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May 22, 2009

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: XO Communications Services, Inc. v. Verizon Pennsylvania Inc.
Docket No. C-2008-2038195

Dear Secretary McNulty:

Enclosed please find the Reply Brief of XO Communications Services, Inc., which was electronically filed today. A copy has been served on all parties of record in accordance with the enclosed certificate of service.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

STEVENS & LEE


Michael A. Gruin

Enclosures

cc: Certificate of Service

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

XO Communications Services, Inc.	:	
Complainant	:	C-2008-2038195
	:	
v.	:	
	:	
Verizon Pennsylvania Inc.	:	
Respondent	:	

REPLY BRIEF OF XO COMMUNICATIONS SERVICES, INC.

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REPLY BRIEF OF XO COMMUNICATIONS SERVICES, INC.

XO Communications Services, Inc. (“XO”) hereby submits this Reply Brief in support of its Complaint against Verizon Pennsylvania, Inc. (“Verizon”).

I. INTRODUCTION

Verizon’s theory of the case is flawed because it is predicated on Verizon’s access tariffs applying to its interconnection arrangements with XO for jointly provided switched access services. However, Verizon’s tariffed charges for dedicated tandem trunk ports do not apply to its meet point billing (“MPB”) trunks and ports. These facilities are not provided as access services, but instead as interconnection services pursuant to the Verizon – XO interconnection agreement (“ICA”) and industry guidelines.

Precise language is anathema to Verizon’s arguments, which rely on clouding the distinctions between shared and dedicated trunks, serving wire centers and end offices, toll traffic and exchange access traffic, customers and providers, trunks and trunk ports, as well as individual trunks and trunk groups. The simple and straightforward fact is that, even if the access tariffs applied, they would not apply to XO, since it is, by definition, not a customer pursuant those tariffs. Furthermore, the trunk port on the XO side of the tandem is not a “dedicated” port for purposes of the tariff, since it is not on the serving wire center side of the tandem, of which there is only one. The FCC has determined that this trunk port is a common

port, shared among interexchange carriers (“IXCs”), and not a dedicated port for the sole use of competitive local exchange carriers (“CLECs”) like XO. The FCC has also directed that the costs of these ports be recouped in the tandem switching rate that that the tandem provider, Verizon, charges to IXCs. Since Verizon charges the same rate to IXCs in all situations, it is clearly being compensated for this element whether the end user belongs to Verizon, an independent telephone company (“ITC”) or a CLEC. In fact, if Verizon is permitted to assess an extra trunk port charge to CLECs, it not only will unjustly enrich Verizon by double recovering for the ports, but it will be unlawfully discriminating against competing CLECs in favor of ITCs (who do not compete) as well as its own operations.

II. ACCESS TARIFFS DO NOT APPLY TO THE INTERCONNECTION ARRANGEMENTS IN THIS CASE.

Verizon’s entire case depends on deemphasizing all of the MPB provisions attending Verizon’s interconnection with XO and instead establishing that Verizon switched access tariff governs this arrangement. XO, in its brief (“XO Brief”), explained that this is not the case. There are express provisions in the ICA that govern MPB arrangements for jointly provided switched access to an IXC.¹ These provisions acknowledge that each party has an obligation to jointly provide switched access services to IXCs in conformance with MECAB/MECOD guidelines and that the parties will not charge the other for any of the MPB services they provide.²

¹ “Meet-Point Billing (MPB) means an arrangement whereby two or more LECs jointly provide to a third party the transport element of a switched access Local Exchange Service to one of the LECs’ End Office switches, with each LEC receiving an appropriate share of the transport element revenues as defined by their effective Exchange Access tariffs.” XO ICA Att. III § II.GG.

² See XO Brief at 18.

