Exhibit 4

Order of the Texas Public Utilities Commission Abating SBC Arbitration of UNE Issues

Docket 28821, September 9, 2004 Order finding that arbitration of UNE issues would be "wasteful in light of the FCC's plan to adopt new permanent rules as soon as possible" and 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."

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ABATING TRACK 2

On August 20, 2004, the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking (NPRM) and Order containing interim rules.[1] In that order, the FCC laid out a two-phase, 12-month plan to stabilize the telecommunications market. The first phase requires ILECs, on an interim basis, to:

> [C]ontinue 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. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.[2]

The second phase sets forth transitional unbundling measures for six months after the first phase ends:

> [I]n the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.[3]

In response to a request by the Arbitrators, on August 26, 2004, the parties filed pleadings addressing the question of how the Commission should proceed with the Track 2 issues in light of the Interim Rules.

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[1] *In the Matter of Unbundled Access to Network Elements; Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, CC Docket No. 01-338, WC Docket No. 04-313 (rel. Aug. 20, 2004) (Interim Rules).

[2] Interim Rules at ¶1.

[3] *Id.*

SBC Texas argued that there should be no delay in the processing of Track 2. SBC Texas argued that the Commission should move forward under the change of law provisions specifically outlined by the FCC in paragraph 22 of the order. Moreover, the Texas 271 Agreement (T2A) expires on February 17, 2005.

The Joint CLECs recognized that Track 2 could proceed, but that if it does, the Commission would not have the guidance of any rules from the FCC. Thus, the Commission would be required to do its own impairment analysis, which would be an enormous undertaking. The Joint CLECs stated that abating Track 2 is the more practical approach.

MCI and the CLEC Joint Petitioners (CJP) urged the Commission to abate Track 2. Both argued that proceeding without permanent rules is a waste of resources.

The Commission determines that Track 2 should be abated pending the issuance of permanent rules by the FCC. The FCC's order recognizes that disputes relating to the provisioning of UNEs "would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible."[4] Thus, 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 Track 2 and wait for guidance from the FCC.

[4] Interim Rules at ¶18.

SIGNED AT AUSTIN, TEXAS the 9th day of September 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER

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Exhibit 5

Connecticut Department of Public Utility Control Order Freezing UNE Obligations Until New FCC Rules Are Available

Docket No. 00-05-06RE03, August 25, 2004 Order holding that SBC must continue to provide the UNEs vacated by *USTA II* until the new permanent FCC unbundling rules are "finalized and available for use."

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 00-05-06RE03 APPLICATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A TARIFF TO INTRODUCE UNBUNDLED NETWORK ELEMENTS - TRO

August 25, 2004

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Department of Public Utility Control (Department) determines that the General Statutes of Connecticut §§16-247a and 16-247b provide it with the requisite authority to unbundle the Southern New England Telephone Company's d/b/a SBC Connecticut (Telco or Company) telecommunications network. Accordingly, the Department directs the Telco to continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates until such time as Federal Communications Commission (FCC) rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between the Telco and respective competitive local exchange carriers (CLEC).

B. BACKGROUND

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) issued its opinion in United States Telecom Ass'n v FCC, Nos. 00-1012 (consol.), 2004 WL 374262 (DC Cir., March 2, 2004) (USTA II). In that opinion, the court vacated the FCC's recently-promulgated rules and regulations by which the FCC delegated a portion of its decision-making authority to state commissions. 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, CC Docket Nos. 01–338 et al., FCC 03–36, 18 FCC Rcd 16978 (Aug. 21, 2003); Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01–338 et al., FCC 03–227, 18 FCC Rcd 19020 (Sep. 17, 2003) (Triennial Review Order or TRO). Subsequent to that ruling, the DC Circuit Court extended until June 15, 2004, the date by which its March 2, 2004 opinion would become effective. These rules and regulations serve as the authority for many of the Department Decisions issued in order to promote competition relative to the obligations of incumbent local exchange carriers to provide access to certain elements of their local network.

In the absence of clear rules and regulations, the FCC has recommended that interested parties engage in commercial negotiation to reconstitute their business relationships without reliance upon the rules and regulations vacated by the DC Circuit Court. It is unclear to the Department whether such agreements will be negotiated in the limited time period remaining before the court's order takes effect on June 15, 2004. The consequences of not reaching a commercial agreement between the various parties are unknown but are of general concern to the Department and the public. Accordingly, the Department must take the necessary action to ensure the interests of the public are not adversely affected by any irreconcilable difference that may ensue from these negotiations.

Therefore, pursuant to Conn. Gen. Stat. §§4-181a and 16-9, the Department reopened the instant docket on June 2, 2004, for the limited purpose of determining whether the Department has sufficient authority to require the continued provisioning of the specific network elements at the same terms and conditions as those required by the April 23, 1997 Decision in the above noted docket. Pending the issuance of this Decision, the Telco was directed in the June 2, 2004 Decision, to continue provisioning the network elements at their currently total service long run incremental cost-based prices until it is otherwise directed by the Department.

In the June 2, 2004 Decision reopening this proceeding, the Department sought Written Comments from interested parties concerning the continued offering of specific network elements by the Telco at their current rates and charges as previously adopted by the Department. The Department received Comments and Reply Comments from ACN Communications (ACN); AT&T Communications of New England, Inc. (AT&T); Choice One Communications of Connecticut, Inc. (Choice One); Conversent Communications of Connecticut, LLC (Conversent); CTC Communications Corp. (CTC); DSLnet Communications, LLC (DSLnet); MCI, Inc. (MCI); and the Telco.

The Department issued its Draft Decision in this docket on July 28, 2004. All parties and intervenors were offered the opportunity to file written exceptions and present oral argument concerning the draft Decision.

II. POSITIONS OF PARTIES

A. AT&T

AT&T argues that the Telco may not unilaterally discontinue offering unbundled network elements (UNE) at their current rates because it would disrupt the Connecticut telecommunications market, frustrate consumer choice and cause irreparable harm to consumers and competitive local exchange carriers (CLEC). Without access to UNE-platform (UNE-P), AT&T claims that its ability to compete would be fundamentally impaired.[1] AT&T also states that it would have no economically viable means of providing service to its customers.[2] According to AT&T, the impact of USTA II became better defined on June 23, 2004, when it announced that it would no longer compete for new residential customers in seven states.[3] AT&T argues that provisioning service through platforms other than UNE-P (e.g., resale) would not permit it to offer unique services and packages to its customers. In that case, AT&T would be forced to offer services and packages identical to that of its underlying provider (i.e., the Telco).[4] AT&T claims that such a duplication of services would deprive customers of unique and better-suited services.[5]

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[1] AT&T Comments, p. 4.

[2] Id.

[3] See AT&T press release, "AT&T To Stop Competing In the Residential Local and Long-Distance Market in Seven States," June 23, 2004.

[4] AT&T Comments, p, 6.

[5] Id., p. 6 and 7.

In an effort to retain its ability to use UNE-P, AT&T cites to a number of state commission orders issued in similar proceedings. According to AT&T, the states of Michigan, Texas, Rhode Island, and Washington have made general findings to the effect that the incumbent local exchange company (ILEC) may not unilaterally discontinue offering UNE-P which have been negotiated as part of a valid ICA unless a change of law provision within that agreement is properly invoked and commission approval secured.[6] AT&T cites to these decisions in support of its position that the Department is justified in ordering its current interim relief.

