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XO Communications, Inc.

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November 12, 2002

Ms. Magalie Roman Salas  
Secretary, Federal Communications Commission  
44.5 12<sup>th</sup> Street, S.W., Room TW-A325  
Washington, D.C 20554

**Ex Parte Presentation**

RE: WC Docket 02-306, Application by SBC Pacific for Authorization to Provide In-Region, InterLATA Services in California

Dear Ms. Salas:

Pursuant to the requirements of Sections 1.1200 et seq. of the Commission's rules, you are hereby notified on behalf of XO Communications, Inc and XO California, Inc. that Christopher McKee, Director, Regulatory Affairs and the undersigned had a telephone conversation with Aaron Goldschmidt of the Wireline Competition Bureau on Friday, November 8 regarding several aspects of SBC Pacific's DS3 and DSI UNE loop rates.

In particular, we discussed with Mr. Goldschmidt SBC Pacific's recent offer to amend XO's interconnection agreement to put in place an interim DS3 UNE loop rate of \$573.20 instead of the current rate of \$1,837.18. A copy of SBC Pacific's initial proposed amendment is attached. While SBC Pacific's offer of an interim rate is appropriate given that its own proposed rate in the California UNE Reexamination proceeding show that the rate is at least 300 percent higher than it should be, there are several extremely troubling aspects to the offer that XO asks Commission staff to consider.

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First, SBC Pacific's own data shows that the \$573.20 rate is too high. SBC Pacific's own proposal would support deaveraged rates as follows:

Zone 1 \$ 482.71  
Zone 2 \$ 714.60  
Zone 3 \$ 1411.63

It appears that the \$573.20 rate that SBC Pacific has provided is the statewide weighted average loop rate. At a minimum, this rate should be deaveraged by zone according to Section 51.507(f) of the FCC's rules. The obvious reason that SBC is not offering a properly de-averaged rate is that the majority of SBC Pacific central offices fall into Zone 1. Thus, the bulk of DS3 loops are ordered by XO and other CLECs in Zone 1. SBC Pacific should be required to offer its proposed, deaveraged rates on an interim basis. Otherwise, XO and other CLECs will continue to pay more than even SBC Pacific acknowledges is an appropriate rate in Zone 1 where competition for business users is most fierce.<sup>1</sup>

Second, SBC Pacific initially proposed that the interim rate not become effective until such time as the California Public Utility Commission (the "CPUC") approves the amendment. As we explained to Mr. Goldschmidt, under the CPUC's processes and procedures this would mean that the interim rate would not become available and effective for at least another 30 days even assuming that both parties executed the amendment today.<sup>2</sup> Since the FCC is required to act on SBC Pacific's application by December 17, 2002, SBC Pacific's current exorbitant DS3 rates would likely be the only rates available and in place on the date that the Commission must rule on SBC Pacific's application. Since the Commission must find that SBC Pacific's rates are cost-based in order to approve the application, XO submits that such a finding is impossible if an acceptable interim pricing plan remains hypothetical at the Commission's deadline.

XO has recommended two remedies to the timing problem. First, XO proposed to SBC Pacific representatives that the amendment should be revised to reflect that the interim pricing is effective on September 20, 2002, the date that SBC Pacific itself has

<sup>1</sup> AT&T's and WCOM's cost studies support a DS3 rate of \$268.76. SBC Pacific's proposed rates should be viewed as self-serving and likely the highest rate that the CPUC could find reasonable. XO recognizes that even if SBC Pacific aligns its interim rates with the deaveraged rates that SBC Pacific has proposed, XO is in all likelihood still paying too much for these facilities.

<sup>2</sup> The CPUC's notice period for interconnection agreement amendments is 30 days. Further, it has been XO's experience that SBC Pacific's contract management group take at least two weeks to get interconnection agreement amendments executed and on file. This would add approximately 14 days to the CPUC's 30 day clock.

