

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Petition for Arbitration)	
of XO Missouri, Inc. of an Amendment to an)	
Interconnection Agreement with Southwestern)	Case No. LO-2004-0575
Bell Telephone L.P. d/b/a SBC Missouri)	
Pursuant to Section 252(b) of the)	
Communications Act of 1934, as Amended)	

**SBC MISSOURI'S RESPONSE TO XO'S REPLY TO
COMMISSION ORDER DIRECTING FILING**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Response to XO's Reply To Commission Order Directing Filing¹ states as follows:

1. XO Missouri filed its Petition for Arbitration on May 3, 2004. SBC Missouri filed its Motion to Dismiss Petition for Arbitration ("Motion to Dismiss") on May 12, 2004. On May 21, 2004, XO filed its Reply In Opposition to SBC Missouri's Motion To Dismiss ("XO Reply"). On May 28, 2004, SBC Missouri filed its Response to XO's Reply in Opposition to SBC's Motion to Dismiss ("SBC Missouri's Response"). After reviewing all of these pleadings, on June 3, 2004, the Commission issued its Order Directing Filing in which it instructed XO Missouri to file "evidence showing a request for negotiations" between itself and SBC by June 11, 2004. XO Missouri filed its Reply to the Commission Order Directing Filing on that date. As detailed herein, XO Missouri has completely failed to show that either party initiated a Request for Negotiations to amend the Interconnection Agreement, and SBC Missouri's Motion to Dismiss the Petition for Arbitration should accordingly be granted.

2. SBC Missouri's Motion to Dismiss raised two issues: (1) neither SBC Missouri nor XO Missouri had initiated a request to negotiate changes to their Interconnection Agreement to

¹ The XO Missouri filing also includes a Reply to SBC Missouri's Response to XO's Reply in Opposition to SBC's Motion to Dismiss.

reflect changes in applicable law such that the Petition for Arbitration is not properly before the Commission; and (2) even if negotiations had been requested and taken place, XO Missouri was required to follow the dispute resolution provisions of the Interconnection Agreement rather than initiate an arbitration under Sections 251 and 252 of the federal Telecommunications Act of 1996 (“the Act”).

3. In its Motion to Dismiss, SBC Missouri explained that it had initiated change of law negotiations with four affiliates of XO Missouri, but not with XO Missouri itself. In its Reply, XO Missouri relied upon an October 30, 2003 letter to NEXTLINK California, Inc. (an affiliate of XO Missouri) for its claim that SBC Missouri had actually initiated a request to negotiate change of law provisions based upon the FCC’s Triennial Review Order (XO Reply, para. 5.) In its Response, SBC Missouri pointed out that the letter upon which XO Missouri relied was addressed to NEXTLINK California, not XO Missouri, and that XO Missouri had not provided any affidavit establishing that a request to amend the Interconnection Agreement to reflect changes in the law had been made. (SBC Missouri Response, para.4.) SBC Missouri further pointed out that XO affiliates had filed petitions for arbitration in California, Michigan, Ohio and Illinois, the only jurisdictions in which an SBC affiliated incumbent local exchange company (“SBC ILEC”) had sent notice of an intent to amend the applicable interconnection agreement to reflect changes in law brought about by the Triennial Review Order. (Id. at para. 6.) Although XO affiliates operate in other states served by an SBC ILEC, Missouri was the only other state where XO sought to file a petition for arbitration. (Id.)

4. In its Order Directing Filing, the Commission was clearly troubled as to whether a request for negotiations between SBC Missouri and XO Missouri had ever been made, pointing out specifically that “the letter of October 30 relied on by XO is addressed to NEXTLINK California, Inc. and not to XO Missouri.” Order Directing Filing, p. 2.

