

CAPTION SHEET

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  - SUPERVISOR:
- 6. PERSON IN CHARGE:
- 8. DOCKET NO: A-310758 F7000
- 4. PUBLIC MEETING DATE: 00/00/00
- 7. DATE FILED: 06/25/02
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PARTY/COMPLAINANT: VERIZON PENNSYLVANIA INC

RESPONDENT/APPLICANT: XO PENNSYLVANIA, INC.

COMP/APP COUNTY:

UTILITY CODE: 310758

ALLEGATION OR SUBJECT

PETITION OF XO PENNSYLVANIA, INC. FOR RESOLUTION OF RECIPROCAL COMPENSATION DISPUTE PURSUANT TO THE ABBREVIATED DISPUTE RESOLUTION PROCESS.

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**DOCKETED**

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5 ALSO ADMITTED TO THE NEW YORK BAR

Re: Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal  
Compensation Dispute Pursuant to the Abbreviated Dispute Resolution  
Process, Docket No. A-310758F0002

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, Pennsylvania 17120

A-310758F7000

Dear Secretary McNulty:

Enclosed for filing is an original and two copies of the Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process. In accordance with the *Order Establishing Revised Interim Guidelines for Abbreviated Dispute Resolution Process* adopted on July 13, 2000 and published in the Pennsylvania Bulletin at 30 Pa. Bull. 3808 (July 29, 2000), the Petition is clearly identified as having been filed pursuant to the Abbreviated Dispute Resolution Process, and prescribes that an Answer is due within seven (7) days of its filing.

Also in accordance with the Revised Interim Guidelines, a copy of the Petition has been served on Verizon Pennsylvania Inc., the opposing party in this matter, and on the Office of Consumer Advocate, Office of Small Business Advocate and the Office of Trial Staff. A certificate of service is also enclosed.

Because of the proprietary information contained in Exhibit "C," the Exhibit has been marked "proprietary" and is attached separately from the Petition. We request that Exhibit "C" be segregated and afforded proprietary protection.

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June 25, 2002  
Page 2

If you have any questions, please contact me at 717 237 6738.

Very truly yours,

RHOADS & SINON LLP

By: *Debra M. Kriete*  
Debra M. Kriete

cc: The Honorable Robert Christianson (w/encl.)  
Renardo L. Hicks, Esq. (w/encl.)

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Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
Harrisburg, Pennsylvania 17105-3265

**DISPUTE RESOLUTION PETITION: ANSWER DUE WITHIN 7 DAYS**

Petition of XO Pennsylvania, Inc.  
for Resolution of Reciprocal  
Compensation Dispute Pursuant to  
the Abbreviated Dispute Resolution  
Process

.....

*A - 310758F7000*

Docket No. A-310758F0002

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**DISPUTE RESOLUTION PETITION OF XO PENNSYLVANIA, INC.**

XO Pennsylvania, Inc. ("XO") seeks to resolve an ongoing dispute with Verizon Pennsylvania Inc. ("Verizon") concerning Verizon's refusal to pay reciprocal compensation for all calls that XO has terminated from Verizon end user customers to XO customers. The amount of payments that Verizon has unilaterally withheld since July 2001 exceeds \$ 800,000 and grows larger with each passing month. In addition, XO seeks to obtain late payment charges on those amounts of the invoice that Verizon did not dispute but failed to pay on a timely basis.

Verizon's unlawful actions are in violation of the interconnection agreement governing the terms of interconnection and other business relationships between XO and Verizon.

Despite XO's good faith efforts to resolve these issues through negotiations with Verizon that lasted well over thirty (30) days, an amicable resolution of this issue was not reached. XO, therefore, must seek recourse through the PUC's abbreviated dispute resolution process ("ADR") in order to obtain payment for the service that XO provided to Verizon, but for which Verizon has unilaterally refused to pay.

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In support thereof, XO avers the following:

**A. Parties and Jurisdiction**

1. XO is a CLEC that holds a certificate of public convenience from this Commission at A-310758, and currently provides local exchange and other telecommunications services in Pennsylvania.

2. Verizon is an incumbent local exchange company ("ILEC"), as defined in 47 U.S.C. §251(h) and provides local exchange and other telecommunications services in Pennsylvania.

3. This Commission has jurisdiction over this dispute pursuant to 47 U.S.C. §§251 and 252. Those statutes expressly confer authority on state commissions such as this regulatory agency to review and approve negotiated interconnection agreements and to resolve disputed issues through arbitration proceedings conducted before an appropriate state commission. The state commissions' authority under these statutes has been interpreted consistently to also include the power to interpret and enforce interconnection agreements. *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942 (8<sup>th</sup> Cir. 2000); *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7<sup>th</sup> Cir. 2000); *Southwestern Bell Telephone Co. v. Public Utility Commission*, 208 F.3d 475 (5<sup>th</sup> Cir. 2000); *Bell Atlantic-VA v. WorldCom Technologies of VA, Inc.* 70 F. Supp. 620 (E.D. VA 1999); *AT&T Communications, Inc. of CA, Inc. v. Pacific Bell*, 60 F.Supp.2d 997 (N.D. CA 1999); *Intermedia, Inc. v. BellSouth Communications, Inc.*, 173 F.Supp. 2d 1282 (M.D. FL. 2000).

