DOT/hkr 5/4/2005

**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) |

# DRAFT ARBITRATOR'S REPORT

## Summary

This arbitrator's report resolves 21 disputed issues arising from the negotiation of an amendment to an existing interconnection agreement (ICA) between XO California, Inc. (XO) and Pacific Bell Telephone Company, d/b/a SBC California (SBC).

## 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)[1] which, among other things, required the 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'

[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*).

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 7 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 ruling of June 8, 2004.

SBC filed its response to the arbitration on May 28, 2004, wherein SBC added 14 issues of its own to the arbitration request. XO moved to dismiss 5 of the 14 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. 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.

## Issue 1: Routine Network Modifications

XO and SBC agree that the FCC requires SBC to undertake routine network modifications for competitive local exchange carriers such as XO. Nevertheless, the parties cannot agree on contract amendment language in three areas regarding the provision of routine network modifications.

### a. Charges for routine network modifications

First, XO and SBC dispute whether SBC should be allowed to charge XO for routine network modifications. Although the parties' latest proposals largely agree on language in Section 3.16 of their contract amendment on this topic, XO asks the Commission to specify that certain network modification costs are already included in UNE rates and SBC cannot charge again when it performs a routine network modification. For example, XO contends that costs for doublers, repeaters, multiplexing equipment, and rearrangement and splicing of cable are already captured in UNE rates. Therefore, XO maintains that SBC should provide routine network modifications at no additional cost and SBC bears the burden of demonstrating that costs of these modifications are not already captured in UNE rates.

SBC responds that XO has not shown that costs for all routine modifications are in UNE rates. SBC's witness Scott Pearsons contends that costs for doublers, repeaters, and multiplexing equipment are not in UNE rates. For rearrangement and splicing of existing cable, SBC argues that while these costs

are "typically captured in loop operating expenses," (SBC 12/15/04, p. 3), current UNE rates do not cover these costs sufficiently because the Commission reduced SBC's proposed expense levels far below current levels when it adopted UNE rates. To resolve the dispute, SBC offers language stating it will not charge for routine modifications where it is already recovering the costs elsewhere.

I find that XO did not provide sufficient or compelling evidence that costs for certain network modifications, namely doublers, repeaters, and multiplexers, are already incorporated in UNE rates. While XO requests the Commission to insert language in the agreement specifying that certain costs should not qualify as routine network modifications, its request is vague and does not include contract language specifying the costs it believes are already recovered. The only area where XO has shown that SBC should not charge is for rearrangement and splicing of existing cable. SBC admits that these costs are "typically captured in loop expenses" which were used to set UNE rates. SBC's argument that UNE rates are too low and do not allow sufficient recovery of these costs is insufficient. The fact that the Commission adopted rates lower than SBC proposed does not mean that SBC can now charge XO for routine rearrangement and splicing. SBC's proposed language contained in its January 7, 2005, reply brief is reasonable and should be adopted, except that SBC may not charge for rearrangement and splicing of existing cable.

### b. Performance

Second, parties initially disagreed on whether SBC's performance in provisioning loops or transport requiring routine network modifications would be judged using standard provisioning intervals. At the time of hearings, the parties indicated they had agreed on language in Section 3.16.5 to resolve this

dispute. The final amendment should incorporate the language proposed by SBC in its Reply Brief.

### c. Certification

Finally, parties disagree on the third sentence in Section 3.16.4 requiring that if SBC refuses to perform a modification, it shall certify that it does not routinely perform such a modification for its own customers. In XO's view, since the FCC defines routine network modifications as "activities that [incumbent local exchange carriers (ILECs)] regularly undertake for their own customers" (TRO para. 632), SBC is in the best position to know what it regularly performs. SBC contends this language is unnecessary because the TRO has already defined what constitutes a routine network modification.

I find that XO's certification language is reasonable and is not an unreasonable burden for SBC. The language should be incorporated into the final amendment.

## Issue 2: Commingling

The parties dispute various terms and conditions related to "commingling," which refers to XO ordering a combination of a UNE and a tariffed service. The parties dispute the UNEs that may be commingled, whether XO should have to submit a "Bona Fide Request" to commingle, and whether SBC can charge XO for time and materials for commingling.

### a. What elements may XO commingle?

XO contends SBC is improperly limiting what it will commingle to "lawful UNEs," and that SBC's language allows it to reduce its unbundling obligations without going through change of law contract provisions. Further, XO contends SBC's language inserts additional commingling criteria above and beyond what the FCC has established in the TRO. SBC responds that its restrictions are

common sense and allow SBC to limit commingling when doing so would impair network reliability, security or SBC's ability to manage and control its network.

