

**ILLINOIS INDEPENDENT
TAX TRIBUNAL
CHICAGO, ILLINOIS**

XO COMMUNICATIONS)	
SERVICES, LLC,)	
Petitioner,)	
)	
v.)	Case No. 14-TT-178
)	
DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	

ANSWER

The Department of Revenue of the State of Illinois, by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, answers the Taxpayer’s Petition as follows:

INTRODUCTION

1. Two Notices were issued by the Department on September 3, 2014. Letter ID CNXXX16945X39523 and Letter ID CNXXX12487393441 assessed total liability in the amount of \$1,437,077.00 in tax, \$335,319.00 in penalties, and \$185,080.73 in interest for the taxable periods January 1, 2009 through June 30, 2009 and July 1, 2009 through December 32, 2011 respectively. The assessments total \$1,957,476.73 including penalties and interest.

ANSWER: The Department admits the factual allegations contained in Paragraph 1.

2. Petitioner is a corporation with its principal place of business in Herndon, Virginia.

ANSWER: The Department admits the factual allegations contained in Paragraph 2.

3. Petitioner is located at 13865 Sunrise Valley Drive and its telephone number is (703) 547-2290. The Taxpayer Account ID is 40433293.

ANSWER: The Department admits the factual allegations contained in Paragraph 3.

4. Petitioner is in the business of providing telephone, data, Internet, and various communications services to business customers.

ANSWER: The Department admits the factual allegations contained in Paragraph 4.

BACKGROUND AND RELEVANT FACTS

5. Petitioner filed returns for taxable periods January 1, 2009 through December 31, 2011.

ANSWER: The Department admits the factual allegations contained in Paragraph 5.

6. On December 4, 2010 the Department issued a Notice of Proposed Liability (ID:L0873365152) in the amount of \$4,455,642.00 including interest and penalty.

ANSWER: The Department Notice of Proposed Liability was issued on December 4, 2012. The Department admits all other factual allegations in Paragraph 6.

7. Petitioner filed a Request for Informal Conference Board Review on February 4, 2013, contesting the entire Notice of Proposed Liability.

ANSWER: The Department admits the factual allegations contained in Paragraph 7.

8. On October 17, 2013 Petitioner met with the auditor at the Informal Conference Board. Petitioner provided a summary of its requested audit reductions. Petitioner's requested reductions were tied to the auditor's assessment summary and pivot tables, which matched the auditor's work papers.

ANSWER: The Department admits that the Petitioner attended an informal conference on October 17, 2013. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 8 and therefore demands strict proof thereof.

9. On November 14, 2013, Petitioner met with the auditor to review the adjustments discussed during the October conference and explain the supporting documentation.

ANSWER: The Department admits that Petitioner met with the auditor on November 14, 2013.

10. The adjustments discussed during the conference review were:
- i. Assessment reduction for telecommunication services sold to provide Internet access;
 - ii. Assessment reduction for telecommunication services sold to Internet Service providers (ISPs) or resellers;
 - iii. Assessment reduction for services sold that were incidental to Internet access;
 - iv. Assessment reduction for credits taken on returns;
 - v. Assessment reduction for private data networks sold to resellers or sold to customers that used the private networks in multiple jurisdictions, therefore, invoking an apportionment reduction; and
 - vi. Assessment reduction for internet access.

ANSWER: The Department admits that several matters were discussed at the informal conference, but lacks sufficient information to either admit or deny the remaining allegations in Paragraph 10 and therefore demands strict proof thereof.

11. On September 3, 2014, the Department issued two Notices of Assessment, reducing the assessment amount to a total of \$1,957,476.73 including penalties and interest. The notice for the period of January 1, 2009 through June 30, 2009 (Letter ID CNXXX16945X39523) is attached as Exhibit 1; the Notice for the period of July 1, 2009 to December 31, 2011 (Letter ID CNXXX12487393441) is attached as Exhibit 2.

ANSWER: The Department admits the factual allegations contained in Paragraph 11.

12. In the current appeal, Petitioner’s proposed adjustments to these Notices of Adjustments referred to in Paragraph 11 are discussed below.

