

Before the
Federal Communications Commission
Washington, DC 20554

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

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

Leonard J. Cali
Lawrence J. Lafaro
Aryeh S. Friedman
One AT&T Way
Bedminster, NJ 07921
(908) 532-1831

Attorneys for AT&T Corp.

October 19, 2004

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

ARGUMENT..... 4

I. THE COMMISSION HAS ALREADY HELD THAT THE PLAIN MEANING OF “FINAL” INCLUDES “ANY SUBSEQUENT PROCEEDING” 4

 A. The Plain Meaning Of The Word “Final” Is That The Conditions Do Not Sunset Until “Any Subsequent Proceedings, Becomes Final And Non-Appealable” 4

 B. The Commission Articulated This Plain Meaning In The *Merger Orders*..... 6

 C. As SBC Concedes the UNE Unbundling Conditions Are Not Subject To The Three Year Sunset..... 9

II. NEITHER THE COMMISSION NOR THE BUREAU HAVE SUBSEQUENTLY ISSUED AN INTERPRETATION INCONSISTENT WITH ITS INITIAL READING OF THE PLAIN MEANING OF THE CONDITIONS10

 A. The Auditor Reports Do Not Reflect Bureau’s Concurrence With Verizon's and SBC's Misinterpretation Of The Language In The Conditions.....10

 B. Neither The Commission Nor The Bureau Has Held That For Purposes Of The Merger Conditions, *USTA I* Was The Requisite "Final" Judicial Decision .12

CONCLUSION.....15

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

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

**REPLY 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 Reply 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 ("CLECs' Petition"). The filed comments confirm that the declaratory ruling requested by the CLECs must be granted.

INTRODUCTION AND SUMMARY

The Commission has already resolved the issue presented to the Commission in the CLECs' Petition. Contemporaneously with the issuance of the UNE unbundling conditions, the

Commission articulated their “plain” meaning:¹ the UNE unbundling conditions do not sunset “until the date on which the Commission’s orders in those proceedings, *and any subsequent proceedings*, becomes final and non-appealable.”² The Commission’s holding regarding the plain meaning of the conditions is binding here, requiring the granting of the CLECs’ Petition.³

In *USTA I*, the *UNE Remand Order* was *remanded* for subsequent proceedings.⁴ The *Triennial Review Order* was the FCC’s order on remand and when the *Triennial Review Order* was appealed, it was *remanded* in *USTA II* for further proceedings.⁵ Thus, there has been no

¹ This was *not*, as SBC and Verizon claim, an attempt by the Commission to modify or add conditions, SBC’s Opposition to Petition For Declaratory Ruling (“SBC Comments”) at 6 and Comments of Verizon on Petition For Declaratory Ruling (Oct. 4, 2004) (“Verizon Comments”) at 6-7, but rather an effort to set forth clearly their plain meaning.

² 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*”) ¶ 394; 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*”) ¶ 316 (emphasis added).

³ *Connors v. Island Creek Coal Co.*, 756 F. Supp. 7 (D.D.C. 1990) (prior court interpretation of the plain language of an agreement precluded relitigation of that issue); *Pergosky v. Pennsylvania Power & Light*, 2004 WL 765108 (E.D. Pa 2004) (same, meaning of settlement agreement).

⁴ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 430 (D.C. Cir. 2002) (*USTA I*) (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”), *cert. den.* 123 S. Ct. 1571 (2003).

⁵ 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*), *cert. den.* ___ U.S. ___ (Oct. 12, 2004).

“final” order or judicial decision in the *UNE Remand* or *Line Sharing* proceedings, since further proceedings need to be held.⁶

SBC and Verizon argue that these proceedings “became no longer appealable *and thus final*, on March 24, 2003” when the Supreme Court denied certiorari in *USTA I*.⁷ But this argument renders the word “final” mere surplusage. As the Commission has already held, the word “final” means that in addition to the exhaustion of appeals of a particular decision there must also be no “further proceedings.”