AT&T further argues that in light of USTA II, the Telco has a continuing obligation to provide UNEs, as the DC Circuit Court did not make a finding of non-impairment. Rather, that court specifically declined to make such a finding. AT&T asserts that because the Telco and other ILECs requested such relief and it was not mentioned in USTA II, it should not be inferred.[7] In the opinion of AT&T, because there has been no specific finding of non-impairment, the Telco should continue to offer UNEs until the ICAs are modified pursuant to their change of law procedures.[8]

Relative to state authority, AT&T maintains that the Department retains authority to require unbundling pursuant to Conn. Gen. Stat. § 16-247b.[9] Under this section, the Department is directed to initiate a proceeding to unbundle an incumbent's network, services, and functions when it is in the public interest, technically feasible, and consistent with federal law.[10] Pursuant to that statute, the Department is also

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[6] Michigan PUC Case No. U-14139, In the Matter of a Request for Declaratory Ruling, or in the Alternative, Complaint of Comptel/Ascent Alliance, AT&T Communications of Michigan, Inc., TCG Detroit, Mcimetro Access Transmission Services, Inc., Talk America Inc., CLEC Association of Michigan, LDMI Telecommunications, Inc., TC3 Telecom, Inc., ELNET Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., The Zenk Group, LTD. d/b/a Planet Access, GRID 4 Communications, Inc., and C.L.Y.K., Inc., d/b/a Affinity Telecom against Michigan Bell Telephone Company, d/b/a SBC Michigan, and Verizon North Inc. and Contel of the South Inc., d/b/a Verizon North Systems, for an Order Requiring Compliance with the Terms and Conditions of Interconnection Agreements, SBC Michigan's Response in Opposition to Complainants' Request for Emergency Relief Order, filed May 25, 2004; Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas PUC Docket No. 28821, Order Abating Proceeding, May 5, 2004; Rhode Island Public Utilities Commission, Order No. 17990, Dockets No. 3550 and 2681, In re: Implementation of the FCC's Triennial Review Order and Review of Verizon Rhode Island's TELRIC Filings, issued March 26, 2004; In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon; Northwest Inc. with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to 47 U.S.C. Section 252(b), and the Triennial Review Order, Docket No, UT-043013, Order No. 4, May 21, 2004.

[7] AT&T Comments, p. 11.

[8] Id.

[9] Id., p. 14.

[10] Conn. Gen. Stat. §16-247b states in part that: "(a) On petition or its own motion, the department shall initiate a proceeding to unbundle a telephone company's network, services and functions that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations. Any telecommunications services, functions and unbundled network elements and any combination thereof shall be offered under tariff at rates, terms and conditions that do not unreasonably discriminate among actual and potential users and actual and potential providers of such local network services."

authorized to set rates for such elements based on forward looking long-run incremental costs.[11]

Additionally, AT&T argues that the FCC recognizes the availability of localized unbundling and supports continued unbundling pursuant to state law.[12] Consequently, AT&T concludes that the Department should continue its standstill order as a necessary interim step pending consideration of whether, in the absence of FCC unbundling rules, the Telco should be required to provide unbundled mass market switching, dedicated transport, and high capacity loops under Connecticut law.[13] By requiring the Telco to continue to offer the UNEs, AT&T claims that the Department will foster competition and protect the public interest.

AT&T further states that continued provisioning of UNEs at total service long run incremental cost-based (TSLRIC) rates pursuant to Connecticut law is not preempted by federal law.[14] In support of its argument AT&T cites to the Connecticut Supreme Court's opinion in S. New England Tel. Co. v. Dep't of Pub. Util. Control (SNET Order).[15] AT&T asserts that this order supports the proposition that the Department may impose unbundling requirements that exceed the scope of current FCC rules under the Telecommunications Act of 1996 (Telcom Act).[16] AT&T maintains that the SNET Order relied on that portion of the Telcom Act that expressly permits states to adopt additional provisions that are in the furtherance of competition and are not in conflict with the federal law.[17]

Moreover, AT&T argues that the unbundling provisions of Conn. Gen. Stat. §16-247b are not in conflict with federal law as they are created to further competition and there are currently no federal rules with which they may conflict. AT&T also takes issue with the Telco's view that to be consistent with federal law, the Department's unbundling requirements must mirror federal law.[18] In the opinion of AT&T, such an interpretation renders 47 U.S.C. § 251(d)(3) without meaning.[19] Thus, AT&T argues that the Department may regulate the terms of network access as long as it does not invoke state law to create barriers to entry in violation of § 253 of the Telcom Act.[20] It is for these reasons that the Department is authorized to order the Telco, as well as all other parties to interconnection agreements in Connecticut, to continue to abide by those terms. Furthermore, AT&T affirms that the Department may order the continuing unbundling of network elements pursuant to state law.[21]

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[11] Id.
[12] AT&T Comments, p. 15.
[13] Id.
[14] Id., p. 16.
[15] S. New England Tel. Co. v. Dep't of Pub. Util. Control, 261 Conn. (2002).
[16] AT&T Comments, p. 17.
[17] Id.
[18] AT&T Reply Comments, p. 6.
[19] Id., pp. 5-8.
[20] AT&T Comments, p. 18.
[21] Id., p. 21.

B. ACN COMMUNICATIONS SERVICES, CHOICE ONE COMMUNICATIONS, CTC COMMUNICATIONS, AND DSLNET COMMUNICATIONS[22]

The Commenters argue that USTA II will not have an immediate effect on the Telco's obligations under state and federal law to provide unbundled transport or switching.[23] Rather, the Telco must continue to abide by its ICAs and amend their contracted obligations only through proper use of the change of law provisions contained in those agreements.[24] Consequently, the Commenters contend that the Department is not required to determine the effects of USTA II at this time because such a determination, prior to a Department case to consider approval of a tariff or contract amendment, would be premature.[25]

C. CONVERSENT

Conversent supports a Department standstill order until such time as the FCC issues new rules that implement USTA II or the existing FCC rules are reinstated.[26] Conversent states that the FCC has found that carriers are impaired without access to DS-1 loops on an unbundled basis.[27] Conversent also argues that USTA II did not vacate the unbundling obligations for DS-1, DS-3 or dark fiber loops.[28]

However, Conversent acknowledges that the Telco's obligation to provide transport is now uncertain as a result of USTA II.[29] Additionally, Conversent concedes that in light of USTA II, there is an absence of federal rules dictating the terms under which the Telco must provide unbundled dedicated transport. Conversent further acknowledges its desire to negotiate with the Telco to secure transport at above-TSLRIC prices, but such negotiations have not resulted in new agreements between the two parties.

Similar to other CLECs, Conversent confirms that the Department has the authority to require unbundling under state law.[30] In the opinion of Conversent, the continuing provisioning of UNEs at their current rates would not conflict with federal law.[31] Therefore, Conversent requests that the Department exercise its authority by issuing a standstill order.[32]

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[22] ACN, Choice One, CTC and DSLnet (collectively the Commenters) filed Comments and Reply Comments, jointly with the Department.
[23] Commenters' Comments, p. 3.
[24] Id., pp. 3 and 4.
[25] Id., p. 5.
[26] Conversent Comments at 1.
[27] Id., p. 3.
[28] Id., p. 4.
[29] Id., p. 6.
[30] Id., p. 12.
[31] Id., p. 14.
[32] Id., pp. 14 and 15.

D. MCI

MCI contends that the Department may require unbundling beyond what is required as long as those unbundling requirements are consistent with the Telcom Act or the FCC's rules.[33] Specifically, MCI contends that the Department possesses the authority to order the continuing provisioning of mass market switching, dedicated transport, and high-capacity loops by making a determination that CLECs would be impaired without unbundled access to the elements.[34] MCI also argues that the Telco may not unilaterally discontinue UNE provisioning; rather, the Company must abide by the change of law provisions included in its ICAs.

Similar to AT&T, MCI asserts that USTA II is limited to the FCC's rules and findings of impairment regarding mass market switching, dedicated transport, and high capacity loops. MCI also asserts that USTA II does not decide the issue of whether impairment actually exists in certain areas without access to the UNEs. Additionally, MCI claims that USTA II does not support the proposition that ILECs are now relieved of their duty to offer the UNEs.

