Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Application 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 Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules	)	CC Docket No. 98-141
	)	
Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control of Domestic and International 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	)	CC Docket No. 98-184

REPLY COMMENTS OF MCI, INC.

Pursuant to the Commission's Public Notice,[1] MCI, Inc. ("MCI"), by its attorneys, hereby submits its reply to initial comments filed in response to the petition for declaratory ruling filed by numerous competitive local exchange carriers ("CLECs" or "Petitioners").[2] As expected, Verizon Communications, Inc. ("Verizon") and SBC

[1] *See* Public Notice, *Wireline Competition Bureau Seeks Comments on Petition for Declaratory Ruling Regarding SBC/Ameritech and Bell Atlantic/GTE Merger Requirements*, CC Docket No. 98-141, CC Docket No. 98-184, DA 04-2974 (rel. Sept. 14, 2004).

[2] *See*, Petition of 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 Bay Ring 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

Communications, Inc. ("SBC")[3] opposed the petition, maintaining their faulty position that their respective unbundling merger conditions expired on March 24, 2003, when the Supreme Court denied petitions for certiorari of the vacatur of the *UNE Remand* and *Line Sharing* orders.[4] In addition, Verizon claims that, in any event, its unbundling condition expired 36 months after its merger closed. MCI strongly disagrees on both counts.

The CLECs generally agreed on what appears to be a straightforward point – that the three-year sunset provision that applies generically to the conditions SBC and Verizon agreed to in exchange for Commission approval for their respective mergers does not apply to the unbundling merger conditions.[5] Verizon, however, claims that the general rule applies to the unbundling condition, and therefore it sunset 36 months after the merger was closed. Verizon claims the merger condition does not have a separate sunset date. That claim, however, ignores the plain language of the *Bell Atlantic/GTE Merger Order*:

> 316. *Offering of UNE*s. 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

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Telecommunications Services, Inc.; Metropolitan Telecommunications, Inc. d/b/a MetTel; Mower Communications Corp.; NTELOS Network, Inc.; Pac-West Telecomm, Inc.; R&B Network, Inc.; RCN Telecom Services, Inc.; settle, Inc.; TDS Metronome, LLC; US LEC Corp.; and Viscera Communications, Inc. f/k/a Genesis Communications Int'l, Inc. for Declaratory Ruling Regarding SBC/Ameritech and Bell Atlantic/GTE Merger Requirements (filed Sept. 9, 2004) ("Petition").

[3] *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*, 14 FCC Rcd 14712, FCC 99-279 (1999) ("*SBC/Ameritech Merger Order*"); *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*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 39696, (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 and Fourth Report and Order, 14 FCC Rcd 20912 (rel. Dec. 9, 1999) (*"Line Sharing Order"*) (emphasis added).

[5] MCI Comments at 4; SBC Comments at n. 22; AT&T Comments at 3.

> 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. Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the *Local Competition Orde*r, ***until the date*** of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.."[6]

Given the nature of litigation, the Commission could not have given a specific date by which the Commission's orders in the *UNE Remand* and *Line Sharing* proceedings and any subsequent proceedings would have concluded, or by which a final and non-appealable decision determining that Verizon is not required to provide these UNEs at cost-based rates could be issued. If the Commission did intend for the benefits of the unbundling merger conditions to continue for only 36 months as Verizon claims, the Commission could have easily added language to that effect, but it did not. Instead, the Commission declared that "from now until the date on which the Commission's orders in those [*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. . ."[7] Verizon's position is flatly inconsistent with the plain language of the merger conditions. By their terms, the merger conditions at issue here have a separate triggering event for termination.

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[6] *See Bell Atlantic/GTE Merger Order,* ¶ 316. (emphasis added)
[7] *Id*.

As MCI and the Petitioners stated in their comments,[8] the merger conditions' expiration dates are triggered when the Commission's orders in the *UNE Remand* or *Line Sharing* proceedings, *and any subsequent proceedings*, become final and non-appealable. Contrary to SBC and Verizon's claims,[9] this has not occurred, and therefore SBC and Verizon must provide the UNEs at issue "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates."[10] SBC and Verizon each conveniently ignores the express language in their respective merger orders that ties the sunset of the conditions to final conclusion of the *UNE Remand* proceeding "*and any subsequent proceedings*."[11]

Petitioners and other commenters are correct that subsequent proceedings to the vacated *UNE Remand Order* are ongoing, and therefore it cannot be said that the Commission's orders "in any subsequent proceedings" to that proceeding are final and non-appealable. Nor, clearly, given the ongoing examination of these issues in the *Triennial Remand* proceeding, [12] can it be said that there has been a final, non-appealable judicial decision that determines that Verizon and SBC are not required to provide these UNEs at cost-based rates. As AT&T demonstrated,[13] the *UNE Remand Order* was a remanded order, and as such, was not a final decision. On this the parties seem to agree. *USTA I*, however, was not a final, non-appealable judicial decision on Verizon and SBC's UNE obligations. To the contrary, *USTA I* remanded the issues back to the

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[8] MCI Comments at 4-5; PACE Comments at 5-8; AT&T Comments at 6-8.
[9] SBC Opposition at 4-6; Verizon Comments at 5-8.
[10] *Bell Atlantic/GTE Merger Order*, ¶ 316.
[11] *Id.*; *SBC/Ameritech Merger Order*, ¶ 394. It is preposterous for the BOCs to claim that they are not bound by the Commission's order, but only the merger conditions. If only the merger conditions were binding the Commission would have just released the text of the conditions.
[12] *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, 18 FCC Rcd 16783 (2004).
[13] AT&T comments at 7.