4. This dispute is an appropriate matter for resolution via the Commission's Abbreviated Dispute Resolution Procedures ("ADR" or "ADRP"). 30 Pa. Bulletin 3808; *Order*

*Establishing Revised Interim Guidelines for Abbreviated Dispute Resolution Process ("ADR Guidelines"); Joint Petition for Global Resolution of Telecommunications Proceedings*, Docket No. P-00991649; *Joint Petition of Senators Fumo, Madigan and White, The Pennsylvania Cable & Telecommunication Association and 7 Competitive Local Exchange Carriers for Adoption of Partial Settlement*, Docket No. P-00991648 (Order entered September 30, 1999) ("*Global Order*"). The dispute arose because of Verizon's violation of the existing interconnection agreement between XO and Verizon. As such, this dispute meets one of the criteria that the Commission has established as appropriate subjects for ADR: a violation of an existing interconnection agreement. *ADR Guidelines*, Annex A, No. 1.

5. XO has attempted to resolve this dispute with Verizon through good faith negotiations for more than 30 calendar days. This ADR petition, therefore, is ripe for review and action by the Commission.

6. More specifically, on or about June 18, 2001, Verizon notified XO that it intended to implement the *FCC ISP Order* without any amendment to the Agreement, but Verizon offered to negotiate such an amendment. On or about July 19, 2001, XO responded that the *FCC ISP Order* was not self-effectuating but that XO was willing to negotiate an amendment to the Agreement that would incorporate the FCC's Order. The Parties subsequently entered into good faith negotiations over the next several weeks. The Parties, however, were unable to resolve several issues, primarily the date on which the rates in the *FCC ISP Order* would be considered effective, and negotiations broke off in October 2001. In March and April 2002, XO made one final effort to resolve its differences with Verizon, but the Parties failed to reach any agreement. Verizon recently corresponded with XO concerning this matter and has insisted on adhering to its original position, to which XO continues to object. Clearly, the parties have reached an

impasse concerning this matter and XO's decision to seek abbreviated dispute resolution from the Commission is timely and appropriate.

7. XO has requested Verizon to pay late payment charges on the amounts that Verizon did not dispute, but failed to pay on a timely basis. Verizon, however, has categorically refused to pay late payment charges on any invoice amounts. The parties, therefore, have been unable to negotiate a resolution of this issue and have reached an impasse.

**B. The Parties' Interconnection Agreement**

8. Verizon's predecessor, Bell Atlantic-Pennsylvania, Inc. and XO's predecessor, Nextlink Pennsylvania, Inc. entered into an interconnection agreement (hereinafter referred to as the "XO-Verizon Agreement") under sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§251-252, that was dated as of June 2, 2000. This Commission approved the Agreement by Order entered at Docket No. A-310260F0002 on February 9, 2001.

9. The XO-Verizon Agreement reflected XO's exercise of the right, under 252(i) of the Telecommunications Act of 1996, 47 U.S.C. §252(i) to opt into the MCI Metro Access Transmission Services, Inc. interconnection agreement with Bell Atlantic-Pennsylvania, Inc. dated as of September 7, 1997 (hereinafter referred to as the "MCI-Verizon Agreement") and which was approved by this Commission.

10. Attachment I, Section 4.2 of the XO-Verizon Agreement provides, "Reciprocal Compensation for the exchange of Local Traffic is set forth in Table 1 of this Attachment and shall be assessed on a per minute-of-use basis for the transport and termination of such traffic." The Agreement defines "Local Traffic" as "traffic that is originated by an end user subscriber of one Party on that Party's network and terminates to an end user subscriber of the other Party on

that other Party's network within a given local calling area, or expanded area service ("EAS") area, as defined in Bell Atlantic's Tariffs, or, if the Commission has defined local calling areas applicable to all Local Exchange Carriers, then as so defined by the Commission." Agreement, Part B at 11. This provision is incorporated by reference into the XO-Verizon Agreement.

11. Traffic terminated to Internet Service Provider ("ISP") customers of the Parties' respective local exchange services is "Local Traffic" under the XO-Verizon Agreement. Such traffic "originates from an end user subscriber of one Party on that Party's network and terminates to an end user subscriber of the other Party on that other Party's network within a given local calling area." *Id.*

12. The XO-Verizon Agreement further recognizes that ISP traffic is Local Traffic by differentiating only between "Local Traffic" and "toll traffic" when establishing requirements for interconnection, compensation, signalling, and other services and functions. *E.g.*, MCI-Verizon Agreement, Attachment I, Section 4.1 (XO "may choose to deliver both Local Traffic and toll traffic over the same trunk group(s)"); Agreement, Attachment III, Section 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"); MCI-Verizon Agreement, Attachment IV, Section 1.1 ("The Parties shall terminate Local Traffic and intraLATA/interLATA toll traffic originating on each other's networks"); MCI-Verizon Agreement, Attachment IV, Section 7.3 ("At such time as either Party has the ability, as the Party receiving the traffic, to use such CPN information to classify on an automated basis traffic delivered by the other Party as either Local Traffic or toll traffic, such receiving Party shall bill the originating Party the Local Traffic termination rates, intrastate Exchange Access rates, or



interstate Exchange Access rates applicable to each minute of traffic for which CPN is passed, as provided in Attachment I and applicable Tariffs”).

13. Under the terms of the existing XO-Verizon Agreement, XO historically has issued monthly invoices to Verizon for all calls from Verizon customers that XO has terminated to XO’s customers, including its ISP customers, and Verizon had typically paid such invoices until the present dispute arose in June 2001. The invoiced amounts for reciprocal compensation are calculated based on XO’s measurement of the number of minutes multiplied by the reciprocal compensation rate in the XO-Verizon Agreement.

14. Verizon clearly understood that the MCI-Verizon and XO-Verizon Agreements required Verizon to pay reciprocal compensation on all calls terminated to XO customers, including XO ISP customers, as evidenced by Verizon’s payment of XO’s reciprocal compensation invoices from the effective date of the XO-Verizon Agreement until the present controversy arose in June 2001.

