

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of XO Florida, Inc.  
Against BellSouth Telecommunications,  
Inc. for Refusal to Convert Circuits to  
UNEs and for Expedited Processing.

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Docket No.: 041114-TP  
Filed: April 8, 2005

PUBLIC

PREFILED TESTIMONY AND EXHIBITS

OF

GARY CASE

ON BEHALF OF

XO COMMUNICATIONS SERVICES, INC.

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1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2  
3                   **DOCKET NO. 041114-TP**

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5                   **SUPPLEMENTAL DIRECT TESTIMONY AND EXHIBITS**  
6                   **OF GARY CASE ON BEHALF OF**  
7                   **XO COMMUNICATIONS SERVICES, INC.**  
8                   **APRIL 8, 2005**

9  
10   **Q.    Please state your name, address and position with XO.**

11   A.    My name is Gary Case. My business address is 11111 Sunset Hills Road, Reston,  
12           Virginia 20190. I am Director of Carrier Management for XO Communications,  
13           Inc. (XO).

14   **Q.    Are you the same Gary Case that previously filed Direct and Rebuttal**  
15           **testimony in this proceeding?**

16   A.    Yes. I filed Direct Testimony on December 12, 2004 and Rebuttal Testimony on  
17           January 20, 2005 in this docket.

18                   **Introduction**

19   **Q.    Please explain why you have filed Supplemental Direct Testimony.**

20   A.    XO filed this Complaint against BellSouth Telecommunications, Inc. (BellSouth)  
21           because BellSouth has an obligation to convert, upon request from XO, special  
22           access circuits to UNE pricing according both to the Parties' Interconnection  
23           Agreement (ICA) and, pursuant to my lay understanding of federal law. However,  
24           as I explained in my Direct Testimony, BellSouth has refused to do so. Should  
25           the Commission agree with XO's position that BellSouth has an obligation to  
26           make these conversions, it will be necessary to determine the items enumerated in  
27           Issue 4.

1 This matter was scheduled to go to hearing on March 3, 2005. On March 1, 2005,  
2 BellSouth and XO filed a Joint Motion for Continuance, which was granted in  
3 Order No. PSC-05-0274-PCO-TP. The purpose of the Joint Motion was to give  
4 the Parties time to conduct discovery on the limited issue of XO's entitlement to a  
5 credit for overbilling, at access pricing, those circuits which BellSouth has refused  
6 to convert and to identify the circuits to which such a credit would apply. These  
7 matters, encompassed in Issue 4, were not raised initially, because they are really  
8 just "fall out" issues (issues that would need to be resolved only if the Parties  
9 could not agree on implementation of a Commission order granting relief on XO's  
10 initial Complaint), and XO had hoped that the Parties could simply meet and  
11 agree on the appropriate circuits (and of course, the Commission could still order  
12 the Parties to do so). However, in the course of discovery, it became clear that the  
13 Parties do not/would not agree on these issues, so, rather than wait for a dispute  
14 on the implementation of any order to provide conversions, the Parties have  
15 agreed that it is necessary to provide detailed testimony on these issues. The  
16 Parties have, however, exchanged a composite circuit list based on all of XO's  
17 previous conversion requests, and currently are working together to reach  
18 agreement on the circuits at issue and the amount of true-up applicable to each  
19 circuit. Should the Parties not reach agreement, the Commission will need to  
20 determine the matters in Issue 4 as part of this proceeding.

21 The Parties, therefore, requested that the Commission add the following issue to  
22 the proceeding as Issue 4 and that they be permitted to address this issue in  
23 supplemental direct and rebuttal testimony:

1 If the Commission finds in favor of XO on Issue 1:

2 a. Which circuits are eligible for conversion?

3 b. What is the appropriate effective date of conversion for  
4 each eligible circuit?

5 c. Is XO entitled to any billing credits as a result of such  
6 conversion, and if so, what is the amount of such credit(s)?