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proposed as a "true-up" date once the CPUC completes its open cost proceeding. SBC Pacific has rejected that proposal. In the spirit of compromise, XO then suggested that SBC Pacific revise the amendment to reflect that the interim pricing is effective on November 1, 2002, the date that SBC Pacific announced its interim pricing proposal to the FCC and to CLEC industry. SBC Pacific has refused this proposal and instead has offered an effective date of December 15, 2002, a mere two days before the FCC must act on SBC Pacific's application. This offer has not been made in writing and SBC Pacific has provided no explanation for why a December 15 date is appropriate given that it chose a "true up" date of September 20 and that it publicly announced its interim pricing plan on November 1. SBC Pacific's intransigence on the timing of its interim pricing proposal is one more example of SBC Pacific's arrogance regarding the California 271 process. Although its excessive DS3 rates have been in place for three years, SBC Pacific continues to try to eke out another three or four months of gouging XO, even though its DS3 rates are by its own admission more than 300 percent too high.

Third, SBC Pacific has included in its DS3 interim pricing amendment a "change of law" provision embedded in paragraph No. 5 that prejudices the outcome of the FCC's Triennial Review proceeding and potentially strips XO of its own entitlement to benefits or protections stemming from a future change of law. In addition, it strips XO of any rights it may have under state law. The language states that if the FCC finds in its Triennial Review that loops or DS3 loops are no longer a UNE:

Pacific will not be obligated by this Agreement or Amendment to provide DS3 UNE Loops, including but not limited to the DS3 UNE Loop terms and conditions and the nonrecurring DS3 UNE Loop rate set forth in the Agreement or the interim DS3 UNE Loop recurring rate set forth in this Amendment, but rather, any such obligations shall automatically terminate upon the effective date of any such action or order, at which time the DS3 UNE Loop (including the nonrecurring rate) set forth in the Agreement and the interim DS3 UNE Loop recurring rate set forth in this Amendment would be converted to the applicable DS3 Fiber Advantage Channel Termination rates, terms and conditions set forth in Pacific's C.P.U.C. No. 175-T Tariff if 90% or more of the traffic carried over the DS3 UNE Loop is jurisdictionally intrastate traffic, or Pacific's FCC No. 1 Tariff if more than 10% of the traffic carried over the DS3 UNE Loop is jurisdictionally interstate traffic. In the event of any such conversion(s), all applicable charges shall apply. In addition, following any such conversion(s), the Parties shall engage in a true-up of the interim DS3 UNE Loop recurring rate set forth in this Amendment retroactive to the Rate Effective Date set forth in this Amendment, including the payment of refunds or recovery of surcharges, as applicable. (emphasis added)

This language is patently over-reaching and unacceptable. Moreover, this change of law provision was not included in the first amendment that SBC Pacific provided to CLECs in connection with its offer to make the DS1 and DS3 rates interim subject to true up

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retroactive to September 20.<sup>3</sup> By including this **language** in the second amendment dealing with the interim DS3 rate, SBC Pacific casts grave doubt on whether its offer of interim pricing is bona fide. Even if the FCC in its Triennial review should decide to modify in some fashion the list of UNEs, it is highly unlikely and would be arguably unlawful for such a decision to have retroactive effect, yet that is precisely the effect of SBC Pacific's amendment. It is also possible that even if the FCC decides to modify the list, it will do so according to a transition period or **only in accordance** with a yet-to-be determined standard. Here, SBC Pacific has written its own ending to the Triennial Review proceeding as well as the California UNE Reexamination proceeding in months before either an FCC or a CPUC order is expected.<sup>4</sup> XO told SBC Pacific that it is willing to accept standard change of control law that gives SBC Pacific the full benefit of future FCC or CPUC action. In fact, such language already exists in the interconnection agreement between the parties. SBC Pacific responded that the language regarding the outcome of the Triennial Review is non-negotiable.

Fourth, SBC Pacific has not offered an interim rate plan for its overpriced DSI UNE Loop rates. XO and other CLECs order significantly more DSI UNE Loops than DS3 UNE Loops. Although SBC Pacific has promised that it will "true up" DSI UNE loop prices at some indefinite date in the future, such a date may be years from now and well after SBC Pacific has gained interLATA authority. As XO explained in its comments, a true-up offer is insufficient to establish that SBC Pacific is in current compliance with the Act. SBC Pacific must establish a reasonable, interim rate for both DSI loops and DS3 loops before the Commission can possibly make a determination that present UNE prices are in compliance with the Section 252(d)(1) standard. SBC Pacific's DSI UNE loop rate does not meet this requirement.

