

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

In the Matter of)	
)	
Petition for Arbitration of XO MISSOURI, INC.)	
Of an Amendment to an Interconnection)	Case No. LO-2004-0575
Agreement with SOUTHWESTERN 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 MOTION TO DISMISS
PETITION FOR ARBITRATION**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (“SBC Missouri”) and for its Motion to Dismiss the Petition for Arbitration filed by XO Missouri, Inc. (“XO Missouri”) states as follows:

EXECUTIVE SUMMARY

1. XO Missouri’s Petition for Arbitration fails on two counts. First, contrary to the claims in XO Missouri’s Petition, SBC Missouri has not yet sought to amend its Interconnection Agreement with XO Missouri (“Interconnection Agreement”) to incorporate the impact of the Federal Communication Commission’s (“FCC’s”) Triennial Review Order.¹ Second, even if SBC Missouri had sought to amend the Interconnection Agreement between itself and XO Missouri to incorporate the provisions of the Triennial Review Order, the procedural vehicle chosen by XO Missouri to accomplish that amendment, a petition for arbitration under Sections 251-252 of the federal Telecommunications Act of 1996 (“the Act”), is inappropriate. Instead, a request to revise an existing interconnection agreement under the change in law provisions of the agreement must

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Further Notice of Proposed Rulemaking (released August 21, 2003) (“Triennial Review Order”).

comply with the dispute resolution provisions of the agreement. XO Missouri has not complied with that process. Accordingly, XO Missouri's Petition for Arbitration is both factually and legally deficient and should be dismissed by the Commission.

XO MISSOURI'S PETITION FOR ARBITRATION SHOULD BE DISMISSED

2. XO Missouri filed its Petition for Arbitration ("Petition") on May 3, 2004. In that Petition, XO Missouri seeks to arbitrate, pursuant to Sections 251-252 of the federal Act, changes to the existing Interconnection Agreement which XO Missouri contends are required by the FCC's Triennial Review Order which became effective on October 2, 2003.

3. In its Petition for Arbitration, XO Missouri claims that SBC Missouri notified XO Missouri that it wanted to negotiate changes to the Interconnection Agreement to implement the requirements of the FCC's Triennial Review Order.² XO Missouri does not attach any written documentation of this purported request to initiate negotiations. Nor does XO Missouri claim that it sought to initiate negotiations to incorporate the Triennial Review Order; instead, XO Missouri claims only that SBC Missouri sought to negotiate changes to the existing Interconnection Agreement pursuant to the change of law provisions of that agreement.

4. Contrary to XO Missouri's claim, SBC Missouri did not provide XO Missouri with notice of a request to initiate negotiations to change the Interconnection Agreement to incorporate the FCC's Triennial Review Order. As set forth in the attached Affidavit of Antonine Megger, various SBC affiliated incumbent local exchange companies ("SBC ILECs") did provide notice to various XO Missouri affiliates of a request to negotiate changes to the respective interconnection agreements to incorporate the FCC's Triennial Review Order, but SBC Missouri did not do so. (Attachment A, para. 3). As noted by Ms. Megger, the Lead Negotiator for SBC affiliated ILECs with the XO Missouri affiliates, notices to incorporate the results of the FCC's Triennial Review

² Petition for Arbitration, para. 6.

Order were issued on October 30, 2003, to XO Illinois, XO Michigan, XO Ohio and NextLink California (an XO affiliate). (Attachment A, para. 5). SBC Missouri did not send any notice to XO Missouri, nor did XO Missouri send any change of law negotiation request to SBC Missouri. (Id.). Nor have any substantive negotiations taken place between XO Missouri and SBC Missouri concerning any change of law provisions to incorporate the results of the FCC's Triennial Review Order. (Id.) XO Missouri is simply mistaken in its claim that SBC Missouri initiated negotiations to revise the Interconnection Agreement.

5. In its Petition for Arbitration, XO Missouri asserts that “the parties have not engaged in direct negotiations with each other. (Petition for Arbitration, para. 15). XO Missouri claims that the lack of direct negotiations precludes it from being able to determine SBC Missouri's positions on the issues which XO Missouri attempts to raise. (Petition for Arbitration, para. 16). It is not surprising that the parties have not engaged in direct negotiations with each other in Missouri, nor is it surprising that XO Missouri is not aware of SBC Missouri's position on the issues which XO Missouri seeks to raise. Since neither party sent notification to the other attempting to initiate negotiations to incorporate changes reflected in the FCC's Triennial Review Order, no such discussions have taken place. Under these circumstances, the Commission has no choice but to dismiss XO Missouri's improvidently filed Petition for Arbitration. The Commission simply does not have the authority to resolve interconnection issues which have not been vetted between the parties pursuant to any applicable Change of Law/Dispute Resolution processes contained in the Interconnection Agreement between the parties.