7 **Q. Please summarize XO's position on Issue 4.**

8 A. The special access circuits which XO has requested that BellSouth convert to  
9 UNE pricing, which are currently active, are listed in Exhibit No. \_\_ (GC-3 [Case  
10 late-filed deposition Exhibit No. 1]) and are currently eligible for conversion.  
11 (The Commission should bear in mind that this list is constantly changing and  
12 will need to be updated at the conclusion of this proceeding). In addition, XO is  
13 entitled to a credit on such circuits for the difference between what BellSouth has  
14 charged XO and the UNE rate XO should have been charged effective one billing  
15 cycle after the conversion request through the date the circuit is actually  
16 converted. The monthly amount of such credit, \$ [REDACTED], is shown on Exhibit  
17 No. \_\_ (GC-3), on a circuit by circuit basis. The total credit due XO will depend  
18 on the ordered conversion date of each circuit. XO believes the appropriate credit  
19 for current circuits exceeds \$ [REDACTED]. The exact amount should be calculated  
20 in accordance with the Commission's determination of the appropriate conversion  
21 date for each circuit, based on XO's request date.

22 In addition, because the conversion issue has been pending between the Parties  
23 for an extended period of time, some of the circuits at issue in this case have been

1 disconnected. For those circuits, XO is entitled to the difference between the  
2 special access rate BellSouth charged and the UNE rate XO should have been  
3 charged from April 1, 2003 (one billing cycle following XO's conversion request  
4 for these circuits) through the date of circuit disconnection. This amount totals  
5 \$ [REDACTED] and is shown on Exhibit No. \_\_ (GC-4 [Case late-filed deposition  
6 Exhibit No. 4]). A summary of these amounts is provided on Exhibit No. \_\_ (GC-  
7 5).

8 The Commission should order BellSouth to immediately convert those circuits  
9 listed on Exhibit No. \_\_ (GC-3), to perform requested special access circuit  
10 conversions on a going forward basis within one billing cycle of receipt of  
11 conversion request, and to credit XO with the difference between the special  
12 access rates BellSouth charged and the UNE rates it should have charged on all of  
13 the circuits as discussed above. This credit amount should be \$ [REDACTED]  
14 through March 1, 2005, plus additional amounts for continued delay after March  
15 1, 2005 through the date of actual conversion for current circuits

16 **Issue 4a: Which Circuits Are Eligible for Conversion?**

17 **Q. Which circuits are eligible for conversion?**

18 A. It is my lay understanding that the active circuits shown on Exhibit No. \_\_ (GC-  
19 3) are currently being billed by BellSouth to XO at special access rates. XO has  
20 requested that these circuits be converted to UNE pricing and it is XO's position  
21 that these circuits are eligible for conversion to UNE pricing at the "switch as is"  
22 rate in the Parties' current ICA. In addition, the circuits listed on Exhibit No. \_\_  
23 (GC-4) should have been converted by BellSouth, as I explain below. It is my

1 understanding that legal briefs will be submitted setting out the legal arguments  
2 supporting such entitlement. Moreover, BellSouth has acknowledged that it is  
3 legally obligated to make such conversions, and, to my knowledge, BellSouth has  
4 not disputed any specific circuit's eligibility or identified any specific circuit in  
5 this proceeding for which conversion is not appropriate.

6 **Q. Have you provided a current list of the circuits for which XO seeks**  
7 **conversion?**

8 A. Yes, attached hereto as Exhibit No. \_\_\_ (GC-3) is a current list of Florida circuits  
9 for which XO seeks conversion. This list was provided to Staff and BellSouth as  
10 Late-filed deposition Exhibit No. 1 to my deposition taken on February 17, 2005.  
11 It is an update to Exhibit A provided in response to Staff Interrogatory No. 3(a) on  
12 February 8, 2005. But again, the Commission should be aware that such lists  
13 quickly become out of date as the circuits are not static and the list will need to be  
14 updated at the conclusion of this proceeding.