Contrary to the arguments of both SBC and Verizon, the Commission did not modify its reading of the plain meaning of these merger conditions in the *Triennial Review Order*. That Order’s discussion of the change of law provisions in interconnection agreements did not purport to address the additional obligations imposed on SBC and Verizon by their merger conditions, especially where those conditions were imposed as a result of mergers that the Commission found would have otherwise been anticompetitive but for the imposition, *inter alia*, of UNE unbundling conditions that would not sunset until there was finality through “any subsequent proceeding.” The Common Carrier Bureau did not (indeed could not) alter the Commission’s clear holding as to the plain meaning of these conditions in its letter to Verizon addressing the impact of a possible denial of certiorari in *Iowa Utils. Bd. v. FCC* on its TELRIC pricing obligations. Nor did the Commission staff do so to the extent that it agreed, in *ex parte*

⁶ See e.g., *International Tel. & Tel. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162, 1163 (4th 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*”) (emphasis added); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 546 (5th Cir.), *cert. den.*, 534 U.S. 945 (2001).

⁷ SBC Comments at 5, n. 7 (emphasis added); see also, Verizon Comments at 2-3.

discussions with SBC, to SBC's definition of the "Evaluation Period" for the audit of compliance with this Condition.⁸

Accordingly, the CLECs' Petition for the requested declaratory ruling must be granted.

ARGUMENT

I. THE COMMISSION HAS ALREADY HELD THAT THE PLAIN MEANING OF "FINAL" INCLUDES "ANY SUBSEQUENT PROCEEDING"

A. The Plain Meaning Of The Word "Final" Is That The Conditions Do Not Sunset Until "Any Subsequent Proceeding Becomes Final And Non-Appealable"

Both SBC and Verizon argue that the Commission must be guided by the plain meaning of the Conditions.⁹ Yet, as noted in AT&T's Comments,¹⁰ the Commission has already ruled, contemporaneously with the issuance of the Conditions, that consistent with their purpose, the plain meaning of these conditions is that they do not expire "until the date on which the Commission's order in that proceeding, *and any subsequent proceedings*, becomes final and non-appealable."¹¹ It is the BOCs' reading of these conditions that is strained and violates their plain terms.

The merger conditions require a "*final*, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided" and conclude with the sentence: "The provisions of this Paragraph shall become null and void and impose no further

⁸ That "agreement" was not made public until the Audit Report was filed on August 30, 2004. Letter from Michelle A. Thomas, SBC, to Marlene Dortch, FCC, CC Docket No. 98-141 (August 30, 2004) ("SBC's 2003 Merger Compliance Audit Report").

⁹ Verizon Comments at 2; SBC Comments at 3-4 and 14.

¹⁰ Comments of AT&T Corp. In Support of Petition for Declaration Ruling (Oct. 4, 2004) at 4-6.

¹¹ *SBC/Ameritech Merger Order* ¶ 394; *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

obligation on [the merging parties] after the effective date of *final* and non-appealable Commission order[s] in the UNE Remand [and for Verizon the Line Sharing] proceeding[s].”¹²

The plain meaning of a “*final*” non-appealable judicial decision or a “final” Commission “order” in a proceeding is that *no subsequent proceedings* are available. Thus, the courts have held that a vacated *and remanded* decision is not “final,” “[s]ince further proceedings will be necessary.”¹³

SBC and Verizon argue that the *UNE Remand Order* “became no longer appealable *and thus final*, on March 24, 2003.”¹⁴ But this argument renders the word “final” mere surplusage, meaning no more than “no longer appealable.” As demonstrated above, and as both the courts and the Commission have already held, the word “final” means that in addition to the exhaustion of appeals of a particular decision there must also be no “subsequent proceedings.”

Verizon’s reliance on *Alabama Power Company v. EPA*, 40 F.3d 450 (D.C. Cir 1994) for the proposition that a “vacated” judgment is a “final” judgment is inapposite because here the order was vacated *and remanded*. In *Alabama Power Company* the Court vacated, *but did not remand*, an EPA rule; thus there were no further proceedings to be had. *USTA I* was vacated *and remanded*.¹⁵ It is for this reason that the Commission, in setting forth its understanding of the

¹² *SBC/Ameritech Merger Conditions* ¶ 53; *Bell Atlantic/GTE Merger Conditions* ¶ 39 (emphasis added).

¹³ See e.g., *International Tel. & Tel. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162, 1163 (4th 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 (5th Cir.), *cert. den.*, 534 U.S. 945 (2001).

¹⁴ SBC Comments at 5, n. 7; *see also*, Verizon Comments at 2-3.

