BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition to Amend The Section 251/252 Interconnection Agreements between SBC Missouri and Various Competitive Local Exchange Carriers.	)	
Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, Petitioner,	)	
vs.	)	Case No. TO-2005-0117
1-800-RECONEX, Inc., Adelphia Business Solution Operations, Inc., now known as TelCove Operations, Inc., BullsEye Telecom, Inc., Global Crossing Local Services, Inc., Global Crossing Telemanagement, Inc., Granite Telecommunications, L.L.C., Intermedia Communications, Inc., Level 3 Communications, L.L.C., Now Acquisition Corporation, Phone-Link, Inc., U.S. West Interprise America, Inc., Now Known as Qwest Interprise America, Inc. and Winstar Communications, L.L.C. Respondents.	)	

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S CONSOLIDATED RESPONSE TO STAFF'S RESPONSE TO SBC MISSOURI'S AMENDED PETITION, MOTIONS TO DISMISS AND REQUEST FOR WITHDRAWAL

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and, for its Consolidated Response to Staff's Response to SBC Missouri's Amended Petition, Motions to Dismiss filed by Adelphia Business Solution Operations, Inc., now known as TelCove Operations, Inc., BullsEye Telecom, Inc., Global Crossing Local Services, Inc., and Global Crossing Telemanagement, Inc., and Request for Withdrawal filed by Winstar Communications, L.L.C., states as follows:

Introduction and Summary

SBC Missouri's interconnection agreements are badly out-of date. Eight years ago, and again five years ago, the Federal Communications Commission ("FCC") put in place maximum unbundling rules that required SBC Missouri and other incumbent local exchange carriers ("ILECs") to make available on an unbundled basis virtually every facility in their local exchange networks. Although SBC Missouri believed those rules to be unlawful, it nevertheless complied with them by entering into interconnection agreements that provide for pervasive, almost unlimited access to SBC Missouri's facilities, including those facilities that are suitable for competitive supply and that the competitive local exchange carriers ("CLECs") are accordingly fully capable of providing for themselves.

Beyond all legitimate dispute, it is now clear that those FCC rules – on which the parties expressly relied in fashioning their interconnection agreements – are unlawful. The Supreme Court held as much in 1999 in *AT&T Corp. v. Iowa Utilities Board*,[1] when it vacated the FCC's first set of maximum unbundling rules, and the D.C. Circuit confirmed that result in 2002 in *United States Telecom Association v. FCC* ("*USTA I*"),[2] when it vacated the FCC's attempt to reinstate those same discredited rules. Moreover, on remand from *USTA I*, the FCC's *Triennial Review Order*[3] restricted unbundling in

[1] 525 U.S.366 (1999).
[2] 290 F.3d 415 (D.C. Cir. 2002).
[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

several important respects, and, in the instances where it perpetuated overly broad unbundling, the D.C. Circuit, in *USTA II*,[4] again vacated the resulting rules.

It is thus clear that the era of maximum unbundling rules is over, and that, as a matter of law, CLECs are not entitled to such broad access to SBC Missouri's facilities. And it is equally clear that most CLECs recognize this fact. Indeed, in October of this year, one of them (AT&T), in the very first sentence of its comments to the FCC on remand from *USTA II*, told the FCC that it no longer even *wants* "rules that require the unbundling of mass-market switching and the maintenance of UNE-P."[5]

Even so, however, most CLECs have nonetheless tried to stave off the inevitable by refusing to respond in a constructive manner to the efforts of SBC Missouri to negotiate agreement language that would conform its interconnection agreements to governing federal law. The reason for that is simple: these CLECs know that the gravy train is running out of track, but they want to put off the day when they have to compete without overly broad access to facilities that are fully capable of competitive supply. As a result, they are trying to retain in their interconnection agreements, for as long as possible, the out-dated and unlawful maximum unbundling rules that the FCC first put in place eight years ago. The motions to dismiss at issue here are part of that delay.

SBC Missouri appreciates that the Staff of the Missouri Public Service Commission ("Staff") supports SBC Missouri's desire to avoid delay in incorporating new FCC rules into existing interconnection agreements.[6] However, SBC Missouri disagrees that a proper filing would be a petition to arbitrate the amendments under

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[4] *United States Telecom Assn'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Association of Regulatory Commissioners, et al., Petitioners v. United States Telecom Association, et al.*,125 S.Ct. 313 (2004).

[5] Comments of AT&T Corp at i, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 4, 2004).

[6] Staff's Response to SBC Missouri's Amended Petition at page 4, paragraph 7.

Section 252(b).[7] As Staff correctly noted, if both parties do not agree to arbitration, then either party may proceed with any remedy available to it pursuant to law, equity, or agency mechanism.[8]

This proceeding is a remedy available to SBC Missouri pursuant to law, equity, and/or agency mechanism. It provides the appropriate opportunity to resolve these issues once and for all and on a consistent basis for the entire industry in Missouri. As the FCC has recognized, and as the courts have made resoundingly clear, the overly broad unbundling obligations at issue here have substantially hindered investment and innovation in the telecommunications industry. The binding judgments of the FCC and the courts should be given effect, so that SBC Missouri's interconnection agreements are in compliance with applicable legal requirements.

II. BACKGROUND

A. LEGAL BACKGROUND

The past fifteen (15) months have brought significant change in the federal regulations governing unbundling. The FCC's *Triennial Review Order* became effective on October 2, 2003. There, the FCC expressly acknowledged the "limitations inherent in competition based on the shared use of infrastructure through network unbundling."[9] Indeed, the FCC said that it was "very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[10]

[7] *Id*. at page 5, paragraph 7.
[8] *Id*. at page 4, paragraph 5.
[9] 18 FCC Rcd at 16984, ¶ 3.
[10] *Id.*

With this principle in mind, the FCC eliminated or reduced the scope of unbundling obligations in many respects. In brief, the FCC held that:

- "[I]ncumbent LECs do not have to provide unbundled access to the high frequency portion of their loops."[11]
- "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops." [12]
- ILECs "are no longer required to unbundle OCn loops."[13]
- ILECs were required to "offer unbundled access to dark fiber loops, DS3 loops (limited to 2 loops per requesting carrier per customer location) and DS1 loops except at specified customer locations where states have found no impairment pursuant to Commission-delegated authority to conduct a more granular review."[14]
- ILECs do not have to offer "unbundled OCn level transport," and dark fiber, DS3, and DS1 transport were "each independently subject to a granular route-specific review by the states to identify available wholesale facilities."[15]
- ILECs do not have to offer "unbundled local circuit switching when serving the enterprise market."[16]
- States could "identify particular markets where there is no impairment" as to mass-market switches.[17]
- "[C]arriers are impaired without shared transport only to the extent that carriers are impaired without access to unbundled switching." [18]
- ILECs "are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs) . . . ."[19]

[11] *Id.* at 16988, ¶ 7.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 16989, ¶ 7.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

- ILECs "are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching."[20]

- CLECs "may order new combinations of unbundled network elements (UNEs), including the loop- transport combination (enhanced extended link, or EEL), to the extent that the requested network elements are unbundled."[21]

- CLECs must additionally meet strict eligibility criteria before they can order the enhanced extended link.[22]

The FCC made clear its expectation that the *Triennial Review Order* would "help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers."[23] The FCC also knew, however, that the CLECs would resist that result, and that they would prefer to continue to rely on access to ILEC facilities, even where those facilities are capable of competitive supply. As a result, at the same time as it provided "individual carriers . . . the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment,"[24] the FCC took several steps intended to minimize delay.