5. XO Missouri's Reply to the Order Directing Filing does nothing to establish that a request to negotiate changes in the Interconnection Agreement was made or that this Commission has jurisdiction over the arbitration petition. The Reply to the Order Directing Filing is limited to the assertion that "XO is already submitted the operative documentation demonstrating the request for negotiation by attaching it to its reply in opposition to SBC's Motion to Dismiss." (XO Missouri's Reply to Order Directing Filing, para. 10.) The matter is now ripe for decision. XO Missouri admits it has no documentation which legitimately establishes a negotiation request directed to XO Missouri. Despite having been given multiple opportunities to produce evidence that a request to amend the Interconnection Agreement had been made, XO Missouri is simply unable to produce it because it does not exist. XO Missouri cannot magically convert a request issued to NEXTLINK California into a request by SBC Missouri to XO Missouri. And even XO Missouri admits that no negotiations even took place. Petition for Arbitration, para. 15. The Commission is simply without jurisdiction to proceed and the Motion to Dismiss should be granted.

6. In SBC Missouri's Response, an additional jurisdictional issue was noted. SBC Missouri properly pointed out that, to the extent XO Missouri sought to rely on the October 30 letter to NEXTLINK California, Section 252(b)(1) of the Act requires that any Petition For Arbitration be filed between the 135th and 160th day (inclusive) following the initiation of a request to negotiate. (SBC Missouri Response, para. 13.) Under the Act, the time to file a Petition For Arbitration based on the October 30 letter expired on April 8, 2004.² Accordingly, XO Missouri's May 3, 2004 Petition for Arbitration was not timely filed. In its Reply to the Order Directing Filing, XO Missouri asserted it was "dumbfounded" that SBC Missouri was trying to

² As noted in its Motion to Dismiss, the proper procedural vehicle for a valid request to amend the interconnection agreement is the Dispute Resolution process as set out in the interconnection agreement, not a Petition for Arbitration under the Act. But, if a Petition for Arbitration were procedurally proper, it is simply not timely.

renege upon a commitment regarding the filing deadline. (XO Missouri's Reply to Order to Directing Filing, para 9.) But, the "agreement" upon which XO Missouri relies was made only with regard to the states where an SBC affiliated ILEC had requested to negotiate changes to the Interconnection Agreement (i.e., California, Ohio, Michigan and Illinois.) SBC Missouri did not agree to extend a filing date in Missouri because no notice had ever been issued requesting an amendment to the Interconnection Agreement.

7. Moreover, XO Missouri is apparently unaware that the Commission has previously determined that parties are not authorized to change the deadline for filing requests for arbitrations under Section 252 of the Act by agreement. In its Order Regarding Jurisdiction and Status of Case in Case No. TO-98-14 (attached as Exhibit 1), the Commission noted:

"The Act does not provide for parties to agree to a 'start date' for purposes of requesting interconnection. In essence, TCG and SWBT have attempted to cause this Commission to have jurisdiction by Agreement. The Public Service Commission is a creature of statute and can only exercise such powers as are expressly conferred on it, the limits of which are clearly defined. [Footnote omitted] Therefore, it is clear this Commission does not have jurisdiction to arbitrate whatever open issues relating to an interconnection remain between TCG and SWBT under the Act."

Id. at p. 2.

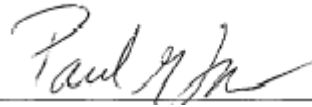
8. As set forth above, the Commission has previously determined that, even where a request to initiate negotiations under the Act was properly made, the parties cannot by agreement extend the statutory deadline by which petitions for arbitration must be filed. The Commission has previously noted that it lacks jurisdiction to proceed under these circumstances.³ Thus, even if a request to negotiate changes to the XO Missouri interconnection agreement had been made, and even if a Petition for Arbitration under Section 252 was procedurally proper (neither of which is correct), then the Petition for Arbitration is not timely filed and must be dismissed.

³ The Commission reached a similar conclusion in Case No. TO-2001-715 in an Order Pursuing Parties dated August 7, 2001 (attached as Exhibit 2).

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to immediately grant its Motion to Dismiss the Petition for Arbitration on the basis that (1) the Commission lacks jurisdiction since no request for negotiations had ever been initiated under the Interconnection Agreement or under the Act, (2) even if a request for negotiations was properly initiated under the Interconnection Agreement, it is the dispute resolution process under that agreement that governs, not a Petition for Arbitration under Sections 251/252 of the Act and (3) even if a request for negotiations under the Act had been issued, and a Petition for Arbitration was the proper procedural vehicle, the Petition for Arbitration was not timely filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on June 18, 2004.



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