In the face of this express language, Verizon's strongest claim is that XO nonetheless "has agreed to pay for facilities used 'in the carriage of Toll Traffic' at rates set forth in Verizon's access tariffs" in conjunction with MPB arrangements.³ However, this quoted phrase is not an ICA provision, but a label selectively lifted from the ICA pricing table and is wholly unrelated to the MPB provisions that govern this traffic. Read in context, it merely acknowledges that when XO is acting as an IXC in its own right, i.e. terminating or originating toll traffic with Verizon end users, then XO will pay the appropriate tariffed access charges.⁴ Verizon is attempting to cloud the difference between "toll traffic," which is *not* at issue in this proceeding, and "meet point billing traffic," which is at issue. Despite what Verizon is attempting to imply, there is a distinction between toll traffic and MPB traffic, as the ICA recognizes.⁵ Toll traffic is between XO and *Verizon*⁶ and MPB traffic is between an XO and a third party *IXC*.

In contrast to the snippet of language that Verizon takes out of context and then leans on for support, the MPB provisions of the ICA are comprehensive, and make it clear that XO is not a taker of Verizon's access service, but a provider of access service in conjunction with Verizon. As XO explained in its brief, the ICA requires that MPB guidelines adopted by and contained in the OBF's MECAB and MECOD documents govern such matters. Each party has an obligation to cooperate with the other to jointly provide switched access services to IXCs and to conform to

³ Verizon Brief at 14.

⁴ Not for the only time in its brief, Verizon has mischaracterized XO's position, claiming that XO has testified that "the access tariff cannot apply to services provided to another LEC." Verizon Brief at 18. However, XO has never been that obtuse. It understands that there are different types of traffic and that they are treated differently under the terms of the ICA.

⁵ ICA III 11.1.6. "The Parties will provide CCS Signaling to one another, where and as available, in conjunction with all local traffic, toll traffic, meet point billing traffic, and transit traffic." III 14.3.1 "Meet-Point Billing compensation arrangements as described in Section 3 of Attachment VIII shall be utilized for compensation for the joint handling of toll traffic."

⁶ XO Brief at 27.

the MECAB/MECOD guidelines in such regard.⁷ Furthermore, the ICA provides that “[n]either Party will charge the other for the services rendered,”⁸ expressly contradicting Verizon’s claims to the contrary.⁹

In its brief, XO referenced applicable case law that confirms that MPB arrangements are not access services. In the *WorldCom Order*,¹⁰ the FCC determined that MPB trunks are not exchange access service subject to access charges, as did the Maryland commission.¹¹ Most notably, the Massachusetts commission also determined that “the Complaining Parties are not purchasing switched access from Verizon; instead, they are obtaining interconnection from Verizon in order to jointly provide switched access service to IXCs.”¹²

⁷ *Id.* at 10.

⁸ XO ICA Att. VIII § 3.3.3.12.

⁹ Verizon Brief at 8.

¹⁰ *Petition of WorldCom, Inc.*, CC Docket No. 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002) (“*WorldCom Order*”). Verizon claims that the *WorldCom Order* is no longer applicable because it was predicated on the availability of UNE transport as an alternative to access facilities. Verizon Brief at 14 n.9. According to Verizon, the FCC eliminated the availability of UNE interconnection facilities in its Triennial Review Remand Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) (“*TRRO*”), thus implying that only access facilities are now available. *Id.*, citing *TRRO* paras. 138-139. However, Verizon is in error, as it would have discovered had it read one paragraph further in the *TRRO*. The FCC went on to clarify that “our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and *exchange access service*.” *TRRO* para. 140 (emphasis supplied). Moreover, in the *Worldcom Order*, the Common Carrier Bureau of the FCC stated: “Therefore, we agree with WorldCom that, when the parties jointly provide such exchange access, Verizon should assess any charges for its access services upon the relevant IXC, not WorldCom.” *Worldcom Order* para. 177. This statement is definitive and has nothing to do with UNE availability. Thus, the *WorldCom Order* and any subsequent decisions relying on it are as relevant and authoritative as they ever were.

¹¹ See XO Brief at 19-20, citing *AT&T Comm’s of Md., Inc. Petition for Arbitration*, Md. PSC Case No. 8882, Order 79250 at 20–23. (“*Maryland Order*”)

¹² Complaint of Choice One Communications, *et al.*, Ma. D.T.C. 08-3, Final Order at 31 (Apr. 9, 2009) (“*Massachusetts Order*”) (quoting liberally from the *WorldCom Order*).