First, negotiations over new agreement language, the FCC stated, should begin "*immediately*," because any "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry."[25] Indeed, invoking the obligation to negotiate in good faith, the FCC stated that "parties may not refuse to negotiate *any subset* of the rules we

[20] *Id*.
[21] *Id.* at 16990, ¶ 7.
[22] *Id.* at 16990-91, ¶ 7.
[23] *Id.* at 16985, ¶ 6.
[24] *Id.* at 17403-04, ¶ 700
[25] *Id.* at 17405, ¶ 703 (emphasis added).

adopt herein."[26] In addition, the FCC instructed that "state commission[s] should be able to resolve" any disputes over contract language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252."[27] Finally, the FCC emphatically stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would not take effect until there has been a "final and unappealable" change in the law. Such a change, the FCC observed, had *already* happened, when its prior unbundling rules had been vacated. Thus, "[g]iven that 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."[28]

The *Triennial Review Order* was then appealed to the D.C. Circuit, which for the most part affirmed the instances in which the FCC limited incumbents' unbundling obligations.[29] By contrast, the D.C. Circuit *overturned* other portions of the *Triennial Review Order* that required pervasive unbundling, including all delegations of authority to state commissions, as well as the FCC's findings of impairment for mass-market

[26] *Id.* at 17406, ¶ 706 (emphasis added).
[27] *Id.* at 17406, ¶ 704 (emphasis added).
[28] *Id.* at 17406, ¶ 705 (emphasis added).
[29] *See, e.g.*, *USTA II*, 359 F.3d at 582 (upholding FCC's decision not to unbundle broadband capacity of hybrid loops); *id.* at 584 (upholding FCC's decision not to unbundle "fiber-to-the-home" loops); *id.* at 585 (affirming FCC's decision not to unbundle line sharing); *id.* at 587 (upholding FCC's decision not to unbundle enterprise switching); *id.* at 587-88 (upholding FCC's decision not to unbundle signaling or call-related databases except in narrow circumstances); *id.* at 588 (upholding FCC's decision to require unbundling of shared transport only in situations where switching is unbundled); *id.* at 589 (upholding FCC's decision that § 271 does not require either § 251 TELRIC pricing for elements unbundled only under § 271 or the combination of elements); and *id.* at 592-93 (upholding FCC's eligibility criteria for CLEC access to the Enhanced Extended Link).

switching and high-capacity loops and transport.[30]

The D.C. Circuit's mandate issued on June 16, 2004, and the Supreme Court recently denied certiorari.[31] In the meantime, the FCC issued its *Interim Rules Order*,[32] in which it required ILECs, on an interim basis, to "continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004."[33] That interim obligation ends after six months, or after the effective date of final unbundling rules, whichever comes earlier. *Id.*[34]

The FCC emphasized its belief that "unbundling rules based on a preference for facilities-based competition will provide incentives for both incumbent LECs and competitors to innovate and invest," and it stated that "we renew our commitment to promoting the development of facilities-based competition and seek to adopt unbundling rules that will achieve this end."[35] Thus, the FCC emphasized that "[i]n order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements."[36] Indeed, the FCC specifically stated that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent

[30] *See id.* at 594 (vacating the FCC's nationwide impairment findings as to DS1, DS3, dark fiber, and mass market switching; wireless access to dedicated transport; and all portions of the *Triennial Review Order* that involve the "subdelegation to state commissions of decision-making authority over impairment determinations").
[31] *See National Association of Regulatory Utility Commissioners, et al., Petitioners v. United States Telecom Association, et al.*, 125 S. Ct. 313 (2004).
[32] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 (2004) ("*Interim Rules Order*").
[33] *Id.* ¶ 1 (footnotes omitted).
[34] *Id.*
[35] *See Interim Rules Order*, ¶ 2.
[36] *Id.* ¶ 22.

LECs of section 251 unbundling obligations with respect to some or all of these elements."[37]

The FCC stressed this point again in the next paragraph: "[W]hile we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport . . ."[38] It then explained the reason for allowing such a presumption: "Thus, whatever alterations are approved or deemed approved by the relevant state commission *may take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order."[39] [40]

B. FACTUAL BACKGROUND

In the spring of 2002, following the D.C. Circuit's invalidation of the FCC's maximum unbundling rules in *USTA I*, SBC Missouri timely invoked the change-of-law processes in its interconnection agreements, notifying CLECs of SBC Missouri's intent to negotiate – and, if necessary, arbitrate – new agreement language. The FCC, however, quickly signaled its intent to put in place new rules to replace the ones the D.C. Circuit vacated. As a result, SBC Missouri abated its efforts to conform its agreements to governing law, and instead awaited the FCC's new rules.

Those new rules were set out in the *Triennial Review Order*, which, as noted at the outset, took effect on October 2, 2003. At that point, SBC Missouri again timely and

[37] *Id.*
[38] *Id.* ¶ 23 (emphasis in original).
[39] *Id.* (emphasis added).
[40] On December 15, 2004, the FCC announced that it had voted to adopt unbundling rules on remand from *USTA II*. The FCC has not yet released an order setting forth those rules.

properly invoked the contractual amendment process set forth in its interconnection agreements. Specifically, following the effective date of the *Triennial Review Order*, SBC Missouri provided the CLEC parties written notice of the need to update their interconnection agreements to reflect the FCC's findings. Later, after the issuance of the D.C. Circuit's mandate in *USTA II*, on June 16, 2004, SBC Missouri notified CLECs with as-yet-unmodified interconnection agreements of the continuing need to conform their interconnection agreements to governing law, this time with the findings of *USTA II*. For the most part, however, the CLECs refused to engage in constructive responses to SBC Missouri's overtures, and, as a result, the interconnection agreements at issue in this proceeding remain out of compliance with governing law.

