

**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) CC Docket No. 98-141
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)

In re Application of GTE Corporation,)
Transferor, and Bell Atlantic Corporation,)
Transferee, for Consent to Transfer of Control)
of Domestic and International Sections 214) CC Docket No. 98-184
and 310 Authorizations and Application to)
Transfer Control of a Submarine Cable)
Landing License)

**REPLY COMMENTS IN SUPPORT OF PETITION FOR
DECLARATORY RULING**

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Summary

For all their purported disagreement with the Petition, the Bells' comments reflect substantial agreement with the CLECs on the framework for the Commission's analysis. Specifically, the Bells agree that the conditions would terminate with respect to a particular UNE upon the earlier of (1) a final, non-appealable judicial decision providing that the UNE is not required to be provided or (2) a final and non-appealable Commission order in the "UNE remand proceeding." Petitioners agree completely. However, based upon the plain meaning of the conditions, the purpose of the conditions, and Commission and court precedent, it is clear that the SBC and Verizon comments have failed to establish that either of these triggers has occurred with respect to the UNE rules that were vacated by *USTA II*. In particular, SBC and Verizon have previously acknowledged that the D.C. Circuit's *vacatur* of the Commission's unbundling rules in *USTA I* did *not* make any determinations as to which UNEs were "required" by the Act. Meanwhile, the *UNE Remand Order* is not a "final and non-appealable order" because, under applicable Supreme Court and Court of Appeals precedent and common sense, an invalid order cannot be considered a final order.

Verizon's alternative argument that its unbundling merger obligations expired automatically after 36 months despite the non-occurrence of the triggers has been rejected previously by the Commission and contradicts the plain language of the conditions.

The continued application of the merger conditions for a specific period after a Commission finding of non-impairment does not undermine the Commission's policies. On the contrary, it is exactly what SBC and Verizon agreed to in order to offset the public interest harms caused by their respective mergers and, in any event, is consistent with the Commission's policy against flash cuts away from former UNEs.

Therefore, the Petition should be granted.

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**REPLY COMMENTS IN SUPPORT OF PETITION FOR
DECLARATORY RULING**

The thirty-seven competitive local exchange carriers¹ that filed the Petition for Declaratory Ruling in this proceeding on September 9, 2004, respectfully submit this

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.; Intelcom 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").

reply to the comments filed by SBC and Verizon that seek to rewrite and thereby eliminate their ongoing unbundling obligations under their respective merger conditions.

For all their purported disagreement with the Petition, the Bells' comments reflect substantial agreement with the CLECs on the framework for the Commission's analysis. Specifically, SBC agrees that there are only two bases on which the Commission could conclude that the unbundling obligations under the conditions would terminate with respect to a particular UNE upon the earlier of (1) a final, non-appealable judicial decision providing that the UNE is not required to be provided or (2) a final and non-appealable Commission order in the "UNE remand proceeding."² Verizon also agrees that either of these two triggers would terminate their merger unbundling obligation.³ Petitioners agree completely.⁴ The only significant disagreement on the applicable standards is that Verizon, unlike SBC, asserts that its merger obligation expired after 36 months even if neither of the triggers ever occurred.⁵

Accordingly, disposition of this Petition requires the Commission to answer only three questions:

1. In vacating the Commission's rules for certain UNEs in *USTA I*, did the D.C. Circuit make a determination that any of these UNEs were not required to be unbundled under the terms of the Act? Verizon and SBC say yes, while the Petitioners say no.

² The SBC conditions provide a third trigger – a final Commission order in the *UNE Remand* proceeding finding that the UNE is not required to be provided. SBC's comments at footnote 22 indicate that it does not intend to rely upon this clause, and the Petitioners agree that it has not been triggered.

³ The second trigger in the Verizon conditions would also require such an order in the *Line Sharing* proceeding.

⁴ See Petition at 4-5, quoting *SBC/Ameritech Merger Order*, Appendix C, condition ¶ 53 and *Bell Atlantic/GTE Merger Order*, Appendix D, condition ¶ 39.

⁵ Verizon comments at 9-11.

2. Has there ever been a Commission order in the *UNE Remand* proceeding that was simultaneously final and non-appealable? SBC and Verizon say yes, while Petitioners say no.
3. Does the three-year sunset clause in Verizon's merger conditions apply to the unbundling obligations? Verizon says yes, and Petitioners say no.

Once the Commission cuts through the distortions in the Bells' comments, it becomes apparent that neither SBC nor Verizon has demonstrated that any of these three bases for termination of their unbundling obligations under their respective merger commitments have occurred with respect to the unbundling rules that were vacated by *USTA II*.

Therefore, the Commission should grant the Petition.

I. *USTA I* DID NOT "PROVIDE" THAT ALL OF THE UNES ESTABLISHED BY THE *UNE REMAND ORDER* ARE "NOT REQUIRED" BY THE ACT. (CLEC Petition § III.A)

A. The Bells' Attempt to Alter the Plain Meaning of the Conditions is Betrayed by their Own Prior Statements and is Undermined by D.C. Circuit Precedent. (Verizon comments at 2-4, SBC comments at 10-12)

SBC and Verizon argue that the merger conditions expired because, according to them, *USTA I*⁶ is a final, non-appealable judicial decision providing that none of the UNEs set forth in the *UNE Remand Order* are required to be provided. But *USTA I* held no such thing. The Bells are unable to quote any such finding in the court's decision because the court did not make any determinations as to which UNEs were required by the Act, but instead remanded those determinations to the Commission.