I agree with XO that SBC has inserted additional criteria above and beyond what the FCC has established for commingling. While SBC contends its proposed language is common sense with regard to network reliability, SBC's proposed language appears to go beyond this. SBC has not fully justified the need for all of the conditions it proposes in its brief. I find the contract amendment should incorporate XO's proposed language in Section 3.14.1 regarding commingling.

**b. BFR Process**

SBC maintains commingling requests must be made using the "bona fide request" (BFR) process because SBC does not have methods or procedures in place to accept commingling orders. XO responds that commingling is not new and SBC's existing systems are fully capable of accepting and processing such orders. Commingling requests are equivalent to placing any other type of UNE or special access order and existing systems can easily accept and process these orders. XO witness Mendoza claims SBC has provisioned commingling orders using its existing processes, although apparently by mistake.

I find that SBC has justified use of the BFR process and the agreement should incorporate SBC's proposed Section 3.14.1.3. I do not agree with the other language regarding the BFR and commingling process that SBC has included in its reply brief proposals because I do not find sufficient explanation or justification for all of these proposals in SBC's filings. In addition, this language appears largely superfluous. Therefore, the agreement should not include Sections 3.14.1.3.1, 3.14.1.4 and 3.14.1.5.

### c. Commingling Charges

SBC contends it should be able to recover its commingling costs through a fee imposed on XO. Further, SBC states that its proposal to charge commingling costs on a time and materials basis is consistent with charges it assesses for UNE combinations. At the arbitration hearing, SBC's witness Roman Smith discussed costs for coordination and records management within SBC's access and local service departments to process commingling arrangements and ensure proper billing and trouble reporting. (TR. at 34-35.)

XO responds that the FCC has not authorized charges for commingling fees, and SBC already recovers costs for commingling as part of existing recurring and nonrecurring charges. In XO's view, SBC's ordering and provisioning process for commingled UNEs and tariffed services are indistinguishable from processes applicable to UNEs and tariffed services alone. XO argues that SBC has failed to identify or justify any costs to accept and provision commingling orders.

I find that, similar to charges SBC may asses for UNE combinations, SBC should be allowed to assess a reasonable cost-based fee for costs it incurs to provide commingled UNEs, if those costs are not already recovered elsewhere. The agreement should include SBC's proposed Section 3.14.1.3.2.

## Issue 3: Combinations

The parties dispute whether the amendment to their ICA should specify terms and conditions for UNE combinations.

SBC contends the agreement must be amended to reflect the restrictions on combinations set forth by the Supreme Court in its decision in *Verizon Communications Inc.* v. *FCC.* (*Verizon*, 535 U.S. 467 (2001).) According to XO, the TRO affirmed existing rules regarding UNE combinations, and it is improper for

SBC to add limitations and restrictions regarding UNE combinations. In XO's view, the existing agreement already included language addressing combinations and SBC has never invoked the change of law provisions to modify that language. SBC offers no reason why the language needs to be modified.

XO correctly points out that the TRO affirmed existing UNE combination rules. (TRO, para. 573.) In addition, the FCC notes the new requirements of the *Verizon* decision that UNE combinations be technically feasible to preserve the reliability and security of the ILEC's network. (*Id.*, para. 574.) ILECs must prove to state commissions that a combination request is not technically feasible. (*Id.*) I agree with XO that SBC has not justified new language restricting UNE combinations. The language proposed by XO requires combinations for UNEs pursuant to FCC regulations and "applicable law." Thus, XO may not request combinations that violate the limitations on combinations detailed by the Supreme Court in its *Verizon* decision. SBC's language involves over four pages of detailed verbiage relating to its interpretation of the *Verizon* decision. I find that a simple reference to "applicable law" is sufficient and does not clutter the agreement with potentially ambiguous or disputed interpretations. The amended ICA should include Section 3.14.2 as proposed by XO.

### Issue 4: Conversions

The parties dispute the terms and conditions that should apply to conversions of a wholesale service to a UNE.

XO proposes language negotiated by the parties in Illinois. (Section 3.15.) XO contends that its language is superior to SBC's proposed language, which would limit or burden XO's ability to convert wholesale service to UNEs and provide SBC with too much unilateral power to convert UNEs back to wholesale services if SBC believes XO has not met eligibility requirements. XO maintains

the TRO provides no authority for this language. In addition, XO opposes SBC's proposed charge for conversions, claiming that the FCC rejected such charges in paragraph 587 of the TRO. XO notes that if any charge is allowed, it should be limited to a service order processing charge, as permitted in the Illinois Amendment.

