

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. _____
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.)

PETITION FOR ARBITRATION

XO Missouri, Inc. (“XO”), by its attorneys and pursuant to Section 252(b) of the Communications Act of 1934, as amended (the “Communications Act”), Section 386.230 R.S.Mo., and other applicable state and federal statutes, rules and regulations, and decisions, hereby files with the Missouri Public Service Commission (the “Commission”) this Petition for Arbitration (the “Petition”) seeking resolution of certain disputed issues arising between XO and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (“SBC”) (collectively, the “Parties”) in the negotiation of an amendment to the Parties’ existing interconnection agreement in Missouri. In support of this Petition, XO states as follows:

I. DESIGNATED CONTACTS

1. All communications, filings, and related submissions in this proceeding, including but not limited to, correspondence, notices, inquiries, and orders, should be served upon the following designated contacts for XO:

Carl J. Lumley
Leland B. Curtis
CURTIS, OETTING, HEINZ, GARRETT & O'KEEFE, P.C.
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with a copy to:

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Salt Lake City, Utah 84111
Telephone: (801) 983-1504
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rex.knowles@xo.com

II. STATEMENT OF FACTS

2. SBC is an incumbent local exchange carrier ("ILEC"), as defined by the Communications Act. *See* 47 U.S.C. § 251(h). To the best of XO's knowledge, SBC's Missouri executive offices are located at One SBC Center, St. Louis, Missouri 63101. Within its operating territory, including Missouri, SBC remains a dominant provider of telephone exchange service. SBC contact information is:

Legal Department
SBC Missouri
One SBC Center, Room 3520
St. Louis, Missouri 63101
Telephone: (314) 235-2508
Facsimile (314) 247-0014

3. XO is a leading facilities-based competitive provider of telecommunications services formed under the laws of the State of Washington and having its principal place of business in Missouri at 2020 Westport Center Drive, Saint Louis, Missouri

63146. XO offers a complete set of telecommunications services, including local and long distance voice services, as well as data services. In Missouri, XO is authorized by the Commission to provide local exchange and long distance communications services pursuant to Case Nos. TA-99-48 and TA-99-220. While XO provides service through its facilities-based networks, XO is still dependent on leased facilities, including loops and transport, that it purchases from incumbent local exchange carriers like SBC. A certificate of good standing from the Missouri Secretary of State is attached hereto as Exhibit 1. XO has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer services or rates, which action, judgment or decision has occurred within three (3) years of the date of this application. XO has no overdue annual reports or assessment fees.

4. XO has an M2A - based interconnection agreement with SBC, which was approved by the Commission on July 25, 2001. The Commission has approved amendments thereto. The Commission should take notice of that agreement and all amendments thereto. This interconnection agreement is currently effective.

5. On August 21, 2003, the Federal Communications Commission (the "FCC") released its *Triennial Review Order*¹ which, among other things, required the incumbent local exchange carriers ("ILECs") to provide access to certain unbundled network elements. The requirements of the *Triennial Review Order* became effective on October 2, 2003.

6. Following the effective date of the requirements of the *Triennial Review Order*, SBC notified XO that it wanted to establish a negotiation schedule to negotiate

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 (rel. Aug. 21, 2003) (*Triennial Review Order*).

“conforming changes” to the Parties’ interconnection agreement purportedly to implement the requirements of the *Triennial Review Order*.

7. Subsequently, XO indicated that for purposes of section 252 interconnection negotiations, it was willing to commence negotiations.

8. By electronic mail dated January 16, 2004, Tonine Megger, SBC’s lead negotiator, sent a copy of SBC’s proposed amendment to XO (“SBC’s Proposed Amendment”).

9. In SBC’s Proposed Amendment, SBC asserts that the *Triennial Review Order* constitutes a change of law that requires the Parties’ to amend their existing interconnection agreement.

10. Although certain portions of the *Triennial Review Order* arguably constitute a “change of law” necessitating good faith negotiations to amend the Parties’ interconnection agreement, certain FCC requirements including those related to routine network modifications to existing facilities (collectively, the “Pre-existing UNE Obligations”) are existing ILEC obligations—predating the *Triennial Review Order*. In other words, these obligations are pre-existing SBC obligations which the FCC has only further clarified in its *Triennial Review Order*. In fact, the FCC’s justification for issuing that clarification was to prevent the ILECs from delaying their competitors’ access to facilities.

