XO Communications

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May 11, 2005

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: *Ex parte* communication – BellSouth's Petition for Forbearance, WC Docket No. 04-313 (filed May 27, 2004)

Dear Ms. Dortch :

XO Communications, Inc. ("XO") submits this *ex parte* communication in response to BellSouth's Petition for Forbearance (the "Petition") that was filed on May 27, 2004 and added to WC Docket No. 04-313.[1] XO, which opposes BellSouth's legal interpretation of Section 252,[2] submits the following further information in response to BellSouth's request for forbearance.

For over a year, XO has attempted to negotiate agreements for access to high capacity loops and transport with each of the Bell Companies. During these negotiations, XO has been open to discussions under a number of alternative frameworks, including Section 252 agreements "without regard to the standards set forth in subsections (b) and (b) of Section 251,"[3] special access pricing flexibility arrangements,[4] and privately negotiated commercial

1 Pursuant to Section 10(c) of the Communications Act, 47 U.S.C. 160(c), failure of the Commission to act on a petition for forbearance within one year after the file date shall be deemed granted. In an Order, released February 11, 2005, the Commission extended by 90 days (*i.e.*, until August 24, 2005) the deadline by which the Petition will be granted, absent Commission action. *See* DA 05-391.

2 *See, e.g.*, Loop and Transport Coalition Comments at 156-166, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2003) (interconnection agreements between ILECs and CLECs are required to be filed pursuant to Section 252).

3 *See* 47 U.S.C. § 252(a).

4 In 1999, the Commission established a two-phase pricing flexibility regime for interstate special access services, extending to ILECs subject to price cap regulation increased flexibility to structure their tariffed special access and dedicated transport offerings. *See* Access Charge Reform, CC Docket No. 96-262, *Fifth Report and Order*, 14 FCC Rcd. 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449

agreements. Despite its efforts, XO has been unable to negotiate a significant new arrangement with any of the ILECs. XO believes that uncertainty over the filing requirements for such agreements has been an impediment to true bargaining by the ILECs on individualized terms tailored to XO's needs. XO recommends that the Commission use its forbearance power to establish a voluntary alternative for carriers negotiating commercial agreements. This voluntary alternative should be established to allow requesting carriers to negotiate carrier-specific commercial arrangements for high capacity services on a basis other than volume and term commitments. Thus, for example, this voluntary alternative could be used by requesting carriers to enter into a commercial arrangement providing discounted pricing in exchange for a commitment by a CLEC to migrate certain UNEs to a commercial arrangement, or for a commitment that a certain percentage of a CLEC's revenue would be derived from services provided via a commercial arrangement versus UNEs. These types of agreements would provide meaningful benefits to all concerned by eliminating uncertainty and encouraging a more free-ranging negotiation that creates new options for consumers in the marketplace.

During the *Triennial Review* proceedings, the Commission urged CLECs and ILECs to engage in commercial negotiations for access to UNEs.[5] The Commission noted that "the Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace."[6] For such commercial negotiations to be successful, carrier-customers like XO must have the flexibility to negotiate deals that combine price concessions and *non-price terms* reflecting the carrier's individualized needs.

The Commission has long held that individual negotiations are beneficial in competitive markets. In 1991, the Commission determined that one important benefit of contract-based arrangements in the long distance marketplace was that it "will increase the

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(D.C. Cir. 2001). Under this regime, pricing flexibility relief depends on a demonstration that competitors have made sufficient sunk investments in facilities within an MSA as measured by the extent of competitive fiber collocation and use of competitive transport. *See id.* at 14261-65 (¶¶ 75-80). An ILEC subject to Phase 2 pricing flexibility may offer some services free from the Commission's price cap rules and price cap rates, and may change its rates and terms on one day's notice. A LEC enjoying Phase I pricing flexibility may offer contract tariffs (in which they tailor the price and service to the "individualized" needs of a particular customer) and volume and term discounts for the services subject to such flexibility on one day's notice, but must maintain their generally available, price-cap constrained tariffed rates. *See id.* at 14232-37 (¶¶ 19-33); *see also* 47 C.F.R. § 69.727(b).

5 *See* FCC Press Release, *Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps* (released March 31, 2004).

