

**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 RESPONSE TO XO’S REPLY  
IN OPPOSITION TO SBC MOTION TO DISMISS**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (“SBC Missouri”) and for its Response to XO’s Reply in Opposition to SBC Motion to Dismiss (“XO’s Reply”) states as follows:

1. In its Motion to Dismiss, SBC Missouri explained that the Petition for Arbitration filed by XO Missouri, Inc. (“XO Missouri”) was subject to dismissal because (1) contrary to XO Missouri’s claims, SBC Missouri never initiated negotiations to implement changes in the interconnection agreement between the parties to incorporate the results of the Federal Communications Commission’s (“FCC’s”) Triennial Review Order (“TRO”) and (2) even if notification of an intent to negotiate changes in the agreement had been given, the dispute resolution process set forth in the interconnection agreement, rather than a petition for arbitration, is the available procedural vehicle to resolve any disputes over implementation of the change of law provisions. XO Missouri’s Reply does not effectively counter either of these positions, and the Petition for Arbitration must be dismissed.

**No Request to Negotiate Changes to the Interconnection  
Agreement Was Sent to XO Missouri**

2. XO Missouri is simply incorrect in its claim that SBC Missouri initiated notification to amend the parties' interconnection agreement to incorporate the results of the FCC's TRO. SBC Missouri filed an affidavit from its chief negotiator with the XO companies which verified that XO Missouri affiliates in California, Michigan, Ohio and Illinois had been sent notifications to negotiate changes in those parties' interconnection agreements to incorporate the FCC's TRO decision, but that XO Missouri had not been notified.

3. Although the opportunity was ripe for XO Missouri to concede that it was simply mistaken with regard to its erroneous claim that SBC Missouri had initiated change of law negotiations under the parties' Interconnection Agreement, XO Missouri not only refused to do so, but also attempted to cast SBC Missouri in a bad light for failure to negotiate. XO Missouri's position is very disappointing, but consistent with the common CLEC tactic of attacking and blaming the incumbent local exchange company ("ILEC") no matter the facts.

4. The Commission should take careful note both of what XO Missouri failed to provide and what it did provide. XO Missouri attached no affidavit to its Response, despite the fact that its Response is replete with factual assertions. In contrast, SBC Missouri provided a detailed affidavit from its chief negotiator explaining that no notice was provided to XO Missouri, and that the only XO affiliated companies to which any SBC ILEC had provided change of law notices were XO Ohio, XO Michigan, XO Illinois and NEXTLINK California. XO Missouri did provide the letter from SBC which it contends constitutes the notice to negotiate changes as a result of the TRO, but a closer look conclusively establishes that SBC Missouri's position is correct. The October 30, 2003 letter on which XO Missouri relies is not even addressed to XO Missouri. Instead, the notification of the change of law provision was sent to NEXTLINK California, Inc. It was not sent to XO Missouri, nor was any other change of law notification sent

to XO Missouri. See: Affidavit of Antonine Megger attached to SBC Missouri's Motion to Dismiss, para. 5. Similar letters to the October 30, 2003 letter to NEXTLINK California, Inc. were sent to XO Michigan, XO Ohio and XO Illinois. Id. The notices were not sent to any other XO entity. Id.

5. XO Missouri now seeks to convert a notice requesting negotiations to amend an interconnection agreement sent to NEXTLINK California, Inc. into a notification to XO Missouri. But XO Missouri provides no basis for this, nor can it. The interconnection agreement between XO Missouri and SBC Missouri specifically provides in Section 11.2 of the General Terms and Conditions that any notices to XO Missouri are to be sent to:

Director, Regulatory and External Affairs  
XO Missouri, Inc.  
1300 W. Mockingbird Ln. #200  
Dallas, TX, 75247

Clearly, the notice provided to NEXTLINK, California does not meet the requirements of the interconnection agreement between XO Missouri and SBC Missouri to begin the negotiation process to amend the agreement to incorporate changes resulting from the FCC's TRO.

6. The only notices sent by SBC-affiliated ILECs were directed to designated XO entities or affiliates; XO Missouri was simply not among them. XO's actions in other SBC ILEC territories is consistent with the limited notices for change of law negotiations. XO affiliates have initiated arbitration proceedings against SBC ILECs in California, Michigan, Ohio and Illinois where notices were sent. But although XO affiliates operate in several other SBC ILEC territories, XO affiliates have not initiated arbitration proceedings in any other SBC ILEC states other than those four states and Missouri. Clearly, XO recognizes, as it must, that notifications seeking amendments to an interconnection agreement to take into account changes in applicable law must precede filing of any dispute resolution proceeding as XO affiliates have pursued such proceedings only in the four states where notice was sent by the SBC ILEC.

