



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Shelby A. Linton-Keddie
Direct Dial: 717.237.5459
Direct Fax: 717.260.1763
skeddie@mwn.com

October 27, 2010

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

RE: Core Communications, Inc. v. XO Communications Services, Inc.;
Docket No. C-2009-2133609


Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") is the revised Supplemental Prehearing Memorandum of XO Communications Services, Inc. ("XO") in the above-referenced proceeding. As indicated herein, XO is represented by the following counsel: Pamela C. Polacek, Shelby A. Linton-Keddie, and Harry N. Malone. The previous submittal included the name of Karen M. Potkul, which was added in error.

As shown on the attached Certificate of Service, all parties to this proceeding are being duly served with a copy of this document.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Shelby A. Linton-Keddie

Counsel to XO Communications Services, Inc.

SLK/km

Enclosures

c: Administrative Law Judge Kandace F. Melillo (via E-mail and First-Class Mail)
Certificate of Service

www.mwn.com

HARRISBURG, PA • LANCASTER, PA • STATE COLLEGE, PA • HAZLETON, PA • COLUMBUS, OH • WASHINGTON, DC

CERTIFICATE OF SERVICE

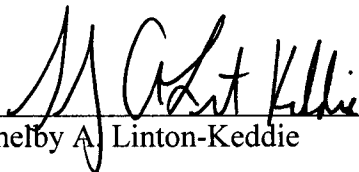
I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

Harry N. Malone, Esq.
Devine, Millimet & Branch
111 Amherst Street
Manchester, NH 03101
hmalone@devinemillimet.com

Deanne M. O'Dell, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market Street – 8th Floor
Harrisburg, PA 17101
dodell@eckertseamans.com

Karen Potkul, Esq.
Corporate Counsel
External Affairs
XO Communications Services, Inc.
1601 Trapelo Road, Suite 367
Waltham, MA 02451
karen.potkul@xo.com



Shelby A. Linton-Keddie

Counsel to XO Communications Services Inc.

Dated this 27th day of October, 2010, at Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.	:	
Complainant	:	
v.	:	Docket No. C-2009-2133609
XO Communications Services, Inc.	:	
Respondent	:	

**SUPPLEMENTAL PREHEARING MEMORANDUM OF
XO COMMUNICATIONS SERVICES, INC.**

Pursuant to Section 5.222(d) of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Regulations, 52 Pa. Code §5.222(d), and the September 23, 2010, Prehearing Conference Order #2 issued by Administrative Law Judge ("ALJ") Kandace F. Melillo in this proceeding, XO Communications Services, Inc. ("XO") hereby submits this Supplemental Prehearing Memorandum in the above-captioned proceeding.

I. INTRODUCTION

Core Communications, Inc. ("Core") initiated this case with a complaint against XO.¹ In its Complaint, Core demanded that XO pay Core intrastate switched access charges (applicable to long distance or toll traffic) for the termination of *non-toll* traffic transmitted to Core by XO. Core admits that it did not bill XO for four years for the traffic that XO transmitted to Core. Once Core did bill XO, XO paid Core for the termination of long distance traffic, but the parties were unable to resolve their disputes regarding the amount owed, if anything, for the termination of non-toll traffic, which ultimately led to Core filing the Complaint. The parties did not have a contract for traffic exchanged between them, and Core has no tariff permitting it to charge XO *any* amount for the termination of non-toll traffic. Consequently, without a contract or an applicable tariff that applied to the non-toll traffic, Core resorted to filing the Complaint in an attempt to enlist the Commission's authority to (1) permit Core to charge inapplicable rates intended for the termination of toll traffic or (2) establish

¹ Core's Complaint was filed against "XO Communications, Inc." The proper corporate name for XO is "XO Communications Services, Inc."

retroactive rates for termination of non-toll traffic.

II. ANTICIPATED ISSUES

The case involves four issues:

1. Whether the Commission has subject matter jurisdiction over the traffic at issue;
2. Whether, in the absence of either a written agreement between the parties or even an effective and applicable tariffed rate, the parties were properly and legitimately operating under a bill-and-keep arrangement for the termination of non-toll traffic destined for Core;
3. Whether, in the absence of either a written agreement between the parties or even an effective, applicable tariffed rate, it is appropriate for the Commission to establish, retroactively, an intrastate rate for the termination of traffic destined primarily, if not exclusively, to locally-dialed Internet service providers ("ISPs"), given that the FCC has determined such traffic to be interstate in nature and has asserted exclusive jurisdiction.² If the Commission, despite XO's belief that bill and keep should apply as the proper compensation arrangement between the parties, finds that an intrastate rate should be established, the Commission must determine the legal basis for applying such rate, particularly in light of the fact that payment of an intrastate rate for ISP-bound traffic is neither authorized under Core's tariffs nor consistent with the FCC's *Mandamus Remand Order*;³ and
4. Whether Core has the authority to issue back-bills covering charges for services allegedly rendered over a prior 4-year period in a CLEC-CLEC context, including the question of whether this action is consistent with Core's tariff and PUC/FCC regulations.

