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,	)	Case No. TO-2005-0117
vs.	)	
1-800-RECONEX, Inc., Adelphia Business Solutions Operations, Inc., now known as TelCove Operations, Inc., Bullseye Telecom, Inc., Global Crossing Local Services, Inc., Granite Telecommunications, L.L.C., Intermedia Communications, Inc., Level 3 Communications, Inc., 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.	)	

MOTION TO DISMISS AND RESPONSE TO SBC'S PETITION

BullsEye Telecom, Inc. ("Bullseye") and TelCove Operations, Inc. ("TelCove") (collectively, "Respondents"), pursuant to 4 CSR 240-2.116(4), submit the following Motion to Dismiss and Response to SBC Missouri's ("SBC") Amended Petition to Amend the Section 251/252 Interconnection Agreements between SBC Missouri and Various Competitive Local Exchange Carriers to Conform Such Agreements to Governing Law ("Petition").

All communications, notices, orders and decisions respecting this Application and proceeding should be addressed to:

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Bullseye and Telcove request the Commission and all parties to amend their service lists to include counsel indicated above.

MOTION TO DISMISS

SBC introduces its Petition with the absurd claim that it filed the Petition "at the direct suggestion of the FCC."[1] On the contrary, the FCC conspicuously suggested to the state commissions that litigation over SBC's proposed contract amendment, while permitted,[2] "would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible."[3] Just because SBC has the right to do something does not mean that it is the right thing to do or even that it should be done. Consideration of SBC's Petition at this time is clearly not the right thing to do for this Commission, for competition, or for Missouri consumers, for at least three reasons: (1) conducting this proceeding now would be a waste of time and resources for this Commission and all parties, since the governing law will likely be changed midstream by new FCC rules that

[1] SBC Amended Petition at 3.

[2] SBC Amended Complaint at 7 (citing *Unbundled Access to Network Elements, Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313 & 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 22 (rel. August 20, 2004) ("*Interim Order & NPRM"*).

[3] *Interim Order & NPRM* at ¶ 17.

SBC itself indicates are expected this month;[4] (2) SBC's Petition is procedurally and fatally defective; and (3) regardless of SBC's Section 251 obligations, its obligations under its federal SBC/Ameritech merger conditions, Missouri law and policy, and Section 271 require it to continue to provide the UNEs that SBC seeks to eliminate through its proposed interconnection agreement amendment.

I. CONSIDERATION OF SBC'S PETITION WHILE FCC RULES ARE BEING REWRITTEN WOULD BE A WASTE OF RESOURCES.

SBC's Petition claims that SBC's proposed amendment would quickly bring interconnection agreements "into conformity with federal law, without the need to engage in detailed modifications and wordsmithing of existing terms and conditions establishing detailed method of UNE access, specification, etc., which would consume the parties' and this Commission's resource needlessly and cause unnecessary delay."[5] But consideration of SBC's Petition at this time would needlessly waste resources, rather than conserve them, by seeking to force this Commission to undertake a complex review of federal law when that law is not only uncertain but will soon change, perhaps even before this Commission rules on SBC's Petition. The Commission can and should reject SBC's attempt to drag CLECs and this Commission into pointless and expensive litigation that would likely accomplish nothing before having to be restarted after the FCC issues its new rules.

A. SBC's Proposal Has Never Been Negotiated with Respondents.

As SBC's Petition notes, the *Triennial Review Order* (*TRO)* directed carriers immediately to undertake the process of updating their interconnection agreements to incorporate the new

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[4] SBC Amended Petition at 4.

[5] SBC Amended Complaint at 9.

rules.[6] But SBC did not share this design at the time. Instead, SBC, among others, sought to block implementation of the *TRO* in the D.C. Circuit. During the period while it waited for the court to reach a decision, SBC did not seriously pursue a *TRO* contract amendment with the Respondents, who for their part believed that it made more sense to defer negotiations until the state of the law became clear. As one of the Respondents wrote to SBC in March 2004:

> SBC's March 11 letter might give a third-party observer the impression that [SBC's revised proposal] has been subject to ongoing negotiation between the parties since October 2003. On the contrary, as you know, this new proposal has not been the subject of any significant negotiation in the industry. First, while SBC's letter to CLECs in October 2003 did request that the parties begin, after January 13, 2004, to negotiate terms for the implementation of the [TRO], SBC did not actively pursue negotiations with most CLECs either before or after that supposed January start date. Given that SBC was simultaneously seeking to overturn the TRO that any amendment would implement, by all appearances SBC's passive approach to negotiation was reasonably interpreted by CLECs as a preference to defer genuine negotiations until completion of the appeal.[7]