Indeed, in the past, SBC and Verizon took pains to clarify that *USTA I* was not the type of decision that they now assert it is. In opposing petitions to the Supreme Court for review of *USTA I*, SBC and Verizon argued that *USTA I* was by then "simply a

⁶ *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*").

sideshow” because “it is the upcoming Triennial Review decision, not this case, that is of surpassing importance to the future implementation of the 1996 Act.”⁷ According to SBC and Verizon, further review of *USTA I* by the Supreme Court was unnecessary because:

The [D.C. Circuit] court did not purport to tell the FCC what elements must be unbundled or where it should strike the unbundling balance; instead, it identified issues that the statute, as interpreted by this Court, required the agency to consider in determining appropriate sharing rules, but that the agency had failed adequately to consider on remand.⁸

In short, SBC and Verizon expressly acknowledged that *USTA I* did *not* render any ultimate determinations as to which UNEs were “required” by the Act. Those decisions were instead to be made in what SBC’s and Verizon’s brief described as the “real battle” – the *Triennial Review*. Clearly, *USTA I* did not provide substantive determinations of whether the Act requires unbundling of particular network elements. Instead, according to SBC’s and Verizon’s own Supreme Court brief, it ruled only that “the FCC had not considered relevant factors or sufficiently explained its judgments” and could therefore be characterized as “largely imposing explanatory and evidentiary burdens on the FCC” for another remand proceeding.⁹ *USTA I* was, in this respect, no different from the Supreme Court’s *vacatur* of the Commission’s first unbundling rules in *Iowa Utilities Board*, which the Commission later explained “expressed *no* view about whether the Commission on remand could compel access to the same network elements that were

⁷ *United States Telecom Ass’n v. FCC*, Brief for Respondents BellSouth, Qwest, SBC, Verizon, and USTA in Opposition to Petition for a Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit, 2003 WL 21698030 at *17 (February 5, 2003) (“USTA Opposition to *Certiorari* Brief”) (stating that even petitioners acknowledge this fact).

⁸ USTA Opposition to *Certiorari* Brief at *11.

⁹ USTA Opposition to *Certiorari* Brief at *19 (referring with approval to characterizations made in Petitioners’ briefs).

included on its initial list under a proper application of the statutory unbundling standard.”¹⁰

The D.C. Circuit itself clearly recognized that it did not make any determinations in *USTA I* as to whether the UNEs established by the *UNE Remand Order* were or were not required by the Act. Had it done so, it would have had no reason to remand these questions to the Commission. Indeed, to assure that its decision was not misconstrued as an excuse to eliminate UNEs that are in fact required by the Act, the Court twice stayed its mandate until the Commission had time to make those determinations and adopt new unbundling rules. The *USTA I* mandate was not issued until February 27, 2003, a week *after* the Commission voted to adopt the *Triennial Review Order (TRO)*.

The Bells’ only real argument to support the contention that *USTA I* made a finding that UNEs are not required is Verizon’s suggestion that the Court did not have to “provide” anything so long as:

the *effect* of [USTA I’s] vacatur was to eliminate ILECs’ obligation to comply with the unbundling rules in the UNE Remand Order. Thus, the Commission has stated that, *in light of* the order of vacatur, “the legal obligation [to provide access to UNEs and UNE combinations] ... no longer exist[ed].”¹¹

SBC relies on the very same Commission statement (from the *TRO*) as Verizon, and proclaims, “That determination ... is binding and confirms that [its merger obligation] is no longer in effect.”¹² But the Bells’ reliance is misplaced, because it confuses a *consequence* of the court’s decision, such as described above, with a *finding provided by*

¹⁰ *USTA v. FCC*, FCC Petition for Rehearing or Rehearing En Banc at 4 (July 8, 2002) (emphasis original) (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999)).

¹¹ Verizon comments at 2-3 (emphasis added).

¹² SBC comments at 10.

the court, such as a finding affirming a Commission decision to terminate a UNE or a finding by the court that the Act does not require unbundling of a network element. Indeed, SBC's comments explicitly equate the two, arguing that "[t]he verb 'providing' in Condition 17 requires only a result: the elimination of the requirement to provide UNEs."¹³ As demonstrated below, SBC's unexplained assertion defies linguistic convention and, in any event, has been rejected by the D.C. Circuit in the specific context of SBC's merger conditions.

The principal definition of "provide" is "to supply or furnish with what is needed."¹⁴ As noted above, SBC and Verizon themselves have stated that the court did not "provide" any finding as to "what elements must be unbundled or where it should strike the unbundling balance;" instead, SBC and Verizon explained that *USTA I* provided certain "explanatory and evidentiary burdens" that the Commission was directed to meet in its remand proceeding. Even if the "effect" of *USTA I* could have been to temporarily relieve the ILECs' obligations under section 251(c)(3) (had the Commission failed to timely adopt new rules to implement the Act),¹⁵ that "effect" is not supplied or furnished by the court, and it does not retroactively put words into the mouth of the court that do not appear in its decision. As demonstrated above, the D.C. Circuit decision did not make or affirm any finding providing that the UNE is not required to be

¹³ SBC comments at 11.

¹⁴ Webster's Dictionary (1988 ed.). See *alternatively*, Black's Law Dictionary at 1224 (6th ed. 1990) ("Provide: To make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.")