ANSWER: The Department neither admits nor denies the allegations in Paragraph 12 but states that the petition speaks for itself.

JURISDICTION

13. The Illinois Tax Tribunal Act provides that “[e]xcept as provided by the Constitution of the United States, the Constitution of the State of Illinois, or any statutes of this State, including, but not limited to, the State Officers and Employees Money Disposition Act, the Tax Tribunal shall have original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency, Notice of Tax Liability, Notice of Claim Denial, or Notice of Penalty Liability...” 35 ILCS 1010/1-45(a).

ANSWER: The Department admits the existence, force and effect of 35 ILCS 1010/1-45(a) and states that the statute speaks for itself.

14. The Tax Tribunal’s jurisdiction is limited to certain Illinois Taxing statutes, which include the Telecommunications Excise Tax Act. Id.

ANSWER: The Department admits the existence, force and effect of 35 ILCS 1010/1-45(a) and states that the statute speaks for itself.

15. The Tax Tribunal provides an independent administrative tribunal with tax expertise to resolve tax disputes between the Department of Revenue and taxpayers. According to the Tax Tribunal Act, a “Taxpayer” means a person who has received a **protestable notice of assessment**, a claim denial, or a protestable notice of penalty

liability within the Tax Tribunal's jurisdiction pursuant to Section 1-45 of this Act. 35 ILCS 1010/1-10 (emphasis added.)

ANSWER: The Department admits the existence, force and effect of the Tax Tribunal and the Tax Tribunal Act (35 ILCS 1010/1-1 *et seq.*) and states that sections 1-10 and 1-45 of the Act speak for themselves.

16. Petitioner in the current case falls within the Tax Tribunal Act's definition of "Taxpayer," because it has received a protestable "Notice of Assessment" in relation to Illinois' Telecommunication Excise Tax.

ANSWER: Paragraph 16 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the taxpayer received a Notice of Assessment. The Department denies that the Notice of Assessment was "protestable."

17. The Telecommunications Excise Tax ("TET") is imposed upon the act or privilege of originating and receiving intrastate or interstate telecommunication in Illinois at the rate of 7% of the gross charge for such telecommunications purchased at retail for retailers. See 35 ILCS 630/2

ANSWER: The Department admits the existence, force and effect of the Telecommunications Excise Tax Act and states that the statute speaks for itself.

18. " 'Gross charge' means the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer, valued in money, whether paid in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of such

telecommunication, the cost of material used, labor or service cost or any other expense whatsoever.” 86 Ill. Admin Code §495.100(a)

ANSWER: The Department admits the existence, force and effect of Ill. Admin Code §495.100(a) and states that the regulations speaks for itself.

19. “ ‘Telecommunications,’ in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications services; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities.” 35 ILCS 630/2(c).

ANSWER: The Department admits the existence, force and effect of section 2(c) of the Telecommunications Excise Tax Act and states that the statute speaks for itself.

20. Under the Internet Tax Freedom Act (“ITFA”) and its amendments, state and local governments are barred from imposing taxes on Internet access and multiple or discriminatory taxes on electronic commerce. 47 U.S.C.A. §151, “Internet Tax Freedom Act.”

ANSWER: The Department admits the existence, force and effect of section 151 of the Internet Tax Freedom Act and states that the statute speaks for itself.

21. The ban applies regardless of whether such a tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to

describe the tax. See CCH Illinois State Tax Guide 60-445, “Internet/Electronic Commerce” (p.9).

ANSWER: Paragraph 21 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

22. Given that IFTA bans state and local governments from collecting tax on Internet access, services which are defined as “Internet Access” are not subject to the TET. Under the ITFA, “Internet Access” is defined as:

a service that **enables users to access content, information, electronic mail, or other services offered over the Internet** and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. The term ‘Internet access service’ does not include telecommunications services, **except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.**

47 U.S.C.A. §151, “Internet Tax Freedom Act.” (Emphasis added.)

ANSWER: Paragraph 22 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of Section 151 of the Internet Tax Freedom Act, and states that the statute speaks for itself.