The wisdom of this approach was confirmed when the D.C. Circuit vacated significant parts of the *TRO* in its *USTA II* decision.[8] Any contract amendment that had been negotiated or arbitrated during the period between the release of the *TRO* in August 2003 and the effective date of *USTA II* in June 2004 would have been rendered obsolete, most likely even before it could have been implemented.

SBC's next step came in July 2004, when it proposed a new and different amendment that it claimed would "implement" *USTA II*. However, *USTA II*, like prior court decisions regarding the FCC's unbundling rules, offered nothing to implement as it did not make any determinations as to whether the UNEs it vacated are in fact required by the Act. Instead, the court remanded the matter to the FCC to make these determinations, and the FCC's decision is

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[6] SBC Amended Complaint at 3 (citing *Triennial Review Order* at ¶¶ 706).

[7] *See* attached Exhibit 1, CLEC letter to SBC, March 18, 2004.

expected in a few weeks. When the parties have faced this situation in the past, after the *Local Competition* and *UNE Remand* rules were vacated, SBC agreed to defer negotiation and implementation of new contract amendments until replacement FCC rules were adopted.[9] As SBC's Petition explains:

> In the spring of 2002 . . . the D.C. Circuit, in *USTA I*, vacated and remanded [the UNE Remand and Line Sharing Orders]. In response to that decision, 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 replaces 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.*[10]

The same course is warranted today. As SBC's Petition acknowledges, the FCC has initiated an expedited remand proceeding and aims to issue new, permanent unbundling rules by the end of this year to refill the temporary gaps created by the *USTA II* decision.[11] Indeed, the FCC announced on December 8 that it will vote on these new rules at its December 15 meeting. Therefore, the uncertainty hanging over the parties' attempts at negotiations is likely to be clarified significantly as early as next week.

This time, however, SBC inexplicably abandoned the sensible approach of deferring implementation of new rules until there are concrete rules to implement. Instead, SBC has tried

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[8] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[9] *See* Common Carrier Bureau Establishes Rapid-Response System to Minimize Disputes Arising From Supreme Court's Iowa Utilities Board Order, Public Notice, 14 FCC Rcd 4061 (1999) (citing letters from Bell companies and GTE stating the carriers' willingness to maintain the *status quo* regarding unbundled access following the Supreme Court's vacatur of the unbundling rules). Similarly, after *USTA I* vacated the *UNE Remand Order*, SBC and the other Bell companies supported a stay of the mandate through February 20, 2003 (nine months after the issuance of the decision) to provide the FCC with sufficient time to adopt replacement rules in the *Triennial Review* proceeding. See *USTA I*, Nos. 00-1012, 00-1015, Motion for Stay, (D.C. Cir. Dec. 23, 2002).

[10] SBC Amended Petition at 21 (emphasis added).

[11] SBC Amended Petition at 23.

to transform *USTA II* into a virtual repeal of the Act, and has aggressively been trying to create the impression that the UNEs it vacated are gone forever – despite the fact at least some of the vacated UNEs will undoubtedly be restored by the FCC.[12] SBC's so-called attempts at "negotiation" of its *USTA II* amendment, at least with respect to the Respondents, consisted of a single letter in July 2004 that presented a contract amendment that would eliminate the vacated UNEs as a *fait accompli*, and imperiously claimed that SBC's interpretation of the law was so certainly correct that "there is no need for negotiations."[13]

By the time Respondents received this new SBC proposal in July, it was widely known that the FCC was drafting an interim order that would likely affect, if not render moot, SBC's *USTA II* amendment. Therefore, some CLECs responded in letters to SBC in early August 2004 that "While we look forward to constructive engagement with SBC, we [] propose that the parties defer negotiation of SBC's proposal until all parties have had the opportunity to consider the new FCC interim order once it is released."[14] SBC did not respond to these letters. Instead, SBC filed a complaint in Indiana, Ohio, and Nevada that is similar to the instant Petition,

