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July 26, 2010

Rosemary Chiavetta, 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 Chiavetta:

Enclosed please find the Reply Exceptions of XO Communications Services, Inc., which were 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: Cheryl Walker Davis, Esq., Office of Special Assistants
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 EXCEPTIONS OF XO COMMUNICATIONS SERVICES, INC.

Pursuant to 52 Pa. Code §5.535, XO Communications Services, Inc. (“XO”) hereby submits this Reply to the Exceptions filed by Verizon Pennsylvania, Inc. (“Verizon”) to the Recommended Decision (“R.D.”) issued by Administrative Law Judge (“ALJ”) Louis G. Cocheres.

In its Exceptions, Verizon argues that the dispute between XO and Verizon is “moot”, and asks the Commission to either dismiss the case in its entirety, or in the alternative, to reject the R.D.’s refund provisions. Verizon’s Exceptions are baseless and must be denied by the Commission. The fact that Verizon now acknowledges that its Dedicated Tandem Port Charges were improper does not render the case “moot” or justify dismissal of the case. To the contrary, it is incumbent upon the Commission to issue an Order which confirms the unlawfulness of the Dedicated Tandem Port Charges, mandates and enforces appropriate remedies for Verizon’s past unlawfulness, and ensures that Verizon does not attempt to impose such unlawful charges again.

Verizon’s Exceptions wrongly state that Verizon has “ already provided the relief requested in the complaint.”¹ XO acknowledges that Verizon has ceased charging the unlawful port charge for the past several months, however, such acknowledgement only temporarily satisfies one aspect of XO’s Complaint. As stated in the R.D., XO’s Complaint in this matter requested that the Commission 1) find that Verizon was violating its tariffs and breaching its

¹ Verizon Exceptions, at p. 1

interconnection agreements by charging the Dedicated Tandem Port Charges, 2) bar Verizon from collecting on past invoices for those Port Charges, 3) order Verizon to issue refunds for all past Port Charges paid, with appropriate interest, 4) prohibit similar charges from being imposed by Verizon in the future, and 5) provide any other appropriate relief. Simply dismissing the case in its entirety based on Verizon's claim of "mootness" without addressing all of the relief requested by XO would be a dereliction of the Commission's duty to enforce the Public Utility Code, its regulations, Verizon's tariffs, and the parties' Interconnection Agreement.

This case is not "moot." While Verizon alleges that "it has provided XO with credits for past disputed billings,"² and has provided credits or refunds to other carriers,³ neither XO nor the Commission is in a position to verify that Verizon has properly refunded all of the overcharges with the appropriate interest until Verizon has provided a full accounting as recommended by ALJ Cocheres. It is imperative for the refund requirement and accounting provisions to be formally included in the Commission's Final Order in this matter so as to bind Verizon to remedying its past unlawfulness and to preserve XO's rights to refunds of the unlawful charges.

The Commission case cited by Verizon in support of its "mootness" argument has a clear and obvious distinction from the present case. In the *Zack* case cited by Verizon, the ALJ determined that that issue of a \$2.49 refund to a residential Complainant was moot because "the **documentary evidence** establishes that Respondent, as a courtesy, credited the subject account a total of \$2.49 for the one-minute calls appearing on the July 2009 bill."⁴ Under the circumstances in the *Zack* case, the issue of a refund was moot because the record in that case clearly demonstrated that the refund had already been issued, thereby making it unnecessary for

² Id.

³ Id., at p. 4

⁴ *Zack v. AT&T Communications of Pennsylvania, LLC*, Docket No. C-2009-2127566 (February 22, 2010 I.D. of ALJ Conrad, at p. 9 (Emphasis added).

the ALJ to rule on the issue. By contrast, there is nothing in the record in the present case that would allow the Commission to conclude that Verizon issued a full and final refund to XO and other carriers with appropriate interest. Verizon would have the Commission extend the mootness doctrine to an illogical extreme. Under Verizon's warped version of the mootness doctrine, a losing litigant can simply allege - *after the record has closed* - that they have completely remedied their past unlawfulness, thereby getting the case dismissed, turning an unfavorable result into a favorable one, and avoiding the consequences of their past unlawful behavior. Clearly, Verizon is misinterpreting the mootness doctrine to serve its own purposes.

Dismissal of the case at this stage would leave Verizon with no explicit order to refund the overcharges and no mandate to provide confirmation of such refunds. Verizon is the party whose behavior was found to be unlawful, and therefore Verizon is the party that must undertake the procedure to ensure that its past unlawful behavior is fully remedied. The refund and accounting procedure recommended by ALJ Cocheres properly places the burden on the party that committed the unlawful behavior.

It is equally imperative for the Commission's Final Order to explicitly forbid Verizon from charging the Dedicated Tandem Port Charges in the future, pursuant to its tariff or otherwise. Without such a directive from the Commission in a Final Order, Verizon could attempt to re-impose the charge in the future, and the parties could find themselves right back in front of the Commission again. It makes no sense for the parties to have vigorously litigated the matter and for ALJ Cocheres to have issued a lengthy R.D. only to have the Commission dismiss the case based on an off-the-record allegation by Verizon that it has since ceased charging for the Dedicated Port Tandem.

Verizon's argument with respect to the issuance of refunds to other carriers also has no place in Exceptions. Verizon's argument on this point consists solely of self-serving, off-the-record statements that it has ceased charging the unlawful Port charge and has issued credits to the appropriate carriers. Again, the Commission has absolutely no way to verify that such steps have been taken. The Commission's final Order must direct Verizon to issue a refund to all affected carriers and to cease from imposing the Dedicated Port Tandem Charges in the future. Without such an Order, the Commission and the affected carriers cannot be assured the Verizon's admitted improper billing has been fully remedied. The refund and accounting provisions of the R.D. are an efficient process to ensure that Verizon's unlawful billing for Dedicated Tandem Port Charges is rectified.

For all of the reasons set forth above, the Commission should deny Verizon's Exceptions and adopt ALJ Cocheres' Recommended Decision in its entirety.

Respectfully submitted,

XO Communications Services, Inc.



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Dated: July 26, 2010

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Complainant	:	
	:	
v.	:	Docket No. C-2008-2038195
	:	
Verizon Pennsylvania Inc.	:	
Respondent	:	

CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Susan S. Paiva, Esquire
Assistant General Counsel
Verizon Pennsylvania Inc.
1717 Arch Street, 10W
Philadelphia, PA 19103



Michael A. Gruin

DATED: July 26, 2010