MCI further states that the Telcom Act remains valid statutory law, as USTA II did not find fault with the statute itself. Consequently, MCI concludes that § 251(d)(3) of the Telcom Act, preserves state regulation, remains intact and in force.[35] Accordingly, MCI requests that the Department order the Telco to provide UNEs consistent with the Telcom Act.[36]

E. TELCO

The Telco commits to adhering to the applicable provisions, including change-of-law clauses, of its existing effective interconnection agreements.[37] The Telco states that it has offered to continue providing mass-market UNE-P, DS-1 and DS-3 loops dedicated to a single customer, DS-1 and DS-3 dedicated transport and to not unilaterally increase rates for these facilities at least through the end of calendar year 2004.[38] The Telco also argues that a standstill order would not protect the industry from ILEC-induced chaos. Rather, by making these pledges, the Company has attempted to assuage any fear related to post-USTA II uncertainty and fend off any "preemptive move[s]" by the Department which it claims may be premature.[39]

Despite these pledges, the Telco argues that the Department has no authority under federal law to order the Company to continue offering UNEs at their current rates.[40] According to the Telco, such an order would directly conflict with USTA II and

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[33] MCI Comments, p. 2.
[34] Id.
[35] MCI Reply Comments, p. 3.
[36] MCI Comments, p. 4.
[37] Telco Comments, p. 3.
[38] Telco Reply Comments, p. 2.
[39] Telco Comments, p. 3.
[40] Telco Reply Comments, p. 3.

the Telcom Act.[41] The Telco premises this argument on the conclusion that USTA II stands for the proposition that only the FCC may determine which network elements must be unbundled under the Telcom Act.[42]

Moreover, the Telco argues that the Department lacks the authority to bypass change of law provisions in valid ICAs. Therefore, the Telco has taken issue with any Department order that may require UNE provisioning indefinitely, regardless of what the Telco's ICAs may provide.[43] In the opinion of the Telco, such an order would be unlawful as it would fail to reference specific terms contained in the ICAs and would be inconsistent with the Department's responsibilities of contract interpretation.[44]

Finally, the Telco argues that the Department has no authority under state law to order unbundling beyond what has been ordered by the FCC. The Telco claims that the TRO specifically questioned state commission practice of implementing additional unbundling restrictions that were inconsistent with federal law. Consequently, the Telco contends that the Department may not implement its own unbundling restrictions. [45]

IV. DEPARTMENT ANALYSIS

A. INTRODUCTION

The Department has reviewed the Comments and Reply Comments and believes that there are at least two available means by which it may lawfully order the Telco to continue providing UNEs at their current rates.[46] The first option, proposed by the Telco, offers for a limited time period, a voluntary agreement with the Department. The second, not universally accepted by the parties, is afforded by Connecticut statute provides the Department with certain authority notwithstanding the actions of USTA II.

While the Telco has indicated that it will not revise its UNE rates through the end of calendar year 2004, the Department is not confident that accepting that offer will adequately protect consumer rights or preserve the responsibilities that have been previously placed upon all service providers by the Department. Consequently, it is necessary to fully explore both options before adopting a specific course of action in this matter.[47]

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[41] Id.
[42] Id.
[43] Id., p. 8.
[44] Id., pp. 8 and 9.
[45] Telco Comments, pp. 7-10.
[46] The Department will not address the other means including merger agreements by which it has the continuing authority to issue a standstill order. The decision not to address these means is in no way a waiver of their validity or an acknowledgment of their lack thereof in this proceeding, but would be redundant to this discussion.
[47] The Department has also issued this Decision in Docket 99-03-21RE01, Application of Verizon New York Inc. – Proposed Tariff for Unbundled Network Elements – Rebundled Service, TRO, detailing Verizon New York Inc.'s (Verizon) responsibilities under federal and state law.

B. THE OFFERING OF UNES THROUGH 2004

The Telco will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and to not raise the prices for these UNEs through the end of calendar year 2004. The Telco will also adhere to its existing ICAs including any applicable change-of-law provisions.[48] Consequently, it is not unreasonable for the Department to assume that the Telco would accept a "standstill" order from the Department as long as that order expires on December 31, 2004. The Department however, lacks confidence that a new regulatory framework can be implemented by the FCC before the six-month window provided by the Telco's offer expires; and past experience with FCC rulemaking efforts tends to support the Department's concern in this area. It is for these reasons that the Department cannot accept the Telco's proposal without amending that proposition. In so doing, the Department will exercise its rights provided for pursuant to Connecticut Statute and offers the following discussion for the benefit of the parties.

C. DEPARTMENT AUTHORITY TO ORDER UNBUNDLING

The Telco argues that the Department is prohibited from instituting its own unbundling restrictions because they are preempted by federal law. The Department disagrees with that argument. At the root of this issue is the difference between an affirmative finding of non-impairment and the absence of any finding. The situation the Department faces in the aftermath of USTA II is that there is no longer any finding regarding impairment which the Department must apply, or with any rules it may promulgate from which they could conflict. That requirement has been vacated by USTA II. Additionally, it is illogical that the only way two regulatory schemes may not conflict is if they are identical, which suggests that they must be identical so as to not conflict. In this matter the lack of an approved regulatory standard cannot be presented as a basis to argue that a proposed standard presents a conflict. Therefore, the Department rejects this assertion as specious and unfounded.

1. State Authority

By Public Act 94-83,[49] the Connecticut General Assembly conveyed broad powers to the Department in Conn. Gen. Stat. §§ 16-247a and 16-247b to provide greater access to the Telco's telecommunications network. It is significant that the Legislature directed the Department to pursue that goal two years before implementation of the Telcom Act. In pursuit of that goal, the Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC. Therefore, the Department's requirement that the Telco's network be unbundled has been made pursuant to the provisions set forth in Public Act 94-83. The actions of the DC Circuit Court to vacate the federal rules does not diminish the authority of the Legislature or the requirements it has imposed on telecommunications service providers by n state statute.

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[48] Telco Reply Comments, p. 2.

[49] An Act Implementing the Recommendations of the Telecommunications Task Force.

While Conn. Gen. Stat. § 16-247a outlines the general goals the Legislature sought to achieve in its efforts to realign the state's telecommunications markets, Conn. Gen. Stat. § 16-247b expressly empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.[50] While the existence of this provision is beyond question, the effect of it in light of the Telcom Act, the TRO, and USTA II has been disputed amongst the parties to this proceeding and is addressed below.

2. Preservation of State Access Regulations

The Telco argues that the Department possesses no authority to order additional unbundling to that prescribed by the Telcom Act. The Department disagrees and is of the opinion that the Telco has misconstrued the intent of this proceeding. First, the Department is not seeking to use the Telcom Act as an enabling statute for its actions in this proceeding. Rather, the Department is exercising its authority provided by the General Assembly prior to enactment of the federal statute as the legal foundation for its actions. Because this authority preceded the Telcom Act, the Department is not dependent upon any federal directive that might be affected by USTA II.

Additionally, the Department's authority is consistent with the Telcom Act's requirement that its actions not conflict with any current federal requirements. 47 U.S.C. § 251(d)(3) specifically states that in prescribing and enforcing its regulations to implement § 251, the FCC shall not preclude the enforcement of any regulation, order, or policy of a state commission that:

> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[51]

Therefore, the Department concludes that the actions it takes in this proceeding are consistent with those provisions. In contrast, the Telco asserts that the Department "must conform to federal law and may not prevent implementation of federal policy" and that "states cannot ignore federal limits on unbundling."[52] The Department agrees; however, it disagrees with the Company suggestion that the lack of stated policy equates to an affirmative finding against such a policy.

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[50] Conn. Gen. Stat. § 16-247b.
[51] 47 U.S.C. § 251(d)(3).
[52] Telco Comments, p. 5.

3. Triennial Review Order

In support of its argument that states may not impose additional unbundling restrictions on ILECs, notwithstanding the clear language of § 251(d)(3), the Telco cited to paragraph 195 of the TRO, which states in part that:

> [i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime.

