

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 28th day of October, 2004.

In the Matter of the Application of XO Missouri, Inc.,)
 Allegiance Telecom of Missouri, Inc., and XO) **Case No. LO-2005-0027**
 Communications Services, Inc., for Approval of an)
 Internal Corporate Reorganization.)

**ORDER APPROVING MERGER AND ORDER GRANTING CERTIFICATE TO
 PROVIDE BASIC LOCAL, NONSWITCHED LOCAL AND INTEREXCHANGE
 TELECOMMUNICATIONS SERVICES**

Summary: This order grants authority to the Applicants to merge XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc., into XO Communications Services, Inc., and grants to XO Communications Services a certificate to provide basic local, nonswitched local and interexchange telecommunications services.

Background

XO Missouri, Inc., Allegiance Telecom of Missouri, Inc., and XO Communications Services, Inc., are subsidiaries of XO Communications. XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc., currently provide telecommunications services in Missouri. On July 21, 2004, Applicants filed a request to reorganize their corporate structure so that XO Missouri, Inc., and Allegiance are merged into XO Communications Services, Inc., with XO Communications Services, Inc., remaining a subsidiary of XO Communications. XO Communications Services will then provide telecommunications services to the customers currently being served by XO Missouri and Allegiance. To this end, XO Communications Services subsequently filed an amended application requesting authority to provide basic local, nonswitched local and interexchange services. The Commission issued its Notice of Application, setting October 7, 2004, as the deadline for request to intervene. There were no such requests.

In its Memorandum, the Staff of the Commission recommended that the Commission issue an order that:

- (1) approves the Applicants' request for approval of the merger;
- (2) grants interexchange, nonswitched local exchange and basic local exchange certificates to XO Communications Services, Inc.;
- (3) orders XO Communications Services to either adopt the currently effective tariff of XO Missouri, incorporating therein the tariff of Allegiance, or to submit new tariffs;
- (4) orders XO Communications Services to provide notice of the reorganization and name change to Allegiance and XO Missouri's customers;
- (5) waives 4 CSR 240-33.150, conditioned upon customer notice, and grants XO Communications Services the standard waivers;
- (6) directs XO Communications Services to notify the Commission when the directives of the order have been completed so that the Commission can cancel the certificates of XO Missouri and Allegiance.

The Application for Merger

Section 392.300, RSMo 2000, and Commission rule 4 CSR 240-3.525 govern transfers of assets and customers. Section 392.300 requires that the Applicants obtain Commission approval to consummate the proposed consolidation. This section, as does 4 CSR 240-3.525 (2)(F), also requires that the Applicants submit a statement concerning the tax impact the proposed transaction will have on the political subdivisions in which the Applicants' facilities are located. Applicants state in the application that the proposed merger will have no tax impact as described above. Also, Staff indicates that the proposed transaction will have no impact on tax revenues.

Although there is no statute or code that sets a standard upon which the Commission must base its decision to approve a merger, the court in *State ex rel. Fee Fee Trunk Sewer, Inc., v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980), stated that "[t]he Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest." The Applicants aver the proposed transaction is not expected to result in any loss or impairment of service to the XO Missouri or Allegiance

customers and that the customers will continue to receive service at the same rates, terms and conditions as they now do. Although 4 CSR 240-3.525(1) does not require competitive telecommunications companies to state the reasons the proposed merger is not detrimental to the public interest, Staff, in its Memorandum, states that it does not believe the proposed transaction is detrimental to the public interest. The Commission therefore finds that it has not been shown that the proposed transaction will be a detriment to the public interest.

Commission rule 4 CSR 240-33.150

Applicants request a waiver of Commission rule 4 CSR 240-33.150, which requires that written authorization from each customer be obtained prior to the change of a service provider. The purpose of the rule is to prevent “slamming,” or the unauthorized change of a customer’s telecommunications carrier without the customer’s knowledge. Applicants state that the customers’ providers are not changing in a practical way, but only in terms of corporate organization. Applicants add that advance written notice will be sent to affected customers informing them of the proposed change and allowing them to change suppliers without penalty. And, the name under which bills will be sent to XO Missouri customers will continue to be “XO.” However, Allegiance customers will be billed, for the first few months after reorganization, under the names of both “Allegiance” and “XO” to prevent customer confusion. Staff states that it has no objection to the Commission waiving 4 CSR 240-33.150 as long as affected customers are notified of the transaction.

Under Commission rule 4 CSR 240-2.015, the Commission can waive its rules for good cause. Those customers whose service will be affected will be notified of the change in service providers. Additionally, the proposed transaction will not affect the rates, terms and conditions under which the customers currently receive service. The Commission finds that good cause exist to waive 4 CSR 240-33.150.