Accordingly, SBC Missouri initiated this proceeding. Accompanying its Amended Petition, SBC Missouri filed a proposed contract amendment that expressly incorporates governing federal law and that is intended to be added to SBC Missouri's existing interconnection agreements. In brief, section 1.1 lists all of the elements that are no longer required to be unbundled under federal law, while section 2.1 expressly includes the obligations imposed by the *Interim Rules Order*. Section 3.1 then provides for a 30-day notice and transition period in the event that the *Interim Rules Order* expires and the FCC eliminates unbundling for any of the elements vacated by *USTA II*. At that point, SBC Missouri's language would allow 30 days for the parties to implement binding federal law by either discontinuing the UNE or migrating the CLEC's service to an alternate service arrangement (*i.e.*, a market-based resale or access arrangement).

III. ARGUMENT

4 CSR 240-2.070(6) provides: "The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with the provisions of these rules or an order of the commission, or may strike irrelevant allegations." A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of plaintiff's petition.[41] It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.[42] No attempt is made to weigh any facts alleged as to whether they are credible or persuasive.[43] Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the element of a recognized cause of action, or of a cause that might be adopted in that case.[44]

The CLECs' primary claim in support of their Motions to Dismiss– that the law is too "unsettled" to proceed – ignores both the fact that the *Triennial Review Order*'s limitations on unbundling have been upheld on appeal, and the FCC's express invitation to ILECs to initiate proceedings *now* to implement changes in unbundling rules. And their suggestion that SBC Missouri has failed to exhaust efforts to negotiate with individual carriers is contrary to fact. Indeed, some CLECs have *initiated* a proceeding in Michigan that, like this one, seeks to incorporate existing federal law into the parties' interconnection agreements. The CLECs' suggestion that SBC Missouri is not authorized to pursue the same course here ignores the plain terms of their interconnection

[41] *Bosch v. St. Louis Healthcare Network,* 41 S.W.3d 462, 464 (Mo. 2001); Order Denying Motion to Dismiss and Scheduling a Prehearing Conference, *MCImetro Access Transmission Services, L.L.C., et al. v. CenturyTel of Missouri, Inc.*, Case No. LC-2005-0080, November 23, 2004.
[42] *Id.*
[43] *Id.*
[44] *Id.*

agreements and is simply wrong. Finally, the CLECs' additional claims – that additional sources of law, including state law, section 271, and the *SBC/Ameritech Merger Order*, require continued unbundling – are both irrelevant on a motion to dismiss and invalid.

A. SBC MISSOURI'S PETITION IS RIPE

The CLECs' principal argument is that SBC Missouri's Petition is not ripe for resolution.[45] In their view, because the FCC is actively considering *new* unbundling rules, it would be premature to excise the *old* unbundling rules from the parties' interconnection agreements, particularly because the FCC, in the *Interim Rules Order*, put in place "stand-still" rules to last for six months (or until the effective date of the FCC's new rules, whichever is sooner).[46] Along the same lines, the CLECs argue that it would "waste the resources" of the Commission to pursue this proceeding now.[47]

As an initial matter, however, these claims simply ignore the fact that the *Triennial Review Order* was *upheld* by the D.C. Circuit insofar as it *limited* ILEC unbundling obligations. None of those limitations – which are detailed above[48] – are under consideration by the FCC in its ongoing rulemaking. On the contrary, they reflect the FCC's binding determinations, they have been upheld by the D.C. Circuit, they are no longer subject to appeal at the Supreme Court, and they must now be incorporated into existing interconnection agreements. For this reason alone, the CLECs' ripeness claim must fail.

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[45] *See* Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 2; Qwest Motion at page 1; Winstar Request for Withdrawal at page 2.

[46] *See, e.g.*, BullsEye and TelCove Motion at pages 2-3, 15-16; Qwest Motion at page 2; Winstar Request for Withdrawal at page 2. Staff takes a similar position; *see* Staff Response to SBC Missouri Amended Petition at page 5, paragraph 8.

[47] *See, e.g.*, BullsEye and TelCove Motion at page 16; Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 2; Winstar Request for Withdrawal at page 1.

[48] *See* pages 4-6 above.

The *Triennial Review Order* is perfectly clear and certain, it has been upheld in most relevant respects, and it has been awaiting implementation for over 14 months now. The *Triennial Review Order* was vacated *only* to the extent it imposed overly broad unbundling obligations on ILECs. To the extent it *limited* those obligations, it was sustained. As a result, there can be no plausible argument that it would be "premature" to implement the *Triennial Review Order*, at least to the extent it was either upheld or never challenged.

Nor are movants correct in asserting that SBC Missouri has somehow acted inconsistently in that it previously urged this Commission to cease impairment proceedings under the *Triennial Review Order*.[49] SBC Missouri asked for such abatement only after the D.C. Circuit had *vacated* the FCC's attempts to allow state commissions to conduct such impairment proceedings.[50] Thus, SBC Missouri was merely urging those state commissions to comply with binding federal law. But here, SBC Missouri's Petition *must* be heard, and for precisely the same reason: to bring interconnection agreements into compliance with binding federal law. SBC Missouri's actions have therefore been perfectly consistent.

To be sure, SBC Missouri's Petition also seeks to implement the results of *USTA II*, insofar as it vacated the FCC's unbundling rules as to mass-market switching and high-capacity loops and transport. In the CLECs' view, rather than implementing the rules as they exist today, the parties should wait still longer, until the FCC issues yet another set of rules. But this is merely a recipe for more delay (and is a particularly egregious way to confuse the issues in order to delay compliance with the almost 15

[49] *See* BullsEye and TelCove Motion at pages 9-10.
[50] *See USTA II*, 359 F.3d at 568.

month-old *Triennial Review Order*). Once the FCC issues new rules, numerous parties will undoubtedly appeal, giving the CLECs yet another excuse to request delay in revising their agreements. The suggestion that the parties should nonetheless wait for the FCC to conclude its proceeding – which would in turn lead to still more requests for delay while any appeals are pursued – is untenable.

In any event, the contention that the parties must await the FCC's resolution of its ongoing proceeding is inconsistent with the FCC's own views on the matter. As discussed above, the *Interim Rules Order* itself emphasized that there should be a "speedy transition" to any new rules regarding mass-market switching and high-capacity loops and transport.[51] Along the same lines, the FCC said that "whatever alterations are approved or deemed approved by the relevant state commission" should "*take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue."[52] Towards that end, the FCC "*expressly preserve[d]* incumbent LECs' contractual prerogatives to initiate change of law proceedings,"[53] and it directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements."[54] None of this would make any sense if the FCC thought that it would be "premature" to initiate any change-of-law proceedings. On the contrary, not only is it not premature to engage in such proceedings, it is an express right of SBC Missouri to do so.

