

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition for arbitration	)	
of <b>XO MICHIGAN, INC.</b> , of an amendment	)	
to an interconnection agreement with	)	Case No. U-14129
<b>SBC MICHIGAN</b> pursuant to Section 252(b)	)	
of the Communications Act of 1934, as amended.	)	
_____	)	

At the August 10, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair  
Hon. Robert B. Nelson, Commissioner  
Hon. Laura Chappelle, Commissioner

**ORDER DISMISSING ARBITRATION**

On May 3, 2004, XO Michigan, Inc. (XO), filed a petition for arbitration to resolve several issues regarding its interconnection agreement with SBC Michigan (SBC) pursuant to Section 252 of the federal Telecommunication Act of 1996 (FTA), 47 USC 252. The petition alleged that SBC had notified XO that SBC wished to establish a schedule to negotiate changes that had to be made to their interconnection agreement to meet the requirements established by the Federal Communications Commission (FCC) in its Triennial Review proceeding.<sup>1</sup>

<sup>1</sup>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-388, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

On May 14, 2004, SBC filed a motion to dismiss the petition for arbitration alleging that XO had chosen the wrong procedure to litigate the merits of its difference of opinion regarding “how the parties’ current agreement should be amended pursuant to its ‘change of law’ provisions to reflect the unbundling rules the FCC promulgated in its 2003 *Triennial Review Order*” (TRO). SBC motion, p. 1. SBC also contended that the Commission did not have the jurisdiction to decide the matters pursuant to Section 252. However, two weeks later, on June 1, 2004, SBC filed a response to XO’s petition for arbitration and presented 14 additional issues. On June 11, 2004, XO filed a response to SBC’s motion to dismiss and on June 14, 2004, XO filed a motion to strike five of the issues presented by SBC. Several days later, SBC filed a response to XO’s motion and a reply in support of their motion to dismiss.

On June 22, 2004, the parties jointly filed a statement of the issues. Then, on June 28, 2004, XO filed a motion to withdraw the petition to arbitrate. XO claimed that United States Telecom Assn v FCC, 360 US App DC 202; 359 F3d 554 (2004) (USTA II), vacated significant portions of the TRO. XO argued that a decision in this matter now would be unwise because the FCC plans to promulgate new interim rules in the near future that will necessitate further negotiations between the parties. SBC filed a response to XO’s motion on July 7, 2004.

An arbitration panel consisting of Administrative Law Judge James N. Rigas and Commission Staff members Orjiakor Isiogu and Rod Gregg considered the arguments made by both parties and issued their decision on July 16, 2004. The decision of the arbitration panel (DAP) recognizes the unique procedural posture of this case due to the USTA II decision and the impending interim rules anticipated from the FCC. In rejecting SBC’s arguments, the DAP states:

Given the current posture of this arbitration and the current uncertainty surrounding the impending FCC action, the Panel believes it would be in the best interest of the parties, the Commission and the telecommunications industry to allow this petition to be withdrawn at this time. Many of the determinations the Panel and ultimately the Commission will make will likely be undermined by the new FCC rules. This will necessarily result in a meaningless and expensive effort to address those issues now. The parties should have the opportunity to undertake negotiations under the new FCC rules prior to bringing disputed issues to the Commission for resolution. Efficiency and conservation of limited Commission and party resources support the termination of the proceeding at this time and under these circumstances.

DAP, p.4.

Furthermore, the arbitration panel noted the Commission's reliance on the USTA II decision in other cases dealing with the TRO.

SBC filed its objections to the DAP on July 22, 2004. SBC argues that withdrawing the petition for arbitration violates its statutory right to have the issues resolved. SBC contends that even if XO's motion to withdraw is granted, SBC still has an absolute right to arbitration on the issues that SBC presented to the arbitration panel.

On July 26, 2004, XO filed a reply to SBC's objections. XO insists that SBC's objections must be rejected and that the Commission should adopt the DAP. First, XO contends that the doctrine of judicial estoppel prevents SBC from objecting to the DAP. XO explains that because SBC has a pending motion to terminate the proceeding, which is the recommendation set forth in the DAP, judicial estoppel prevents SBC from seeking inconsistent relief. Second, XO argues that SBC did not respond to its petition for arbitration in a timely manner. According to XO, the procedures adopted by the Commission in the July 16, 1996 order in Case No. U-11134 require a response to a petition for arbitration to be filed within 25 days. XO asserts that SBC failed to meet that deadline. XO contends that even if SBC electronically filed the correct documents, documents so filed are not considered officially filed until the day on which the Commission receives the paper copy of the document. Accordingly, XO maintains that SBC's response to the petition

for arbitration did not occur until several days after the 25-day deadline. Finally, XO contends that SBC is not prejudiced if the proceeding is terminated because withdrawal of the petition for arbitration is without prejudice and the parties are free to raise the issues with another procedural vehicle.

The Commission is persuaded by the reasoning of the DAP. Both the petitioner and the respondent have sought to have this proceeding dismissed, albeit for different reasons. Moreover, given the USTA II ruling and the FCC's intention to promulgate new rules in the near future, it makes no sense to continue this proceeding at this time. In any event, the parties are free to raise these issues again as the petition is being dismissed without prejudice.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. The DAP should be adopted and the petition for arbitration should be dismissed without prejudice.

THEREFORE, IT IS ORDERED that the petition for arbitration is dismissed without prejudice.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days  
issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark  
Chair

( S E A L )

/s/ Robert B. Nelson  
Commissioner

/s/ Laura Chappelle  
Commissioner

By its action of August 10, 2004.

/s/ Mary Jo Kunkle  
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Suggested Minute:

“Adopt and issue order dated August 10, 2004 granting the request filed by XO Michigan, Inc., for dismissal of the petition for arbitration, as set forth in the order.”