

XO Communications



11111 Sunset Hills Road
Reston, VA 20190
USA

June 24, 2005

VIA ELECTRONIC SUBMISSION

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

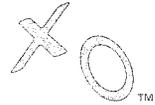
Re: *Ex parte* communication - BellSouth's Petition for Forbearance, WC
Docket No. 04-313 (filed May 27, 2004)

Dear Ms. Dortch:

XO Communications, Inc. ("XO") submits this *ex parte* communication to further address BellSouth's Petition for Forbearance (the "Petition") filed in the above-referenced docket as well as recent filings addressing BellSouth's Petition.

As the two recent *ex parte* letters filed by BellSouth and CompTel/ALTS illustrate dramatically, consideration of BellSouth's Petition, in isolation, presents the Commission with two diametrically opposed viewpoints.¹ On the one hand, if the Commission grants BellSouth's Petition as filed, then arguably no commercial agreement would be subject to the filing and approval requirements of Section 252. On the other hand, if the Commission rejects BellSouth's Petition, then carriers will have no flexibility to negotiate deals that combine price concessions and non-price terms that reflect the carrier's individualized needs. The solution is that only part of what BellSouth has proposed in its Petition is a viable proposal and the petition should not be denied or granted in full, but instead only partially granted. XO supports a partial grant of the Petition to the extent the Commission uses its forbearance power to establish XO's proposed voluntary alternative to allow carriers negotiating carrier-specific

¹ See *Ex Parte* Letter from Bennett L. Ross, General Counsel-DC, BellSouth to Marlene Dortch, Secretary, FCC (Jun. 15, 2005); See *Ex Parte* Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel/ALTS to Marlene Dortch, Secretary, FCC (Jun. 13, 2005).



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commercial arrangements to “opt out” of the Section 251/252 rules and establish a mutual agreement pursuant to Section 211.²

In its Petition, BellSouth asks the Commission to forbear from Section 252 for all “commercially negotiated agreements for the provision of wholesale services that are not required under Section 251.”³ XO opposes BellSouth’s Petition to the extent that it seeks a Commission ruling that commercially negotiated agreements for the provision of services not required under Section 251 (the so-called “Non-251 Agreements”) automatically are not subject to the obligations set forth in Section 252. In particular, XO opposes BellSouth’s legal interpretation of Section 252 because it interprets too narrowly which types of negotiated contractual arrangements between ILECs and CLECs are subject to Section 252.

Sections 251 and 252 are unambiguous in requiring that agreements relating to interconnection, services, and network elements must be filed with the appropriate State commissions. Section 251(c) requires ILECs to: (1) negotiate in good faith, in accordance with Section 252, the particular terms and conditions of agreements to implement the ILEC’s duties;(2) provide interconnection of the ILEC’s network to other networks; (3) provide access to unbundled network elements; (4) allow CLECs to resell services at wholesale rates; and (5) provide for collocation of CLEC equipment in ILEC buildings.⁴

Section 252 governs the process for establishing interconnection agreements between ILECs and CLECs, and provides that negotiated or arbitrated agreements for interconnection must be submitted to State public utility commissions for approval.⁵ Section 252(a)(1), by its express terms, applies to any request by a carrier

² See *Ex Parte* Letter from Christopher McKee, Executive Director, Legal and Regulatory, XO Communications, Inc. to Marlene Dortch, Secretary, FCC (May 11, 2005); *Ex Parte* Letter from Christopher McKee, Executive Director, Legal and Regulatory, XO Communications, Inc. to Marlene Dortch, Secretary, FCC (Jun. 7, 2005)

³ Petition at 1.

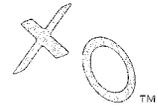
⁴ 47 U.S.C. § 251(c)(1)-(4) and (6).

