

# 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 TO: SBC'S ANSWER;**  
**SBC'S RESPONSE TO XO'S REPLY IN OPPOSITION**  
**TO SBC'S MOTION TO DISMISS; AND COMMISSION ORDER DIRECTING FILING**

Comes Now XO Missouri, Inc. (XO) pursuant to 4 CSR 240-2.080(15)<sup>1</sup> and, for its Reply to: SBC Missouri's (SBC's) Answer; SBC's Response to XO's Reply in Opposition to SBC's Motion to Dismiss; and the Commission's Order Directing Filing dated June 3, 2004, states to the Commission:

1. XO filed its Petition for Arbitration on May 3, 2004 pursuant to Section 252(b) of the Telecommunications Act of 1996. SBC filed a Motion to Dismiss on or about May 12, 2004. On May 21, 2004, XO filed its Reply in Opposition to SBC's Motion to Dismiss (XO's Reply). SBC filed its Answer on May 28, 2004 and filed its Response to XO's Reply (SBC's Response) on May 26, 2004. On June 3, 2004, the Commission issued its Order Directing Filing in which it instructed XO to file "evidence showing a request for negotiations" between itself and SBC by 4:00 pm on June 11, 2004.

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<sup>1</sup> XO filed a Motion for Extension of Time on June 7, 2004.

2. XO denies all of the factual assertions of SBC's Answer and Response except as specifically admitted herein.

**SBC's Answer Improperly Raises Issues Beyond The Scope of this Proceeding**

3 As more fully set forth in XO's Motion to Dismiss Arbitration Issues and Strike Related Contract Language, which is being filed concurrently herewith and which XO incorporates herein by reference, SBC's Answer attempts to raise issues that are not properly the subject of this proceeding. SBC seeks to inject issues that are not required to conform the parties' interconnection agreement in Missouri (the M2A) to the Federal Communications Commission's (FCC's) Triennial Review Order (TRO)<sup>2</sup> and are not ripe for arbitration. Among other things, SBC is inappropriately attempting to revise the existing limited change of law provisions of the M2A, including issues directly affected by the March 2, 2004 decision of the D.C. Circuit Court decision in *United States Telecom Assoc. v. FCC ("USTA II")*. In its Answer, SBC has attached a matrix as Exhibit 1 that improperly includes issues beyond the scope of this proceeding. Specifically, the issues which should be dismissed are, as numbered in SBC's matrix, issues 1, 2, 19, 20, and 21.<sup>3</sup>

4. In its Answer, SBC has not accurately stated XO's issues or XO's positions. Accordingly, XO has attached hereto an updated matrix (Exhibit 1) that accurately states XO's issues and positions. By stating its position on SBC's issues, XO is not waiving its objections, as set forth in its Motion to Dismiss, to SBC's improper attempt to inject new issues in this

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<sup>2</sup> *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*).

<sup>3</sup> Additionally, SBC mistakenly included as issue 5 in its matrix an issue that it erroneously attributes to XO regarding combinations. XO did not raise this issue in its Petition. XO did raise this issue in other states, which presumably is the source of SBC's error.

arbitration. Rather, XO is filing the matrix as a preventive measure, to ensure its positions are on the record.

5. Attached as Exhibit 2 to SBC's Answer is a document that contains proposed language on issues that have not been raised between the parties. For the reasons stated herein and in XO's Motion to Dismiss, SBC's Exhibit 2 improperly includes issues that are not within the lawful scope of this arbitration.

6. SBC's purported reservations of rights set forth in paragraphs 3 and 8 of its Answer are similarly without merit. SBC has no right to attempt to inject additional issues later in this proceeding.