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[12] The evidence unequivocally demonstrates that CLECs would be impaired without unbundled access to high-capacity loops, dedicated transport and switching in at least certain instances. The record of the *Triennial Review* proceeding and preceding cases establish impairment for transport at the majority of locations for DS1 transport, DS3 transport, and dark fiber transport. *See generally TRO* at ¶¶ 360, 391 (DS1 transport), ¶ 387 (DS3 transport), ¶ 384 (dark fiber transport). The FCC observed that "[e]ven some incumbent LECs concede that some impairment exists at the DS1 level according to the impairment tests they propose." *See TRO* at fn. 1215. The FCC also noted that "[e]ven the studies by the incumbent LECs, SBC and BellSouth, found that entry would be uneconomic for wire centers of under 5,000 lines." *See TRO* at ¶ 484.

[13] *See* attached Exhibit 2, SBC letter to competitive local exchange carriers, July 13, 2004. Contrary to SBC's claim that the Respondents made no constructive response to SBC's (SBC Amended Petition at 3), TelCove conducted extensive negotiations with SBC on a comprehensive interconnection agreement and recently filed an arbitration petition to address unresolved issues. *See In the matter of TelCove Operations, Inc.`s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to establish an Interconnection Agreement with Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri*, Case No. TO-2005-0157, filed December 6, 2004.

[14] *See* attached Exhibit 2, CLEC response to SBC, August 3, 2004.

attaching a new version of its *USTA II* amendment that the Respondents had never seen. As Respondent's counsel described in a letter to SBC shortly after it filed its complaint in Ohio:

> Predictably, the FCC *Interim Order* did in fact render prior proposals outdated because it requires that any new unbundling amendments include new terms that incorporate the standstill and transition terms of the new order. SBC did not respond to our August letters, and we have not pressed the point because we believe, as does the FCC and the Texas Public Utilities Commission that arbitration of unbundling-related contract amendments at this time "would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible." While we expected that you might prepare a new amendment that incorporates the *Interim Order*, we did not expect to see that proposal for the first time in a complaint filed against our clients for their supposed refusal to negotiate an amendment they had never seen.[15]

For this reason, we expressed surprise that SBC had filed complaints, and "urge[d] that the parties engage in further attempts to resolve their disputes before SBC files similar actions in other states."[16] We further stated that, "We believe that most state commissions would share our preference that the parties first attempt to negotiate SBC's new proposal before resorting to litigation."[17] Nonetheless, SBC responded to this letter by asserting that its objective in pursuing its complaints is "utterly unobjectionable,"[18] and without further warning or negotiations filed its complaint in Illinois, Michigan, Indiana and, shortly thereafter, Missouri.

B. The Commission Could Not Approve SBC's Proposed Amendment at This Time without Conducting Its Own Impairment Analyses.

It is notable that the complaints SBC filed in September requested relief by November 15, but none of the states have acted on SBC's complaint. Undeterred, SBC's Petition requests relief by December 31. SBC's cries of urgency ring hollow when, notwithstanding the TRO and

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[15] *See* attached Exhibit 3, Swidler Berlin Shereff Friedman letter to SBC, September 24, 2004 (citations omitted).

[16] *Id.*

[17] *Id.*

USTA II, it has been ordered to continue to provide UNEs at TELRIC rates at least the end of this year and potentially longer by the FCC.[19]

In any event, grant of SBC's request for immediate approval of its amendment – which it claims is "utterly unobjectionable" – would be unlawful because the Act prohibits state approval of non-negotiated interconnection agreement amendments without a finding based on record evidence that the amendment would "meet the requirements of Section 251, *including* the regulations prescribed by the [FCC] pursuant to Section 251."[20] This standard requires the Commission to undertake an independent analysis of Section 251 above and beyond the FCC regulations. Had Congress intended that states only consider whether an agreement meets the requirements of FCC regulations, it would have said so, but instead asked the states to address the full scope of Section 251 and all other "open issues."[21] Numerous state commissions, including this one, have previously exercised this obligation by ordering unbundling of elements that had not yet been addressed by the FCC or where the FCC's initial rule had been vacated.

Similarly, to consider SBC's Petition now, the Commission would first be required to fill the gaps in the FCC regulations needed to assure that the resulting revised agreement satisfied the standards of Section 251. Accordingly, after *USTA II* vacated certain FCC unbundling rules, the Connecticut Department of Utility Control explained:

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[18] *See* attached Exhibit 3, Kellogg Huber (on behalf of SBC) response to Swidler Berlin letter, September 28, 2004.

