

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

In the Matter of)	
)	
XO Communications Services, Inc.)	
Petition for Arbitration of an Amendment to an)	Docket No. 05-0763
Interconnection Agreement with SBC Illinois Inc.)	
pursuant to Section 252(b) of the)	
Communications Act of 1934,)	
as Amended.)	

BRIEF ON EXCEPTIONS OF AT&T ILLINOIS

Illinois Bell Telephone Company (“AT&T Illinois”¹), by its attorneys and pursuant to Section 200.830 of the Commission’s Rules, files this Brief on Exceptions for the purpose of requesting the Commission to modify the Proposed Arbitration Decision (“PDAP”) issued on February 8, 2006. This arbitration proceeding presents a single issue, i.e. whether XO Communications Services, Inc. (“XO”) is entitled to retroactive UNE pricing when it fails to assert its right to UNE pricing by issuing a self-certification pursuant to the FCC’s Triennial Review Remand Order (“TRRO”) and the TRRO Amendment. The PDAP incorrectly rules in favor of XO and rejects the positions of AT&T Illinois and Staff. For the reasons explained in the following exceptions, the PDAP should be modified as set forth below.

I. BACKGROUND

The background is fully set forth at pages 1 through 5 of AT&T Illinois’ Initial Brief. In summary, this dispute involves XO’s attempt to hold AT&T Illinois responsible for retroactive credits in the situation where XO could have self-certified pursuant to paragraph 234 of the

¹ Effective January 1, 2006, Illinois Bell Telephone Company will identify itself in this proceeding as “AT&T Illinois” instead of “SBC Illinois”.

TRRO and Section 4.1 of the TRRO Amendment, but elected not to. The issue, with the competing language is set out below. XO's proposed language is shown in bold, underlined text; AT&T Illinois' proposed language is shown in bold text:

ISSUE 1: SECTION 4.1.6

Should The TRRO Amendment Include A Provision That Addresses Instances Where AT&T Illinois' 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?

DISPUTED LANGUAGE

4.1.6 If a wire center designated as non-impaired by SBC is later removed from the non-impaired office list due to an error in SBC's classification or an ICC determination resulting from SBC's challenge of XO's or another CLEC's self-certification or by other Commission action, that the office is impaired, CLEC may submit orders to return facilities transitioned to other SBC wholesale facilities back to UNE facilities. SBC shall perform such conversions within ten (10) days and will credit CLEC the difference between the wholesale price paid and the applicable UNE price for the entire period during which the wire center was inappropriately classified as non-impaired or the date of installation, whichever is shorter and will credit all records change charges CLEC paid SBC for all UNEs transitioned due to SBC's erroneous wire center classification. Such credits shall be placed on CLEC's invoice within two (2) billing cycles.

If SBC Illinois has designated a wire center as non-impaired, CLEC has self-certified with respect to that wire center during the relevant time period specified in this Agreement, and SBC has disputed such self-certification, in the event prior to a Commission ruling on the dispute SBC learns through its own investigation (and based on its sole judgment) that an SBC error or errors caused the wire center to be deemed non-impaired (that it, the wire center would be deemed impaired but for those errors), SBC will promptly provide CLEC notice of the error stating that SBC is reclassifying the wire center as impaired (subject to SBC's rights to later re-designate the wire center at a later date if the non-impairment criteria are met.²

AT&T Illinois advanced five (5) separate reasons why XO's language should be rejected (AT&T Il. Init. Br. at 6-12). The primary and conclusive reason is that XO's proposal (as revised by the

² AT&T Illinois' preferred outcome is to have no language whatsoever for Section 4.1.6. AT&T Il. Init. Br. at 12.

PDAP) is inconsistent with the self-certification process set forth in paragraph 234 of the *TRRO* and as agreed upon between AT&T Illinois and XO in Section 4.1 of the *TRRO* Amendment.³ Under the FCC's self-certification process in the *TRRO*, CLECs have the undisputed right to continue to get unbundled high-capacity loops and dedicated transport at any wire center at which the CLEC issues a self-certification. As long as that self-certification is effective, XO has an unfettered right to continued access to high-capacity loops and dedicated transport UNEs at that wire center and cannot be forced to give them up until there has been a Commission determination on the dispute. Thus, the self-certification process established by the FCC gives XO the ability (and the obligation) to issue a self-certification if it believes it is entitled to the affected UNEs.

These same rights and obligations are carried forward into Section 4.1 of the *TRRO* Amendment upon which XO and AT&T Illinois have already agreed. Under that provision, AT&T Illinois' designation of a wire center as non-impaired is "controlling" unless and until XO "provides a self-certification" as outlined in the Amendment. If XO does not provide a self-certification, it agrees to "transition DS1 and DS3 loop and transport arrangements" to other arrangements effective March 11, 2006. On the other hand, XO has the contractual right to issue a self-certification if, based on a "reasonably diligent inquiry", it believes to the best of its knowledge that the wire center does not meet the non-impairment threshold. *TRRO* Amend, Sec. 4.1, 2nd para.