15 **Q. Was Exhibit No. \_\_ (GC-3) prepared under your direction or supervision?**

16 Yes.

17 **Q. Please explain how Exhibit No. \_\_ (GC-3) was prepared and what it shows.**

18 A. Exhibit No. \_\_ (GC-3) was prepared by reviewing and analyzing BellSouth  
19 billing to XO for the listed circuits. It provides the following information:

- 20 • A list by circuit number of all active XO circuits, as of December 2004, based on  
21 BellSouth's January 2005 circuit billing, eligible for conversion from special  
22 access to UNE pricing;
- 23 • The circuit type – all circuits are DS1 circuits;

- 1 • Whether the conversion request was made before or after the issuance of the *TRO*  
2 (conversion requests for circuits listed as pre-*TRO* were submitted to BellSouth  
3 on the March, 2003 NBR) and if the request was made after the *TRO*, the date of  
4 the request;
- 5 • Whether or not the circuit is on a SmartRing (XO does NOT agree with  
6 BellSouth's position that these circuits are ineligible for conversion; in the interest  
7 of clarity, however, this indication was added simply to identify the circuits to  
8 which BellSouth indicated it might object. As I explain herein, those circuits are  
9 eligible for conversion under XO's ICA and applicable law);
- 10 • The total amount of special access charges that BellSouth currently bills on a  
11 monthly basis for each circuit;
- 12 • What the appropriate UNE monthly recurring rate should be for each circuit;
- 13 • The difference per month between what BellSouth has billed and what should  
14 have been billed.

15 Each of the listed circuits should be immediately converted from special access to  
16 UNE pricing. However, the Commission should note that this list is current as of  
17 December 2004. The list will need to be further refined to take into account the  
18 passage of time until a Commission decision is rendered in this case.

19 **Q. Is this circuit list static?**

20 A. No, as XO explained in response to Staff Interrogatory No. 3 and Production  
21 Request No. 4, the list of circuits which XO wants converted is not static.  
22 Because this dispute has been pending for over two years and because no  
23 conversions have taken place, some of the circuits have been disconnected, some

1 customers have left XO while others have selected XO as their carrier, networks  
2 have been groomed, and other events have impacted the list since XO's first  
3 request was made. Even Exhibit No. \_\_ (GC-3) will need to be updated at the  
4 conclusion of this case, and any disconnected circuits be considered only for true-  
5 up, rather than immediate conversion.

6 **Q. When were XO's conversion requests made?**

7 A. XO has made several requests for conversion of special access circuits to UNE  
8 pricing over the prior two-year period. The first request on which XO is basing  
9 its request for relief was made in March 2003. Attached as Exhibit No. \_\_ (GC-6)  
10 is an email from XO to BellSouth requesting conversion of the circuits and the  
11 proprietary circuit list. To my knowledge, BellSouth has not disputed that the list  
12 was submitted by XO. It is also undisputed that none of these conversions were  
13 ever made.

14 **Q. When was the next conversion request made?**

15 A. The next request at issue in this case was made on December 14, 2004. The  
16 request and the confidential circuit list are attached hereto as Exhibit No. \_\_ (GC-  
17 7). None of these conversions was ever made either. (It should also be noted that  
18 though the date on Exhibit No. \_\_ (GC-3) states that the request was made on  
19 December 1, 2004, that is a scrivener's error and it should read December 14,  
20 2004. This does not affect any of the calculations in the exhibit, since the  
21 calculations only show a monthly true-up amount, not a total.)



1 **Q. Does Exhibit No. \_\_ (GC-3), which contains XO's current list of circuits**  
2 **eligible for conversion, match exactly the March 2003 and December 2004**  
3 **conversion requests you described above?**

4 A. No. Circuits which appeared on our March 2003 and December 2004 requests  
5 which no longer appear on Exhibit No. \_\_ (GC-3) or on Exhibit No. \_\_ (GC- 4),  
6 have been removed as no longer eligible for conversion.