**C. The Reciprocal Compensation Provisions of the XO-Verizon Agreement Comply with this Commission’s Global Order and the TCG Order**

15. This Commission has comprehensively addressed the issue of reciprocal compensation for ISP traffic between CLECs and ILECs, and the standard that governs the interpretation of related provisions that are found in CLEC – ILEC interconnection agreements. Beginning in 1998, this Commission has ruled that local traffic includes calls terminated to ISPs:

The general rule is that in the absence of fraud, accident or mistake, the law declares the writing to be not only the best, but the only evidence of the agreement between parties. *Gianni v. Russell & Co.*, 281 Pa. 320, 126 A. 791 (1924); TCG Petition, p. 7, citing *Young v. Young Equitable Life Assur. Soc. Of U.S.*, 350 Pa. Superior Ct. 247, 504 A.2d 339 (1986); *Com. Dept. of Transp. v. Bracken Const. Co.*, 457 A.2d 995 (Pa. Cmwlth 1983) and *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Superior Ct. 252, 404 A.2d 398 (1978).

Consequently, it is only if the Agreement is not capable of being interpreted according to the plain and ordinary meaning of the words contained therein, will this Commission have to look to extrinsic evidence to resolve the dispute between the parties. *Comm. Dept. of Transp. v. Brozzetti*, 648 A.2d 658, 664 (Pa. Cmwlth. 1996).

\* \* \*

On consideration of the positions of the parties, we find ourselves in agreement with TCG concerning the proper approach to be given the interpretation of the term "Local Traffic" as used in the Agreement. Based on the application of contract principles to this controversy, we agree with TCG that according to the plain and ordinary meaning of the words, the traffic from end-users to ISPs is local and subject to reciprocal compensation arrangements.

\* \* \*

Based on the foregoing, we shall grant TCG's Petition. We conclude that, at the time the Agreement was executed, the definition of Local Traffic, eligible for reciprocal compensation, included traffic from Bell's end-user customers to ISPs who are TCG's end-user local customers. We decline, however, to make any findings of anticompetitiveness or bad faith on the part of Bell.

*Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. P-00971256, Order entered June 16, 1998, at 21-24 ("*TCG Order*").

16. The standards adopted by the Commission in its *TCG Order* for evaluating the applicability of interconnection agreement provisions regarding the reciprocal compensation for ISP traffic are equally applicable to this Petition. Essentially, as in the TCG case, Verizon chooses to ignore applicable and binding contractual provisions in its operative interconnection agreement with XO that obligate Verizon to periodically remit the appropriate payments for the termination of ISP traffic in XO's network.

17. In its landmark *Global Order*, this Commission had the opportunity to both affirm the earlier *TCG Order* and further explain the interaction between the Commission's jurisdiction and FCC directives addressing the issue of reciprocal compensation for ISP traffic. The Commission stated the following:

The specific issues we must address are whether the FCC Inter-Carrier Compensation Order requires us to reverse our TCG Order and discontinue the application of reciprocal compensation for ISP calls in light of the fact that the FCC deemed those calls predominantly interstate in nature and whether, as a matter of policy, Pennsylvania will treat internet calls as local calls for purposes of compensation to the extent permitted by Federal law. These are questions of law and policy.

Based on our review of the record, we find more compelling the arguments set forth by the proponents of the position that ISP calls should be treated as local calls for reciprocal compensation purposes. Moreover, we decline to reverse our prior *TCG* decision consistent with this determination.

Consequently, we direct that ISP calls shall continue to be treated as local calls as a matter of public policy in Pennsylvania, for the purpose of intercarrier compensation consistent with federal law and policy.

Carriers must continue to abide by the current interconnection agreements regarding reciprocal compensation for the local treatment of ISP calls, consistent with the FCC Order and this determination. In addition, we direct that calls to local ISPs shall be considered local and that reciprocal compensation shall be applied on all ISP traffic for all future interconnection agreements filed with this Commission.

*Global Order*, slip op. at 211, 196 PUR4th 172, 264-265, *aff'd Bell Atlantic-Pennsylvania v. Pa. Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Cmwlth 2000).<sup>1</sup>

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<sup>1</sup> The Commission's reference to the FCC Intercarrier Compensation Order relates to Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999), *remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

18. The Commission also concluded that it did not “lack authority to require reciprocal compensation for ISP calls on the sole basis that Internet calls are jurisdictionally considered interstate.”<sup>2</sup> The Commission also observed the following:

In this regard, we note that the we have previously examined, in the context of the TCG Order,<sup>200</sup> the following extrinsic factors dictated by the FCC<sup>201</sup> in reaching our decision that local calls to ISPs are eligible for reciprocal compensation:

- the negotiation of the agreement in the context of the FCC’s longstanding policy of treating the traffic as local;
- the conduct of the parties pursuant to those agreements;
- whether LECs serving ISPs have done so out of intrastate tariffs;
- whether revenues associated with those services were counted as intrastate revenues;
- whether there is evidence that ILECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic; and
- whether, if ISP traffic is not treated as local and subject to reciprocal compensation, ILECs and CLECs would be compensated for this traffic.

*Moreover, we underscore here our expectation that all parties to existing interconnection arrangements will continue to abide by those arrangements to prevent unnecessary litigation of the issues underlying this determination.*

<sup>200</sup> See TCG Decision at 22-23.

<sup>201</sup> Inter-Carrier Compensation Order, at ¶24.

