

**Before the  
Federal Communications Commission  
Washington, DC 20554**

<b>In the Matter of</b>	)	
<b>Applications for Consent to the</b>	)	
<b>Transfer of Control of Licenses and</b>	)	
<b>Section 214 Authorizations from</b>	)	
	)	<b>CC Docket No. 98-141</b>
<b>AMERITECH CORPORATION,</b>	)	
<b>Transferor</b>	)	
<b>to</b>	)	
<b>SBC COMMUNICATIONS, INC.,</b>	)	
<b>Transferee</b>	)	
<hr/>		
<b>In the Matter of</b>	)	
	)	
<b>GTE CORP.</b>	)	
<b>Transferor,</b>	)	
<b>and</b>	)	<b>CC Docket No. 98-184</b>
<b>BELL ATLANTIC CORP.</b>	)	
<b>Transferee,</b>	)	
<b>For Consent to Transfer of Control</b>	)	

**COMMENTS OF AT&T CORP. IN SUPPORT OF  
PETITION FOR DECLARATORY RULING**

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**October 4, 2004**

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**COMMENTS OF AT&T CORP. IN SUPPORT OF  
PETITION FOR DECLARATORY RULING**

Pursuant to Public Notice DA-04-2974 issued by the Commission on September 14, 2004, AT&T Corp. ("AT&T") submits its Comments in support of the Petition for Declaratory Ruling filed by the thirty-seven competitive local exchange carriers ("CLECs") seeking a declaratory order that the incumbent LEC affiliates of SBC Communications, Inc. and Verizon Communications, Inc. remain subject to the unbundling obligation found in their merger conditions ("CLEC Petition").<sup>1</sup> For the reasons set forth below, the declaratory ruling requested by the CLECs should be granted.

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<sup>1</sup> AT&T has also addressed this issue in Comments Of AT&T Corp. To Verizon's Request To Eliminate Merger Condition XXII, CC Docket No. 98-184 (July 27, 2004) and Comments Of AT&T Corp. To SBC's Request To Eliminate Merger Condition 27, CC Docket No. 98-141 (July 27, 2004).

## INTRODUCTION AND SUMMARY

Condition XIII of the *Bell Atlantic/GTE Merger Order*<sup>2</sup> and Condition XXVII of the *SBC/Ameritech Merger Order*,<sup>3</sup> requiring the provision of unbundled network elements (“UNEs”), provide that they do not sunset until the Commission has issued a final, non-appealable order establishing Verizon’s and SBC’s unbundling obligations. The Commission, in both *Merger Orders*, held that the “plain meaning” of this language in the conditions was that “from now until the date on which the Commission’s orders in those proceedings, *and any subsequent proceedings*, becomes final and non-appealable,” Verizon/SBC “will continue to make available to telecommunications carriers each UNE that was” previously available.<sup>4</sup> That “a final, non-appealable order” would include “*any subsequent proceedings*” is consistent with the underlying purpose of these conditions. The entire purpose of these UNE unbundling conditions was to provide market certainty and require Verizon and SBC to offer UNEs during any period in which the Commission’s unbundling rules were stayed or vacated.

These conditions have not sunset because the D.C. Circuit’s two decisions vacating the Commission’s UNE rules are the subject of further proceedings currently pending before the Commission on those issues on remand. Accordingly, any contention that the UNE unbundling merger conditions have been satisfied, notwithstanding the current uncertainty regarding the scope of ILEC unbundling obligations, would be contrary to the plain meaning and entire

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<sup>2</sup> Memorandum Opinion And Order, *Application Of GTE Corp., Transferor, And Bell Atlantic Corp., Transferee, For Consent To Transfer Control*, 15 FCC Rcd. 14032 (2000) (“*Bell Atlantic/GTE Merger Order*”).

<sup>3</sup> Memorandum Opinion and Order, *Applications Of Ameritech Corp., Transferor, And SBC Communications Inc., Transferee, For Consent To Transfer Control Of Corporations*, 14 FCC Rcd. 14712 (1999) (“*SBC/Ameritech Merger Order*”).

<sup>4</sup> *Bell Atlantic/GTE Merger Order* ¶ 316; *SBC/Ameritech Merger Order* ¶ 394.

purpose of these conditions. Any claim that the Commission has subsequently clarified or modified these conditions is unfounded.

As demonstrated in the CLEC Petition, expeditious Commission action is necessary to resolve this controversy before SBC or Verizon unilaterally attempt to terminate UNEs.<sup>5</sup> Accordingly, the declaratory ruling requested by the CLECs should be granted.