Based on its review of the TRO, the Department finds neither the above statement nor the broader opinion expressed in the TRO on this matter to conflict with the general views of the Department. The Department also disagrees with the Telco that the above statement poses a point of conflict with the requirements envisioned by the Department because the situation described above does not reflect what is being addressed in this proceeding. Specifically, unlike the situation envisioned by the above TRO reference, the Department does not seek in this proceeding to unbundle any element for which the FCC has "found no impairment," nor has it "otherwise declined to require [its] unbundling on a national basis."[53]

Therefore, the Department concludes that any assertion made by the Telco that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. In the opinion of the Department, the Telco's proposed options are predicated upon an affirmative finding or some other action on the part of the FCC. In each instance, the option requires some showing by the FCC that it has considered unbundling these network elements and has expressly elected not to do so for federal policy reasons. If such a finding were to be made, any state regulation that conflicts with the FCC's finding would certainly fail. However, 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 if they are authorized under state law to determine the element's status.

It is precisely that scenario which is presented to the Department in this proceeding. To date, the FCC lacks an affirmative conclusion that competitive carriers are not impaired in the marketplace without unbundled access to those network elements at issue in the TRO. Similarly, a general finding by the FCC that carriers are impaired without unbundled access has been vacated by the DC Circuit Court,[54] which has not been replaced or supplemented as of this date.

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[53] TRO, ¶ 195.
[54] USTA II, p. 569.

In the opinion of the Department, any interpretation other than one which requires an affirmative finding of impairment or non-impairment in regard to the provisioning of each element would render § 251(d)(3) meaningless. If the FCC's lack of determination equated to a finding of non-impairment for the purposes of preemption, then state commissions can produce no independent regulations which would be "consistent with" and "not substantially prevent the implementation of" the Telcom Act.[55] Instead, for the purposes of preemption, the provisioning of every network element would have a finding of non-impairment attached to it until the FCC determined otherwise. In that context, a state regulatory body would be unable to promulgate regulations regarding that network element because it would not be consistent with the Telcom Act.[56]

Additionally, when employing the Telco's reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. Furthermore, any state regulations would have to replicate federal regulations regarding the same elements and not provide for any requirement beyond that contained in the federal regulations. Finally, any state regulations that might be interpreted as more lenient would present a direct conflict with the more stringent federal regulations. In that environment, state regulations could only exist if they mirrored federal regulations. If such a regulatory framework were the intent of Congress, it would have provided for that requirement in § 251(d)(3). The Department further believes that if this were Congress' intention, it would not have created the state authority "carve-out" exception in that section.

It is a well-settled principle that a statute's provisions may not be read so as to render superfluous any other provision in the same enactment.[57] Reading § 251(d)(3) in the manner the Telco suggests would result in preemption which the FCC specifically denied in the TRO, stating "[w]e do not agree . . . that the states are preempted from regulating in this area as a matter of law."[58] Instead, a balance must be struck whereby the states possess the authority to regulate the field in a manner which respects the federal role and its supremacy. Consequently, § 251(d)(3) allows for the unbundling of mass market switching, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport. Furthermore, based on USTA II, the TRO does not stand in the way of the Department's endeavor.

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[55] 47 U.S.C. 251(d)(3).

[56] This rationale does not conflict with the Supreme Court's determination in AT&T Corp. v. Iowa Utils. Bd., because it does not impact the FCC's determinations of impairment under the Telcom Act or the baseline presumptions. Rather, this rationale merely addresses whether such an affirmative determination has been made for the purposes of preemption.

[57] Stewart v. Tunxis Service Center, 237 Conn. 71, 79 (1996).

[58] TRO, ¶ 192.

4. USTA II

The Telco asserts that USTA II relieves the Company of its obligations to offer UNEs prescribed by the TRO. The Telco also argues that USTA II preempts the Department from ordering the continued provisioning of those UNEs because the DC Circuit Court determined that the Telcom Act "grants the FCC, not the state commissions, the authority to determine which network elements an ILEC must unbundle."[59] Again, the Department disagrees because USTA II found the FCC's delegation of authority to the states to be unlawful.[60] Once the joint implementation process proposed by the FCC was eliminated, the DC Circuit Court had no choice but to find the resulting nationwide finding of impairment to be too broad to survive.[61] Each of these factors and their effects are discussed in detail below.

First, USTA II turned on the FCC's delegation of authority to the states.[62] The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated its decision-making authority under the § 251(d)(2) to the states.[63] That is, the FCC delegated its decision-making authority to an outside agency rather than to a subordinate. Because the Telcom Act did not contemplate the delegation of authority provided for by the FCC in the TRO, it is clear from USTA II that any responsibility to make determinations of impairment under § 251(d)(2) remains with the FCC and cannot be assigned to the states without additional legislative actions.

The Telco argues that this is proof of the DC Circuit Court's interpretation that the Telcom Act should be implemented by the FCC and not the states. While the Department is in agreement with the Telco with this aspect, it must be pointed out that it has never been, nor is it now, the intention of the Department to implement the requirements contained in the Telcom Act as a self-appointed FCC twin. Rather, the Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3). The Department will exercise that authority in a manner consistent with federal law. Therefore, because the Department is not attempting to use the authority vacated by the DC Circuit Court, that portion of USTA II has no bearing on the Department's efforts in this proceeding.

Additionally, because there is no expressed authority from Congress for states to implement the finding of impairment on a localized basis, the court in USTA II vacated the FCC's national finding of impairment.[64] It is important to note that this was not a determination by the court regarding the actual state of requesting carrier impairment.

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[59] Telco Reply Comments, p. 3 (emphasis omitted).

[60] USTA II, p. 568.

[61] Id.

[62] Id., stating the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties.

[63] Id., stating "[w]e therefore vacate, as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."

[64] Id., p. 569.

Rather, it was a rebuke by the judiciary of the broad impact of the FCC's determination that it did not properly consider the "more nuanced concept of impairment."[65]

USTA II does not supplant the FCC's right to make a determination of impairment where evidence clearly supports such a conclusion. Rather, that decision simply states that the FCC has not adequately made such a determination itself. The consequence of that situation is that the FCC lacks any finding upon which to predicate its instructions and/or its requirements. The absence of any explicit finding on the part of the FCC leaves the area open to state regulation.

Second, the DC Circuit Court specifically declined to address the issue of preemption as presented by paragraph 195 of the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe.[66] Therefore, this issue was not addressed and § 251(d)(3) was left intact and in force.

Third, USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC. The court rendered no comment on the role of state commissions in the implementation of the Telcom Act that might be construed to further restrict the rights and responsibilities of state commissions such as the Department.

Fourth, USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary. Had USTA II made such a finding, the Department would have been required to refrain from any further regulatory action. The lack of such a declaration reinforces the Department's belief that an impairment finding remains to be determined and that the Department must take the necessary actions to protect the interests of the public during the interim.

Therefore, in light of the above, the Department finds that USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers. Accordingly, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

5. SNET Order

The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.[67]

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[65] Id., p. 569, quoting United States Telecom. Ass'n v. Fed. Communications Comm'n, 290 F.3d 415, 426 (D.C. Cir. 2002).

[66] Id., p. 594.

[67] SNET Order, p.36.

The Telco argues that the SNET Order is no longer a valid precedent by virtue of statements contained in the TRO.[68] The Department disagrees. In support of its claim, the Telco again refers to paragraph 195 of the TRO, as well as paragraphs 192 and 193. While these paragraphs generally indicate that federal law may not be ignored or circumvented by state regulators when pursuing additional regulation, the Department notes that this argument is virtually identical to that posed by the Company above. Specifically, the argument that states cannot regulate an element, the lack of access to which has been found to not impair requesting carriers. Therefore, for the same reasons noted above, the Department rejects the Telco's argument that state regulation must mirror federal regulation. The Department also rejects the Telco notion that a general statement made by the FCC in an administrative ruling eviscerates a state appellate court ruling when it does not conflict with the SNET Order and does not constitute final agency action. Consequently, the SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed. All requirements imposed on the Department by both Congress and the Connecticut General Assembly have been fully satisfied.

