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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of SBC Ohio,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 04-1450-TP-CSS
	)	
ACC Telecommunications LLC, et al.,	)	
	)	
Respondents.	)	

SBC OHIO'S MEMORANDUM CONTRA THE MOTIONS TO DISMISS

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SBC OHIO'S MEMORANDUM CONTRA THE MOTIONS TO DISMISS

SBC Ohio[1], by its attorneys and pursuant to Section 4901-1-12(B)(1) of the Commission's rules, hereby files this consolidated response to the motions to dismiss filed by Cincinnati Bell Telephone Company, Global Crossing Local Services, Inc., Level 3 Communications, LLC, Qwest Communications Corp. and Qwest Interprise America, Inc., formerly US West Interprise America, Inc. ("Qwest"), Norlight Telecommunications, Inc. ("Norlight"), the Competitive Carrier Coalition ("CCC"),[2] and the Joint CLECs.[3]

INTRODUCTION AND SUMMARY

SBC Ohio's interconnection agreements are badly out-of-date. Eight years ago, and again five years ago, the FCC put in place maximum unbundling rules that required SBC Ohio and other ILECs to make available on an unbundled basis virtually every facility in their local exchange networks. Although SBC Ohio rightly believed those

[1] SBC Ohio is a registered trade name for The Ohio Bell Telephone Company.

[2] The "Competitive Carrier Coalition" includes Access One, Inc; ACN Communications Services, Inc.; Adelphia Business Solutions Operations, Inc.; American Fiber Systems, Inc.; BullsEye Telecom, Inc.; Cinergy Communications Co.; Cinergy Telecommunications Networks-Ohio, Inc.; CityNet Ohio, LLC; City Signal Communications, Inc.; CloseCall America, Inc.; CoreComm Newco, Inc.; Digicom, Inc.; DSLnet Communications, LLC; Lightyear Network Solutions, LLC; Neutral Tandem-Michigan, LLC; and PNG Telecommunications, Inc.

[3] The Joint CLECs include Access One, Inc.; AT&T Communications of Ohio, Inc., and TCG Ohio (collectively, "AT&T"); MCI WorldCom Communications, Inc., Brooks Fiber Communications, MCImetro Access Transmission Services LLC, and Intermedia Communications, Inc. (collectively, "MCI"); First Communications, LLC; ICG Communications, Inc; KMC Data, LLC, KMC Telecom III, LLC, KMC Telecom V, Inc. (collectively "KMC"); Nuvox Communications of Ohio, Inc.; LDMI Telecommunications, Inc.; Time Warner Telecom of Ohio, LLC; Talk America, Inc.; XO Communications, Inc.; and Z-Tel Communications, Inc.

For its part, Bright CLEC, LLC filed a brief response indicating that it is willing to "adopt the amendment proposed by SBC Ohio as Exhibit A to its Complaint." Bright Response at 2.

rules to be unlawful, it nevertheless gave effect to them by entering into interconnection agreements that provide for pervasive, almost unlimited below-cost access to SBC Ohio's facilities, including those facilities that are suitable for competitive supply and that the CLECs are accordingly fully capable of providing for themselves.

Beyond all legitimate dispute, it is now clear that those FCC rules – on which the parties expressly relied in fashioning their interconnection agreements – are unlawful. The Supreme Court held as much in 1999 in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), when it vacated the FCC's first set of maximum unbundling rules, and the D.C. Circuit confirmed that result in 2002 in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), when it vacated the FCC's attempt to reinstate those same discredited rules. Moreover, on remand from *USTA I*, the FCC's *Triennial Review Order*[4] restricted unbundling in several important respects, and, in the instances where it perpetuated overly broad unbundling, the D.C. Circuit, in *USTA II*, again vacated the resulting rules.[5]

It is thus clear that the era of maximum unbundling rules is over, and that, as a matter of law, CLECs are not entitled to unbridled access to SBC Ohio's facilities, at below-cost rates. And it is equally clear that the CLECs recognize this fact. Indeed, earlier this month, one of them (AT&T), in the very first sentence of its comments to the

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[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[5] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Association of Regulatory Utility Commissioners, et al., Petitioners v. United States Telecom Association, et al.*, 2004 U.S. LEXIS 6710, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

FCC on remand from *USTA II*, told the FCC that it no longer even *wants* "rules that require the unbundling of mass-market switching and the maintenance of UNE-P."[6]

Even so, however, most CLECs have nonetheless engaged in a strategy of recalcitrance and delay, refusing to respond in a constructive manner to the myriad efforts of SBC Ohio to negotiate agreement language that would conform its interconnection agreements to governing federal law. The reason for that is simple: these CLECs know that the gravy train is running out of track, but they want to put off the day at which they finally have to compete without overly broad, subsidized access to facilities that are fully capable of competitive supply. As a result, they will do – and are doing – everything they possibly can to retain in their interconnection agreements the out-dated and unlawful maximum unbundling rules that the FCC first put in place eight years ago. And the motions to dismiss at issue here are part of that delay-at-all-costs strategy.

This Commission should not countenance that result. As the FCC has finally recognized, and as the courts have made resoundingly clear, the overly broad unbundling obligations at issue here have substantially hindered investment and innovation in the telecommunications industry. Because they require below-cost access to facilities that are capable of competitive supply, they offer no competitive benefit, but instead simply provide CLECs a subsidy that is not available to any other competitor in any other industry. Meanwhile, they severely undermine incentives to invest for both CLECs and ILECs alike, and, as this Commission is all-too-aware, they impose substantial administrative costs. The time has come for this Commission to give effect to the binding judgments of the FCC and the courts and to ensure that SBC Ohio's

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

interconnection agreements – which were entered into in express reliance on federal law – in fact conform to federal law.

BACKGROUND

A. Legal Background

The past year has seen significant change in the federal regulations governing unbundling. The FCC's *Triennial Review Order* became effective on October 2, 2003. There, the FCC expressly acknowledged the "limitations inherent in competition based on the shared use of infrastructure through network unbundling." 18 FCC Rcd at 16984, ¶ 3. Indeed, the FCC said that it was "very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.*

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

- "[I]ncumbent LECs do not have to provide unbundled access to the high frequency portion of their loops." *Id.* at 16988, ¶ 7.
- "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops." *Id.*
- ILECs "are no longer required to unbundle OCn loops." *Id.*
- ILECs "must offer unbundled access to dark fiber loops, DS3 loops (limited to 2 loops per requesting carrier per customer location) and DS1 loops except at specified customer locations where states have found no impairment pursuant to Commission-delegated authority to conduct a more granular review." *Id.*
- ILECs do not have to offer "unbundled OCn level transport," and, it further held that dark fiber, DS3, and DS1 transport were "each independently subject to a granular route-specific review by the states to identify available wholesale facilities." *Id.* at 16989, ¶ 7.

- ILECs do not have to offer "unbundled local circuit switching when serving the enterprise market." *Id.*

- States "may identify particular markets where there is no impairment" as to mass-market switches. *Id.*

- "[C]arriers are impaired without shared transport only to the extent that carriers are impaired without access to unbundled switching." *Id.*

- ILECs "are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs) . . . ." *Id.*

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

- CLECs "may order new combinations of unbundled network elements (UNEs), including the loop- transport combination (enhanced extended link, or EEL), to the extent that the requested network elements are unbundled." *Id.* at 16990, ¶ 7.

- CLECs must additionally meet strict eligibility criteria before they can order the enhanced extended link. *Id.* at 16990-91, ¶ 7.

The FCC made clear its expectation that the *Triennial Review Order* would "help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers." *Id.* at 16985, ¶ 6. The FCC also knew, however, that the CLECs would resist that result, and that they would prefer to continue to rely on subsidized access to ILEC facilities, even where those facilities are capable of competitive supply. As a result, at the same time as it provided "individual carriers . . . the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment," *id.* at 17403-04, ¶ 700, the FCC took several steps intended to minimize delay.