XO's proposal nullifies the procedures established by the FCC and agreed upon by XO itself because it absolves XO of the need to self-certify at all. Under XO's proposal, it is entitled to UNE pricing, on a retroactive basis, even if it has not issued the required self-certification. If

³ The *TRRO* Amendment, which is entirely agreed upon except for the single issue presented in this arbitration petition, is attached to the Arbitration Petition as Attachment A.

XO does not issue a self-certification, it should not thereafter complain that it was denied TELRIC prices and it should not ask this Commission to establish special procedures to provide retroactive credits to restore TELRIC pricing, especially since those procedures will inevitably spawn more disputes for the Commission to resolve concerning the calculation and application of retroactive credits. For the reasons discussed below, XO's position should be rejected.

II. EXCEPTIONS

A. EXCEPTION 1

AT&T Illinois takes exception to the analysis and conclusion contained in Part III.2.A of the PDAP entitled "What circumstances will trigger remedies?". The exception covers four (4) conclusions reached in this section of the PDAP.

First, the PDAP mistakenly concludes that XO will not be able to self-certify when AT&T Illinois makes non-impairment designations. PDAP at 7. ("However, XO cannot self-certify merely because it would like to avoid greater expenses"). It is true that paragraph 234 of the *TRRO* and Section 4.1 of the *TRRO* Amendment require XO "to undertake a reasonably diligent inquiry" to determine to the best of XO's knowledge whether the wire center meets the non-impairment threshold established by the FCC, but this only requires XO to review the available facts. It does not, as the PDAP incorrectly concludes, require XO "to discover an error underlying AT&T Illinois' non-impairment designation" (PDAP at 7), or to "perform a more accurate analysis of the available data than AT&T Illinois itself performed". To the contrary, all XO needs to do is to consider the available facts and apply those facts to the FCC's established criteria. A self-certification performed in this manner should be *prima facie* valid. The FCC specifically noted that a CLEC that self-certifies "is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment

criteria in our rules.” *TRRO*, footnote 659. The FCC clearly anticipated that self-certifications made by CLECs would not be completely accurate – and thus provided a means for ILECs to dispute the self-certifications. By reading more into the self-certification requirement than actually exists under the *TRRO* and the *TRRO* Amendment, the PDAP erects a barrier to self-certification that does not exist and then concludes that the non-existent barrier gives merit to XO’s position.

Second, the PDAP mistakenly concludes that XO only has a duty to self-certify when it elects to submit an order to obtain new UNEs. PDAP at 7. (“However, Paragraph 234 only imposes such a duty on a CLEC when it elects ‘to submit an order to obtain’ the relevant UNEs, not when the CLEC elects *not* to do so”). Putting aside the point that the PDAP reads paragraph 234 too narrowly, its analysis looks only to paragraph 234 of the *TRRO* and ignores Section 4.1 of the *TRRO* Amendment. There, XO has already agreed that it is required to submit a self-certification for *existing*, as well as new UNEs:

Until CLEC provides a self-certification for High-Capacity Loops and/or Transport for such wire center designations, CLEC will not submit High-Capacity Loops and/or Transport orders based on the wire center designation, and if no self-certification is provided will transition its affected High-Capacity Loops and/or Transport in accordance with the applicable transition period.

TRRO Amend. Sec. 4.1. Thus, XO has agreed that it will transition its *existing* high-capacity loops and dedicated transport unless it provides a self-certification. Contrary to the conclusion in the PDAP, XO has an affirmative obligation to self-certify if it wishes to continue obtaining the affected UNEs at TELRIC rates pending a resolution of any disputes over the “non-impairment” status of a particular wire center.

In the same paragraph, the PDAP also observes that there “is no apparent reason why it would be advantageous” for XO *not* to self-certify. PDAP at 7. This observation, however, does

not support the PDAP's finding in favor of XO's proposal. To the contrary, it supports AT&T Illinois' position that XO should self-certify where it wishes to continue obtaining the affected UNEs at TELRIC rates, because this is the most logical course of action under the process established by the FCC. If XO acts logically, it eliminates the hypothetical giving rise to its entire proposal. It also allows AT&T Illinois to immediately challenge the self-certification and permits the Commission to promptly resolve the dispute. Under the approach approved by the PDAP, XO can ignore the self-certification process, knowing that it will be entitled to retroactive application of UNE rates at some point in the future.⁴

Third, the PDAP improperly discounts AT&T Illinois' concern that the proposed language will delay dispute resolution and thereby increase AT&T Illinois' financial risk. PDAP at 7-8. The PDAP reasons that AT&T Illinois' financial risk is limited because, under Section 4.1.1.5 of the TRRO Amendment, XO must self-certify any *new* non-impairment designations within sixty (60) calendar days. This, however, fails to account for Section 4.1.5 which provides that "When more than 60 days from the issuance of an SBC designation of a wire center as non-impairment has elapsed, and if there has been no prior ICC determination of the non-impairment as to the applicable wire center(s), CLEC can thereafter still self-certify for the purpose of ordering new loop and transport facilities." Thus, there is no limit on AT&T Illinois' risk concerning *new* non-impairment designations.

