SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

PHILIP J. MACRES

DIRECT DIAL (202)424-7770
PJMACRES@SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: Petition for Declaratory Ruling, CC Docket Nos. 98-141 and 98-184

Dear Secretary Dortch:

On behalf of thirty-seven (37) competitive local exchange carriers, please find attached a Petition for Declaratory Ruling requesting that the Commission enforce the unbundling requirements of the SBC/Ameritech and Bell Atlantic/GTE merger conditions.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

Philip J. Macres

Enclosure

cc: Chairman Michael K. Powell (all via e-mail)
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Christopher Libertelli
Matthew Brill
Scott Bergmann
Jessica Rosenworcel
Daniel Gonzalez
Jeffery Carlisle
Michelle Carey
Thomas Navin
Trent Harkrader
Diana Lee
Michael K. Kellogg

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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
In re 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

PETITION FOR DECLARATORY RULING

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Paul B. Hudson
Philip J. Macres
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, Suite 300
Washington, DC 20007
Tel: 202-424-7500
Fax: 202-424-7645

Counsel for Petitioners

September 9, 2004

TABLE OF CONTENTS

PETITION FOR DECLARATORY RULING 1

I. THE MERGER CONDITIONS REQUIRE UNBUNDLING OF THE UNEs VACATED BY *USTA II* UNTIL THE CONDITIONS ARE TERMINATED 3

II. EXPEDITIOUS COMMISSION ACTION IS NEEDED TO RESOLVE THIS CONTROVERSY BEFORE SBC OR VERIZON UNILATERALLY ATTEMPT TO TERMINATE UNEs 6

III. NONE OF THE TRIGGERS THAT WOULD TERMINATE THE CONDITIONS HAS OCCURRED 10

A. Neither *USTA I* nor *II* Held that the Vacated UNEs Are Not Required by Federal Law. 10

B. The Merger Conditions Were Not Terminated by a Final and Non-Appealable Commission Order in the *UNE Remand* Proceeding Because No Such Order Exists or Has Ever Existed 12

C. The Merger Conditions Have Not "Sunset." 15

CONCLUSION 17

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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
In re 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

PETITION FOR DECLARATORY RULING

Pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, thirty-seven competitive local exchange carriers[1] hereby petition the Commission for a declaratory order that the incumbent local exchange carrier affiliates of SBC Communications, Inc. ("SBC") and

---

[1] Access One, Inc.; ACN Communications Services, Inc.; Alpheus Communications, L.P. f/k/a El Paso Networks, L.P.; ATX Communications, Inc.; Biddeford Internet Corporation d/b/a Great Works Internet; Big River Telephone Company, LLC; BridgeCom International, Inc.; Broadview Networks, Inc.; BullsEye Telecom, Inc.; Capital Telecommunications, Inc.; Cavalier Telephone, LLC; Conversent Communications, LLC; CTC Communications Corp.; CTSI, Inc.; DSLnet Communications, LLC; Focal Communications Corp.; Freedom Ring Communications, LLC d/b/a BayRing Communications; Gillette Global Network, Inc. d/b/a Eureka Networks; Globalcom, Inc.; Integra Telecom, Inc.; Intelecom Solutions, Inc.; KMC Telecom Holdings, Inc.; Lightship Telecom, LLC; Lightwave Communications, LLC; Lightyear Network Solutions, LLC; McGraw Communications, Inc.; McLeodUSA Telecommunications Services, Inc.; Metropolitan Telecommunications, Inc. d/b/a MetTel; Mpower Communications Corp.; NTELOS Network, Inc.; Pac-West Telecomm, Inc.; R&B Network Inc.; RCN Telecom Services, Inc.; segTel, Inc.; TDS Metrocom, LLC; US LEC Corp.; and Vycera Communications, Inc. f/k/a Genesis Communications Int'l, Inc. (collectively, the "Petitioners").

Verizon Communications, Inc. ("Verizon") remain subject to the unbundling obligations to which they committed to secure approval of their respective mergers with Ameritech[2] and GTE.[3] The Commission and the public interest demanded these commitments to guarantee CLEC access to a minimum set of UNEs throughout the period of intermediate twists and turns likely to occur until section 251(c)(3) was at last implemented through final, non-appealable rules. The merger conditions were intended to serve, if needed, as a bridge to the promised land of certain UNE rules.

