

Decision 05-09-042 September 22, 2005

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Request for Arbitration of XO California, Inc. of an Amendment to an Interconnection Agreement with SBC California pursuant to Section 252(b) of the Communications Act of 1934, as amended.

Application 04-05-002  
(Filed May 3, 2004)

**OPINION APPROVING ARBITRATED  
INTERCONNECTION AGREEMENT**

**1. Summary**

We affirm the results reached in the August 15, 2005 Final Arbitrator's Report (FAR), and approve the resulting amendment to the Interconnection Agreement (ICA) between XO California, Inc. (XO) and Pacific Bell Telephone Company, d/b/a SBC California (SBC). On August 26, 2005, parties submitted a fully executed copy of the amendment to the ICA, which will be effective today. This proceeding is closed.

**2. Background**

XO has an ICA with SBC, which became effective March 2, 2000. On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order* (TRO)<sup>1</sup> which, among other things, required the

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<sup>1</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*).

incumbent local exchange carriers such as SBC to provide access to certain unbundled network elements (UNEs). Following the effective date of the TRO, SBC notified XO that it wanted to negotiate conforming changes to the parties' ICA to implement requirements of the TRO. The parties agreed that negotiations commenced on November 25, 2003, and the deadline to request arbitration was May 3, 2004.

On May 3, 2004, XO filed a timely request for arbitration pursuant to Section 252(b) of the Communications Act of 1934. (47 C.F.R. Section 252.) The request for arbitration involved seven disputed issues in the negotiations between XO and SBC.

Shortly thereafter, SBC moved to dismiss the request for arbitration, arguing the Commission does not have jurisdiction to adjudicate disputes arising under an existing ICA, including negotiations to amend it. SBC's motion for dismissal was denied by a ruling of June 8, 2004.

SBC filed its response to the arbitration on May 28, 2004, wherein SBC added fourteen issues of its own to the arbitration request. XO moved to dismiss five of the fourteen issues added by SBC. XO's motion was denied by ruling of June 22, 2004.

An initial arbitration meeting was held on June 8, 2004, and a schedule was set for the arbitration. On June 28, 2004, XO filed a motion to withdraw its arbitration request, arguing that subsequent events have overtaken the arbitration. Specifically, XO contends that a June 16, 2004 order by the D.C. Circuit Court of Appeals vacating portions of the TRO suggests parties should engage in further negotiations and modifications of their positions. SBC opposed XO's withdrawal request. XO's motion was denied at a prehearing conference of November 10, 2004 and a schedule for briefing was established.

In briefs filed December 15, 2004, XO updated the positions it took in its earlier filings, noting that federal law had changed twice since XO's May 2004 arbitration request. XO's latest positions generally involve adoption of language for the contract amendment based on an amendment adopted by the Illinois Commerce Commission (the "Illinois Amendment") in a comparable arbitration between affiliates of XO and SBC that resolved virtually all of the same issues.

Reply briefs were filed on January 7, 2005. An arbitration hearing was held on January 20, 2005, as well as a further prehearing conference to understand the parties' latest positions.

The Draft Arbitrator's Report was issued on May 4, 2005. Comments were filed by SBC and XO on June 1, 2005, and reply comments were filed on June 15, 2005. The Final Arbitrator's Report was filed and served on August 15, 2005.

The fully executed conformed amendment to the agreement was filed with the Commission on August 26, 2005, and on the same date both parties filed statements concerning the outcome in the FAR.

### **3. Arbitrator's Findings**

The Arbitrator resolved 21 disputed issues arising from the negotiation of an amendment to the parties' existing ICA. XO proposed the initial 7 issues and SBC added 14 issues in response to the arbitration request. The arbitrator concluded in the FAR that the 21 disputed issues should be handled as follows:

#### **XO Issue 1: Routine Network Modifications**

Adopted SBC proposed language regarding charges for routine network modifications, except SBC may not charge for rearrangement and splicing of existing cable. Further, if SBC refuses to perform a modification, it must certify it does not routinely perform such a modification for its own customers.

**XO Issue 2: Commingling**

Commingling refers to orders involving a combination of a UNE and a tariffed service. The FAR adopted XO's language regarding what UNEs may be commingled. In addition, the FAR adopted SBC's proposed "bona fide request" process for handling commingling orders. SBC may charge a reasonable, cost-based fee for costs it incurs to provide commingled UNEs, if those costs are not already recovered elsewhere.