## ARGUMENT

### I. THE UNE UNBUNDLING CONDITIONS APPROVED BY THE COMMISSION IN THE SBC AND VERIZON *MERGER ORDERS* HAVE NOT SUNSET

#### A. The Unbundling Merger Conditions In Both Orders Clearly Are Not Subject To A Three-Year Sunset.

As a threshold matter, both the Verizon and SBC unbundling merger conditions clearly are not subject to a three-year sunset. It is true that many merger conditions in both agreements expire after three years, but that default sunset provision in each agreement expressly does not apply to conditions that have their own specific termination language. *See* Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, & SBC Communications, Inc., Transferee*, 17 FCC Rcd. 19595, ¶ 3 (2002) (“Some of the [merger] conditions . . . are not subject to that expiration date because the condition itself specifically establishes its own period of applicability”). The Enforcement Bureau has already expressly recognized that the UNE condition is a condition that is *not* subject to the three-year sunset period. *See id.* ¶ 3 n.7.

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<sup>5</sup> CLEC Petition at 6-10.

**B. The Commission Has Already Found That The UNE Unbundling Merger Conditions Will Not Sunset Until The Commission's Order In "Any Subsequent Proceedings, Becomes Final And Non-Appealable"**

The merger conditions requiring the provision of unbundled network elements were of critical importance to the approval of those mergers, because there was a great need to protect local competition in light of the uncertainty surrounding the Commission's unbundling rules. The FCC found both that these mergers would reduce local competition and that affirmative steps were necessary to facilitate UNE-based competition. In particular, the FCC recognized that local competition was unlikely if carriers did not have a clear entitlement to particular UNEs.<sup>6</sup> Thus, the intended purpose of the condition was to provide the necessary certainty to induce local entry.<sup>7</sup> And it does so by ensuring that the ILEC remains obligated to provide UNEs until litigation surrounding the *UNE Remand Order*, and for Verizon the *Line Sharing Order*, is finally resolved, by either: (1) a final judicial decision upholding the unbundling rules the FCC issues in those proceedings; (2) a final, non-appealable FCC order eliminating unbundling of a particular UNE; or (3) a final judicial decision holding the FCC cannot require unbundling of a particular element.

Thus, SBC Merger Condition XVII was adopted "to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding."<sup>8</sup> That merger condition states that SBC/Ameritech will continue to provide UNEs

under the same terms and conditions that such UNEs or combinations of UNEs that 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

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<sup>6</sup> *SBC/Ameritech Merger Order*, ¶ 394 and *Bell Atlantic/GTE Merger Order* ¶ 316.

<sup>7</sup> *SBC/Ameritech Merger Order*, ¶ 394 and *Bell Atlantic/GTE Merger Order* ¶ 316.

<sup>8</sup> *SBC/Ameritech Merger Order* ¶ 394.

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 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.<sup>9</sup>

The Commission contemporaneously articulated its understanding of the “plain meaning” of this condition in the *SBC Merger Order*, stating that SBC had agreed that “from now until the date on which the Commission’s order in that proceeding, *and any subsequent proceedings*, becomes final and non-appealable” it “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.”<sup>10</sup>

Verizon similarly agreed, in order “to reduce uncertainty to competing carriers from litigation that may arise in response to [the Commission’s] orders in the UNE Remand and Line Sharing proceedings,”<sup>11</sup> to Merger Condition XIII which states that Bell Atlantic/GTE will continue to provide:

the UNEs and UNE combinations required in [the UNE Remand Order and Line Sharing Order] 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 orders in the UNE Remand and Line Sharing proceedings, respectively.<sup>12</sup>

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<sup>9</sup> *SBC/Ameritech Merger Order*, App. C, ¶ 53 (emphases added, footnote omitted).

<sup>10</sup> *SBC/Ameritech Merger Order* ¶ 394.

<sup>11</sup> *Bell Atlantic/GTE Merger Order* ¶ 316.

<sup>12</sup> *Bell Atlantic/GTE Merger Order*, App. D, ¶ 39.

Once again the Commission contemporaneously articulated its understanding of the “plain meaning” of this condition: that “from now until the date on which the Commission’s orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable” it “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.”<sup>13</sup>

Even if there were any ambiguity in these conditions, they were effectively drafted by the BOCs<sup>14</sup> and any ambiguity must be construed against them. *See United States v. Seckinger*, 397 U.S. 203, 210 (1970) (“[A] contract should be construed most strongly against the drafter”).

