

**BEFORE THE
ILLINOIS COMMERCE COMMISSION**

In the Matter of)	
)	
Petition for Arbitration of XO)	
COMMUNICATIONS SERVICES,)	Docket No. 05-0763
INC., of an Amendment to an)	
Interconnection Agreement with SBC)	
ILLINOIS, INC. Pursuant to Section)	
252(b) of the Communications Act of)	
1934, as Amended)	

REPLY BRIEF OF XO COMMUNICATIONS SERVICES, INC.

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Communications Act of 1934, as)	
Amended)	

REPLY BRIEF OF XO COMMUNICATIONS SERVICES, INC.

XO Communications Services, Inc. (“XO”) provides the following Brief in reply to the Initial Brief of Illinois Bell Telephone Company (formerly “SBC” and now referred to as “AT&T Illinois” or “AT&T”) and the Staff of the Illinois Commerce Commission (“Commission Staff” or “Staff”).

The Commission should adopt XO’s proposed language in its entirety and reject AT&T’s and Staff’s proposals. The positions of AT&T and Staff do not acknowledge the realities of AT&T’s designation of wire centers as non-impaired and XO’s ability to self-certify. AT&T is holding the cards – it has the information in its possession that is necessary for XO to perform a diligent inquiry. If the Commission accepts Staff’s and AT&T’s positions, AT&T will have a financial incentive to incorrectly designate wire centers as non-impaired and XO will be left holding the bill for AT&T’s errors.¹

¹ In AT&T’s Initial Brief, AT&T goes to great lengths describing Docket 04-0606 and Docket 05-0442 and questioning XO’s decisions not to participate in those dockets. XO moved for dismissal on October 15th, 2004, from Docket 04-0606 a complaint brought against the CLECs by AT&T (then SBC) because it had

OPEN ISSUE

Issue 1

Should the TRRO Amendment include a provision that addresses instances where AT&T's designation of non-impaired wire center(s) is found to be incorrect and the wire center(s) reverts back to being an impaired wire center(s)? If so, what credits, (if any) and procedures should apply in connection with the reversion?

Amendment Provisions at Issue:

Sections 4.1.6

The TRRO Amendment should include a provision that ensures that XO does not suffer financial harm if AT&T improperly or erroneously designates a wire center as unimpaired. AT&T Illinois' Initial Brief and Staff's Initial Brief erroneously conclude that the FCC's self-certification process and the TRRO Amendment provisions give XO all of the protection it needs to prevent harm if AT&T incorrectly claims nonimpairment of wire centers. This is simply not true.

First, XO takes the good faith requirement in the self-certification process seriously. XO will not, as AT&T and the Staff appear to want it to do, self certify first and ask questions later. Rather, XO wants to conduct (and the TRRO requires) "a reasonably diligent inquiry and, based on that inquiry, self-certify..."² Yet AT&T has thwarted previous efforts by XO to do so. Since February 18th, 2005, almost one year ago, XO has requested, on multiple occasions, the underlying data that AT&T utilized to designate wire centers as non-impaired. Nevertheless, to date, AT&T has refused to provide this data. Thus, AT&T's failure to address this issue in a timely manner

already arbitrated and executed a TRO Amendment with AT&T. AT&T also fails to acknowledge that it included XO in its complaint, even though the parties had been negotiating the TRO issues for months.

² Paragraph 234, TRRO

corroborates XO's concern. AT&T is the repository of all relevant information: the numbers of business lines and loops served out of the wire center, the number and identity of fiber-based collocators, etc. Based on a "diligent inquiry" of information provided by AT&T, CLECs may challenge AT&T's determinations if they detect errors, but the information that CLECs rely on for such information will only be as good as their source – AT&T. AT&T clearly is in the best position to ensure that its wire center designations are accurate. Without the information in AT&T's possession, XO has no way of knowing whether another carrier has been inaccurately designated as a fiber based carrier. XO cannot even know whether or not AT&T "thinks" that a particular CLEC is collocated in a particular office. Neither XO, nor any other carrier, can be assured that its self-certifications cover all of the potential errors that AT&T might make in designating offices as non-impaired.

Additionally, if another CLEC self-certifies in a wire center, and AT&T disputes that self-certification and loses, XO and other CLECs should not be financially penalized for deciding not to challenge AT&T's designation based on the information they were able to acquire. Nor should AT&T be rewarded for the double misfeasance of incorrectly designating a wire center as non-impaired and withholding information from CLECs that would have allowed them to make a good faith self-certification. Therefore, if the Commission determines that a wire center should not be designated as non-impaired, XO should be compensated for having had to pay higher rates and convert UNEs to other higher priced, wholesale services. To keep reiterating the point, AT&T has not provided sufficient back-up data for CLECs to be certain that their self-certifications are inclusive of all offices where AT&T may have made errors.