*Global Order, Slip Op.* at 213, 196 PUR4th 265-266 (emphasis added). This Commission clearly has expressed the view on several prior occasions that the term “local traffic” as used in Verizon interconnection agreements with CLECs should be construed to include ISP traffic,

<sup>2</sup> *Global Order slip op.* at 212, 196 PUR4th 265.

notwithstanding any other jurisdictions' pronouncements on the subject, including any guidance that the FCC may have provided.

**D. The FCC ISP Order Does Not Affect The Reciprocal Compensation Provision of the XO-Verizon Agreement**

19. Verizon has refused to pay a substantial portion or all of the invoiced amounts for reciprocal compensation for local traffic originated by Verizon end user customers that XO terminates or has terminated to its subscribers since June 14, 2001. As May 10, 2002, XO has billed Verizon for \$818,074.66 in reciprocal compensation that Verizon has refused to pay. On June 10, 2002, XO issued another invoice to Verizon for a reciprocal compensation payment. Verizon has not yet notified XO of the amount of that invoice that Verizon disputes. The disputed amount attributable to each monthly unpaid invoice as of the date of filing of this Petition is set forth as Exhibit A (proprietary) to this Petition. XO anticipates that this claim will continue to accrue while this Petition is pending.

20. Verizon has refused to compensate XO because Verizon unilaterally changed the terms of the existing XO-Verizon interconnection agreement and modified the rates that it will pay for reciprocal compensation. Verizon erroneously contends that the FCC's recent decision on compensation for ISP traffic automatically supercedes the provisions of the Agreement. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98 & 99-68, FCC 01-131, Report and Order on Remand ¶ 82 (rel. April 27, 2001), 16 FCC Rcd 9151 ("FCC ISP Order").

21. In the *FCC ISP Order*, the FCC determined that ISP traffic is a form of interstate traffic that is not subject to the reciprocal compensation obligations of the Telecommunications

Act of 1996. The FCC established an interim intercarrier compensation mechanism for ISP traffic that is intended to replace the current reciprocal compensation system.

22. The FCC established a rebuttable presumption that “traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound tariff that is subject to the [interim] compensation mechanism set forth in this Order.” *FCC ISP Order* at ¶79.

23. Verizon has chosen to unilaterally implement the terms of the *FCC ISP Order* as of June 14, 2001, and has stopped paying reciprocal compensation for any traffic that XO has terminated from Verizon customers that exceeds the 3:1 ratio.

24. While the effective date of the *FCC ISP Order* is June 14, 2001, the FCC made clear that the Order did not affect existing interconnection agreements “except to the extent that parties are entitled to invoke contractual change-of-law provisions.” *FCC ISP Order* at ¶82.

25. The legality of the *FCC ISP Order* has been invalidated recently by the United States Circuit Court of Appeals for the District of Columbia Circuit. On May 3, 2002, the Court of Appeals for the D.C. Circuit invalidated the legal rationale underlying the *FCC ISP Order*. *WorldCom v. FCC*, No. 01-1218 (D.C. Cir. May 3, 2002). Section 251(g), upon which the FCC relied to extricate ISP calls from the reciprocal compensation provisions and to establish the interim compensation regime, cannot be used as a basis to justify the FCC’s action. Section 251(g) provides for continued enforcement of certain pre-1996 Act obligations that were prescribed by regulation, order or policy of the FCC. The D.C. Circuit found, “[N]othing in §251(g) seems to invite the Commission’s reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however

remote, linked to LECs' pre-Act obligations." *WorldCom v. FCC*, slip op. at 6. The D.C. Circuit remanded the proceeding to the FCC for further action.<sup>3</sup>

26. The D.C. Circuit Court of Appeals certainly did not expect that the *FCC ISP Order* would disrupt existing business relationships based on interconnection agreements that had been implemented well before the *FCC ISP Remand*—such as the XO-Verizon Agreement. In describing the effect of the *FCC ISP Order*, the Circuit Court stated, "The transitional rules take effect on the expiration of existing interconnection agreements." *WorldCom v. FCC*, No. 01-1218 (D.C. Cir. May 3, 2002), slip op. at 3. The Court implicitly anticipated that there would not a disruptive effect associated with its decision to remand, without vacating, the matter to the FCC since the Court evidently thought that *FCC ISP Order* did not apply to existing agreements.

27. Furthermore, the D.C. Circuit's opinion was issued *after* this Commission took official action on the Verizon ADR Petition that considers a similar issue concerning Verizon's continuing obligations to pay reciprocal compensation. *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process*, Docket No. A-

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<sup>3</sup> Further, at least three separate petitions for rehearing of the Court's Decision are pending, in which parties have advocated that the Court's decision to remand the ISP rules without vacating them constitutes an error that the Court should correct, either by vacating the *FCC ISP Order* or staying the effectiveness of the rules while the FCC engages in the further proceedings on remand. See Petition for Rehearing and Petition for Rehearing *En Banc* submitted by National Association of Regulatory Utility Commissioners ("NARUC") (June 18, 2002); Petition for Rehearing and Rehearing *En Banc* submitted by Core Communications, Inc., (June 17, 2002) and Petition for Rehearing and Rehearing *En Banc* submitted by PAC-West Telecomm., Inc. and Focal Communications Corporation (June 17, 2002). In any event, in light of the Court's invalidation of the statutory basis for the *ISP Order*, XO Verizon may not seek to enforce the FCC's *ISP Order* until after the FCC issues an order consistent with the directive of the D.C. Circuit Court of Appeals.

