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February 28, 2005

Mrs. Blanca S. Bayó  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

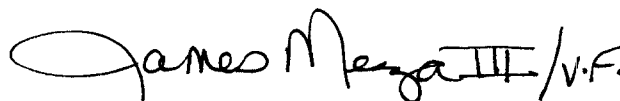
**Re: 041114-TP – Complaint of XO Florida, Inc. Against  
BellSouth Telecommunications, Inc. for Refusal to Convert  
Circuits to UNEs and for Expedited Processing**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Emergency Motion in Limine or, Alternatively, Motion for Continuance, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

  
James Meza III

Enclosures

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

**CERTIFICATE OF SERVICE  
DOCKET NO. 041114-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express and Electronic Mail and First Class U.S. Mail this 28<sup>th</sup> day of February, 2005 to the following:

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James Meza III

**(+) SIGNED PROTECTIVE AGREEMENT**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of XO Florida, Inc.        )  
Against BellSouth Telecommunications, )  
Inc. for Refusal to Convert Circuits to    )  
UNEs and for Expedited Processing        )

Docket No. 041114-TP

Filed: February 28, 2005

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
EMERGENCY MOTION IN LIMINE OR, ALTERNATIVELY,  
MOTION FOR CONTINUANCE**

BellSouth Telecommunications, Inc. ("BellSouth") submits this Emergency Motion *in Limine* or, Alternatively, Motion for Continuance as a result of XO Florida, Inc. ("XO") filing two late filed exhibits (Exhibit Nos.1 and 4) to the deposition of XO witness Gary Case on February 25 and February 28, 2005, respectively ("Deposition Exhibits"). For the reasons set forth herein, the Florida Public Service Commission ("Commission") should prohibit XO from introducing this new evidence into the record on the eve of the evidentiary hearing, or alternatively, grant a continuance of the hearing scheduled for March 3, 2005 to allow BellSouth to conduct additional discovery as to the Deposition Exhibits.

**BACKGROUND**

As set forth in the Order Establishing Procedure (Order No. PSC-04-1147-PCO-TP), there are three issues for the Commission to decide in this case: (1) Does BellSouth currently have an obligation to convert all XO special access circuits to standalone UNE recurring pricing? (2) If so, what nonrecurring charges should apply for such conversions? and (3) If so, how soon after a request has been submitted for performing a conversion of each type of circuit, should be conversion be effectuated? These issues were agreed to by the parties at the Issue Identification Meeting with Staff and no party has asked that these issues be modified to address additional issues.

Consistent with the Order Establishing Procedure, both parties filed Direct and Rebuttal Testimony addressing the three identified issues. See Case Direct Testimony at 2 ("My testimony addresses the issues identified for resolution in this proceeding, which are included in the Order Establishing Procedure, Order No. PSC-04-1147-PCO-TP."). In neither Mr. Case's Direct or Rebuttal Testimony did XO present any evidence regarding the amount of credits it believes it is entitled to in this proceeding or even identify the special access circuits that it believes are the subject of its Complaint. Further, in discovery, Staff asked XO to identify the specific circuits in Florida it believes are at issue in this proceeding. See Staff Interrogatory No. 3(a) ("How many circuits in Florida that XO wants converted from special access to UNEs are at issue in this proceeding. Please specify an exact number for Florida only and only those circuits that are currently special access, not UNE priced."). In response, on February 8, 2005, XO stated the following:

The list of requested circuits is not static and thus no longer matches the exact number from previous interrogatories (also, the number of Florida-specific circuits does not match the previous number, which represented all circuits in dispute between the parties). The list is not static because over the many months (over two years) the conversion requests have been delayed, circuits have been disconnected, customers move, networks are groomed, etc. XO submitted a recent list to BellSouth in December updating that list region-wide, based on BellSouth billing information, even that December that [sic] number has changed, based on a review of the circuits in light of the continued delay of the conversions and receipt of more recent BellSouth billing information showing the disconnection of a number of circuits. The current number of circuits for which conversion is requested, and a list of circuits, including circuit type and circuit ID for each circuit, is contained Proprietary Exhibit A [sic] to Staff's second set of requests for production of documents to XO. For reasons set forth above, this number does not match the number set forth in the referenced previous response, but, rather,

accurately represents the most recent list of circuits remaining from the previous conversion requests, for which XO still requests conversion.

See XO's Response to Staff Interrogatory No. 2(a), Response to Staff Request for Production No. 4. Additionally, in response to Staff's more global request that XO "identify which circuits are at issue in this proceeding," XO again referred the parties only to confidential Exhibit A. See XO's Response to Interrogatory Nos. 6(b), 7(b). Thus, according to XO, the only circuits that are at issue in this proceeding are those identified in Exhibit A. And, as conceded by XO, Exhibit A lists only those circuits that are still in existence with XO. See Case Deposition at 32; lines 21-24.

