

**BEFORE THE
ILLINOIS COMMERCE COMMISSION**

In the Matter of)	
)	
Petition for Arbitration of XO ILLINOIS, INC. Of an Amendment to an Interconnection Agreement with SBC ILLINOIS, INC. Pursuant to Section 252b) of the Communications Act of 1934, as Amended)	Docket No. 04-0371

**XO’S REPLY TO SBC’S AND STAFF’S RESPONSES TO XO’S MOTION
TO DISMISS ARBITRATION ISSUES AND STRIKE
RELATED CONTRACT LANGUAGE PROPOSED BY SBC**

XO Illinois, Inc. (“XO”) provides the following Reply to the Responses of SBC Illinois, Inc. (“SBC”) and Commission Staff (“Staff”) to XO’s Motion to Dismiss Arbitration Issues and Strike Related Contract Language Proposed by SBC (“Motion”). SBC’s Response misstates applicable law and mischaracterizes the contract language that both it and XO have proposed. Staff misinterprets XO’s Motion, as well as applicable law. Accordingly, neither SBC nor Staff has provided any grounds on which the Commission should deny the Motion.

Discussion

XO requests that the Commission dismiss Issues SBC-1, 2, 12, 13 and 14 (and related proposed contract language should be stricken) on the basis that these issues are outside the scope of the Triennial Review Order (“TRO”) and thus may not appropriately be arbitrated. XO’s motion followed the principles enunciated by the Administrative Law Judge in his ruling on the XO issues that are appropriate for this arbitration (“ALJ Ruling” or “the Ruling”). The Ruling held that the subject of negotiations was the

“impact of a specific intervening event, the TRO.”¹ The Ruling noted that *Coserv* held that “the party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.”² Thus, the Ruling added: “The Commission has no jurisdiction to arbitrate matters that lie outside the boundaries of XO’s negotiation request. *Coserv, supra.*”³ Finally, the Ruling stated that XO’s issues must “have sufficient connection [to] the legal changes in the TRO to be within the ambit of XO’s negotiation request.”⁴

Mainly based on policy arguments, the Staff requests denial of XO’s Motion. However, as explained below, the Staff’s policy wish list does not survive the ALJ’s Ruling or an analysis of *Coserv Limited Ltd. Cop. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

SBC responded with three main arguments, claiming: (1) SBC’s language is within the scope of the TRO; (2) XO voluntarily consented to negotiate those issues; and (3) Sections 252(b)(3) and 252(b)(4) permit an ILEC to raise any issue under 251(b) or (c) in response to a petition for arbitration.⁵ SBC misrepresents the language that it has proposed for each issue, which is well outside the scope of the *TRO* and, in fact, conflicts with the requirements of the *TRO*. Nor did XO voluntarily consent to negotiate these issues, as SBC asserts. SBC’s attempt to present issues in this arbitration that SBC never raised during the period in which SBC was supposed to negotiate issues with XO flies in the face of the procedures established in Section 252(b) of the Telecommunications Act of 1996 (“Act”).

¹ ALJ Ruling at 6 (footnote omitted).

² Id. at 2 (citing *Coserv*, 350 F.3d at 487).

³ Id.

⁴ Id. at 8.

⁵ SBC Response at 1-2.

A. SBC Is Not Entitled to Raise Issues Simply By Incorrectly Stating That Those Issues Are Required to Implement the TRO.

The primary grounds for XO's Motion is that some of the arbitration issues raised by SBC would make changes to the agreement that are not required to conform the existing interconnection agreement between the parties ("XO/SBC ICA") to the *TRO*. SBC contends that its disagreement with XO's position, standing alone, necessarily requires the Commission to deny the Motion. SBC's interpretation of its right to respond is so broad that under its argument there is literally no issue that it couldn't raise in its response to an arbitration petition. SBC's new issues are well outside the confines of XO's negotiation request. The issues that XO seeks to strike either concern changes to the parties' change of law ICA provision (that are unrelated, and in fact contrary, to the TRO) or seek to implement alleged changes brought about by *USTA II*.⁶ Under the ALJ's Ruling and *Coserv*, "the Commission has no jurisdiction to arbitrate matters that lie outside the boundaries of XO's negotiation request."⁷

