Before the
Federal Communications Commission
Washington, DC 20554

In re the Application of GTE CORPORATION, Transferor, And BELL ATLANTIC CORPORATION, Transferee, For Consent to Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	))))))))))	CC Docket No. 98-184
In re Applications of AMERITECH CORPORATION, Transferor AND SBC COMMUNICATIONS, INC, Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules	)))))))))))	CC Docket No. 98-141

REPLY COMMENTS OF
ACN COMMUNICATION SERVICES, INC.,
ADELPHIA BUSINESS SOLUTIONS OPERATIONS, INC. D/B/A TELCOVE, ATX COMMUNICATIONS, INC., CAPITAL TELECOMMUNICATIONS, INC., CTC COMMUNICATIONS CORP., CTSI, LLC, DSLNET COMMUNICATIONS, LLC, EL PASO NETWORKS, LLC, FOCAL COMMUNICATIONS CORP., GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS, ICG TELECOM GROUP, INC., INTEGRA TELECOM, INC., LIGHTSHIP TELECOM, LLC, LIGHTWAVE COMMUNICATIONS, LLC, MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MPOWER COMMUNICATIONS CORP., NTELOS NETWORK INC., PAETEC COMMUNICATONS, INC., (CONTINUED)

PAC-WEST TELECOMM, INC. RCN TELECOM SERVICES, INC., TDS MET-ROCOM, LLC AND VYCERA COMMUNICATIONS, INC.

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

REPLY COMMENTS 4

I. THE AUDIT REQUIREMENT IS NECESSARY BECAUSE VERIZON IS STILL OBLIGATED TO OFFER UNES PURSUANT TO TERMS OF THE *BELL ATLANTIC/GTE MERGER ORDER*. 4

A. The *Bell Atlantic/GTE Merger Order* and Conditions Require Verizon to Offer UNEs Pursuant to the Commission's *UNE Remand* and *Line Sharing Orders*. 4

B. Any Arguments that Bell Atlantic/GTE Merger Condition XIII, Offering of UNEs, has Terminated or Sunsetted Should be Rejected. 8

II. THE AUDIT REQUIREMENT IS NECESSARY BECAUSE SBC IS STILL OBLIGATED TO OFFER UNES PURSUANT TO THE SBC/AMERITECH MERGER CONDITIONS. 15

III. INDEPENDENT AUDITS REMAIN NECESSARY TO ENSURE COMPLIANCE WITH AND ENFORCEMENT OF THE MERGER CONDITIONS. 18

A. Independent Audits Result in the Disclosure of Information that Would Not Have Otherwise Been Available. 19

B. The Independent Audit Conditions Provide a Means for Unbiased, Close Scrutiny of SBC's and Verizon's Compliance. 21

C. SBC's and Verizon's Continued Failure to Comply with Their Merger Conditions Warrants Retaining the Independent Auditor Requirement. 23

CONCLUSION 25

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INTRODUCTION AND SUMMARY

ACN Communication Services, Inc.; Adelphia Business Solutions Operations, Inc. d/b/a TelCove; ATX Communications, Inc.; Capital Telecommunications, Inc.; CTC Communications

Corp.; CTSI, LLC; DSLnet Communications, LLC; El Paso Networks, LLC; Focal Communications Corp.; Gillette Global Network, Inc. d/b/a Eureka Networks; ICG Telecom Group, Inc.; Integra Telecom, Inc.; Lightship Telecom, LLC; LightWave Communications, LLC; McLeodUSA Telecommunications Services, Inc.; Mpower Communications Corp.; NTELOS Network Inc.; Pac-West Telecomm, Inc.; PAETEC Communications, Inc.; R&B Network Inc.; RCN Telecom Services, Inc.; and Vycera Communications, Inc (f/k/a Genesis Communications Int'l, Inc.) (collectively, the "Joint Commenters") submit reply comments regarding the requests made by Verizon Communications, Inc. ("Verizon") and SBC Communications Inc. ("SBC") that the Commission no longer require them to engage an independent auditor to examine their respective compliance with the conditions set forth in the *Bell Atlantic/GTE Merger Order*[1] and *SBC/Ameritech Merger Order*.[2]

Verizon's and SBC's requests should be denied because they both have ongoing duties under their respective merger orders that need to be audited. Under the *Bell Atlantic/GTE Merger Order*, Verizon has a continuing obligation to offer UNEs consistent with the *UNE Remand* and *Line Sharing Orders*. SBC also has a continuing obligation, under the *SBC/Ameritech Merger Order*, to offer certain UNEs as well. As the Commission recognizes,

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[1] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221 (2000) ("*Bell Atlantic/GTE Merger Order*"). The actual merger conditions appear as Appendix D to the Order ("Bell Atlantic/GTE Merger Conditions").

[2] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279 (1999) ("*SBC/Ameritech Merger Order*"). The actual merger conditions appear as Appendix C to the Order ("SBC/Ameritech Merger Conditions").

Verizon's and SBC's proposed mergers were approved in reliance on Verizon's and SBC's voluntary commitments that they would comply with the merger conditions established in these orders. The commitments to offer certain UNEs were designed to reduce the uncertainty to competing carriers from litigation that may arise in response to the Commission's order in the UNE Remand proceeding and subsequent proceedings, such as the Triennial Review proceedings. Due to the tremendous uncertainty from litigation that has arisen as a result of the appeals of the FCC's *UNE Remand* and *Triennial Review Orders*, Verizon's and SBC's compliance with these merger commitments is critical at this juncture. Given this and the fact that the merger conditions have not expired or sunsetted, Verizon and SBC should not be relieved of having an auditor investigate their compliance with such important commitments. As discussed herein, any arguments to the contrary should be rejected.