[19] *See Interim Order & NPRM* at ¶ 21 (generally requiring unbundling of the UNEs vacated or arguably vacated by *USTA II* until the earlier of the effective date of new rules or March 2005).

[20] 47 U.S.C. § 252(c)(1) (emphasis added); s*ee also* 47 U.S.C. § 252(e)(2)(B) (an arbitrated agreement must meet the requirement of Section 251).

[21] In addition, the Act explicitly permits state commissions to arbitrate all "open issues," 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations that resolve them. Thus, this Commission is not limited to implementation of FCC rules; instead, the FCC's

> because the FCC must make a finding of impairment to unbundle certain elements, the fact that there has been no discussion or decision regarding a network element does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3), just as it does not equate to a nationwide finding of impairment. Rather, by virtue of § 251(d)(3), the status of any network element is left undecided and left to the states … to determine the element's status.[22]

Thus, to approve a contract amendment that would eliminate a UNE offered under an existing contract, the Commission would be required to make its own non-impairment finding with respect to that element to ensure that any amendment would be consistent with Section 251 and with state law and policy.[23]

The Commission therefore has three options for addressing SBC's Petition: (1) concur with the approach of numerous other states and defer this proceeding until the FCC has established new rules that implement Section 251 of the Act, (2) move forward with its own impairment analyses to determine which of the UNEs that would be eliminated by SBC's proposed amendment are in fact required by the Act; or (3) determine that SBC remains obligated to provide the UNEs in question pursuant to an independent legal obligation, such as its federal SBC/Ameritech merger conditions, Missouri law or policy, or Section 271.

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regulations (if any) are only one of the criteria that must be satisfied in a state commission's overall analysis of whether an agreement meets the requirements of Section 251.

[22] *See* attached Exhibit 5, *Application of The Southern New England Telephone Company For a Tariff to Introduce Unbundled Network Elements – TRO*, Docket No. 00-05-06RE03, Decision at 10 (Conn. Dep't of Public Utility Control, August 25, 2004) ("*Connecticut DPUC USTA II Decision*").

[23] *USTA II* in no way limits state authority. Sections 251(d)(3), 252(e)(3) and 261 of the Act expressly preserve the authority of states to enforce their own unbundling requirements. The court's "subdelegation" decision only provides instructions to the FCC on how to do *its* job; the Court did not (and could not) strip the states of the authority that the federal Act granted directly to them, or of their authority under state law. Thus, while it is now clear that the FCC cannot delegate the initial creation of the federal UNE list, *USTA II* itself does nothing to limit state authority to create additional UNEs pursuant to the Act or state law that Congress explicitly left to the states. *USTA II* specifically held that states had not been preempted from imposing state law requirements for any of the UNEs affected by the *TRO*. *USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted").

C. SBC's Own Statements Confirm the Finding of the FCC and Numerous State Commissions that Consideration of SBC's Petition Would Be a Waste of Resources.

The Commission must determine whether the Commission believes that it would be productive to undertake such an impairment analysis at the present time, even though the FCC is currently considering revisions to its definition of impairment and to its list of federal UNEs. For its answer, the Commission need look no further than SBC's own statements in Case TO-2—4-0207 the statements of the FCC in the very same *Interim Order* on which SBC relies in this proceeding, and the decisions of numerous state commissions that have agreed that such an exercise would be a waste of commission and party resources.

First, SBC itself explained why consideration of the instant Petition should not move forward at this time when it sought to stay this Commission's *Triennial Review* implementation proceedings. After *USTA II* was issued on March 2, 2004, SBC argued to this Commission that it would "it makes no sense for the Commission and the parties to expend now, before the FCC has developed unbundling rules (or mounted a successful challenge to USTA II), the significant amount of time and resources that preparing and filing testimony, conducting discovery, holding hearings, and preparing and filing briefs and analyses would require, all in an attempt to apply rules declared unlawful and invalid by a unanimous Court of Appeals" and that "it would be wasteful and imprudent" to continue the proceeding.[24] The uselessness and wastefulness of a Commission impairment proceeding to consider SBC's Petition now is even clearer than when SBC made these arguments. Any Commission proceeding now would be complex and time-consuming given that the Commission would be left to proceed in the absence of any clear

