

## BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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.	)	

### XO'S REPLY IN OPPOSITION TO SBC MOTION TO DISMISS

COMES NOW XO Missouri, Inc. ("XO") and for its Reply in Opposition to the Motion to Dismiss ("Motion") filed by SBC Missouri ("SBC") states to the Commission:

#### I. Introduction

1. XO has asked the Commission to arbitrate the terms and conditions necessary to implement provisions of the Federal Communications Commission's ("FCC's") *Triennial Review Order*.<sup>1</sup> Section 252 of the Telecommunications Act of 1996 ("Act"), as well as the *Triennial Review Order* itself, provides the Commission with ample jurisdiction to arbitrate these terms and conditions.

2. Without any basis, SBC seeks to dismiss XO's request. First, SBC erroneously asserts that the parties never initiated proceedings under Section 252. Second, SBC erroneously asserts that Section 252(b) does not apply to XO's Petition. It appears that XO and SBC at least agree at some level that new federal law has been promulgated and that the parties need to conduct

---

<sup>1</sup> *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

themselves in compliance therewith. The parties disagree, however, over the interpretation of the *Triennial Review Order* and the contract language necessary to implement that order – precisely the kinds of disputes that this Commission has resolved through arbitrations under Section 252 of the Act.

3. SBC has consistently delayed or refused to abide by, or negotiate appropriate contract language to implement, the *Triennial Review Order*. In light of SBC's track record, the Commission should see SBC's Motion for the meritless delaying tactic that it is and should deny the Motion.

## **II. Argument**

### **A. Both SBC and XO Requested Negotiations**

4. Contrary to SBC's assertions, XO's Petition indicates that both SBC and XO sought to commence negotiations. (Para. 6 and 7). That is also in fact what happened.

5. SBC sent a letter on behalf of all 13 of its ILEC entities, including SBC Missouri, to XO dated October 30, 2003. A copy is attached hereto. Therein, SBC indicated that it wanted to negotiate matters regarding the impact of the TRO upon XO's interconnection agreements with SBC.<sup>2</sup>

6. XO Communications responded by letter dated November 26, 2003, on behalf of all its local subsidiaries including XO Missouri. A copy is attached hereto. Therein, XO indicated its desire to negotiate such matters as well. XO further indicated that in the event the parties

---

<sup>2</sup> SBC sent a follow-up letter dated November 20, 2003 that confirmed the intent of the first letter was to address agreements between SBC and XO entities including for Missouri. A copy is attached. It is self-evident that the Megger Affidavit inaccurately describes the contents of the letters.

could not reach a negotiated agreement, it would request state arbitrations.<sup>3</sup>

7. As indicated in the Petition (para. 14), the parties agreed that the arbitration filing period concluded on May 3, 2004. SBC does not dispute this point in its Motion. Hence, XO's Petition was timely filed.

8. It is SBC that is to blame for the absence of any productive negotiations. It was not the result of a lack of interest by XO. XO requested meetings, but none were scheduled. SBC cannot refuse to negotiate and then try to use that refusal as an obstacle to resolution of the issues by the Commission. And the issues are clearly framed in the Petition, contrary to SBC's contentions.

**B. XO's Request for Arbitration Is Governed by Section 252(b) of the Act.**

9. XO has properly requested pursuant to Section 252(b) of the Act that the Commission arbitrate the parties' disputes over contract terms and conditions to implement the FCC's *Triennial Review Order*. These provisions govern SBC's provisioning of "services" and "unbundled network elements pursuant to section 251," 47 U.S.C. § 252(a)(1), specifically the most recent FCC rules and requirements implementing Section 251(c). *Id.* § 251(d)(2). After agreeing to negotiate these terms and conditions, XO attempted to do so under Section 252(b)(1) without success. Accordingly, XO has petitioned the Commission to arbitrate the disputed issues and establish appropriate terms and conditions consistent with applicable federal law. *Id.* § 252(b)(1).

