

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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XO COMMUNICATIONS SERVICES, INC. (U-5553-C).

Complainant,

Case No. 09-07-021

v.

PACIFIC BELL TELEPHONE COMPANY,
d/b/a AT&T CALIFORNIA (U-1001-C),

Defendant.

OPENING BRIEF OF XO COMMUNICATIONS SERVICES, INC. (U-5553-C)

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OPENING BRIEF OF XO COMMUNICATIONS SERVICES, INC. (U-5553-C)

Pursuant to the procedural schedule established in the above-captioned proceeding, XO Communications Services, Inc. (U-5553-C) (“XO”) provides the following Opening Brief in support of its Complaint.

INTRODUCTION

The issue raised in XO’s Complaint is simple. The Federal Communications Commission (“FCC”) requires incumbent local exchange carriers (“ILECs”) to provide “cross-connect” facilities between competitive local exchange carriers (“CLECs”) that are collocated in the ILEC wire center. These facilities enable the CLECs to exchange traffic and allow one CLEC to obtain competitive transport services from the other. The cross-connect facilities, like other aspects of collocation, must be priced at rates based on total element long-run incremental costs (“TELRIC”). The interconnection agreement (“ICA”) between XO and AT&T incorporates these requirements. AT&T, however, refuses to provide XO the most efficient cross-connect facilities at TELRIC-based rates in wire centers

where AT&T is not required to offer dedicated transport as an unbundled network element (“UNE”).

AT&T cannot justify its refusal to comply with its legal obligations. The availability of UNEs in a particular wire center is wholly unrelated to the rates AT&T charges XO for collocation cross-connects. No portion of those facilities is a UNE. AT&T’s characterization of these cross-connects to include “dedicated transport” is factually incorrect, but even if it were not, “dedicated transport” located wholly within an ILEC wire center is not a UNE that the FCC or the Commission can relieve AT&T of the obligation to provide. Indeed, permitting AT&T to charge XO several hundred dollars per month for “transport” that AT&T incurs no cost to provide is fundamentally inconsistent with the FCC’s and this Commission’s goals to foster the development of both wholesale and retail local exchange competition. The Commission, therefore, should grant XO the relief it has requested in its Complaint.

BACKGROUND

XO is a CLEC that provides intrastate telecommunications services in California in competition with AT&T, the state’s largest ILEC. XO and AT&T are parties to a Commission-approved ICA, pursuant to which XO has obtained and continues to maintain physical collocation in several AT&T wire centers. XO uses this collocation to place equipment enabling XO to interconnect with AT&T and to access UNEs.¹

XO obtains cabling from AT&T that originates on XO’s collocated equipment and terminates on an AT&T Main Distribution Frame (“MDF”). AT&T also terminates facilities on these frames, and XO accesses these facilities by having AT&T provide a connection

¹ Factual Stipulation ¶¶ 1-4.

between the XO and AT&T terminations on the frames. This cabling and these connections on the MDF are generally known as “cross-connects.”²

CLECs other than XO also collocate in AT&T wire centers and have established cabling between their collocated equipment and the AT&T MDF. XO interconnects with these other collocated CLECs to exchange traffic and/or to provide or purchase competitive transport facilities. XO and the other CLEC can obtain cables from AT&T to directly connect the equipment in their collocation spaces, but such an option is expensive and thus is used only when high volumes of traffic are involved. More commonly, XO and the other CLEC interconnect by having AT&T provide a connection between one of XO’s terminations on the MDF and the other CLEC’s termination on the same frame (for purposes of this proceeding referred to as “Cage-to-Cage Interconnection via the MDF”).³

XO initially obtained Cage-to-Cage Interconnection via the MDF by ordering services out of AT&T’s federal special access tariffs at the tariffed rates. Those rates are as high as \$723.96 per month for a DS3 cross-connect. AT&T breaks this rate down into the following elements:

<u>Element</u>	<u>Rate</u>
2 Cross-Connects	\$61.98 (each)
Zero Mileage Special Access Transport	\$600

In 2007, XO requested that AT&T convert the special access pricing in California for XO’s Cage-to-Cage Interconnection via the MDF to total element long-run incremental cost (“TELRIC”) pricing under the parties’ ICA. The TELRIC rate for the same DS3 cross-

² *Id.* ¶ 5.

