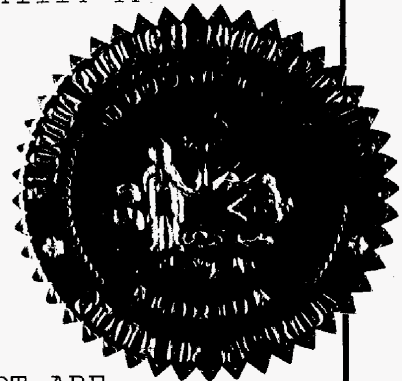


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041114-TP

IN THE MATTER OF:

COMPLAINT OF XO FLORIDA, INC.
AGAINST BELLSOUTH TELECOMMUNICATIONS,
INC. FOR ALLEGED REFUSAL TO CONVERT
CIRCUITS TO UNES; AND REQUEST FOR
EXPEDITED PROCESSING.



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PROCEEDINGS: PREHEARING

BEFORE: COMMISSIONER J. TERRY DEASON
 Prehearing Officer

DATE: Monday, February 7, 2005

TIME: Commenced at 1:30 p.m.
 Concluded at 1:55 p.m.

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
 Official FPSC Reporter
 (850) 413-6734

1 PARTICIPATING:

2 TIMOTHY PERRY, ESQUIRE, McWhirter, Reeves Law Firm,
3 117 South Gadsden Street, Tallahassee, Florida 32301, appearing
4 on behalf of XO Communications Services, Inc.

5 DANA SHAFFER, ESQUIRE, 105 Molloy Street, Suite 300,
6 Nashville, Tennessee 37201-2315, appearing via telephone on
7 behalf of XO Communications Services, Inc.

8 JAMES MEZA, III, ESQUIRE, c/o Ms. Nancy H. Sims,
9 150 South Monroe Street, Suite 400, Tallahassee, Florida
10 32301-1556, appearing via telephone on behalf of BellSouth
11 Telecommunications, Inc.

12 JASON ROJAS, ESQUIRE, FPSC General Counsel's Office,
13 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850,
14 appearing on behalf of the Commission Staff.

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P R O C E E D I N G S

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2 COMMISSIONER DEASON: Call the prehearing conference
3 to order. Could I have the notice read, please?

4 MR. ROJAS: Excuse me?

5 COMMISSIONER DEASON: Could I have the notice read,
6 please?

7 MR. ROJAS: Pursuant to notice issued January 21st,
8 2005, this time and place has been set for a prehearing
9 conference in Docket Number 041114-TP in regard to the
10 complaint of XO Florida, Inc. against BellSouth
11 Telecommunications, Inc. for alleged refusal to convert
12 circuits to UNES; and request for expedited processing.

13 COMMISSIONER DEASON: Thank you. Take appearances.

14 MR. PERRY: Timothy Perry of the McWhirter, Reeves
15 Law Firm, 117 South Gadsden Street on behalf of XO
16 Communications, and also on the phone is Dana Shaffer on behalf
17 of XO Communications.

18 COMMISSIONER DEASON: Mr. Meza, are you with us?

19 MR. ROJAS: Mr. Meza was on the phone right before
20 you walked in, Commissioner.

21 COMMISSIONER DEASON: Okay. Are the connections
22 still up?

23 MR. STADEN: The connection is still up.

24 MR. ROJAS: Jason Rojas on behalf of the Commission.

25 COMMISSIONER DEASON: Okay. And Dana Shaffer is on

1 the phone; is that correct?

2 MR. PERRY: Yes, Commissioner.

3 COMMISSIONER DEASON: I'm sorry. Your name?

4 MR. PERRY: I'm Timothy Perry.

5 COMMISSIONER DEASON: Timothy Perry.

6 Should we give Mr. Meza a couple of minutes or should
7 we proceed?

8 MR. ROJAS: I believe the parties had some
9 preliminary matters to discuss that they brought to my
10 attention today, so it would probably be beneficial to wait for
11 Mr. Meza..

12 MR. PERRY: Yeah. I'm not opposed to waiting for
13 Mr. Meza for a few minutes.

14 (Pause.)

15 MR. MEZA: Dana, I just got a call from my regulatory
16 folks saying that they can't hear us.

17 COMMISSIONER DEASON: We hear you now, so watch what
18 you say.

19 MR. MEZA: Oh, thank you. I apologize for having
20 trouble hearing you, Chairman Deason.

21 COMMISSIONER DEASON: Well, we're glad to have you
22 with us.

23 MR. MEZA: Thank you.

24 COMMISSIONER DEASON: We are in the process of taking
25 appearances. Would you please enter yours?

1 MR. MEZA: Yes. This is Jim Meza on behalf of
2 BellSouth.

3 MS. SHAFFER: Dana Shaffer on behalf of XO.

4 COMMISSIONER DEASON: Okay. Preliminary matters.
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16 for an evidentiary hearing.