SBC's and Verizon's requests should also be denied because the independent audits are an essential aspect of the Commission's and other parties' review of SBC's and Verizon's ongoing compliance. The independent audits can and do identify non-compliance issues that would otherwise not be disclosed. Because neither the Commission nor interested parties have access to the data underlying SBC's and Verizon's voluntary compliance reports, the Commission and CLECs cannot identify incidents of non-compliance buried in this data or in SBC's or Verizon's interpretation of the data. In addition, contrary to SBC's and Verizon's claims, even if a CLEC is able to identify non-compliance on its own, the compliant process is not always an expedient or cost-effective method of enforcing compliance. The independent audit requirement, on the other hand, provides an ongoing means for the Commission to identify non-compliance issues and promptly enforce compliance. Finally, as the large, continuing fines, forfeitures and penalties to which SBC and Verizon have been subject demonstrate, SBC and Verizon continue to

violate their Merger Conditions even with the independent audit requirement. SBC and Verizon should not be rewarded for their poor performance by the Commission eliminating the one condition the Commission noted is the most efficient and cost-effective means of monitoring SBC's and Verizon's ongoing compliance. As long as the Merger Conditions remain in effect, the Commission should continue to require SBC and Verizon to engage an independent auditor to monitor their compliance with those conditions.

REPLY COMMENTS

I. THE AUDIT REQUIREMENT IS NECESSARY BECAUSE VERIZON IS STILL OBLIGATED TO OFFER UNES PURSUANT TO TERMS OF THE *BELL ATLANTIC/GTE MERGER ORDER.*

A. The *Bell Atlantic/GTE Merger Order* and Conditions Require Verizon to Offer UNEs Pursuant to the Commission's *UNE Remand* and *Line Sharing Orders.*

Verizon's request that the Commission relieve it of having an independent auditor examine its compliance with the conditions of the *Bell Atlantic/GTE Merger Order* should be denied. Contrary to the Verizon's claims, Verizon's still has an ongoing legal duty to offer UNEs as required by Bell Atlantic/GTE Merger Condition XIII (¶ 39, Offering of UNEs) and its ongoing compliance with these obligations needs to be audited as Bell Atlantic/GTE Merger Condition VIII (¶ 28) requires.

There can be no question that the *Bell Atlantic/GTE Merger Order* and Bell Atlantic/GTE Merger Condition XIII mandate Verizon to offer UNEs as specified by this condition until there is a *final and non-appealable* decision that requires Verizon to do otherwise. Verizon accepted this legal obligation as a condition of receiving Commission approval of the merger of its predecessor companies, Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE"). Verizon proposed, and the Commission adopted, a series of conditions intended to mitigate potential public interest harms from the merger and to enhance competition in the local

exchange and exchange access markets in previous Bell Atlantic and GTE serving areas. One of those conditions was that Verizon continue to make UNEs available under the *UNE Remand* and *Line Sharing Orders* until the date on which the Commission orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable.[3]

Paragraph 39 of the Bell Atlantic/GTE Merger Conditions specifically states as follows:

> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in [the UNE Remand and Line Sharing Orders] ... in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.[4]

When it approved the Bell Atlantic and GTE merger with this condition, the Commission discussed the effect of the UNE condition in the following terms:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, *from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable,* Bell Atlantic and GTE will continue to make available to telecommunications carri-

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[3] *See Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*") and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (rel. Dec. 9, 1999) ("*Line Sharing Order*")).

[4] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39. By its own terms, this condition continues to apply until the date of a final and non-appealable decision, even though other provisions of the Merger Conditions may have expired. *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 64.

> ers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings [which includes subsequent proceedings] are stayed or vacated.[5]

This condition is still in effect because the Commission's *UNE Remand* and *Line Sharing Orders* never became final and non-appealable, and the Commission's *TRO*[6] is an outgrowth of those same proceedings. Both the *UNE Remand* and *Line Sharing Orders* were appealed to the D.C. Circuit, and that court, in *USTA I*, remanded both decisions to the Commission and in doing so, vacated the *Line Sharing Order* and portions of the *UNE Remand Order*.[7] The Commission then consolidated the remands of these two orders with its ongoing Triennial Review rulemaking.[8] The *TRO* is expressly captioned as an "Order on Remand" in both the UNE Remand docket (CC Docket No. 96-98) and the Line Sharing docket (CC Docket No. 98-147). Indeed, the appeals from the *TRO* were transferred to the D.C. Circuit because the order was an out-

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[5] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

[6] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*"), *aff'd, rev'd, and vacated in part sub nom., United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[7] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[8] *See* FCC Public Notice DA 02-1291, Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings (rel. May 30, 2002) (extending the deadline for reply comments in the *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (Triennial Review) proceeding until July 17, 2002 so that parties can incorporate their analysis of *USTA I* into their reply comments); *see TRO* (citing *USTA I* numerous times as the legal backdrop and basis upon which the Commission rendered its decision).

growth of that court's earlier decision,[9] and the case was assigned to the *USTA* panel for the same reason.[10] Thus, as long as the Triennial Review or successor proceedings remain pending before the Commission, neither the UNE Remand nor the Line Sharing proceeding has been terminated by a final, non-appealable order.