First, negotiations over new agreement language, the FCC stated, should begin "*immediately*," because any "delay in the implementation of the new rules we adopt in

this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703 (emphasis added). Indeed, invoking the obligation to negotiate in good faith, the FCC stated that "parties may not refuse to negotiate *any subset* of the rules we adopt herein." *Id.* at 17406, ¶ 706 (emphasis added). In addition, the FCC instructed that "state commission[s] should be able to resolve" any disputes over contract language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17406, ¶ 704 (emphasis added). Finally, the FCC emphatically stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would take effect until there has been a "final and unappealable" change in the law. Such a change, the FCC observed, had *already* happened, when its prior unbundling rules had been vacated. Thus, "[g]iven that the prior UNE rules have been vacated and replaced *today* by new rules, we believe that it would be *unreasonable and contrary to public policy* to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

The *Triennial Review Order* was then appealed to the D.C. Circuit, which for the most part affirmed the instances in which the FCC limited incumbents' unbundling obligations.[7] By contrast, the D.C. Circuit *overturned* other portions of the *Triennial*

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

Review Order that required pervasive unbundling, including all delegations of authority to state commissions, as well as the FCC's findings of impairment for mass-market switching and high-capacity loops and transport.[8]

The D.C. Circuit's mandate issued on June 16, 2004, and the Supreme Court recently denied certiorari.[9] In the meantime, the FCC issued its *Interim Rules Order*,[10] in which it required ILECs, on an interim basis, to "continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." *Id.* ¶ 1 (footnotes omitted). That interim obligation ends after six months, or after the publication of final unbundling rules, whichever comes earlier. *Id.*[11]

The FCC emphasized its belief that "unbundling rules based on a preference for facilities-based competition will provide incentives for both incumbent LECs and competitors to innovate and invest," and stated that "we renew our commitment to promoting the development of facilities-based competition and seek to adopt unbundling

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[8] *See, e.g., id.* at 594 (vacating the FCC's nationwide impairment findings as to DS1, DS3, dark fiber, and mass market switching; wireless access to dedicated transport; and all portions of the *Triennial Review Order* that involve the "subdelegation to state commissions of decision-making authority over impairment determinations").

[9] *See National Association of Regulatory Utility Commissioners, et al., Petitioners v. United States Telecom Association, et al.*, 2004 U.S. LEXIS 6710, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[10] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* FCC 04-179, 2004 FCC LEXIS 4717 (Aug. 20, 2004) ("*Interim Rules Order*").

[11] The FCC also noted in dicta that it *may* establish a second six-month transition period along with certain UNE rate increases "in the event that our final rules decline to require unbundled access to any element or elements that were available to requesting carriers as of June 15, 2004." *Id.* ¶ 29. The FCC has made clear, however, that this proposal has no binding legal force. Opposition of Respondents to Petition for Writ of Mandamus at 8-9, *United States Telecom Association, v. FCC*, No. 00-1012 (D.C. Cir. filed Sept. 16, 2004) (describing "additional transitional requirements" set out in the *Interim Rules Order* as a "proposal" that may, or may not, be adopted by the FCC).

rules that will achieve this end." *Id.* ¶ 2. Thus, the FCC emphasized that "[i]n order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements." *Id.* ¶ 22. Indeed, the FCC specifically stated that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.*

The FCC stressed this point again in the next paragraph: "[W]hile we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport . . . ." *Id.* ¶ 23 (emphasis in original). It then explained the reason for allowing such a presumption: "Thus, whatever alterations are approved or deemed approved by the relevant state commission *may take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Id.* (emphasis added).

B. Factual Background

In the spring of 2002, following the D.C. Circuit's invalidation of the FCC's maximum unbundling rules in *USTA I*, SBC Ohio timely invoked the change-of-law processes in its interconnection agreements, notifying CLECs of SBC's intent to negotiate

– and, if necessary, arbitrate – new agreement language. The FCC, however, quickly signaled its intent to put in place new rules to replace the ones the D.C. Circuit vacated. As a result, SBC abated its efforts to conform its agreements to governing law, and instead awaited the FCC's new rules.

Those new rules were set out in the *Triennial Review Order*, which, as noted at the outset, took effect on October 2, 2003. At that point, SBC Ohio again timely and properly invoked the contractual amendment process set forth in its interconnection agreements. Specifically, following the effective date of the *Triennial Review Order*, SBC provided the CLEC Parties written notice of the need to update their interconnection agreements to reflect the FCC's findings. Later, after the issuance of the D.C. Circuit's mandate in *USTA II*, on June 16, 2004, SBC notified CLECs with as-yet-unmodified interconnection agreements of the continuing need to conform their interconnection agreements to governing law, this time with the findings of *USTA II*. For the most part, however, the CLECs refused to engage in constructive responses to SBC's overtures, and, as result, the bulk of SBC Ohio's interconnection agreements remain out of compliance with governing law.

Accordingly, SBC Ohio initiated this proceeding, with the express purpose of "end[ing] the unreasonable and unlawful propagation of vacated unbundling rules and contract requirements based on those rules, while at the same time ensuring that all parties, ILECs and CLECs alike, receive that to which they are entitled under binding federal law." SBC Complaint ¶ 6. SBC's wish is that "party and Commission resources can be conserved, rather than expended in the resolution of multiple dispute resolution proceedings involving different agreements, but identical issues of law." *Id.* ¶ 8.

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

ARGUMENT

"Where a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party," and the movant must establish that there is no set of facts that would entitle the complainant to relief. *Complaint of XO Ohio, Inc., Complainant, v. City of Upper Arlington, Respondent*, Case No. 03-870-AU-PWC, Entry on Rehearing, July 1, 2003, ¶ 8, 2003 Ohio PUC LEXIS 293, at *3 (Ohio PUC 2003); *see also Complaint of Tammy Arnold and Kevin Reynolds, Complainants, v. Columbia Gas of Ohio, Inc., Respondent*, Case No. 00-03-GA-CSS, Entry, June 22, 2000, ¶ 9, 2000 Ohio PUC LEXIS 587, at *5 (Ohio PUC 2000) ("[T]he material facts alleged in this complaint, which are assumed to be true for purposes of considering the motion to dismiss, do withstand the motion.").

The CLECs' motions fall well short of this demanding standard. Their primary claim – that the law is too "unsettled" to proceed – simply ignores both the fact that the *Triennial Review Order*'s limitations on unbundling have been upheld on appeal, and the FCC's express invitation to ILECs to initiate proceedings *now* to implement changes in unbundling rules. And their suggestion that SBC Ohio has failed to exhaust efforts to negotiate with individual carriers is contrary to fact. Indeed, as we discuss in more detail below, some CLECs themselves – including many of the same ones that have sought dismissal here – have initiated a proceeding in Michigan that, like this one, seeks to incorporate existing federal law into the parties' interconnection agreements. The CLECs' simultaneous suggestion that SBC Ohio is not authorized to pursue the same course here is both hypocritical and wrong. Finally, the CLECs' additional claims – that additional sources of law, including state law, section 271, and the *SBC/Ameritech Merger Order*, required continued unbundling – are both irrelevant on a motion to dismiss and wrong.

A. SBC Ohio's Complaint is Ripe

The CLECs' principal argument is that SBC Ohio's complaint is not ripe for resolution. In their view, because the FCC is actively considering *new* unbundling rules, it would be premature to excise the *old* unbundling rules from the parties' interconnection agreements, particularly because the FCC, in the *Interim Rules Order*, put in place "stand-still" rules to last for six months (or until the FCC issues new rules, whichever is sooner). *See, e.g.*, CCC Motion at 5-7; Joint CLECs' Motion at 9, 16-17; Level 3 Motion

at 6, 8-11. Along the same lines, the CLECs argue that it would be a "waste of resources" to continue this proceeding now. *See, e.g.*, CCC Motion at 9-15.[12]

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

In this regard, the CCC is flatly misleading when it refers to the "uncertainty surrounding the *TRO*," CCC Motion at 9, or to the supposed "absence of any clear guiding directives or legal standards from the FCC," *id.* at 10. The *Triennial Review Order* is perfectly clear and certain, it has been upheld in most relevant respects, and it has been awaiting implementation for over a year now. It is simply false to claim that the *Triennial Review Order* is somehow unsettled, let alone that it is characterized by an "absence . . . of legal standards."[13] Indeed, the *Triennial Review Order* was vacated *only* to the extent it imposed overly broad unbundling obligations on ILECs. To the extent it

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[12] The CCC also argues briefly that SBC has, in the past, "agreed to defer negotiation and implementation of new contract amendments until replacement FCC rules were adopted." CCC Motion at 4 & n.12. As an initial matter, SBC's past voluntary commitments in no way obligate it to perpetuate such commitments indefinitely. More importantly, the *Triennial Review Order* is itself an example of "replacement FCC rules." Thus, SBC's Complaint is entirely consistent with any commitment it previously made to wait until the FCC adopted the *Triennial Review Order*.