7 **Q. Is it your understanding that BellSouth is in agreement with XO that should**  
8 **XO prevail on Issue 1, the circuits you have listed in Exhibit No. \_\_ (GC-3)**  
9 **are eligible for conversion?**

10 A. Though we have, of course, not yet received or reviewed BellSouth's  
11 supplemental direct testimony on this issue, I gleaned from questions asked at my  
12 deposition, that BellSouth may take issue with some of the circuits on the list.

13 **Q. What do you understand BellSouth's objections to be at this time?**

14 A. While XO reserves the right to respond more fully to any issues BellSouth may  
15 raise in its supplemental direct testimony, I understand its position to be that  
16 circuits on SmartRing are not eligible for conversion and that somehow term  
17 contracts may be implicated in our conversion requests.

18 **Q. What is SmartRing?**

19 A. The label SmartRing is a special access transport service leased by XO from  
20 BellSouth.

21 **Q. Are circuits on SmartRing eligible for conversion?**

22 A. Though this again encompasses a legal issue which the Parties will brief, in my  
23 lay opinion the answer is yes. As I understand it, the *TRO* requires commingling.

1 More importantly, our ICA with BellSouth already allows commingling in the  
2 state of Florida; that language is contained in Attachment 2 to our ICA, paragraph  
3 5.7.1. BellSouth must honor its obligation to provide commingling, both under  
4 our ICA with them and pursuant to federal law.

5 **Q. Did you comment differently on this issue at your deposition?**

6 A. Yes; however, I was mistaken. BellSouth's questions were (p. 33, lines 8-9, 11-  
7 12, Case deposition) "Are there any DS1s that are riding on a Smart Ring in  
8 Exhibit A?" and "[i]f there were, would you agree that those circuits should not  
9 be included in Exhibit A?" I responded (at lines 13-14), "Yes, I would say if it  
10 was on a Smart Ring then it's got transport. It's not a stand-alone UNE loop." I  
11 was thinking that it would be an EEL, but I was mistaken. It would be a stand-  
12 alone loop commingled with special access transport. Such commingling is  
13 allowed both under our ICA with BellSouth and under federal law.

14 Under BellSouth's current, and I might add erroneous, "no commingling" policy,  
15 those circuits would not be convertible, but BellSouth is wrong. XO is entitled to  
16 commingling, as I explain above, and those circuits are clearly eligible for  
17 conversion.

18 **Q. Does XO's term contract with BellSouth affect the issue of which circuits are**  
19 **eligible for conversion?**

20 A. No, XO's term contracts with BellSouth are irrelevant and have nothing to do  
21 with the conversion issue in this case. XO has no term contract with BellSouth  
22 that lists the requested circuits or that is specific to the requested circuits. The  
23 contracts are based on XO maintaining a certain overall volume and/or revenue

1 commitment of special access purchases. BellSouth's refusal to provide the  
2 requested conversions based on these contracts is absurd; it is XO's business  
3 decision which circuits to rely on to meet the commitments of contracts, and  
4 whether XO continues to meet the commitments of those contracts, or even to  
5 renegotiate those contracts. Also, the contract commitments are on a 9-state,  
6 region-wide basis, so even if XO converted every eligible Florida circuit to UNE  
7 pricing, it could still make the business decision to meet its contractual  
8 commitments with circuit and/or revenue volumes from other states. The  
9 Commission should not allow BellSouth to use this "red herring" to deny XO's  
10 conversion requests.

11 **Issue 4b: What Is the Appropriate Effective Date**  
12 **of Conversion for Each Eligible Circuit?**

13 **Q. Why is the effective date of conversion significant?**

14 A. As I noted above, despite XO's requests, BellSouth has continued to charge XO  
15 the much higher special access rate for the circuits at issue here rather than the  
16 UNE rate. In addition to XO's request that BellSouth be ordered to convert  
17 special access circuits to UNE pricing on a going forward basis, also at issue are  
18 the credits due to XO for circuits for which XO requested conversion but which  
19 BellSouth has refused to process and for which BellSouth continues to charge the  
20 higher price as well as circuits for which conversion was requested but which  
21 have been disconnected since the conversion request. Once the effective  
22 conversion date is established, the appropriate credit owed to XO due to  
23 BellSouth's refusal to convert the circuits is a fall out calculation.