6. Even if the Commission had jurisdiction to resolve the Petition for Arbitration, which it clearly does not, the issues have not been identified with particularity and no substantive discussions have taken place. It would be an enormous waste of the resources of the Commission to conduct a proceeding when the parties have not themselves provided notice of an intent to

negotiate changes to the Interconnection Agreement, or engaged in substantive discussions to determine what issues exist between the parties and how those issues might be resolved. XO Missouri has simply failed to demonstrate that any issue has been properly joined for Commission resolution under Sections 251-252 of the Act.

7. If XO Missouri wishes to engage in negotiations to incorporate the FCC's Triennial Review Order in the existing Interconnection Agreement between the parties, it may do so by notifying SBC Missouri and, if agreement is not reached, by complying with any applicable change in law and/or dispute resolution provisions of the Interconnection Agreement. XO Missouri has not availed itself of this opportunity, but has instead attempted to thrust upon the Commission the duty to resolve issues which have not even been properly raised between the parties.

8. As discussed above, the Petition for Arbitration should be dismissed on the basis that XO Missouri has not demonstrated that this proceeding is permissible under the provisions of the Interconnection Agreement. But even if the parties had provided notice to each other of an intent to incorporate the FCC's Triennial Review Order into the existing Interconnection Agreement, the procedural vehicle chosen by XO Missouri would be inappropriate. When the parties have an existing interconnection agreement, changes to that agreement during its term typically must be made pursuant to the provisions of the agreement itself. Under the M2A, which forms the basis of the XO Missouri-SBC Missouri Interconnection Agreement, there are specific provisions addressing generally how the parties may amend the Agreement during its term. XO Missouri has not complied with those requirements, and the Petition for Arbitration must be dismissed on that basis.

9. Section 18 of the General Terms and Conditions of the M2A provides for amendments or waivers. Section 18.4 of the General Terms and Conditions instructs the parties to

engage in negotiations and to proceed under the dispute resolution provisions of the M2A in the event they are unable to agree – not under the statutory timelines set forth in the Act.

10. The dispute resolution procedures under the M2A are set forth in Section 9 of the General Terms and Conditions. Under Section 9.3.1, the parties are required to engage in informal dispute resolution by appointing a knowledgeable, responsible representative to meet and negotiate in good faith. If informal dispute resolution does not result in agreement, either party may invoke formal dispute resolution procedures pursuant to Commission rules or, by agreement, may seek commercial binding arbitration. This formal dispute resolution process is, of course, different from a negotiation/arbitration under Sections 251-252 of the Act. Under the M2A, the parties are attempting to resolve disputes pursuant to their contractual understanding; the parties are not attempting to reach an interconnection agreement under Sections 251-252 of the Act. The dispute resolution procedures under the M2A do not incorporate the timelines or substantive provisions of Sections 251-252 of the Act. As set forth in paragraphs 700-706 of the Triennial Review Order, the FCC specifically declined to establish a mandatory timeline for incorporating changes mandated by that Order into Interconnection Agreements. Instead, the FCC required ILECs and CLECs to follow the provisions of their interconnection agreements. The mandatory timeline of Sections 251-252 are to be followed only where the agreements are “silent concerning change in law and/or transition timing.” (*Id.* at para 703). The provisions of Sections 251-252 regarding negotiations and arbitrations and the associated timelines are simply not applicable here.

11. The dispute resolution processes under the M2A exist for a reason. These provisions require the parties to engage in good faith discussions on an informal basis before formal processes are to begin. Here, XO Missouri admits that it has not engaged in any informal dispute resolution in Missouri. The Commission does not have the authority to conduct a Section 251-252 arbitration in this circumstance, but even if it had such authority it would not be

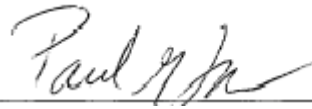
appropriate to exercise it where the parties have not engaged in the contractual prerequisites to formal proceedings before the Commission.

12. In summary, XO Missouri's Petition for Arbitration should be dismissed. Contrary to XO Missouri's claim, SBC Missouri has not initiated negotiations to incorporate changes to the existing Interconnection Agreement between the parties to incorporate the results of the FCC's Triennial Review Order and XO Missouri admits that it has not done so either. Moreover, even if such discussions had been initiated pursuant to the agreement's provisions, the end result would be informal dispute resolution followed by formal dispute resolution (or, by agreement, commercial arbitration) pursuant to the terms of the M2A, not a Petition for Arbitration under Sections 251-252 of the Act. The Commission simply does not have the authority to proceed in this matter, and XO Missouri has failed to present any facts or law that would give the Commission that authority.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to dismiss XO Missouri's Petition for Arbitration, together for such other and further relief as the Commission may deem just and proper.

Respectfully submitted,

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D/B/A SBC MISSOURI

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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 May 12, 2004.



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