**XO Issue 3: Combinations**

The FAR adopted XO's language regarding terms and conditions for UNE combinations, and rejected SBC's proposal to amend the agreement and add additional limitations and restrictions regarding UNE combinations.

**XO Issue 4: Conversions**

The parties disputed the terms and conditions that should apply to conversions of a wholesale service to a UNE. The FAR adopted XO's proposed language for conversions as more consistent with the FCC's requirements.

**XO Issue 5: Qualifying Services**

The FAR adopted language proposed by XO, and as agreed to by the parties.

**XO Issue 6: Eligibility and Certification Requirements**

This issue involved the eligibility and certification requirements that should apply for access to high-capacity Enhanced Extended Loops (EELs)<sup>2</sup> pursuant to FCC rules. The FAR adopted language proposed by XO, along with

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<sup>2</sup> An "EEL" consists of a combination of an unbundled local loop and unbundled dedicated transport.

modifications proposed by SBC to clarify references to “end user” customers and trunk locations in accordance with the FCC’s Rule 318.

**XO Issue 7: Audits**

The parties disputed the terms and conditions for audits to confirm XO meets service eligibility criteria for high-capacity EELs. The FAR adopted XO’s proposed language, along with clarifications proposed by SBC regarding the timing of audits every 12 months and recovery of reasonable audit costs.

**SBC issues 1 and 2: Discontinuance of UNEs**

SBC proposes contract amendment language stating it is only obligated to provide UNEs pursuant to the FCC’s lawful and effective rules. Essentially, SBC proposes that when a UNE is no longer required to be made available by the FCC, there is no need for the parties to engage in protracted negotiations to implement the de-listing, which would only delay compliance with federal law. Instead, SBC proposes written notice and a 30-day transition process for discontinuance of the UNE.

XO opposes SBC’s proposal, and instead proposes contract amendment language that requires SBC to provide UNEs or UNE combinations “to the extent required by Applicable Law.” XO contends the existing ICA requires parties to negotiate any changes of law and file an amendment, whereas SBC’s proposed language would modify this change of law provision and implement an automatic process for SBC to discontinue providing UNEs, without providing sufficient opportunity for carriers to negotiate changes of law.

Essentially, XO and SBC dispute how future changes of law should be incorporated into the ICA. SBC proposes an amendment now that would allow automatic implementation of future rule changes, such as the de-listing of UNEs, that emanate from the FCC, rather than using the existing change of law process

to negotiate the implementation details. XO sees no reason to short circuit the change of law negotiation process.

The FAR concludes that while SBC's proposal is certainly efficient in that it allows future changes of law to take effect without any discussion between the parties, SBC's proposed language could conflict with future transition requirements set forth by the FCC or other jurisdictions. For example, SBC language imposes an automatic 30-day transition period if the FCC determines that SBC is no longer required to unbundle a specific network element. In the FCC's recent Triennial Review Remand Order (TRRO),<sup>3</sup> it established 12-, and in some cases 18-month transition periods for certain UNEs. Thus, SBC's proposed language, if adopted, could lead to future disputes over which transition period would govern—the FCC's or the change of law provision in the amended ICA.

The FAR concludes there is no reason to unilaterally apply a 30-day transition period when recent FCC rule changes have allowed 12 to 18 months, depending on the UNE involved. In establishing 12- and 18-month transition periods, the FCC discussed the need for orderly transitions and expressed concern that a flash cut transition could disrupt services to mass market customers and the business plans of competitors. (TRRO, para. 226-227.) SBC's proposal would allow it to automatically discontinue a UNE but invoke a change of law process to add UNEs. This asymmetry would create a discrepancy that works in SBC's favor. Therefore, the FAR adopts XO's proposed language, along

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<sup>3</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, (rel. February 4, 2005)(*Triennial Review Remand Order*).

with several modifications proposed by SBC, preserving the existing change of law process and avoiding conflicts with specific FCC transition requirements.

**SBC Issue 3: Loops**

The FAR adopted language proposed by XO regarding the retirement of copper loops and subloops and the provision of alternative services, with modifications proposed by SBC.

**SBC Issue 4: Advanced Services**

This issue involves the terms and conditions for hybrid loops, line conditioning, and the high frequency portion of the loop (HFPL). The FAR adopted language proposed by XO.