1 **Q. What is the appropriate effective date of conversion for each eligible circuit?**

2 A. As a preliminary matter, I again preface my remarks by stating that I am not a  
3 lawyer and that this is a matter that will be covered in post-hearing briefs.  
4 However, in my lay opinion, since all of the current circuits listed on Exhibit No.  
5 \_\_\_ (GC-3), with the exception of those whose request date is shown as  
6 December 1, 2004, were on XO's March 2003 conversion request discussed  
7 above, those circuits' conversion date should have been within one billing cycle  
8 of the date of request, or April, 2003. In the alternative, it is my understanding  
9 that the *TRO* required that any requests which a CLEC had pending at the time of  
10 the *TRO* are entitled to the correct pricing up to the time the *TRO* was issued.  
11 This would include of all XO's March 2003 requests shown on Exhibit No. \_\_\_  
12 (GC-3).

13 For the circuits shown on Exhibit No. \_\_\_ (GC-3) for which conversion was  
14 requested in December 2004, their effective date of conversion should be within  
15 one billing cycle that of request, or January, 2005.

16 **Q. How should circuits which have been disconnected be treated?**

17 A. Disconnected circuits are shown in Exhibit No. \_\_\_ (GC-4). The circuits on this  
18 exhibit were all eligible for conversion at the time the request was made but have  
19 been disconnected for any number of reasons. All disconnected circuits were  
20 included in the March 2003 conversion request and their effective date of  
21 conversion also should be April 1, 2003. This conversion date should be used for  
22 calculating the appropriate rate true-up for these circuits.

1                    **Issue 4c: Is XO Entitled To Any Billing Credits as a**  
2                    **Result Of Such Conversion, and If So, What Is The Amount Of**  
3                    **Such Credit(s)?**

4    **Q. Is XO entitled to any credits as a result of BellSouth's refusal to convert the**  
5                    **requested circuits?**

6    A. Yes. All of the circuits I have previously discussed and which are shown on  
7                    Exhibit Nos. \_\_\_ (GC-3 and 4) were the subject of appropriate requests to  
8                    convert. Because BellSouth did not process such requests, XO is entitled to a  
9                    credit for the difference between the amount that was charged and the amount that  
10                  should have been charged.

11 **Q. Has XO calculated those amounts?**

12 A. Yes. Exhibit No. \_\_ (GC-5) shows the total credits due to XO. As of March 1,  
13                  2005, XO was due \$ [REDACTED] for current circuits calculated from one billing  
14                  cycle after the date of request (April 1, 2003, or January 1, 2005, as appropriate),  
15                  through the date of actual conversion and \$ [REDACTED] for disconnected circuits.  
16                  The total credit amount through March 1, 2005 is \$ [REDACTED]. This amount will  
17                  need to be adjusted/increased at the conclusion of the proceeding due to the  
18                  passage of time.

19 **Q. Was Exhibit No. \_\_ (GC-5) developed under your direction or supervision?**

20 A. Yes.

21 **Q. Please explain how it was developed and what it shows.**

22 A. This exhibit is simply a summary exhibit. I have previously described Exhibit  
23                  No. \_\_\_ (GC-3) which shows current circuits. For purposes of calculating the

1 credit due to XO for these current circuits, the difference per month between the  
2 billed amount and the appropriate UNE charge is shown in the last column for  
3 each circuit. That difference per circuit is then multiplied by the appropriate  
4 number of months per circuit. For the circuits listed on the March 2003  
5 conversion request, the appropriate amount of credit through March 1, 2005 is  
6 \$██████████, as shown on Exhibit No. \_\_ (GC-5). For the circuits listed for the  
7 first time on the December 2004 request, the appropriate credit due through  
8 March 1, 2005 is \$██████████. This amount is also shown on Exhibit No. \_\_ (GC-  
9 5).