The Bells would now render the conditions a bridge to nowhere, arguing they simply expired with *USTA I*[4] or after three years. As demonstrated below, that is not what the conditions say, and the reason why is obvious. Why would the Commission have asked for a bridge that failed to reach the other side? The purpose of the merger conditions was to keep existing unbundling obligations in effect until new obligations were established. If the conditions expired upon a judicial decision (*USTA I*) that *vacated* unbundling rules, as the Bells now argue, rather than upon an affirmative finding that such rules were not required by the Act, that purpose would be defeated and the unbundling conditions would be reduced nearly to a sham.

---

[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 merger conditions appear as Appendix C to the Order ("SBC/Ameritech Merger Conditions").

[3] *Application of 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 merger conditions appear as Appendix D to the Order ("Bell Atlantic/GTE Merger Conditions").

[4] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (Mar. 24, 2003) ("*USTA I*").

As the Bell Companies are now so fond of pointing out, the initial implementation of section 251(c)(3) has never been completed.[5] There has *never* been a final, non-appealable determination with respect to the network elements that were vacated by or remain subject to appeal in *USTA II*.[6] Thus, the expiration dates of SBC and Verizon's unbundling merger obligations have not yet arrived. The merger conditions were designed precisely to prevent the uncertainty that otherwise might result from repeated appeals and judicial reversals of unbundling rules, and it is time for the Commission to effectuate that purpose by enforcing the conditions.

I. THE MERGER CONDITIONS REQUIRE UNBUNDLING OF THE UNEs VACATED BY *USTA II* UNTIL THE CONDITIONS ARE TERMINATED.

When Congress established the national policy to promote local telecommunications competition, it directed the Commission to adopt by August 1996 regulations that would assure competitive carriers of access to the particular ILEC network elements they needed to enter local markets. But three years later, in the fall of 1999, clear rights for CLECs remained elusive. The Supreme Court had overturned the Commission's initial unbundling rules, and the Bell Companies were indicating that they were likely to sue again when replacement regulations were adopted in the *UNE Remand* proceeding. Competitive carriers faced perilous uncertainty, as the

---

[5] *See e.g., United States Telecom. Ass'n v. FCC*, Nos. 00-1012 *et al.*, Petition for Mandamus to Enforce the Mandate of this Court, filed with the D.C. Circuit on August 23, 2004 by Verizon, Qwest, and USTA ("Mandamus Petition").

[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*"), *petitions for cert. filed*, 2004 WL 1475967, 1494922, 1494953 (U.S. June 30, 2004).

rules on which they relied could continue to twist in the wind for years until the Commission was able to establish rules that survived the Bells' legal challenges. Substantial investments could be lost if SBC or Verizon were able to withdraw UNEs, even temporarily, each time the rules suffered a setback and had to be restored.

It was at this juncture that the Commission considered petitions from SBC and Ameritech, and subsequently Bell Atlantic and GTE, to approve mergers that would create the largest local telephone companies in the nation since the breakup of AT&T. In its initial analyses, the Commission found that approval of these mergers "absent stringent conditions" would contravene the public interest because the mergers as proposed would "inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition."[7] The Commission ultimately approved these mergers only after SBC and Verizon offered significant commitments designed to offset the public interest harms of the mergers. In particular, to remedy the ongoing suppression of competition imposed by the destabilizing unbundling litigation, the Commission relied upon pledges by SBC and Verizon to continue to provide access to the existing types of UNEs at least until the day finally arrived that undisputed, lawful UNE regulations became effective. Specifically, the conditions provide 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

---

[7] *Bell Atlantic/GTE Merger Order*, ¶ 96; *SBC/Ameritech Merger Order*, ¶ 62.

> area, or (ii) the date of a 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.[8]
>
> * * * *
>
> 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.[9]

The Commission's orders approving these mergers therefore imposed these conditions as a "floor not a ceiling"[10] that would apply as separate and independent legal obligations above and beyond the requirements applicable to other incumbent LECs, such as those established in "other more general proceedings."[11] The Commission had thereby assured that the competitive choices

---

[8] *SBC/Ameritech Merger Order*, Appendix C, ¶ 53.

[9] *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*")).

[10] *See Bell Atlantic/GTE Merger Order*, ¶ 252; *SBC/Ameritech Merger Order*, ¶ 356.

