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APPEARANCES (cont'd)

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I N D E X

Witnesses: Re- Re- By
Direct Cross direct cross Examiner

NONE

E X H I B I T S

Number For Identification In Evidence

NONE

1 JUDGE GILBERT: Pursuant to the authority of
2 the Illinois Commerce Commission, I call
3 Docket 05-0763

4 If I could have appearances for the
5 record, please, beginning with XO.

6 MR. ROWLAND: On behalf XO Communications
7 Services, Inc., Thomas Rowland of the law firm of
8 Rowland and Moore, 200 West Superior Street,
9 Suite 400, Chicago, Illinois 60610.

10 MR. HARVEY: Appearing for the staff of the
11 Illinois Commerce Commission, Mathew L Harvey,
12 160 North LaSalle Street, Suite C-800, Chicago,
13 Illinois 60601.

14 MR. ORTLIEB: Appearing on behalf of SBC
15 Illinois, Mark Ortlieb, 225 West Randolph Street,
16 Suite 2500, Chicago, Illinois 60606.

17 JUDGE GILBERT: All right. We're here on an
18 arbitration petition by XO. I have in hand the
19 petition and some of the exhibits, what have been
20 entitled exhibits to the arbitration petition.

21 My preference is always the documents
22 attached to a petition, an application, or

1 complaint be referred to as attachments or
2 appendices; but in any case, I've -- we've been
3 talking about scheduling and some other procedural
4 questions during an off-the-record conversation.

5 XO and SBC have proposed a schedule, and
6 I would note that I have had some conversations by
7 telephone with counsel for XO and SBC in trying to
8 arrive at a schedule; and what they brought in
9 today reflects their own preferences, and they were
10 kind enough to incorporate some of my concerns as
11 well, concerns which I expressed in the telephone
12 conversations.

13 Staff was not involved in those
14 conversations, but I understand that the schedule
15 and some discussion about the schedule had been
16 presented to staff. I think there have been some
17 off-the-record conversations by staff -- between
18 staff and the litigants in the case.

19 MR. HARVEY: That's correct, your Honor.

20 JUDGE GILBERT: A couple of things we have to
21 take care of. Now, with respect to the factual
22 record in the case, the parties -- I should say XO

1 and SBC are not interested in having an evidentiary
2 hearing but are interested in creating an
3 evidentiary record by stipulation, and so let me
4 turn it over to counsel for SBC and XO to describe
5 what they propose to do.

6 MR. ORTLIEB: Your Honor, in our stipulation we
7 agreed that we would use reasonable efforts to come
8 up with a stipulation because at least in SBC's
9 view there are some facts that are relevant but
10 very, very few facts and these are
11 noncontroversial facts.

12 So we had in mind a stipulation we have
13 yet to work out with XO, but a stipulation that
14 would place into the record the current
15 interconnection agreement between the parties, the
16 TRO TRRO amendment that has been arbitrated and
17 negotiated and conformed to the order in
18 Docket 05-0442 as well as an identification of the
19 wire centers in Illinois that are actually subject
20 to the nonimpairment determination that is raised
21 in issue 1.

22 As I said, counsel for XO and counsel

1 for SBC have yet to work this out and there may be
2 other facts, but it is -- at least what we
3 contemplate is a rather abbreviated stipulation
4 along those lines.

5 JUDGE GILBERT: All right. Now, related to that
6 would be discovery. SBC and XO have indicated
7 they're willing to forego discovery. Staff has
8 some interest in discovery.

9 Mr. Harvey, why don't you talk about
10 that.

11 MR. HARVEY: Well, your Honor, that's correct.
12 Staff, while it views it as very unlikely that it
13 will have any discovery, it's still reviewing the
14 petition. The representation by SBC that it
15 doesn't plan to file a response to the petition and
16 the understanding of the Court that the petition is
17 effectively a joint petition makes it all the more
18 unlikely.

19 That said, staff will get any
20 discovery -- will promulgate any discovery that it
21 has by no later than the close of business on
22 Monday, December the 19th, 2005. And the parties,

1 I understand, will undertake to respond as quickly
2 as they possibly can to that discovery so that to
3 the extent it needs to be in evidence, the
4 responses need to be in evidence, they will be
5 ready to be placed into evidence no later than the
6 30th of December. And, again, staff views this as
7 more of a contingency than anything else. We don't
8 anticipate that we will have any discovery.