[24] *See In the Matter of a Commission Inquiry into the Possibility of Impairment Without Unbundled Local Circuit Switching When Serving the Mass Market*, Case No. TO-2004-0207, SBC Southwestern Bell Telephone, L.P., D/B/A SBC Missouri's Response To Staff's Motion To Suspend Procedural Schedule And To Order Suspending Schedule And Directing Filing, at 2 (Mar. 11, 2004).

guiding directives or legal standards from the FCC. Moreover, the result of an independent Commission proceeding would likely be rendered obsolete either before or soon after it would be issued. SBC itself indicates that the FCC has initiated a remand proceeding and intends to issue new unbundling rules by the end of this year. It would be nearly impossible for this Commission to complete a lawfully-adequate impairment proceeding before then, and even if it did it would likely have to start the process all over again if the FCC adopted rules that are inconsistent with the Commission's findings. For this reason, the FCC *Interim Order & NPRM* explained 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, and what standards might be used to resolve such disputes, 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.*[25]

SBC's Petition fails to disclose this "certain" conclusion of the FCC *Interim Order & NPRM*, and instead emphasizes only the portion of the order that acknowledges, as a result of *USTA II*, that the ILECs are permitted to "initiate" change of law processes by *proposing* amendments that assume the absence of the vacated unbundling rules. As noted above, however, this Commission could not *approve* such a proposal without conducting the type of proceeding that the FCC found with certainty would be a waste of time.

It may be that the FCC envisioned that change of law proceedings could be "initiated" after the *Interim Order & NPRM*, but not reach the litigation stage – which it indicated would be wasteful – before the FCC issued new rules in December. If SBC wishes to proceed accordingly, Respondents will negotiate in good faith. But to the extent that SBC is asserting that the FCC designed a paradoxical plan in which state commissions were being asked to undertake litigation that the FCC believed with certainty would be a waste of time, the state commissions can and

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[25] *Interim UNE Order* at ¶ 17.

should decline. While the 1996 Act encourages the states' voluntary participation, the United States Supreme Court has made clear that federal agencies are constitutionally prohibited from *requiring* state commissions to do anything. *See New York v. United States*, 488 U.S. 1041 (1992) (holding that "Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program.") For this reason, the Act provides that the FCC will assume the responsibility of conducting a Section 252 arbitration if the state commission declines to act. While the Respondents normally encourage state commissions to exercise their option to take an active role in promoting and implementing the goals of the 1996 Act, this Commission need not and in this instance should not undertake an unnecessary proceeding that would unduly waste the resources of the parties and the Commission. Numerous other state commissions that have already faced this issue have agreed, either by staying or dismissing ILEC-initiated change of law proceedings and/or by ordering the ILEC to continue to provide the existing types of UNEs until new FCC rules are effective:

- On November 22, 2004, the Administrative Law Judge hearing SBC's similar complaint in Illinois deferred further consideration of the case until a status hearing to be held January 13, 2005, by which time she hoped that the FCC's new order would have been released.
- The Texas Public Utilities Commission recently stayed its arbitration of all UNE issues in the SBC "mega-arbitration" until the FCC issues its new permanent rules, citing the conclusion of the FCC *Interim Order & NRPM* that to continue the proceeding would be "wasteful in light of the FCC's plan to adopt new permanent rules as soon as possible."[26] The Commission therefore concluded that "in order to conserve both the parties' and the

Commission's resources, the Commission finds that the more appropriate course of action is to abate [arbitration of UNE issues] and wait for guidance from the FCC."[27]

- Shortly after the FCC's *Interim Order & NPRM* was released, the Connecticut Department of Utility Control rejected SBC's arguments that UNE rates and terms should be subject to re-consideration now in change of law proceedings and held that SBC must continue to provide the UNEs vacated by *USTA II* until the new permanent FCC unbundling rules are "finalized and are available for use."[28]
- During the first week of November 2004, BellSouth filed petitions with most of the state commissions its region seeking relief similar to that sought by the SBC Petition . Within days, the North Carolina Utilities Commission issued an order holding that consideration of BellSouth's petition would be "premature at this point," noting that new FCC rules are expected soon and explaining that it "is obviously better … to have final rules in place rather than interim rules before one undertakes a comprehensive change-of-law proceeding."[29] In the meantime, the Commission ordered BellSouth to provide specific information with respect to each CLEC interconnection agreement it intended to include in the proceeding, in place of the generalized allegations of BellSouth's initial petition.