AT&T's (and Staff's) position also stands in stark contrast to the self-certification process for enhanced extended links ("EELs"). XO must certify that the circuits it orders from AT&T as EELs satisfy certain eligibility requirements. AT&T must accept that certification, but it has the right to an annual audit of those circuits to ensure that they meet the eligibility requirements. If such an audit determines that any of those circuits do or did not comply with those requirements, XO must pay AT&T the higher rates that XO should have paid for the noncompliant circuits as of the date the circuits are found to be noncompliant, even if that is months or years in the past. XO is asking for exactly the same treatment here. If the Commission determines that AT&T incorrectly designated a wire center as non-impaired, XO is entitled to the lower rate it should have paid for high capacity UNEs in that wire center, even if that is months or years in the past. Just as AT&T's audit right, standing alone, is not sufficient to make AT&T whole if XO incorrectly certifies compliance with the EEL eligibility criteria, XO's right to self-certify its entitlement to order UNEs, standing alone, is not sufficient to make XO whole if AT&T incorrectly designates a wire center as non-impaired.

AT&T makes the spurious argument that XO's language is unnecessary because it has agreed to contract language in Section 4.0 that states "SBC's designations shall be treated as controlling (even if CLEC believes the list is inaccurate) for purposes of transitioning and ordering unless CLEC provides a self-certification as outlined below." This language is exactly why XO needs section 4.1.6. This language says that XO will, in fact, disconnect or convert unbundled high capacity loops and dedicated transport to other, higher priced, AT&T wholesale services and stop ordering new unbundled high capacity loops and dedicated transport in the offices AT&T has designated as non-

impaired. It does not say that XO gives up all of its financial rights when this Commission or the FCC determines that AT&T has incorrectly interpreted the rules in its favor, or made an error in designating a wire center as non-impaired and then compounded the problem by withholding information needed by XO to challenge AT&T's designation through the self certification process.

Moreover, fundamental fairness dictates that AT&T is in the best position to accept responsibility for its errors. AT&T's attempt to shift the burden to XO for errors it makes is entirely unreasonable. Although the passage of time between AT&T's erroneous non-impairment designation and detection of the error may add a degree of difficulty to the task of verifying the underlying facts pertinent to the designation, AT&T does not make out a compelling case for tossing out the CLECs' proposal. Instead, AT&T tries to shift the argument to the timing of a dispute and the possibility that it might be difficult to determine the exact configuration at the time AT&T Illinois made the designation. AT&T's argument is equivalent to saying that because it may be inconvenient for AT&T to determine exactly how much XO lost because of AT&T's error, AT&T will compensate XO nothing. That argument has no basis in law, and in fact, is contrary to damages calculations in any contract dispute. Moreover, it is not hard to decide exactly how much XO lost. If AT&T is making non-impaired wire center designations that have such a profound operational and financial impact on the CLECs, XO must insist that AT&T keep the records relevant to its claims. The information that is needed to support a non-impairment designation is not great. AT&T need only be able to verify how many business lines it served, how many unbundled loops were leased by CLECs to serve business customers, and how many fiber-based carriers were collocated at the wire

center. At the time AT&T makes a non-impairment designation it should have already gathered this data and made a reasonably diligent effort to verify its accuracy. The information and analysis performed by AT&T should be readily storable; moreover, so should the source records. Therefore, the passage of time, even up to the full period of the applicable statute of limitations, should not make it difficult for AT&T to respond to claimed errors in wire center designations.

Next, AT&T claims that XO's proposal is unduly harsh and administratively burdensome. AT&T Brief at 10-11. This is simply untrue. AT&T wants this Commission to determine that AT&T holds no financial responsibility for errors it makes. Yet, at the same time, AT&T asserts that XO must either disconnect circuits or pay higher rates to AT&T in offices that do not really meet the FCC's non-impairment standards. It is XO that is subject to financial harm if AT&T does not accurately designate wire centers. AT&T states that "if any "ICC determination" goes against AT&T Illinois, AT&T Illinois would be strictly liable, even if the ICC changes a previously-approved methodology to count the number of business lines at a wire center." Such an argument lacks any basis in reality. The ICC can only make a determination of whether AT&T has correctly interpreted and implemented the FCC's rules. For example, as was determined in docket U14447 in Michigan, AT&T can and does go too far in designating collocators as fiber based.³ Such issues have nothing to do with any hypothetical change in the methodology for counting business lines.