310752F7000(Order adopted April 11, 2002 and entered May 29, 2002). Consequently, the Commission's decision in the ADR proceeding is *not* controlling here.<sup>4</sup>

28. In fact, Verizon has already represented to this Commission that the D.C. Circuit's invalidation of the statutory basis of the *FCC ISP Order* certainly constituted a change in circumstances that would require Verizon to revert back to the reciprocal compensation payment method. According to the ALJ's Initial Decision in the Verizon-MCI WorldCom ADR proceeding, Verizon's counsel acknowledged that if the D.C. Circuit Court of Appeals invalidates the statutory basis for the *FCC ISP Order*, then the compensation system that is in place prior to the FCC's issuance of the *FCC ISP Order* would be back in place. Verizon's counsel stated:

If the appeals court completely knocks out and declares invalid, unlawful, objects to and knocks out the statutory analysis, for example, that the FCC has in its order on remand, I don't think there is any question that whatever was there before the order on remand is back in place and we would settle up dollar for dollar." Tr. 31, see also Tr. 34. The parties further agreed that if any modification ordered upon appeal were immaterial, then the original compensation scheme would not be reimposed. Tr. 40.

*Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process*, Docket No. A-310752F7000, Initial Decision Denying Petition Pursuant to the Abbreviated Dispute Resolution Process (November 16, 2001) at 13.

29. Verizon recently transmitted to XO an interconnection amendment that would permit Verizon to begin applying the interim compensation provisions as set forth in the now invalidated *FCC ISP Order* as of June 14, 2002. See Exhibit B. Ignoring the D.C. Circuit's

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<sup>4</sup> Further, it should be noted that MCI WorldCom petitioned the Commission for reconsideration of its Opinion and Order entered May 29, 2002, on June 13, 2002.



remand of the *FCC ISP Order* as well as the Petition for Reconsideration of this Commission's May 29, 2002 Opinion and Order that MCI WorldCom filed on June 13, 2002, Verizon claimed that the Commission, in its May 29, 2002 Order, instructed Verizon to obtain an executed amendment of its interconnection agreement with XO. XO responded by confirming its continuing disagreement with Verizon over the effective date that should govern any revised prices in the interconnection amendment. *See Exhibit C.* As XO explained, the Commission's May 29, 2002 Opinion and Order is not controlling here, since there have been several important developments that occurred after the Commission adopted that Order.

**E. In the Alternative, The XO-Verizon Agreement Does Not Allow Verizon To Unilaterally Modify the Terms of the Agreement**

30. The XO-Verizon Agreement authorizes changes to its rates, terms, and conditions only through written amendment to the agreement except in limited circumstances not applicable here:

In the event the FCC...issues orders...which make unlawful any provision of this Agreement, or which materially reduce or alter the services required by statute or regulations and embodied in this Agreement, then the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which conform to such rules, regulations or orders. In the event the Parties cannot agree on an amendment within thirty (30) days after the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 24 (Dispute Resolution Procedures) hereof.

Agreement, Part A, Section 2.2.

31. Verizon and XO negotiated in good faith to amend the Agreement to incorporate the *FCC ISP Order*, but the Parties were unable to reach agreement on such an amendment. Verizon, however, never sought resolution of the disputed issues through the dispute resolution

provisions of the Agreement or by any other means. Verizon may not, therefore, automatically incorporate the *FCC ISP Order*.

32. The change-of-law provision found at Attachment 1, Section 1.1 of the MCI-Verizon Agreement likewise does not authorize Verizon to unilaterally implement the *FCC ISP Order*. This change-of-law provision prescribes that:

The rates or discounts set forth in Table 1 below may be subject to change and shall be replaced on a prospective basis (unless otherwise ordered by the FCC, the Commission, or the reviewing court(s)) by such revised rates or discounts as may be ordered, approved or permitted to go into effect by the FCC, the Commission or a court of applicable jurisdiction, as the case may be. Such new rates shall be effective immediately upon the legal effectiveness of the court, FCC, or Commission order requiring such new rates or discounts. Within ten (10) days after the legal effectiveness of the court, FCC, or Commission order establishing such new rates or discounts and regardless of any intention by any entity to further challenge such order, the Parties shall sign a document revising Table 1 and setting forth such new rates or discounts, which revised Table 1 the Parties shall update as necessary in accordance with the terms of this Section.

Attachment 1, Section 1.1. This provision should be construed consistent with the general change-of-law provision to require the parties to jointly modify the interconnection agreement whenever there is a regulatory action that allows but does not mandate that the rate schedule be changed. To do so otherwise, and to permit Verizon to unilaterally modify the rate schedule would allow Verizon to unilaterally abrogate the terms of the existing interconnection agreement in contravention of Section 2.2 of Part A. The *FCC ISP Order* did not **require** any new rates to become effective (*FCC ISP Order* at ¶82), which under Section 1.1 would be the only situation in which Verizon is permitted to implement the new rates immediately. The significant distinction between the use of the words “ordered, approved, or permitted to go into effect” would be rendered a nullity if the word “required” in the second sentence is construed to encompass “ordered, approved or permitted to go into effect.” Required connotes a mandate,

just as “ordered” connotes a mandate. “Approved or permitted to go into effect” is not the same as a mandate.

33. Further, the *FCC ISP Order* made clear that the Order did not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim compensation mechanism. Consequently, the Commission’s decisions in the *TCG and Global* proceedings, that ISP-bound traffic is local traffic remains in full force and effect, and should govern the parties’ existing interconnection agreement.