¹⁵ Perhaps that is why Verizon, in quoting the *Triennial Review Order*’s description of *USTA I* in Paragraph 31, deleted the language “and remanded.” Verizon Comments at 3. As noted in the Comments herein, in the *Triennial Review Order* appeals, the BOCs argued that the consolidated

(footnote continued on next page)

plain meaning of these conditions, stated that they did not expire “until the date on which the Commission’s order in that proceeding, *and any subsequent proceedings*, becomes final and non-appealable.”¹⁶

Contrary to SBC’s argument, the “correct chronology”¹⁷ in which these conditions were negotiated demonstrates that the possibility of a remand was precisely what concerned the Commission and that the UNE unbundling obligations were intended to survive a remand order. The UNE unbundling conditions were negotiated after the initial unbundling rules had been *vacated and remanded* by the Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), and the CLECs were awaiting the replacement regulations soon to be promulgated in the UNE Remand proceeding, which were certain to be challenged again by various parties.¹⁸ Thus, the inclusion of the word “final” to preclude sunseting until the conclusion of all proceedings subsequent to a remand made eminent sense.

B. The Commission Articulated This Plain Meaning In The Merger Orders

The Commission ruled in the *Merger Orders*, contemporaneously with the issuance of the Conditions, that consistent with their purpose, the plain meaning of these conditions was that

(footnote continued from previous page)

appeals should be transferred from the Eighth Circuit Court of Appeals to the same panel in the D.C. Circuit that decided *USTA I* precisely because the *Triennial Review* unbundling rules were a result of the remand in that proceeding. *See e.g.*, Comments of the Pace Coalition In Support Of Petition For Declaratory Ruling (October 4, 2004) (“Pace Comments”) at 7, *citing to Eschelon Telecom, Inc. v. FCC*, No. 03-3212, Joint Motion for Expedited Transfer (8th Cir. filed Sept. 18, 2003).

¹⁶ *SBC/Ameritech Merger Order* ¶ 394; *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

¹⁷ SBC Comments at 8.

¹⁸ PACE Comments at 3, n. 9.

they did not expire “until the date on which the Commission’s order in that [or for Verizon those] proceeding[s], *and any subsequent proceedings*, becomes final and non-appealable.”¹⁹

The Commission’s reading of the plain meaning of these conditions in the respective Merger Orders is persuasive, if not binding, precedent for purposes of this Petition.²⁰

SBC and Verizon both argue that it is the conditions themselves, not the Commission’s “summar[y]” [of] the conditions, or “short hand description of those conditions in its adopting order” that govern, and that moreover, the Commission cannot modify or add on conditions by the language used in the adopting order.²¹ But as noted above, the language in the adopting order does not modify or add conditions but rather sets forth the Commission’s contemporaneous construction of the conditions.²² Verizon’s reliance on *Texas Networking, Inc.*,²³ is thus unavailing. As the Verizon footnote concedes, the circumstances in that case differ²⁴ –

¹⁹ *SBC/Ameritech Merger Order* ¶ 394; *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

²⁰ *Connors v. Island Creek Coal Co.*, 756 F. Supp. 7 (D.D.C. 1990) (prior court interpretation of the plain language of an agreement precluded relitigation of that issue); *Pergosky v. Pennsylvania Power & Light*, 2004 WL 765108 (E.D. PA 2004) (same, meaning of settlement agreement). This is certainly the case where, as SBC notes, “[n]othing has changed in the intervening years.” SBC Comments at 13.

²¹ SBC Comments at 6, Verizon Comments at 6-7.

²² SBC further argues that “where the Commission intended to modify the language of SBC’s merger commitments it did so by adding footnotes to the commitments themselves.” SBC Comments at 6. But that does not preclude the Commission from expounding on the plain meaning of those Conditions in the *Merger Order*.

²³ Order, *Texas Networking, Inc.*, 16 FCC Rcd 17898, 17901, ¶ 7 (2001).

²⁴ Verizon, after citing this decision, notes that “the circumstances” in *Texas Networking* “differ” because there the FCC held no more than that its “description of a condition the Federal Trade Commission (“FTC”) imposed on the Time Warner-AOL merger” could not expand on the obligations imposed by the FTC. Verizon Comments at 7 and n. 9.

materially. In *Texas Networking* the petitioner argued that the Commission’s description of the conditions imposed by another agency, the Federal Trade Commission, somehow created an additional FCC condition. That is very different from what occurred here – the Commission’s expression of its understanding of “final” as including “*and any subsequent proceedings*” was not an attempt to impose “an additional independent ... condition” but rather to set forth the “plain meaning” of the commitment it (not another agency) had just agreed to as a condition of approving the merger.

