

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

In the Matter of	)	
	)	
XO Communications Services, Inc.	)	
Petition for Arbitration of an	)	Docket No. 05-0763
Amendment to an Interconnection	)	
Agreement with SBC Illinois Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934,	)	
as Amended	)	

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**INITIAL BRIEF OF THE STAFF OF  
THE ILLINOIS COMMERCE COMMISSION**

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The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, and pursuant to Section 761.400 of the Commission’s Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Initial Brief in the above-captioned matter.

**I. INTRODUCTION**

On or about December 2, 2005, XO Communications Services, Inc. (“XO”) filed a Petition for arbitration and Request for Waiver or Variance of Commission’s Rules (“Petition”) pursuant to Section 252(b) of the federal Telecommunications Act of 1996, 47 USC 151 *et seq* (“Federal Act”), and Section 761.110 of the Commission’s rules. 83 Ill. Admin. Code Part 761. The Petition seeks Commission resolution of certain unresolved issues that arose during negotiations with SBC Illinois, Inc. (“SBC”) of an amendment to the Parties existing arbitration agreement. On December 13, 2005, the Administrative Law

Judge (“ALJ”) held an initial status hearing. At the status hearing the parties (XO and SBC) agreed to stipulate to the few relevant and uncontroversial facts anticipated by the parties. Tr. 5-7. This agreed to stipulation, in the opinion of the parties, alleviated the need for an evidentiary hearing. *Id.* Staff agreed to the proposed schedule and the proposed stipulation but reserved its right for discovery, in the unlikely event it needed to discover facts not covered by the stipulation. Tr. 7-8. Also at that status hearing, the parties proposed a schedule that was agreed to by Staff and adopted by the ALJ. Tr. 17-18, 23.

On December 22, 2005, SBC filed its Response to Petition for Arbitration. On December 30, 2005, the parties filed a Stipulation of Facts between SBC and XO, which consisted primarily of the parties currently effective interconnection agreement and a list of wire centers that SBC has designated as either tier 1, tier 2, or tier 3 wire centers as provided for in the Federal Communications Commission’s (“FCC’s”) Order on Remand, In the matter of unbundled Access to network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange carriers, WC Docket No. 04-313, CC Docket No. 01-338 (Rel. Feb. 4, 2005) (“TRRO”). By agreement of the parties, this completed the evidentiary presentation of the matter. Tr. at 6-17, 23.

## **II. ISSUES PRESENTED FOR ARBITRATION**

### **Issue No. 1**

Issue No. 1, as set forth in the Petition, is as follows:

Should the TRRO Amendment include a provision that addresses instances where SBC’s designation of nonimpaired [sic] wire center(s) is found to be incorrect and the wire center(s) reverts

back to being an impaired wire center(s)? If so, what credits (if any) and procedures should apply in connection with the reversion?

XO Petition at 6

The parties' positions are as follows:

A. XO's Position

XO states its position with respect to Issue No. 1 as follows:

XO believes that SBC should be held responsible for the financial hardship that XO incurs when SBC has erroneously placed a wire center on the non-impaired wire center list. After a wire center is placed on the non-impaired list, XO will be responsible for both higher transition rates during the transition period, and for disconnecting or converting UNEs to other SBC wholesale services at the end of the relevant transition period. The only reason XO is subject to the higher UNE transition rates and to the higher wholesale service rates is because SBC has designated a wire center to be non-impaired. SBC has the relevant information for designating a wire center as non impaired, and receives the financial benefit of XO having to pay the higher transition rates and the higher alternative wholesale service rates for so designating a wire center. If SBC is found to have misidentified an office either through a challenge of a CLEC self certification (XO or another CLEC) or by other Commission action, SBC should be required to credit XO for any transition pricing and/or costs of having converted the impacted UNEs to another SBC wholesale service. XO's proposed language to resolve this issue is set forth on Exhibit 2, Section 4.1.6.

XO Petition at 6-7

XO proposes the following provision as Section 4.1.6:

If a wire center designated as non-impaired by SBC is later removed from the nonimpaired office list due to an error in SBC's classification or an ICC determination resulting from SBC's challenge of XO's or another CLEC's self-certification or by other Commission action, that the office is impaired, CLEC may submit orders to return facilities transitioned to other SBC wholesale facilities back to UNE facilities. SBC shall perform such conversions within ten (10) days and will credit CLEC the difference between the wholesale price paid and the applicable UNE price for the entire

period during which the wire center was inappropriately classified as non-impaired or the date of installation, whichever is shorter and will credit all records change charges CLEC paid SBC for all UNEs transitioned due to SBC's erroneous wire center classification. Such credits shall be placed on CLEC's invoice within two (2) billing cycles.