11. Notwithstanding the clarity of SBC’s Preexisting UNE Obligations, SBC has not complied with these obligations including by refusing to perform routine network modifications to existing facilities (primarily loops), with the result that XO’s ability to provide service to new and existing customers is materially and irreparably impaired.

12. Although XO does not believe that the Parties need to amend their interconnection agreement for XO to avail itself of the benefits certain FCC requirements,

including routine network modifications, XO is forced to file this Petition because of SBC's recalcitrance. Likewise, out of an abundance of caution and in order to preserve its rights under sections 251 and 252 of the Communications Act, XO seeks resolution of these and other issues at this time. XO notes that section 252(b)(4) of the Communications Act mandates that the Commission limit its consideration of any petition [for arbitration under section 252(a)(1)] (and any response thereto) to the issues set forth in the petition and the response thereto.²

III. JURISDICTION AND APPLICABLE LAW

13. Under the Communications Act, parties to an interconnection negotiation have the right to petition the relevant state commission for arbitration of any open issue whenever negotiations between them fail to yield an agreement. *See* 47 U.S.C. § 252(b). Either party may seek arbitration during the period between the 135th day and the 160th day, inclusive, after the date the ILEC received the request for negotiation. *Id.*

14. The parties have agreed that negotiations commenced November 25, 2003, and the arbitration filing period closes on May 3, 2004. Accordingly, this Petition is timely filed. Section 252(b)(4)(C) of the Communications Act requires that the Commission conclude the resolution of any unresolved issues within nine (9) months after the request for interconnection negotiation was initiated. 47 U.S.C. § 252(b)(4)(C). Consequently, unless the statutory deadline is waived, the Commission must conclude this arbitration no later than August 25, 2004.

IV. UNRESOLVED ISSUES AND POSITIONS OF THE PARTIES

15. Other than exchanging a few letters and proposed amendments, the Parties have not engaged in direct negotiations with each other. XO repeatedly requested that SBC provide dates and times that it was available for negotiation. However, SBC did not do so.

² *See* 47 U.S.C. § 252(b)(4).

Consequently, except through construing the language that SBC proposed, XO is unable to ascertain the positions of SBC vis-à-vis commingling, routine network modifications, and other unbundled network element issues. Due to the critical business need for commingling and routine network modifications, XO is compelled to seek arbitration of these issues without attempting further negotiations with SBC. XO would like these issues to be ultimately resolved without further involvement by the Commission. However, given its experience to date, at this point XO cannot state that it is optimistic. A copy of the Parties' respective proposed amendments are attached hereto and incorporated herein by reference respectively as *Exhibits 2 (XO) and 3 (SBC)*.³ A matrix of unresolved issues, which includes the competing contract language that XO and SBC have each proposed, is attached hereto and incorporated herein by reference as *Exhibit 4*.⁴

16. Finally, due to the lack of direct negotiations between XO and SBC to date, XO is not certain whether SBC will attempt to raise additional issues in its response to the Petition. Nor has XO been able to completely determine SBC's positions on each and every issue raised in this Petition. Accordingly, the Petition reflects SBC's positions as XO understands them at this time. As XO explained elsewhere in this Petition, section 252(b)(4) of

³ XO attempted to edit or "redline" SBC's Proposed Amendment. However, XO found it impossible to do so, because SBC's Proposed Amendment goes well beyond modifying the underlying interconnection agreement to reflect any changes pertaining to the FCC's *Triennial Review Order*. Indeed, SBC's Proposed Amendment, without any basis in the *Triennial Review Order*, would replace entire sections of the underlying interconnection agreement. XO therefore drafted a Triennial Review Order Amendment (the "Triennial Review Order Amendment") that it provided to SBC. XO requests that the Commission adopt XO's Triennial Review Order Amendment and reject SBC's Proposed Amendment.

⁴ Because SBC's Proposed Amendment includes terms and conditions that have nothing to do with and go well beyond the FCC's *Triennial Review Order*, XO's Triennial Review Order Amendment does not contain competing contract language for each provision proposed by SBC. The absence of competing contract language from XO should not be interpreted to mean that XO accepts SBC's proposed language, but rather that SBC's proposed language should simply be rejected.

the Communications Act mandates that the Commission limit its consideration of any petition for arbitration to the issues set forth in the petition and response thereto. Accordingly, to the extent SBC asserts additional issues, it must do so in its response to XO's Petition in order that the Commission may properly consider them. Therefore, XO expressly reserves the right to respond to any additional issues that SBC may raise in its response. In addition, XO's failure to raise any issue regarding other portions of SBC's Proposed Amendment should not be misinterpreted as approval or acceptance by XO of those provisions. On the contrary, for the reasons stated above those provisions should be considered as rejected by XO.