### **SBC's Response Mischaracterizes the Parties' Initiation of Negotiations and the Process for Seeking Clarifying Amendments**

7. In SBC's Response to XO's Reply in Opposition to SBC's Motion to Dismiss, SBC erroneously contends that the parties did not initiate negotiations to amend their interconnection agreement in Missouri (the M2A) in light of the TRO. In fact, as clearly demonstrated by XO's Petition and XO's Reply, XO and SBC both requested amendments to their interconnection agreement under Sections 251 and 252 of the Act to address the impacts of the FCC's TRO. In an October 30, 2003 letter, a copy of which was attached to XO's Reply, SBC indicated that it wanted to address the impacts of the FCC's TRO on various agreements including the SBC Missouri agreement. In a November 20, 2003 letter, also attached to XO's Reply, SBC confirmed to Doug Kinkoph, VP Regulatory, of XO Missouri's parent company, XO Communications, that "SBC Missouri" wanted to address its interconnection agreement with XO (i.e. with XO Missouri) regarding the TRO. XO responded, as "XO Communications, Inc.

and its operating subsidiaries" [which includes XO Missouri], that it, too, wanted to negotiate regarding such matters.<sup>4</sup> As previously demonstrated in the Petition and XO's Reply, the parties requested negotiations under Sections 251-252

b. In its Response, SBC castigates XO for not supplying an affidavit with its Reply. SBC, however, admits that XO has supplied the correspondence exchanged between the parties and that those are the operative documents. Indeed, there was no need for XO to submit an affidavit since the correspondence itself establishes the initiation of negotiations between the parties. Unlike SBC, XO has not improperly attempted to mischaracterize that correspondence through a self-serving affidavit.<sup>5</sup>

8. SBC in its Response erroneously contends that Section 18.4 of the General Terms and Conditions of the M2A applies in the instant case and requires the parties to engage in dispute resolution rather than arbitration. However, the section that SBC is relying upon concerns changes in law pertaining to the portions of the M2A that incorporated the results of prior Commission arbitrations and is thus inapplicable in the instant case. In contrast, Section 18.3 of the M2A clearly recognizes that XO may seek the clarifying amendments contained in its Petition by action to the Commission (which has authority under Sections 251 and 252), rather than contract dispute resolution provisions.<sup>6</sup>

9. In its Response, SBC alleges that XO has not timely filed its Petition in this case, XO remains dumbfounded that SBC is trying to renege upon its commitment regarding the filing

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<sup>4</sup> The Notice clause of the M2A concerns notices under the agreement, not under Sections 251-252. Moreover, the parties remain free to accept other forms of notice.

<sup>5</sup> SBC also appears to question why XO would file a petition for arbitration in Missouri and not certain other states. XO did not file in Texas because a proceeding addressing modifications to the Texas T2A was already underway. XO did not file in other states beyond the five mentioned in SBC's pleadings (Missouri, California, Michigan, Ohio, and Illinois) because it had no business reason to make other filings. XO's Petition raises facilities-based issues and it filed in the states in which it conducts business on a facilities basis (other than Texas as explained).

<sup>6</sup> Section 18.3 of the M2A provides in pertinent part "...CLEC expressly reserves the right to seek clarification of interpretation of the terms of this Agreement through the dispute resolution process established by the Commission..."

deadline for XO's Petition. Attached hereto is a copy of an email from SBC confirming that a Petition filed by May 3, 2004 would be timely filed. SBC's request that the Commission dismiss XO's Petition as untimely filed is in explicit contravention of SBC's prior representations to XO and should be summarily denied.

**XO Has Provided the Evidence Requested by the Commission**

10. In response to the Commission's Order Directing Filing, XO states that XO has already submitted the operative documentation demonstrating the requests for negotiation by attaching it to its Reply in Opposition to SBC's Motion to Dismiss. As explained herein and in XO's other pleadings, the correspondence exchanged between the parties included requests to negotiate regarding the agreement between SBC Missouri and XO Missouri.

WHEREFORE, XO respectfully requests that the Commission grant its Motion to Dismiss, deny SBC's Motion to Dismiss, and proceed to arbitrate the issues raised in XO's Petition and the remaining issues raised in SBC's Answer.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, **Carl J. Lumley**, do hereby certify that I have, on this 11th day of June, 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:

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/s/ Carl J. Lumley\_\_\_\_\_