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XO Communications, Inc.



REDACTED VERSION

September 7, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, DC 20554

Re: CC Docket No. 96-262

Dear Chairman Powell:

I am writing on behalf of XO Communications, Inc. ("XO") to protest AT&T's continuing failure to comply with the Commission's recent *CLEC Access Charge Order*.¹ In that order, the Commission established a benchmark rate – currently \$.025 per minute² –for interstate switched access services provided by competitive local exchange carriers ("CLECs"). CLEC access rates that are at or below the benchmark rate fall within a safe harbor and are "conclusively presumed to be just and reasonable."³ XO complied with the Commission's order by filing tariffs, effective June 20, 2001, establishing access rates within the safe harbor.

The Commission intended the benchmark to serve as a "bright-line rule that will facilitate effective enforcement"⁴ and address "problematic" behavior, such as the frequent refusal by some interexchange carriers in the past to pay for CLEC access services that they received.⁵ AT&T, however, has simply ignored the Commission's clear directive.

¹ In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, *Seventh Report and Order*, FCC 01-146 (rel. Apr. 27, 2001) ("*CLEC Access Charge Order*").

² *Id.* at ¶¶ 45, 51; 47 CFR 61.26(c) (establishing that from June 20, 2001 until June 20, 2002, the benchmark rate for a CLEC's interstate switched exchange access services will be \$.025 per minute).

³ *CLEC Access Charge Order* at ¶ 40.

⁴ *Id.* at ¶ 25. *See also id.* at ¶ 60 (explaining that "an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate.")

⁵ *Id.* at ¶ 23.

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After the *CLEC Access Charge Order* was released, AT&T informed both Commission staff and XO personnel that it would resume paying access charges after the Order became effective on June 20, 2001. Since then, XO has had several conversations with AT&T about this issue, and AT&T has repeatedly assured XO that AT&T's policy is to pay access rates that fall within the safe harbor established by the Commission. In fact, AT&T to date has not paid XO any of its outstanding invoices for switched access service provided to AT&T on or after June 20, 2001. AT&T's refusal to pay XO's tariffed interstate access rates not only ignores the Commission's mandate, it is also inconsistent with AT&T's own stated position on this issue.

Despite the fact that XO has filed tariffed rates that fall within the safe harbor, AT&T has not compensated XO for the interstate switched access services it has provided to AT&T since June 20, 2001. Moreover, AT&T has not paid the intrastate switched access charges that it incurred during this period. AT&T's interstate and intrastate switched access charges totaled over {*** REDACTED***} million in August alone.

AT&T's inconsistent statements concerning its willingness to pay access rates that are "conclusively presumed to be just and reasonable" are also reflected in its correspondence with XO. On August 31, 2001, Stan Foster of AT&T sent two letters to Helen Otovo of XO – one stating that XO's access rates are within the FCC's benchmark rates, and explaining that AT&T would pay the charges billed by XO, and another stating that XO's rates are not within the benchmark rates, and indicating that AT&T would not pay the charges billed by XO.⁶

XO has met its obligations under the *CLEC Access Charge Order* by filing access rates that fall within the FCC's safe harbor. Now it is time for AT&T to meet its obligations – and its commitments to XO and the Commission – and pay for the access services it has received from XO.

XO intends to follow up on this matter with the Common Carrier Bureau. We will keep your office advised as developments warrant. Thank you for your attention to this matter.

⁶ See Letters from Stan Foster, Company Manager, Access Billing Management AT&T to Helen Otovo, Switched Billing Analyst, XO Communications (Aug. 31, 2001). The letters are enclosed herewith.

Chairman Michael Powell
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XO Communications, Inc.



Pursuant to 47 C.F.R. Sec. 0.459, XO respectfully requests that the financial information contained in this letter to the Commission be withheld from public inspection and treated as confidential and proprietary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Gerard Saleme', followed by a horizontal flourish line.

R. Gerard Saleme
XO Communications

cc: Dorothy Attwood
Kyle Dixon
Matthew Brill
Sam Feder
Jordan Goldstein
Paul Margie

Enclosures



Stan Foster
Company Manager
Access Billing Management
August 31, 2001

Room B1310
500 North Point Parkway
Alpharetta, GA 30005
(770) 750-3824
FAX (770) 750-8105
EMAIL swfoster@att.com

Ms. Helen Otovo
Switched Billing Analyst
XO Communications

Dear Helen:

We are in receipt of an invoice that includes interstate switched access service charges for the period from and after June 20, 2001. It appears from our initial review that XO's interstate switched access service rates are within the benchmark rates set forth in the Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, issued by the FCC on April 27, 2001 (the "CLEC Access Charge Order"). AT&T reserves the right to further review XO's rates for compliance with the CLEC Access Charge Order.

Provided that you have provided AT&T with a complete and accurate W-9 form and a complete and accurate Vendor Information Form, you will be receiving payment of interstate switched access service charges. Please be advised that AT&T's payment of interstate switched access service charges is without prejudice to and with a full reservation of all of AT&T's rights, including without limitation AT&T's rights arising out of AT&T's pending appeal of the CLEC Access Charge Order. Further, AT&T is paying XO's interstate switched access service charges based solely on the requirements of the CLEC Access Charge Order, for so long as such order remains in effect and is not stayed, modified or reversed on appeal. AT&T's payment of interstate switched access service charges does not constitute an order for or acceptance of XO's interstate switched access services, and AT&T's payment does not constitute an acceptance of or acquiescence in any other terms or conditions of XO's switched access service tariffs.

This letter shall remain in force and effect, and apply to any and all payments that AT&T makes for interstate switched access services provided from and after June 20, 2001, unless and until AT&T notifies XO otherwise.

Very truly yours,

Stan Foster



Stan Foster
Company Manager
Access Billing Management
August 31, 2001

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EMAIL swfoster@att.com

Ms. Helen Otovo
Switched Billing Analyst
XO Communications

Dear Helen:

We are in receipt of an invoice that includes interstate switched access service charges for the period from and after June 20, 2001. XO's interstate switched access service rates are not within the benchmark rates set forth in the Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, issued by the FCC on April 27, 2001 (the "CLEC Access Charge Order"). Accordingly, AT&T is not obligated to pay XO's charges for interstate switched access service charges.

If you claim that XO is entitled to invoke an exemption to the general rules set forth in the CLEC Access Charge Order, please provide AT&T with a certification, sworn under oath, stating the exemption XO is claiming. If XO claims the so-called "rural exemption," the certification should provide all of the information necessary to permit AT&T to evaluate that claim. That information should include, without limitation:

1. A list of all serving areas in which XO operates, including each geographical area within any state in which XO operates or is authorized to operate;
2. A statement that no portion of any serving area falls within either (a) an incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau, or (b) an urbanized area, as defined by the Census Bureau;
3. Copies of all state certifications and intrastate tariffs that identify XO's authorized serving areas;
4. The corresponding incumbent local exchange carrier (or carriers) in each of XO's serving areas; and
5. The names of all of XO's subsidiaries that are claiming an exemption to the general rules in the CLEC Access Charge Order.

AT&T will review that information and respond accordingly. AT&T reserves the right to confirm the information provided by XO. AT&T also reserves the right to request additional information if AT&T determines that it

is needed to clarify XO's response to this letter. Further, the rural exemption only applies if and as long as all of XO's serving areas meet the criteria for the exemption. Thus, even if AT&T agrees that XO presently meets the criteria for the rural exemption, AT&T reserves the right to continue to monitor and confirm XO's operations and serving areas for prospective qualification for the exemption.

Very truly yours,

Stan Foster