The parties' disagreement with respect to these issues is not whether SBC's language is necessary to implement the *TRO*. In fact, SBC identifies no provision of the *TRO* that SBC's proposed contract language in Issues SBC-1, 2, 12, 13 and 14 allegedly implements. Rather, SBC seeks to amend the change of law provision in the XO/SBC ICA. But the parties *already have* a change of law provision in their ICA. And the TRO specifically stated that changes necessary to implement the TRO should be implemented through the existing change of law provisions contained in the ICAs and the Section 252

⁶ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

⁷ *ALJ's Ruling* at 7 (citing *Coserv*, 350 F.3d at 487).

arbitration process.⁸ Moreover, the FCC expressly declined “the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions.”⁹

SBC cannot legitimately claim that its proposal to modify the existing change of law provisions in the existing XO/SBC ICA is in any way required to implement the requirements of the *TRO*, and SBC’s saying it is so does not make it so. Accordingly, SBC is not entitled to present these issues to the Commission in this arbitration, the sole purpose of which is to implement the *TRO*.

B. The SBC Issues Are Beyond the Scope of the Parties’ Negotiations and Should Not Be Included in This Arbitration.

SBC claims “XO voluntarily consented to negotiate these issues by presenting its own counterproposals to SBC’s language on each of these issues.”¹⁰ More particularly, SBC states “XO did ‘voluntarily negotiate’ Issues SBC-1, 2, 12, 13 and 14, because XO proposed its own ‘transition’ and change of law language.”¹¹ However, SBC’s citation does not support its position. In language that XO moved to strike, SBC seeks to add self-effectuating change of law language to XO/SBC’s already effective ICA change of law provision. In contrast, the XO language SBC cites does not alter the change of law provision. Rather, the language is simply a reservation of rights. In other words, sections 1.4-1.6 merely reserve the parties’ right to negotiate – the sections do not alter the parties’ currently effective change of law provision. As discussed in more detail below, the provisions of XO’s proposed contract language do not in any way raise issues with

⁸ XO’s Motion to Dismiss at 7 (citing *TRO* at ¶¶700-706 (Transition Period)).

⁹ *Id.* (citing *TRO* at ¶701).

¹⁰ SBC Response at 1.

¹¹ SBC Response at 4 (citing *TRO* Amendment sections 1.4, 1.5, 1.6).

respect to transitions required for future declassification of UNEs or modifying the existing change of law provisions in the XO/SBC ICA.

Nor can the language XO provided in the Reply of XO Illinois, Inc. to SBC Illinois' Response to Petition filed on June 15, 2004 be construed as "negotiations." XO counter-proposed contract language on these issues so that XO would not be considered to have waived its opposition to SBC's position in the event that the Commission denies XO's Motion to Strike SBC Issues. This response was meant to protect XO's rights should the Commission deny this motion and expand the scope of this arbitration by adding SBC's issues. Far from "voluntarily consenting" to further negotiations, XO's counter proposal language was merely a protection of rights and was not part of any negotiations that preceded the filing of XO's Petition.

Finally, SBC misinterprets XO's reliance on the Fifth Circuit's decision in *Coserv*. XO does not contend that only *voluntarily* negotiated issues can be subject to compulsory arbitration under Section 252 of the Act. To the contrary, XO agrees with the court that SBC "is *required* by the Act to negotiate about those duties listed in § 251(b) and (c)." *Id.* at 487. XO relies on *Coserv* for the proposition that the parties to an arbitration under the Act "may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations." *Id.* Although the court's decision was in the context of a request to arbitrate an issue that SBC was not required to negotiate, the same principle applies to Section 251(b) or (c) issues.

The federal Act fully supports this interpretation. The Act authorizes any party to negotiations to petition the Commission "to arbitrate any *open* issues." 47 U.S.C. § 252(b)(1) (emphasis added). The petitioning party must provide the Commission with

“all relevant documentation concerning . . . the *unresolved* issues” and “the *position of each of the parties* with respect to those issues.” *Id.* § 252(b)(2)(A) (emphasis added). Issues cannot be “open” or “unresolved,” nor can the “positions of each of the parties with respect to those issues” be known if the issues have not been included in the negotiations. SBC essentially asks the Commission to give parties carte blanche to raise any issue for the first time in response to an arbitration petition as long as the issue is related to Sections 251(b) or (c). Thus, SBC could force a CLEC seeking only interconnection to arbitrate access to unbundled network elements, even though such access was never part of the parties’ negotiations. Nothing in the Act, Commission practice, or applicable case law supports such an outcome.