¹⁵ In fact, *USTA I* never had the "effect" of eliminating the obligation to unbundle mass-market switching or dedicated transport in the mandate did not issue until *after* the Commission had reimposed those obligations in the *TRO*. Even with respect to those UNEs that the *TRO* eliminated, which are not the elements in dispute in this proceeding, it was the *TRO*, rather than *USTA I*, that had the "effect" of eliminating such unbundling obligations.

provided. Nor is there any evidence that the Court ever intended to make such a finding or that it believed it to be true, especially given that it repeatedly stayed its decision until after the *TRO* was approved such that this potential effect described by the Bells' comments never actually occurred.

In any event, an "effect" is not the same thing as a finding. The recent D.C. Circuit decision affirming the Commission's \$6 million forfeiture against SBC for violation of its merger obligations considered exactly the distinction between a consequence and a finding, and rejected SBC's attempt to eliminate its merger obligation to provide shared transport UNEs.¹⁶ SBC had urged the court to divine a Commission "finding that shared transport is not required to be provided" from the fact that a series of Commission decisions had resulted (in SBC's view) in a set of regulations that did not include an obligation to unbundle shared transport in certain instances.¹⁷ The Court held unequivocally that "Despite SBC's vigorous protestations, the UNE Remand order contained no such finding."¹⁸ The court found instead that the Commission had been silent as to whether the particular type of unbundling was required by the Act, and concluded:

That silence is simply not a "finding that shared transport is not required to be provided by SBC/Ameritech in the relevant geographical area." It is the absence of such a finding.¹⁹

In the wake *USTA I's vacatur* of the *UNE Remand Order*, there was the same

¹⁶ *SBC v. FCC*, 373 F.3d 140 (D.C. Cir. July 6, 2004).

¹⁷ *SBC v. FCC*, 373 F.3d at 150.

¹⁸ *SBC v. FCC*, 373 F.3d at 150.

¹⁹ *SBC v. FCC*, 373 F.3d at 151. Not surprisingly, referring to SBC's torturing of another phrase in its merger obligations, the Court held that SBC's reading of the conditions "defies linguistic convention." *Id.* at 149.

“absence of a finding” on the question of whether any UNEs were required by the Act. That absence did not, and by itself could not, trigger the termination of SBC’s or Verizon’s merger obligations. SBC’s and Verizon’s suggestion that *USTA I* made a sweeping determination that every single UNE in the *UNE Remand Order* was not required by the Act is therefore patently ridiculous. The plain meaning of the conditions and D.C. Circuit precedent compel rejection of SBC’s and Verizon’s argument that the D.C. Circuit’s *USTA I* decision provided that none of the UNEs set forth in the *UNE Remand Order* are required to be provided under the Act.

B. The Litigation of the Shared Transport Merger Condition Undermines, Rather than Supports, the Bells’ Attempt to Alter the Plain Meaning of the Unbundling Conditions. (Verizon comments at 4, fn. 8; SBC comments at 11-12)

The extent to which SBC and Verizon are grasping at straws to defeat the plain meaning of the conditions is evident from the fact that they resort to attempt to rely on a harmless misstatement in a footnote of the Commission’s *SBC Forfeiture Order*,²⁰ which imposed a \$6 million forfeiture on SBC for its failure to comply with its shared transport obligation. The Bells insinuate that because the order included a misstatement, its holding must be incorrect.²¹ Their logical fallacy is undermined not only by the plain meaning of the merger conditions themselves, but also by the fact that SBC later appealed the Commission’s order to the D.C. Circuit and lost.

The shared transport merger obligation addressed by the *SBC Forfeiture Order* is different from the unbundling obligations at issue in the Petition, but shares a similar

²⁰ *SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, Forfeiture Order, 17 FCC Rcd 19923, FCC 02-282 (2002).

²¹ SBC comments at 11-12; Verizon comments at 4, fn. 8.

sunset provision: the condition would expire upon “the date of a final, non-appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area.”²² The *SBC Forfeiture Order* explicitly held that *USTA I* had not triggered this basis for termination of the condition²³ – a finding that, if anything, undermines the Bells’ primary argument in this proceeding. But the Bells ignore the overall findings of the Commission’s order and instead turn their guns upon a footnote to this finding that states the Commission’s then-view that *USTA I* had not vacated the *UNE Remand Order*. The Bells now contend that since this footnote is mistaken, so too must be the findings of the *SBC Forfeiture Order* itself.

Of course, a passing phrase offered in a footnote of the *SBC Forfeiture Order* does not alter the plain language of the merger conditions. The *SBC Forfeiture Order* could have relied on any number of arguments to find that there had not been a “final, non-appealable judicial decision providing that shared transport is not required to be provided.” The fact that the Commission chose to state a basis that turned out to be incorrect does not mean that the Commission’s conclusion was wrong. For example, a Commission determination that SBC and Verizon are Regional Bell Operating Companies would not be rendered incorrect if it appended a footnote that stated that the Earth is flat. Instead, at most, discovery of the error would prompt the Commission to determine whether or not SBC and Verizon are in fact RBOCs – a fact it could readily reestablish without the mistaken footnote.

In any event, if the Bells’ interpretation of the *SBC Forfeiture Order* here were

²² *SBC/Ameritech Merger Order*, Appendix C, ¶ 56.

²³ *SBC Forfeiture Order*, ¶ 19.

correct, SBC should have won its appeal of the order at the D.C. Circuit and would have back its \$6 million. Instead, the D.C. Circuit rejected SBC's argument in a decision that as a general matter found that SBC's "vigorous attempts to create ambiguity"²⁴ "defied linguistic convention,"²⁵ would lead to conclusions that would "make no sense,"²⁶ and would subvert the "ordinary meaning" of the conditions, which the court found are "plain."²⁷ Clearly, the *SBC Forfeiture Order* cannot help the Bells to escape their merger obligations in this proceeding.