17 MS. SHAFFER: And this is Dana Shaffer. If we could
18 as a preliminary matter discuss -- I guess one thing that I'm
19 not clear on, and Jim and I have talked via e-mail this
20 morning, if the parties are able to reach a stipulation as to
21 the appropriate rate, I'm not sure I understand what is left
22 for an evidentiary hearing since the question of an obligation
23 is a question of law.

24 COMMISSIONER DEASON: Mr. Meza, your response.

25 MR. MEZA: Yes, sir. It's BellSouth's position that

1 the seminal issue in the case is Issue 1, but there are several
2 factual and policy considerations that BellSouth will point out
3 during cross-examination as well as through its own witness
4 testimony that it believes the Commission should take into
5 account in addressing Issue 1.

6 MS. SHAFFER: And XO disagrees. We believe it to be
7 an issue of law. And to the extent there are policy arguments,
8 I mean those are exactly that, arguments, and should be
9 briefed.

10 COMMISSIONER DEASON: Okay. We're going to -- at
11 this point I understand where we are. We're going to proceed
12 through the draft prehearing order. And are there any other
13 preliminary matters? Hearing none, then we will proceed
14 through the draft prehearing order.

15 MS. SHAFFER: Jim, can you hear them?

16 MR. MEZA: No, I'm having trouble.

17 MS. SHAFFER: Yeah. We're not hearing anything. I'm
18 sorry, Commissioner Deason.

19 COMMISSIONER DEASON: Okay. What about now? Can you
20 hear me?

21 MS. SHAFFER: Hello?

22 MR. ROJAS: This is Jason Rojas. Can you hear me?

23 MS. SHAFFER: Hello?

24 MR. PERRY: Dana, this is Tim Perry. Can you hear
25 me?

1 MS. SHAFFER: I can hear you, Tim.

2 MR. MEZA: Yeah. This is Jim Meza. I heard you too.

3 COMMISSIONER DEASON: What about -- can you hear me
4 now? This is Chairman Deason.

5 MR. MEZA: Chairman, briefly. I mean, fading.

6 COMMISSIONER DEASON: We'll take a recess to see
7 if -- just stay on the line, but we're just going to take a
8 recess. We'll go off the record and we'll see if we can try
9 to -- stay on the line.

10 MR. MEZA: Thank you, sir.

11 (Brief recess.)

12 COMMISSIONER DEASON: Can everyone hear me now?

13 MS. SHAFFER: Yes, sir.

14 MR. MEZA: Yes, sir.

15 COMMISSIONER DEASON: Very good. We just made a
16 minor adjustment and hopefully that will address it.

17 Mr. Rojas, speak into your microphone.

18 MS. SHAFFER: I'm sorry. You're fading.

19 MR. ROJAS: Parties, can you hear me?

20 MR. MEZA: Yes.

21 MR. ROJAS: Okay.

22 COMMISSIONER DEASON: Okay. I understand that there
23 have been some discussions about stipulating witnesses and
24 maybe even addressing a stipulation on Issue 2.

25 What I intend to do at this point is proceed through

1 the draft prehearing order, and if we need further discussion
2 when we get to that point, we'll do so.

3 MR. MEZA: Yes, sir.

4 MS. SHAFFER: Sounds good.

5 COMMISSIONER DEASON: Okay. As is my custom, when we
6 proceed through the prehearing order, we proceed in a rather
7 rapid fashion section by section. Unless a party indicates
8 that there is a problem or concern, question or clarification,
9 we'll just proceed through. So please feel freely -- free to,
10 to address any concerns that you have.

11 We'll begin with Section I, conduct of proceedings.
12 Section II, case background. Section III, confidential
13 information. IV, posthearing procedures. V, prefiled
14 testimony and exhibits.

15 VI, order of witnesses. I have a question. This
16 order indicates that if we do actually have witnesses take the
17 stand, that we will have direct followed by rebuttal. In some
18 cases we hear direct and rebuttal simultaneously. What is the
19 desire of the parties in this proceeding?

20 MR. MEZA: BellSouth requests that we do testimony
21 simultaneously, both direct and rebuttal.

22 COMMISSIONER DEASON: Is there an objection?

23 MR. PERRY: Dana, do you have a preference?

24 MS. SHAFFER: I do have a preference. I mean, I have
25 a preference that we hear direct and then come back with

1 rebuttal. Since we only have one witness, our witness would be
2 doing both, and that would put us at a disadvantage.