In Decision (D.)02-05-042, the California Public Utilities Commission ("CPUC") implemented on an interim basis -- subject to true up -- a 15.1% reduction in SBC Pacific's 2-wire loop rate. In the decision, the CPUC noted, "Pacific has admitted significant volume growth for high capacity services provided over DSI and DS3 facilities." Further, the CPUC held that it would "account for DS-1 lines as two access lines since they are comprised of two pairs of copper." Yet, the CPUC did not adopt a 15.1% reduction for SBC Pacific's DSI UNE loop rate. As discussed in XO's opening comments, SBC Pacific points to SBC Texas as a comparable state to California for purposes of benchmarking UNE rates. SBC Texas' Zone I DSI UNE loop rate, unlike

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<sup>3</sup> XO and SBC Pacific have agreed to the change of law and reservation of rights **language** in *that* first amendment

<sup>4</sup> The fact that SBC Pacific subsequently offered to modify the second amendment so that the change of law provision would include language to the effect "unless the FCC decides otherwise" does not alter this fact and does not make the provision any less extreme and objectionable.

<sup>5</sup> D.02-05-042 at 27.

<sup>6</sup> *Id.* at 30.

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the current DSI UNE loop rate in California, was closely scrutinized by the Texas Commission and, not surprisingly, is approximately 15.1% lower than SBC Pacific's rate. The Texas DSI UNE rate is \$76.22. A 15.1% reduction in the SBC Pacific DSI rate would result in a DSI UNE loop rate of \$76.64. Accordingly, SBC Pacific should be required to reduce its DSI UNE loop rate on an interim basis subject to true up or its 271 application should be denied.

Unless and until SBC Pacific is willing to address each of these concerns, it is inescapable that its offer of an interim pricing plan is illusory and SBC Pacific's Section 271 application must be denied. At this stage of development of telecommunications competition, the obligations imposed by checklist item 2 regarding UNE pricing are arguably the most important obligations created by the Act. Yet, SBC Pacific appears so certain of FCC approval that it has put forward a proposal for an interim that exceeds even its own pricing proposal and that continues to allow it to charge patently unreasonable rates until some future, uncertain date. In addition, SBC Pacific has larded the amendment with change of law language that prejudices the outcome of the FCC's Triennial Review and strips XO of important rights. Finally, SBC Pacific has done nothing to lower its DS-1 Loop pricing to an appropriate cost-based level. For each of these reasons, XO reiterates its request that the FCC reject SBC Pacific's application.

Should there be any questions regarding this matter, please do not hesitate to contact Christopher McKee (703-547-2358), Karen Potkul (949-417-7766) or me.

Sincerely,



Cathleen Massey  
Vice President, External Affairs

Enc.

cc: Sean O'More	Susan German
Rhonda Lien	Katie Rangos
Joanne Wall	Daniel Shiman
Aaron Goldschmidt	
Renee Critrendon	
John Stanley	
Jack Yachbes	
Pam Arluk	

**AMENDMENT TO  
INTERCONNECTION AGREEMENT**

**BETWEEN**

**PACIFIC BELL TELEPHONE COMPANY d/b/a  
SBC PACIFIC BELL TELEPHONE COMPANY**

**AND**

**[CLEC NAME]**

WHEREAS, Pacific Bell Telephone Company d/b/a SBC Pacific Bell Telephone Company ("Pacific"), formerly Pacific Bell and [CLEC NAME] ("CLEC") ("collectively referred to as the "Parties") entered into an Interconnection Agreement which became effective on [INSERT EFFECTIVE DATE] ("the Agreement");

WHEREAS, the Agreement permits the Parties to mutually amend the Agreement in writing;

WHEREAS, for purposes of Pacific's federal 271 application for California pending before the Federal Communications Commission ("FCC"), in WC Docket No. 02-306, for approval to provide in-state interLATA service pursuant to 47 U.S.C. §271, Pacific is making available to CLECs in California a certain interim DS3 Unbundled Network Element ("UNE) Loop recurring rate, as set forth below, upon the terms and conditions set forth herein;

WHEREAS, pursuant to Resolution ALJ 181, this Amendment will become effective, absent rejection of the advice letter by the Commission, thirty (30) days after the filing date of the Advice Letter to which this amendment ("Amendment") is appended ("Amendment Effective Date");