Of course, the *TRO* itself is far from being final and non-appealable. The D.C. Circuit recently vacated and/or remanded many significant provisions of the *TRO*, and this decision, in turn, has been appealed by CLECs to the Supreme Court. Moreover, the Commission is already moving forward in addressing the defects associated with the *TRO* that the D.C. Circuit identified in *USTA II*.[11] As the Commission explained, the Bell Atlantic/GTE Merger Condition described above was expressly designed to protect CLECs from the "uncertainty" associated with this type of litigation prior to its ultimate conclusion. Accordingly, Verizon's request that it be relieved of the audit requirement is premature and should be denied until the litigation surrounding the *UNE Remand* and *Line Sharing Orders* is finally resolved.[12]

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[9] *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003).

[10] *USTA II*, 359 F.3d at 564.

[11] *USTA II*, 359 F.3d at 594-595.

[12] Conceivably, such issues could be resolved, in *toto*, by a final judicial decision upholding the unbundling rules the Commission establishes in those proceedings. They could also be resolved, in part, by final, non-appealable Commission orders that eliminate previous unbundling obligations for certain UNEs or final, non-appealable judicial decisions holding the Commission cannot require unbundling of particular network elements in all or a portion of Verizon's operating territories.

B. Any Arguments that Bell Atlantic/GTE Merger Condition XIII, Offering of UNEs, has Terminated or Sunsetted Should be Rejected.

In a number of state arbitration and standstill proceedings, Verizon has made four primary arguments (which it is expected to make here) that its obligation to offer UNEs as required by the *Bell Atlantic/GTE Merger Order*[13] and Merger Condition XIII no longer applies. As explained below, each of these arguments fail. First, Verizon has claimed that the obligation to provide UNEs in accordance with the *UNE Remand* and *Line Sharing Orders* lasts only "until the date of any final and non-appealable judicial decision [on the direct appeals of those two named orders]."[14] Verizon has submitted that its obligation to offer UNEs pursuant to the *UNE Remand* and *Line Sharing Orders* became non-appealable when the Supreme Court denied certiorari on the D.C. Circuit's decision in *USTA I.*

Verizon is entirely incorrect in this regard. In the *Bell Atlantic/GTE Merger Order*, the Commission was perfectly clear about how and how long this merger condition applies and its basis for imposing the condition when it approved the merger of these two powerful companies that were already dominant forces in their respective markets. The Commission stated, "until the date on which the Commission's orders in [UNE Remand and Line Sharing] proceedings, ***and any subsequent proceedings***, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders...."[15] As explained above, the *TRO* is a "subsequent proceeding" and it is far from being final and non-appealable.

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[13] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[14] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[15] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

Verizon's related contention that the condition has terminated because the Supreme Court's denial of certiorari of *USTA I* was "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area"[16] is equally incorrect. Contrary to such claims, *USTA I* was no such decision. *USTA I* remanded Commission orders that had *required* unbundling; by contrast, what Verizon needs to terminate the merger condition is judicial affirmation of a Commission decision that particular UNEs are *not required* to be unbundled.[17] Such findings could only be made in the Triennial Review or subsequent decisions, which all agree are *not* final and non-appealable. Because there has *never* been any final, non-appealable order of the Commission that determined that, for example, loops, transport, and switching, are not required, Bell Atlantic/GTE Merger Condition XIII clearly remains in effect.[18] By the same token, even if the FCC determines in the *Triennial Review Remand* proceedings (which, as explained above, is the subsequent proceeding

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[16] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39.

[17] For example, the *TRO* determined that ILECs are not required to provide certain broadband UNEs to CLECs for mass market customers. *USTA II* affirmed this decision, but it remains subject to appeal at the Supreme Court. *USTA II,* 359 F.3d at 585. If the Supreme Court affirmed the Commission's decision, then and only then would there be a triggering of the condition subsequent associated with the merger condition (thus ending Verizon's obligation under the condition to offer broadband UNEs) because there would have been a "final, non-appealable judicial decision providing that the UNE or combination of UNEs is *not required to be provided* by Bell Atlantic/GTE in the relevant geographic area." See *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39 (emphasis added).

[18] Any argument by Verizon that its independent auditor verified this merger condition expired on March 24, 2003 (which is the date the Supreme Court denied certiorari of *USTA I*) can be rejected readily. *See* Letter from Deloitte and Touche to Marlene H. Dortch, CC Docket 98-184 (filed Oct. 17, 2003). Auditors are engaged to determine questions of fact, not matters of law. In addition, the independent auditor relied solely on assertions made by Verizon management that the Bell Atlantic/GTE Merger Condition at issue, *i.e.*, Condition XIII, expired on March 24, 2003. Nor is there anything in the Bell Atlantic/GTE Merger Conditions themselves that gives any particular legal effect to the report of the auditor. Until the Commission specifically releases an order that specifically repeals Verizon's obligations under a specific Bell Atlantic/GTE Merger Condition that only sunsets after the occurrence of an event specified in the condition (such as Bell Atlantic/GTE Merger Condition XIII), those obligations continue until that event occurs.

to the UNE Remand proceeding) that ILECs are not required to offer some UNEs previously made available pursuant to the *UNE Remand* and *Line Sharing Orders*, Verizon's obligation to offer such UNEs remains in effect until that Commission decision becomes final and non-appealable or there is final and non-appealable judicial decision that the Commission cannot require unbundling of a particular UNE in all or a portion of Verizon's operating territory.[19]

Second, Verizon has claimed that the Commission's Common Carrier Bureau said that if the Supreme Court vacated the Commission's TELRIC pricing rules, the *Bell Atlantic/GTE Merger Order* "would not independently impose an obligation to follow any finally invalidated pricing rules."[20] Verizon reasons that the *UNE Remand* and *Line Sharing Orders* have been "finally invalidated," and thus the *Bell Atlantic/GTE Merger Order* imposes no independent obligation to follow those rules. In making this argument, Verizon fails to explain that the *Bell Atlantic/GTE Merger Order* imposed *different* conditions relating to (1) the offering of UNEs and (2) the pricing of UNEs. With respect to pricing, the Commission stated in the *Bell Atlantic/GTE Merger Order* itself that Verizon must price UNEs consistent with the Commission's TELRIC pricing rules only until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide UNEs at cost-based rates.[21]