3 COMMISSIONER DEASON: Okay. Mr. Meza, as is normally
4 the case, to hear direct and rebuttal simultaneously usually
5 takes the agreement of all the parties, and the fallback
6 position is to hear direct and then rebuttal. So I think
7 that's what we'll have to do in this case.

8 MS. SHAFFER: Thank you.

9 COMMISSIONER DEASON: Section VII, basic positions.

10 MR. PERRY: I would just like to note, Commissioner,
11 that there appeared to be some formatting errors in XO's basic
12 position, and I believe I could probably just address that with
13 Mr. Rojas.

14 MS. SHAFFER: Tim, I'm going to have to rely on you
15 because I really -- I don't have a copy of the draft prehearing
16 order.

17 MR. PERRY: Yes, ma'am.

18 MS. SHAFFER: I mean, I've been having computer
19 trouble, so that's probably why.

20 COMMISSIONER DEASON: Very well. You can just
21 communicate with Mr. Rojas. And if there are any formatting
22 problems, you can get that clarified with him.

23 MR. PERRY: Okay. Thank you, Commissioner.

24 COMMISSIONER DEASON: Okay. Section VIII, issues and
25 positions. We will begin with Issue 1. Now I understand

1 that -- Mr. Meza, could you --

2 MR. MEZA: Yes, sir.

3 COMMISSIONER DEASON: Can you state again the reason
4 that you believe that this issue needs to be heard at hearing
5 as opposed to simply being briefed?

6 MR. MEZA: Yes, sir. It is BellSouth's position that
7 there are several factual issues relating to the parties'
8 attempt to amend the current agreement to take into account
9 various changes in the law that have transpired since 2003.
10 There is also disputes relating to whether or not XO should
11 avail itself of the change of law obligations in the current
12 agreement to seek the desired relief, and there's also disputes
13 that I believe may exist in relation to what this all means in
14 light of the final rules order or the triennial review remand
15 order that came out on Friday. And combined with that there
16 are several policy considerations that obviously the parties
17 disagree on that we believe the PSC should hear in addressing
18 the issues raised in Number 1.

19 COMMISSIONER DEASON: Okay. Ms. Shaffer.

20 MS. SHAFFER: Mr. Chairman, may I respond?

21 COMMISSIONER DEASON: Yes, please do. Yes.

22 MS. SHAFFER: It's XO's position that the disputed
23 facts to which Mr. Meza refers really just muddy the waters.
24 It is a question of law. In fact, I mean, it would probably be
25 simpler to settle this if we just would stipulate that, you

1 now, both parties have tried to get an amendment. We do not
2 have an amendment. I mean, that fact is not disputed, that
3 there is no amendment. It's not disputed that the
4 interconnection agreement between the parties says whatever it
5 says. And beyond that, it's purely a legal issue to argue in
6 brief. Policy considerations are part of an argument that's
7 more appropriately to be briefed. We think it would be a waste
8 of resources and time of this Commission to get down there and
9 squabble about who said what on what date when the only
10 relevant fact is that the parties do not currently have an
11 amendment that specifically addresses this, and that's
12 undisputed.

13 COMMISSIONER DEASON: Mr. Meza, that suggestion is
14 rather attractive.

15 MR. MEZA: Yes, sir, I understand that. But I think
16 that there are -- at least BellSouth has a concern with the
17 idea that the Commission will look at this in a vacuum.

18 One of the things that we believe you need to hear
19 are implications resulting from, you know, the policy decisions
20 XO has made regarding they will amend their agreement to make
21 it TRO compliant for those portions of the TRO that were not
22 impacted by USTA II, while BellSouth has taken the position
23 that you need to make the agreement compliant with the current
24 status of the law, and there are disputes about that that need
25 to be flushed out. And I'm not suggesting that this would be

1 n all-day hearing, and, in fact, I believe that it could
2 probably be addressed within one or two hours.

3 But the, the -- while there are legal issues involved
4 n Issue 1, there are other things that we believe the
5 ommission should hear, and do not believe that briefing them
6 n a vacuum will necessarily give you the full flavor that we
7 believe you should have.

8 COMMISSIONER DEASON: Okay.

9 MS. SHAFFER: Mr. Chairman, if I may.

10 COMMISSIONER DEASON: Yes.

11 MS. SHAFFER: Of course, XO, you know, strongly
12 disagrees. In fact, I disagree with, with Mr. Meza's statement
13 of the facts. But more importantly, even if what he says were
14 true, it's irrelevant. The only relevant fact is whether or
15 not the parties have an amendment, and they don't. I don't
16 think that's disputed between the parties.