**F. Verizon Consistently Has Failed to Remit Payment of Invoices on a Timely Basis and Has Consistently Failed to Pay Late Payment Charges.**

34. The XO-Verizon Agreement prescribes that undisputed amounts due under the Agreement must be paid no later than the due date on the invoice or bill. WorldCom-Verizon Agreement, Attachment VIII, Section 3.1.8.1. XO typically issues invoices to Verizon on a monthly basis, and provides a due date that is 30 days from the invoice date. XO’s believes, and therefore avers, that its billing practices with Verizon conform to industry standards.

35. Verizon routinely fails to remit payment of XO’s invoices until well past the 30 day invoice due date. Verizon typically issues payment to XO sometime between the 31<sup>st</sup> and 90<sup>th</sup> day after the XO invoice date.

36. The XO-Verizon Agreement prescribes that “undisputed amounts which are not paid by the due date stated on the providing Party’s bill shall be subject to a late payment charge.” WorldCom-Verizon Agreement, Attachment VIII, Section 3.1.8.2. The amount of the late payment charge shall be the amount set forth in Verizon’s interstate access tariff, but in the event that no such late payment fee is prescribed therein, the charge shall not exceed a rate of

1.5% of the overdue amount, including any unpaid, previously billed late payment charges, each month. *Id.*

37. XO has computed the amount of the late payment charges on the undisputed amounts that Verizon failed to pay on a timely basis during the same period applicable to the disputed reciprocal compensation payments that Verizon has refused to pay, as of the date of filing of this Petition, using a rate of 1.5%. These amounts total \$37,326.09, and are itemized on Exhibit A (proprietary). XO anticipates that this claim will continue to accrue while this Petition is pending.

**Request for Relief**

WHEREFORE, XO requests an opportunity for hearing; and that this Commission issue an Order requiring that Verizon comply with the Agreement, specifically that Verizon compensate XO for transport and termination of all Local Traffic, including ISP traffic, according to the rates, terms, and conditions in the Agreement, including all amounts XO has billed Verizon for traffic terminated since June 14, 2001 until the XO-Verizon Agreement is modified by an amendment jointly executed by the parties, plus late payment charges on all overdue payments of undisputed amounts at the rate of 1.5% per month; and, such other or further relief as the Commission finds just and reasonable.

Respectfully submitted,

RHOADS & SINON LLP

By:

Debra M. Kriete

James H. Cawley

Debra M. Kriete

One South Market Square

P. O. Box 1146

Harrisburg, PA 17108-1146

(717) 233-5731

Attorneys for XO Pennsylvania, Inc.

June 25, 2002

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02 JUN 25 PM 3:50  
P.A.F.U.C.  
SECRETARY'S BUREAU

VERIFICATION

I, Renardo L. Hicks, hereby aver that I am Vice President and Regulatory Counsel for XO Pennsylvania, Inc.; I am authorized to make this verification on behalf of XO Pennsylvania, Inc. and that the facts set forth in the foregoing document are true and correct to the best of his knowledge, information and belief.

I understand that false statements herein are made subject to the penalties of 18 C.S. Section 4904 relating to unsworn falsification to authorities.

Renardo L. Hicks  
Signature

Dated: June 24, 2002

Renardo L. Hicks  
Printed Name

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02 JUN 25 PM 3:50  
P.A.P.U.C.  
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2002, a true and correct copy of the foregoing document, Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process, was served upon the following persons in the manner indicated below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant):

VIA U.S. MAIL, FIRST CLASS POSTAGE PRE-PAID	
Charles Hoffman, Esquire Chief Prosecutor Office of Trial Staff Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	Irwin Popowsky, Esquire Consumer Advocate 555 Walnut Street 5 <sup>th</sup> Floor Forum Place Harrisburg, PA 17101-1923
Carol Pennington Acting Small Business Advocate Office of Small Business Advocate Suite 1102, Commerce Building 300 North Second Street Harrisburg, PA 17101	

  
Debra M. Kriete

RECEIVED  
02 JUN 25 PM 3:50  
PA.P.U.C.  
SECRETARY'S BUREAU

Jack H. White  
Vice President and Associate General Counsel



1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201

June 18, 2002

**BY CERTIFIED U.S. MAIL.**

Renardo L. Hicks  
Vice President, Regulatory Counsel  
XO Pennsylvania Inc.  
2690 Commerce Drive  
Harrisburg, PA 17110

Re: Implementation of the FCC Order on Remand

Dear Renardo L. Hicks:

This letter is to advise you of an important development regarding your company's interconnection agreement with Verizon Pennsylvania Inc.

On June 26, 2001, your company was notified of Verizon Pennsylvania's election to adopt, effective June 14, 2001, the interim compensation regime for Internet traffic adopted by the Federal Communications Commission in its Order on Remand and Report and Order, Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 98-68, FCC 01-131 (Rel. April 27, 2001) ("*Order on Remand*"). According to our records, however, your company so far has failed to execute an amendment conforming its interconnection agreement to the terms of the Order on Remand, and continues to invoice Verizon for intercarrier compensation charges attributable to presumptively ISP-bound traffic at rates that exceed the rates established by the FCC (currently \$.0010/minute of use).

At a public meeting of the Pennsylvania Public Utility Commission (the "Commission") on April 11, 2002, the Commission voted 5-0 to grant Verizon's petition for resolution of a dispute with MCI WorldCom regarding the appropriate date and mechanism for implementing the *Order on Remand*. In its Opinion and Order, entered May 29, 2002, the Commission determined that "Verizon PA is correct that the new rate regime is effective upon the effective date of the ISP Remand Order . . . [and] . . . [t]he ISP Remand Order became effective on June 14, 2001." Opinion and Order, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process* at 6, 16 (Pa. PUC Docket No. A-310752F7000, May 29, 2002).