9 JUDGE GILBERT: All right.

10 MR. ORTLIEB: That's acceptable to SBC,
11 your Honor.

12 MR. ROWLAND: That's acceptable to XO.

13 MR. ORTLIEB: Could I make one clarification.
14 SBC will technically be filing a response. You
15 know, as a matter of statute it's due, I think, 25
16 days after the petition. So on about -- no later
17 than December 22nd we'll be filing a response. We
18 will not be raising any new issues in that
19 response.

20 MR. HARVEY: That's my understanding, I guess.

21 JUDGE GILBERT: So that the two issues that are
22 identified in the petition will be the only issues

1 that will be addressed.

2 MR. ORTLIEB: That's correct.

3 JUDGE GILBERT: A couple things. One, with
4 respect to the discovery, staff, I think, is being
5 gracious in taking it on faith that the litigating
6 parties will respond quickly enough so that if
7 staff chooses it can place the discovery responses
8 into evidence. And I don't want staff to be
9 disappointed in its -- in the faith it has placed
10 in the parties.

11 So to the extent that discovery or the
12 speed with which one responds to discovery can
13 sometimes be one of the gambits in litigation, I'm
14 assuming it's not the parties' intentions and that
15 they will, in fact, produce quick responses and
16 that the schedule we will set today will be
17 contingent upon that. So I do want there to be
18 some hammer over your heads in case there are slow
19 responses; and in case staff feels its own
20 participation is disadvantaged because of that,
21 staff would be able to request adjustments to the
22 schedule.

1 MR. ROWLAND: Your Honor, we intend to respond
2 to any discovery quickly. It goes without saying
3 that we're not anticipating a great deal of
4 discovery from staff. That's our hope.

5 MR. HARVEY: That's certainly -- you know, I
6 can't, you know, give any perfect assurance that
7 there won't be -- it wouldn't be voluminous, but I
8 can assure you almost certainly based on the
9 relatively narrow scope of the issues and
10 relatively legal nature there will be very modest,
11 if any, discovery.

12 MR. ORTLIEB: SBC for its part strives never to
13 disappoint staff, so we too will respond quickly.

14 JUDGE GILBERT: All right. And really all I
15 wanted to accomplish was just to remind everyone
16 that I think staff is attempting to be very
17 cooperative in allowing the proposed schedule to go
18 forward as presented, and in doing so I don't want
19 staff to lose its opportunity to effectively
20 participate.

21 That said, the other point I want to
22 raise is if there is discovery and assuming those

1 responses are propounded prior to the 30th of
2 December, which is our target date for closing the
3 record, would it make sense -- I'm just throwing
4 this out -- to incorporate those materials into the
5 stipulated evidentiary record that the parties are
6 intending to create.

7 MR. ORTLIEB: I think not just for -- just
8 because matters of timing, I think. It would be my
9 hope at least to wrap up the stipulation before
10 Christmas, you know, just to accommodate the
11 holiday schedules so that it -- if discovery comes
12 out, it could well -- the responses could well come
13 out after the stipulation is prepared and filed.

14 MR. HARVEY: Perhaps the parties would undertake
15 to stipulate to the admissibility at least, you
16 know, the foundational aspects of the discovery
17 responses they propounded, not necessarily the
18 relevance or, you know, materiality of the matter
19 at hand. I mean, you know, we don't expect to ask
20 what color was the light, in counsel's example;
21 but, you know, there might be reasonable disputes
22 on whether something we thought was strictly

1 relevant to these issues.

2 MR. ROWLAND: Just for clarification, Matt, you
3 mentioned what we could stipulate to in terms of
4 foundation but not admissibility?

5 MR. HARVEY: I don't expect you guys to agree
6 necessarily that something we want into evidence is
7 necessarily relevant to the matters at issue but
8 that the foundational elements for placing it into
9 the record are met. That's another matter
10 altogether.

11 JUDGE GILBERT: You mean in terms of the
12 authenticity of the paper --

13 MR. HARVEY: Yeah, exactly. That's precisely
14 it. I mean, I don't expect you to waive all
15 possible objections you would have to something
16 like that, but certainly to the extent that you
17 have prepared these responses, I would think that,
18 you know, there would be some agreement as to
19 whether they, you know, had adequate foundation to
20 find their way into evidence.

21 JUDGE GILBERT: I'm assuming there's no harm to
22 the litigating parties to represent now that there

1 would not be a problem with authenticity.

2 MR. ORTLIEB: Correct, we're not concerned with
3 that.

4 MR. HARVEY: That's all we really expect.

5 MR. ROWLAND: I would agree with that.

6 JUDGE GILBERT: What could be a problem, I
7 suppose, is if staff were to receive a lengthy
8 response and want to use only part of that response
9 and then the party that propounded the response may
10 want to insist that either some additional portion
11 of the response or all of the response be added to
12 the record.