During the arbitration hearing, SBC stated it accepts most of XO's proposed language on the issue of cost recovery for conversions. (Tr. At 52.) The remaining dispute appears primarily limited to the conversion ordering process described in Section 3.15.3, and other minor wording differences.

Overall, I find XO's proposed language for conversions captures the essence of requirements in the FCC's TRO and does so simply and concisely. XO's language should be adopted rather than SBC's language, which adds references to USTA II that are unnecessary. Further, XO's language regarding what happens if XO fails to meet eligibility criteria for a particular conversion is preferable to SBC's because it discusses a 60-day deadline and process for discontinuing the conversion and transferring to another appropriate service. With regard to the ordering process for conversions, I find XO's proposal in Section 3.15.3 superior to SBC's because it provides specificity and a deadline for order processing, with allowances for the parties to mutually agree to different terms. SBC's proposed language regarding use of the "change management" process where conversion processes are not in place is too open-ended, leaving the door open for further disputes. Therefore, the amended agreement should include XO's proposed language for Section 3.15.

### Issue 5: Qualifying Services

Initially, the parties disputed language regarding the terms and conditions that should apply to "qualifying" and "non-qualifying" services.[2] In XO's reply brief, it states the issue is moot in light of the FCC's December 15, 2004 Order on Remand.

In SBC's reply brief, SBC agrees to accept the language from the Illinois Amendment regarding qualifying services (Sections 1.2 and 2.23), thus resolving this dispute. The amendment should incorporate Sections 1.2 and 2.23 as contained in the attachment to XO's reply brief.

### Issue 6: Eligibility and Certification Requirements

This issue involves the eligibility and certification requirements that should apply for access to high-capacity Enhanced Extended Loops (EELs)[3] pursuant to FCC rules.

XO proposes using the Illinois Amendment for this language. (Sections 3.14.3.1 through 3.14.3.7.) In its reply brief, SBC does not oppose this language as a starting point, but asks that certain language be added to properly implement federal law. Generally, SBC proposes additional language that includes EEL eligibility criteria directly from the FCC's Rule 318. XO opposes SBC's proposals, contending SBC has inserted new terminology defining "end user" customers and trunk locations that are not found in the FCC's rule.

---

[2] A "qualifying" service is a telecommunications service that competes with a telecommunications service that has been traditionally the exclusive or primary domain of the ILEC, including but not limited to, local exchange service and access services. A "non-qualifying" service is any service that is not "qualifying."

[3] An "EEL" consists of a combination of an unbundled local loop and unbundled dedicated transport.

I find that SBC's proposed additions to XO's language are reasonable and should be included in the amended agreement. SBC's additions either track the FCC rule 318 language verbatim, or include references to "end user" customers and trunk locations that are discussed in the TRO at paragraphs 595 and 607. Therefore, the agreement should incorporate SBC's modifications to Sections 3.14.3.3.5, 3.14.3.3, and 3.14.3.7 as contained in SBC's reply brief.

**Issue 7: Audits**

Initially, the parties disputed the terms and conditions for audits to confirm XO meets service eligibility criteria for high-capacity EELs. In briefs, XO proposes adoption of the Illinois Amendment language on these audit issues. SBC does not object to this as a starting point, but asks for several modifications.

First, Section 3.14.3.8.2 states audits shall be conducted no more than once on an annual basis. SBC proposes a modification so that the annual basis for an audit is not tied to the issuance of the auditor's report. Instead, SBC proposes that the 12-month period commence with a written Notice of Audit. I find SBC's proposal reasonable and it should be adopted.

Second, SBC proposes modification of the last sentence of Section 3.14.3.8.5 to allow it to immediately begin a new audit if an audit report finds XO is not complying with eligibility criteria. This modification is not reasonable and should not be adopted because the TRO allows only one audit per year. (TRO, para. 626.)

Finally, SBC proposes slight revisions to Sections 3.14.3.8.6 and 3.14.3.8.7 to allow recovery of only "reasonable" audit costs. XO does not oppose this modification. (1/20/05, Tr. at 35.) The language proposed by SBC for these sections is reasonable and should be adopted.

**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, which SBC contends is appropriate and consistent with FCC orders requiring it to provide only those UNEs that are lawfully UNEs. According to SBC, its proposed language makes clear that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved. SBC's proposal includes language addressing the proper notice and transition process for future UNE declassifications by the FCC.