7. XO Missouri also seeks to rely upon its November 26, 2003 letter to SBC as support for its claim that change of law negotiations were instituted in Missouri. XO Reply, para. 6. Again, a review of the letter which XO has attached to its Reply demonstrates that it is not correct in that assertion. The November 26 XO letter acknowledged receipt of the change of law negotiations letters which certain SBC ILECs previously sent, but those previous letters did not include any notice from SBC Missouri to XO Missouri. XO's acknowledgement of receipt of change of law notifications in California, Michigan, Ohio and Illinois cannot create a notification in Missouri where none was sent.

8. XO Missouri next seeks to justify its position by making scurrilous accusations that SBC Missouri failed and refused to engage in negotiations to incorporate changes in law brought about by the FCC's TRO decision. See: XO Reply, paras. 3, 8. Setting aside the failure of XO Missouri to present any affidavit in support of its assertions, the attempt to evade the issue does not pass muster. XO Missouri cannot logically criticize SBC Missouri for failing to negotiate change of law provisions in their Interconnection Agreement when neither party requested these negotiations. Applying XO's "logic," SBC Missouri could today file arbitration petitions with regard to all of its contracts with CLECs in the state and assert that those CLECs have failed and refused to negotiate even though no notification was sent to them. XO Missouri's attempt to paint SBC Missouri in a bad light is highly improper and offensive. In addition to promptly granting the Motion to Dismiss, the Commission should make it abundantly clear that improper attempts to invoke the Commission's jurisdiction and to assert frivolous positions will not be countenanced.

**Even If Change Of Law Negotiations Had Been Implemented,  
Sections 251-252 Arbitration Is Not Available**

9. In its Motion to Dismiss, SBC Missouri explained that even if a notice requesting initiation of negotiations to amend the interconnection agreement to reflect changes in law as a result of the FCC's TRO had been sent, which clearly did not occur here, the procedures of the

interconnection agreement, and not Sections 251-252 of the Act, govern the process. XO Missouri's Response fails to effectively rebut this position and appears to miss the point.

10. XO Missouri erroneously claims that SBC Missouri is asserting that amendments to interconnection agreements are not subject to Commission approval or available to other CLECs. XO Response, para. 12. SBC Missouri has not espoused this position, nor have its actions been consistent with XO's claim. Amendments to interconnection agreements, including the M2A which is in effect between XO Missouri and SBC Missouri, have been filed with the Commission for approval and have been made available to other CLECs. The point is that the agreement between the parties governs whether and how amendments to the agreement are to be accomplished; once an agreement to amend an interconnection has been reached under the processes set forth in the interconnection agreement, the amendment is submitted to the Commission for approval and, upon approval, is available to other CLECs.

11. SBC Missouri's Motion to Dismiss explained that changes to an interconnection agreement must typically be made pursuant to the terms of that agreement. Motion to Dismiss, para. 8. Here, the M2A based interconnection agreement between XO Missouri and SBC Missouri provides for amendments or waivers, and Section 18.4 of the General Terms and Conditions of that agreement instructs the parties to engage in negotiations and to proceed under the dispute resolution provisions of Section 9 in the event the parties are unable to agree. Id. at para. 9-10. The dispute resolution procedures include the requirement to engage in informal dispute resolution by appointing knowledgeable, responsible representatives to meet and negotiate in good faith. Failing agreement, either party may invoke formal dispute resolution procedures pursuant to Commission rules or, by agreement seek binding commercial arbitration. These procedures, which are separate from Sections 251-252, have not been followed. XO Missouri

must comply with the terms of the existing interconnection agreement and may not invoke arbitration under Sections 251-252 of the Act.

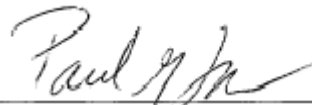
12. XO Missouri also misconstrues the FCC's TRO decision on this point. In the TRO, the FCC specifically rejected the proposal to automatically amend existing interconnection agreements to incorporate changes contemplated by the order, and instead directed the parties to follow the processes set out in their interconnection agreements. FCC TRO, paras. 700-701. But XO Missouri has not followed those processes and has instead attempted to contend that it is initiating a Section 252 arbitration. That path is not available to XO, and the Commission should dismiss the petition on that basis as well.

13. XO Missouri also claimed in its Reply that its Petition for Arbitration was timely filed. Even if it were permissible to pursue the Petition for Arbitration under Sections 251-252 of the Act, which it clearly is not, XO Missouri's petition is not timely filed. XO Missouri relies on an October 30 letter from SBC (but ignores that the letter was sent to NEXTLINK California) as the request to initiate negotiations under Sections 251-252. But under Section 252(b)(1) of the Act, any petition for arbitration must be filed between the 135<sup>th</sup> and 160<sup>th</sup> day (inclusive) following the initiation of a request to negotiate. Based on the October 30 notice on which XO Missouri relies, the time to file a petition for arbitration expired on April 8, 2004. As XO did not file its arbitration petition in Missouri until May 3, it is not timely filed even if the parties had initiated a request for negotiations and even if a petition for arbitration under Sections 251-252 were available. Again, the Petition for Arbitration must be dismissed.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to grant its Motion to Dismiss, and for such other and further relief as the Commission deems 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 26, 2004.



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