13 Is there some way to deal with that now?

14 MR. HARVEY: Staff will undertake that if it
15 seeks to introduce any part of a data response, it
16 will introduce all of it without any excision or
17 redaction unless there is, of course, proprietary
18 matter in it so that the parties will have all of
19 the information they believe relevant to the
20 request in evidence.

21 JUDGE GILBERT: All right. Let's go this far
22 then, unless the litigating parties are prepared to

1 go even further. If there's going to be an
2 objection on the part of either or both litigating
3 parties to admitting any piece of the discovery
4 responses, you're going to have to do that
5 virtually immediately and we're going to have to
6 get together and have a very quick ruling on that.
7 And everyone will have to understand that, I guess,
8 myself included because we may literally have a
9 24-hour time period and only that period in which
10 we can resolve that.

11 MR. ORTLIEB: Can I ask staff if staff, for
12 example, contemplates in this hypothetical moving
13 for the admission of data request responses that if
14 SBC Illinois at least if it is contacted in advance
15 may stipulate to the motion so there is a
16 possibility that it could be a joint motion or
17 perhaps an agreed upon motion by all three --

18 MR. HARVEY: We'll certainly seek agreement from
19 both litigating parties prior to, you know, any
20 such moving into evidence of any data response. To
21 the extent that agreement can be obtained, we would
22 assume that there would be, you know -- type of

1 things.

2 JUDGE GILBERT: I suppose theoretically a
3 litigating party could object to the discovery
4 itself as not tending to lead to admissible or
5 relevant evidence. And as a second point of
6 objection, even if the party were to respond to the
7 discovery could nonetheless object to its relevance
8 or admissibility.

9 I guess what I hope would occur is when
10 you're at the first of those thresholds and
11 considering whether any staff discovery request is
12 even appropriate discovery, this is prior to the
13 determining whether you're going to pose on its
14 admission or not, but even when you think it's
15 appropriate discovery, if you object to it at that
16 point, please say so right away.

17 MR. HARVEY: This is on the basis that discovery
18 while otherwise permitted would only be permitted
19 to the extent it would produce or lead to the
20 discovery of relevant or admissible evidence.

21 JUDGE GILBERT: Right, I mean, which is kind of
22 a basic. But if there's that kind of objection

1 early on, please say that right away, I mean,
2 because clearly if you don't think it's even
3 discoverable, you're not going to let its admission
4 go without objection. So please say that
5 immediately.

6 MR. HARVEY: On the theory that staff may be
7 extremely way out in left field instead of just out
8 in left field.

9 THE COURT: Yeah. I'm just trying to accomplish
10 all we need to accomplish by the 30th around the
11 holidays. Assuming everyone is operating in good
12 faith, I think we can do this. So I'm just sort of
13 brainstorming it all and hoping we can make that
14 happen.

15 MR. ROWLAND: If it were possible if staff would
16 let us know, even though you're not going to
17 propound the discovery until the end of the day on
18 Monday the 19th, if you give us some sort of
19 heads-up one way or another.

20 MR. HARVEY: We will undertake to do that. As I
21 say, it is our profound hope that what we will be
22 telling you is we don't have anything.

1 JUDGE GILBERT: Okay. Let me run through the
2 proposed schedule -- let me ask you this,
3 Mr. Harvey. Given our conversation about
4 discovery, is there any -- does staff have any
5 concern with the schedule as proposed?

6 MR. HARVEY: In light of our conversations, no,
7 the staff believes this is feasible and we can make
8 this work for us.

9 JUDGE GILBERT: Let me run through it very
10 quickly. And I'll first rule that this will be the
11 schedule for the case unless and until -- unless or
12 until we decide to do something different or I
13 decide to do something different, I should say.

14 Close of evidence will be December 30th
15 of this year. The initial brief will be January
16 13th of 2006. Reply brief January 25th. The
17 proposed arbitration decision on February 8th.
18 Briefs on exceptions on February 20th. Reply brief
19 on exceptions on March 1st. And I will endeavor to
20 have a proposed order to the Commission by March
21 15th.

22 One question I had in reading the

1 materials that were submitted with the petition and
2 also I took a look at the order in 05-0442, it's
3 clear that from the litigating parties'
4 perspective, the two issues that you presented in
5 the petition are not resolved by the contents of
6 05-0442, the order in that docket, I should say.