SBC does not believe its language impermissibly overrides the existing change of law provisions. 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. (See "new section" following Section 1.3.3.3 in SBC's Reply Brief.) Moreover, SBC contends its language incorporates any unbundling obligations under state law, and its proposed language was recently adopted by the arbitrator in the SBC-Level 3 arbitration (Application 04-06-004).

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." (Sections 1.1 through 1.6.) The proposed language includes a list of UNEs that are no longer required to be provided and transition periods, consistent with FCC orders and state unbundling requirements. According to XO, the Commission has required SBC to advise the Commission and "seek leave" before altering its list of UNEs "because such an

alteration could significantly impact the competitive local market in California." (Decision (D.) 02-12-081, at 10 and Ordering Para. 2.) Moreover, 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.

XO maintains SBC cannot unilaterally discontinue providing UNEs upon any event that it deems has relieved it of such obligations and without the required negotiation under change of law provisions, but must continue to comply with federal and state requirements. In XO's view, SBC's proposed language empowers SBC to implement the ICA by second-guessing regulatory and judicial rulings outside regular appellate processes. Moreover, according to XO, the FCC has anticipated carriers would implement changes pursuant to change of law provisions "consistent with their governing interconnection agreements." (TRO at para. 701.)

Finally, XO contends SBC's proposal does not comply with a 6-month transitional period set forth by the FCC in its Interim Rules Order.[4] (XO brief, 1/7/05, p. 13.) On this point, SBC responds that it does not include a 6-month transition period because this was merely a proposal in the interim rules order that has not been adopted by the FCC.

Essentially, XO and SBC dispute how future changes of law should be incorporated into the ICA. SBC proposes an amendment now that would allow

[4] *In re Unbundled Access to Network Elements*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, (rel. August 20, 2004).

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. 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),[5] 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.

For this reason, I do not find SBC's proposed language on this issue reasonable. I see 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.) Therefore, I find it reasonable to adopt XO's proposed language preserving the existing change of law process and avoiding conflicts with specific FCC transition requirements.

---

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, (rel. February 4, 2005).

Nevertheless, there are certain modifications that are required to XO's language. First, the parties agree to adopt SBC's modifications reflecting the FCC's revised fiber loop rules. (Section 1.3.1(xi).) Second, I agree with SBC that Section 1.3.3.2 is moot and should be removed. Third, I agree that Section 1.3.3.2.1 should be modified as proposed by SBC to state that network elements will be provided "in a manner that is consistent with the new FCC rules(s)." Finally, I agree that references to a "6 month transition period" in Section 1.3 should be removed because this proposal was not adopted by FCC in TRRO.

### SBC Issue 3: Loops

XO recommends the Commission adopt language from the Illinois Amendment regarding the retirement of copper loops or subloops and the provision of alternative services. According to XO, FCC rules provide that if an ILEC replaces or retires a copper loop or subloop with "fiber to the home" (FTTH), an ILEC must ensure continued access so that competitors may provide narrowband services.

SBC accepts XO's proposal on this issue, but offers two modifications. The first involves elimination of language regarding "house and riser cables" from Section 3.1.3 because the TRO does not provide a basis for this language. The second modification involves new language proposed by SBC based on FCC revisions to fiber loop rules.[6] XO agrees to SBC's proposed modifications.

---

[6] *See* Order on Reconsideration, *In re Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 04-191 (rel. Aug. 9, 2004) ("*MDU Reconsideration Order*"). *See also* Order on Reconsideration, *In re Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., (rel. Oct. 18, 2004) ("*Order on Reconsideration*").

Therefore, the agreement should incorporate XO's recommendation, as modified by SBC in its Reply Brief in Section 1.3.1(xi), Section 2.18, and Section 3.1 through 3.1.3.

### 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). XO suggests language from the Illinois Amendment to govern these areas, which it contends are consistent with and mirror the language in the FCC's TRO.

SBC responds that XO's language regarding hybrid loops is acceptable, although it suggests removal of Section 3.1.4.1 which requires SBC to provide "nondiscriminatory access to hybrid loops … to the extent required by Applicable Law." In SBC's view, this language is vague, unnecessary, inappropriate, and cannot be found in the TRO.

While the language in Section 3.1.4.1 is general, it does not contradict any language in the TRO. Therefore, I agree with XO that the language should remain because it provides a general requirement for nondiscriminatory access to hybrid loops in accordance with existing law.

SBC accepts XO's proposed language regarding line conditioning and HFPL, and therefore, the contract should contain the language as agreed to by both parties.