C. SBC’s Proposed Language Is Not Designed to Implement the *TRO*.

The Commission can and should determine at this time that the contract language proposed by SBC does not relate to any requirements in the *TRO* and thus is not properly raised in this arbitration. As discussed in more detail below, SBC mischaracterizes its own issues in an unsuccessful attempt to make them appear to arise out of the *TRO*.

Issue SBC-1: A more accurate description of Issue SBC-1 is that it concerns whether the interconnection agreement should obligate SBC to continue to provide network elements that *SBC believes* have been “declassified” *in the future* and whether it should state that SBC is required to provide *in the future* only *what SBC believes* are “lawful” UNEs. In Issue SBC-1, SBC seeks to amend the change of law provision in the XO/SBC ICA so that the agreement automatically incorporates SBC’s interpretation of future determinations that SBC is no longer required to provide certain UNEs. This issue

is outside the scope of the parties' negotiations/ arbitration and does not relate to the implementation of the *TRO*.

The parties' interconnection agreement already has a change of law provision. XO and SBC never negotiated whether it should be amended. XO's proposed language on the applicability of Section 271 to which SBC refers was provided in response to Issue SBC-1, not as part of XO's proposed language prior to filing its Petition. The remainder of XO's proposed language that SBC quotes concerns the UNEs that the FCC "declassified" in the *TRO*, not UNEs that may be declassified in the future.

Nor is SBC's proposed language designed to implement the *TRO*. Contrary to SBC's assertions, that language is not limited to the UNEs "declassified" in the *TRO* – including enterprise switching, OCn loops and dedicated transport, and entrance facilities – but applies to any and all UNEs that are now *or at any point in the future* declassified. Nothing in the *TRO* requires such a modification to the XO/SBC ICA. Rather, as discussed in XO's Motion, the FCC required parties to comply with the change of law provisions in the existing interconnection agreements. *See TRO ¶¶ 700, et seq.* Issue SBC-1 thus is affirmatively precluded by the *TRO*.

Issue SBC-2: SBC mischaracterizes Issue SBC-2 as concerning contract language intended to implement the UNE declassification provisions of the *TRO*. Indeed, SBC concedes that its proposed language actually establishes a "transition" process for "declassification" of UNEs in the future.¹² To the extent that SBC intends this process to apply to UNEs that the FCC "declassified" in the *TRO*, such a process does not apply to XO and thus should not be included in the XO/SBC ICA. The transition procedure is in reality a rewrite of the parties' currently effective change of law provision. SBC-2 is

¹² SBC Response at 6.

therefore improper because it goes beyond the parties' negotiations and should be dismissed.

SBC, for example, includes an extensive discussion of its proposed language in Issue SBC-2 that expressly identifies enterprise switching as one of the network elements that has been declassified, and provides a transition procedure to phase out enterprise switching. XO, however, does not obtain enterprise switching from SBC. Accordingly, XO neither seeks nor needs any "transition" mechanism for the declassification of enterprise switching.

SBC also concedes that the proposed contract language at issue in Issue SBC-2 applies to future declassifications, but contends that dealing with such declassifications in the future "makes no sense." It is SBC's position that makes no sense. The Commission has not "declassified" any UNE that the FCC authorized the Commission to "declassify" after the appropriate factual inquiry. Even if it were to do so, an appropriate transition process would undoubtedly be part of any Commission determination. Modifications to the XO/SBC ICA should be made only in light of any such determination, not made in advance. Nor can SBC legitimately claim that a Commission decision to declassify a particular UNE would not trigger the change of law provision of the XO/SBC ICA.

Finally, SBC incorrectly contends that XO has proposed contract language that addresses this same issue.¹³ XO's contract language is specifically limited to the UNEs "declassified" in the *TRO*. XO has never proposed, much less negotiated, terms for a transition process for UNEs that are declassified in the future. SBC's proposal to litigate that issue, therefore, is beyond the scope of the *TRO* and this arbitration.

¹³ SBC Response at 9.

Issue SBC-12, 13 & 14: These issues, like the prior issues, represent SBC’s attempt to revise the change of law provision in the existing XO/SBC ICA to automatically incorporate SBC’s interpretation of future changes of law into the agreement. In Issue SBC-12, the context is language that purports to supercede the terms and conditions in the existing agreement. First, SBC-12 refers back to SBC’s proposed “declassification” procedures (i.e., SBC’s attempt to alter the current change of law provision) from its Issue 1. Second, SBC refers back to its transition proposal from Issue 2 (Section 1.3.4), again, another attempt to bring new change of law provisions into the agreement. Third, SBC-12 seeks to unilaterally dismiss UNEs from the parties’ ICA (“if a pricing schedule includes a UNE that is Declassified or not Lawful pursuant to the terms and conditions of this Attachment, the inclusion of the UNE in the pricing schedule shall be of no effect and the UNE will not be available under the Agreement”¹⁴). As previously stated, the parties already have a change of law provision in their ICA. The TRO does nothing to change that provision so SBC’s Issue is beyond the scope of the parties’ negotiations.