10 So the subtotal of billing credits to which XO is entitled, through March 1, 2005,  
11 for currently active circuits is \$██████████. In addition, XO is entitled to  
12 \$██████████ in billing credits for the circuits that were disconnected after the  
13 conversion request, as explained below.

14 **Q. Why do some circuits on Exhibit No. \_\_ (GC-3) say “See Note 2” in the**  
15 **column headed “Updated List Total Billed Amount”?**

16 A. Because this exhibit is an update to a previous list (Confidential Exhibit A), it  
17 reflects that, after the creation of Confidential Exhibit A, certain circuits have  
18 become inactive. They are treated on Exhibit No. \_\_ (GC-4).

19 **Q. Have you calculated the credit due to XO for circuits that have been**  
20 **disconnected?**

21 A. Yes. That amount is shown on Exhibit No. \_\_ (GC-4) and is \$██████████.

22 **Q. Was Exhibit No. \_\_ (GC-4) prepared under your direction and supervision**  
23 **and was it previously provided to BellSouth and Staff?**

1 A. Yes, it was prepared under my direction and supervision and was provided to  
2 Staff and BellSouth as Late-filed Deposition Exhibit No. 4.

3 **Q. Please explain what is shown on Exhibit No. \_\_ (GC-4).**

4 A. This exhibit shows the credit due to XO for circuits that were eligible for  
5 conversion at the time the request was been but were subsequently disconnected.

6 It provides the following information:

- 7 • The circuit identification number;
- 8 • The disconnection date;
- 9 • **The BellSouth charge** at the time of the disconnection;
- 10 • What the UNE charge should have been;
- 11 • The difference between the two charges;
- 12 • The credit amount per circuit if it is assumed that conversion should have  
13 occurred on April 1, 2003 (the billing cycle after the request); it is XO's  
14 position that this is the date should be used for the true-up;
- 15 • The true-up amount per circuit assuming the true-up is calculated from the  
16 date of the *TRO*.

17 The amounts are totaled at the end of the spreadsheet.

18 **Q. So what is the total amount of billing credits to which XO is entitled?**

19 A. As of March 1, 2005, XO was entitled to \$ [REDACTED] in billing credits. Of  
20 course, as I explain above, that amount will need to be adjusted – increased -- to  
21 reflect the billing credits for overbilling by BellSouth from March 1, 2005  
22 through the date of actual conversion pursuant to the Commission's Order in this  
23 docket.

**Conclusion**

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**Q. How should the Commission resolve Issue 4?**

A. The Commission should order that the requested conversions be processed immediately, at BellSouth's "switch as is" charge used for EEL conversions (it should be noted that BellSouth has agreed to this rate), and that future conversion requests be properly effectuated within one billing cycle of request. Finally, the Commission should order that BellSouth credit or refund amounts overpaid by XO to BellSouth for all circuits BellSouth improperly refused to convert, based on the date those circuits should have been converted to the appropriate UNE pricing, within one billing cycle of the initial request for conversion of those circuits.

**Q. Does this conclude your Supplemental Direct Testimony?**

A. Yes.



EXHIBIT NOS. \_\_\_\_\_

GC-3 through GC-7

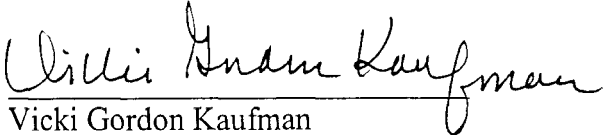
CONFIDENTIAL

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Supplemental Direct Testimony and Exhibits of Gary Case was served on the following by hand delivery this 8<sup>th</sup> day of April 2005:

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