



Federal Communications Commission  
Enforcement Bureau  
Investigations and Hearings Division  
445 12th Street, S.W., Suite 4-C330  
Washington, DC 20554

June 22, 2005

**VIA UNITED STATES MAIL**  
**AND FACSIMILE (202) 408-8745**

Christopher Heimann  
General Attorney  
SBC Telecommunications Inc.  
1401 I Street N.W., Suite 400  
Washington, D.C. 20005

Re: *Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Post Merger Audit Requirements.

Dear Mr. Heimann:

This letter responds to SBC Telecommunications, Inc.'s ("SBC") request for an interpretation<sup>1</sup> of the scope of its SBC/Ameritech merger audit for 2004.<sup>2</sup> SBC asks the Enforcement Bureau to affirm that the independent auditor conducting the audit of SBC's compliance with the conditions of the *Merger Order* is not required to include in the 2004 audit report an assessment of SBC's obligation under Condition 19 because that condition terminated by its own terms.<sup>3</sup> As discussed below, we grant SBC's request.

On October 9, 1999, subject to certain voluntary conditions, the Commission approved the application of SBC Communications, Inc. and Ameritech Corp. seeking Commission approval to transfer

---

<sup>1</sup> See Letter from Christopher Heimann, General Attorney, SBC Telecommunications, Inc., to William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, CC Docket No. 98-141 (filed Jan. 21, 2005) ("*SBC Interpretation Request*"). See also letter from Christopher Heimann, General Attorney, SBC, to William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, CC Docket NO. 98-141 (filed Sept. 9, 2004). No party has filed a response to the *SBC Interpretation Request*.

<sup>2</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*" or "*Merger Order*"), vacated in part *sub nom.*, *Ass'n of Communications Entrs. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001); *id.*, 17 FCC Rcd at 14 FCC Rcd at 14964-15039, Appendix C ("*Merger Conditions*"). See also *Delegation of Additional Authority to the Enforcement Bureau*, 17 FCC Rcd 4795 (2002) (delegating authority to the Enforcement Bureau to carry out merger-related audit and compliance tasks).

<sup>3</sup> See *SBC Interpretation Request* at 1; *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56 ("*Condition 19*").

Mr. Christopher Heimann  
SBC Telecommunications Inc.  
June 22, 2005  
Page 2 of 4

control of licenses and lines from Ameritech to SBC in connection with the companies' proposed merger. SBC's request implicates two conditions of the *Merger Order*. The first condition, Condition 19, required the combined company to offer shared transport in the former Ameritech states pursuant to specific terms and conditions, stating that SBC must provide shared transport "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."<sup>4</sup> The *Merger Order* also requires SBC to conduct an audit of its compliance with the merger conditions. Specifically, under Condition 27, SBC is required to engage annually an independent auditor to conduct an examination engagement resulting in a positive opinion regarding SBC's compliance with the merger conditions. In addition, each year, the independent auditor is required to submit to the Commission a report concerning its examination.<sup>5</sup> With its request, SBC is seeking an interpretation from the Bureau that the independent auditor is not required to include an assessment of SBC's Condition 19 obligation in the 2004 report.

In support of its request, SBC contends that its obligation to offer shared transport under the merger conditions terminated when the Supreme Court refused to grant certiorari of a D.C. Circuit decision invalidating the Commission's unbundling rules. The proceedings SBC refers to began in November 1999, shortly after the release of the *Merger Order*. At that time, the Commission released the *UNE Remand Order* requiring SBC and other incumbent LECs to make available specific UNEs, including shared transport.<sup>6</sup> On appeal in 2002, the D.C. Circuit vacated the portion of that order establishing a list of specific UNEs, including shared transport, that the Commission had mandated incumbent LECs provide, and remanded the matter back to the Commission.<sup>7</sup> On March 24, 2003, the Supreme Court denied the petition for certiorari of the D.C. Circuit's decision. SBC claims that the Supreme Court's denial of certiorari of the vacatur of the UNE rules operates to terminate its obligation under Condition 19.<sup>8</sup> It therefore follows, according to SBC, that the independent auditor engaged to assess its compliance with the merger conditions should not be required to assess SBC's compliance with Condition 19.