The context in Issue SBC-13 is the effect of a stay, reversal, or vacatur of the TRO. Again, this is a topic that is already covered in the parties’ currently effective change of law provision.

Issue SBC-14 concerns whether the performance measures plan previously adopted by the Commission to govern the provision of UNEs continues to apply to a UNE that has been “declassified” in the future. Again, contract language that establishes terms and conditions for future declassification of UNEs, including the decision in *USTA*

¹⁴ SBC Response to Petition, Exhibit 1, page 79.

II, is beyond the scope of the *TRO* and this arbitration and should be stricken from all of these issues.

D. The Commission Should Not Address the *USTA II* Issues That SBC Has Attempted to Raise in This Arbitration.

Issues SBC-1, 2, 12, 13, and 14 also should be dismissed, and associated contract language stricken, to the extent that SBC is attempting to prematurely implement the *USTA II* decision, which is not properly included in this arbitration. SBC contends that issues related to *USTA II* are ripe for adjudication because the D.C. Circuit's mandate issued on June 16, 2004, and SBC included that decision in its proposed contract language in Issue SBC-2. Staff maintains that requiring that *USTA II* issues be addressed in a separate proceeding would be "a clear misuse of Commission resources, and a waste of those of the parties."¹⁵ Both SBC and Staff are incorrect.

SBC purports to support its position with case law standing for the proposition that a court reviewing a state commission arbitration decision must consider the law that is currently in effect. *See, e.g., US West Communications v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002). In none of those cases, however, did a court conclude that the Commission is obligated to *add* issues to an arbitration as a result of newly effective FCC rules or other law. Rather, the only court to address this issue directly concluded that issues that were already before the state commission for decision *and had been decided* would be reviewed in light of the latest FCC rules. *See id.* at 959-60 (remanding state commission determination that conflicted with newly effective FCC rules). SBC does not claim that any issue properly presented should be decided differently in light of *USTA*

¹⁵ Staff Response at para. 7.

II. Instead, SBC seeks to interject issues concerning implementation of the *USTA II* decision just days after it becomes effective and shortly before the Commission is required to issue a decision on XO's Petition. Nothing in prior case law supports such a proposal, which as discussed above, was never part of the request for negotiations or the negotiations themselves and directly conflicts with both the plain language of the Act and the change of law provisions in the existing XO/SBC ICA.

Nor would addressing those issues in this arbitration be an appropriate use of Commission and party resources, as Staff proposes. To the contrary, addition of these issues would exponentially complicate the arbitration. XO disputes that the *USTA II* decision represents a change of law under the XO/SBC ICA. Even though the FCC Rules governing certain UNEs have been vacated, SBC continues to be obligated to provide those UNEs under Sections 251 and 271 of the Act, as well as under Section 801 of the Illinois Public Utilities Act and under the tariffs it filed in compliance with this Commission's June 11, 2002 order in Docket 01-0614. Litigating these issues could require the Commission to undertake an analysis comparable to the FCC's impairment analysis, as well as costing and pricing issues if the Commission were to determine that existing rates are inapplicable. Such an inquiry cannot possibly be accomplished within the time that the Commission has to decide this arbitration. Any such inquiry, moreover, should be made in the context of a generic proceeding in which all interested parties can participate, not in a single arbitration involving only SBC and XO. Whatever decision the Commission makes, moreover, would likely be preempted by interim and or permanent rules from the FCC. Far from conserving Commission and party resources, as

Staff suggests, including SBC's *USTA II* issues in this proceeding would needlessly waste both Commission and party resources.