Unlike the condition that requires Verizon to *offer* UNEs consistent with the *UNE Remand* and *Line Sharing Orders* until the Commission's orders in those proceedings and any

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[19] The Bell Atlantic/GTE Merger Condition XIII expressly contemplates that there be geographic specificity in such orders. *Bell Atlantic/GTE Merger Order,* ¶ 316 & Appendix D ¶ 39. *See also SBC Communications Inc. v. FCC*, 373 F.3d 140, 150 (D.C. Cir 2004) (acknowledging that that the only time SBC is relieved of offering the shared transport UNE is if there is a Commission or judicial decision that shared transport is not required to be provided by SBC/Ameritech in a relevant geographic area).

[20] Letter Clarification, Bell Atlantic/GTE Merger Order, 15 FCC Rcd 18327, 18328, DA 00-2168, at 2 (2000).

[21] *Bell Atlantic/GTE Merger Order*, ¶ 316.

"subsequent proceedings" become final and non-appealable, the TELRIC pricing condition was not contingent upon "subsequent proceedings" becoming final and non-appealable.[22] Significantly, the Commission recognizes that it would not be "consistent with the ordinary principles of textual construction to read one provision ... in a fashion that nullifies another provision."[23] In this case, Verizon has essentially suggested that the last sentence of paragraph 316, which does not include the reference to subsequent proceeding, nullifies the first sentence in the paragraph that does. Such an interpretation violates such basic recognized principles.

Third, Verizon cannot persuasively argue that obligations imposed on it by the *Bell Atlantic/GTE Merger Order* expired in July 2003, or 36 months after the Bell Atlantic/GTE merger closed. AT&T made this precise point in its comments.[24] Indeed, in paragraph 64 of Appendix D to the *Bell Atlantic/GTE Merger Order*, the Commission explicitly stated that, "[e]*xcept where other termination dates are specifically established herein*, all Conditions set out in th[e] [Order] ... shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect 36 months after the merger closing date."[25] With respect to the Commission's requirement that Verizon offer UNEs in accordance with the *UNE Remand Order* and *Line Sharing Order*, the "specific" termination date is "the date" on which "the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable."[26] Since that

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[22] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[23] *See* Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Ms. Carr, Senior Executive Vice President, SBC Communications, Inc., 15 FCC Rcd 20131, DA 00-2340 (2000) (rejecting SBC's interpretation of merger conditions imposed on it by the FCC).

[24] AT&T Verizon Comments at 7-8.

[25] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 64 (emphasis added).

[26] *Bell Atlantic/GTE Merger Order*, ¶ 316.

condition subsequent has not occurred (for the reasons discussed above), Verizon is not relieved of its continuing obligation in this regard.

The Enforcement Bureau has even endorsed this reading of a similar merger condition in the *SBC/Ameritech Merger Order,*[27] as AT&T noted. The significance of this ruling cannot be overstated. In rendering its decision, the Bureau explained that "The effective period for many of the merger conditions terminates thirty-six months after the Merger Closing Date..."; however, "[s]ome of the conditions ... are not subject to that expiration date because the condition itself specifically establishes its own period of applicability [*i.e.*, based on the specific future event]."[28] It also specifically pointed out that the SBC/Ameritech merger condition (as set forth in paragraph 53 of Appendix C of the *SBC/Ameritech Merger Order*) regarding Offering UNEs remains in effect beyond 36 months after the merger closing date.[29]

The language of that SBC Merger Condition is virtually the same as the Bell Atlantic/GTE Merger Condition at issue here, so that both conditions should be interpreted similarly. Indeed, the conditions adopted by the Commission in the *Bell Atlantic/GTE Merger Order* were

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[27] *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 17 FCC Rcd 19595, DA 02-2564, ¶ 3 & n.7 (Oct. 8, 2002) ("*FCC's Enforcement Bureau Order*") (citing and interpreting *SBC/Ameritech Merger Order*, Appendix C ¶¶ 53 & 74).

[28] *FCC's Enforcement Bureau Order,* 17 FCC Rcd at 19596, ¶ 3 (emphasis added); *see also SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, Forfeiture Order, 17 FCC Rcd 19923, FCC 02-282, n.53 (2002) ("*SBC Forfeiture Order*") (recognizing that the 36 month sunset provision of the SBC/Ameritech Merger Conditions does not apply to a merger condition that specifies in the text of the condition the events that must occur before the condition expires). Bell Atlantic/GTE Merger Condition XIII, Offering UNEs, is a similar type of merger condition that continues until the events specified in the condition and specifically contemplated by the Commission in its order occur.

[29] *FCC's Enforcement Bureau Order,* 17 FCC Rcd at 19596, ¶ 3 & n.7.

"patterned closely" after those adopted in the *SBC/Ameritech Merger Order*.[30] Thus, Verizon's obligation to offer UNEs (pursuant to paragraph 316 and paragraph 39 of Appendix D to the *Bell Atlantic/GTE Merger Order)* has its own express period of applicability, which is until "the date" on which the Commission's orders in the [UNE Remand and Line Sharing] proceedings, and any subsequent proceedings, become final and non-appealable."[31]

Finally, Verizon cannot contend that the Commission in paragraph 705 the *TRO* somehow relieved Verizon from complying with this ongoing merger condition. The *TRO* says no such thing. In this paragraph, the Commission was addressing concerns that certain change of law provisions in interconnection agreements may not be triggered until all the appeals of the

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[30] *Bell Atlantic/GTE Merger Order,* ¶ 248. *Compare SBC/Ameritech Merger Order,* ¶ 394 & Appendix C ¶¶ 53 & 74, with *Bell Atlantic/GTE Merger Order,* ¶ 316 & Appendix D ¶¶ 39 & 64.