Indeed, the CLECs themselves expressly admit as much. One group of them, for example, acknowledges that SBC has the "right" to initiate this proceeding, and questions

[51] FCC Interim Order at ¶22.
[52] *Id.* ¶ 23.
[53] *Id.* ¶ 22 (emphasis added).
[54] *Id.*

only whether "it is the right thing to do."[55] This dispositive concession makes clear that even the CLECs recognize that, under the *Interim Rules Order*, ILECs have every right to initiate change of law proceedings in order to conform their interconnection agreements to governing federal law, precisely as SBC Missouri has done here.

Despite these concessions, the CLECs point to a passage in the *Interim Rules Order* that provides that "whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions . . . is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible."[56]

The CLECs' reliance on this statement is misplaced. In context, the FCC intended this statement solely as a means to justify the stand-still aspect of the *Interim Rules Order* – *i.e.*, the requirement that ILECs continue to make available *USTA II*-affected UNEs for six months or until the FCC issues new rules, whichever is sooner. At the same time, as discussed, the FCC "expressly preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings,"[57] and directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements."[58] SBC Missouri's proposed amendment is fully consistent with *both* mandates, taking full account of the FCC's stand-still requirements while attempting to conform its existing agreements to governing law.

[55] BullsEye and TelCove at page 2.
[56] BullsEye and TelCove at pages 2 and 11.
[57] *Interim Rules Order* ¶ 22.
[58] *Id.*

The CLECs are also wrong to contend that, because the FCC is expected to issue new UNE rules in the future, this proceeding would be a waste of resources.[59] In fact, SBC's proposed amendment is drafted to take account of those forthcoming rules. To the extent the FCC eliminates unbundling requirements, Section 1.1 of SBC's proposed amendment would take effect, eliminating the requirement from the CLEC's agreement. If the FCC reinstates unbundling of any element, Section 2.1.1.1 provides that the element in question "shall continue to be provided by SBC Missouri in accordance with rates, terms and conditions of this Agreements . . . that were in effect prior to the Effective Date of this Amendment, to the extent they are consistent with the new FCC rule(s)." Both outcomes are accordingly *already* covered by SBC Missouri's Amendment. The CLECs' suggestion that the Commission will necessarily have to revisit these issues is accordingly wrong.

Nor are movants correct that the precedents of other state commissions provide support for the CLECs' plea for more delay. [60] First, the Illinois staff recommendation cited by Qwest is not a decision of the Illinois Commission. Moreover, the bulk of the other decisions cited were made in the immediate wake of the *USTA II* ruling, at which point it was unclear whether the D.C. Circuit would grant reconsideration or a stay (it did not), whether the Supreme Court would grant certiorari (it did not), and what the FCC would do on remand. Now, the situation is much more stable and certain. The FCC has set out clear interim rules, signaled its intent that any new final rules should be immediately implemented, and, most importantly, expressly authorized ILECs to initiate change of law proceedings such as this one.

[59] *See, e.g.*, BullsEye and TelCove at page 3.
[60] *See* BullsEye and TelCove at pages 12-16; Qwest Motion at page 3.

B. SBC MISSOURI'S PETITION IS PROCEDURALLY PROPER AND COMPLIES WITH SECTION 252

Some CLECs argue that SBC Missouri's Amended Petition is procedurally defective.[61] Although they concede that the Commission has jurisdiction to consider and impose interconnection agreements and amendments pursuant to Section 252, they quibble over the manner in which the Commission's jurisdiction has been invoked, contending that the Commission can only grant relief through the specific arbitration procedures set forth by Section 252 of the federal Act.[62] These CLECs contend that SBC Missouri has improperly attempted to bypass 47 U.S.C. §252.[63] But the CLECs do not – because they cannot – demonstrate that *all* of the section 252 requirements apply to SBC Missouri's request to amend existing agreements. The FCC has held that, in some respects, the "section 252(b) *timetable*" may be relevant to an effort to revise existing agreements to conform to governing law.[64] But the FCC did not hold that a request to amend existing agreements would necessarily have to comply with all of the formal requirements that parties must meet when they seek to arbitrate a *brand new* agreement.

It is also incorrect to assert that SBC Missouri's Petition is somehow precluded by *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), or *Wisconsin Bell v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003).[65] In each of these cases, a state commission had issued an order requiring the ILEC "to file tariffs with the state, 'setting forth the rates, terms, and conditions' under which competitors might acquire network elements and services."[66]

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[61] *See* BullsEye and TelCove Motion at pages 16-19; Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 4.
[62] *See* BullsEye and TelCove Motion at pages 17 and 18.
[63] *See* Bullesye and TelCove Motion at page 17; Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 3 .
[64] *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added).
[65] *See* BullsEye and TelCove Motion at page 17.
[66] *Verizon North*, 309 F.3d at 939 (citation omitted); *see also Bie*, 340 F.3d at 442-43.

The Sixth Circuit struck down the Michigan commission's order, as it "completely bypasse[d] and ignore[d] the detailed process for interconnection set out by Congress . . . ."[67] Similarly, the Seventh Circuit faulted the Wisconsin process for "enabl[ing] would-be entrants to bypass the federally ordained procedure."[68]

SBC Missouri, however, is not asking the Commission to override the section 252 process or establish anything akin to a tariff that would replace interconnection agreements. On the contrary, SBC Missouri is asking the Commission to *fulfill its role* under that process, by ensuring that the parties conform their agreements to governing law, as they specifically contemplated when they entered into the agreements in question. Far from undercutting the basis for such relief, *Verizon North* and *Bie* – and, in particular, their clear statement that the 1996 Act's interconnection and unbundling requirements must be implemented through the interconnection agreement process – firmly support it.

C. SBC MISSOURI'S PETITION CONFORMS TO THE TERMS OF ITS INTERCONNECTION AGREEMENTS

The CLECs make much of the fact that SBC Missouri's agreements contain language that requires the parties to work together in the first instance to revise the parties' interconnection agreements.[69] In their view, rather than initiate this proceeding, SBC Missouri should be required to continue to engage each individual CLEC in negotiations, notwithstanding the fact that most of the CLECs' have failed to respond in a remotely constructive manner, or have already rejected SBC Missouri's efforts and language proposals, as discussed in more detail below.

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[67] *Id.* at 941.
[68] *Bie,* 340 F.3d at 445.
[69] *See* BullsEye and TelCove Motion at pages 18-19; Qwest Motion at pages 3-4; Winstar Request for Withdrawal at page 2.