**SBC Issues 5 Through 10: Dark Fiber, Interoffice Facilities, Local Switching, Call-Related Databases, Signaling, and AIN**

During the course of the arbitration, parties came to agreement on language pertaining to SBC Issues 5 through 10. XO proposed language from the Illinois Amendment, and SBC agrees with XO's proposal. The FAR adopted the language agreed to by the parties.

**SBC Issue 11: Tariffs and SGATs**

This issue pertains to language in the cover amendment to the agreement and whether XO may pick and choose between the ICA and any SBC tariff. The FAR concludes the agreement should include the cover amendment, Section 1, as proposed by XO and as agreed to by the parties during the arbitration.

**SBC Issue 12: Effect on Underlying Agreement and Reservation of Rights**

Similar to SBC Issue 11, the dispute here involves whether language in the cover amendment should clarify how the amendment replaces the underlying agreement. There is no dispute over the principles of the amendment governing in case of conflict with the underlying agreement, and the reservation of rights.

SBC's proposed language provides unnecessary examples that could create ambiguity and a list of cases that is extraneous and will be quickly outdated as new orders or litigation surface. The cover amendment should include the shorter and more succinct language proposed by XO on this topic.

**SBC Issue 13: Stay, Reversal or Vacatur of TRO**

SBC agreed to omit this language from the parties' amended agreement.

**SBC Issue 14: Performance Measures**

The FAR adopts the position of XO that even if SBC has no obligation to provide a UNE under Section 251, it still has an obligation to comply with Section 271 and the Commission adopted performance measure plan and penalties. This is consistent with statements by the FCC in the TRO. If SBC wishes to be relieved of any performance obligations, it should seek relief through a petition to modify the decision establishing its Performance Incentive Plan, Decision (D.) 02-09-050, rather than through this arbitration.

**4. Additional TRRO Issues**

On March 3, 2005, XO filed a motion in this arbitration in response to an announcement by SBC that, beginning on March 11, 2005, SBC would reject all new orders for certain UNEs pursuant to SBC's interpretation of the FCC's recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.

In a ruling addressing that motion, the Arbitrator and Assigned Commissioner called for the parties to negotiate for 60 days to attempt to agree on further modifications to their ICA to implement the newly released TRRO. At a May 19, 2005 prehearing conference, parties raised 10 additional issues for arbitration. Parties filed a matrix of their positions on these issues on May 17,

2005, and updated it on June 17, 2005. Briefs on these 10 additional issues were filed June 1 and June 15, 2005.

In July 2005, the Commission issued D.05-07-043, closing the portion of Rulemaking 95-04-043 (the “Local Competition Rulemaking”) designated to implement provisions of the FCC’s TRO. D.05-07-043 directs SBC to file a consolidated arbitration to resolve remaining interconnection disputes relating to implementation of the TRO and TRRO change of law provisions. Any carriers that have a dispute with SBC over the terms of implementing TRRO change of law provisions are authorized to be a party of record in that consolidated arbitration, which SBC has now filed as Application (A.) 05-07-024. Therefore, the record of this proceeding pertaining to the 10 new issues raised by XO and SBC in their June 2005 briefs should be transferred to A. 05-07-024 and resolved therein.

#### **5. Negotiated Portions of Amendment to ICA**

Portions of the Amendment to the ICA filed by XO and SBC were negotiated by the parties. Section 252(e) of the Act provides that the Commission may only reject an agreement (or portions thereof) adopted by negotiation if it finds that the agreement (or portions thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience and necessity. No party or member of the public alleges that any negotiated portion of the amendment should be rejected. We find nothing in any negotiated portion of the amendment which results in discrimination against a telecommunications carrier not a party to the agreement, nor which is inconsistent with the public interest, convenience and necessity.

## **6. Arbitrated Portions of Amendment to ICA**

As directed by the Final Arbitrator's Report, XO and SBC filed and served an executed copy of their amendment to their existing interconnection agreement on August 26, 2005.