[31] *Bell Atlantic/GTE Merger Order* ¶ 316. Verizon has also argued that an Arbitrator's decision in the Verizon-Rhode Island arbitration proceeding held that the first clause of paragraph 64 only applies to specific dates and not specific future events. See *In re Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements*, RI PUC Docket 3588, Procedural Arbitration Decision, at 18-19 (R.I. PUC. Apr. 9, 2004) ("*RI Procedural Arbitration Decision*"). The Commission itself, however, has not recognized this distinction, and has treated a specific future event as equivalent to a specified future date. In rendering his decision, the Arbitrator apparently inadvertently overlooked the Enforcement Bureau's decision that demonstrates that the Bell Atlantic Merger Condition at issue has its own period of applicability, *i.e.,* it does not terminate after 36 months and is based on the specific event specified by the Commission. *See FCC's Enforcement Bureau Order,* ¶ 3 & n.7. Certain Joint Commenters that are parties to this Rhode Island proceeding are therefore seeking reconsideration of this erroneous determination made by the Rhode Island Arbitrator.

The same Joint Commenters are also seeking reconsideration of the Rhode Island Arbitrator's determination that paragraph 705 of the *TRO* implicitly repealed Verizon's obligations under the merger condition at issue. Contrary to this decision, the legal doctrine of repeal by implication applies to statutes, not agency decisions, and application of the doctrine is not favored in any event. *See Rodriguez v. United States,* 480 U.S. 522, 524 (1987). In this case, the doctrine would be inapplicable because there is no "irreconcilable conflict" between paragraph 705 and the merger condition at issue, nor is there "clear and manifest" evidence that *TRO* repealed Verizon's obligation under the merger condition. *See Id.* Under this clear legal principle, for the Commission to have repealed a merger condition, it would have to announce and justify a change. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Verizon's obligation under the Bell Atlantic/GTE merger condition therefore must be treated as an exception to the *TRO*.

TRO become final and non-appealable.[32] Although the Commission agreed that the change of law provisions in interconnection agreements were generally triggered when the *USTA I* decision became final and non-appealable, the Commission never even addressed, and certainly never relieved Verizon of, the independent obligations imposed on it in the *Bell Atlantic/GTE Merger Order*. Nor could the Commission do that by implication in the *TRO*.[33]

As emphasized above, the merger conditions are separate and independent legal obligations that were imposed on Verizon to mitigate the public interest harms from the merger of two extremely powerful companies and to enhance competition in the local exchange and exchange access markets in previous Bell Atlantic and GTE serving areas.[34] The Commission stated that the conditions serve as a "floor not a ceiling,"[35] and that "[t]he conditions are designed to address the public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs",[36] especially those established in "other more general proceedings."[37] Paragraph 705 of the *TRO* is, of course, just such a general obligation established in a general proceeding, and therefore does not repeal the floor established by the Commission in the *Bell Atlantic/GTE Merger Order*.

At bottom, Verizon's request for elimination of the audit requirement should be denied because the *Bell Atlantic/GTE Merger Order* still and unambiguously requires Verizon to offer

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[32] *TRO*, ¶ 705. In any event, the Commission's statements in paragraph 705 of the *TRO* appears to be mere *dicta*. The Commission did not have the terms of specific interconnection agreements before it and was in no position to offer an authoritative interpretation of particular change of law clauses. Nor would such an interpretative ruling be within the scope of the Commission's rulemaking process.

[33] *Greater Boston Television Corp.*, 444 F.2d at 852.

[34] *See, e.g., Bell Atlantic/GTE Merger Order*, ¶¶ 4, 246-47.

[35] *Bell Atlantic/GTE Merger Order,* ¶ 252.

[36] *Bell Atlantic/GTE Merger Order,* ¶ 253.

[37] *Bell Atlantic/GTE Merger Order,* ¶ 252.

UNEs, in accordance with the *UNE Remand* and *Line Sharing Orders*. If the Commission has difficulty coming to this conclusion - which it should not, the Commission should recognize that when there have been issues regarding how to construe conditions the Commission has imposed on a merger of two RBOCs, the Commission has, as a general matter, broadly interpreted them and has rendered clarifications that favor CLECs rather than the merged entity.[38] Thus, the Commission should confidently construe the *Bell Atlantic/GTE Merger Order* in the same manner as the Joint Commenters and reject any narrow reading of them.

II. THE AUDIT REQUIREMENT IS NECESSARY BECAUSE SBC IS STILL OBLIGATED TO OFFER UNES PURSUANT TO THE SBC/AMERITECH MERGER CONDITIONS.

For virtually the same reasons that Verizon has a continuing obligation to offer UNEs pursuant to the *Bell Atlantic/GTE Merger Order* and Bell Atlantic/GTE Merger Condition XIII, SBC has a continuing obligation pursuant to the *SBC/Ameritech Merger Order* and SBC/Ameritech Merger Condition XVII.[39] For this reason, SBC should not be relieved of having an independent auditor review SBC's compliance with its obligations in this regard.