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[26] *See* attached Exhibit 4, Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Docket No. 28821, Order Abating Track 2, at 2 (Public Utility Commission of Texas, Sept. 9, 2004).

[27] *Id.*

[28] *See* attached Exhibit 5, *Connecticut DPUC USTA II Decision* at 14.

[29] *Generic Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law*, Docket P-100, sub 133U, Order Establishing Generic Docket and Requiring Supplemental Information (N.C. Util. Comm. November 10, 2004).

- The New Hampshire Public Utilities Commission declined to hear Verizon's petition to arbitrate its *TRO* amendment, informing Verizon that it could bring its petition to the FCC. The commission explained its decision:

> as a matter of efficiency and resource conservation. The status of the applicable law remains in flux, as the D.C. Circuit decision on the *TRO* has reversed certain FCC decisions and is being challenged. It is not a prudent use of our limited state resources to arbitrate these agreements, on an expedited basis, only to face the possibility that the TRO standards will yet again be changed by the Circuit Court or U.S. Supreme Court. [30]

- The Hawaii Public Utilities Commission's dismissal of Verizon's arbitration petition further clarified that an ILEC proposal is no more ripe for consideration simply because it purports to pave the way for a future change of law:

> Clearly, the implications of the TRO are not settled. … We believe that it would be inappropriate, untimely, and a waste of the parties' and commission's resources to grant Verizon Hawaii's request for a consolidated arbitration proceeding, at this time. Verizon Hawaii's contention that its [proposal] was structured to accommodate future legal developments is unpersuasive since the legal environment at this time is too uncertain.[31]

- The North Carolina Utilities Commission held that "[I]t makes no sense to begin an arbitration [of Verizon's TRO amendment] where the underlying rules may be changed in midstream." Accordingly, the commission advised Verizon that if it wished to proceed, it

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[30] *Verizon New Hampshire Petition for Consolidated Arbitration for an Amendment to the Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, DT 04-018, Order No. 24,308 Addressing Motions to Dismiss at 9 (New Hampshire Pub. Util. Comm. April 12, 2004).

[31] *Petition of Verizon Hawaii, Inc. for Arbitration of an Amendment to Interconnection Agreements With Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Hawaii Pursuant to Section 252 of the Communications Act of 1934*, Docket 04-0040; Order No. 21022 at ¶¶ 19-20 (Hawaii Pub. Util. Comm., June 2, 2004) ("*Hawaii Arbitration Dismissal Order*").

would have to "avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC."[32]

- The Public Utilities Commission of Nevada similarly dismissed Verizon's consolidated arbitration petition, holding that "Once the appeals are completed, if the case is remanded the FCC will have to prescribe new unbundling rules. … Given that the law which is the basis of Verizon's Petition is unsettled … it would be a waste of the Commission's resources to undertake the process of amending interconnection agreements at this time."[33]

We urge the Commission to follow the example of these other commissions. But if there is any doubt, the best reason for the Commission to dismiss can be found from a review of the state proceedings where Verizon petitions seeking similar relief to SBC's petition here have *not* been stayed or dismissed. Those cases, unlike the ones cited above, have now been ongoing for nearly eight months – and have accomplished nothing. Not one of these cases has been able to even reach the stage of briefing or hearings, and it is now apparent that the new FCC rules will likely overtake the proceedings before a decision based on the existing uncertain scheme could be reached. The only products of these cases to date are significant expenses for the parties and significant aggravation for the commissions. For example, on November 18, 2004, a hearing examiner of the Maine Public Utilities Commission recommended dismissal of Verizon's

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[32] *Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely, at 2 (N.C.U.C. Mar. 3, 2004) ("*North Carolina Arbitration Dismissal Order*"). Although numerous states have declined to proceed with Verizon's *TRO* arbitration petitions, it is notable that Verizon has not sought to bring its petitions before the FCC as permitted by Section 252(e)(5).