23. Similarly, the term “Internet” is defined as

collectively **the myriad of computer and telecommunications facilities, including equipment and operating software**, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

Id. (Emphasis added.)

ANSWER: The Department admits the existence, force and effect of Section 151 of the Internet Tax Freedom Act, and states that the statute speaks for itself.

24. Under the Supremacy Clause of the United States Constitution, state law is null and void if it conflicts with federal law. Performance Mktg. Ass'n Inc. v. Hamer, 998 N.E.2d 54, 57 (IL 2013).

ANSWER: Paragraph 24 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of the case law referred to in paragraph 24 and states that such case law speaks for itself.

25. Specifically, the Illinois Supreme Court recently held that part of an Illinois taxing statute was void and unenforceable because it was expressly preempted by the IFTA. Id. at 60. The Court defined express preemption as a situation in which “Congress has expressly preempted state action. Id. at 57. Similarly, the Court defined implied preemption as state action that actually conflicts with federal law. Id.

ANSWER: Paragraph 25 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of the case law referred to in paragraph 25 and states that such case law speaks for itself.

Bad Debt

26. Under the Illinois TET Act, “[b]ad debt means any portion of a debt that is related to a sale at retail for which gross charges are not otherwise deductible or excludable that has become worthless or uncollectable, as determined under applicable federal income tax standards. If the portion of the debt deemed to be bad is subsequently

paid, the retailer shall report and pay the tax on that portion during the reporting period in which the payment is made. 35 ILS 630/2 (Ch.120, par. 2002).

ANSWER: The Department admits the existence, force and effect of Section 2 of the Illinois Telecommunications Excise Tax Act, and states that the statute speaks for itself.

27. Therefore, such as the case with Retailers' Occupation Tax "(ROT)", a taxpayer is entitled to a bad debt credit with respect to the original sale in which the default has occurred to the extent to which the taxpayer has paid tax on a portion of the price which it does not collect. See 35 ILCS 630/10 (from Ch.120, par. 2010).

ANSWER: Paragraph 27 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of Section 10 of the Illinois Telecommunications Excise Tax Act and states that the statute speaks for itself.

28. According to section 6b of the ROT Act, the Department's denial of a taxpayer's claim for credits constitutes prima facie proof that the taxpayer is not entitled to a credit. 35 ILCS 120/6b. The Department's prima facie case is a rebuttable presumption. The presumption is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations are wrong. See Copilvitz v. Dept. of Revenue, 41 Ill. 2d 154, 156-57 (1968); see also A.R. Barnes & Co. v. Dept. of Revenue, 173 Ill. App. 3d 826,832 (1st Dist. 1988).

ANSWER: The Department admits the existence, force and effect of Section 6b of the Retailers' Occupation Tax Act and states that the statute speaks for itself. The

Department admits the existence, force and effect of the case law referred to in paragraph 28 and states that such case law speaks for itself.

29. Under section 10 of the TET ACT, “[i]f it shall appear that an amount of tax or penalty or interest has been paid in error hereunder to the Department by a taxpayer, as distinguished from the retailer, whether such amount be paid through a mistake of fact or an error of law, such taxpayer may file a claim for credit or refund with the Department. If it shall appear that an amount of tax or penalty or interest has been paid in error to the Department hereunder by a retailer who is required or authorized to collect and remit the tax imposed by this Article, whether such amount be paid through a mistake of fact or an error of law, such retailer may file a claim for credit or refund with the Department, provided that no credit or refund shall be allowed for any amount paid by any such retailer unless it shall appear that he bore the burden of such amount and did not shift the burden thereof to anyone else, or unless it shall appear that he or she or his or her legal representative has unconditionally repaid such amount to his customer (1) who bore the burden thereof and has not shifted such burden directly or indirectly in any manner whatsoever; or (2) who, if he or she shifted such burden, has repaid unconditionally such amount to his or her own customer; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his retailer, nor to be relieved of such burden in any other manner whatsoever.” 35 ILCS 630/10 (CH. 120, par. 2010).

ANSWER: The Department admits the existence, force and effect of Section 10 of the Telecommunications Excise Tax Act and states that the statute speaks for itself.