Verizon argues that the Commission’s reference to “subsequent proceeding” “does not in any way modify the type of ‘judicial decision’ that would put an end to Verizon’s obligations.” Rather, Verizon argues, the “subsequent proceeding” language is no more than an acknowledgement by the Commission “that even if the D.C. Circuit had never vacated the UNE Remand Order and Line Sharing Order, a subsequent final and non-appealable FCC order *on any subject within the scope of Paragraph 29* would put an end to the corresponding obligation under the merger conditions (whether the order eliminated the condition or not).”²⁵ That is simply incorrect. The Commission’s reference to “*any subsequent proceedings*” is modified by the preceding reference to the “orders in *those*” – that is, the *UNE Remand* and *Line Sharing* “proceedings” – and is immediately followed by the sentence “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.”²⁶ Thus, it is clear that the Commission was using “*any subsequent proceedings*” to identify the possibility of a remand of its Order in the *UNE Remand*

²⁵ Verizon Comments at 7-8.

²⁶ *SBC/Ameritech Merger Order* ¶ 394; *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

and *Line Sharing* proceedings, as a result of which that there would be no “final” order or judicial determination, resulting in the lack of the certainty that CLECs needed in order to be induced to enter the local market.

SBC and Verizon also both overstate and misstate the scope of the “subsequent proceeding” language in the Commission’s decision in an effort to incorrectly argue that this language is inconsistent with the Conditions themselves.²⁷ Thus, SBC argues that under the CLECs’ interpretation the UNE unbundling condition would effectively never sunset because they would not be “final” “so long as the Commission has an open proceeding to consider the scope of its unbundling rules” while Verizon argues that the “CLEC’s reading ... would freeze unbundling rules in place despite a court decision (or repeated such decisions) that they are unlawful and even if the Commission itself had refused to adopt such an unbundling obligation in subsequent orders.”²⁸ These posited interpretations are contrived; all that is encompassed within “subsequent proceeding” are further proceedings required by an appellate remand. Once an order or remand is not appealed, or on final appeal is not remanded, there is a final and non-appealable decision or order.

C. As SBC Concedes the UNE Unbundling Conditions Are Not Subject To The Three Year Sunset

As AT&T demonstrated in its Comments, the Enforcement Bureau has already expressly recognized that the UNE condition is a condition that is *not* subject to the three-year sunset period.²⁹ Verizon argues that the three year sunset clause applies because the general “Sunset”

²⁷ SBC Comments at 7.

²⁸ Verizon Comments at 8-9.

²⁹ AT&T’s Comments at 3.

Condition found in ¶ 64 provides that “except where other termination dates are specifically established herein” the three year sunset clause applies, and the UNE unbundling condition makes reference to a specific event rather than a specific date.³⁰ This argument is absurd and SBC specifically disavows it.³¹ In addition to the Enforcement Bureau’s holding that the UNE condition is *not* subject to the three-year sunset period,³² the Commission in the *Shared Transport Forfeiture Order*, similarly held that conditions with their own triggering “events” fell within the “exception” language of ¶ 64.³³ Verizon’s argument is patently frivolous.

II. NEITHER THE COMMISSION NOR THE BUREAU HAVE SUBSEQUENTLY ISSUED AN INTERPRETATION INCONSISTENT WITH ITS INITIAL READING OF THE PLAIN MEANING OF THE CONDITIONS

A. The Auditor Reports Do Not Reflect Bureau’s Concurrence With Verizon’s and SBC’s Misinterpretation Of The Language In The Conditions

SBC and Verizon claim that the Commission and/or the Commission staff have, in actions subsequent to the issuance of the *Merger Orders*, endorsed their position that the UNE unbundling conditions expired on March 24, 2003. The Commission has clearly not done so.

Both BOCs argue that the Bureau, as part of the merger auditing process, has sanctioned their interpretation that the UNE unbundling conditions sunset on March 24, 2003. SBC asserts that “Ernst & Young – with the concurrence of the Commission’s Staff – concluded that

³⁰ Verizon Comments at 9-11.

³¹ SBC Comments at 10 n. 22; *see also, id* at 5..

³² *See* Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, & SBC Communications, Inc., Transferee*, 17 FCC Rcd. 19595, ¶ 3 (2002) n.7.

³³ *Forfeiture Order, SBC Communications, Inc., Apparent Liability for Forfeiture*, 17 FCC Rcd 19923 (2002) (“*Shared Transport Forfeiture Order*”) ¶ 19 and n. 53.