[11] *See Bell Atlantic/GTE Merger Order*, ¶¶ 252-253; *SBC/Ameritech Merger Order*, ¶¶ 356-357. The D.C. Circuit affirmed that SBC's merger obligations are independent of its obligations under section 251. Rejecting SBC's argument that the shared transport merger condition had been superceded by subsequent unbundling orders, the court stated: "But those orders had nothing to do with SBC's paragraph 56 obligations under the *Merger Order*. They concerned instead SBC's unbundling obligations

Cont'd

available to more than half of the nation's consumers would not be stifled by Bell refusals to provide network elements that Congress intended to unbundle but that were thrown into limbo by temporary setbacks in the unbundling litigation.

This is not to say that the merger conditions were intended to last forever. The unbundling conditions established two escape triggers, either of which would result in the termination of the condition. As demonstrated in Section III below, SBC and Verizon have failed to establish the occurrence of either of these triggers. The Commission should therefore protect its jurisdiction to enforce the conditions, and the competitors and consumers who rely on them, by issuing a declaratory order directing SBC and Verizon to continue to comply with their unbundling merger obligations until they each establish to the Commission that these obligations have terminated.

II. EXPEDITIOUS COMMISSION ACTION IS NEEDED TO RESOLVE THIS CONTROVERSY BEFORE SBC OR VERIZON UNILATERALLY ATTEMPT TO TERMINATE UNEs.

When the D.C. Circuit vacated the *UNE Remand Order* in *USTA I*, the Commission was not forced to address the applicability of the merger conditions because SBC and Verizon agreed to continue providing UNEs while the Commission developed replacement rules in the *Triennial Review*.[12] After *USTA II*, by contrast, SBC and Verizon have aggressively sought to exploit the

---

under the Act. They were silent on SBC's independent obligations under the *Merger Order*." *SBC v. FCC*, 373 F.3d 140, 150 (D.C. Cir. July 6, 2004).

[12] SBC and Verizon supported a stay of the mandate through February 20, 2003 (nine months after the issuance of the decision) to provide the FCC with sufficient time to adopt replacement rules in the *Triennial Review* proceeding. See *USTA I*, Nos. 00-1012, 00-1015, Motion for Stay, (D.C. Cir. Dec. 23, 2002). Similarly, SBC and Verizon had previously agreed to maintain the status quo regarding unbundled access following the Supreme Court's vacatur of the Local Competition Order. *See Common Carrier Bureau Establishes Rapid-Response System to Minimize Disputes Arising From Supreme Court's Iowa Utilities Board Order, Public Notice*, 14 FCC Rcd 4061 (1999) (citing letters from the Bell companies and GTE stating the carriers' willingness to maintain the *status quo*).

temporary gap in the Commission's regulations by asserting a right to rush to eliminate the vacated UNEs before the FCC is able to re-establish regulations. Verizon petitioned state commissions to arbitrate contract amendments that, if implemented, would allow Verizon to decide for itself which UNEs could be terminated and when. SBC has demanded that CLECs sign a similar amendment, claiming that its interpretation of the law is so certain that "there is no need for negotiations."[13]

The CLECs have answered these demands by explaining that SBC and Verizon remain obligated to provide the UNEs at issue under the merger conditions. SBC and Verizon responded that these conditions have expired, but neither of them can establish that any of the events that could trigger the expiration of their respective conditions have occurred. And in defiance of the rule that any ambiguity in the conditions must be construed against their drafters (the Bells),[14] SBC and Verizon have tried to turn the tables and shift the burden of proof to the CLECs. Faced with this dispute, several state commissions directed CLECs to ask the FCC to

---

[13] SBC letter to competitive local exchange carriers, July 13, 2004.

[14] *See United States v. Seckinger*, 397 U.S. 203, 210 (1970) ("a contract should be construed most strongly against the drafter"); *see also Global NAPs, Inc. 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); *see also* 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, at 2 (2000) (rejecting Verizon's limited interpretation of the merger conditions that the Commission imposed on Verizon); *SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, 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) ("*SBC Forfeiture Order*"), *aff'd*, 373 F.3d 140 (D.C. Cir. July 6, 2004); *see also SBC v. FCC*, 373 F.3d 140, 147-149 (D.C. Cir. July 6, 2004) (The D.C. Circuit rejected "SBC's vigorous attempts to create ambiguity" in the shared transport merger conditions through affidavits purporting to show SBC's intent, finding that "The best objective evidence of the collective intent of the parties in such circumstances is the ordinary meaning of that document, and that meaning, as we have stated, is plain.").

clarify the continuing applicability of the unbundling merger conditions.[15] These state commissions are looking to the Commission to provide a timely resolution to this controversy.

