

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of XO Communications, Inc.'s  
Petition to Implement an Access Recovery  
Charge

ISSUE DATE: July 21, 2005

DOCKET NO. P-6422/M-05-427

ORDER APPROVING ACCESS RECOVERY  
CHARGE AS PROPOSED

**PROCEDURAL HISTORY**

On March 15, 2005, XO Communications, Inc. (XO), a certified competitive local exchange carrier (CLEC) serving business customers in Minnesota, filed a petition to introduce an Access Recovery Charge (ARC) with an effective date of April 1, 2005.

On April 29, 2005, the Minnesota Department of Commerce (the Department) filed comments opposing XO's petition.

On May 13, 2005, XO filed its comments responding to the Department's analysis and recommendation.

The Commission met on June 16, 2005 to consider this matter. At the hearing, the Commission heard from XO, the Department, and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG), which supported the Department's recommendation.

**FINDINGS AND CONCLUSIONS**

**I. The Proposed Tariff Changes**

On March 14, 2005, XO Communications, Inc. (XO Communications or the Company) filed revised local tariff pages, adding what it termed an "Access Recovery Charge." The proposed tariff language regarding the Access Recovery Charge is as follows:

3.1.0 Access Recovery Charge

The Access Recovery Charge (ARC) is a monthly surcharge assessed in order to recover materially increased costs resulting from regulations adopted by the Federal Communications Commission in *In the Matter of Unbundled Access to Network Elements and Review of the Unbundled Obligations of Incumbent Local Exchange Carriers*, (CC Docket 01-388 and WC Docket 04-313). The ARC is calculated by application of a percentage to each customer's total monthly recurring charges (MRCs). The ARC percentage to be applied will be determined by the customer's total MRCs on its monthly invoice.

The Company included a chart showing the ARC percentage that will be applied based on the MRCs.

## **II. The Department's Comments Opposing the Proposed Tariff Changes**

The Department recommended that the Commission find that it has jurisdiction over the billing practices of CLECs with regard to local services, find that the ARC as currently presented is not in the public interest, and as a consequence deny the petition as filed.

In support of its conclusion that the Access Recovery Charge as currently presented is not in the public interest, the Department advanced four propositions.

First, the Department argued that the Access Recovery Charge was misleading in that it suggested that the charge was a government mandate or tax.

Second, the Department stated that no description or explanation accompanies the bill statement which simply states "Access Recovery Charge," in violation of FCC's truth-in-billing provisions, Rule 47 C.F.R. § 64.2401(b).

Third, the Department objected that the relationship of the ARC to the actual cost of providing service to the customer is ambiguous and unexplained, and that it is deceptive to imply that the charge recovers a specific cost when the aggregate charges to customers may exceed the aggregate costs incurred.

Fourth, the Department argued that line-item charges such as the Company's proposed ARC impeded the development of fair and reasonable competition by making it difficult for consumers to correlate the charges they owe with the services they actually receive and to accurately compare the prices of telecommunications services and packages offered by competing carriers.

### **III. XO Communications' Response**

XO denied that the ARC was misleading or that it would impede competition. The Company stated that the ARC is a straight-forward charge that it has identified to customers accurately as a method of recovering additional costs resulting from the FCC's Triennial Review Remand Order (TRRO).<sup>1</sup> The Company stated that the customer invoices refer to the ARC accurately and in plain language as a charge to recover the cost of gaining access to customers. The Company noted that it does not list the charge under the tax or surcharge headings on customer invoices, but instead lists it under the separate heading "Other Charges."

As to the charge of impeding competition, XO stated that its customers are sophisticated businesses that have multiple wireline alternatives, including Qwest, McLeod USA, Integra, TDS Metrocom, AT&T, and MCI. The customers can readily compare XO's total bill to the prices they would be charged by the other carriers and choose any carrier that provides better service or pricing. The Company stated that even customers under term contracts can switch to alternative carriers without penalty pursuant to Paragraph M of the Company's Standard Terms and Conditions if they found that the ARC materially and detrimentally affected the customer's service or rights and the parties, after 30 days, were unable to reach a mutually satisfactory resolution.

