

Docket No: 04-0371
Bench Date: 8/31/04
Deadline: 9/9/04

MEMORANDUM

TO: The Commission
FROM: David Gilbert, Administrative Law Judge
DATE: August 26, 2004
SUBJECT: XO Illinois, Inc.

Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.

RECOMMENDATION: Review and discuss the attached Arbitration Decision.

This is an arbitration under federal Telecommunications Act of 1996 ("Federal Act") between XO Illinois, Inc., ("XO"), and Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"). Staff participated actively in the case.

1. The Impact of Recent FCC Action on this Arbitration

Because of recent action by the FCC, discussed below, the attached Arbitration Decision cannot yet be voted upon. Nevertheless, because of its size, and because of the great number of disputed points addressed, the Decision is presented now to give the Commission more time to review its contents. It is likely that most of the current text will not be affected by the FCC's action and will remain as is. However, certain portions of the Decision may well need to be revised.

In August 2003, the FCC issued its Triennial Review Order ("TRO"), dramatically altering the regulatory landscape for unbundled network elements ("UNEs"). In March 2004, in USTA II, the U.S. Court of Appeals vacated and remanded portions of the TRO. However, the court temporarily stayed the effect of its order. The stay ended on June 16, 2004, thereby invalidating portions of the TRO.

On August 20, 2004, the FCC issued an order and proposed rulemaking ("Interim Order"), in which it adopted an interim regulatory scheme that will apply during a transition period leading to permanent rules. As part of that scheme, the FCC mandates that the ILECs shall continue offering three categories of UNEs (switching,

enterprise market loops and unbundled transport) under the contract rates, terms and conditions that applied on June 15, 2004. The parties here do currently have an interconnection agreement (“ICA”). Consequently, since each of the three pertinent UNE categories are discussed in the present arbitration, and since the attached Decision contains rulings based on the conclusion that the ILECs do *not* have to offer unbundled switching and transport, the FCC’s Interim Order necessitates changes in the attached Decision (particularly to XO Issue 6 and SBC Issues 5 and 7).

However, by its terms, the Interim Order will not take effect until it is published in the Federal Register. I have been informed by the parties that publication has not yet occurred. Thus, it is not certain that the Interim Order will become effective before the September 9 deadline in this case. That leaves open the question of whether this arbitration can resolve issues on the basis of prospective law. Additionally, I am aware that certain ILECs have requested court action that could affect, and perhaps block, the FCC’s interim rules.

Furthermore, the Interim Order suggests that ILECs can presume, in change-of-law proceedings, that the FCC will later remove the very obligation to unbundle switching, loops and transport that the Interim Order imposes (although no action could be taken on that presumption for six months). I have not fully considered whether this arbitration is the kind of change-of-law proceeding the FCC has in mind (or, even if it is, whether presumptions about future FCC unbundling decisions are warranted).

I have, however, instructed the parties to file supplemental briefs addressing the impact of the Interim Order, so that I can revise the attached Decision to incorporate that order, if need be. Then, prior to the Commission’s September 9 meeting, I will either present a revised Decision containing changes required by the Interim Order, or advise you that the attached Decision should remain intact. In the meantime, you can, at your discretion, consider the many substantive provisions of the attached Decision that will not, in any case, be affected by the Interim Order.

2. Contents of the Attached Decision

Between them, the arbitrating parties presented 35 numbered issues and sub-issues, and reframed each other’s issues to create additional issues 12 times. Several issues were presented as “topics” (in contravention of the Federal Act) rather than framed as disputes. Also, there were myriad contentious provisions in each party’s densely worded proposed contract. As a result, the actual points of disagreement between the parties numbered in the hundreds. Accordingly, the decisions in the attached Arbitration Decision are simply too numerous to address in this memorandum.

The history of this case can be summarized here, however. According to the record here, after the FCC issued its TRO, the parties exchanged correspondence about revising their existing ICA to incorporate applicable TRO rulings (as the FCC required). That correspondence discussed the arbitration provisions of Section 252 of

the Federal Act. Nevertheless, despite XO's requests, the parties conducted no face-to-face negotiations, although contract terms were exchanged.

As previously described, in March 2004, in USTA II, the U.S. Court of Appeals vacated and remanded portions of the TRO, but temporarily stayed the effect of its order.

XO petitioned this Commission for arbitration in May 2003. SBC objected to the petition, arguing that disputes about the impact of the TRO on the parties' ICA should be addressed in a different (unidentified) type of proceeding, rather than through arbitration. I denied that objection, and the parties waived evidentiary hearings.

As noted above, the USTA II decision, overturning parts of the TRO, became effective on June 16, 2004. On June 23, this Commission reopened Docket 01-0614 to consider the impact of the TRO and USTA II on prior Commission rulings implementing Section 13-801 of the Illinois Public Utility Act.

On June 28, XO moved to withdraw its arbitration request and terminate this proceeding, asserting that the "state of flux and rapid change" in the regulatory landscape precluded rationale decision-making. Despite its earlier contention that the Commission lacked jurisdiction to conduct this arbitration, SBC opposed that motion. In a conference call with all parties, I presented the preliminary view that the Federal Act permitted XO to withdraw its own issues, but would not permit the Commission to dismiss SBC's issues without SBC's consent. XO then waived a formal ruling and, on July 13, moved to withdraw its motion. The parties then filed initial and reply briefs, I issued a proposed Arbitration Decision and the parties filed exceptions.

The FCC's Interim Order followed. It was not a surprise. The FCC had indicated that interim rules were in the offing. It had also indicated (and reaffirmed in emphatic language in the Interim Order) that permanent rules would follow by year's end. That means that the ICA that results from the instant arbitration will likely need renegotiation at that time. In view of all the uncertainty described here, had I believed that the Federal Act permitted it, I would have granted XO's motion to terminate this arbitration, despite SBC's opposition. Instead, the case has continued on, using the resources of this Commission, to produce an amendment to the parties' ICA that will determine their respective obligations for a limited time only.

DG:fs