30. Every retailer maintaining a place of business in the State under this Article and every taxpayer making direct tax payments to the Department under the TET Act shall keep books, records, papers and other documents which are adequate to reflect the information required by Sections 6 and 7 of the TET Act to be reported to the Department by filing timely returns with the Department. See 35 ILCS 630/11 (Ch. 120, par. 2011).

ANSWER: The Department admits the existence, force and effect of Section 11 of the Telecommunications Excise Tax Act and states that the statute speaks for itself.

Monthly Commitment Charges

31. When exempt Internet access service charges are aggregated with telecommunications charges or other taxable services, the Internet access charges are still exempt from tax if Petitioner can reasonably identify the charges for Internet access from its books and records kept in the reasonable course of business. See CCH Illinois State Tax Guide 60-445 “Internet/Electronic Commerce” (p. 10).

ANSWER: Paragraph 31 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

Penalty

32. No penalty shall be imposed under this Section if it is shown that failure to comply with the tax Act is due to reasonable cause. A taxpayer is not negligent if the taxpayer shows substantial authority to support the return as filed. 35 ILCS 735/3-5(c).

ANSWER: Paragraph 32 contains legal conclusions, not material allegations of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal

Regulations. The Department admits the existence, force and effect of Section 3-5 of the Retailers' Occupation Tax Act and states that the statute speaks for itself.

33. Under the Illinois Administrative Code, tax penalties should not apply where the taxpayer shows that the failure to pay tax at the required time was due to reasonable cause. 86 Ill. Admin. Code §700.400(a).

ANSWER: The Department admits the existence, force and effect of Section 700.400 of the Illinois Administrative Code and states that the regulation speaks for itself.

34. Reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important fact to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper tax liability and to file and pay his proper liability in a timely fashion. Id. at (b).

ANSWER: The Department admits the existence, force and effect of Section 700.400 of the Illinois Administrative Code and states that the regulation speaks for itself.

ERROR I

The assessment erroneously included charges related to non-taxable Internet services, including but not limited to sales of telecommunications services used by Petitioner's customers to access the Internet, sales of Internet access, and ancillary charges associated with Petitioner's above referenced sales.

ANSWER: The Department denies this allegation and demands strict proof thereof.

35. Under the IFTA, Illinois is barred from imposing taxes on Petitioner's sales, as a provider of Internet access to its customers. Petitioner provides a service that "enables users to access content, information, electronic mail, or other services offered over the

internet” and therefore, falls within the IFTA’s definition of “Internet access.” 47
U.S.C.A. §151 §1101(d)(3)(D), Internet Tax Freedom Act.”

ANSWER: Paragraph 35 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of sections 151 and 1101 of the Internet Tax Freedom Act and states that the statute speaks for itself. The Department denies all of the factual allegations in paragraph 35 and demands strict proof thereof.

36. To the extent that the Illinois state law conflicts with the IFTA, such as how the Internet service is charged on the bill, the IFTA preempts Illinois Law. See Performance Mktg. Ass’n Inc. v. Hamer, 998 N.E.2d 54, 57 (IL 2013).

ANSWER: Paragraph 36 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of the case law referred to in paragraph 36 and states that such case law speaks for itself.

37. Additionally, the fact that exempt Internet access service charges are separately stated from charges for other taxable services further supports Petitioner’s contention that such charges are not taxable. See CCH Illinois State Tax Guide 60-445 “Internet/Electronic Commerce” (p. 10).

ANSWER: Paragraph 37 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department denies all of the factual allegations in paragraph 37 and demands strict proof thereof.

38. Although “Internet access” does not generally include telecommunications, Petitioner’s services fall under the exception because the services are purchased, used, and sold by Petitioner to provide Internet access to its customers. 47 U.S.C.A. §151 §1101(d)(3)(D).

ANSWER: Paragraph 38 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of sections 151 and 1101 of the Internet Tax Freedom Act and states that the statute speaks for itself. The Department denies all of the factual allegations in Paragraph 38 and demands strict proof thereof.

