

XO Communications

1924 Deere Avenue
San Jose, CA 95131
U.S.A.



VIA FACSIMILE AND FEDERAL EXPRESS

March 18, 2004

Eddie A. Reed, Jr.
Director – Contract Management
Industry Markets Support
SBC Telecommunications, Inc.
311 S. Akard, Room 940.01
Four SBC Plaza
Dallas, TX 75202

RE: Notice of One-Week Deadline to Execute "SBC's Lawful UNE
Amendment"

Dear Mr. Reed:

XO Communications, Inc. and its operating subsidiaries (collectively, "XO") have received your letter dated March 11, 2004 (the "Letter") in which SBC purports to invoke the Intervening Law/Change in Law provisions of XO's interconnection agreements to force XO to modify XO's interconnection agreements with SBC no later than March 19, 2004. XO has several significant objections to SBC's approach to the issue of amending XO's interconnection agreements.

It is wholly unclear what change of law SBC is seeking to implement through the proposed amendment that it forwarded to XO on March 11th. SBC explicitly acknowledges in its Letter that the mandate for the decision by the U.S. Court of Appeals for the D.C. Circuit in *USTA v. FCC*, Case No. 00-1012 (D.C. Cir. 2004) ("*USTA II*") has not yet issued and states that "in the near future" SBC will be providing language to XO that will address any "modifications based upon *USTA II*." Thus, it appears that while SBC is demanding that XO execute an amendment by March 19th, SBC is not actually invoking the change of law provisions in the relevant interconnection agreements to effect changes that may result from the not-yet-effective D.C. Circuit ruling in *USTA II*. Rather, it appears that SBC may be attempting to renegotiate the change of law

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provisions of the interconnection agreements as they relate to the provision of UNEs.¹ In fact, nothing in the Triennial Review Order ("TRO") or *USTA II* supports an attempt by SBC to revise the change of law provisions in the underlying interconnection agreements.

Even if the TRO somehow authorized the revision of the underlying change of law provisions related to the provision of UNEs (which it does not), nothing in the TRO or the change of law provisions of the underlying interconnection agreements mandate that XO forego its right to negotiate any SBC proposed amendments. Indeed, pursuant to paragraphs 703 and 704 of the TRO, the parties have been engaged since October of 2003 in negotiation of an amendment to implement the TRO changes that will ultimately provide the opportunity for arbitration in the time frame established by 47 U.S.C. 252(b)(1) should the parties be unable to agree on amendment language.

Similarly, nothing in *USTA II* authorizes a revision to the change of law provisions in the underlying interconnection agreements nor does it permit SBC to ignore such provisions in implementing *USTA II*. SBC's unilateral imposition of a one-week deadline, until March 19th, to execute its proposed contract amendment strips the parties of any ability to negotiate. Therefore, it is wholly inconsistent with the change of law provisions as well as with the time frame contemplated by paragraphs 703 and 704 of the TRO.

Not only does XO take issue with the proposed amendment forwarded with SBC's letter, XO disagrees with SBC's claim in the Letter that *USTA II*, among other things, vacates the FCC's nationwide impairment determination with respect to "hi-cap loops and dark fiber loop(s)." In fact, *USTA II* does not explicitly address the FCC's impairment determinations regarding loops.

For the reasons set forth above, XO disagrees with many of the positions taken by SBC in its Letter and will not execute the SBC amendment by March 19, 2004. Nevertheless, XO wishes to move forward with the initial TRO negotiations as quickly as possible since many of the requirements of the TRO were not impacted by *USTA II*. Moreover, XO is willing to negotiate mutually acceptable changes to the SBC

¹ The amendment states that its terms and conditions relating to UNEs "shall apply, notwithstanding any language in the Agreement to the contrary, including, without limitation, any intervening law, change in law or other substantively similar provision." This provision could be interpreted to take precedence over any change of law provision in any underlying interconnection agreement.

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interconnection agreements as required by *USTA II* should a mandate for *USTA II* ultimately be issued. In the meantime, XO expects SBC to comply with its contractual obligations.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Karen M. Potkul".

Karen M. Potkul

cc: Mary Pat Regan, SBC
Doug Kinkoph, XO