Certificate of Service Authority

Currently, XO Missouri and Allegiance are certificated to provide interexchange and basic local and nonswitched local service. In addition to their request to consolidate, Applicants also request that the Commission grant XO Communications Services a certificate

to provide interexchange, basic local and nonswitched local telecommunications services.

The Commission may grant an application for a certificate of service authority to provide basic local telecommunication service upon a showing (1) that the applicant has met the statutory requirements, ^[1] and (2) that the grant of authority is in the public interest. ^[2] The applicant must also comply with the Commission's procedural rules. ^[3] The Commission may grant an application for a certificate of service authority to provide interexchange telecommunications service upon a showing that the grant is in the public interest. ^[4]

Requirements of the Commission's rules:

Commission rules 4 CSR 240-2.060(1) and (6) require that an entity seeking certification to provide basic local telecommunications services provide certain information to the Commission in its application, including: a description of the business organization of the applicant, supported by a certificate of the Missouri Secretary of State; names and addresses for contact purposes; a disclosure of any pending or final judgments or decisions against it from any state or federal agency or court involving customer service or rates; a verified statement that there are no outstanding annual reports or assessment fees owed to this Commission; if applicable, a request to be classified as a competitive telecommunications company; a description of the types of services the applicant intends to provide; the exchanges in which services are to be offered; and, a proposed tariff with an effective date that is not fewer than 45 days after its issue date.

Having reviewed the application and supporting materials filed by XO Communications Services, the Commission finds that XO Communications Services has complied with each of these requirements except for the proposed tariff. XO Communications Services requests a temporary waiver of 4 CSR 240-3.510(1)(C). XO Communications Services intends to either adopt the tariff of XO Missouri, incorporating Allegiance's tariff, or file a separate tariff which is identical to those on file by XO Missouri and Allegiance.

Requirements of Section 392.450

Section 392.450.1 provides that the Commission may grant a basic local certificate only

upon a finding, after notice and a hearing, that the applicant has complied with the certification process established under Section 392.455. Thus, an applicant's satisfaction of the requirements of the Commission's regulations and of Section 392.455 also satisfies Section 392.450.1. As explained below, the Commission does find that XO Communications Services has satisfied the requirements of the Commission's regulations and of Section 392.455, and consequently finds that XO Communications Services has complied with the certification process established by the Commission in satisfaction of Section 392.450.1.

Section 392.450.2 provides that an applicant for a basic local certificate must (1) file and maintain tariffs with the Commission in the same manner as the incumbent local exchange carriers and (2) meet the minimum service standards, including quality of service and billing standards, that the Commission requires of the competing incumbent local exchange carriers.

XO Communications Services did not file a proposed tariff in support of its application. However, XO Communications Services stated that it would comply with all applicable Commission rules except those expressly waived by the Commission. Thus, XO Communications Services has agreed to provide services that will meet the minimum basic local service standards required by the Commission, including quality of service and billing standards. Staff recommends that the certificate be granted. Having reviewed XO Communications Services' application and supporting materials, as well as Staff's Memorandum and Recommendation, the Commission finds that XO Communications Services has met the requirements of Section 392.450.2.

Requirements of Section 392.455

Section 392.455 authorizes the Commission to establish a process to grant basic local certification to new entrants and to grant certificates to new entrants to provide basic local telecommunications service on a common carriage basis. That section further requires that a new entrant: (1) possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications services; (2) demonstrate that the services it proposes to offer satisfy the minimum standards established by the Commission; (3) set forth the geographical area in which it proposes to offer service and demonstrate that such area

follows the exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange; and, (4) offer basic local telecommunications service as a separate and distinct service. Finally, Section 392.455 also requires that the Commission give due consideration to equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

XO Communications, the parent company, is not a typical new entrant. It is a leading facilities-based provider of broadband telecommunications services and offers a complete set of telecommunications services including local and long distance voice, Internet Access, Virtual Private Networking, Ethernet, Wavelength, Web Hosting and Integrated voice and data services. Furthermore, XO Communications is authorized by the FCC to provide interstate and international telecommunications services and provides competitive local exchange services in 47 states. In Missouri, XO Missouri has provided local and interexchange services since January of 1999. Allegiance has provided local exchange service since October of 1999 and interexchange and nonswitched local exchange since March of 2000. In its Memorandum, Staff indicated that XO Communications Services has sufficient technical, financial and managerial resources and recommends that the application be granted.

Having reviewed the application and supporting materials, as well as Staff's Recommendation and Memorandum, the Commission finds that XO Communications Services has met the requirements of Section 392.455(1) in that it has shown that it possesses sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications services. This is primarily so because the companies that will comprise XO Communications Services after the merger, XO Missouri and Allegiance, possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications services. And furthermore, the parent company, XO Communications, has the background as is described above.