Therefore, in light of the above, the Department hereby determines that Conn. Gen. Stat. §§16-247a and 16-247b provide it with the requisite authority to require the unbundling of the Telco's telecommunications network. Accordingly, the Telco should continue provisioning mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates. The Company should continue provisioning these UNEs until such time as the FCC's rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between the Telco and respective CLEC.

V. FINDINGS OF FACT

1. The Telco will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and will not raise the prices for these UNEs through the end of calendar year 2004.

2. The Telco will adhere to its existing ICAs including any applicable change-of-law provisions.

3. The Connecticut Legislature directed the Department to unbundled the Telco's telecommunications network two years before implementation of the Telcom Act.

4. The Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC.

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[68] Telco Reply Comments, p. 11.

5. The Department's requirement that the Telco's network be unbundled has been made pursuant to the provisions set forth in Conn. Gen. Stat. §16-247b.

6. Conn. Gen. Stat. § 16-247b empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

7. The Department is exercising its authority provided by the Legislature prior to enactment of the federal statute as the legal foundation for its actions.

8. The Department is not requiring in this proceeding the unbundling of any element for which the FCC has found no impairment or declined to require its unbundling on a national basis.

9. By virtue of § 251(d)(3) of the Telcom Act, the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element's status.

10. USTA II turned on the FCC's delegation of authority to the states.

11. The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated to the states its decision-making authority under the § 251(d)(2).

12. The Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3).

13. The Department will exercise its authority in a manner which is consistent with federal law.

14. The DC Circuit Court declined to address the issue of preemption as presented the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe and § 251(d)(3) was left intact and in force.

15. USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC.

16. USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary.

17. USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers.

18. The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in

the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.

19. The SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed.

VI. CONCLUSION AND ORDER

A. CONCLUSION

Conn. Gen. Stat. §§16-247a and 16-247b provide the Department with the authority to require the unbundling of the Telco's telecommunications network. That authority was granted two years prior to the implementation of the Telcom Act. Therefore, the Department is not dependent upon any federal directive that might be affected by USTA II. This authority is also consistent with the Telcom Act. Accordingly the claim made by the Telco that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. Consequently, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

B. ORDERS

1. The Telco shall continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates.

2. The Telco shall not discontinue or alter these services or their respective rates and charges until such time as FCC rules and regulations have been finalized and are available for use or until such time as an ICA has been filed and approved by the Department or binding commercial agreement has been negotiated between the Telco and a CLEC and the Department has been notified as such.

3. The Telco shall also continue to abide by its existing ICAs until such time as the Department orders otherwise.

DOCKET NO. 00-05-06RE03 APPLICATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A TARIFF TO INTRODUCE UNBUNDLED NETWORK ELEMENTS - TRO

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

August 26, 2004,
Date

Exhibit 6

CLEC's FCC Petition for Declaratory Ruling

FCC Common Carrier Docket No. 98-141, Petition for Declaratory Ruling that SBC remains subject to the unbundling obligations to which it committed to secure approval of their respective mergers with Ameritech.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of Ameritech Corporation, Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses 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 No. 98-141
In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	)	CC Docket No. 98-184

PETITION FOR DECLARATORY RULING

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September 9, 2004

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PETITION FOR DECLARATORY RULING

Pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, thirty-seven competitive local exchange carriers[1] hereby petition the Commission for a declaratory order that the incumbent local exchange carrier affiliates of SBC Communications, Inc. ("SBC") and

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[1] Access One, Inc.; ACN Communications Services, Inc.; Alpheus Communications, L.P. f/k/a El Paso Networks, L.P.; ATX Communications, Inc.; Biddeford Internet Corporation d/b/a Great Works Internet; Big River Telephone Company, LLC; BridgeCom International, Inc.; Broadview Networks, Inc.; BullsEye Telecom, Inc.; Capital Telecommunications, Inc.; Cavalier Telephone, LLC; Conversent Communications, LLC; CTC Communications Corp.; CTSI, Inc.; DSLnet Communications, LLC; Focal Communications Corp.; Freedom Ring Communications, LLC d/b/a BayRing Communications; Gillette Global Network, Inc. d/b/a Eureka Networks; Globalcom, Inc.; Integra Telecom, Inc.; Intelecom Solutions, Inc.; KMC Telecom Holdings, Inc.; Lightship Telecom, LLC; Lightwave Communications, LLC; Lightyear Network Solutions, LLC; McGraw Communications, Inc.; McLeodUSA Telecommunications Services, Inc.; Metropolitan Telecommunications, Inc. d/b/a MetTel; Mpower Communications Corp.; NTELOS Network, Inc.; Pac-West Telecomm, Inc.; R&B Network Inc.; RCN Telecom Services, Inc.; segTel, Inc.; TDS Metrocom, LLC; US LEC Corp.; and Vycera Communications, Inc. f/k/a Genesis Communications Int'l, Inc. (collectively, the "Petitioners").

Verizon Communications, Inc. ("Verizon") remain subject to the unbundling obligations to which they committed to secure approval of their respective mergers with Ameritech[2] and GTE.[3] The Commission and the public interest demanded these commitments to guarantee CLEC access to a minimum set of UNEs throughout the period of intermediate twists and turns likely to occur until section 251(c)(3) was at last implemented through final, non-appealable rules. The merger conditions were intended to serve, if needed, as a bridge to the promised land of certain UNE rules.

The Bells would now render the conditions a bridge to nowhere, arguing they simply expired with *USTA I*[4] or after three years. As demonstrated below, that is not what the conditions say, and the reason why is obvious. Why would the Commission have asked for a bridge that failed to reach the other side? The purpose of the merger conditions was to keep existing unbundling obligations in effect until new obligations were established. If the conditions expired upon a judicial decision (*USTA I*) that *vacated* unbundling rules, as the Bells now argue, rather than upon an affirmative finding that such rules were not required by the Act, that purpose would be defeated and the unbundling conditions would be reduced nearly to a sham.

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[2] *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*"). The merger conditions appear as Appendix C to the Order ("SBC/Ameritech Merger Conditions").

[3] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221 (2000) ("*Bell Atlantic/GTE Merger Order*"). The merger conditions appear as Appendix D to the Order ("Bell Atlantic/GTE Merger Conditions").

[4] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (Mar. 24, 2003) ("*USTA I*").

As the Bell Companies are now so fond of pointing out, the initial implementation of section 251(c)(3) has never been completed.[5] There has *never* been a final, non-appealable determination with respect to the network elements that were vacated by or remain subject to appeal in *USTA II*.[6] Thus, the expiration dates of SBC and Verizon's unbundling merger obligations have not yet arrived. The merger conditions were designed precisely to prevent the uncertainty that otherwise might result from repeated appeals and judicial reversals of unbundling rules, and it is time for the Commission to effectuate that purpose by enforcing the conditions.

I. THE MERGER CONDITIONS REQUIRE UNBUNDLING OF THE UNEs VACATED BY *USTA II* UNTIL THE CONDITIONS ARE TERMINATED.

When Congress established the national policy to promote local telecommunications competition, it directed the Commission to adopt by August 1996 regulations that would assure competitive carriers of access to the particular ILEC network elements they needed to enter local markets. But three years later, in the fall of 1999, clear rights for CLECs remained elusive. The Supreme Court had overturned the Commission's initial unbundling rules, and the Bell Companies were indicating that they were likely to sue again when replacement regulations were adopted in the *UNE Remand* proceeding. Competitive carriers faced perilous uncertainty, as the

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[5] *See e.g., United States Telecom. Ass'n v. FCC*, Nos. 00-1012 *et al.*, Petition for Mandamus to Enforce the Mandate of this Court, filed with the D.C. Circuit on August 23, 2004 by Verizon, Qwest, and USTA ("Mandamus Petition").