⁵ Section 252 provides, in relevant part, that –

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting



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for a negotiated agreement for interconnection, services or network elements pursuant to Section 251. BellSouth places heavy reliance on the clause “pursuant to Section 251” as demonstrating that only agreements for the provision of network elements and services required to be offered under Section 251 should be filed.⁶ This clause, however, does not compel that conclusion. First, given that no comma has been inserted after the term “network elements,” the clause “pursuant to section 251” only modifies the request for negotiation and not the resulting contract terms. Thus, a CLEC’s request “pursuant to Section 251” for an agreement for interconnection, services, or network elements triggers the filing and approval provisions in Section 252. Second, Section 252 also states that the resulting “binding agreement” may be executed “*without regard to the standards set forth in*” Sections 251(b) or (c).⁷ This language indicates that, contrary to BellSouth’s contention,⁸ all contracts between ILECs and CLECs relating to “interconnection, services, or network elements” – regardless of whether compelled by the rules implementing Section 251 – are subject to the filing and approval provisions of Section 252.

In addition, the Commission has already determined that the type of agreements that fall under Section 252 is expansive. It has held, in response to Qwest’s 2002 petition for a declaratory ruling that negotiated agreements need not be filed, that agreements creating an “*ongoing obligation pertaining to resale, number*

telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

* * * * *

(e) Approval by State commission

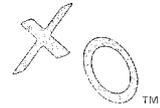
(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

⁶ See *Ex Parte* Letter from Bennett L. Ross, General Counsel-DC, BellSouth to Marlene Dortch, Secretary, FCC (Jun. 15, 2005) at 3 (“*BellSouth Ex Parte Letter*”).

⁷ 47 U.S.C. § 252(a)(1) (emphasis added).

⁸ See *BellSouth Ex Parte Letter* at 6.



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portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation” constitute “interconnection agreements” that must be filed pursuant to Section 252(a)(1).⁹ By any measure, this definition is extremely far-reaching. Indeed, it is difficult to conceive of any contract between an ILEC and a CLEC that does not “pertain to” or “relate to” any of these subjects.¹⁰ To avoid any doubt, the Commission later explained in the *Qwest NAL*, “we rejected [Qwest’s] ‘cramped reading’ of section 252, noting that ‘on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.’ Instead, we broadly construed section 252’s use of the term ‘interconnection agreement’...”¹¹ BellSouth has provided no coherent explanation or example to clarify exactly what kind of agreement or provision would not meet the Commission’s definition and would thus warrant relief from Section 252.

Moreover, the Commission held in the *Qwest Declaratory Order*, that State commissions have a “statutory role provided by Congress,” and that the 1996 Act “expressly contemplates that the section 252 filing process will occur with the states.”¹² The Commission was “reluctant to interfere” with that authority, and thus held that “states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard.”¹³

Despite the Commission’s unequivocal refusal to impede on state jurisdiction, BellSouth cites to a footnote and text in the *Qwest Declaratory Order* in which the Commission opined that only agreements “relating to section 251(b) or (c) should be filed.”¹⁴ This footnote and text, which is taken entirely out of context, does not

⁹ Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), *Memorandum Opinion and Order*, 17 FCC Rcd. 19337, 19341 (¶ 8) (emphasis in original) (“*Qwest Declaratory Order*”).

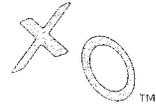
¹⁰ The Commission has excepted minor categories of agreements from this group, such as agreements for retroactive consideration and publicly filed terms for dispute resolution. *Id.*, 17 FCC Rcd. at 19340 (¶¶ 8-9).

¹¹ *Qwest NAL*, 19 FCC Rcd. at 5175 (¶ 11).

¹² *Qwest Declaratory Order*, 17 FCC Rcd. at 19341 (¶ 10).

¹³ The Commission expressly “declined[d] to establish an exhaustive, all-encompassing ‘interconnection agreement’ standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval.” *Id.*

¹⁴ See *Ex Parte* Letter from Bennett L. Ross, General Counsel-DC, BellSouth to Marlene Dortch, Secretary, FCC (Jun. 15, 2005) at 6 (citing *Qwest Declaratory Order* at 19341, n.26).



