

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 19, 2006

IN RE:

COMPLAINT OF XO TENNESSEE, INC. AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC.  
AND REQUEST FOR EXPEDITED RULING AND  
FOR INTERIM RELIEF

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DOCKET NO.  
04-00306

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ORDER APPROVING VOLUNTARY DISMISSAL WITH PREJUDICE  
OF XO TENNESSEE, INC.'S COMPLAINT AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC.

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This matter came before Chairman Ron Jones, Director Pat Miller and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 21, 2005, for consideration of the voluntary dismissal with prejudice of the *Complaint of XO Tennessee, Inc. Against BellSouth and Request for Expedited Ruling and for Interim Relief* ("Complaint") filed on September 21, 2004.

**BACKGROUND**

**XO's Complaint**

XO Tennessee, Inc. ("XO") filed its *Complaint* against BellSouth Telecommunications, Inc. ("BellSouth") on September 21, 2004, seeking an emergency order requiring BellSouth to immediately process all of XO's requests to convert circuits from special access billing to unbundled network element ("UNE") billing and to establish an interim rate of \$52.73 for initial conversions and \$24.62 for additional conversions. The *Complaint* also sought the establishment of a permanent conversion rate with a retroactive true-up to all conversion

requests and an order requiring BellSouth to credit XO for the difference between the special access rate and UNE loop rate for each circuit for which XO requested conversion and set an expedited schedule for hearing and resolving the *Complaint*.<sup>1</sup>

XO asserted that it had repeatedly requested BellSouth to convert special access lines (loops obtained from BellSouth pursuant to BellSouth's special access tariffs) to UNE loops. XO contended that the conversions being requested are similar to conversions of special access mileage circuits to UNE loop/transport combinations for which BellSouth currently assesses a "switch as is" charge of \$52.73 for initial conversions and \$24.62 for additional conversions. These rates exist in the Parties' current Interconnection Agreement rate amendment, executed February 26, 2003, and XO requested that these rates be assessed until the Authority could establish permanent cost-based rates for these conversions. XO alleged that BellSouth was delaying these conversions to extract additional revenue from XO because the rates for special access are higher than those that XO would pay for UNEs.

Moreover, the *Complaint* alleged that BellSouth had informed XO that before BellSouth would process the requested conversions, XO would be required to pay the full nonrecurring charge to disconnect each special access circuit; the full nonrecurring charge to install each UNE circuit; and a "Project Management Fee" to have BellSouth "coordinate" these orders for discontinuance of service and establishment of service, purportedly to avoid a lapse in end user activity.<sup>2</sup> XO stated that because, in essence, there would be no physical disconnection or installation taking place, XO should not have to pay fees to BellSouth for discontinuing and establishing service.

XO argued that the Federal Communications Commission ("FCC") requires the requested conversions be priced at just and reasonable rates such that conversions appear

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<sup>1</sup> *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc. and Request for Expedited Ruling and for Interim Relief* (September 21, 2004) ("*Complaint*").

<sup>2</sup> *Id.* at 2

seamless to consumers and that the *Triennial Review Order* (“TRO”) prohibits ILECs from requiring conversion fees at levels to deter these requested conversions and unjustly profiting from them.<sup>3</sup>

Finally, based on paragraph 588 of the *TRO*, XO requested that the TRA require BellSouth to credit XO the difference between the special access rates it was currently paying and the UNE loop rate for which XO has requested conversion back to one billing cycle after XO made its conversion request.<sup>4</sup>

### **BellSouth’s Response**

In *BellSouth Telecommunications, Inc.’s Response* (“Response”) filed on October 21, 2004, BellSouth argued that XO’s claim is not supported by the law or the parties’ current Interconnection Agreement. BellSouth stated that an emergency order would not be appropriate because, among other reasons, the dispute regarding the conversion of circuits had been pending since at least February 2002 and this docket was an attempt by XO to circumvent the change of law and amendment process by attempting to “cherry-pick” certain portions of the FCC’s *Triennial Review Order* without executing an amendment to incorporate the TRO in its entirety.<sup>5</sup> As such this docket could have wide-range policy ramifications.

BellSouth asserted that, in July 2004, it sent XO an amendment to the existing Agreement (“Vacatur Amendment”) addressing the D.C. Circuit’s decision in *USTA II*,<sup>6</sup> which

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<sup>3</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978 (2003), *corrected by Errata*, 18 FCC Rcd. 19020 (2003)(“*Triennial Review Order*” or “*TRO*”), ¶ 587.