As previously noted, XO Communications Services has stated that it will comply with all applicable Commission rules except those expressly waived by the Commission. Based on this statement, the Commission finds that XO Communications Services has demonstrated

that the services it propose to offer satisfies the minimum standards promulgated in Section 392.455(2).

XO Communications Services seeks certification in the exchange or services areas of XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc., which are the exchanges of Southwestern Bell Telephone Company, CenturyTel and Sprint Missouri d/b/a Sprint. Staff agrees that XO Communications Services has sufficiently identified the exchanges in which it seeks certification and recommends that the application be approved. Having reviewed XO Communications Services' application and supporting materials, as well as Staff's Memorandum and Recommendation, the Commission finds that XO Communications Services has met the requirements of Section 392.455(3) in that it has set forth the geographic area in which it proposes to offer service and has demonstrated that such area follows the exchange boundaries of the incumbent local exchange telecommunications companies and is no smaller than an exchange.

In its application, XO Communications Services states that it will offer basic local service as a separate and distinct service. Based on this statement, the Commission finds that XO Communications Services has met the requirements of Section 392.455(4), that all providers offer basic local telecommunications service as a separate and distinct service.

In its application, XO Communications Services states that it will give consideration to equitable access for all Missourians, regardless of where they reside or their income, to affordable telecommunications service. Section 392.455(5) requires the Commission to give due consideration in this regard. XO Communications Services' statement furthers this requirement.

The Public Interest

Section 392.430 provides that the Commission shall approve an application for certificate of service authority to provide either interexchange or basic local telecommunications services upon a finding that the grant of service authority is in the public interest.

XO Communications Services states in the application that the public interest will be served because the proposed services will create and enhance competition and expand

customer service options consistent with the legislative goals set forth in the Federal Telecommunications Act of 1996 and Chapter 392, RSMo. Section 392.180 states that “[t]he provisions of this chapter shall be construed to . . . promote diversity in the supply of telecommunications services and products throughout the state of Missouri; [and to] . . . [a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest[.]” In consideration of the foregoing, and based upon its findings that XO Communications Services has met all of the requirements for the requested certification, the Commission concludes that granting the requested certification is in the public interest. The Commission also finds that competition in the interexchange telecommunications market is in the public interest and XO Communications Services should be granted a certificate of service authority to provide interexchange telecommunications services.

Competitive Classification

XO Communications Services seeks competitive classification and the Commission has found that XO Communications Services will be subject to a sufficient degree of competition to justify a lesser degree of regulation. The Commission has further found that all of XO Communications Services’ services will be entitled to classification as competitive services. Therefore, the Commission may classify XO Communications Services as a competitive telecommunications company if such lesser degree of regulation is consistent with the protection of ratepayers and promotes the public interest. In consideration of these findings and of the public interest, the Commission concludes that granting competitive classification to XO Communications Services is consistent with the protection of ratepayers and promotes the public interest.

Waivers

The Commission may waive certain statutes and administrative rules for competitively classified carriers “if such waiver or modification is otherwise consistent with the other provisions of Section 392.361 to 392.520 and the purposes of this chapter.”^[5]

The Commission has developed a standard list of statutes and regulations that it waives

for competitive local exchange and interexchange carriers. The Commission will waive these provisions for XO Communications Services because to do so furthers the purposes of Chapter 392 to foster and encourage the development of competition in the telecommunications industry.

Staff's recommendation indicates that XO Communications Services should be classified as a competitive telecommunications company. Staff agrees that XO Communications Services' switched exchange access services may be classified as competitive services, conditioned upon certain limitations on XO Communications Services' ability to charge for its access services. Those limitations are as follows:

1. XO Communications Services' originating and terminating access rates will be no greater than the lowest Commission-approved corresponding access rates in effect for each ILEC within whose service area XO Communications Services seeks authority to provide service, unless authorized by the Commission pursuant to Sections 392.220 and 392.230.
2. The Certificate and service classification for switched access services is conditioned on the continued applicability for Section 392.200, and the requirement that any increase in switched access service rates above the maximum switched access service rate set forth herein shall be made pursuant to Sections 392.220 and 392.230, and not Section 392.500 and 392.510.
3. If the directly competing ILEC, in whose service area the applicant is operating, decreases its originating and/or terminating access service rates, the applicant shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC's service area within 30 days of the directly competing ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap.

The Commission has considered the conditions proposed by Staff and concludes that they are reasonably necessary to protect the public interest and should be adopted.

Compliance

The Commission places XO Communications Services on notice that failure to comply with certain obligations pursuant to law may result in penalties assessed against it. These obligations include, but are not limited to, the following:

- A) The obligation to file an annual report, as established by Section 392.210, RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of

\$100 per day for each day that the violation continues. 4 CSR 240-3.540 requires telecommunications utilities to file their annual report on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000.