[13] The CCC also claims that any decision here "would likely be rendered obsolete" in short fashion. CCC Motion at 10. Again, this is false as to the *Triennial Review Order*; the CCC presents absolutely no reason to think that the FCC plans to overhaul the *upheld* rules in the near future.

limited those obligations, it was sustained. As a result, there can be no plausible argument that it would be "premature" to implement those limitations.

Nor is the CCC correct in asserting that SBC Ohio has somehow acted inconsistently in that it previously urged this Commission (and others) to cease impairment proceedings under the *Triennial Review Order*. CCC Motion at 9-10. SBC did not argue for abatement until the D.C. Circuit had *vacated* all of the FCC's attempts to allow state commissions to conduct such impairment proceedings. *See USTA II*, 359 F.3d at 568. Thus, SBC was merely urging those state commissions to comply with binding federal law. But here, SBC Ohio's Complaint *must* be heard, and for precisely the same reason: to bring interconnection agreements into compliance with binding federal law. SBC Ohio's actions have therefore been perfectly consistent.

To be sure, SBC Ohio's complaint also seeks to implement the results of *USTA II*, insofar as it did vacate FCC determinations (*i.e.*, as to mass-market switching and high-capacity loops and transport). In the CLECs' view, rather than implementing the rules as they exist today, the parties should wait still longer, until the FCC issues yet another set of rules. But this is merely a recipe for more delay (and is a particularly egregious way to confuse the issues in order to delay compliance with the year-old *Triennial Review Order*). Once the FCC issues new rules, numerous parties will undoubtedly appeal, giving the CLECs yet another excuse to request delay in revising their agreements. As noted at the outset, certain CLECs – in particular, AT&T – are not even *asking* the FCC to unbundle mass-market switching and thus to retain the UNE-P. The suggestion that the parties should nonetheless wait for the FCC to conclude its proceeding – which would in turn lead to still more requests for delay while any appeals are pursued – is untenable.

In any event, the contention that the parties must await the FCC's resolution of its ongoing proceeding simply ignores the relevant FCC discussion. As discussed above, the *Interim Rules Order* itself emphasized that there should be a "speedy transition" to any new rules regarding mass-market switching and high-capacity loops and transport. *Id.* ¶ 22. Along the same lines, the FCC said that "whatever alterations are approved or deemed approved by the relevant state commission" should "*take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue." *Id.* ¶ 23. Towards that end, the FCC "*expressly preserve[d]* incumbent LECs' contractual prerogatives to initiate change of law proceedings," *id.* ¶ 22, and it directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* None of this would make any sense if the FCC thought that it would be "premature" to initiate any change-of-law proceedings. On the contrary, not only is it not premature to engage in such proceedings, it is an express right of SBC Ohio to do so.

Indeed, the CLECs themselves expressly admit as much. CCC, for example, acknowledges that SBC's initiation of this proceeding is "permitted," and questions only where "it is the right thing to do." CCC at 2. Cincinnati Bell likewise states that the FCC "*authorized* ILECs to invoke the 'change of law' provisions . . . in advance of final FCC unbundling rules." Cincinnati Bell at 2. The Joint CLECs, rather bizarrely, appear to concede that ILECs have authority to initiate change of law proceedings, and question only whether the *Interim Rules Order* "*requires* that the state commissions act upon [such] proceedings." Joint CLECs at 16. These dispositive concessions make clear that even the CLECs recognize that, under the *Interim Rules Order*, ILECs have every right to

initiate change of law proceedings in order to conform their interconnection agreements to governing federal law, precisely as SBC Ohio has done here.

Despite these concessions, some CLECs point to a passage in the *Interim Rules Order* that provides that "whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions . . . is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible." CCC Motion at 10 (quoting *Interim Rules Order* at ¶ 17); Level 3 Motion at 11 (same).

The CLECs' reliance on this statement is pure distortion. In context, the FCC intended this statement solely as a means to justify the stand-still aspect of the *Interim Rules Order – i.e.*, the requirement that ILECs continue to make available *USTA II*-affected UNEs for six months or until the FCC issues new rules, whichever is sooner. At the same time, as discussed, the FCC "expressly preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings," *Interim Rules Order* ¶ 22, and directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* SBC Ohio's proposed amendment, moreover, is fully consistent with *both* mandates, taking full account of the FCC's stand-still requirements while attempting to conform its existing agreements to governing law.

In this respect, the CLECs are wrong to contend that, because the FCC is expected to issue new UNE rules in the future, this proceeding would be a waste of resources. If the FCC eliminates unbundling requirements, Section 1.1 of SBC's proposed amendment

would take effect, eliminating the requirement from the CLEC's agreement. If the FCC reinstates unbundling of mass-market switching and/or high-capacity loops or transport, Section 2.1.1.1 provides that the element in question "shall continue to be provided by SBC Ohio in accordance with rates, terms and conditions of this Agreements . . . that were in effect prior to the Effective Date of this Amendment, to the extent they are consistent with the new FCC rule(s) . . . ." Both outcomes are accordingly *already* covered by SBC's Amendment. The CLECs' suggestion that the Commission will necessarily have to revisit these issues is accordingly wrong.

Nor is the CCC correct that the precedents of other state commissions provide support for this view. *See* CCC Motion at 12-14. The bulk of those decisions were made in the immediate wake of the *USTA II* ruling, at which point it was unclear whether the D.C. Circuit would grant reconsideration or a stay (it did not), whether the Supreme Court would grant certiorari (it did not), and what the FCC would do on remand. Now, the situation is much more stable and certain, and the FCC has set out clear interim rules, signaled its intent that any new final rules should be immediately implemented, and, most importantly, expressly authorized ILECs to initiate change of law proceedings such as this one. Moreover, these state commission decisions – which are inapplicable in any event – are particularly unpersuasive as to the implementation of the aspects of the *Triennial Review Order* that limited unbundling, which could not possibly be any more certain than they are today.

B. SBC Ohio's Complaint Is Procedurally Proper

1. The Complaint Complies with Section 252

Some CLECs argue that SBC Ohio cannot "use state law procedures to amend its interconnection agreements," and that SBC Ohio has improperly attempted to "bypass" 47 U.S.C. § 252. *See, e.g.*, CCC Motion at 16; Global Crossing Motion at 2-3. In this regard, the CCC and the Joint CLECs cite the Sixth Circuit's decision in *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002). *See, e.g.*, Joint CLEC Motion at 11 n.7. The CLECs also claim that SBC Ohio failed to provide all the documentation listed in section 252(b)(2)(A), including a list of unresolved issues and the parties' position on each issue. *See, e.g.*, CCC Motion at 17.

The CLECs do not demonstrate, however, that *all* of the section 252 requirements apply to SBC Ohio's petition to amend existing agreements. Admittedly, the FCC has held that the "section 252(b) *timetable*" applies. *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added). But the FCC did not hold that a petition seeking to *amend* current agreements would necessarily have to comply with all of the formal requirements that parties must meet when they seek to arbitrate a *brand new* agreement.

Even assuming that all of section 252's requirements apply, SBC Ohio has effectively complied with those requirements in light of the circumstances of this proceeding. SBC Ohio has described the issues presented by its draft amendment and has explained its position in detail. But because SBC Ohio has attempted to establish consolidated proceeding – as explicitly permitted by § 252(g) for the convenience of the Commission and the parties – it has not been possible to describe "the position of each of

the parties" on the "unresolved issues." Indeed, SBC Ohio was simply unable to describe parties' positions on the various issues when the parties did not respond to SBC Ohio's communications in the first place.

That said, SBC Ohio's suggested amendment is relatively brief, and virtually all of the parties has already been able to file an answer that lays out their positions in detail. In these circumstances, the Commission already has the information that it needs under section 252. In no event would the drastic remedy of *dismissal* be appropriate; such a remedy would be vastly disproportionate to any technical defects in SBC Ohio's Complaint. The FCC has determined that "delay in the implementation of the new rules we adopt in [the *TRO*] will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703; *see also Virginia Order*, 16 FCC Rcd at 6229, ¶ 9 (holding that, where a petition had failed to meet Section 252's service requirement, a "draconian remedy, such as dismissing outright the preemption petition before us, would contravene the intent of section 252(b) – to ensure a forum for parties to bring interconnection disputes for timely resolution").