1. Some CLECs Are Themselves Pursuing Similar Relief In Another Forum

As an initial matter, the CLECs' claim in this regard is impossible to square with the proceeding that numerous CLECs, including one of the CLECs which have moved to dismiss this proceeding, recently initiated in Michigan.[70] The express purpose of that proceeding is to investigate "the vacatur of the rules promulgated by the FCC in its Triennial Review Order and/or the effect of the FCC's August 20, 2004 'interim' order on remand, and if the Commission determines that these events constitute a change in law, to solicit recommendations from interested parties on the appropriate procedures to incorporate, where necessary, modified terms in current tariffs and/or interconnection agreements."[71] Simply put, if the CLECs can implement such a generic proceeding in Michigan -- which they obviously can – it is impossible to understand why SBC Missouri cannot do so here.

2. The CLECs' Claims of Surprise Are Disingenuous

In any event, as noted at the outset, SBC Missouri filed this proceeding because there is no other practical and timely way to conform SBC Missouri's interconnection agreements to current federal law. Contrary to the CLECs' conclusory assertions, SBC Missouri did not blindside them with its filing. On the contrary, the CLECs' refusal to engage SBC Missouri in constructive negotiations left SBC Missouri with no choice other than to resort to this Commission.

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[70] The parties in Michigan include, among others, MCImetro Access Transmission Services, LLC, Talk America Inc., XO Michigan, Inc., and the CLEC Association of Michigan (among whose members are BullsEye Telecom, KMC Telecom, Inc., McLeodUSA Telecommunications Services, Inc., and New Edge Networks, as listed on the association's website: http://www.cleca.org/membership directory.htm). BullsEye Telecom, Inc. is a party here.

[71] *See* Application to Initiate Investigation, Case No. U-14303 (Mich. PSC filed Sept. 30, 2004). Available at: http://efile.mpsc.cis.state.mi.us/efile/docs/14303/0001.pdf

As the CLECs acknowledge, their agreements clearly contemplate that they are to be amended in the event of a change in governing law. There can be no doubt that such a change has taken place. In *USTA I*, the D.C. Circuit vacated *all* of the FCC's unbundling rules. On remand, the *Triennial Review Order* then limited unbundling in several respects, and the D.C. Circuit Court in *USTA II* then vacated certain unbundling rules promulgated in that same order. In the wake of these dramatic changes, the amendment required by the change in law provisions of the interconnection agreements will effectively remove contractual terms requiring SBC Missouri to provide UNEs that have been declassified or vacated – some for more than a year now. Realizing that they are nearing the end of the road, CLECs seek to stave off the inevitable by accusing SBC Missouri of failing or refusing to follow applicable change of law and dispute resolution provisions. But the truth of the matter is that, as alleged in its Amended Petition – which, again, must be taken as true for purposes of a motion to dismiss – SBC provided ample notice and opportunity for CLECs to amend their agreements pursuant to those provisions, but the CLECs failed to do so.

One CLEC argues that SBC Missouri's action is improper because it was never provided a copy of the UNE Conforming Amendment attached to SBC Missouri's Amended Petition as Exhibit A ("Exhibit A").[72] [73] What this CLEC does not say is that CLECs have long been aware of SBC Missouri's position on the narrowing of unbundling requirements that occurred in the *Triennial Review Order*, as well as in *USTA*

[72] *See* Qwest Motion at page 3.

[73] SBC Missouri does not concede that it had an obligation to provide any CLEC with proposed amendment language pursuant to applicable change in law and/or dispute resolution provisions. Those provisions, in fact, do not require either party to provide a written language proposal; rather, both parties are required to amend the interconnection agreement, preferably by negotiating an amendment to conform the agreement to governing law. Accordingly, it is as much a CLEC obligation to provide contract language proposals as it is SBC Missouri's, and is not a prerequisite to the filing of this proceeding.

II; those positions have been publicly argued in state and federal proceedings for over a year now. CLECs were even delivered a prior version of Exhibit A in March, 2004. This prior version is known as the "Lawful UNE Amendment" and a copy of this amendment attached hereto as **Attachment 1**. Even a cursory examination of the Lawful UNE Amendment shows that it raises all of the relevant issues that are contained in the previously filed Exhibit A. For example, the Lawful UNE Amendment, like Exhibit A, states that SBC Missouri need no longer provide certain UNEs that are no longer required under the *Triennial Review Order* and *USTA II* and lists those specific UNEs. See, *e.g.*, section 1.4 of the Lawful UNE Amendment *with* section 1.1 of Exhibit A.

Exhibit A is more detailed, of course, because it was prepared well after the *USTA II* mandate issued, and after the FCC's *Interim Rules Order* was released. Accordingly, its language is informed by both of those events in a way the Lawful UNE Amendment could not have been. Both of the proposed amendments contain notice and transition procedures and both contain a mechanism whereby access to UNEs that are "declassified" by regulators in the future is terminated. In light of the close similarity between Exhibit A and prior versions, it would be pointless to do as the CLECs request – *i.e.*, dismiss this Petition just so SBC Missouri could redistribute Exhibit A and wait some period of time before re-filing the Petition. CLECs are no more likely to agree to this form of UNE amendment than they were to the Lawful UNE Amendment, which they soundly rejected. For these reasons, the Commission can confidently conclude that SBC Missouri has properly alleged that it appropriately requested CLECs to enter into a UNE amendment and that it properly provided a copy of such an amendment to CLECs well in advance of this proceeding.

3. A So-Called "Parallel" Proceeding To Arbitrate New Or Successor Agreements Under Sections 251/252 Is Not Duplicative Of This Proceeding

TelCove points out that it has pending negotiations for replacement of its ICA with SBC Missouri. It appears to be arguing that this Amended Petition proceeding is "duplicative."[74] TelCove fails to acknowledge, however, that the *new* agreement the parties are negotiating is not the same as an amendment of the *current* agreement to conform it to federal law – the relief sought by SBC Missouri in filing this Petition. Instead, in that other proceeding, SBC Missouri and TelCove are arbitrating a *new* interconnection agreement that will not take effect until some unknown date in the future.

Here, however, SBC Missouri seeks to conform the CLECs' *current* interconnection agreements to applicable federal law. The current agreements purport to require that SBC Missouri provide unbundled network elements that SBC Missouri is no longer obligated to provide. The current interconnection agreements also require their amendment – now – and this proceeding was filed to accomplish that in a timely fashion. While a decision in this Amended Petition proceeding may clarify some of the issues raised in separate arbitration proceedings, this proceeding is not duplicative.