C. The Bureau Letter's Hypothetical Interpretation of Verizon's TELRIC Merger Condition Did Not and Cannot Alter the Plain Meaning of the Unbundling Conditions. (Verizon comments at 3-4; SBC comments at 10, fn. 24)

Verizon and SBC argue that a letter issued by the Common Carrier Bureau demonstrates a generally-applicable rule that denial of *certiorari* from an appeals court *vacatur* of Commission rules constitutes a finding that a UNE is not required to be provided by the Act.²⁸ The Bureau letter was written during the period between the Eighth Circuit's decision vacating the Commission's TELRIC pricing rules and the Supreme Court's decision to grant *certiorari* (and ultimately reverse the lower court's decision) in *Verizon v. FCC*. Verizon had requested clarification from the Bureau as to whether its obligation under the merger conditions to price UNEs at existing TELRIC rates would be terminated if the Supreme Court were to deny *certiorari*, and the Bureau

²⁴ *SBC v. FCC*, 373 F.3d at 147.

²⁵ *SBC v. FCC*, 373 F.3d at 149.

²⁶ *SBC v. FCC*, 373 F.3d at 148.

²⁷ *SBC v. FCC*, 373 F.3d at 149.

²⁸ Verizon comments at 3-4 (citing Letter Clarification of Bell Atlantic/GTE Merger Order, 15 FCC Red 18327, DA 00-2168, at 2 (2000)).

responded in a two-page letter that it believed it would. However, it is far from clear that the Bureau letter intended to apply such an interpretation to Verizon's general unbundling obligations (set forth in a different condition) under the merger conditions. Even if it did, such interpretation would be contrary to the plain meaning of the conditions and must be disregarded.

As an initial matter, it is instructive to note Verizon's reaction to the Petitioners' citation to an order issued by the Enforcement Bureau that had interpreted the sunset provisions of SBC's merger conditions. Verizon's comments protest that the "specific language" of the merger conditions "cannot [be] control[led] by" an "unnecessary" finding of a Bureau, especially on an issue that had not been briefed by any party and was inadequately explained. The Petitioners agree completely; under no circumstances could the Commission adopt Verizon's interpretation of the Bureau letter, which would change the plain meaning of the merger conditions.

The Bureau letter recognized that the *Bell Atlantic/GTE Merger Order* imposed *different* conditions relating to the *offering* of UNEs and the *pricing* of UNEs, with different sunset provisions.²⁹ With respect to pricing, Verizon was required to offer "these UNEs" (the UNEs covered by its Condition 39):

at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the *Local Competition Order*, 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.³⁰

Somehow, to use SBC's expression, the Bureau letter transmogrified the sunset clause set

²⁹ The letter distinguished between Verizon's "obligation to follow the TELRIC pricing rules" "as opposed to the obligation to follow the substantive rules in the *Local Competition Third Report and Order* and the *Line Sharing Order*."

forth above for the UNE pricing obligation into “the date of any final and non-appealable judicial decision concluding the litigation concerning those rules by invalidating them.” This is not what the conditions say. On the contrary, it should not be considered an accident that the sunset clause refers to the Commission’s cost methodology regulations in its first part but only to cost-based rates in the second. Accordingly, the conditions plainly provide that Verizon would remain obligated to provide the UNEs in the *UNE Remand Order* at TELRIC rates until a court found that it is not required to provide the UNEs in the UNE Remand Order at cost-based rates (TELRIC or otherwise). There are few circumstances in which a court could find that a UNE is not required to be provided at “cost-based” rates, since section 252(d)(1)(A)(i) of the Act unambiguously requires that all UNEs be priced “based on the cost of providing the ... network element.” It appears that the Commission could only have intended this sunset to be triggered if (1) a court determined that Verizon was not required to unbundle the network element at all or (2) if section 252(d)(1)(A)(i) itself was invalidated by a court. Since neither of these events has occurred, the UNE pricing merger obligation would have remained in effect even if the Supreme Court had denied *certiorari* in *Verizon v. FCC*.

When a letter does not interpret correctly the rule it was attempting to interpret, it should hardly be relied upon as establishing a sweeping rule of general applicability for other rules that the letter itself noted are different – especially, as Verizon notes, in the case of an unnecessary letter response that was not briefed or adequately explained. Therefore, the Bureau letter does not support the Bells’ attempt to rewrite the terms of their merger conditions.

³⁰ *Bell Atlantic/GTE Merger Order*, ¶ 316.

D. The Petition Does Not Seek to Change the Plain Meaning of the Unbundling Conditions. (Verizon comments at 5-6, SBC comments at 10-11)

SBC and Verizon suggest erroneously that Petitioners tried to add words and thereby change the meaning of the judicial finding trigger for termination of their merger obligations.³¹ In the first place, the Petitioners have no need to do so since, as demonstrated above and in the Petition, under even the narrowest permissible reading the Bells have failed to establish any of the triggering events that would terminate their merger obligations. But for the sake of clarification, the Bells' straw-man argument is simply incorrect. The CLEC Petition fully acknowledges that if SBC or Verizon could point to any final and non-appealable judicial decision that "provided" that the UNEs at issue were "not required" by the Act, that would be the end of the merger obligation, period. Nothing in the Petition suggests otherwise, much less depends upon it.

What has drawn SBC's farcical charge of "fabrication"³² is the last phrase of the following section of the Petition:

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 provided." (citing conditions). 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.³³

This passage simply reflected the Petitioners' attempt to explain and illustrate all of the conceivable scenarios that would constitute a final and non-appealable judicial decision

³¹ Verizon comments at 5-6; SBC comments at 10-11.