Jack H. White  
Implementation of FCC's *Order on Remand*  
June 18, 2002  
Page 2

Your company elected under section 252(i) of the Communications Act to adopt the same MCI WorldCom agreement that is the subject of the Commission's order. Accordingly, it is clear that the terms of the Commission's order are equally applicable to your company, and that the FCC's rate regime for Internet traffic should be given effect under your interconnection agreement as of June 14, 2001. I enclose an amendment that reflects the Commission's instruction to file an amendment that conforms to the FCC's Order on Remand, with an effective date of June 14, 2001. We would appreciate your prompt execution of this amendment, so that the parties can reconcile their billings to reflect the Commission's order. Please sign both signature pages and return them to the attention of Antonia Siebert, Specialist, Verizon, 1515 North Courthouse Road, Suite 500, Arlington, Virginia 22201. We will return a fully executed original for your records.

If you have any questions concerning the required bill reconciliation, please contact Sandy McMurtry at 617-743-0370.

Sincerely,



Jack H. White

Enclosure

**Amendment Number 5  
to the  
Interconnection Agreement  
between  
Verizon Pennsylvania Inc.  
and  
XO Pennsylvania, Inc., f/k/a Nextlink Pennsylvania, Inc.**

THIS AMENDMENT NUMBER 5 (this "Amendment") to the Interconnection Agreement (the "Agreement") dated June 2, 2000 between Verizon Pennsylvania Inc. ("Verizon") and XO Pennsylvania, Inc., f/k/a Nextlink Pennsylvania, Inc. ("XO"), is entered into this 18th day of June 2002 and shall be effective as of June 14, 2001 (the "Effective Date"). Verizon and XO may be referred to herein individually as "Party" and collectively as "the Parties".

WHEREAS, pursuant to Section 36 of Part A of the Agreement, the Parties desire to amend the Agreement as set forth in this Amendment;

WHEREAS, Verizon has offered to exchange all traffic subject to the reciprocal compensation provisions of section 251(b)(5) with LECs, CLECs, and CMRS providers, at the rates applicable to ISP-bound Traffic, in accordance with the provisions of the ISP Remand Order (as defined herein);

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the Parties, each on its own behalf and on behalf of its respective successors and assigns, hereby agree as follows:

1. Part B of the Agreement, entitled "Definitions", is hereby amended to add the following definition after the definition for "Interexchange Carrier":

"ISP-bound Traffic" shall have the same meaning as is used in the FCC's Order on Remand and Report and Order in CC Docket Nos. 96-98 & 99-68, FCC 01-131, released April 27, 2001 ("ISP Remand Order").

2. The following new Section 4.10 is hereby added to Section 4, "Interconnection and Reciprocal Compensation" of Attachment I of the Agreement:

4.10 This Section 4.10 is intended to implement the FCC's ISP Remand Order. Notwithstanding any provision of this Section 4.10 or any other provision of this agreement, this Section 4.10 shall be construed so that the Parties' rights and obligations hereunder are the same as the rights and obligations applicable to CLECs and ILECs as set forth in the ISP Remand Order (defined below). For purposes of this Section 4.10, "ISP-bound Traffic" shall have the same meaning as is used in the FCC's Order on Remand and Report and Order in CC Docket Nos. 96-98 & 99-68, FCC 01-131, released April 27, 2001 ("ISP Remand Order"). Other terms used

in this Section 4.10 shall have the same meaning as those terms are used in the ISP Remand Order.

4.10.1 Reciprocal Compensation Rates. The reciprocal call termination rates applicable to "Local Traffic" (as defined in the Agreement), shown in Table 1 of this Attachment, shall apply to the exchange of all section 251(b)(5) traffic (that is, traffic below the FCC's 3:1 ratio, as described in paragraphs 8 and 79 of the ISP Remand Order).

4.10.2 Intercarrier Compensation for ISP-bound Traffic. For the period beginning on June 14, 2001 and ending on December 13, 2001, intercarrier compensation for delivery of ISP-bound Traffic shall be capped at a rate of \$.0015 per minute of use (MOU). Beginning on December 14, 2001, and ending on June 13, 2003, intercarrier compensation for delivery of ISP-bound Traffic shall be capped at a rate of \$.0010 per MOU. Beginning on June 14, 2003, and ending on June 13, 2004, intercarrier compensation for delivery of ISP-bound Traffic shall be capped at a rate of \$.0007 per MOU. The ISP Remand Order specifies that, in the event the FCC does not take further action within the final period during which the \$.0007 per MOU rate is applicable to ISP-bound Traffic, that such period will be extended until the FCC takes such further action. The Parties agree that if the FCC fails to take such further action by June 13, 2004, that the \$.0007 per MOU rate will continue in effect for ISP-bound Traffic beyond June 13, 2004 until the FCC takes further action, provided that, such extension of the \$.0007 rate shall not be construed to modify or extend the term of this Agreement or to affect either Party's right of termination under the Agreement.

4.10.3 Identification of ISP-bound Traffic and section 251(b)(5) traffic. The determination of whether traffic is section 251(b)(5) traffic or ISP-bound Traffic shall be performed in accordance with Paragraphs 8 and 79, and other applicable provisions, of the ISP Remand Order (including, but not limited to, in accordance with the rebuttable presumption established by the ISP Remand Order that traffic delivered to a carrier that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound Traffic, and in accordance with the process established by the ISP Remand Order for rebutting such presumption before the Commission).