Condition 17 sunset on March 24, 2003.”³⁴ But the cited material does not say that. The cited appendix to the most recent audit report, filed on August 30, 2004, states only that “[t]he Company and the FCC Staff agreed” in the most recent audit “to the following definition of the Evaluation Period” for Condition 17 – that the Evaluation period would go “through March 24, 2004.” Thus, the reported agreement between SBC and the FCC staff related only to the definition of the Evaluation period and was not a ruling by the staff on the plain meaning of the underlying unbundling conditions or when the conditions actually sunset. More importantly, the Commission could not, consistent with its rules, the Administrative Procedure Act, or due process, have made such a determination without some public notice and request for public comment. The first public “notice” of the adoption of this definition of the “Evaluation Period” was only made when the audit was put in the public file on August 30, 2004, and it has never been put out for public comment.³⁵

Verizon argues that its auditor “has verified in its report to the Commission that the obligations imposed under paragraph 39 of the merger conditions expired on March 24, 2003” and noted that under paragraph 56(b) of the Merger Conditions the auditor must “consult with the Common Carrier Bureau regarding any accounting or rule interpretation necessary to

³⁴ SBC Comments at 5, *citing to* SBC’s 2003 Merger Compliance Audit Report, Tab 2, Att. A at 2. Tab 2 is the Report of Management; Tab 1 would be the Accountant’s Report.

³⁵ Nor does the Public Notice on the CLECs’ Petition, which was issued two weeks later, provide such notice, inasmuch as it does not refer at all to the “Evaluation Period” in the Audit. There was certainly no notice of such an “agreement” by Commission staff from the prior merger audit report which defined the audit period for this condition as covering the entire audited period. *See* Letter from Michelle Thomas, SBC to Marlene Dortch, FCC, CC Docket No. 98-141 (Sept. 2, 2003), Attachment D to the Report of Independent Accountants on SBC’s Compliance with the Merger Conditions.

complete the audit.”³⁶ The reference to “rule” refers to accounting rules interpretation not condition interpretation,³⁷ as Verizon is well aware, since past disputes of interpretation affecting conditions have arisen without any auditor consultation with the Bureau staff.³⁸ Nor is there any indication that the auditor in fact consulted with the Bureau on this matter – to the contrary, had the auditor done so and the Bureau agreed, this would have been indicated in the audit report or by Bureau letter and Verizon would have noted it here. Verizon’s failure to do so is telling.

As AT&T’s Comments demonstrated, the auditor’s assertion in its audit report as to the sunset date, which is patently beyond the scope of the auditor’s authority,³⁹ does not determine the proper sunset date.⁴⁰ Nor can *ex parte* agreements between the audited company and/or the auditor and the Commission staff regarding the mechanics of the audit override the Commission’s reading of the plain meaning of the UNE unbundling conditions.

B. Neither The Commission Nor The Bureau Has Held That For Purposes Of The Merger Conditions, *USTA I* Was The Requisite “Final” Judicial Decision

SBC and Verizon argue that the Commission acknowledged in the *Triennial Review Order* that *USTA I* had “vacated” its prior orders and that “the legal obligation [to provide those

³⁶ Verizon Comments at 5.

³⁷ “Conditions” are referred to as such with a capital “C”. *Bell Atlantic/GTE Merger Conditions passim*.

³⁸ For example, with respect to Condition V, the most recent Audit Report identified an issue involving the interpretation of the Performance Measurement Business Rules associated with the method by which Verizon measures the Trouble Duration Interval for fGTE (“MR-4 metrics”). E&Y 2004 Audit Report, ¶ 3, at 1-2.

³⁹ *Bell Atlantic/GTE Merger Conditions*, ¶ 56(f) (auditors can evaluate compliance with the substantive terms of the conditions, but have no authority to interpret the terms of those conditions).

⁴⁰ AT&T’s Comments at 8.