E. The Commission Should Reject the Arguments Provided by the Commission Staff.

The Staff argues that it cannot accept the premise that a party can unilaterally limit the scope of negotiations and thus preclude arbitration of an issue.¹⁶ The Staff's argument is directly contrary to the opinion of the court in *Coserv*. In that case, the court unequivocally held that a commission may not arbitrate an issue unless it has been subject of negotiations between the parties. *Coserv*, 350 F.3d at 487. The set of facts in this proceeding is precisely the same as in *Coserv*. Here, SBC asked to include *USTA II* issues and XO refused to negotiate those issues. In *Coserv*, the CLEC asked to include in the negotiations the issue of compensated access and the ILEC refused to negotiate the issue. The Court held that because compensated access was not the subject of negotiations, it could not be the subject of the arbitration. The Court stated that an issue can be part of an arbitration only if it is a "mutually agreed upon subject of voluntary negotiation between [the two LECs]." There is no question that there was not a mutual agreement of XO and SBC to negotiate *USTA II* provisions. Thus, as in *Coserv*, the non-negotiated issues are not subject to arbitration.

The Staff raises the public policy implication of XO's motion when it expresses the concern that a party could preclude a ruling on an issue by refusing to negotiate it.¹⁷ The Staff notes Section 251(c)(1) obligates both the ILEC and the requesting carrier to negotiate in good faith. XO agrees that it has the obligation to negotiate in good faith. As can be seen from XO's letter responding to SBC's request to negotiate *USTA II* issues,

¹⁶ Staff Response at para. 4.

¹⁷ *Id.*

XO had good faith reasons to refuse to begin negotiations until the mandate was issued by the Circuit Court. In any event, the remedy for the failure to negotiate in good faith is not, as suggested by the Staff, the unilateral arbitration of the issue. Such unilateral arbitration is exactly what the Court in *Coserv* found to be improper.

Staff also argues that it appears that negotiations of the *USTA II* issue took place, “at least to the extent of the parties concluding that further negotiations were fruitless, and that the matter would need to be resolved through arbitration.”¹⁸ XO’s unequivocal refusal to discuss *USTA II* issues cannot be called the recognition “that further negotiations would be fruitless.” It was instead, a very loud “NO!” Moreover, the Staff’s position is directly contrary to the finding in *Coserv* that when a party refuses to negotiate an issue, it cannot be the subject of arbitration.

Staff argues that the parties “conducted only the barest negotiations on *any* issue.” (original emphasis).¹⁹ According to the Staff, no issue is properly before this Commission if “failure to negotiate” is grounds for dismissal of the *USTA II* issue. There is a qualitative difference between the issues raised by XO in its petition and the issues raised by SBC. First, while the Staff is correct that there was minimal give and take on the issues raised by XO, the parties did agree to negotiate those issues. The fact that they had minimal negotiations does not deprive XO of the right to an arbitration under the Act. In contrast, there was no agreement to negotiate SBC’s *USTA II* issues because XO refused to negotiate the impact of *USTA II* until the mandate of the Circuit Court was issued.

¹⁸ Staff Response at para. 5.

¹⁹ *Id.*

Second, SBC's request that the parties negotiate the impact of *USTA II* on their agreement came long after negotiations began. SBC sent XO a request to negotiate a TRO amendment on October 30, 2003.²⁰ XO responded to that request with a letter dated November 26, 2003 agreeing to begin negotiations. SBC's request that the parties negotiate *USTA II* issues was not sent to XO until March 11, 2004, which was near the beginning of the 135 to 160 day "window" for filing arbitrations.²¹ While the issues subject to negotiations and arbitration should not be locked in on the first day of negotiations, SBC has abused the right to add new issues by doing so at such a late date. Neither XO nor this Commission is required to submit to SBC's desire to add the *USTA II* issue into the negotiations at the last minute. It would be consistent with the spirit and letter of the federal Act to consider SBC's request on March 11, 2004 to begin *USTA II* negotiations on an entirely separate timetable with its own window for filing an arbitration.

²⁰ Petition, para. 6.

²¹ Because the parties agreed to a negotiation start date of November 25, 2003, the window for filing this arbitration was set to begin on April 8, 2004 and end on May 3, 2004.

Conclusion

For the foregoing reasons, as well as the reasons set forth in XO's Motion, the Commission should grant XO's Motion to Dismiss Arbitration Issues and Strike Related Contract Language Proposed by SBC.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen J. Moore, do hereby certify that I have, on this 21st day of June 2004 caused to be served upon the following individuals, by e-mail, a copy of the foregoing XO'S REPLY TO SBC'S AND STAFF'S RESPONSES TO XO'S MOTION TO DISMISS ARBITRATION ISSUES AND STRIKE RELATED CONTRACT LANGUAGE PROPOSED BY SBC.

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