**C. The UNE Unbundling Merger Conditions Have Not Sunset Because There Is No “Final And Non-Appealable Commission Order” In The *UNE Remand Or Line Sharing Proceedings*.**

There is, in fact, no “final and non-appealable Commission order” in the *UNE Remand Or Line Sharing* proceedings. Contrary to the BOCs’ argument<sup>15</sup> *USTA I* was neither a final judicial decision holding the FCC cannot require unbundling of a particular element nor did the denial of

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<sup>13</sup> *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

<sup>14</sup> This condition was initially drafted by SBC after “closed door” negotiations with the Commission staff; *see ex parte* submission by SBC, CC Docket No. 98-141 (July 1, 1999) at 1, placing the Proposed Conditions in the public record. Verizon conditions were “patterned closely” on the SBC conditions. *See* Supplemental Filing of Bell Atlantic and GTE, CC Docket 98-184 (Jan. 27, 2000) at 2.

<sup>15</sup> Reply of Verizon to AT&T’s Comments On Verizon’s Request To Discontinue Audit of Verizon’s Compliance With Merger Conditions, CC Docket No. 98-184 (August 10, 2004) (“Verizon’s Reply Comments”) at 7; Reply Comments of SBC Communications, CC Docket No. 98-141 (August 10, 2004) (“SBC’s Reply Comments”) at 3. They accordingly argue that the conditions expired on March 24, 2003 when the Supreme Court denied *certiorari* in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2003) *cert. den.* 123 S. Ct. 1571 (2003) (“*USTA I*”).

*certiorari* by the Supreme Court render the Commission's order a final, non-appealable FCC order eliminating unbundling of a particular UNE. In *USTA I*, the *UNE Remand Order* was remanded,<sup>16</sup> and a remanded order is simply *not* a final order.<sup>17</sup>

The *Triennial Review Order* was the FCC's order on remand from that decision.<sup>18</sup> In *USTA II*, the court vacated the unbundling rules a second time merely for lack of reasoned explanation, which has triggered another "subsequent proceeding" on remand which is still pending at the Commission. The court did not hold that ILECs "are not required" to provide UNEs within the meaning of the condition. In the wake of the D.C. Circuit's decision in *USTA II*, there are still "subsequent proceedings" underway at the Commission, and the Commission has yet to issue a final, non-appealable order determining whether Verizon or SBC must make a number of important UNEs, including switching, available. There is still no final, non-appealable order with respect to the aspects of the Commission's unbundling rules that were vacated in *USTA II*. The very point of the conditions was to preserve the *status quo* should a

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<sup>16</sup> *Id.*, 290 F.3d at 430 (the D.C. Circuit "remand[ed] both the Line Sharing Order and the Local Competition Order to the Commission for further consideration in accordance with the principles outlined above").

<sup>17</sup> See e.g., *International Tel. & Tel. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162, 1163 (4<sup>th</sup> Cir. 1975) ("the Ninth Circuit reversed in part the judgment ... granted by the district court in Hawaii and remanded for further proceedings ... Since further proceedings will be necessary before either party can prevail on the merits of the antitrust issues, there is no final judgment upon which GTE may found its res judicata defense") (emphasis added); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 546 (5<sup>th</sup> Cir.), *cert. den.*, 534 U.S. 945 (2001).

<sup>18</sup> Report and Order, Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17186, 17406 ¶ 705 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("Triennial Review Order"), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). 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). And that is, of course, why the appeal of the *TRO* was transferred from the Eighth Circuit to the D.C. Circuit and assigned to the same panel that heard *USTA I* – at Verizon's and SBC's request.

court stay or vacate the unbundling rules that the FCC adopted in the UNE proceeding – as the D.C. Circuit has done in *USTA II*.<sup>19</sup> Thus, the conditions are still operative.

**D. Verizon’s Auditor’s Assertion That The Condition Has Sunset Is Irrelevant.**

Verizon seeks to support its strained reading of the UNE merger condition applicable to it by asserting that “the auditors found that this condition sunset on March 24, 2003.”<sup>20</sup> However, not only is the auditor not the arbiter of the plain meaning of this condition, it is apparent from the auditor’s report that its conclusion was based on Verizon’s representations to it.<sup>21</sup> In at least one other merger audit, the auditor similarly found compliance with merger conditions based on the audited party’s definition of compliance<sup>22</sup> only to have the audited BOC enter into a Consent Decree years later admitting that during the audited period it in fact had violated the merger conditions.<sup>23</sup> The Auditor’s interpretation of the Condition, prompted by Management’s representation, is meaningless.