The Commission has previously exercised, and the D.C. Circuit has affirmed, its authority to enforce the unbundling obligations established by the merger conditions.[16] Further, the Commission has broad authority to issue declaratory rulings to terminate controversies or remove uncertainty.[17] The Commission need not wait until SBC or Verizon violates its merger conditions; it may act in any instance where a "genuine controversy or uncertainty requires clarification."[18] If incumbent carriers will be permitted to continue to try to cease providing

---

[15] *See Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, Order, at 7 (Me. P.U.C. June 11, 2004) ("We believe the best course of action at this time is for the parties to seek guidance directly from the FCC regarding what it intended concerning the continued enforceability of the conditions.); *Application of Verizon Delaware, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* PSC Docket No. 04-68, Order, ¶ 26 (Del. P.S.C. May 18, 2004) ("if the CLECs continue to believe that the GTE merger condition continues to govern the scope of VZ-DE's UNE obligations, the Commission would hope that ... the CLECs will have taken their argument to the FCC for that agency's resolution. After all, the invoked condition was accepted, and imposed, by the FCC. The FCC, not this Commission, is surely in a better position to interpret the prior Merger Order, both as to the scope of the condition and its duration. Moreover, a single answer from the FCC, applicable throughout Verizon's footprint, would surely be preferable to a dozen or so state commissions offering their own (potentially conflicting) views on what the Merger Order requires."); *Application of Verizon Northwest, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* Arb. No. 531, Order 04-369 at 8 (Or. P.U.C. June 30, 2004) ("Although we agree with [CLECs] that it is appropriate for the parties to discuss the *Bell Atlantic/GTE Merger Order* during the course of their contract negotiations, we do not agree that the [Oregon] Commission is the proper forum for interpreting the *Merger Order* in the event of a disagreement. ... [T]he parties should petition the FCC if they require assistance in interpreting and enforcing the terms of the merger.")

[16] *See e.g., SBC Forfeiture Order, aff'd,* 373 F.3d 140 (D.C. Cir. July 6, 2004) (levying a $6 million forfeiture against SBC for violation of the shared transport unbundling condition).

[17] *See* 47 C.F.R. § 1.2.

[18] *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out Functionality as a Component of Regulated Network Interface Connectors on Customer Premises,* Memorandum Opinion and Order, 6 FCC Rcd 3336, ¶ 26 (1991).

UNEs through change of law procedures before the Commission's *TRO* remand order is released,[19] the controversy over the applicability of the UNE merger condition requires clarification as soon as possible. SBC and Verizon need to know whether they must continue to provide these UNEs. CLECs need to know whether they can continue to reject SBC and Verizon's proposed contract amendments in good faith based on the merger obligations. State commissions need to know what to do when this debate inevitably crashes in on them, as it already has in Verizon states. Finally, the Commission's Enforcement Division requires this clarification, because SBC and Verizon have requested the elimination of the audit requirement of the merger conditions on the grounds that the conditions have expired.[20] Therefore, this Petition is ripe for Commission action under section 1.2 of the Commission's rules.

The need for action on this Petition is especially urgent in light of Verizon's mandamus petition requesting the D.C. Circuit to invalidate the Commission's *Interim Order*. If the D.C. Circuit grants the mandamus petition before the Commission orders SBC and Verizon to comply

---

[19] The Commission's August 20, 2004 interim UNE order could have defused this debate for the time being, because it requires SBC and Verizon to continue to provide the UNEs that were vacated by *USTA II*. Regrettably, however, the order would appear to permit SBC and Verizon (at least absent the merger conditions that are the subject of this petition) to continue to try to eliminate the UNEs that were vacated by *USTA II*, despite the fact that the Commission believed that the inevitable litigation that would result "would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible." *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313 & 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 17 (rel. August 20, 2004) ("*Interim Order*").