XO Petition, Attachment A at 11

Implicit in XO's proposed language is the proposition that the Agreement should include a provision that addresses instances where SBC's designation of non-impaired wire center(s) is found to be incorrect and the wire center(s) reverts back to being an impaired wire center(s),

B. SBC's Position

SBC is required to indicate what wire centers are non impaired and list the number of fiber collators and lines in a particular wire center. Where SBC learns through its own investigation and in its sole judgment that a wire center has been misdesignated [sic] as non impaired SBC will notify the CLEC of it error and reclassify the wire center as impaired.

XO Petition at 7<sup>1</sup>

SBC proposes the following provision as Section 4.1.6:

If SBC Illinois has designated a wire center as non-impaired, CLEC has self-certified with respect to that wire center during the relevant time period specified in this Agreement, and SBC has disputed such self-certification, in the event prior to a Commission ruling on the dispute SBC learns through its own investigation (and based on its sole judgment) that an SBC error or errors caused the wire center to be deemed non-impaired (that is, the wire center would be deemed impaired but for those errors), SBC will promptly provide CLEC notice of the error stating that SBC is reclassifying the wire center as impaired (subject to SBC's rights to later re-designate the wire center at a later date if the non-impairment criteria are met.

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<sup>1</sup> It is not clear to the Staff how precisely this reflects SBC's position, since it is contained in the XO Petition. SBC, however, does not appear to object to the XO characterization of its position. See SBC Illinois' Response to Petition for Arbitration.

See XO Petition, Exhibit 2 at 15.

### C. Staff Position

With respect to XO's proposed language for Section 4.1.6, the Staff notes, first, that the FCC's *Triennial Review Remand Order*<sup>2</sup> provides a method whereby disputes regarding non-impairment can be resolved. Specifically, the TRRO provides that:

We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. [fn] **We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).** [fn] Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. **To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.** [fn] In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority. [fn]

TRRO, ¶1234 (emphasis added)

The Staff understands that SBC has added one wrinkle to this scheme. Specifically, it has prepared a list of wire centers in which it claims that

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<sup>2</sup> *Order on Remand, In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC No. 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. February 4, 2005) (hereafter "TRRO").

impairment no longer exists. See Joint Stipulation, ¶¶3-6. This appears to the Staff not to be specifically required or called for under the *TRRO*. That said, the matter does not appear to the Staff to be one of particularly great moment. Under the specific terms of the *TRRO*, the SBC non-impaired wire center list is not in any way legally binding upon XO or any other CLEC. Indeed, the *TRRO* requires a CLEC seeking provisioning of UNEs to “undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the [non-impairment] requirements ... and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3)[.]” TRRO, ¶234. Moreover, when an ILEC receives a self-certified request for UNEs, “the incumbent LEC must **immediately** process the request.” Id.

Accordingly, XO need not rely upon the SBC non-impairment list; indeed, there is a case to be made that it is not entitled to rely exclusively on the list, but rather is bound to conduct its own “reasonably diligent inquiry” before self certifying that it is entitled to UNEs. Certainly, XO might consult the non-impaired wire center list as part of its inquiry, but it is not clear to the Staff that this is absolutely or under all circumstances a necessary component of such an inquiry. For example, XO might have a good-faith belief, as indeed it appears to do, that SBC’s methodology for determining non-impairment is fundamentally unreliable, or at least insufficiently transparent. See, *generally*, Petition, XO Communications Services, Inc., CIMCO Communications, Inc., and Mpower Communications Corp., d/b/a Mpower Communications of Illinois, Petition to

Investigate the Non-Impairment Claims of Illinois Bell Telephone Company Regarding Wire Centers, ICC Docket No. 05-0717 (filed November 10, 2005) (XO and other CLECs assert that SBC's methodology for determining non-impairment is flawed) (hereafter "Non-Impairment Methodology Petition"). In fact, XO concedes, in the *Non-Impairment Methodology Petition*, that "[a]lthough Petitioners can self-certify [notwithstanding the non-impaired wire center list], the process would be much more efficient if CLECs had access to the data that SBC used to determine the non-impaired wire center list." Non-Impairment Methodology Petition, ¶11. Accordingly, it is clear that CLECs are not by any means legally bound by the non-impaired wire center list.

Moreover, once a CLEC self-certifies, the ILEC must "**immediately**" process the CLEC's request for UNEs. TRRO, ¶234 (emphasis added). This means, of course, that the CLEC is "immediately" entitled to UNEs, since, should an ILEC seek to challenge self-certification, it nonetheless "must provision the UNE and **subsequently** bring any dispute regarding access to that UNE before a state commission or other appropriate authority [under the ICA dispute resolution procedure]." Id. (emphasis added).