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<sup>19</sup> *SBC/Ameritech Merger Order*, ¶ 394 and *Bell Atlantic/GTE Merger Order* ¶ 316.

<sup>20</sup> Verizon Reply Comments at 7, *citing to*, Deloitte Independent Audit Report, Merger Conditions Report at 1 (Filed Oct. 17, 2003).

<sup>21</sup> Report of Management on the Effectiveness of Controls over Compliance With Merger Conditions II, III, VIII, IX, XIII, XIV, XV, and XX (Oct. 17, 2003), appended to the Deloitte Report, at 2.

<sup>22</sup> The April 16, 2001 Report of Independent Public Accountants (“Auditor’s Report”) prepared by Arthur Anderson LLP at 1 (“From the period from July 1, 2000 to December 31, 2000 the Company has operated its business in accordance with the Final Divestiture Plan and the FCC’s Orders in Docket No. 99-272”).

<sup>23</sup> Order, *In the Matter of Qwest Communications International, Inc.*, File No. EB-02-IH-0674, 18 FCC Rcd. 10299 (rel. May 7, 2003), Consent Decree, ¶¶ 8-9.

## II. THE COMMISSION HAS NOT ISSUED ANY SUBSEQUENT CLARIFICATION OF, OR DECISION MODIFYING, THE RELEVANT CONDITIONS

Verizon argues that, in a letter ruling issued on September 22, 2000, the Commission clarified that the UNE unbundling condition expired on the date of “any final and non-appealable judicial decision concluding the litigation concerning [the UNE Remand and Line Sharing rules] by invalidating them.”<sup>24</sup> As a threshold matter, it is ironic that Verizon gives great weight to this later Commission “clarification” but is dismissive of the Commission’s contemporaneous “clarification” of Condition XIII of the *Bell Atlantic/GTE Merger Order* that Verizon had agreed that it would make UNEs available “from now until the date on which the Commission’s orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable.”<sup>25</sup>

In any event, the scope of Verizon’s September 2000 request for clarification did *not* deal with the language governing the termination of the conditions at issue here. Rather, the issue raised by Verizon was “whether the Merger Conditions impose a free-standing requirement to set prices for bundled network elements based on the FCC’s TELRIC pricing rules, such that the merged company would be required to retain TELRIC-based pricing even if those rules ultimately are determined to be inconsistent with the law of the land,”<sup>26</sup> noting that this was the decision of the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, then on appeal to the Supreme Court.<sup>27</sup>

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<sup>24</sup> Verizon’s Reply Comments at 7, n. 11.

<sup>25</sup> *Bell Atlantic/GTE Merger Order* ¶ 316.

<sup>26</sup> Letter of Michael E. Glover, Verizon, to Dorothy T. Atwood, Chief, Common Carrier Bureau, FCC (Sept. 8, 2000) at 1. This issue is similarly identified as the issue in Ms. Atwood’s response, Letter from Dorothy T. Atwood, Chief, Common Carrier Bureau, FCC to Michael E. Glover, Verizon (September 22, 2000) at 1.

<sup>27</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *reversed in part, sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Ms. Atwood, the then Chief of the FCC's Common Carrier Bureau, simply responded that if the Supreme Court either denied *certiorari* or invalidated those rules outright (neither of which occurred), they would not independently impose an obligation on Verizon to price UNEs at TELRIC. Her clarification sheds no light on the issue of whether a remand of a Commission's order by the Supreme Court would, or would not, render that Order "final and non-appealable."

SBC argues that "the Commission held in its *Triennial Review Order* that, upon the *USTA I* decision becoming 'final and no longer subject to further review ... the legal obligation [to provide UNEs] *will no longer exist.*'"<sup>28</sup> The short answer, of course, as noted by the CLEC Petitioners, is that this decision had nothing to do with the independent obligations imposed by the *Merger Orders*, nor could the Commission implicitly modify the Merger conditions in this manner.<sup>29</sup>

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<sup>28</sup> SBC's Reply Comments at 4 (emphasis added by SBC), citing to the *Triennial Review Order*, ¶ 705.

<sup>29</sup> CLEC Petition at 13-14 and note 31.

## CONCLUSION

For the reasons stated above, the Commission clearly should issue the requested declaratory order.

Respectfully submitted,

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October 4, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of October 2004, I caused true and correct copies of the foregoing Comments of AT&T Corp. In Support of Petition for Declaration Ruling to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 4, 2004  
Bedminster, NJ

/s/ Karen Kotula  
\_\_\_\_\_

Karen Kotula

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