D. CLECs Have Had Ample Opportunity To Negotiate A Resolution

One CLEC complains that SBC Missouri has failed to negotiate over its proposed amendment as fully as it might have, and that, as a result, the Petition should be dismissed.[75] This allegation – which in all events is premature on a motion to dismiss, where, again, the allegations in the Petition must be accepted as true – is untrue. In the wake of *USTA I*, the *Triennial Review Order*, and *USTA II*, SBC Missouri repeatedly

[74] BullsEye and TelCove Motion, page 6, footnote 13.
[75] *See* Qwest Motion at pages 3-4.

advised the CLECs of its desire to modify its agreements. As made clear in the attachments to this pleading, SBC sent written notices, with proposed contract language, expeditiously upon the occurrence of each of these events. Specifically, SBC Missouri sent the CLECs notices regarding *USTA I* and the *Triennial Review Order* on or about October 30, 2003,[76] and additional notices regarding *USTA II* on or about July 13, 2004. As the attachments make clear, each notice informed the CLECs of the need to amend their agreements, and each also constituted notice of a dispute.

Using U.S.West Interprise America, Inc., now known as Qwest Interprise American Inc. ("Qwest") as one example, SBC Missouri's notice letters accomplished the following things:

October 30, 2003 Letter (see **Attachment 2** hereto):

- Notified Qwest of the need to amend the agreement pursuant to *USTA I* and the *Triennial Review Order*.
- Notified Qwest that if agreement was not reached by March 12, 2004, resolution of the dispute would be pursued.
- Designated a representative for SBC (Keisha Rivers).

March 11, 2004 Letter (see **Attachment 3** hereto):

- Notified Qwest of continuing need to amend the agreement pursuant to *USTA I* and the *Triennial Review Order*.
- Notified Qwest of the impending issuance of the *USTA II* mandate and the additional need to amend the agreement to conform to *USTA II* as well.
- Informed Qwest that SBC reserved all positions with regard to proceedings to resolve disputes arising out of the October 30, 2003 notice letter, and that, "[i]f you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues."
- Enclosed contract language (the "Lawful UNE Amendment") designed to shorten and simplify the amendment of the agreement.
- Enclosed a form that Qwest could use to request a signature ready Lawful UNE Amendment on a 24-hour basis.

[76] Indeed, some CLECs received *two* notices, with *two* proposals for amending contract language (the first on or about October 30, 2003, and the second on or about March 11, 2004).

- Explained how the Amendment was intended to work.
- Designated a representative for SBC (Keisha Rivers).

July 13, 2004 Letter (see Qwest **Attachment 4** hereto):

- Notified Qwest of the issuance of the *USTA II* mandate and the need to conform the agreement to governing unbundling law.
- Reminded Qwest that the agreement still needed to be amended for *USTA I* and the *Triennial Review Order*, as well.
- Enclosed contract language (the "Post USTA II Amendment") to specifically remove the *USTA II*-vacated network elements from the agreement.
- Explained how the Amendment was intended to work.
- Designated a representative for SBC (CLEC's Assigned Account Manager).

Despite SBC Missouri's notices, Qwest did not constructively engage after receiving these letters and it has not yet amended its interconnection agreement with SBC Missouri.

1. Specific Examples Illustrate The Necessity (And Propriety) Of This Proceeding

Attachments to the BullsEye and TelCove Motion illustrate the attitude of the CLECs toward SBC Missouri's specific requests for amendment to the ICAs. The CLECs did not engage in any negotiations to amend the interconnection agreements. Instead, on March 18, 2004, the law firm of Swindler Berlin Shereff Friedman, L.L.P. rejected both the Lawful UNEs Amendment and the *USTA II* Amendment on behalf of Adelphia Business Solution Operations, Inc., d/b/a TelCove ("TelCove") and several other CLECs.

The Swidler, Berlin March 18, 2004, letter is attached to the motion filed by BullsEye and TelCove as Exhibit 1, and rejects SBC Missouri's attempts to amend the interconnection agreements in at least seven different ways:

> Rejection No. 1: " . . . *it would be inappropriate and inefficient* for SBC to attempt to seek formal dispute resolution over the terms of its 'Lawful UNE Amendment' . . . we propose that the parties initiate negotiations over SBC's proposed amendment if and when a change of

law has occurred under the terms of their Agreements and when each party's opening position for such negotiations has become final."

Rejection No. 2: "In any case, while SBC's proposal purports to respond to the TRO and the USTA II decision [fn omitted], nothing in the proposed 'Lawful UNE Amendment' addresses any of the substantive conclusions of either. Thus, *the proposed amendment cannot fairly be characterized as a reflection of changes to the substantive unbundling obligations that either party might claim have been altered*. . . At such time that SBC is prepared to propose such substantive changes, the CLECs will comply with their obligations under the law and the Agreement to negotiate."

Rejection No. 3: *"It would be premature to initiate negotiations or formal dispute resolution . . . ."*

Rejection No. 4: "Moreover, *CLECs are unable to negotiate constructively with SBC . . . ."*

Rejection No. 5: "Where new interconnection agreement arbitrations are now pending . . . *it should not be necessary to separately negotiate the 'Lawful UNE Amendment' or subsequent proposed amendments in these circumstances*."

Rejection No. 6: "Finally, *SBC is wrong in contending that . . . the effect of the court's decision is the ultimate elimination of certain legal unbundling obligations* . . . At most, if it ever becomes effective, *USTA II* would vacate rules and remand certain issues to the FCC, but would not necessarily preclude the FCC from adopting new unbundling regulations that are at least as expansive as those set forth in the parties' interconnection agreements."

Rejection No. 7: *Furthermore, even if USTA II becomes effective and no replacement rules from the FCC have been adopted, the unbundling policy and requirements set forth by Congress remain clear and effective* under the statutory requirements of Sections 251 and 271. . . . Thus, *regardless of whether any of the parties' agreements would deem an effective* USTA II *as a change of law, there would be no resulting changes to the parties' agreements for a state commission to implement at this time*." (Emphasis added).

SBC Missouri's response to the above letter is attached hereto as **Attachment 5**.

Although the second to last paragraph of this letter indicates: "CLECs are prepared to negotiate in good faith with SBC," the filings by the CLECs in this

proceeding are clearly contrary to the supposed willingness to negotiate. Even though the FCC's *Interim Rules Order* has been released and is very specific as to the path forward, the CLECs joining in that filing now say that any efforts to determine proper amendments to the agreements are a "waste of time"[77] and they seek to avoid participation in this proceeding, asking instead that it be dismissed.

As these situations illustrate,[78] it is clear that the CLECs have had every opportunity to negotiate conforming language with SBC Missouri, but have failed or refused to do so. It is equally clear that the CLECs have no interest in doing so. Indeed, their pleadings in this very case make that unequivocally clear. Despite *USTA I*, despite the *Triennial Review Order*, and despite *USTA II*, the CLECs *still* insist it is "premature" to negotiate over any change in law, and *still* insist, after eight years, that they are entitled to maximum unbundling. Perhaps more than anything else, these statements underscore the futility of insisting on still more notices from SBC Missouri, to be followed by still more refusals to engage by the CLECs, before this Commission is called upon to ensure that the parties' agreements conform to governing federal law.