As for *existing* non-impairment designations, the PDAP correctly recognizes that there is no time limit for self-certification against AT&T Illinois' *original* non-impairment designations. PDAP at 8. The PDAP dismisses this concern because "it would simply not be commercially

⁴ The PDAP itself recognizes in footnote 8 that XO, if it is acting logically, will self-certify in order to "force AT&T Illinois original impairment designations to dispute resolution". This accords with the heart of the AT&T Illinois proposal, i.e., to structure the TRRO Amendment so that XO is encouraged to issue a self-certification so the matter can be brought to the Commission for prompt dispute resolution.

rational for XO not to self-certify.” PDAP at 8. The PDAP cannot logically mandate the adoption of language which is only designed to address a “no self-certification” scenario, and then support that language with the assertion that XO will always act rationally to self-certify against non-impairment designations.

Fourth, the PDAP mistakenly relies upon the agreed language in Section 4.1.3 to support its conclusion. PDAP at 8. (The “true-up” in Section 4.1.3 “establishes a reasonable justification for refraining from self-certification in doubtful cases” and “equitably balances the risk XO proposes to impose on AT&T”). This is not the case. Section 4.1.3 provides that if XO issues a self-certification (and thereby continues to pay TELRIC rates), and if the Commission ultimately determines that the non-impairment designation was proper (meaning that XO should have been paying market based rates all along), then XO is responsible for the difference between the low rates it actually paid and the higher rates it should have paid. This provision does not cause CLEC to “refrain” from self-certification. To the contrary, since it has the benefit of low rates while the self-certification dispute is pending, XO’s profit appears to be maximized when it self-certifies, gets the advantage of lower TELRIC rates, and retains the difference until after the legal proceedings are complete, if not indefinitely.

Nor does Section 4.1.3 “equitably balance” the risk XO imposes on AT&T Illinois. The true-up provision in Section 4.1.3 is merely the flip-side of the self-certification provision in Section 4.1 which permits XO to have UNEs at TELRIC rates pending resolution of the non-impairment dispute. In other words, in exchange for keeping low TELRIC rates while the dispute is promptly resolved, XO is subject to the true-up in Section 4.1.3. XO’s proposal in this proceeding is materially different than the true-up provisions of Section 4.1.3 because it does not permit prompt resolution of a non-impairment dispute at all. To the contrary, it encourages

delayed resolution and makes AT&T Illinois potentially responsible for years and years of retroactive credits. Furthermore, in the situation described in 4.1.3, XO is fully aware that there is a active dispute which could result in true-up requirements. Under the PDAP's language, on the other hand, AT&T Illinois would not know if the retroactivity requirement would ever be triggered, and so cannot as effectively manage that process. There is no "balance" between these two disparate situations.

AT&T Illinois' proposed changes to the relevant portions to Sections III.2.A are set forth in Attachment 1. AT&T Illinois respectfully requests the Commission to make these changes to the PDAP.

B. EXCEPTION 2

AT&T Illinois takes exception to the analysis and conclusion contained in Section III.2.B of the PDAP entitled "What remedies are reasonable?". PDAP at 9. As AT&T Illinois explains in Exception 1, the PDAP should be revised to eliminate any requirement that AT&T Illinois provide retroactive credits to XO. If the Commission is not inclined to accept these proposed modifications to the PDAP, then at the very least the PDAP should be revised to eliminate or extend the conversion period, i.e., the time period within which AT&T Illinois must convert wholesale services to UNEs. The PDAP adopts a fifteen (15) day period, but this should be eliminated or changed because: a) it is not based on any evidence in the record; and b) the PDAP inappropriately shifts the burden of proof to AT&T Illinois on this point.