[6] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*"), *aff'd, rev'd, and vacated in part sub nom., United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. filed*, 2004 WL 1475967, 1494922, 1494953 (U.S. June 30, 2004).

rules on which they relied could continue to twist in the wind for years until the Commission was able to establish rules that survived the Bells' legal challenges. Substantial investments could be lost if SBC or Verizon were able to withdraw UNEs, even temporarily, each time the rules suffered a setback and had to be restored.

It was at this juncture that the Commission considered petitions from SBC and Ameritech, and subsequently Bell Atlantic and GTE, to approve mergers that would create the largest local telephone companies in the nation since the breakup of AT&T. In its initial analyses, the Commission found that approval of these mergers "absent stringent conditions" would contravene the public interest because the mergers as proposed would "inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition."[7] The Commission ultimately approved these mergers only after SBC and Verizon offered significant commitments designed to offset the public interest harms of the mergers. In particular, to remedy the ongoing suppression of competition imposed by the destabilizing unbundling litigation, the Commission relied upon pledges by SBC and Verizon to continue to provide access to the existing types of UNEs at least until the day finally arrived that undisputed, lawful UNE regulations became effective. Specifically, the conditions provide as follows:

> 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

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[7] *Bell Atlantic/GTE Merger Order*, ¶ 96; *SBC/Ameritech Merger Order*, ¶ 62.

> 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.[8]
>
> * * * *
>
> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in [the UNE Remand and Line Sharing Orders] ... in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.[9]

The Commission's orders approving these mergers therefore imposed these conditions as a "floor not a ceiling"[10] that would apply as separate and independent legal obligations above and beyond the requirements applicable to other incumbent LECs, such as those established in "other more general proceedings."[11] The Commission had thereby assured that the competitive choices

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[8] *SBC/Ameritech Merger Order*, Appendix C, ¶ 53.

[9] *See Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 39 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*") and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (rel. Dec. 9, 1999) ("*Line Sharing Order*")).

[10] *See Bell Atlantic/GTE Merger Order*, ¶ 252; *SBC/Ameritech Merger Order*, ¶ 356.

[11] *See Bell Atlantic/GTE Merger Order*, ¶¶ 252-253; *SBC/Ameritech Merger Order*, ¶¶ 356-357. The D.C. Circuit affirmed that SBC's merger obligations are independent of its obligations under section 251. Rejecting SBC's argument that the shared transport merger condition had been superceded by subsequent unbundling orders, the court stated: "But those orders had nothing to do with SBC's paragraph 56 obligations under the *Merger Order*. They concerned instead SBC's unbundling obligations

Cont'd

available to more than half of the nation's consumers would not be stifled by Bell refusals to provide network elements that Congress intended to unbundle but that were thrown into limbo by temporary setbacks in the unbundling litigation.

This is not to say that the merger conditions were intended to last forever. The unbundling conditions established two escape triggers, either of which would result in the termination of the condition. As demonstrated in Section III below, SBC and Verizon have failed to establish the occurrence of either of these triggers. The Commission should therefore protect its jurisdiction to enforce the conditions, and the competitors and consumers who rely on them, by issuing a declaratory order directing SBC and Verizon to continue to comply with their unbundling merger obligations until they each establish to the Commission that these obligations have terminated.

II. EXPEDITIOUS COMMISSION ACTION IS NEEDED TO RESOLVE THIS CONTROVERSY BEFORE SBC OR VERIZON UNILATERALLY ATTEMPT TO TERMINATE UNEs.

When the D.C. Circuit vacated the *UNE Remand Order* in *USTA I*, the Commission was not forced to address the applicability of the merger conditions because SBC and Verizon agreed to continue providing UNEs while the Commission developed replacement rules in the *Triennial Review*.[12] After *USTA II*, by contrast, SBC and Verizon have aggressively sought to exploit the

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under the Act. They were silent on SBC's independent obligations under the *Merger Order*." *SBC v. FCC*, 373 F.3d 140, 150 (D.C. Cir. July 6, 2004).

[12] SBC and Verizon 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). Similarly, SBC and Verizon had previously agreed to maintain the status quo regarding unbundled access following the Supreme Court's vacatur of the Local Competition Order. *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 the Bell companies and GTE stating the carriers' willingness to maintain the *status quo*).

temporary gap in the Commission's regulations by asserting a right to rush to eliminate the vacated UNEs before the FCC is able to re-establish regulations. Verizon petitioned state commissions to arbitrate contract amendments that, if implemented, would allow Verizon to decide for itself which UNEs could be terminated and when. SBC has demanded that CLECs sign a similar amendment, claiming that its interpretation of the law is so certain that "there is no need for negotiations."[13]

The CLECs have answered these demands by explaining that SBC and Verizon remain obligated to provide the UNEs at issue under the merger conditions. SBC and Verizon responded that these conditions have expired, but neither of them can establish that any of the events that could trigger the expiration of their respective conditions have occurred. And in defiance of the rule that any ambiguity in the conditions must be construed against their drafters (the Bells),[14] SBC and Verizon have tried to turn the tables and shift the burden of proof to the CLECs. Faced with this dispute, several state commissions directed CLECs to ask the FCC to

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[13] SBC letter to competitive local exchange carriers, July 13, 2004.

[14] *See United States v. Seckinger*, 397 U.S. 203, 210 (1970) ("a contract should be construed most strongly against the drafter"); *see also Global NAPs, Inc. v. Verizon Communications, Verizon New England, Inc., and Verizon Virginia, Inc.*, File No EB-01-MD-010, Memorandum Opinion and Order, 17 FCC Rcd 4031, FCC 02-59, ¶ 15 (2002) (declining to construe the merger conditions that the Commission imposed on Verizon in the "cramped" manner suggested by Verizon); *see also* Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Mr. Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, 16 FCC Rcd 22, DA 00-2890, at 2 (2000) (rejecting Verizon's limited interpretation of the merger conditions that the Commission imposed on Verizon); *SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, 17 FCC Rcd 19923, FCC 02-282, ¶ 4 (rejecting SBC's statement that the merger conditions were unclear and assessing forfeitures for SBC's failure to comply with what the Commission characterized as "unambiguous" merger conditions that the Commission imposed on SBC) ("*SBC Forfeiture Order*"), *aff'd*, 373 F.3d 140 (D.C. Cir. July 6, 2004); *see also SBC v. FCC*, 373 F.3d 140, 147-149 (D.C. Cir. July 6, 2004) (The D.C. Circuit rejected "SBC's vigorous attempts to create ambiguity" in the shared transport merger conditions through affidavits purporting to show SBC's intent, finding that "The best objective evidence of the collective intent of the parties in such circumstances is the ordinary meaning of that document, and that meaning, as we have stated, is plain.").

clarify the continuing applicability of the unbundling merger conditions.[15] These state commissions are looking to the Commission to provide a timely resolution to this controversy.