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[38] *Global NAPs, Inc., Complainant, v. Verizon Communications, Verizon New England, Inc., and Verizon Virginia, Inc.*, File No EB-01-MD-010, Memorandum Opinion and Order, 17 FCC Rcd 4031, FCC 02-59, ¶ 15 (2002) (declining to construe the merger conditions that the Commission imposed on Verizon in the "cramped" manner suggested by Verizon); Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Mr. Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, 16 FCC Rcd 22, DA 00-2890 (2000) (rejecting Verizon's limited interpretation of the merger conditions that the Commission imposed on Verizon); *SBC Forfeiture Order,* 17 FCC Rcd 19923, FCC 02-282, ¶ 4 (rejecting SBC's statement that the merger conditions were unclear and assessing forfeitures for SBC's failure to comply with what the Commission characterized as "unambiguous" merger conditions that the Commission imposed on SBC). The interpretation of the Bell Atlantic/GTE Merger Condition XIII, Offering UNEs, requested herein is legally sound because Verizon effectively drafted the merger condition at issue and therefore, any ambiguity, as AT&T noted, must be construed against Verizon. *See* AT&T Comments at 7 (citing *United States v. Seckinger*, 397 U.S. 203, 210 (1970)("[A] contract should be construed most strongly against the drafter")).

[39] *See* AT&T SBC Comments 7-11; AT&T Verizon Comments 7-11.

Like *Bell Atlantic/GTE Merger Order*, the *SBC/Ameritech Merger Order* requires SBC to make certain UNEs available until the date on which the Commission orders in that proceeding, *and any subsequent proceedings*, become final and non-appealable.[40] In addition, similar to the Commission's rational for imposing the analogous Bell Atlantic/GTE Merger Condition, the Commission imposed this SBC/Ameritech Merger Condition to provide stability to competitive markets during periods of uncertainty when the Commission's regulations implementing Section 251(c)(3) of the Act had been stayed or vacated.[41] In the *SBC/Ameritech Merger Order* the Commission specifically stated that:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, *from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable,* SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, *unless the Commission removes an element from the list* in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is *not required to provide the UNE in all or a portion of its operating territory.*[42]

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[40] *SBC/Ameritech Merger Order*, ¶ 394 and Appendix C ¶ 53.

[41] *See id.* ¶ 394.

[42] *SBC/Ameritech Merger Order*, ¶ 394 (emphasis added). The relevant condition in the *SBC/Ameritech Merger Order* provides as follows:

> SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is *not required to be provided by SBC/Ameritech in the relevant geographic area*, or (ii) the date of a

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These conditions remain in effect, because (as discussed previously) the successor proceeding to the *UNE Remand* proceeding – the *Triennial Review* – is not final and therefore, the *UNE Remand* proceeding has not been terminated by a final, non-appealable order. Moreover, even if the FCC determines in the Triennial Review proceedings that ILECs are not required to offer UNEs previously made available, SBC's obligation to offer such UNEs remains in effect until that Commission decision becomes final or there is final and non-appealable judicial decision that the Commission cannot require unbundling of a particular UNE in all or a portion of SBC's operating territory.[43]

Moreover, for the same reasons the analogous Bell Atlantic/GTE Merger Condition did not sunset after 36 months, the SBC/Ameritech Merger Condition did not either. Indeed, the Merger Conditions' three-year "sunset" provision explicitly did not apply to conditions whose duration was otherwise specified.[44] The obligation to provide UNEs pending the final resolution of the litigation over Section 251(c)(3) obligations was precisely such a condition whose duration was specified by the Conditions.

> final, non-appealable judicial decision providing that the UNE or combination of UNEs is *not required to be provided by SBC/Ameritech in the relevant geographic area.* This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.

SBC/Ameritech Merger Order, Appendix C ¶ 53 (emphasis added)(footnotes omitted).

[43] *See id.* SBC/Ameritech Merger Condition XVII, Offering UNEs, also expressly contemplates that there be geographic specificity in such orders. *See also SBC Communications Inc. v. FCC*, 373 F.3d 140, 150 (D.C. Cir. 2004) (acknowledging that that the only time SBC is relieved of offering the shared transport UNE is if there is a final Commission or judicial decision that shared transport is not required to be provided by SBC/Ameritech in a relevant geographic area).

[44] The Commission explicitly stated that, "[e]xcept where other termination dates are specifically established herein, all Conditions set out in th[e] [Order] . . . shall cease to be effective and shall no longer bind SBC/Ameritech in any respect 36 months after the Merger Closing Date . . . ." *SBC/Ameritech Merger Order*, Appendix C, ¶ 74 (emphasis added).

Consistent with Bell Atlantic/GTE Merger Condition XIII, the specific termination date for SBC/Ameritech Merger Condition XVII is "the date" on which the "Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable."[45] This obligation could have ended months or years earlier, or later, than the sunset date. Since the purpose of the condition was to ensure stability until the litigation over Section 251(c)(3) was resolved, it would have made no sense for the Commission to have intended the merger condition to expire while the litigation remained pending. Fortunately, the Commission need not speculate on the proper interpretation of the sunset provision, because it has already held that the SBC/Ameritech Merger Condition XVII is one of the conditions that is not covered by the three-year sunset.[46] Therefore, this merger condition clearly remains in effect and SBC's compliance with this obligation needs to be verified by independent auditors as the SBC/Ameritech Merger Conditions require.

III. INDEPENDENT AUDITS REMAIN NECESSARY TO ENSURE COMPLIANCE WITH AND ENFORCEMENT OF THE MERGER CONDITIONS.

The Commission found the mergers at issue in the *Bell Atlantic/GTE Merger Order* and the *SBC/Ameritech Merger Order* to be in the public interest only with *all* of the conditions the Commission adopted and then only assuming Verizon's and SBC's ongoing compliance with

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[45] *SBC/Ameritech Merger Order* ¶ 394, and Appendix C, ¶ 53.