We agree with SBC and conclude that the independent auditor conducting the audit of SBC's compliance with the conditions of the *SBC/Ameritech Merger Order* in 2004 is not required to include an assessment of SBC's obligation under Condition 19 in its audit report. Under the terms of Condition 19, SBC is required to provide shared transport until either the Commission issues a final order in its UNE Remand proceeding or a court issues a final, non-appealable judicial decision finding that SBC is not required to provide shared transport. SBC's obligation under Condition 19 terminated when the Supreme Court denied the *USTA I* petition for certiorari on March 24, 2003, rendering *USTA I* a "final, non-

---

<sup>4</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56. Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches in the incumbent LEC network. See 47 C.F.R. § 51.319(d)(4)(i)(C).

<sup>5</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 66.

<sup>6</sup> *Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), reversed and remanded in part sub. nom. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), cert. denied, 123 S. Ct. 1571 (2003).

<sup>7</sup> See *USTA I*, 290 F.3d 415, 430.

<sup>8</sup> *SBC Interpretation Request* at 1; *SBC September 9, 2004 Letter* at 1.

appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant [region].”<sup>9</sup>

Our decision comports with the Commission’s description of the validity of the *UNE Remand* unbundling rules in the *Triennial Review Order*. In August 2003, the Commission released the *Triennial Review Order* and addressed commenters’ concerns about when existing interconnection agreement change of law provisions would be triggered. The Bell Operating Companies argued that the change of law provisions requiring parties to modify their agreements in response to “legally binding intervening law or final and unappealable judicial orders” should be triggered when the *UNE Remand Order*, not the *Triennial Review Order*, became final and non-appealable.<sup>10</sup> The Commission agreed, finding that once the *USTA I* decision vacating the *UNE Remand* unbundling rules became final and no longer subject to review, or the new rules adopted in the *Triennial Review Order* became effective, “the legal obligation upon which the existing interconnection agreements are based will no longer exist.”<sup>11</sup> The Commission concluded that since “the prior UNE rules have been vacated and replaced today by new rules, we believe 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.”<sup>12</sup> The Commission’s acknowledgement that the *UNE Remand* unbundling rules, including shared transport, were invalidated by *USTA I* and the subsequent denial of certiorari supports our decision that SBC’s obligations under Condition 19 terminated at the same time.<sup>13</sup>

In addition, our decision is consistent with the principle that the merger conditions should be limited in time by ensuring that the termination date of Condition 19 is based on the final resolution of a particular Commission proceeding rather than all Commission unbundling proceedings.<sup>14</sup> Were we to find that Condition 19 remained in effect whenever there existed non-final Commission unbundling rules that required shared transport, even if such rules were imposed *after* a final, non-appealable decision vacating prior similar rules, Condition 19 might never sunset. Such an outcome would frustrate the Commission’s explicit decision to impose merger conditions for a limited time.

---

<sup>9</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

<sup>10</sup> *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17406, ¶ 705 (2003) (“*Triennial Review Order*”), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), cert. denied, 125 S.Ct. 313, 316, 345 (2004).

<sup>11</sup> *Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705.

<sup>12</sup> *See Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705.

<sup>13</sup> We find further support for this decision in a 2000 merger clarification letter from the former Common Carrier Bureau (“CCB”) to Verizon. In September 2000, Verizon sought guidance from CCB whether it was required to continue to provide UNEs in accordance with its merger conditions in the event the Supreme Court invalidated the Commission’s TELRIC rules. Since the merger conditions required it to comply with certain rules until the date of a final and non-appealable judicial decision concerning the litigation of those rules, CCB found Verizon would be obligated to comply with the Commission’s TELRIC rules until the Court invalidated those rules or denied certiorari of a lower court decision pertaining to those rules. *See* Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, to Michael Glover, Verizon Communications Inc., 15 FCC Rcd 18327, 18328 (2000).

<sup>14</sup> *See, e.g., SBC/Ameritech Merger Order*, 14 FCC Rcd at 14891-2, ¶ 438 (“In the fast-changing world of telecommunications industries, these commitments, in our judgment, will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues.”).

Mr. Christopher Heimann  
SBC Telecommunications Inc.  
June 22, 2005  
Page 4 of 4

Accordingly, we grant SBC's request for interpretation and find that the independent auditor conducting the engagement of SBC's compliance with the conditions of the *SBC/Ameritech Merger Order* is not required to include in the 2004 audit report an assessment of SBC's obligation under Condition 19.

Sincerely yours,

William Davenport  
Chief  
Investigations and Hearings Division  
Enforcement Bureau