<sup>4</sup> Paragraph 588 of the *TRO* states:

We [the FCC] recognize, however, that converting between wholesale services and UNEs (or UNE combination) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request.

<sup>5</sup> *BellSouth Telecommunications Inc.’s Response*, p. 2 (October 21, 2004).

<sup>6</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004)(“*USTA II*”).

vacated certain unbundling rules. The Vacatur Amendment would have incorporated the *USTA II* decision into XO's current Agreement, and, along with the surviving portions of the *TRO* that were not affected by *USTA II*, would have provided XO all of the relief it was seeking through its *Complaint*, to wit: a contractual obligation whereby BellSouth would convert special access circuits to UNEs at Total Element Long Run Incremental Cost ("TELRIC") pricing. According to BellSouth, XO refused to execute the Vacatur Amendment.<sup>7</sup>

### **Travel of the Case**

On December 9, 2004, BellSouth filed a *Request To Defer* this matter, stating that XO's *Complaint* is not ripe for consideration because the matter raises issues related to services that BellSouth maintains are impacted by the *TRO*, the *USTA II* decision of the D.C. Circuit Court, the *Interim Rules Order*<sup>8</sup> of the FCC and the *Final Rules* expected from the FCC.<sup>9</sup> On December 13, 2004, the panel granted BellSouth's *Request to Defer* by a majority vote.<sup>10</sup> The majority of the panel determined that it would be beneficial to wait until the FCC issues its *TRO* Final Rules on unbundling to consider XO's *Complaint*.

On January 7, 2005, XO filed a letter reiterating its request for interim relief and reporting that the FCC had voted to approve the Final Rules on December 15, 2004. XO contended that the FCC's Final Rules have no effect on the interim relief requested by XO for DS1 circuits, and little, if any, impact on the interim relief requested by XO for DS3 circuits. XO also requested that BellSouth be required to report to the TRA and to XO within two weeks

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<sup>7</sup> *BellSouth Telecommunications Inc.'s Response*, p. 6 (October 21, 2004).

<sup>8</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, 19 FCC Rcd. 16783 (2004) ("*Interim Rules Order*")

<sup>9</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*," or "*TRRO*").

<sup>10</sup> Director Jones did not vote with the majority in granting BellSouth's *Request to Defer* and instead moved to deny the *Request to Defer* and to grant interim relief with a true-up. As a basis for his motion, Director Jones opined that the adoption of an interim rate with a true-up would prevent harm to both parties. As to BellSouth, the true-up permits it to receive the permanent rate from the date of the adoption of the interim rate. As to XO, the interim relief would allow XO to immediately realize savings that it may not be able to recover absent the setting of an interim rate. See Transcript of Authority Conference, p. 46 (December 13, 2004).

whether any Tennessee wire centers fall within the exemption carved out by the FCC for certain wire centers.

At the regularly scheduled Authority Conference held on January 10, 2005, BellSouth and XO came before the panel to request additional time to continue negotiations regarding a possible settlement of the *Complaint*. The panel voted unanimously to defer the matter to the January 31, 2005 Authority Conference, to allow the parties additional time to negotiate.

On January 18, 2005, XO filed a letter notifying the Authority that the negotiations had failed and asking that the matter be considered by the panel during the January 31, 2005 Conference.<sup>11</sup> XO filed a second letter on January 25, 2005 urging the TRA to grant its request for interim relief regarding the DS1 circuits because those lines would not be affected by the FCC's Final Rules.<sup>12</sup> BellSouth filed a letter on January 27, 2005 responding to XO's January 18, 2005 letter and expressing its disagreement with XO's arguments and referring the Authority to its previous filings in this proceeding.<sup>13</sup>

At the January 31, 2005 Authority Conference, the panel ordered the parties to brief the impact of the FCC's Final Rules on the issues in this docket within seven days of the issuance of the Final Rules. On February 4, 2005, the FCC released its Final Rules as the *Triennial Review Remand Order* ("TRRO").<sup>14</sup> The TRRO set forth the FCC's reclassification of certain UNEs, which changed the obligation of incumbent local exchange carriers to provide those UNEs to competitive local exchange carriers. The parties filed the briefs as ordered.