Issue No. 1: *Should SBC be required to make routine network modifications to unbundled network elements, including loops and transport (including dark fiber), consistent with FCC rules?*

XO's POSITION: Yes, the FCC's rules require an ILEC to make routine network modifications to unbundled facilities, including loops and transport (including dark fiber), at no additional cost or charge, where the requested transmission facilities have already been constructed. Moreover, standard provisioning intervals and performance metrics should apply. *See* 47 C.F.R. §§ 51.319(a)(8), 51.319(e)(5). XO's proposed language is set forth in Exhibits 2 and 4.

SBC's POSITION: SBC is required to provide routine network modifications only under very limited conditions. Moreover, SBC should be permitted to exempt from its performance plan obligations any facilities that are involved in routine network modifications and, further, should be permitted to impose substantial charges for performing these "routine" network modifications.

Issue No. 2: *Must SBC permit XO to commingle unbundled network elements, combination of unbundled network elements, and wholesale services, consistent with FCC rules?*

XO's POSITION: Yes, the FCC's rules require ILECs to permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services. In addition, upon request, an incumbent LEC is required to perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale. *See* 47 C.F.R. §§ 51.309(e), (f) and § 51.318. XO's proposed language is set forth in Exhibits 2 and 4.

SBC's POSITION: SBC is required to allow commingling only under very limited conditions and is not required to price commingled facilities at multiple rates as may be necessary to reflect the fact that the facility in question includes both unbundled network elements ("UNEs") and non-UNE circuits or services.

Issue No. 3: *Is SBC required to convert a wholesale service, or a group of wholesale services, to unbundled network elements or combinations of unbundled network elements consistent with FCC rules?*

XO's POSITION: Yes. Pursuant to the FCC's rules, an ILEC must, upon request, convert a wholesale service, or a group of wholesale services, to the equivalent unbundled

network element, or combination of unbundled network elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Communications Act. In addition, an ILEC must perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunication's end-user customer. Moreover, unless otherwise agreed to by the parties, an ILEC may not impose any termination charges, or any disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements. *See* 47 C.F.R. § 51.316. XO's proposed language is set forth in Exhibits 2 and 4.

SBC'S POSITION: SBC is required to provide conversions only under very limited conditions and is permitted to include numerous extraneous provisions that are not contemplated by the *Triennial Review Order*.

<p><u>Issue No. 4:</u> <i>May XO, consistent with FCC rules, provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services?</i></p>

XO'S POSITION: Yes. The FCC's rules preclude a requesting telecommunications carrier from accessing an unbundled network element for the *sole* purpose of providing non-qualifying service. "Non-qualifying service" is defined as a "service that is not a qualifying service." The term "qualifying service" is defined as "a telecommunications service

that competes with a telecommunications service that has been traditionally the exclusive or primary domain of incumbent LECs, including, but not limited to, local exchange service, such as plain old telephone service, and access services, such as digital subscriber line services and high-capacity circuits.” The FCC's rules further provide that a requesting telecommunications carrier that accesses and uses an unbundled network element pursuant to section 251(c)(3) of the Communications Act to provide a qualifying service may use the same unbundled network element to provide non-qualifying services. *See* 47 C.F.R. §§ 51.309(b), 51.5. XO’s proposed language is set forth in Exhibits 2 and 4.

SBC’s POSITION: No, XO’s ability to use unbundled network elements purchased from SBC is subject to very strict criteria, and SBC is permitted to include numerous provisions that go well beyond the requirements in the *Triennial Review Order*.

<p><u>Issue No. 5:</u> <i>Should SBC’s right to audit XO’s compliance with the qualifying service eligibility criteria for high-capacity EELs be limited consistent with FCC rules?</i></p>
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XO’s POSITION: Yes. While the FCC’s rules require that a requesting carrier must certify in writing that it satisfies the qualifying service eligibility criteria for each high-capacity EEL circuit, the ILECs’ right to audit compliance with those criteria is very limited. For example, the ILECs may obtain and pay for an independent auditor to audit, on an annual basis, CLECs’ compliance with the eligibility criteria. However, to the extent the independent auditor’s report concludes that the requesting carrier complied in all material respects with the

eligibility criteria, the ILEC must reimburse the audited carrier for its costs associated with the audit. *See Triennial Review Order* at 14, 389. In short, the FCC recognized that the ILECs could abuse their audit rights, and thus made sure, through its rules, that such potential abuses do not remain unchecked. XO's proposed language is set forth in Exhibits 2 and 4.