### **IV. Commission Analysis and Action**

#### **A. Summary**

For reasons stated below, the Commission finds that XO's ARC proposal does not contravene the public interest and will, therefore, approve it and allow it to continue in operation, effective April 1, 2005. This decision is fact-specific and is based in large part on the fact that XO's customers are sophisticated businesses that have several wireline carriers from which to choose.

Having found that XO's ARC proposal does not violate the public interest, the Commission need not address the Company's challenge to the Commission's authority to adopt the Department's recommendation to deny the Company's petition.

#### **B. Analysis of Objections to the ARC**

The Department's arguments that the Company's ARC as currently presented is not in the public interest are not persuasive.

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<sup>1</sup> *In the Matter of Unbundled Access to Network Elements and Review of the Unbundling Obligations of Incumbent Local Exchange Carriers*, 2005 WL 289015, CC Docket 01-388, WC Docket 04-313 (Feb. 5, 2005).



First, the Commission finds that the Company's presentation, contrary to the Department's assertion, does not give the impression to the Company's sophisticated business customers that the ARC is a tax or fee imposed by the government or, more specifically, the FCC. XO has placed the charge on customer bills not in the taxes category but in a separate category, "Other Charges," making clear that it is the Company, not the federal government, that is implementing the ARC.

Second, the Department objected that the description of the ARC on the customer's bill ("Access Recovery Charge") is inadequate, in violation of 47 C.F.R. § 64.2401(b), the FCC's truth-in-billing requirements. However, 47 C.F.R. § 64.2401(b) simply states:

(b) Description of billed charges. Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the **service or services** rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can *accurately assess that the services for which they are billed correspond to those that have been requested and received, and that the costs assessed for those services conform to their understanding of the price charged.* (Emphasis added.)

The Commission notes that the second sentence in this subsection clarifies the level of detail required in the bill by stating the purpose of the description, clarifying that it will be adequate if it allows customers to ". . . accurately assess that the services for which they are billed correspond to those that have been requested and received, and that the costs assessed for those services conform to their understanding of the price charged." The Commission finds that the bill provided by XO is sufficiently clear to fulfill those limited purposes with respect to XO's sophisticated business customers.

Third, the Department objected that XO has not adequately explained the relationship between the cost and the charge and further asserted that there may be a mismatch between the amount of cost increase and the amount recovered through the ARC. However, the FCC's truth-in-billing rules do not require a carrier like XO to match its charges to its costs and to affirm to its customers in their bills that it has done so. Neither do they require complete technical clarity on each component of the price charged and only require that the bill communicate

. . . that the services for which they are billed correspond to those that have been requested and received, and that the costs assessed for those services conform to their understanding of the price charged.<sup>2</sup>

In this case, XO provides customers with information adequate to meet that purpose, thereby complying with the FCC's truth-in-billing requirements.

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<sup>2</sup> See 47 C.F.R. § 64.2401(b).

Fourth, the record does not support a conclusion that the ARC has or will impede development of fair and reasonable competition. Contrary to the Department's suggestion, XO's sophisticated business customers are aware via Paragraph M of the Company's Standard Terms and Conditions that they can avoid the charge by switching carriers without incurring substantial termination liability.

Nor does the ARC interfere with the customer's ability to comparison shop since the Company's sophisticated business customers know the total monthly price and can use that to compare. XO's customers have many alternative wireline carriers from which to choose. Any difficulty in comparison shopping due to unequal telecommunications packages is beyond the scope of this docket and not attributable to XO's ARC.

Fifth, the Commission agrees with the Department that billing and advertising tactics that deceive the public are not in the public interest but finds that there is no information in this docket suggesting that XO's advertising of the ARC is inappropriate and nothing indicating that XO's sophisticated business customers are likely to be misled by XO's ARC.

### **ORDER**

1. The Commission hereby approves the Access Recovery Charge proposed by XO Communications, Inc., thereby allowing it to remain in effect, effective April 1, 2005.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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