C) The obligation to comply with all relevant laws and regulations, as well as orders issued by the Commission. If the company fails to comply, it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

D) The obligation to keep the Commission informed of its current address and telephone number.

Furthermore, the company is reminded that, if it is a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice law in Missouri.

In addition, the company is reminded that Section 392.410.5, RSMo Supp 2003, renders the company's certificate of service authority null and void one year from the date of this order unless it has exercised its authority under that certificate.

Conclusion

It has not been shown that the proposed merger will be a detriment to the public interest. The Commission therefore concludes that the standard set forth in *Fee Fee Trunk Sewer, Inc., v. Litz* has been satisfied. The Commission also concludes that there is good cause to grant a waiver of Commission rule 4 CSR 240-33.150 and require that the Applicants provide prior notice of the consolidation to its customers.

The Commission has found that XO Communications Services has met the statutory requirements to be granted a certificate of service authority and that granting such authority is in the public interest. The Commission will therefore authorize the company to provide telecommunications services. Finally, the Commission will grant a temporary waiver of the requirement that the company file a tariff.

IT IS THEREFORE ORDERED:

1. That the proposed merger between XO Missouri, Inc., Allegiance Telecom of Missouri, Inc., and XO Communications Services, Inc., is approved.
2. That the application of 4 CSR 240-33.150 is waived conditioned upon the customers of XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc., being notified at least 30 days prior to the merger.
3. That XO Communications Services, Inc., is granted a certificate of service authority to provide basic local telecommunications services in the exchanges currently being served by XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc.
4. That XO Communications Services, Inc.' switched exchange access services shall be classified as a competitive.
5. That XO Communications Services, Inc., is granted a certificate of service authority to provide nonswitched local exchange telecommunications service, restricted to dedicated private line services.
6. That XO Communications Services, Inc., is granted a certificate of service authority to provide interexchange telecommunications services.
7. That XO Communications Services, Inc.'s, originating and terminating access rates shall be no greater than the lowest Commission-approved corresponding access rates in effect for each ILEC within whose service area XO Communications Services, Inc., seeks authority to provide services, unless authorized by the Commission pursuant to Sections 392.220 and 392.230.
8. That XO Communications Services, Inc.'s, certificate and competitive status are expressly conditioned on the continued applicability of Section 392.200 and the requirement that any increase in switched access service rates set forth herein shall be made pursuant to Sections 392.220 and 392.230, and not Sections 392.500 and 392.510.
9. That if the directly competing ILEC, in whose service area the applicant is operating, decreases its originating and/or terminating access service rates, the applicant shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC'S service area within 30 days of the directly competing ILEC's

reduction of its originating and/or terminating access rates in order to maintain the cap.

10. That application of the following statutes and Commission regulations is waived:

Statutes

- 392.210.2 - uniform system of account
- 392.240(1) - just and reasonable rates
- 392.270 - valuation of property (ratemaking)
- 392.280 - depreciation accounts
- 392.290 - issuance of securities
- 392.300.2 - acquisition of stock
- 392.310 - stock and debt issuance
- 392.320 - stock dividend payment
- 392.330 - issuance of securities, debts and notes
- 392.340 - reorganization(s)

Commission Rules ^[6]

- 4 CSR 240-3.550(5)(C) - exchange boundaries
- 4 CSR 240-10.020 - depreciation fund income
- 4 CSR 240-30-040 - uniform system of accounts

11. That XO Communications Services, Inc., shall either adopt the currently effective tariff of XO Missouri, Inc., incorporating therein the tariff of Allegiance Telecom of Missouri, Inc., or it shall submit a new tariff reflecting the same.

12. That Commission rule 4 CSR 240-3.510(1)(C) is waived.

13. That prior to delivering services under its certificate of service authority, XO Communications, Inc., shall file, in a separate case, tariff sheets with an effective date which is not fewer than 45 days from the issue date and which reflects the rates, rules, regulations and the services it will offer. The tariff shall also include a listing of the statutes and Commission rules waived above.

14. That XO Communications Services, Inc., shall notify the Commission when the directives of this order have been completed so that the Commission can cancel the certificate of XO Missouri, Inc., and Allegiance Telecom of Missouri, Inc.'s certificates of service authority.

15. That this order shall become effective on November 7, 2004.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Gaw, Ch., Murray, Davis, and
Appling, CC., concur.
Clayton, C., absent.

Jones, Regulatory Law Judge

[1] See Sections 392.450 and 392.455 RSMo 2000.

[2] Sections 392.430 and 392.440.

[3] See Chapter 2, 4 CSR 240.

[4] Sections 392.430 and 392.440.

[5] Section 392.361.5 and 392.420.

[6] The Commission notes that 4 CSR 240-3.545(2)(C) no longer exists. And, that 4 CSR 240-33.030 has been rescinded.