[46] In interpreting the SBC/Ameritech Merger Conditions, the Commission explicitly included this UNE condition in a list of conditions that were not subject to the three-year sunset date because they specified their own, different terms for expiration. *FCC's Enforcement Bureau Order,* 17 FCC Rcd at 19596, ¶ 3 & n.7; *see also SBC Forfeiture Order*, 17 FCC Rcd 19923, FCC 02-282, at n.53 (recognizing that the 36 month sunset provision of the SBC/Ameritech Merger Conditions does not apply to a merger condition that specifies in the text of the condition the events that must occur before the condition expires).

those conditions, including the conditions requiring an independent audit.[47] Indeed, one of the primary goals the Merger Conditions were designed to accomplish was "ensuring compliance with and enforcement of the conditions."[48] The Commission further found that only a strong corporate compliance program, *in conjunction with*, the independent audit and other enforcement mechanisms, would ensure protection of the public interest.[49] SBC and Verizon now seek to avoid scrutiny of their compliance and foist enforcement responsibility upon their competitors. Accordingly, the independent audit conditions remain necessary. The Commission should deny Verizon's and SBC's request to eliminate prematurely the public interest protections provided by the independent audit conditions.

A. Independent Audits Result in the Disclosure of Information that Would Not Have Otherwise Been Available.

Verizon and SBC claim that there is no reason for the Commission to continue to devote resources to independent audits when most of SBC's and Verizon's respective Merger Conditions sunset prior to January 1, 2004, or will expire in 2004.[50] Contrary to these claims, the SBC and Verizon Merger Conditions are not self-policing and, the compliant process is less efficient, less effective and more costly than the existing independent audits.[51] Experience with past audits demonstrates that independent audits result in the disclosure of compliance information that SBC

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[47] *Bell Atlantic/GTE Merger Order*, at ¶ 247; *SBC/Ameritech Merger Order*, at ¶ 359.

[48] *Bell Atlantic/GTE Merger Order*, at ¶ 251; *SBC/Ameritech Merger Order*, at ¶ 355.

[49] *Bell Atlantic/GTE Merger Order*, at ¶ 250; *SBC/Ameritech Merger Order*, at ¶ 409.

[50] SBC Waiver Request at 1; Verizon Waiver Request at 2.

[51] Comments of AT&T Corp. to SBC's Request to Eliminate Merger Condition 27 at 13-16 ("AT&T SBC Comments"); Comments of AT&T Corp. to Verizon's Request to Eliminate Merger Condition XXII at 14-16 ("AT&T Verizon Comments").

or Verizon may not have voluntarily reported to the Commission and thus these audits remain essential.[52]

Under the audit process, independent auditors have access to SBC and Verizon information that is not disclosed in SBC's or Verizon's performance reports and would not be available to any third party attempting to evaluate compliance with the Merger Conditions.[53] For example, as AT&T explained, violations of the discount conditions would only be identified by independent auditors because of their unique access to SBC's and Verizon's workpapers and because of the substantial difference between the amount of the discount and the cost of pursuing a formal complaint.[54] In these circumstances, it is either impossible or impracticable for third parties to obtain access to the information necessary to raise non-compliance issues. Significantly, in approving the Merger Conditions, the Commission determined that "[t]he independent audit requirement establishes an efficient and cost-effective mechanism for providing reasonable assurances of SBC/Ameritech's compliance with the its obligations under the conditions."[55] The independent audit condition thus makes routine, thorough evaluation of SBC's and Verizon's compliance with the Merger Conditions practicable and leads to prompt enforcement of the conditions.[56] Elimination of these conditions as requested by SBC and Verizon would remove this critical aspect of ensuring SBC's and Verizon's ongoing compliance.

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[52] AT&T SBC Comments at 14-17; AT&T Verizon Comments at 13-17.

[53] AT&T SBC Comments at 13-14; AT&T Verizon Comments at 14-15.

[54] AT&T SBC Comments at 13-14; AT&T Verizon Comments at 14-15.

[55] *SBC/Ameritech Merger Order*, ¶ 412. *See also Bell Atlantic/GTE Merger Order*, ¶ 341 (same).

[56] Indeed, as AT&T noted, citing the most recent SBC audit report, CLEC complaints alleging non-compliance remain unresolved two to three years after they were filed. AT&T SBC Comments at 14 (citing Ernst & Young Report of Independent Accountants, Attachment C (Aug. 29, 2003)). Conse- (Cont'd)

Moreover, past audits have revealed disputed interpretations affecting compliance with the Merger Conditions that would not necessarily have been identified or disclosed through self-policing or the annual audit reports. SBC's and Verizon's Annual Compliance Reports and other compliance filings necessarily only include SBC's and Verizon's interpretations and conclusions of compliance. To the extent a compliance issue is ambiguous, it is unlikely that SBC or Verizon will interpret that issue on the side of non-compliance. In fact, it is in their best interests to interpret any ambiguity in favor of compliance. AT&T identified several instances of such self-serving interpretations that were later found to be incorrect, but only after the issues were identified through the independent audit process.[57] Because neither the Commission nor CLECs would have access to the data, interpretations and assumptions underlying SBC's and Verizon's compliance filings, it is unlikely that these issues would have been identified and resolved in the absence of the independent audit conditions. Consequently, SBC's and Verizon's claimed self-policing or compliant solutions cannot offer the same level of assurance that SBC and Verizon are in fact complying with the Merger Conditions.