SBC's POSITION: SBC is entitled to the whole panoply of audit rights, in addition to those specifically set forth in the *Triennial Review Order*.

V. PROCEDURAL MATTERS

17. Section 252(b)(4)(c) of the Communications Act requires that, unless waived by the parties, the Commission should render a decision in this proceeding not later than nine (9) months after the date on which the request for interconnection negotiations is received. By agreement of the parties regarding the commencement of negotiations and arbitration filing period, the Commission must resolve the issues set forth in the Petition by August 25, 2004.

18. The issues raised in this Petition are questions of law and not questions of fact that require an evidentiary hearing. Accordingly, XO requests that the Commission dispense with holding any evidentiary hearing. Instead, the Commission should require the Parties to brief the issues, and make its determinations and conclusions based on the legal arguments advanced by the Parties in their respective briefs. Similarly, the Commission should not allow discovery requests or require prefiled testimony for the same reason set forth above—*i.e.*, the issues raised in the Petition do not involve factual disputes, but rather purely legal questions; accordingly, the filing of discovery requests and prefiled testimony is unnecessary. Discovery requests and testimony would be a waste of valuable resources, particularly in light of the fact

that evidentiary hearings are not necessary in order to resolve the issues in dispute between the Parties. Further, such filings would only add to the documents that the Commission must review, thereby potentially wasting the Commission's time and valuable resources. If the Commission should ultimately conclude that discovery and prefiled testimony must be filed, XO respectfully requests that it be given adequate time to prepare and submit its discovery requests and prefiled testimony.

VI. CONCLUSION

The Communications Act, the *Triennial Review Order*, and the FCC's rules require SBC to provide XO with access to certain unbundled network elements. Under currently effective law, SBC is also required to provide routine network modifications to its existing facilities, commingling, combinations, and conversions, among several other things. SBC has refused to abide by its legal obligations, causing material and potentially irreparable impairment to XO. While XO continues to believe that negotiations, if actually scheduled, might prove to be productive, XO is compelled to file this Petition in view of the statutory requirements of section 252(b) of the Communications Act. The issues set forth by XO in this Petition invariably involve questions of law, not factual disputes. In all cases, the law is determinative of the issues. Accordingly, the issues should be disposed of without prefiled testimony, discovery, or evidentiary hearings. The law is clear that, as to each of the open issues, XO's position is eminently reasonable and legally supportable. On the other hand, SBC's attempts unilaterally to either restrict XO's rights and/or impose additional requirements, that are unrelated to the FCC's Triennial Review Order, are contrary to applicable law. Therefore, XO should prevail on each and every disputed issue.

CERTIFICATE OF SERVICE

I, **Carl J. Lumley**, do hereby certify that I have, on this 3rd 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
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Jefferson City, Missouri 65101-2230
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Legal Department
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One SBC Center, Room 3520
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/s/ Carl J. Lumley

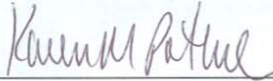
STATE OF CALIFORNIA

COUNTY OF ORANGE

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) SS.
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VERIFICATION

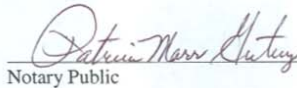
I, Karen M. Potkul, first being duly sworn, state on my oath that I am over the age of twenty-one years, sound of mind, and the Vice President, Regulatory and External Affairs of XO Communications, Inc. I am authorized to act on behalf of XO Missouri, Inc. regarding the foregoing document. I have read the document and I am informed and believe that the matters contained therein are true. Further, I hereby confirm that Carl J. Lumley, Leland B. Curtis, and Curtis, Oetting, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Suite 200, Clayton, Missouri 63105, are authorized to sign all pleadings and documents necessary to obtain the decision of the Missouri Public Service Commission on the foregoing Complaint, and to represent XO Missouri, Inc. in this proceeding.



Karen M. Potkul

On this 29th day of April, 2004, before me, a Notary Public, personally appeared Karen M. Potkul, and being first duly sworn upon her oath stated that she is over twenty-one years, sound of mind and the Vice President, Regulatory and External Affairs of XO Communications, Inc., she signed the foregoing document as Vice President, Regulatory and External Affairs of XO Communications, Inc., and the facts contained therein are true and correct according to the best of her information, knowledge and belief.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year above written.


Notary Public

My Commission Expires: March 16, 2008



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