UNEs] upon which ... existing interconnection agreements are based ... *no longer exist.*”⁴¹ That is wrong. The Commission observed in the *Triennial Review Order* that *USTA I* “vacated and remanded” certain portions of the UNE Remand Order,⁴² and found the BOCs’ (including BellSouth’s and Qwest’s) contention that change of law provisions in interconnection agreements “are triggered when the decision of the D.C. Circuit reversing the Commission’s prior UNE rules becomes final and nonappealable” is reasonable so that the new unbundling rules in the TRO proceeding would now be applicable in that context.⁴³ Nowhere did the Commission state that this portion of the TRO was intended to override SBC’s or Verizon’s additional merger UNE unbundling conditions, which had a purpose independent of those applicable to the interconnection agreements. That is, the merger UNE unbundling conditions were intended to remedy the otherwise significant anticompetitive effects of the mergers, *inter alia*, on local competition within the affected regions. It was the need to provide the necessary certainty to induce local entry by CLECs to override those anticompetitive effects that required that those conditions continue until there was finality through “any subsequent proceeding.” Thus, Verizon and SBC, in order to alleviate the concerns about the anticompetitive impact of

⁴¹ Verizon Comments at 3, SBC Comments at 12. In this context, SBC further argues that the Commission, in the *Triennial Review Order* “corrected” its statement in the *Shared Transport Forfeiture Order* that *USTA I* was not the required Commission finding or judicial decision that would trigger the sunset of that condition. SBC Comments at 11-12. The *Triennial Review Order* certainly did not do so explicitly (*see* the only reference to the *Shared Transport Forfeiture Order* in the *Triennial Review Order* at ¶ 146, n. 480). Moreover SBC, in defining the “Evaluation Period” for the shared transport condition (that it claims it negotiated with the FCC staff) includes the post March 24, 2003 portion of the audit period, again suggesting that the Commission staff fully believed that *USTA I* was not final for purposes of triggering the sunset provision for that condition). *See* SBC’s 2003 Merger Compliance Audit Report, Tab 1, Att. A at 3 and n. 1.

⁴² *Triennial Review Order*, ¶ 31.

⁴³ *Id.*, ¶ 705.

their mergers, accepted UNE unbundling obligations above and beyond those assumed by the other BOCs.

Verizon further argues that the “Common Carrier Bureau has already held that the vacatur of the FCC’s rules would eliminate Verizon’s obligations under Paragraph 39.”⁴⁴ However, its subsequent selective quotation from Ms. Atwood’s letter demonstrates that it did no such thing. As AT&T demonstrated in its Comments, and as is apparent from Verizon’s discussion of her response, Ms. Atwood said no more than that Verizon would not be required, by the merger conditions, to maintain TELRIC-based pricing if the Supreme Court either denied *certiorari* in the appeal of the Eighth Circuit decision in *Iowa Utils. Bd. v. FCC* (where there was a vacatur without a remand) or invalidated those rules outright.⁴⁵ The denial of *certiorari* in *Iowa Utils. Bd.*, in which the Circuit Court did not order a remand, is qualitatively different from the denial of *certiorari* of *USTA I* in which the Circuit Court *did* remanded the proceedings, so that they were not “final” because “subsequent proceedings” were necessary.

⁴⁴ Verizon Comments at 3-4.

⁴⁵ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 819 n. 39 (8th Cir. 1997), *reversed in part, sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

CONCLUSION

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

Respectfully submitted,

/s/ Aryeh Friedman
Leonard J. Cali
Lawrence J. Lafaro
Aryeh S. Friedman
One AT&T Way
Bedminster, NJ 07921
(908) 532-1831

Attorneys for AT&T Corp.

October 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2004, I caused true and correct copies of the foregoing Reply 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 19, 2004
Bedminster, NJ

/s/ Karen Kotula

Karen Kotula

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554*

Janice M. Myles
Federal Communications Commission
Wireline Competition Bureau
Competition Policy Division
445 12th Street, SW
Washington, D.C. 20554**

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554**

Russell M. Blau
Patrick J. Donovan
Paul B. Hudson
Andrew Lipman
Philip J. Macres
Swidler Berlin Shereff Friedman LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116

Aaron M. Panner
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
Counsel for Verizon

Michael E. Glover
Edward Shakin
Verizon
1515 North Courthouse Road, Suite 500
Arlington, VA 22201-2909

Jim Lamoureux
Gary Phillips
Paul K. Mancini
SBC Communications, Inc.
1401 I Street, N.W.
Suite 400
Washington, D.C. 20005

Kecia Boney Lewis
Curtis Groves
MCI, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

Genevieve Morelli
Kelly Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Counsel to the PACE Coalition

Jason D. Oxman, General Counsel
Teresa K. Gaugler, Assistant General
Counsel
Association for Local Telecommunications
Services
888 17th Street, NW, Suite 1200
Washington, DC 20006

* Filed electronically via ECFS.

** Sent via e-mail