³² SBC comments at 11.

that provided that the UNEs at issue were not required. Since everyone agrees on what the controlling test is and yet disagrees on the outcome, the Petitioners thought that it would be helpful to spell out (while candidly admitting the use of “other words”) the real-world means by which the triggering event (as written into the merger conditions) could occur. In any event, the ILECs are correct that the merger conditions do not literally require that a court find that the “UNE could not be required under any circumstances consistent with federal law, such that no remand to the Commission was necessary.” But the Bells fail to offer a plausible explanation other than the two scenarios offered above as to how else a court decision (at least one that could survive appeal) would otherwise make a finding that the *UNE Remand* UNEs are not required to be provided by the Act.

SBC attacks the Petition’s formulation through distortion, suggesting that the CLECs have argued, “in essence,” that the trigger can only be met by a “judicial finding of non-impairment.”³⁴ First, the words “impair” and “impairment” appear exactly zero times in the Petition.³⁵ Second, and more importantly, SBC completely ignores the fact that the first scenario (described in the Petition excerpt above) explicitly recognizes that the trigger could also be met by a judicial affirmation of a *Commission* decision that a UNE is not required. Since it is the job of the Commission, and not the courts, to make findings as to which UNEs are required by the Act, this scenario is the only one likely to actually occur. The second scenario would only arise if the Commission adopted an

³³ Petition at 10-11.

³⁴ SBC comments at 11.

³⁵ Given that, according to the D.C. Circuit, impairment is supposed to be the “touchstone” of the Commission’s analysis, it is likely that any final and nonappealable judicial decision that a UNE is not required under that Act would rest on a non-impairment determination made by the Commission and affirmed by the court, or one made by the court itself. However, the Petition does not limit the test to UNEs that are eliminated by a non-impairment finding.

unbundling requirement that was so obviously contrary to the Act that a court found that the UNE could not possibly be required – otherwise, the court would only vacate the UNE rule and remand consideration of the network element back to the Commission to redo its analysis.

Not surprisingly, therefore, it is the first scenario described in the excerpt from the Petition above that led finally to the first triggering events to eliminate certain unbundling obligations under the merger conditions. The merger obligation to provide OCn loops and transport terminated on June 30, 2004, when no party petitioned for *certiorari* of the decision in *USTA II* providing that such UNEs were not required to be provided under the Act, and the merger obligation to provide certain mass-market broadband loops terminated on October 12, 2004, when the Supreme Court denied *certiorari* of the decision in *USTA II* providing that such UNEs were not required to be provided under the Act. That is the process by which the conditions are intended to operate – CLECs are assured access to the *UNE Remand Order* UNEs until, for the first time, there is a final and non-appealable determination that such UNEs are not required by the Act or there is a final and non-appealable Commission order that otherwise does not require the UNE.³⁶ The standards for the termination of the merger conditions set forth in the Petition are exactly as they are set forth in the conditions themselves.

³⁶ SBC questions the Petition’s explanation that the merger conditions were designed “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.” SBC comments at 8 (quoting Petition at 2). SBC asserts that the Commission could not possibly have intended such protection for CLECs because, according to SBC, there was only a “faint prospect of appeal” of what became the *UNE Remand Order* at the time its merger obligations were drafted. The Commission surely recognizes the insincerity of this argument, especially when compared to the statement in Verizon’s comments at 7 that the end of “all litigation concerning any Commission unbundling rules ... may not arrive so long as section 251(c)(3) remains in effect.”

E. The Commission Must Reject Verizon's Attempt to Rewrite the Conditions. (Verizon comments at 6)

After accusing the CLECs of rewriting the merger conditions, Verizon attempts precisely that. Verizon postulates that “the only sensible reading of the phrase ‘that the UNE or combination of UNEs is not required to be provided’ is to mean a determination that the [*UNE Remand* and *Line Sharing*] orders are invalid and impose no further obligation.”³⁷ If the Commission had wanted the conditions to say that, it could have easily demanded it. Instead, the judicial finding trigger clearly indicates that the Commission intended to assure stability until final determinations were made about the status of particular *UNEs*, not particular Commission *documents* such as the *UNE Remand Order*.

Acceptance of Verizon's rewrite of the termination triggers would reduce the conditions to a sham.³⁸ Nothing better illustrates the emptiness of Verizon's interpretation than its auditor's report, which (relying on Verizon's interpretation of the conditions) states that the unbundling merger obligation was in effect for only *26 days*, from the D.C. Circuit's issuance of the *USTA I* mandate on February 27, 2003 to the Supreme Court's denial of *certiorari* of *USTA I* on March 24, 2003.³⁹ Prior to February 27, 2003, the conditions imposed no incremental obligation upon Verizon because it was already required to provide the UNEs pursuant to effective FCC regulations. It is ludicrous to suggest that the public injuries that this condition was designed to address were cured by a mere 26 days of protection for consumers and competitors – perhaps less

³⁷ Verizon comments at 6.

³⁸ See Petition at 2-3, 13-14.

³⁹ Verizon comments, Exhibit B, Verizon October 17, 2003 report to auditor.

time than was spent negotiating the condition with the Commission.⁴⁰ After (allegedly) complying with this condition for just 26 days, Verizon contends that the Commission intended to allow Verizon to push competitors right back into the same debilitating and uncertain circumstances that led the Commission to conclude that the conditions were necessary in the first place. To remedy the public interest harms that necessitated the conditions, the merger obligation must bridge competitors to the solid ground of final and non-appealable Commission rules implementing section 251(c)(3),⁴¹ not just provide some arbitrary amount of “bonus time” of unbundling as suggested by Verizon’s comments.