10. XO responded to SBC's "Change in Law Notice", indicating its willingness to

---

<sup>3</sup> In its Motion, SBC unjustifiably chastises XO for not including copies of these letters with the Petition. Obviously, the documentation exists, for it is attached hereto. XO did not attach these letters to the Petition because it had no reason to believe that SBC would attempt to disavow the parties' commencement of negotiations. SBC's contention came as a complete surprise, particularly in light of the fact that the parties reached agreement upon the arbitration filing date.

engage in negotiations to establish contract language to implement the *Triennial Review Order* under the provisions of that order and Section 252(b). (See letter of November 26, 2003 attached hereto). Such a response amply satisfied the requirements of Section 252. The FCC agrees, concluding, “Although section 252(a)(1) and section 252(b)(1) refer to requests that are made *to* incumbent LECs, we find that in the interconnection amendment context, either the incumbent or the competitive LEC may make such a request, consistent with the parties’ duty to negotiate in good faith pursuant to section 251(c)(1).” *Triennial Review Order* ¶ 702, n.2087 (emphasis in original).

11. SBC next claims that the request for negotiations was directed to amending the parties’ existing interconnection agreement, not to establishing a new or successor agreement. But under Section 252(a) that is a distinction without a difference. The request for negotiation only must be for “interconnection, services, *or* network elements pursuant to section 251.” *Id.* § 252(a) (emphasis added). The plain language of the Act thus contemplates the possibility of multiple agreements on separate subjects. That language similarly includes amendments to existing interconnection agreements, as long as those amendments concern “interconnection, services, or network elements under section 251.”

12. The arbitration provisions of the Act, and rules implementing those provisions, are designed precisely for resolving the type of issues that XO has presented in its Petition. Section 252(e)(1) requires that agreements that are negotiated under Section 252(a) or arbitrated under Section 252(b) must be submitted to the Commission for approval. Section 252(i) requires that the terms and conditions in approved agreements must be made available to other carriers. Under SBC’s interpretation, amendments to an interconnection agreement would not be subject to Commission approval or available to other carriers because they are not agreements that were

negotiated or arbitrated under Section 252(a) or (b). Such an interpretation flies in the face of both the plain language of the Act and well-established Commission practice.

13. The plain language of the Act, the FCC's interpretation of the Act, and well-established Commission practice support using the arbitration procedures in Section 252(b) to resolve the disputed issues in XO's Petition, and SBC has failed to demonstrate otherwise.

**C. The FCC's Triennial Review Order Supports the Use of the Arbitration Procedures of Section 252(d).**

14. The FCC anticipated that disputes would arise over the development of contract language to implement the legal requirements of the *Triennial Review Order*. The FCC thus established default time frames and supplemental procedures for negotiating and arbitrating such disputes. *Triennial Review Order* ¶¶ 700-06. XO's attempts to negotiate contract language with SBC and XO's Petition for Arbitration have consistently referenced and complied with these requirements, as well as with Section 252.

15. SBC erroneously claims that under the *Triennial Review Order* "the processes of Sections 251-252 regarding negotiations and arbitrations and the associated timelines are simply not applicable here." Motion at 5. SBC has a short memory. SBC was one of the Bell Operating Companies ("BOCs") that asked the FCC automatically to incorporate the new requirements into existing interconnection agreements. *Triennial Review Order* ¶ 701, n.2085. The FCC refused, explaining, "to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several BOCs that we *override the section 252 process* and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." *Id.* ¶ 701 (emphasis added). The FCC further stated, "While *we decline to depart from the section 252 process*, we believe that additional guidance is needed here to ensure that parties make the necessary changes to their

interconnection agreements in response to this Order in a timely manner.” *Id.* ¶ 702 (emphasis added).