[20] *See* Enforcement Bureau Seeks Comment on Verizon's Request to Discontinue Audit of Verizon's Compliance with Merger Conditions, CC Docket 98-184, Public Notice, DA 04-2093 (rel. July 13, 2004); *see also* Enforcement Bureau Seeks Comment on SBC's Request to Discontinue Audit of SBC's Compliance with Merger Conditions, CC Docket 98-141, Public Notice DA-04-2092 (rel. July 13, 2004). This issue has been raised in the comments and reply comments of several parties in both cases. Verizon now argues to state commissions that they should defer any further review of the merger conditions since the issue has been presented to the FCC in this docket. *See* D.C. P.S.C. Telecommunications Arbitration Case No. 19, Response of Verizon Washington DC Inc. to CLEC Filings Regarding the Change of Law Provisions of their Interconnection Agreements, at 14 (Sept. 7, 2004).

with their merger obligations, CLECs and consumers would be left to rely only on SBC's and Verizon's voluntary commitments, which the Commission recently determined are inadequate.[21] Verizon's commitment would expire on November 11, 2004, and does not cover any transport and enterprise market loops, while SBC now interprets its commitment to exclude dark fiber, as well as switching for many mass-market customers.[22] Therefore, the Commission should act quickly to assure that the millions of consumers in the SBC and Verizon regions are not denied the benefit of the bargain that allowed these otherwise anticompetitive mergers to consummate.[23]

III. NONE OF THE TRIGGERS THAT WOULD TERMINATE THE CONDITIONS HAS OCCURRED.

A. Neither *USTA I* nor *II* Held that the Vacated UNEs Are Not Required by Federal Law.

The merger obligation for a particular UNE terminates upon "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be

---

[21] *Interim Order* at ¶ 19.

[22] *Interim Order* at ¶ 19. Although not apparent from the face of its June 9, 2004 commitment letter to Chairman Powell, SBC has indicated to CLECs that the commitment does not include switching for any customer with more than three DS-0 lines, even in rural areas, or "dark fiber of any kind." *See* June 23, 2004 letter from SBC counsel, filed at the Texas Public Utilities Commission in Docket Nos. 28821 and 29824.

[23] Grant of the mandamus petition would not diminish the Commission's authority to grant this Petition. *USTA II* did *not* find that the substantive result of the vacated rules were inherently illogical, arbitrary, or contrary to the Act. Instead, it found only that the Commission had not sufficiently justified these rules under the standards of section 251. Therefore, it would be immaterial if the unbundling obligations enforced by the Commission pursuant to the merger conditions closely mirror the UNEs that were vacated by *USTA II*. Courts are not charged with judging the outcome of the regulatory process, only whether the regulations adopted are lawful based upon reasoned decision-making and the laws relied upon by the agency. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If the FCC is able to enforce similar obligations on authority other than section 251, the limitations of *USTA II* would be inapplicable because those limitations are highly specific to the court's analysis of section 251. The D.C. Circuit has plainly recognized that an agency may readopt a vacated rule without regard to a court's vacatur if the agency has an independent and lawful basis for doing so. *See Solite Corp. v. EPA*, 952 F.2d 473, 493-494 (D.C. Cir. 1991). The D.C Circuit has already determined that the unbundling obligations under the SBC Merger conditions are independent of the general unbundling obligations under section 251. *See SBC v. FCC*, 373 F.3d at 149-150.

provided."[24] In other words, the Bells would be relieved of the obligation to provide a particular UNE upon either (1) a final, non-appealable judicial affirmation of a *Commission* determination that the UNE was not required; or (2) a final, non-appealable judicial determination that a particular UNE could not be required under any circumstances consistent with federal law, such that no remand to the Commission was necessary. Clearly, neither *USTA I* nor *II* is such a decision. These cases did not make any findings as to whether section 251 ultimately requires unbundling of high-capacity loops, transport, or switching. If it had, the court would have had no reason to remand that determination to the Commission.

USTA I and *II* remanded Commission orders that had *required* unbundling. By contrast, what SBC and Verizon need to terminate the merger condition is judicial affirmation of a Commission decision that particular UNEs are *not required* to be unbundled.[25] Such findings could only be made in the *Triennial Review Order* 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 loops, transport, or switching are not required, this basis for termination of the condition has not occurred.

---

[24] *See SBC/Ameritech Merger Order*, Appendix C, ¶ 53; *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 39.

[25] For example, the *TRO* determined that ILECs are not required to provide certain broadband UNEs to CLECs for mass market customers. The D.C. Circuit affirmed this decision, but it remains subject to appeal at the Supreme Court. If the Supreme Court affirms, or declines to review the Court of Appeals decision, then and only then would the merger condition with respect to these UNEs terminate, because there then would be 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."