[33] *Petition of Verizon California, Inc., dba Verizon Nevada, for arbitration of an amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the*

arbitration petition. The Examiner's Report concluded that "The amount of time, resources, and money that has been wasted over the past eight months arguing about the appropriateness of the arbitration and the scope of the issues to be addressed already exceeds reasonableness," and "recommend[ed] that the Commission consider imposing sanctions or reprimanding Verizon for its actions in this docket."[34]

In sum, SBC (1) slow-rolled contract negotiations while it was challenging the *TRO*, (2) after *USTA II*, argued that continuation of the state TRO proceedings would be "wasteful" until the "FCC formulates its new unbundling rules;" and (3) now argues that the Commission must hurry to adopt new contract terms immediately despite the fact that new FCC rules are expected soon. SBC's self-serving strategy is comparable to a football team taking the lead late in the third quarter and then immediately attempting to declare the game over, even as the other team was marching down the field poised to score. As demonstrated above, the final whistle cannot be blown prematurely at SBC's request; instead, no contract amendment can be approved without a determination that the amendment would meet the requirements of Section 251. Since a lengthy and complex Commission proceeding to make this determination now while FCC rules are being rewritten would unnecessarily waste the resources of the Commission and the parties, the Commission should reaffirm its approach in the *TRO* implementation cases by staying or dismissing SBC's complaint without prejudice to re-filing after the FCC's permanent rules take effect.

II. SBC's PETITION IS PROCEDURALLY DEFECTIVE.

Triennial Review Order, Docket No. 04-0230, Order Granting Motions to Dismiss at ¶ 22 (Nevada Pub. Util. Comm., April 28, 2004) ("*Nevada Arbitration Dismissal Order*").

[34] *Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, Examiner's Report at 1, 7-8 (November 18, 2004).

Even if the Commission determines, despite Section I above, that the public interest would be served by moving forward with consideration of a TRO amendment now despite the likely futility of such a proceeding, it must still dismiss SBC's Petition as procedurally defective.

A. SBC Has Failed to Plead Necessary Facts to State a Claim.

SBC has not met the prerequisites to petition the Commission for relief under the terms of the parties' interconnection agreements or the federal Act's mandatory process that applies to a state commission's approval of amendments to interconnection agreements.

1. The Relief Requested by SBC Only Could Be Granted in a Section 252 Proceeding.

The Commission is barred from granting the relief requested by SBC except through the specific arbitration procedures set forth by Section 252 of the federal Act. The Commission only has authority to consider and impose interconnection agreements and amendments thereto pursuant to its delegated authority under Section 252. SBC's attempt to use a state law-based petition proceeding to amend its interconnection agreements "ignores and bypasses the detailed process for interconnection set out by Congress in the [federal Act]" and is therefore preempted under binding federal law. *Verizon North, Inc. v. Strand*, 309 F.3d 935. 941-944 (6th Cir. 2002). *See also Wisconsin Bell v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003) (use of state procedure that provides an alternative route around the entire interconnection process would "short-circuit [] negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after" negotiations are requested). A recent order by an Illinois Administrative Law Judge agreed, rejecting SBC's argument that disputes concerning ICA amendments are not subject to Section 252:

> It simply makes no sense to assume that Congress subjected all other aspects of ICA formation and approval to the uniform, orderly and expeditious provisions of Section 252, yet left amendments of those agreements to haphazard resolution under unnamed processes. … And more importantly, it is highly doubtful that

> Congress left ICA amendments to a patchwork of state remedies, assuming such remedies exist.[35]

Therefore, the Commission could only consider the relief requested by SBC as part of a properly-filed Section 252 proceeding.

2. Petitions to Amend an Existing Agreement Must Also Comply with the Terms of the Contract.

The *TRO* reaffirmed that the contract amendment process must be used to implement its provisions. The FCC found that the contract amendment process "is the very essence of section 251 and section 252" of the Act, and that "to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several [ILECs] that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions."[36] As the Oregon Public Utility Commission explained:

> To the extent that interconnection agreements must be modified as a result of the TRO, the procedure and timetable for dealing with those modifications is governed by the change of law provisions contained in the interconnection agreements. Although the FCC clearly articulated its expectation that the §252 arbitration timetable should apply, it did not mandate that result, and, indeed, could not do so without altering the contracts themselves. Consequently, the FCC's statements regarding the appropriate timetable for implementing TRO-related changes must be viewed as advisory in nature and do not supplant the contractual obligations set forth in the interconnection agreements.