6 *Id.*

ability of customers to negotiate service arrangements that best address their particular needs."[7] The Commission also found that the practice of negotiating rates with any particular customer on an individualized basis is not unreasonably discriminatory in the commercial mobile radio service market.[8] The D.C. Circuit likewise has approved the use of individually negotiated contracts by carriers.[9]

XO urges the Commission to extend a similar option to the local interconnection marketplace. The Commission should forbear from applying Section 252's standards and the price cap rules if the requesting CLEC elects to utilize Section 211 contracts instead. Under this procedure, upon receipt of a Section 211 request, an ILEC and a CLEC would be free to negotiate the full range of issues relating to access to high capacity services, free of the procedures and obligations of Section 252 or the price cap rules. For example, such negotiations could be based on the location and type of services ordered, on a carrier-customer's willingness to forego the use of UNE arrangements in order to obtain consistent pricing for all network access needs, or on other non-price factors.

The Commission has approved many examples of non-volume and term differences that result from individualized agreements. The Commission cited a "litany of beneficial contract terms" that customers obtained through Tariff 12 contracts, including, for example, special protection against service outages, front-loading or back-loading of payments to accommodate cash-flow availability, and one-second intervals for call measurement (compared to the one minute or six second increments ordinarily available at the time).[10]

Finally, XO urges the Commission to address one of its rulings that has caused confusion in the industry. XO's experience has been that the Commission's recent decision in the AT&T complaint against BellSouth (the "*BellSouth Complaint*"), related to BellSouth's optional tariff discount plan for special access services, has had a chilling effect on ILEC negotiation of special access arrangements on any basis other than volume and term

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7 Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 FCC Rcd. 5880, 5899 (¶ 103) (1991). The Commission also noted that limiting service to generic tariffs "would substantially restrict the availability of these types of service arrangements because no single tariff can adequately incorporate all of the individually designed variables that customers desire." *Id.* ¶ 104.

8 *See* Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless et al., *Memorandum Opinion and Order*, 17 FCC Rcd. 8987 (2002). The Commission noted that negotiating rates with individual customers allowed the parties to "respond immediately to individual customer demand when existing plans and promotions were inadequate." *Id.* at 8998-99 (¶ 24).

9 *MCI v. FCC*, 917 F.2d 30 (D.C. Cir.1990) ("*AT&T Tariff 12 Decision*").

10 Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 FCC Rcd. 5880, 5899 (¶ 103).

XO Communications

commitments. The Commission found that BellSouth's Transport Savings Plan unlawfully discriminates in favor of BellSouth's interexchange affiliate in violation of Section 272.[11] XO urges the Commission to correct the misunderstanding that its decision in the *BellSouth Complaint* strictly limits the ILECs from negotiating commercial arrangements with competitive carriers on any basis other than volume and term commitments. Rather, the Commission should clarify that the *BellSouth Complaint* merely reaffirmed that Section 272 imposes an "unqualified prohibition" on BOC discrimination that favors the BOC's Section 272 affiliate, regardless of whether the discrimination is arguably reasonable, in the absence of a cost showing that justifies the rates and practices.[12]

The requested clarifications described above are needed to eliminate a significant obstacle to the successful negotiation of carrier-specific network access arrangements and will advance the Commission's objectives and the public interest. The Commission will encourage commercial negotiations and agreement if it provides a voluntary alternative framework under which carriers are permitted to negotiate all factors – not just volume and term commitments – in order to reach carrier-specific network access arrangements.

Sincerely,

Christopher McKee

Christopher McKee
Executive Director
of Legal and Regulatory Affairs
XO Communications, Inc.

cc: Dan Gonzalez
Jessica Rosenworcel
Scott Bergmann
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Michelle Carey
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11 47 U.S.C. § 272.

12 AT&T Corp. v. BellSouth Telecommunications, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd. 23898, 23908-909 (¶¶ 30-33) (2004) ("*BellSouth Complaint*"). The Commission noted that the plain language of Section 272 "establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities." *Id.* ¶ 19 (citations omitted). The Commission further explained, "section 272's prohibition on discrimination favoring a BOC affiliate is "flat," "unqualified," and "stringent," and thus permits no exception for conduct that happens to benefit certain non-affiliates, as well." *Id.* ¶ 30. The Commission noted that BellSouth had not attempted to cost-justify the optional tariff discount plans. *See, e.g., id.* ¶ 32.