Even though the Massachusetts case is based on the identical fact scenario, Verizon attempts to distinguish it from this case on the theory that Pennsylvania's contract "drafting requirements" are different than Massachusetts' and that "general references" to tariffs are permitted.¹³ While it might be an interesting academic exercise, this case does not require a comparative analysis of the contract interpretation rules of the respective commonwealths. Suffice it to say that to whatever extent that the rules arguably differ, XO is unaware of any legal doctrine that permits one party to read certain express provisions completely out of an agreement in favor of "general references" to conflicting provisions in separate documents.

III. REGARDLESS OF THE CONTRACT VEHICLE, XO IS NOT THE USER OF THE TRUNK PORT AND BEARS NO RESPONSIBILITY FOR ITS COSTS.

An examination of the ICA and the governing regulations should be sufficient to end the inquiry and firmly establish that, in a MPB arrangement, XO is not liable for any charges under Verizon's access tariffs, least of all trunk ports. So, as an alternative to its argument that XO is liable under Verizon's access tariff, Verizon has advanced something resembling a quantum meruit argument. It asserts that "[e]ven if the Commission concluded that the interconnection agreement somehow was not precise enough in specifying that the 'tariffs for Exchange Access Service' apply to XO's use of Verizon facilities in MPB arrangements, . . . in the absence of a contractual rate, Pennsylvania law requires XO to pay a just and reasonable rate for the facilities it uses."¹⁴ Verizon goes on to suggest that an appropriate rate is, unsurprisingly, the tariffed rate under the access tariff.¹⁵ As explained above, this argument makes no sense, because contracts *do* exist for the use of the port – but they establish that XO is not the responsible party and that the applicable rate is the tandem switching rate that Verizon is assessing already to the

¹³ Verizon Brief at 15.

¹⁴ *Id.* at 17-18.

¹⁵ *Id.*

appropriate party, the IXC. The ICA also specifies that the parties will conform to the MPB Guidelines. These guidelines establish that tandem switching (which, as discussed below, includes the tandem ports) is Verizon's responsibility for which it bills the IXC.

Moreover, this claim is based on the erroneous presumption that XO is the user of the trunk port, and that this port is dedicated to XO's use.¹⁶ Verizon shades the facts by stating that XO "elects" to exchange traffic with IXCs through Verizon's tandem.¹⁷ However, as XO explained in its brief, this characterization is incorrect. XO has no say in how an IXC interconnects to it, and offers both direct and indirect interconnection, at the IXC's option.¹⁸ In fact, Verizon offers this service to IXCs through its tariffs, and contracts with XO through the MPB provisions of the interconnection agreement to facilitate this offering. The trunk port on the end office side is for the benefit of multiple IXCs, not XO.¹⁹ The sole retail customer-provider relationship is between an IXC and its end-user. XO and Verizon are jointly facilitating this relationship, and each recovers its costs from the IXC. Thus, any argument that the trunk port is dedicated to XO's use is incorrect. As the FCC stated, and Verizon agrees, "trunks that are shared . . . carry traffic between the end office and a tandem switch."²⁰

IV. THE COST OF THE TRUNK PORT IS ALREADY RECOVERED BY VERIZON IN ITS TANDEM SWITCHING CHARGE.

Verizon expends a considerable amount of ink in establishing that XO has "conceded" that it is responsible for transport from the XO end office to the Verizon tandem.²¹ Furthermore, it misstates one of XO's arguments, erroneously claiming that "[a]ccording to XO's witness, the

¹⁶ *Id.* at 26-28.

¹⁷ Verizon Brief at 4-5.

¹⁸ XO Statement 2 at 4-5.

¹⁹ *See* XO Brief 20-21.

²⁰ Verizon Brief at 22-23 (citing *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 para. 158 (1997) ("*Access Reform Order*").