39. As an example, Petitioner’s “Network Access Facility” charge is a cost to access Petitioner’s local loop network, which Petitioner purchases and uses to provide Internet access to its customers. Without access to such a service, Petitioner’s customers would not be able to access the world-wide network that comprises the Internet.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 39 and therefore demands strict proof thereof.

40. Petitioner’s services that are incidental to Internet access, such as “Network Access Facility” charges and “Ethernet” charges fall outside of the scope of Illinois TET because such charges fall outside the definition of gross receipts and are barred from taxation by the IFTA.

ANSWER: Paragraph 40 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal

Regulations. The Department denies all of the factual allegations in paragraph 40 and demands strict proof thereof.

41. Specifically, the Department has held that supplementary Internet services, such as web hosting services which are separately stated by a telecommunication company, are not subject to TET. State of Illinois Letter No. ST 98-004-GIL, Jan. 6, 1998

ANSWER: The Department denies the Petitioner's characterization of the Department's General Information Letter ST-98-0004-GIL is correct and states that "general information letters do not constitute statements of agency policy that apply, interpret or prescribe the tax laws administered by the Department. Information letters are not binding on the Department, may not be relied upon by taxpayers in taking positions with reference to tax issues and create no rights for taxpayers under the Taxpayers' Bill of Rights Act." 86 Ill. Admin. Code §1200.120

42. Petitioner's services which are ancillary to Internet access are also included within the ITFA's definition of "Internet Access" since Petitioner uses such services to "enable users to access content, information, electronic mail or other services offered over the Internet." *Id.* at §1101(d)(2)(D).

ANSWER: Paragraph 42 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of Internet Tax Freedom Act and states that the statute speaks for itself. The Department denies all factual allegations contained in Paragraph 42 and therefore demands strict proof thereof

ERROR I

The assessment erroneously disallowed Petitioner's bad debt write offs taken on its tax returns.

ANSWER: The Department denies this allegation and demands strict proof thereof.

43. According to Illinois Guidance, Petitioner validly took tax credits on its returns for tax paid on bad debt accounts in the normal course of its business. See Illinois Dep. of Revenue Letter No. 90-0252.

ANSWER: Paragraph 43 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department denies the applicability of the Department's Letter Ruling ST 90-0252 as letter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling and "every letter ruling is revoked on the date that is 10 years after the date of issuance of the ruling or July 1, 2002, whichever is later. No ruling may be cited or relied upon for any purpose after the date of its revocation, and the ruling will cease to bind the Department after the date of revocation." (86 Ill. Admin Code §1200.110.) The Department denies all factual allegations contained in Paragraph 43 and therefore demands strict proof thereof.

44. Illinois law allows Petitioner to take a bad debt deduction on the following month's tax returns, where it classified certain sales in a previous month's return as bad debt. Petitioner successfully followed this procedure, and therefore should be entitled to a TET reduction for such credits. See 35 ILCS 630/10 (from Ch. 120, par. 2010).

ANSWER: Paragraph 44 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of section 10 of the

Telecommunications Excise Tax Act and states that the statute speaks for itself. The Department denies all factual allegations contained in Paragraph 44 and therefore demands strict proof thereof.

45. Further, petitioner has processes in place to detail bad debt tax credits taken based off bad debt accounts on returns. Such processes are subject to a system of internal procedures and controls, which Petitioner followed during the assessment period. Additionally, Petitioner's financial statements were subject o audit and no material weaknesses were noted.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 45 and therefore demands strict proof thereof.

ERROR III

The assessment erroneously disallowed Petitioner's bad debt write offs on its tax returns.

ANSWER: The Department denies this allegation and demands strict proof thereof.

46. Petitioner's Tax Liability Analysis Report outlines tax refunds applied to exempt vendors who erroneously paid Petitioner tax.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 46 and therefore the Department denies all the factual allegations in Paragraph 46 and demands strict proof thereof.

47. Under section 10 of the Illinois TET Act, Petitioner may claim a credit with the Department because it has met all of the requirements for taking a valid credit. One, Petitioner paid TET in error; two, Petitioner is a retailer authorized to collect and

remit TET; and three, although Petitioner shifted payment of TET to its customers, it repaid such amounts. 35 ILCS 630/10 (Ch. 120, par. 2010).