Verizon’s comments state that the time between a *vacatur* and a denial of *certiorari* could have been “several months or more than a year.”⁴² However, even if under different facts, Verizon’s interpretation of the conditions would have caused its merger unbundling obligations to remain in effect for more than a year, rather than 26 days, Verizon’s interpretation still contradicts the purpose of the condition, which was to provide a *remedy to a problem* by assuring access until new rules were established, not a consolation prize of an arbitrary amount of “bonus time” access to vacated UNEs. The Bells’ interpretation that their merger obligations terminated on March 24, 2003, before final and nonappealable unbundling rules were in effect, therefore contravenes both the letter and the purpose of the merger conditions and must be rejected.

⁴⁰ This statement refers to the initial development of the condition in the SBC/Ameritech merger proceeding.

⁴¹ Petition at 2-3, 13-14.

⁴² Verizon comments at 8.

II. THE *UNE REMAND ORDER* IS NOT A “FINAL AND NON-APPEALABLE ORDER.” (CLEC Petition at § III.B, Verizon comments at 5, SBC comments at 4-5)

All parties agree that, independent of the judicial finding trigger discussed above, the unbundling merger conditions would also be terminated upon the first instance of “a final and non-appealable Commission order in the *UNE* remand proceeding.”⁴³ SBC and Verizon assert that the *UNE Remand Order*, issued on November 9, 1999 and vacated by *USTA I* on February 27, 2003, became such a “final and non-appealable order” on March 24, 2003, when the Supreme Court denied *certiorari* of *USTA I*.⁴⁴

As the Petition explained, “a vacated decision is not an order at all, and is certainly not final given that the Court remanded it to the Commission for further

⁴³ SBC’s comments at 5 state that the Petition “fails to address at all” this basis for the termination of the merger obligation. But Section III.B. of the Petition is entitled “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.” Curiously, after SBC states that the CLECs failed to address the issue, its comments proceed to analyze the Petition’s arguments on exactly this point. Even more confounding then is SBC’s subsequent assertion that “Without actually addressing the last sentence of Condition 17, the CLECs nonetheless insist that the plain terms of Condition 17 mean something other than what they say.” Since the Petition did address the last sentence of Condition 17 and because it accepts that its plain meaning is controlling, Petitioners have no idea what SBC is talking about.

⁴⁴ Since Petitioners agree that *any* final and nonappealable order in the “*UNE* remand proceeding” would terminate the unbundling merger obligations, and since SBC and Verizon rely only upon the November 9, 1999 *UNE Remand Order* for their argument that this termination event has occurred, SBC’s confusing discussion of “subsequent proceedings” is irrelevant to the Commission’s further consideration of this trigger. See Petition at 14-15 (explaining that Petitioners are at most indifferent as to whether the *Triennial Review* or the pending remand proceeding are considered to be part of the “*UNE* remand proceeding” referenced in this trigger). However, in response to SBC’s grossly inaccurate characterizations, Petitioners wish to clarify that they have never contended, as SBC asserts, that the unbundling condition “never sunsets so long as the Commission has an open proceeding to consider the scope of its unbundling rules.” SBC comments at 7. The CLECs have said nothing of the sort, and indeed these reply comments expressly recognize that certain merger obligations terminated on June 30, 2004 and October 12, 2004 even as the Commission’s latest *UNE* remand proceeding remains ongoing. The Petitioners have also recognized repeatedly that the satisfaction of any one of the bases for termination would end the merger obligation with respect to a particular *UNE*. Therefore, there is no foundation for SBC’s suggestion that the Petitioners’ interpretation of this trigger would render the unbundling conditions indefinite.

consideration.”⁴⁵ Rather than attempting a serious rebuttal, SBC simply called this statement “preposterous” and claims that while a “vacatur certainly removes the force and effect of a Commission order, [] it does not somehow transmogrify an order into some other species of document.”⁴⁶ SBC’s contention is amply answered by Verizon, whose comments state that “To vacate means to annul; to cancel or rescind; to declare, make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.”⁴⁷ The only “preposterous” argument on this issue is SBC’s claim that an action that is “void” and “of no authority or validity” can constitute a final order.

The SBC and Verizon comments read in conjunction illustrate that the *UNE Remand Order* cannot be considered a “final order” after *USTA I*. To be final, an order must currently possess “the force of law.” *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942). *See also FTC v. Standard Oil Co.*, 449 U.S. 232, 239-240 (1980) (a final agency order has “the status of law,” as to which “immediate compliance is expected,” and has a “direct and immediate ... effect on the day-to-day business” of affected parties.) In short, the absence of “operative effect” is “determinative” that there is no final order. *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1080-1081 (3rd Cir. 1989). Indeed, since the *UNE Remand Order* no longer “orders” anyone to do anything, it is not an “order” at all.⁴⁸

Under the Bells’ theory, even an order adopted by the Commission and then later

⁴⁵ Petition at 12.

⁴⁶ SBC comments at n. 7.

⁴⁷ Verizon comments at 3.

