



Control Number: 42464



Item Number: 1

Addendum StartPage: 0

DOCKET NO. 43464

FILED
14 APR 23 AM 9:29
DALLAS

COMPLAINT OF CYPRESS
TELECOMMUNICATIONS INC.
AGAINST XO COMMUNICATIONS
SERVICES, INC.

§ BEFORE THE PUBLIC
§ UTILITY COMMISSION OF
§ TEXAS
§

**COMPLAINT OF CYPRESS TELECOMMUNICATIONS INC.
AGAINST XO COMMUNICATIONS SERVICES, INC.**

COMES NOW, Cypress Telecommunications Inc., (Cypress) with this Complaint against XO Communications Services Inc. (XO). Cypress is a competitive local exchange carrier (CLEC) and former XO customer. XO is also a CLEC certified in the state of Texas.

Overview

CLECs operating in Texas are required to file tariffs or price sheets with this Commission in Docket 27385. The reason for these filings is so that carriers clearly state pricing and terms, and avoid deceptive or discriminatory practices. In addition to tariffs, Section 211 of the Communications Act also allows for direct agreements between carriers. Direct agreements may prescribe services, rates, terms and conditions outside of the tariff. Whatever path is selected, there is a standard of conduct and disclosure expected of carriers operating in Texas. Neither this Commission, nor the Act, envisioned a contractual shell game, where less desirable contract provisions are hidden away by a service provider through a company owned website. Full disclosure has been the mantra of this Commission since its inception, whether the issue has been unexpected 0+ Operator Service charges or “cramming” phone bills with unexpected services.

XO is violating a longstanding policy of transparency established by this Commission. XO is trying to collect over \$50,756.30 from Cypress for services *it will never even provide*. XO bases its claim against Cypress on illusory contract provisions contained on an XO company web site. Those provisions also conflict with the XO tariff that is on file here with this Commission.

This Complaint requests that the Commission exert its authority by Ordering XO to cease this collection effort and amend its practices immediately. Cypress also requests mediation under PUC Interconnection Rule 21.91, and informal resolution under PUC Proc. R. 22.242(e), in order to require XO to provide sufficient detail to support its demands on Cypress, as well as justify its actions with this Commission.

Identification of the Parties

Cypress Telecommunications is a Texas Corporation. The designated representatives for Cypress are:

Roger Scott
President, Cypress Telecommunications
440 Benmar, Suite 3022
Houston, TEXAS 77060
(281) 449-4000
Fax: (281) 449-4000
rscott@cytelcom.com

Leo A. Wrobel
TelLAWCom Labs Inc.,
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Ovilla TEXAS 75154
Voice: (214) 888-1300
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leoprivate@tellawcomlabs.com

A copy of this Complaint has also been delivered to XO Communications Services Inc:

Teresa Miller
9201 N. Central Expressway
Bldg. B 3rd Floor
Dallas, TEXAS 75231
Email: regulatorygrievances@xo.com
teresa.miller@xo.com
Phone: (877) 912-4829 Fax: (214) 261-7509

KELLY FAUL
DIRECTOR REGULATORY AFFAIRS
13865 SUNRISE VALLEY DRIVE
HERNDON, VA 20171
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Jurisdiction

PURA § 52.001(b) states, in part, that the public interest requires that rules, policies, and principles be formulated and applied to protect the public interest and provide equal opportunity to each telecommunications utility in a competitive marketplace. PURA § 52.002 provides that the Commission has the authority to carry out the public policy stated in PURA § 52.001, and to regulate rates, operations, and services so that the rates are just, fair, and reasonable and the services are adequate and efficient. This Commission has jurisdiction over the business and property of a telecommunications utility in this state subject to the limitations imposed by PURA. PURA § 53.001 states in part that, except as otherwise provided in PURA, the Commission may establish and regulate rates of a public utility and may adopt rules for determining the classification of customers and services, and the applicability of rates. PURA § 53.002 prohibits a utility from charging or receiving a rate for utility service except as provided by PURA. PURA § 53.004 provides, in part, that a person may not knowingly receive or accept a service from a public utility for compensation greater or less than the compensation prescribed by the tariff.

In addition, the Texas Legislature has granted this Commission jurisdiction over non dominant carriers that engage in preferential or discriminatory activities if after notice and hearing the carrier is found to have engaged in such a pattern of conduct. Specifically, PURA Sec. 52.108(C) states, "The Commission may enter into any order necessary to protect the public interest if the Commission finds after notice and hearing that a telecommunications utility has ... (3) engaged in a pattern of preferential or discriminatory activities prohibited by Section 53.003, 55.005 or 55.006."

The Commission's authority to engage in Informal Resolution extends to "any act or thing done or omitted to be done by any electric utility or telecommunications utility in violation or claimed violation of any law which the commission has jurisdiction to administer or of any order, ordinance, rule, or regulation of the commission." PUC. Proc. R. 22.242(a). The Commission has authority under PURA Title II over both dominant and non-dominant carriers.