³ *Id.* ¶¶ 6-8.

connect that XO obtained out of the AT&T tariff is \$91.36 per month. AT&T breaks this rate down into the following elements:

<u>Element</u>	<u>Rate</u>
2 Cross-Connects	\$45.68 (each)
Zero Mileage UNE Transport	\$0 ⁴

AT&T agreed to convert the collocation cross-connects from its tariff to the ICA but only in wire centers that had been deemed “impaired” for dedicated interoffice transport under the criteria established by the FCC in its Triennial Review Remand Order (“TRRO”).⁵ AT&T refused to convert the special access pricing for XO’s Cage-to-Cage Interconnection via the MDF to TELRIC pricing in wire centers that the Commission has determined are not so impaired. Instead, AT&T has continued to bill XO for these facilities at AT&T’s tariff rates, which can be over *seven times higher* than the TELRIC rates established by the Commission and incorporated into the Parties’ ICA. By far the largest difference in the rates is the “transport” element, which is \$0 under TELRIC but up to \$600 per month for a DS3 in AT&T’s tariff.⁶

XO began disputing AT&T’s billing for collocation cross-connects in California as of January 1, 2008, and paid AT&T only the amounts that were properly due for Cage-to-Cage Interconnection via the MDF. As of November 15, 2009, the total amount in dispute is approximately \$1,482,996.⁷ The parties’ attempted to resolve their disagreement on a

⁴ *Id.* ¶¶ 9-10.

⁵ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-290, Order on Remand, 20 FCC Rcd 2533 (2005), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁶ *Id.* ¶¶ 10-11.

⁷ AT&T would not stipulate that this figure is correct, but AT&T offered no other amount. If the Commission finds in favor of XO, therefore, the Commission either should order AT&T to pay or credit XO the amounts that

business-to-business basis for more than a year without success, after which XO filed its Complaint with the Commission to resolve the dispute.⁸

DISCUSSION

The FCC has interpreted Sections 201 and 251(c)(6) of the Federal Communications Act⁹ to require ILECs to provide cross-connects between CLECs collocated within the same ILEC wire center.¹⁰ The FCC defines “cross-connect” as “a cabling scheme between cabling runs, subsystems, and equipment using patch cords or jumper wires that attach to connection hardware on each end.”¹¹ “Cross-connects interconnect incumbent LEC equipment to other incumbent LEC equipment and incumbent LEC equipment to collocator equipment,” and are also “used to interconnect one collocator’s equipment to another collocator’s equipment.”¹² When used for the latter purpose, the FCC concluded that requiring the ILEC to provide cross-connects avoids discrimination by “put[ing] the collocator in position to achieve the same interconnection with other competitive LECs that the incumbent itself is able to achieve.”¹³ The FCC found that refusal to provide cross-connects would be discriminatory because it “would in effect force the competitive LEC to purchase incumbent LEC transport in order to access a competitive provider’s transport service.”¹⁴ Because the FCC included cross-connects between collocating CLECs as part of the ILECs’ obligation to provide

XO has calculated or require the parties to work together to agree on the correct amount. See Scoping Memo and Ruling of Assigned Commissioner at 2, Issue 4.

⁸ *Id.* ¶¶ 12-13.

⁹ 47 U.S.C. §§ 201 & 251(c)(6).

¹⁰ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204, Fourth Report and Order ¶¶ 55-84 (rel. Aug. 8, 2001) (“*Collocation Cross-Connect Order*”).

¹¹ *Id.* ¶ 58 (quotation marks and citation omitted).

¹² *Id.*

¹³ *Id.* ¶ 82.

¹⁴ *Id.* ¶ 83.

physical collocation under Section 251(c)(6), ILECs must provide those cross-connects at TELRIC-based rates.¹⁵

AT&T does not dispute that it has an obligation to provide cross-connects to XO, and AT&T is charging XO TELRIC-based rates for cross-connects in some of the AT&T wire centers in which XO is physically collocated. AT&T, however, insists on charging XO tariff rates for cross-connects in wire centers in which AT&T no longer has the obligation to provide dedicated transport as a UNE pursuant to the TRRO. The TRRO, however, has no effect whatsoever on AT&T's obligation to provide collocation, including cross-connects between XO and another collocated CLEC.

The FCC expressly stated that the TRRO “focus[ed] on the market-opening provisions of section 251(c)(3), which require that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2).”¹⁶ The FCC characterized the TRRO as “impos[ing] **unbundling** obligations only in those situations where we find that carriers genuinely are impaired without access to **particular network elements** and where **unbundling** does not frustrate sustainable, facilities-based competition.”¹⁷ The TRRO only addresses UNEs. Nothing in that order purports to modify, reduce, or have any other impact on ILECs' obligations to provide collocation under Section 251(c)(6). More specifically, the FCC in its 2004 TRRO never even mentions its 2001 Collocation Cross-Connect Order, much less makes any changes to that prior order. Accordingly, there is no “relationship between the

¹⁵ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 629 (1996) (subsequent history omitted) (“*Local Competition Order*”) (interpreting Section 251(c)(6) to require the same pricing rules for collocation as apply to interconnection and access to UNEs).