It is also incorrect to assert that SBC Ohio's complaint is somehow precluded by *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002). There, the Michigan PSC had issued an order requiring "Verizon to file tariffs with the state, 'setting forth the rates, terms, and conditions' under which competitors might acquire network elements and services." *Id.* at 939 (citation omitted). As the Court explained, "the order requires incumbents 'to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants without the necessity of negotiating an interconnection

agreement.'" *Id.* (citation omitted). The Court thus faulted the PSC's order, as it "completely bypasses and ignores the detailed process for interconnection set out by Congress . . . ." *Id.* at 941. But this Commission has done nothing of the sort, nor is SBC Ohio asking the Commission to establish anything akin to a tariff that would replace interconnection agreements. Instead, SBC Ohio is merely making what should be a routine request to amend existing interconnection agreements. *Verizon North* simply does not have anything to say about that situation, except to the extent that it implicitly *approves* the process of arbitrating interconnection agreements.

For similar reasons, the CLECs' are wrong to suggest that the Ninth Circuit's decision in *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), deprives this Commission of "jurisdiction" over SBC Ohio's complaint. Joint CLEC Motion at 8, 10-11; Level 3 Motion at 3-5. *Pac West* involved a dispute over whether Internet-bound traffic is subject to reciprocal compensation. The California commission had issued "generic orders" that purported to *interpret* the terms of interconnection agreements in California. *See* 325 F.3d at 1121. Specifically, the commission there held that "reciprocal compensation provisions of applicable interconnection agreements applied to ISP-bound traffic in California," but it did so without considering the specific terms of the ILECs' agreements. *Id.* In response, the Ninth Circuit concluded that the state commission could not impose a *substantive* obligation upon an ILEC, under the guise of "interpreting" the ILECs' interconnection agreements, without purporting to consider or construe the language in the ILEC's agreements. *See id.* at 1125-26, 1128.

In *Pac West*, then, the Ninth Circuit faulted the state commission for imposing a substantive obligation on an ILEC in a manner that circumvented the ILECs'

interconnection agreements. Contrary to the Joint CLECs' apparent understanding, SBC Ohio is not seeking such relief here. Rather, SBC Ohio is seeking to *conform* the language of its existing interconnection agreements to governing federal law. In other words, whereas the California commission in *Pac West* departed from the 1996 Act's framework of interconnection agreements, SBC Ohio is seeking to work *within* that framework. Thus, far from being contrary to the decision in *Pac West*, SBC Ohio's approach here is fully consistent with it.

2. The Complaint Complies With Ohio Law

Several CLECs argue that SBC Ohio's complaint is procedurally defective in that Ohio Rev. Code § 4905.26 does not confer jurisdiction over the complaint. CCC Motion at 15; Level 3 Motion at 5. They acknowledge that the Commission "undoubtedly has jurisdiction over the general issues raised by SBC's complaint under the authority delegated to it by the federal Telecommunications Act of 1996," but they quibble with the manner in which the Commission's jurisdiction has been invoked. CCC Motion at 15.

These CLECs ignore the fact that the Commission itself points to the complaint statute as the proper vehicle in its own orders. SBC Ohio invoked the carrier-to-carrier dispute provisions of the Commission's Local Service Guidelines in paragraph 3 of its Complaint. SBC Ohio Complaint at ¶ 3. Guideline XVIII.C.1 provides that "(u)nder its authority pursuant to *Section 4905.26, Revised Code*, the Commission will consider carrier-to-carrier Complaints." The Guideline also subjects to a streamlined procedure a "carrier-to-carrier complaint involving implementation of interconnection arrangements *filed pursuant to Section 4905.26, Revised Code*. . . ." Local Service Guidelines, Case No. 95-845-TP-COI, February 20, 1997 (emphasis added). In addition, the Commission

has declared that it maintains "continuing jurisdiction" over approved interconnection agreements. In the Guidelines adopted in Case No. 96-463-TP-COI, the Commission stated: "The Commission retains continuing jurisdiction and will maintain regulatory oversight of the approved interconnection agreements." Guidelines for Mediation and Arbitration, Section XIV, Case No. 96-463-TP-UNC, adopted July 18, 1996.

SBC Ohio's Complaint is therefore entirely proper under this Commission's precedents. In order to withstand a motion to dismiss, SBC Ohio must simply have set forth "reasonable grounds" for its complaint. The Ohio Supreme Court has recognized that § 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the Commission. *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117. In the *Allnet* case, the Court found that Allnet had complied with the statutory requirement of "reasonable grounds" for complaint and therefore held that R. C. § 4905.26 required that the PUCO set a hearing and publish notice of the matters raised in the complaint. The Court further held that the Commission's dismissal of Allnet's complaint without such notice and a hearing was unreasonable and unlawful. *Id.*, p. 118.

The CCC also suggests that R. C. § 4905.26 is somehow limited by its title to "Complaints *as to service*." CCC Motion at 15. This argument is contrary to codified Ohio law, the very first section of which provides in part that "Title, Chapter, and section headings . . . do not constitute any part of the law as contained in the 'Revised Code.'" R. C. § 1.01. Moreover, the Sixth Circuit has followed the state courts in ruling that resort to a title in construing a statute is both unnecessary and improper under R. C. § 1.01. *Warner v. Zent*, 997 F.2d 116 (6th Cir. 1993). The complaint statute is not limited to

complaints "as to service," but extends to unreasonable practices, as its text clearly shows. The statute provides in pertinent part as follows:

> Upon complaint in writing against any public utility by any . . . corporation . . . that any . . . practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential . . . if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

R.C. § 4905.26. It is enough to say, as SBC Ohio alleged in paragraph 7 of its Complaint, that the CLEC parties have refused to conform their interconnection agreements to governing law and that this refusal constitutes an unreasonable practice under R. C. § 4905.26. The jurisdiction of this Commission was properly invoked with that allegation.

Moreover, the Commission has "such power and jurisdiction as is reasonably necessary for the commission to perform the acts of a state commission" pursuant to the Act, as set forth in R. C. 4905.04(B). Nothing prevents it from implementing that authority through the complaint statute or through another appropriate vehicle.

C. No Other Source of Law Requires Continued Unbundling Here

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

we now discuss, the CLECs' claimed justifications for continued unbundling are flatly contrary to binding federal law.

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

The CCC claims that SBC Ohio remains obligated to provide UNEs under the terms and conditions of the *SBC/Ameritech Merger Order*.[14] CCC Motion at 19. The CCC also notes that the FCC is currently considering a declaratory proceeding that will determine SBC's ongoing UNE obligations, if any. *Id.* at 19-20.

SBC Ohio agrees that the Commission should leave that issue to the authoritative disposition of the FCC. Nonetheless, should the Commission address that issue, it should find that the CCC's interpretation of the *SBC/Ameritech Merger Order* is false. The relevant condition attached to that order provided:

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

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[14] *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).

Id. Appx. D, ¶ 53 (footnote omitted). This paragraph's obligations have expired for two reasons. First, as noted in the last sentence, the obligations become "null and voice" as soon as there has been a "final and non-appealable Commission order in the UNE remand proceeding." *Id.* Even reading this language at its broadest – *i.e.*, treating the *Triennial Review Order* as an extension of the UNE remand proceeding – the *Triennial Review Order* is indisputably "final and non-appealable." Any obligation imposed by paragraph 53 is therefore completely "null and void." Second, if there were any doubt, the *Triennial Review Order* was upheld by the D.C. Circuit to the extent that it cut back on unbundling obligations, and as noted above, the Supreme Court denied certiorari in *USTA II*. The decision in *USTA II* therefore counts as a "final, non-appealable judicial decision" providing that certain UNEs are "not required to be provided by SBC/Ameritech." *Id.*[15]

SBC Ohio's interpretation is confirmed by an FCC letter opining – as to TELRIC pricing in particular – that if the "Supreme Court conclud[ed] the TELRIC litigation by denying certiorari," the substantively similar *Bell Atlantic/GTE Merger Order* "would not independently impose an obligation to follow [the] finally invalidated pricing rules." Letter to Verizon from Dorothy Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000). The same is true here: Now that the Supreme Court has concluded the *TRO* litigation by "denying certiorari" in the *USTA II* litigation, there is no longer any "obligation to follow" the conditions of the *SBC/Ameritech Merger Order.*[16]

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[15] SBC Ohio does not waive the argument that *USTA I* was also a "final, non-appealable judicial decision" for purposes of paragraph 53.

[16] The CCC also argues that this Commission should enforce the *Merger Order* due to paragraph 73:

> SBC/Ameritech shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions (e.g., review and

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

The CCC claims that SBC Ohio is still subject to numerous sources of state law that mandate unbundling, including the Commission's Local Service Guidelines. CCC Motion at 20. It claims that these unbundling obligations survive federal preemption due to sections 251(d)(3), 252(e)(3), and 261 of the 1996 Act, which "expressly preserve the authority of state commissions to enforce their own requirements" as to unbundling. *Id.* Along the same lines, the CCC argues that this Commission must "undertake an independent analysis of Section 251 above and beyond the FCC regulations." CCC Motion at 7. Thus, claims the CCC, this Commission must make an affirmative "non-impairment finding" with regard to any element that is discontinued. *Id.* at 8.