On February 17, 2005, Staff and BellSouth deposed Mr. Case. In that deposition, Staff asked Mr. Case to provide a late filed exhibit identifying those circuits in Exhibit A that XO requested be converted prior to the date of the TRO. See Case Deposition at 28, lines 9-21. In response, on February 25, 2005, XO produced Late Filed Exhibit No. 1, that included more than what was requested by Staff. Specifically, with this recent exhibit, XO introduces certain, new evidence and arguments that XO never previously raised, including but not limited (1) the identification of circuits contained in Exhibit A that have been disconnected (see Note 2); (2) columns that are somewhat unclear but appear to contain specific credits and amounts that XO apparently believes it is entitled to; (3) the total monthly credit that XO believes it is entitled to in a true-up; and (4) a new commingling argument as to why almost one third of the subject circuits in Exhibit A should be converted even though they contain SmartRing/transport (see Note 1).

None of this evidence or arguments was ever previously disclosed by XO, notwithstanding numerous opportunities in testimony and in discovery. Indeed, as to XO's new commingling argument, XO is now impeaching their own witness as Mr. Case testified in his deposition that circuits with transport would not be eligible for conversion to stand-alone UNEs:

Q. Are there any DS1s that are riding on a SmartRing in Exhibit A?

A. Not to my knowledge

Q. If there were, would you agree with me that those circuits should not be included in Exhibit A?

A. Yes. I would say if it's on a SmartRing, then it's got transport. It's not a stand-alone UNE loop.

See Case Deposition at 33, lines 7-14.

Also in his Deposition, on redirect, XO voluntarily agreed to provide a late filed deposition exhibit setting forth the circuits and appropriate credits it believes it is entitled to receive for those circuits that were disconnected prior to the creation of Exhibit A. Neither Staff nor BellSouth requested this late filed exhibit. And, BellSouth specifically objected to the production of such an exhibit because it constituted an improper attempt by XO to rehabilitate its case by putting in evidence at the last minute, after discovery is closed and immediately prior to the hearing.<sup>1</sup>

On February 28, 2005, XO produced Late Filed Exhibit No. 4. Identical to Exhibit No. 1, this spreadsheet also contains information that XO never previously produced, including but not limited to the identification of circuits that were disconnected but that XO believes are at issue in this proceeding (contrary to XO's responses to Staff's

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<sup>1</sup> In the deposition, BellSouth asked that it be able to brief the issue of Late Filed Exhibit No. 4. In response, Staff instructed BellSouth to raise it as a preliminary matter.

discovery) as well as actual credits that it believes it is entitled to for these disconnected circuits. As with the Exhibit No. 4, XO never previously disclosed this specific information.

### **ARGUMENT**

#### **I. The Commission Should Prohibit XO from Entering Into the Record the Deposition Exhibits.**

As a matter of fundamental fairness, the Commission should prohibit XO from introducing into the record of this matter evidence and arguments raised in the Deposition Exhibits that XO never previously disclosed. XO had multiple opportunities in its Complaint, in discovery, and in its testimony to present this evidence and arguments, and for whatever reason, XO chose not to. Now, on the eve of trial, XO is attempting to cure its previous, strategical decision not to include such evidence and arguments through the Deposition Exhibits. BellSouth is extremely prejudiced by XO's actions as it has no opportunity to challenge the new evidence, including credit calculations and appropriate charges, or rebut XO's new legal arguments, especially the argument that circuits with SmartRing/transport should be converted because of a new allegation that BellSouth has an obligation to allow XO to commingle UNEs. See Exhibit No. 1. This "trial by ambush" strategy by XO is particularly egregious in that, with Exhibit No. 1, XO is attempting to rehabilitate via impeachment the deposition testimony of its own witness. Simply put, XO had more than adequate time to present the evidence it deemed appropriate in this case and it should not, on the eve of trial, be able to assert additional facts and arguments after the close of discovery to the detriment of BellSouth. Accordingly, for these reasons, the Commission should prohibit

XO from relying on the Deposition Exhibits and the arguments and facts contained therein to support its case.

**II. Alternatively, the Commission Should Continue the Hearing to Allow BellSouth to Conduct Limited Discovery on the Deposition Exhibits.**

In the event the Commission refuses to grant BellSouth's Motion in Limine, the Commission should, at a minimum, continue the hearing scheduled for March 3, 2005 to allow BellSouth to conduct discovery regarding the Deposition Exhibits. In those exhibits, XO makes several factual assertions and statements that were previously not disclosed, including but not limited to (1) the alleged date of disconnection of a circuit; (2) the monthly recurring charges XO believes it was charged versus the amount it believes it should have been charged; and (3) the amount of credits XO believes it is entitled to receive from BellSouth. BellSouth should be able to inquire into the specific allegations contained in the Deposition Exhibits, especially given the fact that XO's sole witness, Mr. Case, testified in his deposition that he had no personal knowledge regarding the initial conversion requests, which is the subject of XO's true-up claim. See Case Deposition at 36, lines 19-20.

**CONCLUSION**

For the foregoing reasons, BellSouth requests that the Commission grant BellSouth's Motion in Limine or, alternatively, continue the hearing to allow BellSouth to conduct discovery regarding the Deposition Exhibits.



Respectfully submitted this 28th day of February, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

Handwritten signature of Nancy B. White in cursive, followed by a horizontal line and the initials "VF." to the right.

NANCY B. WHITE

c/o Nancy Sims

150 South Monroe Street, Suite 400

Tallahassee, FL 32301

(305) 347-5558

Handwritten signature of R. Douglas Lackey in cursive, followed by a horizontal line and the initials "VF." to the right.

R. DOUGLAS LACKEY

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