ANSWER: Paragraph 47 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits that the Petitioner is a retailer authorized to collect and remit TET. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 47 and therefore demands strict proof thereof.

48. During the normal course of Petitioner's business it refunded customers who erroneously paid tax on purchases which were exempt from tax. According to Illinois TET procedures, Petitioner subsequently took credits on its own returns for tax refunds it credited its customers.

ANSWER: The Department admits that the Petitioner claimed credits for tax refunds on its returns. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 48 and therefore demands strict proof thereof.

49. During this time, Petitioner maintained a system of internal procedures and controls which tied credits to customer invoices, as well as a breakdown of the taxes subsequently credited.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 49 and therefore the Department denies all the factual allegations in Paragraph 49 and demands strict proof thereof.

50. Similar to Petitioner's bad debt credits, the additional credits taken for its exempt customers were included in Petitioner's financial statements, where subject to audit. Since no material irregularities were ever noted, and Petitioner followed proper procedures, such credits should reduce the current assessment amount.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 50 and therefore the Department denies all the factual allegations in Paragraph 50 and demands strict proof thereof.

ERROR IV

The assessment erroneously included "monthly commitment" charges which included portions of non-taxable services.

ANSWER: The Department denies this allegation and demands strict proof thereof.

51. Petitioner's "minimum Monthly Commitment" charges are monthly calling plans in which Petitioner's customers agree to a specified monthly revenue commitment. For example, the "XO National Plan" requires a monthly revenue commitment of \$4,000. Customers who do not meet their revenue commitment are still charged the monthly commitment rate.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 51 and therefore the Department denies all the factual allegations in Paragraph 51 and demands strict proof thereof.

52. Monthly commitment charges include telecommunications charges as well as Internet access charges. Additionally, Petitioner charges the full monthly commitment amount, even for services that customers never use.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 52 and therefore the Department denies all the factual allegations in Paragraph 52 and demands strict proof thereof.

53. Petitioner determined from its books and records kept in the regular course of business that 13% of the total charges were taxable charges subject to TET. The remaining charges were either non-taxable Internet Access Charges or unused services, which can reasonable be distinguished from the taxable charges. See CCH Illinois State Tax Guide 60-445 “Internet/Electronic Commerce” (p. 10).

ANSWER: Paragraph 53 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department lacks sufficient information to either admit or deny the allegations in Paragraph 53 and therefore demands strict proof thereof.

54. Because the non-taxable Internet access charges and unused service charges can be reasonably distinguished from the taxable charges, the assessment should be reduced by the taxable percentage portion of the monthly commitment charges. Id.

ANSWER: Paragraph 54 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department denies all factual allegations in Paragraph 54 and demands strict proof thereof.

ERROR V

Petitioner requests penalty abatement for the current assessment.

ANSWER: The Department denies that the Petitioner is entitled to an abatement of penalties.

55. The additional amounts due as identified in the above audit were identified despite Petitioner's best efforts to determine and report its proper tax liability. Petitioner filed and paid its returns in good faith, without negligence and without intent to defraud. Petitioner's actions were reasonable and without negligence.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 55 and therefore the Department denies all the factual allegations in Paragraph 55 and demands strict proof thereof.

56. Throughout the audit Petitioner maintained a professional attitude and continued to answer various information requests. Petitioner is a large corporation, collecting and remitting large amounts of tax to the state of Illinois annually.

ANSWER: The Department admits that the Petitioner responded to its requests for information and that the Petitioner collects and remits large amounts of tax to the state of Illinois annually. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 56 and therefore demands strict proof thereof.

57. As a national telecommunications company, Petitioner has had several large acquisitions over the years including Allegiance Telecom and Concentric Networks. Many of these entities maintained their billing systems and as a result there are several systems that roll into Petitioner's filings

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 57 and therefore demands strict proof thereof.

58. As such, both this audit and the issues Petitioner face are complicated and detailed. To some extent, the complexity of Petitioner's billing systems has in isolated incidences caused it to rely on erroneous information when collecting and remitting tax.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 58 and therefore demands strict proof thereof.