Given this legal context, XO's position cannot be adopted. XO asserts that "[a]fter a wire center is placed on the non-impaired list, XO will be responsible for both higher transition rates during the transition period, and for disconnecting or converting UNEs to other SBC wholesale services at the end of the relevant transition period." XO Petition at 6. This is simply not the case. After a wire center is placed by SBC on the non-impaired list, XO may, after

conducting a reasonably diligent inquiry regarding the question, self-certify that the wire center indeed remains impaired, whereupon it will continue to receive products at UNE rates until such time as SBC challenges the designation, and the dispute is resolved in SBC's favor. If SBC does not challenge the designation, or if the Commission subsequently determines that SBC's challenge is without basis, then XO will continue to be entitled to UNEs. Only if XO's self-certification is found to be in error will XO incur costs.

XO next asserts that "[t]he only reason XO is subject to the higher UNE transition rates and to the higher wholesale service rates is because SBC has designated a wire center to be non-impaired." Again, this is markedly incorrect; the only way that XO will become liable for such costs is its own inability to self-certify, or its erroneous self certification. SBC's designation is without legal effect.

XO further contends that: "SBC has the relevant information for designating a wire center as non impaired, and receives the financial benefit of XO having to pay the higher transition rates and the higher alternative wholesale service rates for so designating a wire center." XO may very well be correct in its assertion that SBC has access to somewhat better information than CLECs do regarding the designation of a wire center as non-impaired. As Staff understands matters, the Commission is currently investigating this question. However, the fact remains that SBC's designation, without more, cannot compel a CLEC to pay higher wholesale rates. Only a CLEC's unwillingness to self certify can do so.

This is confirmed by the Commission's *Access One Arbitration Decision*. See *Arbitration Decision, Access One, Inc., et al.: Petition for Arbitration pursuant to*

Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, ICC Docket No. 05-0442 (November 3, 2005) (hereafter “Access One Arbitration Decision). There, the Commission specifically rejected an SBC request that allegedly non-impaired wire centers on the list be conclusively found to be non-impaired if no CLEC challenged the alleged non-impairment within a pre-determined time. Access One Arbitration Order at 106. Further, the Attachment to the TRO/TRRO Cover Amendment, which memorializes the Commission’s findings in the *Access One Arbitration Decision*, provides that: “[i]n performing its [self-certification] inquiry, [a] CLEC shall not be required to consider any lists of Non-Impaired Wire Centers compiled by SBC as creating a presumption that a wire center is not impaired.” Section 4.1, Exhibit 2.1, Joint Stipulation.

At bottom, the defect in XO’s argument is that it fails to recognize XO’s own obligations arising out of the *TRRO*. XO, not SBC, is required to conduct a “reasonably diligent inquiry” into impairment questions prior to self-certification. XO attempts to shift this responsibility to SBC, and then seeks to make SBC financially responsible for any mistakes made. The Staff recommends that the Commission not permit this, and reject XO’s argument in its entirety.

Staff recommends that XO’s proposed language for section 4.1.6 be rejected in its entirety.

Staff does not, however, unconditionally endorse SBC's proposal; in fact Staff considers SBC's proposed section 4.1.6 to be problematic<sup>3</sup>, in that it confuses SBC's role with the Commission's role. Staff understands the obvious need for SBC to provide notice in the instances where it has discovered it made an error in declaring a wire center to be non-impaired. However, SBC's retention of rights (which could be viewed as being in derogation of the Commission's authority to investigate disputes regarding impairment) is, in Staff's view, not necessary to the operation of the contract provision. Accordingly, Staff recommends that if the Commission is to adopt SBC's proposed language, it adopt language for Section 4.1.6 as amended below.

If SBC Illinois has designated a wire center as non-impaired, CLEC has self-certified with respect to that wire center during the relevant time period specified in this Agreement, and SBC has disputed such self-certification, in the event that ~~prior to a Commission ruling on the dispute~~ SBC learns through its own investigation (and based on its sole judgment) that an SBC error or errors caused the wire center to be incorrectly designated by SBC as non-impaired (that is, ~~the wire center would be deemed impaired but for those errors~~), SBC will promptly provide CLEC and the Commission notice of the error stating that SBC is reclassifying the wire center as impaired (subject to SBC's rights to later re-designate the wire center at a later date if the non-impairment criteria are met).

### III. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

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<sup>3</sup> It is not, in fact, clear to Staff that Section 4.1.6 is necessary at all.

Respectfully submitted,

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