⁴⁸ *See US v. Los Angeles & S. L. R. Co.*, 273 U.S. 299, 309 (1927) (“The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything ... [and] which does not determine any right or obligation.”)

vacated by a Commission reconsideration order would remain a “final order,” despite the fact that it would no longer impose any effective regulations. Moreover, since such a withdrawn order could not be appealed, it would be a “final and non-appealable order” according to SBC and Verizon. As discussed above and in the Petition,⁴⁹ such a hollow definition of “final and non-appealable order” would utterly defeat the stated purpose of the Merger Orders “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.”⁵⁰

Thus, when the Supreme Court denied *certiorari* of *USTA I*, the *UNE Remand Order* was not a “final order.” Instead, SBC and Verizon explained that further consideration of the invalid and inoperative order would have been a “sideshow” that “present[ed] no issue of continuing importance.”⁵¹ The Bells’ merger obligations were not terminated when this “sideshow” ended with the denial of *certiorari* on March 24, 2003. Instead, SBC and Verizon must show that there has been a final, non-appealable judicial decision providing that the UNE covered by the conditions are not required to be provided by the Act, or a final and non-appealable Commission order in the UNE remand proceeding. Their comments cannot hide that they have failed to do either.

⁴⁹ See Section I (E), *supra*; see also Petition at 2-3, 13-14.

⁵⁰ *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added). Except for references to the *Line Sharing Order*, nearly identical language is found in ¶ 394 of the *SBC/Ameritech Merger Order*. SBC and Verizon imply that the Petition relies upon the Merger Orders in a manner that would conflict with the conditions. On the contrary, the Petition is completely consistent with the conditions. But if a court were to find the conditions to be ambiguous, it would look to the orders as the most appropriate source to determine the intent of the conditions.

⁵¹ *USTA Opposition to Certiorari Brief* at *1 (opening sentence of brief).

III. VERIZON’S MERGER CONDITIONS HAVE NOT “SUNSET.” (CLEC Petition § III.C, Verizon comments at 9-11)

Verizon’s claim that the unbundling conditions sunset after 36 months is so far-fetched and contrary to Commission precedent that SBC declined to even make it.⁵² The Petition plainly demonstrates that the 36-month general sunset does not apply to conditions that set forth their own specific termination provisions,⁵³ and that the unbundling merger obligation is such a condition because it sets forth specific triggers for termination conditioned on events described in the condition. Verizon’s argument is inconsistent with the plain terms of the conditions, and the CLECs will not repeat the arguments set forth in the Petition again here.

One failing of the Verizon comments must be noted, however. Verizon criticizes the Petition for its citation to an Enforcement Bureau decision that agreed with the CLEC’s position on this issue, stating in effect that dicta from a Bureau-level decision should be disregarded.⁵⁴ But Verizon ignores the fact that the Petition also cited a Commission order that also determined that the 36-month sunset does not apply to SBC’s shared transport condition, on a basis that is equally applicable to the unbundling

⁵² SBC comments at 10, n. 22 (“SBC has never claimed that this sunset provision has been triggered.”)

⁵³ Petition at 15 (citing *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 64 (“[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.”)

⁵⁴ Verizon comments at 10-11 (discussing *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).

conditions of both SBC and Verizon.⁵⁵

The *SBC Forfeiture Order* addressed SBC's shared transport merger obligation, which sets forth termination provisions that are substantively similar to the termination provisions of Verizon's unbundling obligations: the condition would apply "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 shared transport 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 shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area." In the *SBC Forfeiture Order*, the Commission concluded that this merger condition was not subject to the 36-month general sunset provision because it "expressly provides its own merger condition sunset date,"⁵⁶ which is not a stated calendar date, but is "is conditioned on the events we describe in text, rather than on a particular date."⁵⁷ Verizon has not identified any reason why this Commission precedent should not be applicable to the interpretation of its unbundling conditions.⁵⁸ Therefore, Verizon's argument should be rejected for the reasons set forth in the Petition and the *SBC Forfeiture Order*.

⁵⁵ Petition at 16, n. 33 (citing *SBC Forfeiture Order*, n.53 (recognizing that the 36-month sunset provision of the SBC/Ameritech Merger Conditions does not apply to a merger condition that specifies in the text of the condition the events that must occur before the condition expires).

⁵⁶ *SBC Forfeiture Order*, ¶ 19.

⁵⁷ *SBC Forfeiture Order*, n.53.

⁵⁸ Verizon suggests, without any basis in the conditions, that the exception to the general sunset provision only applies to merger conditions that set forth termination dates that were *after* the 36-month sunset. Verizon comments at 11, fn. 14. Had the Commission intended such a result, it could have easily said so, but the conditions do not include any such provision. In any event, the unbundling condition would still fall within Verizon's narrowed exception because its termination events had not occurred yet as of the date of the 36-month general sunset.

IV. THE MERGER OBLIGATIONS ARE INDEPENDENT OF THE ACT.
(Verizon comments at 8-9, SBC comments at 7)

Verizon and SBC argue that Petitioners' reading of the conditions "tends to undermine the significance of the Commission's unbundling determinations in the *Triennial Review Order*."⁵⁹ This is both untrue and irrelevant.

First, as of October 12, 2004, SBC and Verizon do *not* have any continuing obligation under the merger conditions to provide any of the UNEs for which a non-impairment determination was made in the *TRO*.⁶⁰ With respect to these network elements, the merger conditions were terminated in exactly the manner provided for under the conditions. And while, as SBC and Verizon note, the *TRO* did express a hope that its new rules would be implemented quickly, that statement was made before portions of the order were vacated. There is no public interest benefit to eliminating the merger obligations on the grounds that it would frustrate the "implementation" of vacated rules.