That view is incorrect. Although the 1996 Act allows state commissions to play a role in implementing the Act, only the FCC can make an impairment determination that requires an element to be unbundled.[17] The Supreme Court held as much in 1999, *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) (§ 251(d)(2) "requires *the*

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approve interconnection agreement amendments, or determine if telecommunications providers violate requirements associated with the promotional discounts).

That paragraph does not apply. *First*, as conclusively demonstrated in the text, paragraph 53 has expired anyway. *Second*, even if the *Merger Order*'s condition were active, this Commission would lack jurisdiction to enforce a condition that is currently the subject of a declaratory action at the FCC. Indeed, the CCC's own petition (as filed with the FCC) admits that state commissions have universally left the interpretation of similar merger conditions to the FCC. *See* CCC Petition for Declaratory Ruling at 8 & n.15, CC Docket Nos. 98-141 & 98-184 (FCC filed Sept. 9, 2004) (attached to CCC Motion to Dismiss).

[17] The 1996 Act's provision that state commissions can arbitrate all "open issues," 47 U.S.C. § 252(c) (cited at CCC Motion at 7 & n.21) does not even remotely support the CCC's position here. The CCC cites no authority that treats the term "open issues" as a license to impose perpetual unbundling even where the FCC and/or the D.C. Circuit have authoritatively pronounced that certain unbundling requirements are inconsistent with the pro-competitive goals of the Act.

Commission to determine on a rational basis *which* network elements must be made available"), and the D.C. Circuit reconfirmed this view in *USTA II*: Where the FCC had tried to allow state commissions to make impairment findings, the D.C. Circuit held that *only* the FCC can make the impairment determinations that trigger the requirements for unbundling. *See USTA II*, 359 F.3d at 594.

Similarly, in its *Triennial Review Order*, the FCC made clear that states are *not* free to reconsider federal policies and impose an unbundling requirement — whether under federal or state law — that the FCC has already considered and expressly rejected. The FCC ruled that in circumstances where "the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," states are effectively barred from adopting any unbundling requirement because it would be "unlikely that such decision would fail to conflict with . . . implementation of the federal regime." *Triennial Review Order* ¶ 195.

Where no such valid federal finding exists, any state imposition of any unbundling is *per se* inconsistent with federal law and is therefore preempted. This is precisely what the Virginia commission recently held, explaining that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)" and that any state-commission imposed UNE obligations would therefore "violate federal law." Order, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004). Similarly, the New York PSC has recognized that when a regulation requiring an ILEC to provide a UNE is eliminated — whether by action of the FCC or a court — the ILEC is "permit[ted] . . . to cease performance of [that] prior obligation if it so desires." Order Resolving Complaint,

Complaint of MetTel and Broadview against Verizon New York Inc. Concerning Alleged Discriminatory and Anti-Competitive Abuse of OSS Changes, Case 04-C-0538, at 9 (N.Y. P.S.C. June 3, 2004).

The same reasoning applies where a court of appeals has found that there is no valid FCC finding of impairment. As the D.C. Circuit has consistently found, unbundling in the absence of genuine impairment undermines the 1996 Act's central goal of promoting facilities-based competition. *See, e.g., United States Telecomm. Ass'n v. FCC*, 290 F.3d 419, 424-25 (D.C. Cir. 2002) ("*USTA I*"). Because the 1996 Act preserves only those state regulatory requirements that are "*consistent* with" and "do[] *not* substantially prevent implementation of the requirements of this section [251]," 47 U.S.C. § 251(d)(3) (emphases added), state commissions have no authority to require provision of UNEs that a federal court has declared unlawful.

Lastly, it should be noted that this Commission has not attempted to impose unbundling requirements that go beyond the requirements of federal law or the FCC's rules. The Local Service Guidelines contemplate the identification of additional UNEs but the Commission never prescribed them. Local Service Guideline VIII (B).

3. Section 271 Does Not Apply Here

The FCC has construed Section 271 to impose an obligation on BOCs, such as SBC Ohio, independent of their obligation to provide UNEs under Section 251(c)(3), to provide access to "loop[s]," "transport," "switching," and "databases and associated signaling." 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x); *see Triennial Review Order* at ¶¶ 653-59. Some CLECs claim that SBC Ohio "has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271." CCC

Motion at 21; Joint CLEC Motion at 22. They urge this Commission to establish "a just and reasonable rate" for any element provided under section 271. CCC Motion at 21.

But this view is wrong on multiple levels. *First*, elements provided under section 271 *are not UNEs* in the first place. Any obligation under section 271 is "independent" of "any unbundling analysis under section 251." *Triennial Review Order* ¶ 653. Moreover, the FCC has held that the TELRIC prices (*i.e.*, UNE prices) *do not apply* to section 271 elements. Indeed, the FCC held that "TELRIC pricing" or other "forward-looking pric[ing]" for section 271 elements would be "*counterproductive*" (*UNE Remand Order* ¶ 473 (emphasis added)) and is "*no[t] necessary* to protect the public interest" (*Triennial Review Order* ¶ 656 (emphasis added)). The D.C. Circuit upheld the FCC's determination, holding that there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). Thus, the mere fact that there might be unbundling obligations under section 271 cannot be used to perpetuate *UNE* obligations under interconnection agreements — the two obligations are entirely separate and unrelated.

Second, this Commission simply has no authority to enforce SBC Ohio's obligations under section 271. As the FCC has held, Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*[18] at ¶¶ 17-18 (emphases added). Courts have also held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing a BOC's compliance with section 271.

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[18] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, at ¶ 17 (1999) ("*InterLATA Boundary Order*").

See, e.g., SBC Communications Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).

Indeed, the text of Section 271 is chock full of references to the *FCC's* duties. *See* 47 U.S.C. § 271(d)(3), (4), (6).[19] By contrast, the only role that state commissions can play is that of "consult[ing]" with the FCC, so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of []section [271](c)." *Id.* at § 271(d)(2)(B) (emphasis added). Congress gave state commissions no role *after* approval of such an application, and the FCC has never held that it has any duty to consult with a state commission before ruling on a complaint under section 271(d)(6). State commissions therefore have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).[20]

D. SBC Ohio's Complaint Conforms to the Terms of its Interconnection Agreements

The CLECs make much of the fact that SBC Ohio's agreements contain language

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[19] Indeed, the FCC is currently exercising those duties. For example, the FCC just held that Section 271 unbundling obligations do not extend to fiber-to-the-home or fiber-to-the-curb loops, the packetized functionality of hybrid loops, or packet switching. *See* Press Release, *Federal Communications Commission Further Spurs Advanced Fiber Network Deployment* (Oct. 22, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253492A1.pdf.

[20] It is also irrelevant whether, as some CLECs claim, SBC has misjudged the state of the law as to high-capacity loops and/or entrance facilities. Level 3 Motion at 12-15; Joint CLEC Motion at 19-22. As noted, SBC's Amendment already encompasses any possible decision that the FCC might make in its final rules. In any event, the core point at this stage is that any alleged errors in SBC's explanation of federal law are not a reason for dismissal. Instead, to the extent the CLECs believe SBC Ohio's discussion of federal law is incorrect – or to the extent they wish to propose alternative contract language that they believe would more accurately implement binding federal law – they are free to do so at the appropriate stage in this proceeding.

that requires the parties to work together in the first instance to revise the parties' interconnection agreements. *See, e.g.*, Cincinnati Bell Motion at 2-6; Joint CLEC Motion at 11-13. In their view, rather than initiate this proceeding, SBC Ohio should be required to continue to engage each individual CLEC in negotiations, notwithstanding the fact that most of the CLECs' have utterly failed to respond in a remotely constructive manner. *See, e.g.*, CCC Motion at 3-7, 17-18; *see generally* Qwest Motion.

As an initial matter, however, this claim is impossible to square with the proceeding numerous CLECs – including several of the same CLECs that have sought to dismiss SBC Ohio's complaint – recently initiated in Michigan. The express purpose of that proceeding is to investigate "the vacatur of the rules promulgated by the FCC in its Triennial Review Order and/or the effect of the FCC's August 20, 2004 'interim' order on remand, and if the Commission determines that these events constitute a change in law, to solicit recommendations from interested parties on the appropriate procedures to incorporate, where necessary, modified terms in current tariffs and/or interconnection agreements." *See* Application to Initiate Investigation, Case No. U-14303 (Mich. PSC filed Sept. 30, 2004)[21]. If the CLECs can implement such a generic proceeding in Michigan, it is impossible to understand why SBC Ohio cannot do so here.