B. The Merger Conditions Were Not Terminated by a Final and Non-Appealable Commission Order in the *UNE Remand* Proceeding Because No Such Order Exists or Has Ever Existed.

SBC's obligation to provide a particular UNE would also terminate if and when 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."[26] Similarly, Verizon's unbundling merger condition would terminate "after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively."[27] The Bells have argued that these clauses have triggered because the *UNE Remand* and *Line Sharing* cases ended when the Supreme Court denied petitions for *certiorari* of the D.C. Circuit's decision in *USTA I.* But neither the D.C. Circuit's decision in *USTA I* nor the Supreme Court's order denying *certiorari* was a final and non-appealable <u>*Commission order*</u>, since they were not Commission orders at all. Nor did the court decisions render the Commission's *UNE Remand Order* "final and non-appealable." A vacated decision is not an order at all, and is certainly not "final" given that the Court of Appeals remanded it to the Commission for further consideration. And SBC certainly cannot satisfy the additional requirement under its merger conditions to produce a final and non-appealable Commission order that found that high-capacity loops, dedicated transport or mass market switching are not required to be provided. In short, to terminate the unbundling merger condition under this second trigger, SBC and Verizon need to produce a final and non-appealable Commission order

---

[26] *SBC/Ameritech Merger Order*, Appendix C, ¶ 53.

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

from the *UNE Remand* proceeding – and no such order exists. Therefore, these clauses do not provide a basis for termination of the unbundling conditions.

Only this interpretation, and not the Bells', is consistent with the letter and purpose of the merger conditions and with common sense. The conditions were designed not only to last beyond *USTA I*; they were in fact designed to spring to life in response to decisions like *USTA I* and *II*. The Commission explained:

> 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 carriers, 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 are stayed or vacated.*[28]

The conditions were thus designed to provide a backstop of greater certainty to bridge the gap that would be created if the Court of Appeals or Supreme Court vacated the Commission's unbundling rules (as in fact happened). In that event, the Commission anticipated that the rules would be remanded to it, and it would have to consider them again in some subsequent

---

[28] *Bell Atlantic/GTE Merger Order,* ¶ 316 (emphasis added). Except for references to the *Line Sharing Order*, nearly identical language is found in the *SBC/Ameritech Merger Order,* ¶ 394. ("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.")

proceeding.[29] To reduce uncertainty for CLECs, the conditions were to provide a bridge all the way across to the first foothold of dry land – the solid ground of an unbundling regime established in *some* Commission proceeding that was final and non-appealable. It does not matter what docket number or caption appears on the order that finally implements section 251(c)(3). The Commission's reference to "subsequent proceedings" simply makes clear that what matters under the merger conditions is to be measured by the objective of reducing uncertainty until truly final unbundling rules are established for the first time.

In any event, while it clear that the *Triennial Review* and *TRO* remand proceedings are "subsequent proceedings" of the *UNE Remand* and *Line Sharing* cases,[30] grant of this Petition is in no way dependent upon such a finding. It is SBC and Verizon who will need to persuade the Commission of that fact if they ever want to terminate the merger conditions on the grounds that there has been a final and non-appealable Commission order in the *UNE Remand* or *Line Sharing* proceedings. Since no such order exists today, if there is ever to be such an order, it will have to come from one of the subsequent proceedings, such as the *Triennial Review* or *TRO*

---

[29] Verizon has argued that the words "subsequent proceedings," as used in paragraph 316 of the *Bell Atlantic/GTE Merger Order*, refer only to subsequent judicial proceedings. However, the sentence refers to "the Commission's orders" in those subsequent proceedings, meaning that the sentence must refer to subsequent Commission proceedings.

[30] After the *UNE Remand* and *Line Sharing* Orders were vacated, the Commission consolidated the remands of these two orders with its ongoing *Triennial Review* rulemaking. *See* FCC Public Notice, Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings, DA 02-1291 (rel. May 30, 2002). 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, at the ILECs' urging, the appeals from the *TRO* were transferred to same panel of judges on the D.C. Circuit because the order was an outgrowth of that court's adjudication of the *UNE Remand* and *Line Sharing* orders. *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003); *USTA II*, 359 F.3d at 564. And when Verizon sought to challenge the Commission's August 20, 2004 *Interim Order*, it returned to the same panel.

remand cases.[31] In the meantime, SBC and Verizon cannot rely on this trigger to terminate their unbundling merger obligations.