XO initially proposed a ten (10) day conversion period. AT&T Illinois pointed out that XO's proposal was unreasonably short and was unsupported by any record evidence establishing why it was an appropriate interval. The PDAP finds little fault with XO's evidentiary failure, but instead criticizes AT&T Illinois because it did not offer evidence to refute the reasonableness of

the ten (10) day period proposed by XO. This criticism is incorrect. XO is the proponent of the ten (10) day period and therefore bears the burden of proving that its proposal is reasonable. Just as a plaintiff in an administrative proceeding holds the burden of proof and will be denied relief if it fails to sustain that burden, *Miller v. Hill*, 337 Ill.App.3d 210, 785 N.E.2d 532, 539 (2003), and just as a complainant in a rate case before the Commission has the burden of proof to show the unreasonableness or discriminatory nature of a rate (*Champaign County Telephone Co. v. Illinois Commerce Commission*, 37 Ill.2d 312, 226 N.E.2d 849, 853 (1967)), so too does a proponent of language in an arbitration proceeding hold the burden of proving that its proposed language is reasonable. This is particularly so because the language proposed by a party inevitably creates or eliminates legal rights and has very real consequences for the losing party. These consequences cannot be imposed by the Commission without requiring the proponent of those legal obligations to meet the burden of proving, through admissible evidence, that the requested obligations are reasonable. Under the Administrative Procedure Act, the standard of proof in a Commission proceeding is “the preponderance of evidence”. 5 ILCS 100/10-15. XO submitted not one scintilla of evidence in support of its ten (10) day proposal. The PDAP does not dispute this. Rather, it shifts the burden of proof on AT&T Illinois to *disprove* XO’s proposed ten (10) day period. This is inappropriate as a matter of law and must be remedied.

Moreover, there is no reason for the PDAP to impose the unduly short fifteen (15) day conversion period at all. Under the PDAP’s required language for Section 4.1.6, AT&T Illinois must provide retroactive credits to XO up to “the date of conversion”. Accordingly, XO will receive its retroactive credits for the entire period of the conversion – regardless of whether it takes 10 days, 15 days or 90 days. There is no rational basis to impose an unduly short conversion period. The only effect it would have is to create an obligation that AT&T Illinois

cannot comply with, thus making it likely that there would be a technical breach of the provision and giving rise to future disputes. There is also a great discrepancy between the period of time allowed to CLECs for the transition away from affected UNEs (12-18 months) and the period of time given to AT&T Illinois to transition back to those same UNEs (15 days). AT&T Illinois requests that the conversion period be extended to ninety (90) days in Illinois.

The changes proposed by AT&T Illinois for Exception 2 are reflected in the revised text in Attachment 2.

C. EXCEPTION 3

At the very least, the PDAP should be revised to place a one (1) year cap on any AT&T Illinois obligation to provide retroactive true-ups under Section 4.1.6. As AT&T Illinois explains in Exceptions 1 and 4, the PDAP should be revised to eliminate any requirement that AT&T Illinois provide retroactive credits to XO. If the Commission is not inclined to accept these proposed modifications to the PDAP, then at the very least the PDAP should be revised to place a reasonable limitation, (i.e., a “cap”) on AT&T Illinois’ obligation to provide retroactive credits. In particular, the Commission should adopt a one-year cap on any retroactive credits. This would achieve several goals. First, it would provide further incentive for XO to promptly self-certify in response to any future AT&T Illinois wire center designation so that the dispute could be expeditiously resolved by the Commission. Since any dispute brought to the Commission should be resolved in far less than one year (see Section 4.1.3, obligating AT&T Illinois to file a dispute resolution petition with the state Commission within 60 days of a self-certification and to request expedited resolution), the one year cap is objectively reasonable. Second, the one year cap would reduce the administrative burden placed on the Commission and the parties in the event any retroactive credits are called for under the provision. The

Commission can well imagine the administrative problems caused by having to determine (and reconstruct) all of the moves, adds and changes extending back over several years. Finally, the one year cap would limit AT&T Illinois' financial exposure to provide unlimited retroactive credits that could otherwise accumulate over many years. In summary, the one year cap balances the Commission's interest in providing some type of retroactive credit in the situation posited by XO with the need to retain appropriate incentives to encourage XO to use the self-certification process to bring disputes to the Commission for resolution and to streamline the administration of the wire center non-impairment process.

AT&T Illinois has proposed revised text incorporating its revisions under Exception 3. This proposed text is included in Attachment 2.

D. EXCEPTION 4

AT&T Illinois excepts to Section III.2.D entitled "Approved Provision". This portion of the PDAP should be revised to eliminate any language for Section 4.1.6 as described in the discussion for Exception 1. If the Commission does not accept AT&T Illinois' request to modify the PDAP in this manner, then at the very least the PDAP should be revised consistent with the discussions for Exceptions 2 and 3. The required changes for this are shown in the revised text in Attachment 2.

II. CONCLUSION

For all the reasons set forth above, AT&T Illinois respectfully requests that the Commission revise the PDAP consistent with the proposals set forth in this Brief on Exceptions and with the revised language set forth in Attachments 1 and 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **BRIEF ON EXCEPTIONS OF AT&T ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on February 20, 2006.

/s/ Mark R. Ortlieb _____
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