XO does not dispute that intrastate access charges may apply to long-distance, or toll, calls, properly billed, at lawful rates. XO has always been, and remains willing to pay such lawful access

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6485-86, ¶ 22 (2008) ("*Mandamus Remand Order*") (emphasis added). See also *Intercarrier Compensation For ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9189 ¶ 82 (2001) ("*ISP Remand Order*") ("Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue."), *remanded but not vacated by WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

³ *Mandamus Remand Order*, 24 FCC Rcd. 6475 n.69. XO also avers that a recent Commission action, *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, Pa. PUC C-2009-2093336, Motion of Chairman Cawley adopted Feb. 11, 2010, is not applicable to this case. *Palmerton* involved a situation where the respondent was an *intermediate* telecommunications carrier delivering *PSTN-bound* traffic (purportedly IP-originated although actually of indeterminate origin and type), whereas this case involves XO, a *local exchange carrier*, delivering non-toll *ISP-bound* traffic.

charges. As to the exchange of non-toll traffic, XO's position is that, in the absence of either a written contract between the parties or an effective, applicable tariffed rate, the parties could only have operated under a bill-and-keep arrangement for the exchange of such traffic, which is an industry standard practice.

III. PROPOSED WITNESSES

At the present time, XO anticipates presenting the following witnesses in this proceeding:

Richard Jackson
Director, National Telco Audit
XO Communications Services, Inc.

Gary Case
Director, CABS
XO Communications Services, Inc.

The need for different and/or additional witnesses may be identified as the proceeding progresses. If XO determines that it will present other witnesses, XO will inform the ALJ and the other parties as soon as possible.

III. PROCEDURAL SCHEDULE AND SERVICE OF DOCUMENTS

The parties are still engaged in the first round of discovery, and it is anticipated that further discovery will be circulated following the submission of testimony by each party. For purposes of this proceeding, XO proposes the following procedural schedule:

January 4, 2010 — Core Direct Testimony
February 28, 2010 — XO Rebuttal Testimony
March 28, 2010 — Core Surrebuttal Testimony
Week of May 2, 2010 — Evidentiary Hearings
30 days after transcript — Main Briefs
15 days after Main Briefs — Reply Briefs

XO recommends that service of documents be deemed served when sent to the parties by electronic mail so long as they are sent before 5:00 pm EST. Service should then be followed with a hard copy. XO is also agreeable to an arrangement whereby the parties will, within five days of

service of a discovery request, provide oral notice of any objections to that request so that the parties will have the opportunity to resolve those objections short of a formal objection.

IV. SERVICE ON XO

XO will be represented in this case by the following counsel, who should be served with copies of all documents in this proceeding:

Pamela C. Polacek, Esq.
Shelby A. Linton-Keddie
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Tel: (717) 237- 5368
FAX: (717) 260-1736
ppolacek@mwn.com
skeddie@mwn.com


Harry N. Malone, Esq.
Devine Millimet & Branch, P.C.
111 Amherst Street
Manchester, NH 03101
Tel: (603) 695-8532
Fax: (603) 669-8547
hmalone@devinemillimet.com

V. **SETTLEMENT DISCUSSIONS**

The parties have had several discussions regarding discovery and other matters related to the issues in this case. Although it is highly unlikely that the parties will amicably resolve all issues in this case — in particular the compensation scheme for non-toll traffic — the parties are continuing to discuss other issues in an effort to narrow any disputed issues in this case. The parties will promptly notify the ALJ if they are able to resolve any issues.

Respectfully submitted,

XO Communications Services, Inc.

By 
Pamela C. Polacek, Esq. (PA I.D. No. 78276)
Shelby A. Linton-Keddie (PA I.D. No. 206425)
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Tel: 717.237.5368
Fax: 717.260.1736
ppolacek@mwn.com
skeddie@mwn.com

Harry N. Malone, Esq.
Devine Millimet & Branch, P.C.
111 Amherst Street
Manchester, NH 03101
Tel: 603.695.8532
Fax: 603.669.8547
hmalone@devinemillimet.com

Counsel to XO Communications Services, Inc.

Dated: October 27, 2010