I. Background

On October 1, 2008, Cypress placed an XO Service Order for provision of certain telecommunications services. The Service Order prescribed a three-year term. The services were in use over four years, during which time Cypress paid for them faithfully. After expiration of the initial three-year term, Cypress expected them to revert to a month to month contract, as is customary. This is what the XO tariff on file with this Commission indicated would happen. (See Attachment 1) Cypress also checked with the XO Business Center in August of 2012. The Business Center indicated a blank in the term field of the Cypress service agreement, consistent with the initial 3 year term expiring. It was later when Cypress attempted to cancel the services this dispute ensued. XO insisted that "the contract" called for automatic renewal – for a full three year term – unless Cypress notified XO of its intent to cancel, within a narrow 45 day window. This provision was not stated on the Service Order that Cypress signed. XO based its misguided contention on a web site located at www.terms.xo.com. On that sole premise, XO is trying to collect \$50,756.30 for services it will never even provide to Cypress.

Cypress maintains that XO's Internet based shell game constitutes an **illusory contract** that has no place in telecommunications. XO's auto-renew clause is not based on a valid contract. In fact, many judges are uncomfortable enforcing agreements like XO's, where evidence indicates a lack of bargaining power or insufficient notice. Cypress believes XO should have more carefully considered how to draft their user agreements, and taken better care to communicate those terms to their customers.¹

The discredited practice of using the Internet to hook customers is becoming epidemic, whether it is by clicking a web browser or downloading a song. This Commission can't do anything about many of these issues, but it can keep these practices from infecting the telecom industry in Texas. Indeed, there are examples to follow right here in Texas for setting policy in cases like these. A federal court in Texas ruled that an arbitration clause in a user agreement (in this case for Blockbuster Online) could not be enforced because Blockbuster had reserved the right to unilaterally modify the agreement at any time.²

¹In the *Specht v. Netscape* decision, 306 F.3d 17 (2d Cir. 2002), the Second Circuit held that plaintiffs weren't bound by Netscape's user agreement because they were not required to manifest affirmative consent to the agreement (e.g., via a "click through") and it was not posted in a conspicuous manner where the user clicked to download the Netscape software.

² *Harris v. Blockbuster, Inc.*, No. 3:09-cv-217-M (N.D. Tex. April 15, 2009).

Carriers are expected to have higher standards than Internet gaming or “free” credit report web sites. It has been the policy of this Commission that the terms and conditions of telecommunications services are transparent, clearly defined, and there for all to see. XO did file tariffs with this Agency, and those tariffs call for XO contracts to become *month to month* at the conclusion of the contract term. The onerous auto-renew clauses however, are NOT on the Service Orders Cypress signed. Those terms, designed to rope in busy or unsuspecting customers, are deeply embedded in voluminous pages on an XO owned web site. A web site is not a contract, especially when it conflicts with the policies established by this Commission.

3. Summary and Prayer

XO had a responsibility to integrate all of its contract terms into the document signed by Cypress. XO also has a responsibility to clearly communicate the terms of its agreements to its customers in order to make sure its service orders constituted a binding, enforceable contract. We therefore ask that this Commission to take the following action:

- A. Order XO to desist and drop all collection activities against Cypress immediately.
- B. If required, assist the Parties in mediating a solution that hopefully avoids further litigation.
- C. If required, conduct a formal complaint proceeding to resolve this matter. If the Commission deigns jurisdiction we respectfully request a written Order to that effect to avoid jurisdictional conflicts later in the courts.
- D. Consider new policies and rules that remove this blight from the telecommunications environment in Texas and restore transparency in dealings between carriers in the future.

Respectfully Submitted,



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Certification of Service:

In addition to the above, I, Leo A. Wrobel certify that a copy of this Complaint was served on all Parties listed herein via regular mail, fax, or both commensurate with its filing.

Attachment 1

XO Communications Services, Inc.

Texas Tariff No. 5
Original Page 7

INTEREXCHANGE SERVICES TARIFF

SECTION 2 - GENERAL REGULATIONS (CONT'D.)

2.1 Undertaking of the Company (Cont'd)

2.1.3 Terms and Conditions (Cont'd)

2.1.3.2 Customers may be required to enter into written Service Orders which shall contain or reference the name of the Customer, a specific description of the service ordered, the rates to be charged, the duration of the services, and the terms and conditions in this tariff. Customers will also be required to execute any other documents as may be reasonably requested by the Company.

2.1.3.3 At the expiration of the initial term specified in each Service Order, or in any extension thereof, service shall continue on a month to month basis or as specified in the Service Order Agreement, at the then current rates unless terminated by either party upon 30 days written notice. Any termination shall not relieve the Customer of its obligation to pay any charges incurred under the service order and this tariff prior to termination. The rights and obligations which, by their nature, extend beyond the termination of the term of the service order shall survive such termination.

2.1.3.4 In any action between the parties to enforce any provision of this tariff, the prevailing party shall be entitled to recover its legal fees and court costs from the non-prevailing party in addition to other relief a court may award.

2.1.3.5 Service may be terminated upon written notice to the Customer if:

- (a) the Customer is using the service in violation of this tariff, or
- (b) the Customer is using the service in violation of the law, or as set forth in Section 2.5.5 of this Tariff.

2.1.3.6 The Customer agrees to operate Company-provided equipment in accordance with instructions of the Company or its agents. Failure to do so will void Company liability for interruption of service and may make the Customer responsible for damage to equipment pursuant to Section 2.1.3.7 below

Issued: December 31, 2004

Effective: January 1, 2005

Alaine Miller, VP - Regulatory & External Affairs
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