³ *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon*, MPSC Case No. U-14447, Order Sept. 20, 2005. The MPSC rejected SBC's efforts to count CLECs as fiber-based collocators who do not have fiber facilities that enter and exit their collocations. In the Dearborn/Freeborn wire center, the Commission specifically rejected SBC's efforts to count a CLEC that did not have its own separate fiber as a fiber-based collocator. Instead, this CLEC was cross-connected with another CLEC, which SBC had already included in its fiber-based collocator count.

Staff argues that AT&T's non-impaired wire center list is not legally binding and states that "the only way that XO will become liable for such costs [higher UNE rates and higher wholesale service rates] is its own inability to self certify, or its erroneous self certification. SBC's designation is without legal effect." Staff's argument does not acknowledge the realities of either AT&T's designation or XO's self-certification. In the Commission's analysis and conclusion on Issue 17 of the 05-0442 decision, this Commission concluded that AT&T can update its non-impairment list at any time. Further, new transition periods begin each time the list is updated. Thus, each time AT&T changes its non-impairment list, XO and other CLECs are once again called upon to self certify or face higher transition rates and the disconnection or conversion of the effected UNEs to higher priced, alternative wholesale services at the end of the transition periods. Essentially AT&T and Staff argue that if a wire center is erroneously put on the list and someone else discovers it (either another CLEC or the Commission through other means), XO has to absorb the financial harm created by AT&T's error.

Staff asserts XO should recognize its own obligations arising out of the TRRO (Brief at 9), stating: "XO, not SBC, is required to conduct a "reasonably diligent inquiry" into impairment questions prior to self certification. XO attempts to shift this responsibility to SBC, and then seeks to make SBC financially responsible for any mistakes made." Staff's analysis is completely backward. AT&T, not XO, has the responsibility to ensure that AT&T accurately designates wire centers as non-impaired. AT&T alone has access to the information to make that designation and has refused to provide that information to XO. In effect, Staff proposes to shift to XO the responsibility to police AT&T's wire center designations and to make XO, not AT&T, financially

responsible for any “mistakes” that *AT&T* has made. The financial benefit of non-impairment designations goes directly to *AT&T*, and since *AT&T* is in the controlling position for making non-impairment decisions, there is no justification from a policy or legal standpoint of holding *XO* financially responsible for *AT&T*’s errors.

AT&T also takes issue with *XO*’s proposal that conversions to UNEs be completed within 10 days because *XO* has a 12-month transition period to convert UNEs to wholesale services. Again, this argument holds no water. *XO* and the other CLECs have a 12-month transition period because *AT&T* controls which wire centers are placed on the non-impairment list and *XO* has no forewarning that a wire center might be placed on that list. Additionally, *XO* has to determine which services to disconnect and which wholesale services to convert to. In the case of a wire center being determined to have been inappropriately designated as non-impaired by *AT&T*, *AT&T* will know exactly what wire centers are in question and what circuits need to be reclassified, and billed as UNEs. The 10-day timeline for conversions is intended to ensure that there is a timely end to the on-going burden borne by *XO* as the result of *AT&T*’s errors in making non-impairment designations. When an error is discovered, *XO* should not be subjected to continued overbilling (which must be disputed in accordance with established bill dispute processes) over prolonged periods of time.

Finally, although Staff proposes cosmetic changes to *AT&T*’s language that improves notice for CLECs and the Commission where *AT&T* has discovered it has made an error in designation, it does nothing to satisfy *XO*’s concerns. Under Staff’s position, if *AT&T* discovers errors after *XO* has paid the higher transition prices, and converted its unbundled high capacity loops and dedicated transport to higher priced,

AT&T wholesale services, XO remains uncompensated for those AT&T errors and AT&T receives a windfall.

In summary, it is inappropriate to place the burden on XO for errors that AT&T makes in designating non-impaired wire centers. AT&T is the repository of all relevant information: the numbers of business lines and unbundled loops served out of the wire center, the number and identity of fiber-based collocators, etc. Based on diligent review of information provided by AT&T, XO may challenge AT&T determinations if they detect errors, but the information that XO relies on for such information will only be as good as its source – AT&T. AT&T clearly is in the best position insure that its wire center designations are accurate. Moreover, AT&T clearly is in the best position to accept financial responsibility for its errors. In fact, rejection of XO’s proposal will give AT&T a financial incentive to inaccurately designate wire centers as non-impaired.

Therefore, XO submits that its proposed language in Section 4.1.6 is reasonable and should be adopted by the Commission.

Conclusion

For the reasons stated above, the Commission should accept XO’s proposed language in its entirety and reject AT&T’s and Staff’s proposals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kevin D. Rhoda, do hereby certify that I have, on this 25th day of January 2006 caused to be served upon the following individuals, by e-mail, a copy of the foregoing Reply Brief of XO in docket 05-0763.

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