7 Is that correct?

8 MR. ROWLAND: Correct.

9 MR. ORTLIEB: That's right.

10 MR. ROWLAND: Let me --

11 JUDGE GILBERT: Go ahead.

12 MR. ROWLAND: On the second issue on the
13 applicability of the rider for 13-801, there is a
14 decision commensurate with the decision in 05-0442
15 with respect to that rider of applicability of
16 state law. It's true, though, that XO was not part
17 of that arbitration, if that's your question.

18 What I'm confused about in your question
19 is when you say those two issues are not dealt with
20 in the Commission's order in 05-0442, how do you
21 mean that?

22 JUDGE GILBERT: That's a fair question, and I'm

1 certainly not as conversant with the contents of
2 this order as you guys are. And I wasn't
3 suggesting that by filing this arbitration you
4 were, in fact, seeking to relitigate matters that
5 were already settled in 05-0442.

6 I guess what I'm saying is I'm new
7 enough to that question to not be able to simply
8 assume, as much as I respect all counsel in the
9 room, that, in fact, 05-0442 does not provide a
10 resolving principle for the issues you raise in
11 this arbitration. You believe it does not. I
12 don't necessarily know that.

13 MR. ORTLIEB: And I was going to offer a
14 clarification, your Honor, on issue 1, for example.
15 One of SBC's arguments will be that while 05-0442
16 does not specifically address the precise
17 circumstance posited by the proposed language, it
18 covers the subject matter area and so that it has
19 been adequately addressed by the rest of the
20 industry and that the outcome should be no
21 different for XO.

22 So I don't want to be on record as

1 saying that 05-0442 does not control in any way or
2 does not inform how this arbitration should be
3 resolved because I think it does.

4 JUDGE GILBERT: So --

5 MR. ROWLAND: Something that Mr. Ortlieb raises
6 is the particular question raised in the issue 1 of
7 the arbitration. The precise question is not
8 answered, and I think with we both agree on that,
9 from the 05-0442 decision.

10 JUDGE GILBERT: I see two lines of inquiry. One
11 line of inquiry is, is the only reason 05-0442 does
12 not apply here is because XO was not a party to
13 that?

14 MR. ROWLAND: No. My previous question to you
15 went to a different matter with respect to what
16 Mr. Ortlieb just stated. I would agree to a
17 certain extent in particular where he's talking
18 about it has nothing to do with whether XO was a
19 party or not. With respect to is the precise
20 question answered in the order, I think we both
21 agree no, the precise question is not answered in
22 that order. We agree with that.

1 JUDGE GILBERT: Okay.

2 MR. ROWLAND: With respect to the second issue,
3 the 13-801 issue, I think there is an overarching
4 decision of the Commission's in that order, in that
5 arbitration order 05-0442 that does address
6 applicability of state law.

7 JUDGE GILBERT: So then your position might well
8 be what Mr. Ortlieb's position with respect to
9 issue 1, namely, look, this was decided in this way
10 in 05-0442 and should be decided similarly in the
11 present arbitration.

12 MR. ROWLAND: Yes, that's quite possible.

13 JUDGE GILBERT: At this stage -- I know you want
14 to speak. Let me just say at this stage the only
15 reason I'm raising this is to say by going forward,
16 I can't commit at this point to saying to you guys
17 it's clear to me that you are not relitigating
18 05-0442, trying to, in a sense, get a second bite.
19 Or putting it in the negative, it's not clear to me
20 at this point that I can rule out saying at the end
21 of this case I can't give you anything beyond
22 what's already been said in 05-0442, that you're

1 asking me in a sense to overrule that. I just
2 don't know where we're going to go with the case.

3 I'm taking it as something that I need
4 to do a lot more thinking about in order to decide
5 whether what you present in this case is -- are, I
6 should say, two new issues.

7 MR. ORTLIEB: Fair enough. But can I just
8 supplement that by saying on this issue 2, this 801
9 issue, SBC Illinois' issue is that -- we
10 acknowledge that XO is after the precise result
11 that was rendered in 05-0442, but our position is
12 that they're just asking for a second bite at the
13 apple because, in fact, they had and took the full
14 opportunity to litigate any state law UNE
15 obligations in 04-0371, their TRO arbitration.

16 And so I would just append to what you
17 just said that there is -- at least it will be our
18 position that there is another order that, in
19 essence, precludes XO's position on issue number 2.
20 So I think in addition to 05-0442 we may have to
21 talk about 04-0371.

22 JUDGE GILBERT: Okay. All right.