SBC has failed to plead the necessary allegations that its Petition has been brought in accordance with the terms of each of the Respondents' agreements. The parties' interconnection agreements vary, and since SBC has not pled its rights under the contracts as a basis for its Petition, the Respondents need not and will not attempt to recite the terms of each contract here. But as an

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[35] *Petition for Arbitration of XO Illinois, Inc. of an Amendment to an Interconnection Agreement with SBC Illinois, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended*, Docket 04-0371, Administrative Law Judge's Ruling at 3, n.2 (June 3, 2004).

example of the Petition's inadequacies, SBC has failed to plead with respect to any Respondent that it has formally sought escalation of the negotiation dispute to a higher level of management, which under most interconnection agreements is a prerequisite to seeking resolution of the dispute from a state commission. Since SBC has completely failed to plead these necessary facts, the Petition may be dismissed without further explanation from Respondents of SBC's failure to satisfy these requirements.[37]

III. SBC REMAINS OBLIGATED TO PROVIDE UNEs INDEPENDENT OF SECTION 251.

Finally, the Commission could dismiss the Petition on the grounds that there has been no *net* change to SBC's legal duty to offer UNEs, as SBC remains required to provide the UNEs vacated by *USTA II* pursuant to its SBC/Ameritech Merger Conditions, Missouri law and policy, and Section 271 of the Act. Such a finding on any of these bases would enable the Commission to rule on the merits of SBC's Complaint without conducting its own impairment analysis under the auspices of Section 251.

A. SBC Remains Obligated to Provide UNEs at TELRIC under the FCC's SBC/Ameritech Merger Conditions.

Notwithstanding the *vacatur* of some of the FCC's unbundling rules, SBC remains obligated to continue to provide the UNEs that were vacated by *USTA II* pursuant to the independent legal obligations of the FCC's SBC/Ameritech Merger Conditions.[38] After SBC

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[36] *TRO* at ¶ 701.

[37] For informational purposes, Respondents have attached correspondence that is generally illustrative of the entirety of the scope of "negotiations" that have occurred between SBC and Respondents to date. Some respondents have not even had this degree of "negotiations." In the event that the Commission moves forward with this proceeding, Respondents reserve the right to present evidence that SBC has failed to satisfy the pre-requisite conditions under the contracts for filing this Petition.

[38] *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*

disavowed their applicability, on September 9, 2004, thirty-seven CLECs filed a petition with the FCC seeking a declaratory order that the merger obligations remain in effect.[39] Just three business days later, the FCC issued a Public Notice establishing an unusually expedited briefing schedule for this Petition; comments and reply comments have already been filed. If the FCC grants the CLEC Petition, SBC's Complaint would largely be rendered moot. Since the FCC is considering this issue, at the very least, this Commission should stay SBC's Complaint until the FCC issues its decision.

This Commission also has the authority to enforce SBC's merger obligations. *See SBC/Ameritech Merger Order*, Appendix C, ¶ 73 (providing that "SBC/Ameritech shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions...."). Therefore, the Commission should find that SBC remains obligated to provide the vacated UNEs pursuant to the conditions, for the reasons set forth in the CLECs' September 9, 2004 FCC petition, which is attached hereto as Exhibit 6 and is incorporated as part of this Motion to Dismiss.

B. SBC's Amendment Cannot Be Approved Until Its Section 271 Offerings Are Made Available to CLECs at Commission-Approved Rates.

SBC also has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271. The Commission cannot reasonably approve any SBC contract amendment that takes away a UNE unless and until it has first approved a just and reasonable and generally-available rate at which SBC will make that network available under Section 271.

Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279 (1999).

[39] *See* attached Exhibit 6, Petition for Declaratory Ruling (filed September 9, 2004).

The Commission's endorsement of SBC's Section 271 application was premised on the existence of competition that relied in large part on the availability of loops, switching and transport at TELRIC rates. The sustenance of competition should be an important factor in the Commission's consideration of the appropriate rate for SBC's Section 271 offerings. Until SBC has obtained Commission approval of § 271 rates for network elements that it seeks to withdraw as § 251 offerings through its contract amendment, the Commission should stay consideration of SBC's Complaint.

III. CONCLUSION

For the foregoing reasons, the Commission should dismiss SBC's Petition.

Respectfully submitted,

/s/Mary Ann Young
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Dated: December 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or served electronically on all parties of record this 13th day of December 2004.

/s/Mary Ann Young
Mary Ann (Garr) Young

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