WHEREAS, this Amendment shall only be available to those CLECs in California who have or obtain the Amendment for Interim Rate DS1/DS3 Loops Amendment. previously announced by Pacific in Accessible Letter CLECC02-267;

NOW THEREFORE, the Parties agree to amend the Agreement based upon the following terms and conditions:

(1) The Agreement is hereby amended to replace the recurring rate for a DS3 UNE Loop currently set forth in such Agreement with the following interim recurring rate for a DS3 UNE Loop, effective as of the Amendment Effective Date:

Interim DS3 UNE Loop Recurring Rate (statewide average rate only): \$573.20

(2) This Amendment shall not modify the nonrecurring rate for the DS3 UNE Loop currently set forth in the Agreement, but rather, such nonrecurring rate shall continue to apply to the DS3 UNE Loop.

(3) For any DS3 UNE Loops CLEC has in service on the Amendment Effective Date, the interim DS3 UNE Loop recurring rate set forth above in this Amendment shall be effective between the Parties as of the Amendment Effective Date.<sup>1</sup> Pacific will calculate and apply to CLEC's bill any applicable credits or charges due CLEC as a result of such pricing change.

<sup>1</sup> Notwithstanding anything to the contrary in the Agreement (including, as applicable, this Amendment and any other Amendments to the Agreement ("Agreement")), in the event that any other telecommunications carrier should adopt provisions in the Agreement pursuant to Section 252(i) of the Act ("Adopting CLEC) alter the effective date of a particular rate change, that rate change shall only apply prospectively beginning from the date that the MFN provisions becomes effective between Pacific and the Adopting CLEC following the Commission's order approving the Adopting CLECs Section 252(i) adoption or, the date such Agreement is deemed approved by operation of law (Section 252(i) Effective Date), and that rate change would not in any manner apply retroactively prior to the Section 252(i) Effective Date.

(4) The Parties agree that any billing adjustments and payments made in accordance with this Amendment are not subject to Pacific's obligations under the Service Performance Measurements and that liquidated damages shall not apply to any adjustment or credits made in connection with this Amendment and will not be included in or affect any past, current or future performance measurement results.

(5) The Term and Termination provisions set forth in the Agreement shall not apply to the rates, terms and conditions being incorporated into the Agreement by this Amendment. Rather, this Amendment, including the interim DS3 UNE Loop recurring rate set forth herein, will automatically terminate the earlier of: (1) the date the CPUC approves an interim or final DS3 UNE Loop recurring rate in Application 01-02-024/A.01-02-035, the CPUC's Unbundled Network Element (UNE) Reexamination for Pacific Bell Telephone Company, at which time the interim DS3 UNE Loop recurring rate set forth in this Amendment would automatically be replaced by the DS3 UNE Loop recurring rate established by the CPUC in such proceeding, subject to any appeals and associated review, and the Parties would engage in a true-up of the Commission-established DS3 UNE Loop recurring rate(s) retroactive to September 20, 2002, as to any DS3 UNE Loops that CLEC had in service during such true-up period (i.e., the true-up would be based upon the difference between the final Commission-established DS3 UNE Loop recurring rate and the recurring rate(s) paid by CLEC for DS3 UNE Loops during the true-up period), including the payment of refunds or recovery of surcharges, as applicable;<sup>2</sup> or (2) upon the effective date of any regulatory or judicial action, finding and/or order, including but not limited to by the FCC in its pending Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) ("Triennial Review UNE rulemaking") finding that Loops or DS3 Loops are no longer a UNE. In the event of such action or order, Pacific will not be obligated by this Agreement or Amendment to provide DS3 UNE Loops, including but not limited to the DS3 UNE Loop terms and conditions and the nonrecurring DS3 UNE Loop rate set forth in the Agreement or the interim DS3 UNE Loop recurring rate set forth in this Amendment, but rather, any such obligations shall automatically terminate upon the effective date of any such action or order, at which time the DS3 UNE Loop (including the nonrecurring rate) set forth in the Agreement and the interim DS3 UNE Loop recurring rate set forth in this Amendment would be converted to the applicable DS3 Fiber Advantage Channel Termination rates, terms and conditions set forth in Pacific's C.P.U.C. No. 175-T Tariff if 90% or more of the traffic carried over the DS3 UNE Loop is jurisdictionally intrastate traffic, or Pacific's FCC No. 1 Tariff if more than 10% of the traffic carried over the DS3 UNE Loop is jurisdictionally interstate traffic. In the event of any such conversion(s), all applicable charges shall apply. In addition, following any such conversion(s), the Parties shall engage in a true-up of the interim DS3 UNE Loop recurring rate set forth in this Amendment retroactive to the Rate Effective Date set forth in this Amendment, including the payment of refunds or recovery of surcharges, as applicable.