In any event, as noted at the outset, SBC Ohio filed this proceeding because there is no other practical and timely way to achieve the amendment of SBC Ohio's interconnection agreements to conform them to current federal law. Contrary to the CLECs' conclusory assertion, SBC Ohio did not blindside them with its filing. On the

[21] Available at: http://efile.mpsc.cis.state.mi.us/efile/docs/14303/0001.pdf

contrary, the CLECs' refusal to engage SBC Ohio in constructive negotiations left SBC Ohio with no choice other than to resort to this Commission.

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

In Level 3's Motion to Dismiss, Level 3 points out in passing that it has a pending arbitration with SBC Ohio and argues that the complaint proceeding is "duplicative". Level 3 Motion at 3. However, what Level 3 fails to mention is that what is being arbitrated between the parties in Case No. 04-940-TP-ARB is not an amendment of its current agreement to conform it to federal law – the relief sought by SBC Ohio in filing this complaint. Instead, the parties are arbitrating a *new* interconnection agreement that will not take effect until some unknown date in the future.

SBC Ohio seeks to conform Level 3's current interconnection agreement with applicable federal law. The current agreement purports to require that SBC Ohio provide unbundled network elements that SBC Ohio is no longer obligated to provide. The parties' current agreement requires that it comports with the law and, despite SBC Ohio's efforts to engage the parties in negotiations, the parties have been unable to resolve the issue. While a decision in this complaint proceeding may clarify some of the issues raised by Level 3 in its arbitration proceeding, the two proceedings do not address the same agreements and are thus not duplicative of each other.

Similarly, SBC Ohio seeks to conform Norlight's current agreement with applicable federal law. Norlight explains that it has been in negotiations over a successor agreement. Norlight, p. 2. Norlight contends that the issues presented here are not relevant to its current circumstances. Id. The fact remains that Norlight is operating under its current agreement and has the ability to order UNEs as described therein. The most reasonable approach, then, is to adopt the proffered change of law amendment to the existing interconnection agreement.

E. CLECs Have Had Ample Opportunity to Negotiate a Resolution

Numerous CLECs complain that SBC Ohio has failed to negotiate in good faith regarding its proposed amendment. *See, e.g.*, Joint CLEC Motion at 14-15. The Joint CLECs claim that SBC Ohio's Complaint "makes no reference to, and completely ignores all CLEC interconnection agreements, in particular the change in law and dispute resolution provisions;" and that SBC Ohio has "utterly ignored" the agreement's change in law and dispute resolution processes in bringing this action. Joint CLEC Motion at 8.

These allegations are untrue. SBC repeatedly advised the CLECs of its desire to modify its agreements. As made clear in the attachments to this pleading, SBC sent written notices, with proposed contract language, expeditiously upon the occurrence of each change in law event, and making contract language available. Specifically, SBC sent the CLECs notices regarding *USTA I* and *Triennial Review Order* on or about October 30, 2003,[22] and additional notices regarding *USTA II* on or about July 13, 2004. As the attachments make clear, each notice informed the CLECs of the need to amend their agreements, and each also constituted notice of a dispute.

Using American Fiber Systems, Inc. ("AFS")[23] as one example, SBC's notice letters accomplished the following things:

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

[23] AFS is one of the Competitive Carrier Coalition CLECs. Its Ohio agreement contains the following relevant dispute resolution language:

10.3.1 Dispute Resolution shall commence upon one Party's receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach.

* * *

10.5 Informal Resolution of Disputes

10.5.1 Upon receipt by one Party of notice of a dispute by the other Party . . . , each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, form, frequency, duration, and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative Dispute Resolution procedures such as mediation to assist in the negotiations. Discussions and the correspondence among the representatives for purposes of settlement are exempt from discovery and production and will not be admissible in the arbitration described below or in any lawsuit without the concurrence of both Parties. Documents identified in or provided with such communications that were not prepared for purposes of the negotiations are not so exempted, and, if otherwise admissible, may be admitted in evidence in the arbitration or lawsuit.

October 30, 2003 Letter (Attachment AFS 1 hereto):[24]

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

March 11, 2004 Letter (Attachment AFS 2 hereto):

- Notified AFS of continuing need to amend the agreement pursuant to *USTA I* and the *Triennial Review Order*.
- Notified AFS of the impending issuance of the *USTA II* mandate and the additional need to amend the agreement to conform to *USTA II* as well.
- Informed AFS that SBC reserved all positions with regard to proceedings to resolve disputes arising out of the October 30, 2003 notice letter, and that, "[i]f you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues."

10.6 Formal Dispute Resolution

10.6.1 If the Parties are unable to resolve the dispute through the informal procedure described in Section 10.5, then either Party may invoke the formal Dispute Resolution procedures described in this Section 10.6. Unless agreed among all Parties, formal Dispute Resolution procedures, including arbitration or other procedures as appropriate, may be invoked not earlier than sixty (60) calendar days after receipt of the letter initiating Dispute Resolution under Section 10.3.

* * *

10.6.4 Claims Not Subject to [Commercial] Arbitration. If the following claims are not resolved through informal Dispute Resolution, they will not be subject to arbitration and must be resolved through any remedy available to a Party pursuant to law, equity or agency mechanism.

10.6.4.1 Actions seeking a temporary restraining order or an injunction related to the purposes of this Agreement.

10.6.4.2 Actions to compel compliance with the Dispute Resolution process.

10.6.4.3 All claims arising under federal or state statute(s), including antitrust claims.

[24] Although the October 30, 2003 notice letter was sent to the person identified in AFS's agreement as the person authorized to receive notices (Amy Gilchrist), SBC Ohio learned later that the designated person was no longer with AFS, so re-sent the notice letter to AFS representative Bruce Frankiewich on November 6, 2003. Copies of both notice letters are included in the AFS Attachment.

- Enclosed contract language (the "Lawful UNE Amendment") designed to shorten and simplify the amendment of the agreement.
- Enclosed a form that AFS could use to request a signature ready Lawful UNE Amendment on a 24-hour basis.
- Explained how the Amendment was intended to work.
- Designated a representative for SBC (Keisha Rivers).

July 13, 2004 Letter (Attachment AFS 3 hereto):

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

In AFS's case (as was the case with other CLECs in Ohio), when SBC Ohio did not receive a response from AFS to its October 30, 2003 TRO notice letter, SBC Ohio sent a follow-up letter on November 14, 2003 reminding AFS about SBC Ohio's October TRO letter, and stating that if AFS did not agree to a negotiations schedule, SBC Ohio would have no choice but to pursue other remedies in order to amend the agreement. See AFS Attachment 4. AFS did respond by accepting SBC Ohio's proposed negotiation date, but then no further progress was made. See AFS Attachment 5. On March 9, 2004, AFS noted the issuance of the *USTA II* decision on March 2, 2004, and summarily advised SBC Ohio that "processing of the amendment should be suspended pending the outcome of any appeal of the *USTA II* decision." See AFS Attachment 6. Nonetheless, SBC Ohio sent AFS the second notice letter on March 11, 2004, along with the other CLECs; however, based upon its March 9, 2004 letter, AFS did not engage. See AFS Attachment 7. On March 19, 2004, SBC Ohio again provided AFS with a copy of the

Lawful UNE Amendment proposal.[25] See AFS Attachment 8. Once again, after SBC Ohio sent AFS its *USTA II* Notice Letter on July 13, 2004, SBC Ohio was contacted by a new AFS representative, and, in response, on July 14, 2004, SBC Ohio again explained its position on the *USTA II* amendment proposal. See AFS Attachment 9. Not until October 5, 2004 did AFS contact SBC Ohio again, only to ask for another copy of the July 13, 2004 *USTA II* Notice Letter and language. SBC Ohio provided the Notice and language again, but AFS has not responded, so AFS's Ohio agreement remains unamended and unconformed. See AFS Attachment 9.