²¹ *Id.* at 7-8.

concept of "meet point billing" would require *Verizon* to bill the IXCs directly for *any* Verizon facility that is used to provide joint switched access service to the IXCs"²² This is emphatically not true. XO has stated that it owns the the MPB trunks that interconnect XO's end office with the Verizon tandem. This does not mean that XO is responsible for a dedicated trunk port charge. Verizon consistently harps on the "separate" transaction that XO is purportedly evading,²³ but this is a red herring. Verizon is not providing XO with a dedicated trunk port.²⁴

The trunk port on the end office side is not a separately priced element, but is instead part of the tandem switching element that Verizon admits its recoups from the IXC through the tandem switching charges.²⁵ As XO has repeatedly written and testified, this is in accord with the access charge regime established by the FCC. The FCC required that the costs of switched access be segregated between the costs dedicated to single IXC customers and cost of "common" or "shared" facilities used to serve multiple IXCs. The primary elements of switched access service were determined to be serving wire center entrance facilities dedicated to a particular IXC; transport facilities from the serving wire center to the tandem switch, also dedicated to a particular IXC, a trunk port on the tandem switch, again dedicated to a particular IXC; and transport facilities from a second trunk port on tandem switch to the end office switch, which are *shared* among many IXCs.²⁶ The FCC prescribed the rate structure for access charges accordingly. Under rate structure, there is a dedicated tandem port charge is on the serving wire center side *only*, which is the side closest to the IXC's point of presence. There is no separate

²² *Id.* at 11 (emphasis original).

²³ *See id.* at 12.

²⁴ Verizon Brief at 12.

²⁵ *Id.* at 11.

²⁶ *See* XO Brief at 7-10.

charge, either on the IXC *or* XO for the second port serving the shared transport to the end office. The FCC allocated the costs and the recovery of the cost for the second port to the per minute tandem switching charge. Verizon has no justification for charging XO – or anyone – for the second port because Verizon’s costs for the second port are being recovered through the other tandem-switched transport rates that the FCC adopted.²⁷ Verizon admitted as much when it confirmed that when the traffic goes through its access tandem to a Verizon end office, Verizon does not charge for the second access tandem port, and that any costs that Verizon incurs for providing that second port are allocated to its tandem switching charge, *which does not vary* regardless of whether traffic is switched to a Verizon end office, an ITC end office, or a CLEC end office.²⁸ As XO pointed out, and the Massachusetts commission agreed, to the extent that Verizon is charging CLECs a dedicated tandem port charge for the port between the Verizon access tandem and the CLEC end office, it is *double recovering* for the end office port; once by charging the IXC the tandem switching charge, and again from CLECs through the dedicated tandem port charges on the end office side of the switch.²⁹

Verizon tries to evade the dictates of the FCC’s rate structures by arguing that there is a second “serving wire center” between its network and XO’s, and thus a dedicated trunk and a dedicated tandem trunk port. It accuses XO of “implying” that there are clearly defined “sides” to tandem switches, the “IXC” side (i.e. the “serving wire center” side) and “end office” side.³⁰ XO is “implying” nothing, but merely stating the obvious as expressed by the FCC, which has consistently recognized only one “serving wire center” between an end user and an IXC’s POP.³¹

²⁷ *See id.* at 20-21.

²⁸ Tr. 82:21-83:1.

²⁹ XO Brief at 22-23.

³⁰ Verizon Brief at 24.

³¹ *See* XO Brief at 29.

Verizon can point to no FCC ruling that has ever referred to serving wire “sides” in the plural, or even used an indefinite term such as “a serving wire center side” to describe these arrangements. The FCC consistently uses the singular article “the” to describe the one serving wire center side in the relevant call path.³²

While Verizon accuses XO of engaging in circular reasoning,³³ it is really Verizon that does so when it explains that the reason XO is on the serving wire center side is because it is using dedicated transport, and then turns around and says that XO is a purchaser of dedicated transport because it is on the serving wire center side of the tandem.³⁴ The fact is that aside from an ambiguous definition that it has taken out of context,³⁵ Verizon has produced no support for this claim. Advising against “too restrictive” a reading of the governing regulations and documents,³⁶ Verizon expects the Commission to read outside the boundaries of straightforward FCC decisions and regulations, formal industry guidelines and intricate explanations contained in its own tariffs in favor of an unorthodox theory concocted solely for this proceeding.