The Commission has previously exercised, and the D.C. Circuit has affirmed, its authority to enforce the unbundling obligations established by the merger conditions.[16] Further, the Commission has broad authority to issue declaratory rulings to terminate controversies or remove uncertainty.[17] The Commission need not wait until SBC or Verizon violates its merger conditions; it may act in any instance where a "genuine controversy or uncertainty requires clarification."[18] If incumbent carriers will be permitted to continue to try to cease providing

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[15] *See Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, Order, at 7 (Me. P.U.C. June 11, 2004) ("We believe the best course of action at this time is for the parties to seek guidance directly from the FCC regarding what it intended concerning the continued enforceability of the conditions."); *Application of Verizon Delaware, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, PSC Docket No. 04-68, Order, ¶ 26 (Del. P.S.C. May 18, 2004) ("if the CLECs continue to believe that the GTE merger condition continues to govern the scope of VZ-DE's UNE obligations, the Commission would hope that ... the CLECs will have taken their argument to the FCC for that agency's resolution. After all, the invoked condition was accepted, and imposed, by the FCC. The FCC, not this Commission, is surely in a better position to interpret the prior Merger Order, both as to the scope of the condition and its duration. Moreover, a single answer from the FCC, applicable throughout Verizon's footprint, would surely be preferable to a dozen or so state commissions offering their own (potentially conflicting) views on what the Merger Order requires."); *Application of Verizon Northwest, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Arb. No. 531, Order 04-369 at 8 (Or. P.U.C. June 30, 2004) ("Although we agree with [CLECs] that it is appropriate for the parties to discuss the *Bell Atlantic/GTE Merger Order* during the course of their contract negotiations, we do not agree that the [Oregon] Commission is the proper forum for interpreting the *Merger Order* in the event of a disagreement. ... [T]he parties should petition the FCC if they require assistance in interpreting and enforcing the terms of the merger.")

[16] *See e.g., SBC Forfeiture Order, aff'd*, 373 F.3d 140 (D.C. Cir. July 6, 2004) (levying a $6 million forfeiture against SBC for violation of the shared transport unbundling condition).

[17] *See* 47 C.F.R. § 1.2.

[18] *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, Memorandum Opinion and Order, 6 FCC Rcd 3336, ¶ 26 (1991).

UNEs through change of law procedures before the Commission's *TRO* remand order is released,[19] the controversy over the applicability of the UNE merger condition requires clarification as soon as possible. SBC and Verizon need to know whether they must continue to provide these UNEs. CLECs need to know whether they can continue to reject SBC and Verizon's proposed contract amendments in good faith based on the merger obligations. State commissions need to know what to do when this debate inevitably crashes in on them, as it already has in Verizon states. Finally, the Commission's Enforcement Division requires this clarification, because SBC and Verizon have requested the elimination of the audit requirement of the merger conditions on the grounds that the conditions have expired.[20] Therefore, this Petition is ripe for Commission action under section 1.2 of the Commission's rules.

The need for action on this Petition is especially urgent in light of Verizon's mandamus petition requesting the D.C. Circuit to invalidate the Commission's *Interim Order*. If the D.C. Circuit grants the mandamus petition before the Commission orders SBC and Verizon to comply

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[19] The Commission's August 20, 2004 interim UNE order could have defused this debate for the time being, because it requires SBC and Verizon to continue to provide the UNEs that were vacated by *USTA II*. Regrettably, however, the order would appear to permit SBC and Verizon (at least absent the merger conditions that are the subject of this petition) to continue to try to eliminate the UNEs that were vacated by *USTA II*, despite the fact that the Commission believed that the inevitable litigation that would result "would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible." *In the Matter of 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, ¶ 17 (rel. August 20, 2004) ("*Interim Order*").

[20] *See* Enforcement Bureau Seeks Comment on Verizon's Request to Discontinue Audit of Verizon's Compliance with Merger Conditions, CC Docket 98-184, Public Notice, DA 04-2093 (rel. July 13, 2004); *see also* Enforcement Bureau Seeks Comment on SBC's Request to Discontinue Audit of SBC's Compliance with Merger Conditions, CC Docket 98-141, Public Notice DA-04-2092 (rel. July 13, 2004). This issue has been raised in the comments and reply comments of several parties in both cases. Verizon now argues to state commissions that they should defer any further review of the merger conditions since the issue has been presented to the FCC in this docket. *See* D.C. P.S.C. Telecommunications Arbitration Case No. 19, Response of Verizon Washington DC Inc. to CLEC Filings Regarding the Change of Law Provisions of their Interconnection Agreements, at 14 (Sept. 7, 2004).

with their merger obligations, CLECs and consumers would be left to rely only on SBC's and Verizon's voluntary commitments, which the Commission recently determined are inadequate.[21] Verizon's commitment would expire on November 11, 2004, and does not cover any transport and enterprise market loops, while SBC now interprets its commitment to exclude dark fiber, as well as switching for many mass-market customers.[22] Therefore, the Commission should act quickly to assure that the millions of consumers in the SBC and Verizon regions are not denied the benefit of the bargain that allowed these otherwise anticompetitive mergers to consummate.[23]

III. NONE OF THE TRIGGERS THAT WOULD TERMINATE THE CONDITIONS HAS OCCURRED.

A. Neither *USTA I* nor *II* Held that the Vacated UNEs Are Not Required by Federal Law.

The merger obligation for a particular UNE terminates upon "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be

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[21] *Interim Order* at ¶ 19.

[22] *Interim Order* at ¶ 19. Although not apparent from the face of its June 9, 2004 commitment letter to Chairman Powell, SBC has indicated to CLECs that the commitment does not include switching for any customer with more than three DS-0 lines, even in rural areas, or "dark fiber of any kind." *See* June 23, 2004 letter from SBC counsel, filed at the Texas Public Utilities Commission in Docket Nos. 28821 and 29824.

[23] Grant of the mandamus petition would not diminish the Commission's authority to grant this Petition. *USTA II* did *not* find that the substantive result of the vacated rules were inherently illogical, arbitrary, or contrary to the Act. Instead, it found only that the Commission had not sufficiently justified these rules under the standards of section 251. Therefore, it would be immaterial if the unbundling obligations enforced by the Commission pursuant to the merger conditions closely mirror the UNEs that were vacated by *USTA II*. Courts are not charged with judging the outcome of the regulatory process, only whether the regulations adopted are lawful based upon reasoned decision-making and the laws relied upon by the agency. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If the FCC is able to enforce similar obligations on authority other than section 251, the limitations of *USTA II* would be inapplicable because those limitations are highly specific to the court's analysis of section 251. The D.C. Circuit has plainly recognized that an agency may readopt a vacated rule without regard to a court's vacatur if the agency has an independent and lawful basis for doing so. *See Solite Corp. v. EPA*, 952 F.2d 473, 493-494 (D.C. Cir. 1991). The D.C Circuit has already determined that the unbundling obligations under the SBC Merger conditions are independent of the general unbundling obligations under section 251. *See SBC v. FCC*, 373 F.3d at 149-150.

provided."[24] In other words, the Bells would be relieved of the obligation to provide a particular UNE upon either (1) a final, non-appealable judicial affirmation of a *Commission* determination that the UNE was not required; or (2) a final, non-appealable judicial determination that a particular UNE could not be required under any circumstances consistent with federal law, such that no remand to the Commission was necessary. Clearly, neither *USTA I* nor *II* is such a decision. These cases did not make any findings as to whether section 251 ultimately requires unbundling of high-capacity loops, transport, or switching. If it had, the court would have had no reason to remand that determination to the Commission.

USTA I and *II* remanded Commission orders that had *required* unbundling. By contrast, what SBC and Verizon need to terminate the merger condition is judicial affirmation of a Commission decision that particular UNEs are *not required* to be unbundled.[25] Such findings could only be made in the *Triennial Review Order* or subsequent decisions, which all agree are *not* final and non-appealable. Because there has *never* been any final, non-appealable order of the Commission that determined that loops, transport, or switching are not required, this basis for termination of the condition has not occurred.

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[24] *See SBC/Ameritech Merger Order*, Appendix C, ¶ 53; *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 39.

[25] For example, the *TRO* determined that ILECs are not required to provide certain broadband UNEs to CLECs for mass market customers. The D.C. Circuit affirmed this decision, but it remains subject to appeal at the Supreme Court. If the Supreme Court affirms, or declines to review the Court of Appeals decision, then and only then would the merger condition with respect to these UNEs terminate, because there then would be a "final, non-appealable judicial decision providing that the UNE or combination of UNEs is *not required to be provided* by Bell Atlantic/GTE in the relevant geographic area."