Although SBC Ohio's experience with the CLECs named in this proceeding was similar in that none of its efforts to amend interconnection agreements was successful, it may be useful to review another example in Ohio -- ACN[26]. ACN was sent the same three notice letters (*TRO*, Lawful UNE and *USTA II*) sent to AFS. ACN also received the November 11, 2003 letter reminding ACN that an amendment was required. See ACN Attachment 1. ACN did not engage with SBC, but on March 18, 2004 and again on August 5, 2004 the law firm Swidler Berlin Shereff Friedman, LLP rejected both SBC's Lawful UNE Amendment and its *USTA II* Amendment on behalf of ACN and several other CLECs. See ACN Attachment 2.

The Swidler, Berlin March 18, 2004 letter is attached to the Motion to Dismiss filed by Competitive Carrier Coalition CLECs (including ACN), and rejects SBC Ohio's attempts to amend ACN's interconnection agreement in at least seven different ways:

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[25] AFS did not formally notify SBC Ohio of its desire to modify its notice contact information until March 9, 2004; consequently, SBC Ohio's March 11, 2004 notice letter and enclosed Lawful UNE amendment were also delivered to Amy Gilchrist. As a courtesy, SBC Ohio, followed up with an identical notice letter and amendment to Bruce Frankiewich on March 19, 2004. Copies of both communications are attached in the AFS Attachment.

[26] ACN is one of the Competitive Carrier Coalition CLECs. Its Ohio agreement contains dispute resolution language substantially identical to AFS's.

Rejection No. 1: " . . . ***it would be inappropriate and inefficient*** for SBC to attempt to seek formal dispute resolution over the terms of its 'Lawful UNE Amendment' . . . we propose that the parties initiate negotiations over SBC's proposed amendment if and when a change of law has occurred under the terms of their Agreements and when each party's opening position for such negotiations has become final."

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

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

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

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

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

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

The second Swidler, Berlin rejection letter on behalf of ACN and others is not attached to the Motion to Dismiss filed by Competitive Carrier Coalition CLECs. See ACN Attachment 2. It was delivered after SBC Ohio sent its July 13, 2004 *USTA II* Notice and proposed amendment to ACN and the other CLECs, and rejects SBC Ohio's efforts to amend ACN's agreement in at least five different ways:

> **Rejection No. 1:** "First, the *USTA II* decision did not vacate the Commission's rules for high-capacity loops. [fn omitted]"
>
> **Rejection No. 2:** "Second, SBC remains obligated to provide unbundled switching and transport under the terms of the parties' (sic) pursuant to the FCC's SBC/Ameritech Merger Conditions, [fn omitted] and in some cases, state law, regulation, tariff and/or order."
>
> **Rejection No. 3:** "Third, SBC is required in most of its region to continue to provide loops, transport and switching pursuant to its Section 271 obligations and commitments."
>
> **Rejection No. 4:** "Fourth, *USTA II* did not find that any of the vacated UNEs were not or could not be required by Section 251. . . Thus, SBC's proposal to eliminate these UNEs across the board would be an unlawful interpretation of Section 251 that could not be approved by a state commission under the terms of Section 252(e)(2)(B)."
>
> **Rejection No. 5**: "Finally, as you know, the FCC is soon expected to release an interim order that may significantly affect the terms of any proposed amendment. While we look forward to constructive engagement with SBC, we therefore propose that the parties defer negotiation of SBC's proposal until all the parties have had the opportunity to consider the new FCC interim order once it is released."

Of course, we now know from ACN's filing in this proceeding (Competitive Carrier Coalition CLECs' Motion to Dismiss) that ACN didn't mean what it said in Rejection No. 5 above. Even though the FCC's *Interim Order* has been released and is very specific as to the path forward, ACN and the other CLECs in the Competitive Carrier Coalition now say that any efforts to determine proper amendments to the agreements are a "waste of

time"[27] and they refuse to participate in this proceeding, asking instead that it be dismissed.

As the situations with AFS and ACN illustrate,[28] it is clear that the CLECs have had every opportunity to negotiate conforming language with SBC, but have failed or refused to do so. It is equally clear that the CLECs have no interest in doing so. Indeed, their pleadings in this very case make that unequivocally clear. Despite *USTA I*, despite the *Triennial Review Order*, and despite *USTA II*, the CLECs *still* insist it is "premature" to negotiate over any change-in-law, and that they are *still*, after eight years, entitled to maximum unbundling. Perhaps more than anything else, these statements underscore the futility of insisting on still more notices from SBC Ohio, to be followed by still more refusals to engage by the CLECs, before this Commission is called upon to ensure that the parties' agreements conform to governing federal law.

As the FCC has made clear, the duty to negotiate in good faith applies to ILECs and CLECs alike. *See Triennial Review Order*, 18 FCC Rcd at ___, ¶ 706. What is more, failure "to negotiate *any* subset" of the FCC's new rules constitutes "bad faith." *Id.* Despite every opportunity, the CLECs have utterly failed to engage SBC Ohio in meaningful negotiations. Granting their motions to dismiss – on the theory that SBC Ohio has been unable to force them to the table to negotiate appropriate agreement language – would serve only to reward such recalcitrance and encourage similar behavior in the future.

---

[27] Competitive Carrier Coalition Motion to Dismiss, p. 11.

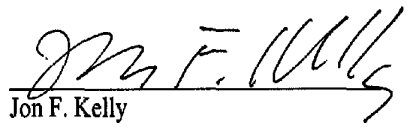
[28] Of course, the situations with AFS and ACN in Ohio are not identical to that of every other Ohio CLEC. In many cases, CLECs did not respond at all to SBC Ohio's notice letters, or sent different types of rejections than the ones sent by AFS and ACN. But the AFS and ACN facts exemplify the impossible situation in which SBC Ohio finds itself. It has attempted to engage the CLECs in an inherently two-party activity – negotiation – but has been routinely stonewalled.

CONCLUSION

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

Respectfully submitted,

SBC Ohio

By: 

Jon F. Kelly
Mary Ryan Fenlon
SBC
150 E. Gay St., Room 4-A
Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

AFS-1

October 30, 2003

Amy Gilchrist
American Fiber Systems, Inc
VP of Regulatory
100 Meridian Centre
Rochester, NY 14618

Re: Change in Law Notice under the approved Interconnection Agreement between American Fiber Systems, Inc ("CLEC") and one or more of the following SBC ILECs: SBC SNET, SBC Kansas and SBC Ohio (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear Amy Gilchrist:

Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May of 2002 that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's 2002 notice were postponed, in part because of the pendency of the TRO. SBC's 2002 invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

Subject to the above, this is to advise that (subject to any stay, appeals or associated review of the TRO), SBC is requesting to establish a negotiations schedule to negotiate the conforming changes SBC wishes to negotiate as a result of the TRO and USTA. In particular, SBC is providing notice by way of this letter that it is enforcing its rights to negotiate any and all conforming changes which may be needed to the Agreement(s) to conform it to the TRO and USTA which will include, but not be limited to, the following subjects:

- Network Elements no longer Required to be offered as UNEs
- Declassification of Unbundled Network Elements based upon Non-Impairment Findings or Presumptions
- Implementation of Line Sharing Grandfathering
- Removal of any broadband service references
- Qualifying Service Conditions
- Eligibility Criteria
- Scope of Shared Transport and SS7 availability with ULS

- Scope of CNAM, LIDB, 800, LNP, AIN availability with ULS
- Redefinition of certain Network Elements

SBC proposes that the Negotiations Start date for conforming modifications for TRO and USTA to the Interconnection Agreement(s) between the Parties in the above mentioned state(s) be set on 12/15/03. Consequently, if agreement between the Parties on conforming modifications is not reached, the Parties will engage in dispute resolution procedures set forth in the Agreement(s) by 03/12/04, or as otherwise agreed by the Parties.

It is anticipated that this time period will allow both Parties to review language proposals and to conduct any additional discussions or negotiations which may be required in an attempt to reach agreement on as many issues as possible.

If the foregoing Negotiations Start Date and date for proceeding to dispute resolution are acceptable, please sign in the space below and fax a copy to Keisha Rivers' attention at **(214) 464-8528**. In the event the Negotiations Start Date and dispute resolution date proposed in this letter are different than any dates already contemplated by the Agreement(s), the Parties agree that their agreement to the dates proposed in this letter constitute an agreed and valid amendment to the Agreement(s).

Should you have any questions or need further information, please contact your assigned Account Manager.

Sincerely,

Agreed to by CLEC's authorized representative:

Notices Manager
Contract Management

_____

KELLY, JON (Legal)

From: MULLINS, JANICE K (AIT)
Sent: Thursday, November 06, 2003 12:54 PM
To: 'Frankiewich, Bruce'
Subject: FCC Triennial Review Order (TRO) notice 11-6-03

Bruce,

AFS was recently noticed for negotiations regarding the FCC's Triennial Review Order (TRO). I noticed the letter was sent to Amy Gilchrist who is no longer with AFS but is the notice contact per AFS's ICA. I have attached the letter since it has a response date requested.