4.10.4 Demand or Minutes of Use Cap. For the year 2001, a Party may receive the applicable FCC interim rate set out in Section 4.10.2 for ISP-bound Traffic minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound Traffic minutes for which the Party was entitled to receive compensation under this Agreement during the first calendar quarter of 2001, plus a ten percent growth factor. For the year 2002, a Party may receive the applicable FCC interim rate set out in Section 4.10.2 for ISP-bound Traffic minutes up to a ceiling equal to the ISP-bound Traffic minutes for which it was entitled to receive compensation in 2001, plus a ten percent growth factor. For the year 2003, a Party may receive the applicable FCC interim rate set out in Section 4.10.2 for ISP-bound Traffic minutes up to a ceiling equal to the ceiling for 2002, described above.

4.10.5 Reservation of Rights. If the ISP Remand Order is reversed or vacated in its entirety, by the FCC or another governmental entity of competent jurisdiction, each Party shall have the right, upon the effective date of any such decision, to terminate this Section 4.10 and Amendment No. 5 to this Agreement by written notice to the other Party. The termination shall be effective upon receipt of the notice by the other Party. In the event of termination of this Section 4.10 in accordance with this paragraph, the Parties' rights and obligations with respect to intercarrier compensation for ISP-bound traffic shall be governed by the terms of this Agreement retroactive to the date upon which ISP-bound Traffic under this Amendment became subject to the ISP Remand Order. If the ISP Remand Order is vacated in part, or materially modified, the Agreement shall be modified to the extent of the governmental entity's vacatur or modification. The provisions of this paragraph shall be in addition to and not in limitation to any other provisions of this Agreement that might apply if the ISP Remand Order is reversed, vacated or materially modified.

3. Scope of Amendment. This Amendment shall not amend, modify, revise or supersede the Agreement except to the extent expressly set forth in Sections 1 and 2 hereof. Nor should this Amendment be construed as an admission or acknowledgement by either Party that no other terms or conditions of the Agreement require modification or further amendment.

4. Conflict between this Amendment and the Agreement. This Amendment shall be deemed to revise the terms and provisions of the Agreement to the extent necessary to give effect to the terms and provisions hereof. In the event of a conflict between the terms and provisions of this Amendment and terms and conditions of the Agreement, this Amendment shall govern, provided, however, that the fact that a term or provision appears in this Amendment but not in the Agreement, or in the Agreement but not in this Amendment, shall not be interpreted as, or deemed grounds for finding, a conflict for purposes of this Section 4.

5. Choice of Law. This Amendment shall be governed by, and construed in accordance with, the laws of the state of Pennsylvania, without reference to its choice of law principles.

6. Counterparts. This Amendment may be executed in one or more counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be duly executed and delivered by their duly authorized representatives.

XO Pennsylvania, Inc., f/k/a Nextlink  
Pennsylvania, Inc.

Verizon Pennsylvania Inc.

By: \_\_\_\_\_

By: \_\_\_\_\_

Printed: \_\_\_\_\_

Printed: Jeffrey A. Masoner

Title: \_\_\_\_\_

Title: Vice-President - Interconnection  
Services Policy & Planning

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June 26, 2002

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CARL D. LUNDBLAD  
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AMY J. MENDELSON<sup>2</sup>  
MICHAEL W. WINFIELD<sup>3</sup>  
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STEPHANIE E. DIVITTORRE  
KATHLEEN D. BRUDER<sup>4,5</sup>  
CHRISTYLEE L. PECK  
JOHN M. COLES

<sup>1</sup> ALSO ADMITTED TO THE DISTRICT OF COLUMBIA BAR  
<sup>2</sup> ALSO ADMITTED TO THE FLORIDA BAR  
<sup>3</sup> ALSO ADMITTED TO THE MARYLAND BAR  
<sup>4</sup> ALSO ADMITTED TO THE NEW JERSEY BAR  
<sup>5</sup> ALSO ADMITTED TO THE NEW YORK BAR

Re: Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal  
Compensation Dispute Pursuant to the Abbreviated Dispute Resolution  
Process, Docket No. A-310758F0002

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, Pennsylvania 17120

*P 00021971*  
*A - 310758 F7000*

Dear Secretary McNulty:

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Yesterday I filed a Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process. The Certificate of Service that was attached to the Petition inadvertently omitted service on Verizon Pennsylvania Inc. Yesterday, I served the Petition on Verizon via e-mail to its General Counsel and via overnight mail. An amended Certificate of Service reflecting service on Verizon Pennsylvania Inc. is enclosed for filing.

If you have any questions, please contact me at 717 237 6738.

Very truly yours,

RHOADS & SINON LLP

By: *Debra M. Kriete*  
Debra M. Kriete

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SECRETARY'S BUREAU

cc: The Honorable Michael Schnierle (w/encl.)

CERTIFICATE OF SERVICE

A-310758F7000  
P-00021971

I hereby certify that on this 25th day of June, 2002, a true and correct copy of the foregoing document, Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process, was served upon the following persons in the manner indicated below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant):

VIA U.S. MAIL, FIRST CLASS POSTAGE PRE-PAID	
Charles Hoffman, Esquire Chief Prosecutor Office of Trial Staff Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	Irwin Popowsky, Esquire Consumer Advocate 555 Walnut Street 5 <sup>th</sup> Floor Forum Place Harrisburg, PA 17101-1923
Carol Pennington Acting Small Business Advocate Office of Small Business Advocate Suite 1102, Commerce Building 300 North Second Street Harrisburg, PA 17101	Julia A. Conover Vice President and General Counsel Verizon Pennsylvania Inc. 1717 Arch Street, 32NW Philadelphia, PA 19103

DOCUMENT  
FOLDER

Debra M. Kriete  
Debra M. Kriete

DOCKETED

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