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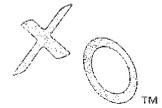
support BellSouth's cause. In the *Qwest Declaratory Order*, the Commission clarified that only agreements creating *ongoing* obligations would need to be filed, and that agreements that "do not affect an incumbent LEC's ongoing obligations relating to section 251" such as agreements that "simply provide for 'backward-looking consideration'" need not be filed.¹⁵ Moreover, to the extent that the Commission may have made a statement in the *Qwest Declaratory Ruling* that was beyond what was minimally necessary to decide the issue before it, that statement is non-binding. It therefore cannot reasonably be contended, as BellSouth purports to do, that the Commission "endorsed" Qwest's flawed interpretation of Section 252(a)(1). Rather, the Commission provided an expansive definition of "interconnection agreement" to indicate that the breadth of agreements subject to Section 252 filing requirements is quite broad.

While XO agrees with CompTel/ALTS that the Commission should preserve the current Section 251/252 pathway for commercially negotiated agreements between ILECs and CLECs,¹⁶ XO urges the Commission to apply its forbearance authority to create an additional pathway that would be entirely voluntary for the CLEC. Under XO's proposal, the Commission would grant in part BellSouth's forbearance request, in order to establish a voluntary alternative for carrier-specific commercial arrangements negotiated on a basis other than volume and term commitments. XO envisions that the opt-out option would be most advantageous when a CLEC and ILEC seek to negotiate a comprehensive agreement blending UNEs, services and non-price considerations. For example, a CLEC might agree to place a certain number of its facilities on UNEs, order special access or managed services for other circuits, and agree to sell spare capacity to an ILEC out of region. Such an agreement might best be negotiated under an alternative construct and filed under Section 211 of the Act.

XO's proposal has several advantages. First, as XO's proposal is an optional choice for carriers, it would not replace or undermine the existing Section 251 and Section 252 rules. If a party wants to negotiate commercial arrangements under the Section 251/252 pathway, it can still do so. Second, adoption of XO's proposal would not cause harm, because both the ILEC and CLEC must agree to it. Third, XO's proposal is additive. XO's proposal provides the parties with an incentive to implement bilateral arrangements that could benefit both parties. It would be particularly useful where the parties want to negotiate an agreement that blends UNE and non-UNE elements. An ILEC who wants to make an offering tailored to a particular carrier-customer's need can do so under XO's proposal.

¹⁵ *Qwest Declaratory Order*, 17 FCC Rcd. at 19342 (¶ 12).

¹⁶ *See Ex Parte* Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel/ALTS to Marlene Dortch, Secretary, FCC (Jun. 13, 2005).



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XO fully expects that the existing Section 251/252 framework would still govern most agreements negotiated between CLECs and ILECs. XO is only proposing the creation of an additional option for situations where the ILEC and CLEC have mutually negotiated a commercial agreement, both parties are willing to forgo rights and obligations under Section 251 and 242, and both parties wish to file that agreement at the Commission under Section 211 authority.

The “opt-out” that XO has proposed is supported by the Commission’s forbearance authority under Section 10 of the Act.¹⁷ The Commission can forbear from applying Section 252 obligations to the proposed voluntary Section 211 contracts, and prohibit states from imposing their own requirements on these agreements if it finds that the proposed forbearance is not necessary (i) to ensure just and reasonable rates and charges; (ii) to protect consumers; and (iii) is consistent with the public interest. XO believes that the Commission can apply its forbearance authority and grant the Petition only to the extent that it provides for a voluntary alternative for carriers negotiating carrier-specific commercial arrangements to elect to opt out of the Section 251/252 rules and establish a mutual agreement pursuant to Section 211.

Sincerely,

A handwritten signature in black ink that reads "Christopher McKee". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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

cc: Dan Gonzalez
Michele Carey
Russell Hanser
Jessica Rosenworcel
Scott Bergmann
Thomas Navin
Jeremy Miller

¹⁷ 47 U.S.C. § 160.