### 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 final agreement

should incorporate the language pertaining to these issues as agreed to by SBC in its Reply Brief.

### SBC Issue 11: Tariffs and SGATs

Issue 11 pertains to language in the cover amendment to the agreement and whether XO may pick and choose between the ICA and any SBC tariff. Issue 11 also addresses whether the ICA and its amendments prevail over SBC's tariffs.

At an arbitration meeting of January 20, 2005, the parties agreed that their dispute on this language was academic because SBC does not have a UNE tariff in California. Thus, the agreement should include the cover amendment, Section 1, as proposed by XO and as agreed to by the parties, which states that the "TRO Attachment shall apply notwithstanding other provisions contained in the agreement."

### 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. SBC proposes contract language that it believes gives the amendment complete and proper effect by clarifying the effect of the amendment on conflicting terms in the underlying agreement. In Section 2 of the cover amendment, SBC proposes language stating the TRO amendment governs if the agreement and amendment conflict. In addition, SBC's proposed wording of Section 9 of the cover amendment clarifies that the parties do not waive their rights with respect to "orders, decisions, legislation or proceedings … which the parties have not yet fully incorporated into this agreement…." SBC contends this language is necessary to properly implement the TRO so that neither party is

silently waiving its right to implement any additional TRO requirements in the future.

XO agrees with the principle that the amendment replaces the underlying agreement, and it agrees with the principle of parties reserving their rights regarding future orders, legislation, etc. Nevertheless, XO objects to the examples that SBC builds into its proposed language, which include reference to "lawful" and "declassified" UNEs, and include a list of court cases and FCC orders. XO prefers the cover amendment as adopted in Illinois, which does not address this additional language proposed by SBC.

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 for Sections 2 and 9.

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

SBC initially proposed language addressing what would happen if portions of the TRO are remanded to the FCC but not vacated. In its reply brief, SBC agrees to omit this language from the amendment. Based on the parties' agreement, the final agreement should not include SBC's initially proposed language on this issue.

### SBC Issue 14: Performance Measures

SBC proposes that if a particular UNE is "declassified" by the FCC, then "SBC California will have no obligation to report on or pay remedies for any measures associated with such network element." (Cover Amendment, Section 7.) SBC contends that if it no longer has to provision a UNE, the

"practical consequence is that the performance plan established to govern the provision of UNEs cannot, by definition, apply to network elements that are no longer UNEs." (SBC Brief, 12/15/04, p. 93.) In SBC's view, it has never agreed to pay remedies related to performance measures for network elements that are not Section 251 UNEs.

XO contends SBC has an ongoing obligation to provide nondiscriminatory service and to comply with Section 271 and performance measure plans and penalties, regardless of whether a UNE is required under Section 251(c)(3). As support for its view, XO asserts that neither the TRO nor Commission orders support SBC's position. Indeed, the FCC found, "[Bell Operating Company] obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." (TRO, para. 655, footnotes omitted.) This Commission's Performance Incentive Plan (PIP), established during our review of SBC's Section 271 entry, imposes an ongoing obligation on SBC that is unchanged until the Commission reviews and revises the plan. (D.02-09-050, Ordering Paragraph 7.)

I agree with 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. There has been no change to the Commission's PIP. Where network elements are provided pursuant to Section 271, SBC must still comply with the Commission adopted performance measurement plan. 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 the PIP, rather than through this arbitration.

## O R D E R

**IT IS ORDERED** that:

1. Parties are to file and serve comments on the Draft Arbitrator's Report, as provided by Rule 3.19 of the Commission's Arbitration Rules set forth in Resolution ALJ-181, on or before June 1, 2005, and file and serve reply comments on or before June 15, 2005.

2. On _____, the parties shall file and serve an entire Interconnection Agreement, for Commission approval, that conforms with the decisions of the Final Arbitrator's Report; and a statement which (a) identifies the criteria in the Act and the Commission's Rules (e.g., Rule 4.3.1, Rule 2.18, and Rule 4.2.3 of Resolution ALJ-181), by which the negotiated and arbitrated portions should be assessed; (b) states whether the negotiated and arbitrated portions pass or fail those tests; and (c) states whether or not the Agreement should be approved or rejected by the Commission.

Dated May 4, 2005, at San Francisco, California.

/s/ DOROTHY DUDA
Dorothy Duda, Arbitrator
Administrative Law Judge

## CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Draft Arbitrator's Report on all parties of record in this proceeding or their attorneys of record.

Dated May 4, 2005, at San Francisco, California.

/s/ KE HUANG
Ke Huang

## 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 ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.