As the FCC has made clear, the duty to negotiate in good faith applies to ILECs and CLECs alike.[79] What is more, failure "to negotiate *any* subset" of the FCC's new rules constitutes "bad faith."[80] Despite every opportunity, the CLECs have utterly failed to engage with SBC Missouri in meaningful negotiations. Granting their motions to dismiss – on the theory that SBC Missouri has been unable to force them to the table to

[77] BullsEye and TelCove Motion at page 2.
[78] Of course, the situations with TelCove in Missouri is not identical to that of every other Missouri CLEC. In many cases, CLECs did not respond at all to SBC Missouri's notice letters, or sent different types of rejections than the ones sent by TelCove. However, the above facts exemplify the situation in which SBC Missouri finds itself. It has attempted to engage the CLECs in an inherently two-party activity – negotiation – but has been rebuffed.
[79] *See Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 706.
[80] *Id.*

negotiate appropriate agreement language – would serve only to reward such recalcitrance and encourage similar behavior in the future.

E. NO OTHER SOURCE OF LAW REQUIRES CONTINUED UNBUNDLING HERE

In an attempt to delay the inevitable, some CLECs point to sources of authority that, they claim, continue to mandate unlimited unbundling for as far as the eye can see. The short answer to these contentions is that they are beside the point on a motion to dismiss. If parties feel that the language in their existing agreements is justified on the basis of some source of authority other than the FCC's unbundling rules, they are free to argue as much at the appropriate stage in this proceeding. In no circumstance could such claims plausibly be grounds for dismissing SBC Missouri's Petition at the outset. In all events, the CLECs' claimed justifications for continued unbundling are flatly contrary to binding federal law.

1. The *SBC/Ameritech Merger* UNE Condition Has Expired

Some CLECs claim that SBC Missouri remains obligated to provide UNEs under the terms and conditions of the *SBC/Ameritech Merger Order*.[81] [82] They also note that the FCC is currently considering a declaratory proceeding that will determine SBC's ongoing obligations, if any, under this theory.[83]

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[81] *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*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279 (1999) ("*SBC/Ameritech Merger Order*").

[82] *See* BullsEye and TelCove Motion at page 19; *see also* Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 4, footnote 4.

[83] *See* BullsEye and TelCove Motion at pages 19-20.

SBC Missouri agrees that the Commission should leave that issue to the authoritative disposition of the FCC.[84] Nonetheless, should the Commission address the issue, it should find that the CLECs' interpretation of the *SBC/Ameritech Merger Order* is incorrect. The relevant condition attached to that order provided:

> 53. SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.[85]

This paragraph's obligations have expired for two reasons. First, as noted in the last sentence, the obligations became "null and void" upon a "final and non-appealable Commission order in the UNE remand proceeding."[86] Even reading this language at its broadest – *i.e.*, treating the *Triennial Review Order* as an extension of the UNE remand proceeding – the *Triennial Review Order* is indisputably "final and non-appealable." Any obligation imposed by paragraph 53 is therefore completely "null and void." Second, if there were any doubt, the *Triennial Review Order* was upheld by the D.C. Circuit to the extent that it cut back on unbundling obligations, and, as noted above, the

[84] Indeed, the BullsEye group's own petition (as filed with the FCC) admits that state commissions have universally left the interpretation of similar merger conditions to the FCC. *See* Petition for Declaratory Ruling at 8 & n.15, CC Docket Nos. 98-141 & 98-184 (FCC filed Sept. 9, 2004) (attached to BullsEye and TelCove Motion as Exhibit 6).
[85] *SBC/Ameritech Merger Order*, appx. C, ¶ 53 (footnote omitted).
[86] *Id.*

Supreme Court denied certiorari in *USTA II*. The decision in *USTA II* therefore counts as a "final, non-appealable judicial decision" providing that certain UNEs are "not required to be provided by SBC/Ameritech."[87]

SBC Missouri's interpretation is confirmed by an FCC letter opining – as to TELRIC pricing in particular – that if the "Supreme Court conclud[ed] the TELRIC litigation by denying certiorari," the substantively similar *Bell Atlantic/GTE Merger Order* "would not independently impose an obligation to follow [the] finally invalidated pricing rules."[88] The same is true here: Now that the Supreme Court has concluded the *Triennial Review Order* litigation by "denying certiorari" in the *USTA II* litigation, there is no conceivable basis for finding an "obligation to follow" the conditions of the *SBC/Ameritech Merger Order*.

2. State Law Cannot Mandate Unbundling That Is Inconsistent With Federal Law

The CLECs also claim that SBC Missouri is subject to state law that mandates unbundling.[89] They claims that these unbundling obligations survive federal preemption. Along the same lines, these CLECs argue that this Commission must "undertake an independent analysis of Section 251 above and beyond the FCC regulations."[90] On this view, they claim that this Commission must make an affirmative "non-impairment finding" with regard to any element that is discontinued before removing it from SBC Missouri's interconnection agreements.[91]

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[87] *Id.* SBC Missouri does not waive the argument that *USTA I* was also a "final, non-appealable judicial decision" for purposes of paragraph 53.
[88] Letter to Verizon from Dorothy Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000).
[89] BullsEye and TelCove Motion, pages 7-9.
[90] *Id.* at page 8.
[91] *Id.* at page 9.

These claims are incorrect. Although the 1996 Act allows state commissions to play a role in implementing the Act, only the FCC can make an impairment determination that requires an element to be unbundled. The Supreme Court held as much in 1999, *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) (§ 251(d)(2) "requires *the Commission* to determine on a rational basis *which* network elements must be made available"), and the D.C. Circuit confirmed this view in *USTA II*: Where the FCC had tried to allow state commissions to make impairment findings, the D.C. Circuit held that *only* the FCC can make the impairment determinations that trigger the requirements for unbundling.[92] Similarly, in its *Triennial Review Order*, the FCC made clear that states are *not* free to reconsider federal policies and impose an unbundling requirement — whether under federal or state law — that the FCC has already considered and expressly rejected. The FCC ruled that in circumstances where "the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," states are effectively barred from adopting any unbundling requirement because it would be "unlikely that such decision would fail to conflict with . . . implementation of the federal regime."[93]

Where no such valid federal finding exists, any state imposition of any unbundling is *per se* inconsistent with federal law and is therefore preempted. This is precisely what the Virginia commission recently held, explaining that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)" and that any state-commission imposed

[92] *See USTA II*, 359 F.3d at 594.
[93] *Triennial Review Order* ¶ 195.