B. The Merger Conditions Were Not Terminated by a Final and Non-Appealable Commission Order in the *UNE Remand* Proceeding Because No Such Order Exists or Has Ever Existed.

SBC's obligation to provide a particular UNE would also terminate if and when 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."[26] Similarly, Verizon's unbundling merger condition would terminate "after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively."[27] The Bells have argued that these clauses have triggered because the *UNE Remand* and *Line Sharing* cases ended when the Supreme Court denied petitions for *certiorari* of the D.C. Circuit's decision in *USTA I*. But neither the D.C. Circuit's decision in *USTA I* nor the Supreme Court's order denying *certiorari* was a final and non-appealable *Commission order*, since they were not Commission orders at all. Nor did the court decisions render the Commission's *UNE Remand Order* "final and non-appealable." A vacated decision is not an order at all, and is certainly not "final" given that the Court of Appeals remanded it to the Commission for further consideration. And SBC certainly cannot satisfy the additional requirement under its merger conditions to produce a final and non-appealable Commission order that found that high-capacity loops, dedicated transport or mass market switching are not required to be provided. In short, to terminate the unbundling merger condition under this second trigger, SBC and Verizon need to produce a final and non-appealable Commission order

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[26] *SBC/Ameritech Merger Order*, Appendix C, ¶ 53.

[27] *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 39.

from the *UNE Remand* proceeding – and no such order exists. Therefore, these clauses do not provide a basis for termination of the unbundling conditions.

Only this interpretation, and not the Bells', is consistent with the letter and purpose of the merger conditions and with common sense. The conditions were designed not only to last beyond *USTA I*; they were in fact designed to spring to life in response to decisions like *USTA I* and *II*. The Commission explained:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. *This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated.*[28]

The conditions were thus designed to provide a backstop of greater certainty to bridge the gap that would be created if the Court of Appeals or Supreme Court vacated the Commission's unbundling rules (as in fact happened). In that event, the Commission anticipated that the rules would be remanded to it, and it would have to consider them again in some subsequent

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[28] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added). Except for references to the *Line Sharing Order*, nearly identical language is found in the *SBC/Ameritech Merger Order*, ¶ 394. ("In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the Commission removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is not required to provide the UNE in all or a portion of its operating territory.")

proceeding.[29] To reduce uncertainty for CLECs, the conditions were to provide a bridge all the way across to the first foothold of dry land – the solid ground of an unbundling regime established in *some* Commission proceeding that was final and non-appealable. It does not matter what docket number or caption appears on the order that finally implements section 251(c)(3). The Commission's reference to "subsequent proceedings" simply makes clear that what matters under the merger conditions is to be measured by the objective of reducing uncertainty until truly final unbundling rules are established for the first time.

In any event, while it clear that the *Triennial Review* and *TRO* remand proceedings are "subsequent proceedings" of the *UNE Remand* and *Line Sharing* cases,[30] grant of this Petition is in no way dependent upon such a finding. It is SBC and Verizon who will need to persuade the Commission of that fact if they ever want to terminate the merger conditions on the grounds that there has been a final and non-appealable Commission order in the *UNE Remand* or *Line Sharing* proceedings. Since no such order exists today, if there is ever to be such an order, it will have to come from one of the subsequent proceedings, such as the *Triennial Review* or *TRO*

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[29] Verizon has argued that the words "subsequent proceedings," as used in paragraph 316 of the *Bell Atlantic/GTE Merger Order*, refer only to subsequent judicial proceedings. However, the sentence refers to "the Commission's orders" in those subsequent proceedings, meaning that the sentence must refer to subsequent Commission proceedings.

[30] After the *UNE Remand* and *Line Sharing* Orders were vacated, the Commission consolidated the remands of these two orders with its ongoing *Triennial Review* rulemaking. *See* FCC Public Notice, Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings, DA 02-1291 (rel. May 30, 2002). The *TRO* is expressly captioned as an "Order on Remand" in both the *UNE Remand* docket (CC Docket No. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147). Indeed, at the ILECs' urging, the appeals from the *TRO* were transferred to same panel of judges on the D.C. Circuit because the order was an outgrowth of that court's adjudication of the *UNE Remand* and *Line Sharing* orders. *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003); *USTA II*, 359 F.3d at 564. And when Verizon sought to challenge the Commission's August 20, 2004 *Interim Order*, it returned to the same panel.

remand cases.[31] In the meantime, SBC and Verizon cannot rely on this trigger to terminate their unbundling merger obligations.

C. The Merger Conditions Have Not "Sunset."

SBC and Verizon have suggested that their unbundling obligations under the merger orders expired after three years. However, the default three-year sunset does not apply to the unbundling requirement. Both sets of merger conditions provide that "[e]*xcept where other termination dates are specifically established herein*, all Conditions set out in th[e] [Order] ... shall cease to be effective and shall no longer bind [SBC or Verizon] in any respect 36 months after the merger closing date."[32] The unbundling conditions are among these exceptions because they are governed by "specific" termination dates. As discussed in Sections III.A. and III.B. above, these dates are the earlier of the date of "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided," or, for SBC, the date of a final non-appealable order in the *UNE Remand* proceeding that eliminates a UNE, and for Verizon, the date of a final and non-appealable order in the *UNE Remand* and *Line Sharing* proceedings. Since none of those termination conditions have occurred, the unbundling obligations remain in effect.

The Enforcement Bureau previously agreed with the Petitioners' interpretation of the sunset clause. The Bureau noted that while "[t]he effective period for many of the merger

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[31] Of course, the *TRO* today is neither final nor non-appealable. CLECs and states have petitioned the Supreme Court to hear an appeal of portions of the order that were affirmed by the D.C. Circuit identified in *USTA II*, while the portions that were vacated are not final because they are pending in the new remand proceeding that the Commission initiated in its August 20, 2004 interim order. If, however, the Supreme Court were to affirm portions of the TRO before it is modified by the Commission, those portions would be final and non-appealable.

[32] *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 64 (emphasis added); *SBC/Ameritech Merger Order*, Appendix C, ¶ 74 (emphasis added).

conditions terminates thirty-six months after the Merger Closing Date...," "[s]ome of the conditions ... are not subject to that expiration date because the condition itself specifically establishes its own period of applicability [*i.e.*, based on the specific future event]."[33] The Bureau then explicitly listed the unbundling condition as an example of a condition that is not subject to the three-year sunset date because it specified its own, different terms for expiration.[34]

Therefore, the plain language of the merger orders, Commission precedent, and effectuation of the Commission's objectives all require rejection of any argument that the unbundling obligations of the merger conditions have expired under the three-year sunset provisions.

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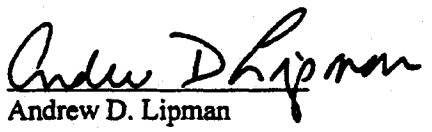
[33] *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 17 FCC Rcd 19595, DA 02-2564, ¶ 3 & n.7 (Oct. 8, 2002) ("*FCC's Enforcement Bureau Order*") (citing and interpreting *SBC/Ameritech Merger Order*, Appendix C, ¶¶ 53 & 74); *see also SBC Forfeiture Order*, 17 FCC Rcd 19923, FCC 02-282, n.53 (2002) (recognizing that the 36 month sunset provision of the SBC/Ameritech Merger Conditions does not apply to a merger condition that specifies in the text of the condition the events that must occur before the condition expires).

[34] *FCC's Enforcement Bureau Order*, ¶ 3 & n.7.

CONCLUSION

For the foregoing reasons, the Commission should declare that Verizon and SBC remain obligated to offer UNEs pursuant to their respective merger orders until they establish to the Commission that these obligations no longer apply.

Respectfully submitted,



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September 9, 2004

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served upon the parties of record listed on the attached service list by first class, United States mail, postage prepaid, this 2nd day of December, 2004.

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