C. The Merger Conditions Have Not "Sunset."

SBC and Verizon have suggested that their unbundling obligations under the merger orders expired after three years. However, the default three-year sunset does not apply to the unbundling requirement. Both sets of merger conditions provide 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 or Verizon] in any respect 36 months after the merger closing date."[32] The unbundling conditions are among these exceptions because they are governed by "specific" termination dates. As discussed in Sections III.A. and III.B. above, these dates are the earlier of the date of "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided," or, for SBC, the date of a final non-appealable order in the *UNE Remand* proceeding that eliminates a UNE, and for Verizon, the date of a final and non-appealable order in the *UNE Remand* and *Line Sharing* proceedings. Since none of those termination conditions have occurred, the unbundling obligations remain in effect.

The Enforcement Bureau previously agreed with the Petitioners' interpretation of the sunset clause. The Bureau noted that while "[t]he effective period for many of the merger

---

[31] Of course, the *TRO* today is neither final nor non-appealable. CLECs and states have petitioned the Supreme Court to hear an appeal of portions of the order that were affirmed by the D.C. Circuit identified in *USTA II*, while the portions that were vacated are not final because they are pending in the new remand proceeding that the Commission initiated in its August 20, 2004 interim order. If, however, the Supreme Court were to affirm portions of the TRO before it is modified by the Commission, those portions would be final and non-appealable.

[32] *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 64 (emphasis added); *SBC/Ameritech Merger Order*, Appendix C, ¶ 74 (emphasis added).

conditions terminates thirty-six months after the Merger Closing Date...," "[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]."[33] The Bureau then explicitly listed the unbundling condition as an example of a condition that is not subject to the three-year sunset date because it specified its own, different terms for expiration.[34]

Therefore, the plain language of the merger orders, Commission precedent, and effectuation of the Commission's objectives all require rejection of any argument that the unbundling obligations of the merger conditions have expired under the three-year sunset provisions.

---

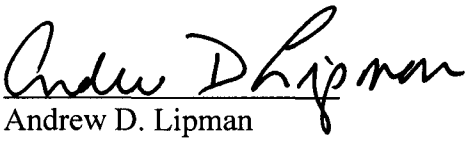
[33] *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's 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); *see also SBC Forfeiture Order,* 17 FCC Rcd 19923, FCC 02-282, n.53 (2002) (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).

[34] *FCC's Enforcement Bureau Order,* ¶ 3 & n.7.

CONCLUSION

For the foregoing reasons, the Commission should declare that Verizon and SBC remain obligated to offer UNEs pursuant to their respective merger orders until they establish to the Commission that these obligations no longer apply.

Respectfully submitted,



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Paul B. Hudson
Philip J. Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, Suite 300
Washington, DC 20007
Tel: 202-424-7500

Counsel for:
Access One, Inc.
ACN Communications Services, Inc.
Alpheus Communications, L.P. f/k/a El Paso Networks, L.P.
ATX Communications, Inc.
Biddeford Internet Corporation d/b/a Great Works Internet
Big River Telephone Company, LLC
BridgeCom International, Inc.
Broadview Networks, Inc.
BullsEye Telecom, Inc.
Capital Telecommunications, Inc.
Cavalier Telephone, LLC
Conversent Communications, LLC
CTC Communications Corp.
CTSI, Inc.
DSLnet Communications, LLC
Focal Communications Corp.
Freedom Ring Communications, LLC d/b/a BayRing Communications
Gillette Global Network, Inc. d/b/a Eureka Networks
Globalcom, Inc.
Integra Telecom, Inc.
Intelecom Solutions, Inc.
KMC Telecom Holdings, Inc.
Lightship Telecom, LLC
Lightwave Communications, LLC
Lightyear Network Solutions, LLC
McGraw Communications, Inc.
McLeodUSA Inc.
Metropolitan Telecommunications, Inc. d/b/a MetTel
Mpower Communications Corp.
NTELOS Network, Inc.
Pac-West Telecomm, Inc.
R&B Network Inc.
RCN Telecom Services, Inc.
segTel, Inc.
TDS Metrocom, LLC
US LEC Corp.
Vycera Communications, Inc. f/k/a Genesis Communications Int'l, Inc.

September 9, 2004