Commission, which dealt with the remanded issues in the *Triennial Review Order*, a subsequent proceeding of the *UNE Remand Order*.[14] As MCI explained in its comments, the *Triennial Review Order* is expressly captioned as an "Order on Remand." The Commission consistently referred back to *USTA I* as its directive. The *Triennial Review Order* is clearly a "subsequent proceeding" of the *UNE Remand Order* as contemplated by the merger conditions. Further, the *USTA II* decision that vacated and remanded the *Triennial Review Order* also remanded the unbundling issues back to the Commission, triggering another "subsequent proceeding" as contemplated by the merger conditions. The Commission is currently developing new unbundling rules to comply with *USTA II*.[15] The purpose of the merger conditions was to maintain the *status quo* if the Commission's unbundling rules were stayed or vacated. Under the BOCs' reading of the merger condition, there would never be any "subsequent proceedings" because the obligation would have terminated after the initial judicial review of the *UNE Remand Order* and *Line Sharing Order*, when the Supreme Court declined to hear *USTA I*. The merger orders cannot be read in a way that gives no meaning to the "subsequent proceedings" language or other material aspects of the conditions, such as the explicit requirement to continue providing these UNEs until a final and non-appealable judicial decision to the contrary.

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[14] *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*, 18 FCC Rcd 16978 (2003) corrected by errata, 18 FCC Rcd 19020 (2003), *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*"), *cert. denied*, 2004 U.S. LEXIS 6710 (Oct. 12, 2004).

[15] *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, 18 FCC Rcd 16783 (2004).

Finally, in a last ditch effort, Verizon and SBC go out on a limb by relying on paragraph 705 of the *Triennial Review Order* as evidence that the Commission did not intend to preserve prior rules pending reconsideration or appeal of its orders.[16] To the contrary, the language cited by the BOCs lends more support to the CLECs' position. In paragraph 705 of the *Triennial Review Order*, the issue was the impact change of law provisions would have on the effectiveness of the Commission's rules adopted in the *Triennial Review Order* vacated rules. There the Commission specifically stated that it would be "unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of *this* Order."[17] Two points can be gleaned from the Commission's language.

First, by its terms, this paragraph only applies to changes in obligations as set forth in the *Triennial Review Order* and not, for example, to merger conditions. The paragraph does not apply or even refer to merger conditions, which are separate and independent of the Commissions' unbundling rules.[18] Second, the fact that the Commission did *not* make a similar pronouncement with respect to the expiration of the merger conditions lends support to the argument that the Commission's intent was to maintain the BOCs' unbundling obligations pending litigation. As the PACE Coalition pointed out, the Commission recognized that there would be no final unbundling rules for an unknown amount of time after the *UNE Remand Order* was issued because legal appeals were sure to be pursued.[19] Again, the Commission could have easily limited the time period for the unbundling merger conditions, but it did not. As a result, unlike in the

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[16] SBC Opposition at 7; Verizon Comments at 6.
[17] *Triennial Review Order*, ¶ 705 (emphasis added).
[18] *SBC v. FCC*, 373 F.3d 140 (D.C. Cir. 2004) (declaring that Commission unbundling orders are independent of merger condition obligations).
[19] PACE Comments at 5.

Triennial Review Order, the Commission specifically tied the sunset of the merger unbundling condition to a final, non-appealable determination of the *UNE Remand Order* "and any subsequent proceedings."[20]

In its initial comments, MCI stressed that the unbundling conditions were integral factors in the Commission's grant of Verizon and SBC's mergers. The mergers were quid pro quos. The merged BOCs got enormous benefits in exchange for certain commitments. Now, Verizon and SBC want to maintain the benefits and abandon the commitments. This cannot be allowed to stand. Verizon and SBC must continue to provide all UNEs and UNE combinations pursuant to the *UNE Remand Order* until there is a final, non-appealable decision on the Commission's unbundling rules.

Respectfully submitted,

MCI, Inc.

_____/s /_____

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[20] *See Bell Atlantic/GTE Merger Order,* Appendix D; *SBC/AIT Merger Order*, Appendix C.

Certificate of Service

I, Lonzena Rogers, on this eighteenth day of October, 2004, do hereby certify that I have caused a true and correct copy of MCI, Inc. Reply Comments to be served on the following with respect to a Petition for Declaratory Ruling in the matter of CC Docket No. 98-141 and CC Docket No. 98-184 to be served electronically on the following:

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