59. Petitioner has been a welcome participant to the Illinois business community for years, has maintained the appropriate business records, collected and remitted tax on all clearly taxable revenue, and has maintained the records necessary to establish their sales.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 59 and therefore demands strict proof thereof.

60. Furthermore, and more importantly, Petitioner endeavors to appropriately collect and remit tax on all taxable transactions going forward. Petitioner has acted in good faith and has consistently strived to conduct its business in the state of Illinois in a professional and ethical manner.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 60 and therefore demands strict proof thereof.

61. Petitioner maintains that it made a good faith effort to comply with the law, and therefore, is entitled to an abatement of late-filing penalty or late-payment penalty due to "reasonable cause." 86 Ill Admin. Code §700.400.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 61 and therefore demands strict proof thereof. The Department admits the existence, force and effect of section 700.400 of the Illinois Administrative Code and states that the regulation speaks for itself.

62. Therefore, no penalty should be imposed under this Section because Petitioner has shown that failure to comply with the tax Act is due to reasonable cause. Also Petitioner is not negligent as it has substantial authority to support the majority of the returns as filed. 35 ILCS 735/3-5(c).

ANSWER: Paragraph 62 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department denies all factual allegations in Paragraph 62 and demands strict proof thereof.

WHEREFORE, the Department respectfully requests this tribunal

- a. Find that the Department's Notices correctly reflect the Petitioner's liability including interest and penalties;
- b. Enter judgment in favor of the Department and against the Petitioner; and
- c. Grant any further relief this Tribunal deems just and appropriate.

Respectfully submitted,
Lisa Madigan
Attorney General of the State of Illinois

By: s/ Paula M. Hunter
Paula M. Hunter
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, Level 7-900
Chicago, Illinois 60601
(312) 814-1633

ILLINOIS INDEPENDENT
TAX TRIBUNAL
CHICAGO, ILLINOIS

XO COMMUNICATIONS)
SERVICES, LLC)

v.)

Case No. 14-TT-178)

DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)

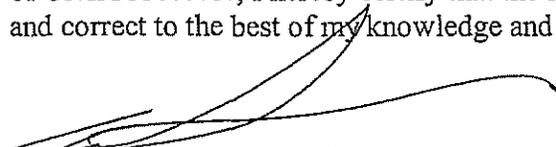
AFFIDAVIT OF KYE SWANSON
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)

STATE OF ILLINOIS
COUNTY OF COOK

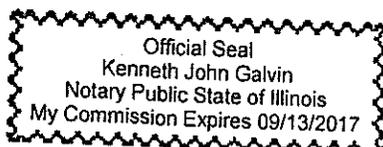
Under penalties as provided by Section 1-109 of the Code of Civil Procedure, 735 ILCS §5/1-109, I, Kye Swanson, being first duly sworn on oath, depose, and state as follows:

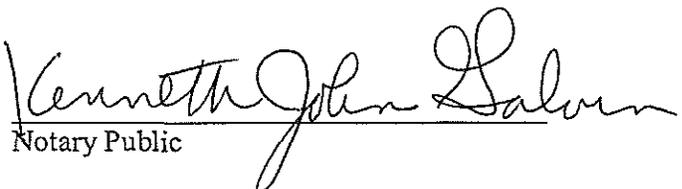
1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor.
3. I provide technical assistance to auditors performing telecommunications audits.
4. I reviewed the audit performed on XO Communications Services, LLC for the periods of January 1, 2009 through December 31, 2011.
5. I lack the personal knowledge required to either admit or deny the allegations alleged in Taxpayer's Petition paragraphs 39, 45 through 53, and 55 through 61.
6. I am an adult resident of the State of Illinois and can truthfully and competently testify as to the matters contained herein based upon my own personal knowledge.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I hereby certify that the statements set forth in this Affidavit are true and correct to the best of my knowledge and belief.


Kye Swanson
Revenue Auditor
Illinois Department of Revenue

Subscribed and sworn to this 12th day
of November, 2014.




Notary Public