17 And then with regard to any arguments concerning what
18 the ICA may or may not say today, the agreement speaks for
19 itself, and everything else is a legal question. I mean, I
20 think to pull witnesses down there to get into a squabble about
21 who's trying to do what, who said what, when it's totally
22 irrelevant to the core issue is a waste of time. And legally
23 it's inappropriate because there are no disputed issues of
24 material fact, and I think that that's what we need to focus on
25 is what are the material facts. And all of the things that

1 Mr. Meza refers to are immaterial.

2 MR. MEZA: I disagree with that.

3 COMMISSIONER DEASON: I know you do, and I'm ready to
4 rule. Okay?

5 MR. MEZA: Yes, sir.

6 COMMISSIONER DEASON: We're going to allow this issue
7 to stay in. We will allow the, the witnesses to address it.
8 Ms. Shaffer, to the extent that there is testimony provided
9 that is irrelevant, you may object to it at the time.

10 I'm not in a position at this point to -- I'm
11 concerned that to not allow the witnesses to address this, at
12 least attempt to address it at the hearing may prevent all
13 relevant information coming before the Commission. But you're
14 certainly free to pose whatever objection at the time that you
15 think is appropriate.

16 Okay. That addresses Issue 1.

17 Issue 2.

18 MR. MEZA: Yes, sir. Just to highlight to your
19 attention that BellSouth and XO are working on a proposed
20 stipulation that would say to some degree that if BellSouth is
21 unsuccessful on Issue 1, that, you know, the parties stipulate
22 that the current EEL conversion rate would apply for SPA to UNE
23 conversions until such time as a SPA to UNE rate is
24 established. And we're busy trying to work on the exact
25 language of the stipulation.

1 COMMISSIONER DEASON: Do you anticipate that that
2 will be accomplished?

3 MR. MEZA: I think so. Fundamentally there is one
4 disagreement we have over whether or not there is a true-up
5 aspect of that, and Ms. Shaffer raised that with me via e-mail
6 this morning and I'm running that down with my clients. I do
7 not anticipate that it, that it, that we will not be able to
8 reach a stipulation, but I just don't know.

9 COMMISSIONER DEASON: Well, let me offer this to you.
10 I, when -- in reviewing the draft prehearing order, I was
11 concerned with your, Mr. Meza, with your response to this
12 issue. I found it not responsive. It seemed to be more of a
13 continuation of your argument on Issue 1.

14 MR. MEZA: Well, sir, that is --

15 COMMISSIONER DEASON: And to the extent -- I'm sorry.

16 MR. MEZA: -- exactly our point.

17 COMMISSIONER DEASON: I'm sorry. Can --

18 MR. MEZA: Our intent is that all of this, 2 and 3
19 are irrelevant.

20 COMMISSIONER DEASON: Mr. Meza.

21 MR. MEZA: Yes, sir.

22 COMMISSIONER DEASON: I was not finished. To the
23 extent that Issue 2 is as it states, I would anticipate that it
24 is up to you to either get a stipulation or else provide a
25 response, a responsive response to what is asked in that issue.

1 Is that clear?

2 MR. MEZA: Yes, sir. I apologize for interrupting
3 you.

4 COMMISSIONER DEASON: Very good. Any other concerns
5 with Issue 2?

6 MS. SHAFFER: No, sir.

7 COMMISSIONER DEASON: Issue 3, questions or concerns?
8 Very good.

9 Exhibit list, Section IX.

10 MR. PERRY: I'd just like to point out -- I don't
11 have the testimony with me today, but I believe that Gary
12 Case's exhibits are GC-1 and GC-2 in the draft prehearing.

13 MS. SHAFFER: I'm sorry. We can't hear you again.

14 COMMISSIONER DEASON: Can you hear me?

15 MS. SHAFFER: Yes, sir.

16 COMMISSIONER DEASON: He was just clarifying that the
17 exhibits for Witness Case should be identified as GC-1 and
18 GC-2.

19 MS. SHAFFER: Yes, sir. Thank you.

20 COMMISSIONER DEASON: Any other concerns with the
21 exhibit list? Hearing none, Section X, proposed stipulations.
22 Mr. Meza, if there is to be any stipulations, when can that be
23 provided to Mr. Rojas?

24 MR. MEZA: I anticipate having an answer to
25 Ms. Shaffer in the relatively near future. My, my goal would

1 be to get it resolved this week.

2 COMMISSIONER DEASON: Mr. Rojas, is that acceptable?

3 MR. ROJAS: Yes, Commissioner.

4 COMMISSIONER DEASON: Very good. Section XI, pending
5 motions. I believe there are none; is that correct?

6 MR. ROJAS: That is correct.

7 MS. SHAFFER: That's correct at this time,
8 Mr. Chairman. We reserve the right, however, based on the
9 recent FCC ruling to possibly file an additional motion.