Section 252(e) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, or the standards set forth in Section 252(d) of the Act.<sup>4</sup>

In its statement filed with the conformed amendment, SBC requests the Commission to reject the amendment for failing to meet the requirements of the FCC's current rules, particularly those in the TRRO. Specifically, SBC contends the amendment does not satisfy the requirements of Section 251 because it does not resolve the parties' dispute over appropriate language to implement the TRRO. Instead, SBC asks the Commission to delay the effectiveness of the amendment until the Commission resolves the ten remaining TRRO issues. In SBC's view, the Commission must apply the law that exists at the time of review, namely the TRRO, and it would be unlawful to approve an amendment that reflects only a portion of the parties' disputes and only a portion of federal law. SBC urges the Commission to expeditiously arbitrate the parties' disputed TRRO issues.

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<sup>4</sup> Section 251 describes the interconnection standards. Section 252(d) identifies pricing standards.

In response to SBC, XO comments that, except for two exceptions discussed further below, the arbitrated portions of the amendment meet the all applicable federal requirements and should be approved. XO maintains it is appropriate for the amendment to incorporate TRO requirements that were not vacated and remain in full effect, and it would be improper to delay approval of the amendment and not allow these lawful TRO provisions to take effect. XO supports the Commission arbitrating TRRO requirements in a separate proceeding.

Following the filing of the conformed amendment and parties' statements, comments were filed by a joint group of competitive local exchange carriers (Joint CLECs).<sup>5</sup> The Joint CLECs urge the Commission to pursue a middle ground and give interim effect to the conformed amendment, while postponing a final decision on the amendment until the ten additional TRRO issues are resolved in A.05-0-7-024. They argue this approach will give XO access to the TRO requirements that are in full effect, but avoid the risk of prejudging any issues that are slated to be resolved in the consolidated arbitration on TRRO matters.

We find it appropriate to approve the conformed amendment implementing requirements of the TRO, which were not vacated and are fully effective, even though disputes remain between the parties regarding further amendments that may be required to implement the TRRO. SBC contends the Commission cannot resolve one set of issues, namely those surrounding the

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<sup>5</sup> The Joint CLECs are Arrival Communications Inc., Curatel LLC, CF Communications LLC d/b/a Telekenex, DMR Communications, MCI Inc., Mpower Communications Corp., Navigator Telecommunications LLC, NetLojix Telecom Inc., Pac-West Telecomm Inc., Telscape Communications Inc., TCAST Communications, and Tri-M Communications Inc. d/b/a TMC Communications.

TRO, without also resolving the second set of TRRO issues. We disagree. The amendment resolves the issues that the parties' brought to us in May 2004 to arbitrate. When the FCC issued its TRRO in February 2005, the Commission could have easily asked the parties to open new negotiations and file a separate arbitration to resolve their new disputes. Instead, for the parties' convenience, the Commission suggested they attempt to negotiate TRRO language and incorporate any revisions in the same arbitrated amendment. The arbitrator also inquired whether any provisions of the newly released TRRO affected the decisions rendered by the arbitrator on the parties' initial TRO disputes. The parties assured the arbitrator that the TRO and TRRO issues could be addressed separately. (Arbitration Meeting Transcript, 5/19/05, at 59-60.) Although SBC would prefer to not implement TRO provisions until TRRO provisions are also arbitrated, we find it is well within the Commission's discretion to handle these disputes separately and move newly raised TRRO issues to A.05-07-024, the new consolidated arbitration proceeding, where the issues can be resolved simultaneously for all carriers. It is unreasonable to delay implementation of those aspects of the TRO that are lawful and effective, and which XO requested arbitration of in May 2004, simply because new disputes on a later FCC ruling have arisen. If the Commission finds at a later date that aspects of the amendment approved in today's order do not comply with provisions of the TRRO, the Commission can order any necessary changes.

Finally, XO contends the Commission should modify the amendment in two areas that it believes do not comply with federal requirements. Specifically, XO alleges the amendment 1) unlawfully allows SBC to impose charges for routine network modifications and commingling and 2) unlawfully restricts XO's use of enhanced extended links (EELs) to serving "end user" customers. XO

maintains SBC has not proven the existence and magnitude of any costs for routine network modifications or commingling. Further, XO contends such charges would be discriminatory where SBC does not impose such charges on its other customers. Regarding EELs, XO contends the Final Arbitrator's Report misinterprets FCC requirements on this topic. XO asks the Commission to reject provisions in the amendment related to these issues, but otherwise approve the amendment.

