSOUTH TO
8 INCORPORATE THE *TRO*. IS HE CORRECT?

9
10 A. No. Although BellSouth provided XO with the *TRO* amendment in December
11 2003, XO did not provide its proposed amendment to reflect the *TRO* until
12 February 9, 2004. On March 2, 2004 when the D.C. Circuit released its decision
13 in *United States Telecom Association v. Federal Communications Commission*,
14 359 F.3d 554 (D.C. Circuit 2004) ("*USTA IP*"), which vacated certain FCC
15 unbundling rules ("*Vacatur Decision*") the parties were still negotiating the *TRO*
16 Amendment. Further negotiations regarding the *TRO* were stalled by the FCC's
17 call to ILECs and CLECs to negotiate commercial agreements. On July 3, 2004,
18 after *USTA II* went into effect, BellSouth sent XO a revised *TRO* Amendment to
19 incorporate the *USTA II* decision ("*USTA II Amendment*"). Again, XO was not
20 amenable to negotiating an amendment that would bring the parties' agreement
21 compliant with the law. In fact, in response to BellSouth's *USTA II* Amendment,
22 XO sent an amendment back to BellSouth that stripped all provisions that were

¹ The *TRO* found no impairment for local channels and entrance facilities and thus eliminated any obligation by BellSouth to provide these services as UNEs. The December 2003 amendment reflected this decision.

1 not beneficial to XO and added back to the proposed amendment all of the
2 elements that were vacated by *USTA II*. Additionally, after release of the FCC's
3 decision in *Order and Notice of Proposed Rule Making* in WC Docket No. 04-
4 313, CC Docket No. 01-338 (*Interim Rules Order*), BellSouth forwarded a
5 revised amendment to XO to incorporate this most recent FCC decision. XO has
6 never substantively responded to this latest amendment and instead has attempted
7 to dismiss BellSouth's efforts to establish a generic proceeding with the
8 Commission to address the *Interim Rules Order* as well as the upcoming FCC
9 Final Rules. XO has never provided BellSouth with an amendment to incorporate
10 all of the non-appealed *TRO* issues as suggested by Mr. Case on page 14 of his
11 testimony. Clearly, contrary to Mr. Case's testimony, XO's undisputed actions
12 lead to the inescapable conclusion that XO has no intention of making its Current
13 Agreement compliant with the current status of the law.

14
15 Q. WHY IS IT IMPORTANT THAT XO MAKE ITS AGREEMENT COMPLIANT
16 WITH THE CURRENT STATUS OF THE LAW AND NOT JUST THOSE
17 PROVISIONS OF THE *TRO* THAT WERE NOT AFFECTED BY *USTA II*?

18
19 A. XO has an obligation under the Current Agreement to incorporate all changes in
20 the law, not just those that XO finds acceptable or desirable. The *TRO* is not the
21 current status of the law and simply amending the Current Agreement to reflect
22 the findings of the FCC in the *TRO* that were not impacted by *USTA II* and the
23 *Interim Rules Order* ignores these most recent "changes in the law." While both
24 parties are aware that the FCC intends to release its permanent rules soon, the

1 current law today is the FCC's *Interim Rules Order*, which sets forth obligations
2 by which both parties must abide. These obligations include increases in pricing
3 for vacated elements and the unavailability of certain elements for future new
4 requests. Without amending the Current Agreement to incorporate the *Interim*
5 *Rules Order*, XO will continue to avoid its current legal obligations if the FCC
6 does not issue permanent rules by March 2005. Thus, with its most recent
7 proposal, XO seeks to have this Commission permit XO to reap the benefits of
8 some aspects of the current law while preventing BellSouth from implementing
9 those aspects of the current law that are favorable to BellSouth.
10

11 ***Issue 2: If so, what nonrecurring charges should apply for performing such***
12 ***conversions?***

13
14 Q. WHAT IS YOUR GENERAL POSITION AS TO THIS ISSUE?

15
16 A. As stated in my Direct Testimony, the Commission need not address this issue
17 because, as stated above, BellSouth has no obligation under the Current
18 Agreement to convert special access circuits to stand-alone UNEs for XO.
19

20 Q. WOULD IT BE APPROPRIATE FOR THE COMMISSION TO ORDER
21 BELL SOUTH TO PROVIDE THIS SERVICE AT A TELRIC RATE AS
22 SUGGESTED BY MR. CASE?
23

1 A. No. It would not be appropriate for the Commission to set a rate for a service that
2 is not required under the Current Agreement and that the FCC stated should only
3 be incorporated into the Current Agreement through the appropriate change in law
4 provisions of the parties Current Agreement. Notwithstanding the above, to the
5 extent XO agrees to amend the parties' Current Agreement to be consistent with
6 current law, the Commission would have the authority to approve reasonable
7 TELRIC rates. Until that time, granting XO's requested relief would result in the
8 imposition of a rate on a professional service that is beyond the scope of the
9 Commission's authority under Section 252 of the Act and would circumvent the
10 parties respective obligations under the Current Agreement to amend that
11 agreement consistent with applicable law.

12
13

14 *Issue 3: If so, how soon after a request has been submitted for performing a*
15 *conversion of each type of circuit, should the conversion be effectuated?*

16

17 Q. WHAT IS YOUR GENERAL POSITION AS TO THIS ISSUE?

18

19 A. As stated in my Direct Testimony, the Commission need not address this issue
20 because, as stated above, BellSouth has no obligation under the Current
21 Agreement to convert special access circuits to stand-alone UNEs for XO.

22
23
24

1 Q. DO YOU AGREE WITH MR. CASE THAT ALL CONVERSIONS SHOULD
2 BE PERFORMED WITHIN 30 DAYS AFTER XO SUBMITS THE REQUEST?

3

4 A. No. As stated by Mr. Owens, all requests for work on 15 or more circuits are
5 considered "projects", meaning the parties must negotiate due dates as standard
6 intervals are not designed for such large numbers of circuits.

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