V. VERIZON IS UNLAWFULLY DISCRIMINATING AGAINST CLECS BY ASSESSING THE DEDICATED TANDEM TRUNK PORT CHARGE.

In its brief, XO demonstrated that Verizon does not impose tandem trunk port charges on ITCs, even though its arrangements with respect to handling of IXC traffic are essentially the same for ITCs as they are for CLECs. The only difference between the two situations is the specific location of the meet point between Verizon and the other entity. In the case of the ITC, it is usually a mid-span meet somewhere between the Verizon tandem switch and the end office

³² *Access Reform Order* para. 152. The FCC has referred to “the LEC serving wire center” in more than 250 orders addressing one component of its access charge regime. We have not identified a single such order that even suggests that the call path involves *two* such wire centers.

³³ Verizon Brief at 27.

³⁴ *Id.* at 22.

³⁵ *Id.* at 23; *see* XO Brief at 31 explaining the true context.

³⁶ Verizon Brief at 18.

switch. In the case of the CLEC it is at a collocation/POT Bay within the Verizon wire center. The fact that Verizon is assessing tariffed access charges on CLECs while not assessing the ITCs constitutes discrimination by Verizon in applying the terms and conditions of Verizon's access tariffs.³⁷

Verizon claims that the record establishes that there are "very real and fundamental differences" between Verizon's relations with the ITC and its relations with the competitive LECs like XO, so that it is reasonable for Verizon to charge XO the dedicated tandem trunk port rate on the end office side, but not ITCs.³⁸ Contrary to Verizon's representation, the record is actually very sparse in regard to the differences between ITCs and CLECs. Verizon explains that connect their networks by each building to the "exchange boundary" and that and they do not bill each other for the facilities on their respective sides of the meet point. Verizon also states that the trunks "carry all kinds of traffic, not just access toll traffic."³⁹ However, it was clear in the hearing that Verizon was not only conflating trunks, trunk groups and facilities, but could not describe why the ITC was still not responsible for ATC trunk ports for that portion of its traffic that was toll traffic.⁴⁰

Verizon's four paragraph treatment of this issue boils down to a distinction without a difference. Taken from Verizon's description, the essential difference between interconnection with CLECs and interconnection with ITCs is merely the location of the meet point. With ITCs, it is typically at a geographical point between networks; with CLECs, it is usually within the Verizon network. However, the CLEC is no more or less responsible for facilities on its side of the meet point than an ITC. As Verizon emphasized, XO claims 100% of the responsibility for

³⁷ XO Brief at 23-24.

³⁸ Verizon Brief at 25.

³⁹ *Id.* at 25.

⁴⁰ Tr. 76:11-78:18.

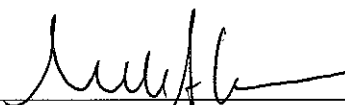
the MPB trunks leading to Verizon's tandem.⁴¹ Verizon also seems to believe that it is somehow significant that that ITC does not charge Verizon for traffic on the ITC's side of the meet point. However, this is irrelevant, because *neither party* charges the other in a MPB arrangement.

VI. CONCLUSION

Verizon's efforts to re-characterize what is widely recognized as joint provisioning of meet point billing arrangements for allowing IXC access to CLEC end user customers is illogical and contrary to all applicable law, the governing agreement and industry guidelines. Therefore, Verizon's dedicated tandem trunk port charges must be disallowed with prejudice and any penalties, interest or any other charges also being erased and Verizon must be barred from efforts to impose such charges in the future.

Respectfully submitted,

XO Communications Services, Inc.


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⁴¹ Verizon Brief at 1.

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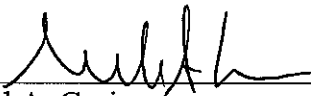
CERTIFICATE OF SERVICE

I hereby certify that I have this day the foregoing Reply Brief in accordance with the requirements of 52 Pa. Code § 1.54 et. seq. (relating to service by a participant):

VIA ELECTRONIC MAIL

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Michael A. Gruin

DATED: May 22, 2009