We decline to modify the agreement on the two issues raised by XO because we find the arbitrated outcomes acceptable. First, the Final Arbitrator's Report establishes that disputes over the magnitude of charges for routine network modifications and commingling should be handled through the dispute resolution process. (*See* Final Arbitrator's Report, p. 5 and p. 8.) Second, we agree with the Final Arbitrator's Report in its interpretation of EEL requirements. (Final Arbitrator's Report, pp. 11-12.)<sup>6</sup>

## **7. Waiver of Public Review and Comment**

The Public Utilities Code and our Rules of Practice and Procedure generally require that draft decisions be circulated to the public for review and comment 30 days prior to the Commission's vote.<sup>7</sup> On the other hand, the Act requires that the Commission reach its decisions to approve or reject an

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<sup>6</sup> Although XO contends the FCC EEL requirements do not restrict XO's use of EELs to serving "end users," paragraphs 597 and 607 of the TRO establish architectural safeguards to prevent gaming of access to EELs and specifically refer to "customer premises" which we consider synonymous with end users.

<sup>7</sup> See Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure.

arbitrated agreement within 30 days after submission by the parties.<sup>8</sup> This establishes a conflict.

However, Rule 77.7(f)(5) provides that we may reduce or waive the period for public review and comment "for a decision under the state arbitration provisions of the Telecommunications Act of 1996." We consider and adopt this decision today under the state arbitration provisions of the Act.

### **8. Assignment of Proceeding**

Geoffrey F. Brown is the assigned Commissioner and Dorothy Duda is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. On August 26, 2005, parties filed an amendment to their ICA for Commission approval as well as statements regarding whether or not the Agreement should be approved by the Commission.
2. No party or member of the public alleges that any negotiated portion of the Amendment to the ICA is not in compliance with Section 252(e)(2)(A) of the Act.
3. No negotiated portion of the Amendment to the ICA results in discrimination against a telecommunications carrier not a party to the Agreement, or is inconsistent with the public interest, convenience and necessity.
4. The arbitrated agreement does not discriminate against a telecommunications carrier not a party to the agreement; is consistent with the public interest, convenience and necessity; and meets other Commission rules, regulations, and orders, including service quality standards.

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<sup>8</sup> 47 U.S.C. Section 252(e)(4).

5. In D.05-07-043, the Commission directed SBC to file a consolidated arbitration to resolve disputes relating to implementation of the TRRO.

6. The Act requires that the Commission approve or reject an arbitrated interconnection agreement within 30 days after the agreement is filed. (47 U.S.C. Section 252(e)(4).)

7. A draft decision must be subjected to 30 days' public review and comment prior to the Commission's vote; however Rule 77.7(f)(5) provides that the Commission may reduce or waive the period for public review and comment under Pub. Util. Code § 311(g)(1) for a decision under the state arbitration provisions of the Act.

8. This is a proceeding under the state arbitration provisions of the Act.

### **Conclusions of Law**

1. Nothing about the result of this arbitration is inconsistent with governing federal law.

2. No arbitrated portion of the Amendment to the ICA fails to meet the requirements of Section 251 of the Act, including FCC regulations pursuant to Section 251, or the standards of Section 252(d) of the Act.

3. The arbitrated amendment to the ICA between XO and SBC should be approved.

4. It is unreasonable to delay implementation of portions of the TRO that are lawful and effective.

5. The Commission should resolve ten additional disputes relating to the TRRO in A.05-07-024, where all TRRO issues can be resolved simultaneously for all carriers.

6. If the arbitrated amendment approved in this order does not comply with provisions of the TRRO, the Commission can order any necessary changes in A.05-07-024.

7. This order should be effective today because it is in the public interest to implement national telecommunications policy as accomplished through the ICA, and to make this amendment to the ICA effective as soon as possible.

**O R D E R**

**IT IS ORDERED** that:

1. Pursuant to the Telecommunications Act of 1996, and Resolution ALJ-181, the fully executed Amendment to the Interconnection Agreement between XO California, Inc. and Pacific Bell Telephone Company d/b/a SBC California filed August 26, 2005 is approved.

2. The record of this proceeding pertaining to ten additional Triennial Review Remand Order issues, including a jointly filed matrix of issues and briefs filed on June 1 and June 15, 2005, is transferred to Application (A.) 05-07-024.

3. A.04-05-002 is closed.

This order is effective today.

Dated September 22, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
DIAN M. GRUENEICH  
JOHN A. BOHN  
Commissioners