B. The Independent Audit Conditions Provide a Means for Unbiased, Close Scrutiny of SBC's and Verizon's Compliance.

As noted, in the absence of the independent audit conditions, the Commission and CLEC's do not have access to underlying data, methodologies, and interpretations that for the basis of SBC's and Verizon's compliance filings. Under SBC's and Verizon's proposals, a CLEC would only be able to identify non-compliance if it was aware of specific instances where

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quently, relying solely upon self-policing or the complaint process as SBC and Verizon urge would not provide prompt, effective enforcement of non-compliance and would not promote the public interest goals that the conditions were initially intended to serve.

[57] AT&T SBC Comments at 15-16; AT&T Verizon Comments at 14-16.

SBC or Verizon failed to comply with their Merger Conditions and then would only be able to enforce compliance by expending the substantial resources necessary to pursue a complaint with the Commission. Significantly, even if a CLEC were able to identify non-compliance on its own, the compliant process is not always an expedient or cost-effective method of enforcing compliance. Further, unless CLECs were given access to the information underlying SBC's and Verizon's compliance filings, they would have no way to effectively monitor compliance, and, even with such access, many CLECs may not have resources or incentive to identify and pursue enforcement. The independent audit conditions address both of these concerns by identifying and disclosing for all parties compliance issues that might not otherwise be disclosed and enabling the Commission to enforce compliance promptly.

Placing audit and enforcement responsibilities with SBC and Verizon, which would be the effective result of SBC's and Verizon's proposals to eliminate the independent auditor requirement, would let the fox guard the henhouse. SBC and Verizon have every incentive to find compliance and to resolve uncertainties in their own favor. An enforcement policy that relies upon the parties subject to compliance to identify and disclose their own violations is ineffective, unworkable and contrary to the public interest.

When it imposed the Merger Conditions on SBC and Verizon, the Commission did so to protect the public interest from the potential negative effects of the Bell Atlantic/GTE and SBC/Ameritech mergers. In doing so, the Commission noted that only a strong compliance program, in conjunction with the independent audit would protect the public interest. Given the millions of dollars in penalties and forfeitures SBC and Verizon have paid to the Treasury for failure to comply with their merger conditions, even in recent months, it is clear that their compliance record falls short. In fact, this evidence demonstrates that SBC's and Verizon's

compliance has changed little since the Commission first imposed the audit conditions. Removing the second element of protection of the public interest provided by the Merger Conditions – the independent audit conditions – severely limits the ability of the Commission and CLECs to monitor even SBC's and Verizon's demonstrated inadequate performance and increases the likelihood that future non-compliance will go unnoticed. As long as the Merger Conditions remain in effect and until SBC and Verizon have demonstrated that they are in fact complying with the remaining Merger Conditions, the Commission should not relieve SBC and Verizon of the independent audit requirements.

C. SBC's and Verizon's Continued Failure to Comply with Their Merger Conditions Warrants Retaining the Independent Auditor Requirement.

SBC and Verizon have been subject to millions of dollars in fines for failure to comply with their respective Merger Conditions since the Commission imposed the conditions.[58] In fact, in 2004, despite SBC's and Verizon's claims that a number of their Merger Conditions have sunset, SBC has been subject to nearly $1.5 million in fines[59] and Verizon has been subject to nearly $2 million in fines.[60] As these large, continuing fines, forfeitures and penalties demonstrate, SBC and Verizon continue to violate their Merger Conditions. Were their records cleaner

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[58] *See* Notice of SBC Voluntary Payments Pursuant to Merger Conditions, CC Docket No. 98-141 (June 3, 2004) ($86.7 million in voluntary payments for performance months August 2000 through March 2004); Notice of Verizon Voluntary Payments Pursuant to Merger Conditions, CC Docket No. 98-184 (July 2, 2004) ($17.7 million in voluntary payments for performance months April 2001 through April 2004).

[59] *See* SBC *Ex Parte*, CC Docket No. 98-141, May 21, 2004; SBC *Ex Parte*, CC Docket No. 98-141, April 23, 2004; SBC *Ex Parte*, CC Docket No. 98-141, March 23, 2004; SBC *Ex Parte*, CC Docket No. 98-141, February 20, 2004.

[60] *See* Verizon *Ex Parte*, CC Docket No. 98-184, June 28, 2004; Verizon *Ex Parte*, CC Docket No. 98-184, May 27, 2004; Verizon *Ex Parte*, CC Docket No. 98-184, April 27, 2004; Verizon *Ex Parte*, CC Docket No. 98-184, March 29, 2004; Verizon *Ex Parte*, CC Docket No. 98-184, March 1, 2004; Verizon *Ex Parte*, CC Docket No. 98-184, January 27, 2004,

over the last few years, or had the auditors found a decreasing trend in compliance violations, one could argue that a reevaluation of the independent auditor requirement might be warranted. That is not the case here however, as the evidence indicates that levels of non-compliance are relatively consistent and performance remains poor.

Indeed, SBC's and Verizon's continuing failure to comply with their Merger Conditions alone support retaining the independent audit conditions. SBC and Verizon should not be rewarded for their poor performance by the Commission eliminating the one condition the Commission noted is the most efficient and cost-effective means of monitoring SBC's and Verizon's ongoing compliance. Nor should SBC and Verizon be permitted to foist onto their competitors the burden and expense of identifying when SBC and Verizon fail to abide by their obligations under the Merger Conditions. As long as the Merger Conditions remain in effect, the Commission should continue to require SBC and Verizon to engage an independent auditor to monitor their compliance with those conditions.

CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's and SBC's request that they be relieved of complying with the audit requirements associated with their merger conditions.

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