16. The Order would not have discussed overriding or departing from the Section 252 process if the FCC did not interpret Section 252 to apply to interconnection contract amendments, including amendments required to incorporate the *Triennial Review Order*. The Order reinforces this view by stating, “We will rely on state commissions to be vigilant in monitoring compliance with the provisions of sections 251 and 252.” *Id.* ¶ 703. Again, no such vigilance would be necessary if resolution of disputes over implementing the *Triennial Review Order* did not raise issues under Section 251 that triggered the negotiation and arbitration process in Section 252.

17. The FCC refused to unilaterally amend existing interconnection agreements and required carriers to give effect to the change in law provisions contained in those agreements. The Act, in turn, authorizes carriers to enter into agreements “without regard to the standards set forth in subsections (b) and (c) of section 251,” 47 U.S.C. 252(a)(1), including whether and how any changes in law affecting such standards will be incorporated into the agreement. The *Triennial Review Order* respects the possibility that carriers might have agreed – and the state commission might have approved – a process for resolving disputes over amendments to their interconnection agreements other than the one established in Section 252(b). The FCC nevertheless required carriers with such agreements (including agreements that do not authorize amendments for changes in law) to use the timeframes in the Section 252(b) process when the agreements do not specify any timeframes or more specific procedures. SBC acknowledges this point at page 5 of its Motion. The FCC thus chose not to override either the Section 252 process or carriers’ agreements to use a different process but attempted to accommodate a variety of

individual circumstances to ensure prompt implementation of the *Triennial Review Order* requirements.<sup>4</sup>

18. The interconnection agreement between XO and SBC contains a change of law provision, but that provision does not purport to establish a procedure other than Section 252(b). Indeed, the provision does not specify any procedure or timeframes but simply provides that the parties will incorporate changes of law into their interconnection agreement. Section 252(b) is not mere “guidance” under these circumstances but the appropriate procedure for resolving the parties’ disputes over implementation of new legal requirements in general, and the *Triennial Review Order* in particular.

### **III. Conclusion**

19. Both XO and SBC initiated negotiations to address issues raised by the TRO. When SBC subsequently failed and refused to negotiate, XO filed its Petition. The Act, the FCC’s *Triennial Review Order*, and well-established Commission practice support using the arbitration procedures in Section 252(b) to resolve the issues set forth in XO’s Petition. The Commission, therefore, should deny SBC’s Motion.

---

<sup>4</sup> Similarly, the *Triennial Review Order* does not expand the Commission’s jurisdiction under Section 252(b). As discussed above and as the FCC implicitly recognized, Section 252(b) by its express terms applies to all requests for negotiation of contract language to implement Section 251 requirements, including the FCC’s interpretation of some of those requirements in the *Triennial Review Order*, in the absence of an agreement to the contrary. Congress established the Commission’s jurisdiction under these circumstances, and the FCC has done nothing to expand or otherwise alter that jurisdiction.

Respectfully submitted,

By: /s/ Carl J. Lumley  
Carl J. Lumley, #32869  
Leland B. Curtis, #20550  
Curtis, Heinz, Garrett & O'Keefe, P.C.  
130 S. Bemiston, Suite 200  
St. Louis, Missouri 63105  
Telephone: (314) 725-8788  
Facsimile: (314) 725-8789  
clumley@lawfirmemail.com  
lcurtis@lawfirmemail.com

*Attorneys for XO Missouri, Inc.*



## CERTIFICATE OF SERVICE

I, **Carl J. Lumley**, do hereby certify that I have, on this 21st day of May, 2004 caused to be served upon the following individuals, by first class U.S. mail, postage prepaid and e-mail, a copy of the foregoing Petition for Arbitration:

General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65101  
bruce.bates@psc.mo.gov

Office of Public Counsel  
P.O. Box 2230  
Jefferson City, Missouri 65101-2230  
mdandino@ded.state.mo.us

Legal Department  
SBC Missouri  
One SBC Center, Room 3520  
St. Louis, Missouri 63101  
paul.lane@sbc.com

/s/ Carl J. Lumley

---