UNE obligations would therefore "violate federal law."[94] Similarly, the New York PSC has recognized that when a regulation requiring an ILEC to provide a UNE is eliminated — whether by action of the FCC or a court — the ILEC is "permit[ted] . . . to cease performance of [that] prior obligation if it so desires."[95]

The same reasoning applies where a court of appeals has found that there is no valid FCC finding of impairment. As the D.C. Circuit has consistently found, unbundling in the absence of genuine impairment undermines the 1996 Act's central goal of promoting facilities-based competition.[96] Because the 1996 Act preserves only those state regulatory requirements that are "*consistent* with" and "do[] *not* substantially prevent implementation of the requirements of this section [251],"[97] state commissions have no authority to require provision of UNEs that a federal court has declared unlawful.[98]

3. Section 271 Does Not Authorize the Commission To Require Continued Unbundling

The FCC has construed Section 271 to impose an obligation on BOCs, such as SBC Missouri, independent of their obligation to provide UNEs under Section 251(c)(3), to provide access to "loop[s]," "transport," "switching," and "databases and associated signaling."[99] Some CLECs claim that SBC Missouri "has an independent obligation to

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[94] Order, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004).
[95] Order Resolving Complaint, Complaint of MetTel and Broadview against Verizon New York Inc. Concerning Alleged Discriminatory and Anti-Competitive Abuse of OSS Changes, Case 04-C-0538, at 9 (N.Y. P.S.C. June 3, 2004).
[96] *See, e.g.*, *USTA I*, 290 F.3d at 424-25.
[97] 47 U.S.C. § 251(d)(3) (emphases added).
[98] The 1996 Act's provision that state commissions can arbitrate "open issues," 47 U.S.C. § 252(c) (cited at BullsEye and TelCove Motion at page 8, footnote 21) does not even remotely support BullsEye and TelCove's position here. BullsEye and TelCove cite no authority that treats the term "open issues" as a license to impose perpetual unbundling where the FCC and/or the D.C. Circuit have authoritatively pronounced that certain unbundling requirements are inconsistent with the pro-competitive goals of the Act.
[99] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x); *see Triennial Review Order* at ¶¶ 653-59.

provide access to network elements pursuant to its ongoing obligations under Section 271."[100] They urge this Commission that it cannot approve any contract amendment until it has first approved a "just and reasonable and generally-available rate" for any element provided under section 271.[101]

But this view is wrong on multiple levels. *First*, elements provided under section 271 *are not UNEs* in the first place. Any obligation under section 271 is "independent" of "any unbundling analysis under section 251."[102] Moreover, the FCC has held that TELRIC prices (*i.e.*, UNE prices) *do not apply* to section 271 elements. Indeed, the FCC held that "TELRIC pricing" or other "forward-looking pric[ing]" for section 271 elements would be "*counterproductive*"[103] and is "*no[t] necessary* to protect the public interest."[104] The D.C. Circuit upheld the FCC's determination, holding that there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271."[105] Thus, the mere fact that there might be unbundling obligations under section 271 cannot be used to perpetuate *UNE* obligations under interconnection agreements — the two obligations are entirely separate and unrelated.

Second, this Commission simply has no authority to enforce SBC Missouri's obligations under section 271. As the FCC has held, Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process."[106] Courts have also held that "Congress has

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[100] *See* BullsEye and TelCove Motion at page 20; Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. Response at page 4, footnote 4.
[101] *See* BullsEye and TelCove Motion at page 20.
[102] *Triennial Review Order* ¶ 653.
[103] U*NE Remand Order* ¶ 473 (emphasis added).
[104] (*Triennial Review Order* ¶ 656 (emphasis added))
[105] *USTA II*, 359 F.3d at 589 (emphasis added).
[106] *InterLATA Boundary Order*[106] at ¶¶ 17-18 (emphases added).

clearly charged the FCC, and *not the State commissions*," with assessing a BOC's compliance with section 271.[107]

Indeed, the text of section 271 is chock full of references to the *FCC's* duties.[108] By contrast, the only role that state commissions can play is that of "consult[ing]" with the FCC, so that the FCC can "verify the compliance of the Bell operating company with the requirements of []section [271](c)."[109] Congress gave state commissions no role *after* approval of such an application, and the FCC has never held that it has a duty to consult with a state commission before ruling on a complaint under section 271(d)(6).

F. WINSTAR'S REQUEST FOR WITHDRAWAL IS INAPPROPRIATE AND SHOULD BE DENIED

Winstar alleges that it: "does not rely on the UNE platform or UNEs for switching or transport; rather, it purchases nearly all ILEC facilities pursuant to 'special access' tariffs."[110] Winstar further alleges that it: "has substantially ceased providing commercial retail local exchange services in the State of Missouri," "anticipates that it will not rely upon UNEs in the future," and "has no stake in this proceeding."[111] None of these allegations form a proper basis for allowing Winstar to "withdraw" from this proceeding.

It is simply irrelevant whether Winstar is currently purchasing any elements that would be impacted by the adoption of Exhibit A as SBC Missouri seeks in its Amended Petition. The fact remains that Winstar is operating under its current interconnection agreement and has the ability to order UNEs are described therein now, or six months

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[107] *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).
[108] *See* 47 U.S.C. § 271(d)(3), (4), (6). Indeed, the FCC is currently exercising those duties. For example, the FCC recently held that Section 271 unbundling obligations do not extend to fiber-to-the-home or fiber-to-the-curb loops, the packetized functionality of hybrid loops, or packet switching. *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Section 160(e)*, Memorandum Opinion and Order (released Oct. 27, 2004) (FCC 04-254).
[109] *Id.* at § 271(d)(2)(B) (emphasis added).
[110] *See* Winstar Request for Withdrawal at page 2, paragraph 2.
[111] *Id*. at page 2, paragraph 3.

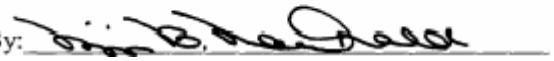
from now, should it change it position with regard to relying on UNEs. The most reasonable approach, therefore, is to adopt the proffered change of law amendment to the existing interconnection agreement. Thus, at this time, Winstar's Request for Withdrawal is inappropriate and should be denied. However, if Winstar executes Exhibit A as SBC Missouri seeks in its Amended Petition, SBC Missouri would be willing to dismiss Winstar as a respondent. Similarly, if Winstar voluntarily terminates its interconnection agreement with SBC Missouri, SBC Missouri would also be willing to dismiss Winstar as a respondent.

V. CONCLUSION

The issues raised by SBC Missouri's Petition are ripe for review by this Commission. The CLECs' failure to engage in meaningful negotiations should not be used by them as a means to thwart efforts to bring their interconnection agreements into conformance with the binding judgments of the FCC and the courts. The Commission should deny the motions to dismiss.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI

By: 

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CERTIFICATE OF SERVICE

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