

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)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS ARBITRATION ISSUES**

On June 7, 2004, XO California, Inc. (XO) filed a motion to strike five issues raised in the response of SBC California (SBC) to XO's petition for arbitration (Application 04-05-002). XO contends these five issues are outside the scope of arbitration, which concerns amendments to XO's interconnection agreement with SBC to implement the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO).¹ According to XO, SBC's Issues 1,2, 12, 13, and 14 are not required to implement the TRO. Specifically, XO maintains that SBC's proposed language inappropriately attempts to modify the "change in law" provisions in the interconnection agreement and attempts to implement the recent decision by

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, (CC Docket No. 01-338, 96-98, and 98-147); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, (rel. Aug. 21, 2003) ("*Triennial Review Order*").

the D.C. Circuit vacating the TRO.² XO maintains that issues relating to *USTA II* are not ripe for adjudication because the parties have not yet negotiated them. Finally, XO contends the scope of the arbitration is limited to issues that were the subject of voluntary negotiations between the parties, based on citations to *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company*, (350 F.3d 482, 487 (5th Cir. 2003)).

SBC opposes XO's motion on several grounds. First, SBC contends XO has voluntarily negotiated these five issues by proposing its own language in these areas. Second, SBC disputes XO's reading of *Coserv* that an arbitration is limited to the issues voluntarily negotiated between the parties. SBC contends XO's interpretation is ridiculous because it would gut Sections 251 and 252 of the Act and allow SBC to refuse to negotiate an issue and unfairly limit the arbitration. Rather, SBC states that XO cites *Coserv* out of context, and that when read fully, *Coserv* held that "other than section 251(b) and (c) items," parties may only arbitrate issue that are the subject of voluntary negotiations. SBC contends the issues it seeks to arbitrate clearly relate to its duties under Section 251. Third, SBC notes Section 252(b)(4)(c) plainly states that "[t]he State commission shall resolve each issue set forth in the petition and the response." Fourth, SBC asserts that the purpose of the arbitration is to resolve disputes between XO and SBC over implementation of the TRO and that XO's motion seeks to dismiss the precise issues that the PUC must arbitrate. SBC contends that the five issues XO seeks to dismiss contain language necessary to implement the TRO.

² *United States Telecommunications Assoc. v. Federal Communications Comm.*, Case No. 00-0112 (D.C. Cir. 2004) ("*USTA II*").

XO's motion to dismiss is denied. The scope of the arbitration will include the seven issues raised in XO's petition for arbitration, plus the 14 issues raised by SBC in its response to the arbitration petition. I agree with SBC that this arbitration concerns disputes over how to amend the existing interconnection agreement to implement the TRO. The issues that XO seeks to dismiss involve SBC's interpretation of how to implement the TRO and are properly within the scope of the arbitration. Moreover, I agree with SBC that under Section 252, the arbitration shall consider the issues raised in the arbitration request and the response. As noted by SBC, XO's interpretation of *Coserv* is out of context and would improperly limit the issues that the Commission could arbitrate.

With regard to *USTA II*, I agree with SBC that this is an effective decision and the Commission cannot ignore it when arbitrating this matter. XO contends it has not yet negotiated language concerning *USTA II*. This may be true, particularly since the mandate of *USTA II* issued only a few days ago on June 16, 2004, but the Commission cannot ignore *USTA II* as it affects the issues in this arbitration. The parties are free to continue to negotiate while this arbitration is in progress, or request a delay in this arbitration while they negotiate the impact of *USTA II*.

Therefore, **IT IS RULED** that XO California, Inc.'s motion to dismiss arbitration issues and strike related contract language proposed by SBC California is denied.

Dated June 22, 2004, at San Francisco, California.

/s/ DOROTHY J. DUDA

Dorothy J. Duda
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Dismiss Arbitration Issues on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated June 22, 2004, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.