¹⁶ TRRO ¶ 1.

¹⁷ *Id.* ¶ 2 (emphasis added).

FCC's Triennial Review Remand Order and its Collocation Order as applied to the facts of this case.”¹⁸

AT&T disagrees and claims that it is providing “dedicated transport” through the cross-connects it provides XO, and dedicated transport is one of the elements the FCC concluded in the TRRO that ILECs were not required to provide in “non-impaired” wire centers. AT&T is incorrect. A cross-connect is not “transport.” The FCC defines a cross-connect as merely cabling that connects equipment located in the same wire center.¹⁹ In this case, it is nothing more than a patch cord that runs from an XO termination on the MDF to another CLEC's termination on the same frame. Such a patch cord is not transport, nor can any other portion of the cross-connect between XO and other CLEC be characterized as “transport.” Collocation cross-connects provided at TELRIC rates, therefore, should not include any “transport” charge.²⁰

Even if a cross-connect could somehow be considered “transport” from a network perspective – which it cannot – it is not the dedicated transport the FCC addressed as a UNE in the TRRO. ILECs must “provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis” under specified conditions.²¹ The FCC defines “dedicated transport” as “incumbent LEC transmission facilities *between wire centers or switches* owned by the incumbent LECs, or *between wire centers or switches* owned by the incumbent LECs and switches owned by requesting

¹⁸ Scoping Memo and Ruling of Assigned Commissioner at 2, Issue 1.

¹⁹ *Collocation Cross-Connect Order* ¶ 58.

²⁰ Scoping Memo and Ruling of Assigned Commissioner at 2, Issues 2 & 3. AT&T includes a “UNE transport” rate element for cross-connects in impaired wire centers, but the rate is \$0. Factual Stipulation ¶ 10. AT&T, however, provides no “UNE transport” or any other “transport” when providing collocation cross-connects, and there should not be either a “transport” rate element or a “transport” rate associated with such cross-connects, regardless of whether the wire center is “impaired” or “non-impaired” under the TRRO.

²¹ 47 C.F.R. § 51.319(e).

telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.”²²

Collocation cross-connects begin and end entirely *within* a single ILEC wire center and thus no part of that connection can be considered UNE dedicated transport, which is defined as being provided *between* wire centers and/or switches.

AT&T’s position is inconsistent not only with the FCC’s definition of UNE “dedicated transport” but with the purpose underlying the *Collocation Cross-Connect Order*, as well as the TRRO. The FCC found in the *Collocation Cross-Connect Order* that a “failure to provide cross-connects would in effect force the competitive LEC to purchase incumbent LEC transport in order to access a competitive provider’s transport service.”²³ AT&T is doing just that. XO cannot provide or obtain competitive transport to or from an AT&T wire center without cross-connecting its collocated equipment to the collocated equipment of the other CLEC. By imposing up to \$600 per DS3 cross-connect per month in “transport” charges in “non-impaired” wire centers, AT&T is effectively compelling XO to purchase AT&T tariffed transport in order for XO (or any other CLEC) to provide or obtain competitive transport.

Such a compulsion, moreover, undermines the basis for the wire center’s non-impaired status under the TRRO. The FCC concluded in that order that where transport “facilities are or are likely to be available from competitors on a wholesale basis, we find that competing carriers are not impaired without access to these facilities from the incumbent LEC.”²⁴ AT&T’s \$600 monthly transport charge for cross-connects effectively makes

²² *Id.* § 51.319(e)(1); accord TRRO ¶ 67.

²³ *Collocation Cross-Connect Order* ¶ 83.

²⁴ TRRO ¶ 127.

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

On February 17, 2010, I caused the following to be served:

OPENING BRIEF OF XO COMMUNICATIONS SERVICES, INC. (U-5553-C)

via electronic mail to all parties on the service list C.09-07-021 who have provided the Commission with an electronic mail address and by First class mail on the parties listed as “Parties” and “State Service” on the attached service list who have not provided an electronic mail address.

/s/

Judy Pau

VIA EMAIL AND US MAIL

Commissioner Michael R. Peevey
California Public Utilities Commission
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ALJ Karl Bemesderfer
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