On February 24, 2005, XO submitted a letter to the Authority in which it attached a filing made by BellSouth to the FCC on February 18, 2005. The filing listed the BellSouth end-offices affected by the FCC's TRRO. Based on BellSouth's FCC filing, XO requested that the

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<sup>11</sup> See Letter from Henry Walker to Chairman Pat Miller, p. 1 (January 18, 2005).

<sup>12</sup> See Letter from Henry Walker to Chairman Pat Miller, p. 2 (January 25, 2005).

<sup>13</sup> See Letter from Guy Hicks to Chairman Pat Miller (January 27, 2005).

<sup>14</sup> TRRO, 20 FCC Rcd. 2533 (2004).

TRA require BellSouth to comply with all conversion requests except those involving the DS1 loops subtending Nashville Main or DS3 loops subtending Nashville Main or Memphis Oakville central offices.<sup>15</sup>

During a regularly scheduled Authority Conference on February 28, 2005, the panel voted unanimously to grant, in part, the interim relief requested by XO in the *Complaint*. The panel determined that, pursuant to FCC rules in place prior to the issuance of the *TRRO*, BellSouth was required to convert the special access circuits at issue to UNEs.<sup>16</sup> The *TRRO* did not change or vacate any language that would alter BellSouth's obligation to convert special access circuits to UNE circuits as requested by XO except under certain circumstances. Based on XO's assertion, none of those circumstances existed for the circuits at issue in this docket. Furthermore, consistent with a previous TRA decision regarding the rates for converting these circuits,<sup>17</sup> the panel found that BellSouth should convert XO special access circuits to UNE circuits at an interim rate of \$52.73 for initial conversions and \$24.62 for additional conversions. The interim rates would be subject to true-up upon determination and approval by the Authority of final rates. The panel found that the parties should submit cost studies no later than April 1, 2005 to support the Authority's final rate determination. The panel declined to grant XO's request that BellSouth credit XO the difference in special access and UNE rates retroactively for each circuit for which XO had requested conversion.

On March 29, 2005, BellSouth, with the agreement of XO, filed a letter requesting a twenty day extension for filing its cost study<sup>18</sup> and subsequently on April 21, 2005 filed its Unbundled Network Element Cost Study in this docket. By notice issued on July 19, 2005, the

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<sup>15</sup> See Letter from Henry Walker to Chairman Pat Miller, pp. 1-2 (February 24, 2005).

<sup>16</sup> See Transcript of Authority Conference, p. 56 (February 28, 2005).

<sup>17</sup> See *In re: Petition for Arbitration of ITC^Deltacom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, Transcript of Proceedings, pp. 36-38 (January 12, 2004).

<sup>18</sup> See Letter from Joelle Phillips to Chairman Pat Miller, p. 1 (March 29, 2005).

Authority invited interested parties to file comments on or before August 2, 2005 regarding BellSouth's cost study. Through a series of correspondence, XO requested additional time to file comments because it was actively engaged in settlement negotiations with BellSouth.


Finally on October 10, 2005 the parties, by letter from BellSouth, advised the Authority that they had settled their dispute regarding the issues in this docket. On October 12, 2005 the parties jointly filed a letter stating that XO had agreed to dismiss its *Complaint* in this docket with prejudice.<sup>19</sup>

**NOVEMBER 21, 2005 AUTHORITY CONFERENCE**

At a regularly scheduled Authority Conference held on November 21, 2005, based on the two filings of the parties notifying the Authority of the agreement, the panel voted unanimously to dismiss XO's *Complaint* with prejudice and close this docket.

**IT IS THEREFORE ORDERED THAT:**

The *Complaint of XO Tennessee, Inc. Against BellSouth and Request for Expedited Ruling and for Interim Relief* is dismissed with prejudice and this docket is hereby closed.

  
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Ron Jones, Chairman

  
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Pat Miller, Director

  
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Sara Kyle, Director

<sup>19</sup> As part of their settlement, BellSouth agreed to voluntarily dismiss, with prejudice, its complaint against XO seeking an audit of XO's Enhanced Extended Loops. See *In re. Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.*; *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and XO Tennessee, Inc.*, Docket No. 02-001203, *Order Approving BellSouth Telecommunications, Inc.'s Voluntary Dismissal With Prejudice of Its Complaint Against XO Tennessee, Inc. and Closing TRA Docket No. 02-01204*, pp. 3-4 (December 20, 2005).