(6) The Parties acknowledge and agree that the rates set forth in this Amendment are each legitimately related to, conditioned on and consideration for, every other term and condition in this Amendment.

(7) EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS IN THE UNDERLYING AGREEMENT REMAIN UNCHANGED.

(8) Notwithstanding any other change of law provision in the Agreement, the Parties acknowledge and agree that in entering this Amendment neither Party is waiving any of its rights, remedies or arguments with respect to any orders, decisions or proceedings and any remands thereof, including but not limited to its rights under the United States Supreme Court's opinion in *Verizon v. FCC*, 535 U.S. \_\_\_\_ (2002); the D.C. Circuit's decision in *United States Telecom Association, et. al v. FCC*, No. 00-101 (May 24, 2002); the FCC's *Order In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, (FCC 99-370) (rel. November 24, 1999), including its Supplemental Order Clarification (FCC 00-183) (rel. June 2, 2000) in CC Docket 96-98; or the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68 (the "ISP Inter-carrier Compensation Order") (rel.

<sup>2</sup> In the event the CPUC first establishes interim DS3 UNE Loop recurring rate(s) in Application 01-02-024/A.01-02-035, then upon the CPUC's establishment of a final DS3 UNE Loop recurring rate(s), the final DS3 UNE Loop recurring rate(s) shall be retroactively true-up back to September 20, 2002, as to any DS3 UNE Loops that CLEC had in service during such true-up period (i.e., the true-up would be based upon the difference between the final Commission-established DS3 UNE Loop recurring rate and the recurring rate(s) paid by CLEC for DS3 UNE Loops during the true-up period).

April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). Rather, in entering into this Amendment, each Party fully reserves all of its rights, remedies and arguments with respect to any decisions, orders or proceedings, including but not limited to its right to dispute whether any UNEs and/or UNE combinations identified in the Agreement and this Amendment must be provided under Sections 251(c)(3) and 251(d) of the Act, and under this Agreement. The Parties further acknowledge that they have executed an amendment superseding certain compensation, interconnection and trunking terms ("Reciprocal Compensation Amendment"). Until the expiration of such Reciprocal Compensation Amendment, the Parties agree not to exercise their intervening law rights for any reciprocal compensation, point of interconnection or trunking requirements that are subject to the Reciprocal Compensation Amendment. By executing this Amendment, neither Party waives any of its rights that it may have at the time of, or that arise after, the expiration of the Reciprocal Compensation Amendment and expressly reserve all of their respective rights, under the ISP Intercarrier Compensation Order, or any other regulatory, legislative or judicial action. In the event that the FCC, a state regulatory agency or a court of competent jurisdiction, in any proceeding, including without limitation, in the FCC's Notice of Proposed Rulemaking, **Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers**, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) ("Triennial Review UNE rulemaking"), finds, rules and/or otherwise orders that any of the UNEs and/or UNE combinations provided for under this Agreement and this Amendment do not meet the necessary and impair standards set forth in Section 251(d)(2) of the Act, the affected provision will be immediately invalidated, modified or stayed as required to effectuate the subject order upon written request of either Party. In such event, the Parties shall have sixty (60) days from the effective date of the order to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications required to the Agreement. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the effective date of the order, any disputes between the Parties concerning the interpretations of the actions required or the provisions affected by such order shall be handled under the Dispute Resolution Procedures set forth in this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed in triplicate on the date(s) shown below by their respective duly authorized representatives.

CLEC

Pacific Bell Telephone Company d/b/a  
SBC Pacific Bell Telephone Company  
By SBC Telecommunications, Inc.,  
its authorized agent

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(Print or Type)

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_  
(Print or Type)

Title: *For/* President-Industry Markets

Date: \_\_\_\_\_

Date: \_\_\_\_\_

AECN/OCN # \_\_\_\_\_