10 COMMISSIONER DEASON: What would be the nature of
11 those motions?

12 MS. SHAFFER: Motion for summary judgment, summary
13 disposition.

14 COMMISSIONER DEASON: Very well. I, I appreciate you
15 putting us on notice that that is a possibility. I would
16 anticipate you would discuss that with Mr. Meza during your
17 discussions on possible stipulations as well.

18 MS. SHAFFER: Yes, sir.

19 COMMISSIONER DEASON: Mr. Rojas, there are some
20 pending confidentiality matters; is that correct?

21 MR. ROJAS: Yes, sir. BellSouth has several
22 outstanding requests for specified confidential classification.
23 The original requests were not compliant with our rule, but
24 BellSouth has refiled so that it is compliant with our rule,
25 and those will -- the order will be forthcoming on those.

1 COMMISSIONER DEASON: Okay. Any concerns by the
2 parties?

3 MR. PERRY: Not with respect to BellSouth's
4 confidentiality filings. But I would just like to note for the
5 record that XO had some confidential discovery responses that
6 they filed in response to staff's discovery, and we did a claim
7 of confidentiality under 364.183. To the extent that those are
8 moved into the record at hearing, we would file a request for
9 confidential classification at that time.

10 COMMISSIONER DEASON: Is that acceptable, staff?

11 MR. ROJAS: Yes.

12 COMMISSIONER DEASON: That information will be
13 treated confidential until there is a determination; is that
14 correct?

15 MR. ROJAS: Yes, sir.

16 COMMISSIONER DEASON: Very well.

17 Section XIII, decisions that may impact the
18 Commission's resolution. The prehearing order lists none.
19 Parties, is that correct?

20 MR. MEZA: I, I, I believe that the, the decision
21 from Friday may have some impact.

22 MS. SHAFFER: I'm sorry. I didn't hear the question.

23 MR. MEZA: Whether or not there was any decisions
24 that would impact the Commission's determination, Ms. Shaffer.

25 MS. SHAFFER: Oh, I see. I've actually, believe it

1 or not, read the applicable sections of the order, and we do
2 not believe that it impacts this, this case at all.

3 COMMISSIONER DEASON: Staff?

4 MR. ROJAS: Commissioner, at this time staff has also
5 reviewed the pertinent sections of the final rules, and from a
6 preliminary review we do not feel that it impacts this, this
7 matter.

8 COMMISSIONER DEASON: Very well. Section XIV,
9 rulings. Mr. Rojas, to the extent there's been any rulings
10 made at this prehearing conference, you can include those. I'm
11 not sure there have been other than the fact that we are going
12 to continue to allow testimony to be given as it relates to
13 Issue 1, subject to appropriate objection at the time, but that
14 was already anticipated in this draft.

15 Are there any other matters that need to be brought
16 up to the prehearing officer at this time?

17 MR. PERRY: The only matter I would raise is given
18 the one section that had formatting errors, I'd just like to
19 reserve the right to go back through the issues that were filed
20 in our prehearing statement and compare them to the prehearing
21 order. And I can get with Mr. Rojas and make sure that
22 everything is, is correctly reflected in the prehearing order.

23 COMMISSIONER DEASON: Very well. Mr. Meza, do you
24 have anything in conclusion?

25 MR. MEZA: No, sir. I would like to thank you for

1 your indulgence for allowing me to participate via phone, and I
2 apologize for any inconvenience or disruption to the flow of
3 the hearing for, for that participation.

4 COMMISSIONER DEASON: Ms. Shaffer?

5 MS. SHAFFER: I thank you as well, Mr. Chairman.

6 COMMISSIONER DEASON: I'm sorry. Ms. Shaffer, any
7 final matters?

8 MS. SHAFFER: No. Just I thank you for allowing me
9 to participate via teleconference. And, again, as Mr. Meza
10 said, sorry -- we both apologize if our teleconferencing in
11 disrupted in any way.

12 COMMISSIONER DEASON: Well, it's really not been a
13 disruption. I understand this is an efficient way to handle
14 matters and we are happy to accommodate.

15 MR. MEZA: Thank you.

16 COMMISSIONER DEASON: Hearing nothing further, the
17 prehearing conference is adjourned. Thank you all.

18 (Prehearing conference adjourned at 1:55 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 9th day of February, 2005.

Linda Boles
LINDA BOLES, RPR
FPSC Official Commission Reporter
(850) 413-6734