Second, even where UNEs have been eliminated by the Commission, its policy has been to establish a transition period rather than impose disruptive "flash cut" to new rules.⁶¹ This fact significantly undermines SBC's and Verizon's suggestion that continuation of their merger conditions for the period of time after a non-impairment

⁵⁹ Quoting Verizon comments at 8-9; SBC's comments at 7 similarly argue that continuation of the merger obligations would be "inconsistent with the Commission's policy" set forth in the *TRO*.

⁶⁰ See Section I (D), *supra*.

⁶¹ *TRO*, ¶ 529 ("We recognize that eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt the business plans of some competitors. ... There is also a need for an orderly transition to afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment").

finding while appeals remain possible or pending would somehow subvert the public interest. For example, although the *TRO* determined that CLECs were not impaired without access to unbundled line sharing, it established a three-year transition period “to minimize disruption to the customers that obtain xDSL service through line shared loops and to provide a reasonable glide path to competitive LECs currently availing themselves of this UNE.”⁶² The Commission explained that it is “entirely appropriate to fashion a transition period of sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward.”⁶³ Similarly, the *Interim Order & NPRM* tentatively proposes a 12-month transition plan for any UNEs that are eliminated by the forthcoming new rules.⁶⁴ The continuing obligations under the merger condition (which in significant part may simply overlap transition obligations) perform a similar public interest benefit.

Third, SBC’s and Verizon’s cries that the merger obligations could extend beyond their section 251 obligations is unavailing, given that this is exactly what they agreed to in order to secure approval of their respective mergers. If the merger obligations imposed no additional obligations above and beyond the section 251 obligations to which SBC and Verizon were already subject, the conditions could not have provided any public interest benefit that the Commission found was needed to offset the public interest harms that would occur as a result of the mergers. As the Petition notes, the merger conditions are *separate* and *independent* legal obligations “designed to address the public interest harms specific to the merger of the Applicants, not the general obligations of incumbent

⁶² *TRO*, ¶¶ 264-268.

⁶³ *TRO*, ¶ 266.

⁶⁴ *Interim Order & NPRM*, ¶¶ 29-30.

LECs,” especially those established in “other more general proceedings.”⁶⁵ The Commission’s section 251 proceedings are clearly among the “other more general proceedings” that the Commission held do not repeal or amend the merger conditions.

The D.C. Circuit recently confirmed this fact:

FCC unbundling orders are, again, independent of merger-condition obligations. ... We express no view on the adequacy of the forfeiture order’s interpretation of ILECs’ unbundling obligations under the Act. At times, SBC’s arguments read as if this is indeed the issue before us. For example, SBC suggests that the FCC in the forfeiture order interpreted its unbundling rules in arbitrary-and-capricious fashion because those interpretations are contrary to the analysis in the UNE remand order and the resulting clarification. But the rationality of the forfeiture order’s unbundling analysis is not before us. The only issue is whether [the merger condition applied in accordance with its terms]. For the reasons we have stated, it did.

It is notable that USTA’s recent mandamus petition, while trying to get section 251 obligations eliminated immediately, represented to the Court that, “[t]o the extent that individual ILECs made commitments to the FCC, they will of course abide by those commitments.”⁶⁶ The SBC and Verizon merger conditions are just such individual commitments that are separate and apart from the obligations imposed by section 251. The Commission should therefore reject SBC’s and Verizon’s assertions that the *TRO* repealed or altered the independent unbundling obligations of the merger conditions.

⁶⁵ Petition at 5 (citing *Bell Atlantic/GTE Merger Order*, ¶¶ 252-253; *SBC/Ameritech Merger Order*, ¶¶ 356-357).

⁶⁶ See *United States Telecom. Ass’n v. FCC*, Nos. 00-1012 et al., Petition for Mandamus to Enforce the Mandate of this Court at 22, fn. 25 (D.C. Cir. August 23, 2004). USTA’s statement references the Bells’ recent commitments to maintain certain UNEs for a period of time after *USTA II*. Petitioners do not suggest that USTA intended to refer to the merger conditions, and cites this statement only for the principle that independent commitments and obligations are not affected by the *USTA II* litigation.

V. THE FINDINGS OF VERIZON'S AUDITOR ARE IRRELEVANT TO DETERMINATIONS OF LAW. (Verizon comments at 5)

Verizon suggests that the October 17, 2004 report of its auditor “verified” that its unbundling obligations under the merger conditions expired on March 24, 2003.⁶⁷ The auditors’ statement is irrelevant, since auditors are engaged to determine questions of fact, not matters of law. The *Bell Atlantic/GTE Merger Order* makes clear that the auditor’s report would “not provide a legal determination of Bell Atlantic/GTE’s compliance with the specified requirements.”⁶⁸ Moreover, as AT&T’s comments note, the auditor relied solely on the mistaken representation made by Verizon that the condition had expired when it in fact had not.⁶⁹ The auditor’s report is therefore irrelevant to the Commission’s consideration of the questions of law posed by the Petition.

CONCLUSION

The unbundling obligations under the merger conditions are clear and simple, and, as the Commission found in the *SBC Forfeiture Order*, SBC’s and Verizon’s “*post hoc* efforts to muddy the waters cannot justify [their] failure to comply with the law.”⁷⁰ Neither SBC nor Verizon has demonstrated that any of the bases for termination of their unbundling obligations under their respective merger commitments have occurred with respect to the unbundling rules that were vacated by *USTA II*.

⁶⁷ Verizon comments at 5.

⁶⁸ *Bell Atlantic/GTE Merger Order*, n. 794.

⁶⁹ AT&T comments at 8.

⁷⁰ *SBC Forfeiture Order*, ¶ 5.

Therefore, the Commission should grant the Petition.

Respectfully submitted,



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