American Fiber Systems, Inc .d...

Since Amy Gilchrist is no longer there AFS will need to change the notice contact per the ICA:

17.1.6 Notices will be addressed to the Parties as follows:

NOTICE CONTACT	CLEC CONTACT	SBC-13STATE CONTACT
NAME/TITLE	Amy Gilchrist VP of Regulatory	Contract Administration ATTN: Notices Manager
STREET ADDRESS	245 Illinois Street	311 S. Akard, 9th Floor Four SBC Plaza
CITY, STATE, ZIP CODE	Delhi, LA 71232	Dallas, TX 75202-5398
FACSIMILE NUMBER	888-220-1200	214-464-2006

17.1.7 Either Party may unilaterally change its designated contact, address, telephone number and/or facsimile number for the receipt of notices by giving written notice to the other Party in compliance with this Section. Any notice to change the designated contact, address, telephone and/or facsimile number for the receipt of notices shall be deemed effective ten (10) calendar days following receipt by the other Party.

The change can be delivered by facsimile; provided that a paper copy is also sent by either express overnight delivery, certified mail or first class U.S. Postal Service, with postage prepaid, and a return receipt requested; or delivered personally.

Thank You,

Janice Mullins
SBC Midwest, Industry Markets
Local Account Manager

work/fax 216-822-8551

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

October 30, 2003

Amy Gilchrist
American Fiber Systems, Inc
VP of Regulatory
100 Meridian Centre
Rochester, NY 14618

Re: Change in Law Notice under the approved Interconnection Agreement between American Fiber Systems, Inc ("CLEC") and one or more of the following SBC ILECs: SBC SNET, SBC Kansas and SBC Ohio (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear Amy Gilchrist:

Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May of 2002 that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's 2002 notice were postponed, in part because of the pendency of the TRO. SBC's 2002 invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

Subject to the above, this is to advise that (subject to any stay, appeals or associated review of the TRO), SBC is requesting to establish a negotiations schedule to negotiate the conforming changes SBC wishes to negotiate as a result of the TRO and USTA. In particular, SBC is providing notice by way of this letter that it is enforcing its rights to negotiate any and all conforming changes which may be needed to the Agreement(s) to conform it to the TRO and USTA which will include, but not be limited to, the following subjects:

- Network Elements no longer Required to be offered as UNEs
- Declassification of Unbundled Network Elements based upon Non-Impairment Findings or Presumptions
- Implementation of Line Sharing Grandfathering
- Removal of any broadband service references
- Qualifying Service Conditions
- Eligibility Criteria
- Scope of Shared Transport and SS7 availability with ULS

- Scope of CNAM, LIDB, 800, LNP, AIN availability with ULS
- Redefinition of certain Network Elements

SBC proposes that the Negotiations Start date for conforming modifications for TRO and USTA to the Interconnection Agreement(s) between the Parties in the above mentioned state(s) be set on 12/15/03. Consequently, if agreement between the Parties on conforming modifications is not reached, the Parties will engage in dispute resolution procedures set forth in the Agreement(s) by 03/12/04, or as otherwise agreed by the Parties.

It is anticipated that this time period will allow both Parties to review language proposals and to conduct any additional discussions or negotiations which may be required in an attempt to reach agreement on as many issues as possible.

If the foregoing Negotiations Start Date and date for proceeding to dispute resolution are acceptable, please sign in the space below and fax a copy to Keisha Rivers' attention at **(214) 464-8528**. In the event the Negotiations Start Date and dispute resolution date proposed in this letter are different than any dates already contemplated by the Agreement(s), the Parties agree that their agreement to the dates proposed in this letter constitute an agreed and valid amendment to the Agreement(s).

Should you have any questions or need further information, please contact your assigned Account Manager.

Sincerely,

Agreed to by CLEC's authorized representative:

Notices Manager
Contract Management

_____

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

November 11, 2003

VIA OVERNIGHT DELIVERY, FAX OR EMAIL

Amy Gilchrist
American Fiber Systems, Inc
VP of Regulatory
100 Meridian Centre
Rochester, NY 14618

Re: Correction of Prior TRO/*USTA* Change in Law Notice under the approved Interconnection Agreement between American Fiber Systems, Inc ("CLEC") and SBC Arkansas, SBC California, SBC SNET, SBC Illinois, SBC Indiana, SBC Kansas, SBC Michigan, SBC Missouri, SBC Nevada, SBC Oklahoma, SBC Ohio, SBC Texas and SBC Wisconsin (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear Amy Gilchrist:

On October 30, 2003, pursuant to our existing Interconnection Agreement(s) ("Agreement(s)"), SBC notified CLEC of a change in law event (specifically, the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003, and effective October 2, 2003), that impacts the rates, terms and conditions of the Agreements. In the second paragraph of the notice letter(s), SBC correctly informed you that it had previously delivered CLEC a change in law notice related to the decision issued by the D.C. Circuit Court of Appeals in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*). Inadvertently, SBC stated that the *USTA* notice letter was sent in 2002. In fact, the *USTA* notices were sent in 2003. For your convenience, below is a reprint of the second paragraph of the October 30, 2003 letter, with the mistaken 2002 references corrected:

> Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May ***2003*** that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's ***2003*** notice were postponed, in part because of the pendency of the TRO. SBC's ***2003*** invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

We trust this inadvertent error has not caused you any undue inconvenience. If CLEC has any questions or concerns regarding this letter or the associated negotiations, it should contact its account manager.

Sincerely,

Notice Manager
Contract Management

AFS-2

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

March 11, 2004

Amy Gilchrist
American Fiber Systems, Inc
VP of Regulatory
100 Meridian Centre
Rochester, NY 14618

Subject: SBC[1] Lawful UNE Amendment

Dear Sir or Madam:

As you know, by letter dated October 30, 2003,[2] SBC invoked the change in law provision(s) of your SBC interconnection agreement(s) and provided your company notice of intent to negotiate modifications to the interconnection agreement(s) to conform it (them) to findings of the FCC's Triennial Review Order, released August 21, 2003 and effective October 2, 2003 ("TRO"), and the D.C. Circuit Court of Appeals' decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). Following that notification, we have engaged in correspondence and/or discussion with your company regarding a negotiations schedule, and may have exchanged contract language proposals toward that end.

In order to ensure that your interconnection agreement(s) reflect only lawful obligations with regard to the provision of access to unbundled network elements, SBC encloses an amendment ("Lawful UNE Amendment") that would add language to your interconnection agreement(s) and modify it so that it reflects applicable law. This language supplements and serves to modify language that may have been previously provided to you pursuant to our October 30, 2003 notice. It is our hope that it may streamline further negotiations and facilitate a quick conclusion. It remains SBC's position that SBC has no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and another telecommunications carrier's own elements or UNEs in commingled arrangements beyond those required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. This language and any associated positions will be part of any dispute resolution proceeding that may arise out of our recent negotiations, prompted by our October 30, 2003 notice.

---

[1] Denotes one or more SBC ILECs (including Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a SBC Michigan, Nevada Bell Telephone Company d/b/a SBC Nevada, The Ohio Bell Telephone Company d/b/a SBC Ohio, Pacific Bell Telephone Company d/b/a SBC California, The Southern New England Telephone Company d/b/a SBC Connecticut and Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma and/or SBC Texas, and Wisconsin Bell, Inc. d/b/a SBC Wisconsin), as applicable, who have previously corresponded with CLEC regarding change in law negotiations arising from the FCC's Triennial Review Order.

[2] On November 11, 2003, SBC sent CLEC a letter noting typographical errors in the October 30, 2003 letter, and providing corrections of those errors for CLEC's convenience.

Further, we have received many questions regarding the issuance of a recent D.C. Circuit opinion reversing, vacating and remanding various TRO rules and findings. As you are likely aware, on March 2, 2004, following remand and appeal of the D.C. Circuit's decision in *USTA I*, the D.C. Circuit issued another decision, *USTA v. FCC*, Case No. 00-1012 (D.C. Cir. 2004) ("*USTA II*"), ruling that the FCC's TRO is unlawful in many respects. Significantly, among other things, the Court vacated the FCC's nationwide impairment determination with respect to mass market switching, DS1 and DS3 dedicated transport, hi-cap loops and dark fiber loop and transport. Absent a rehearing or a grant of certiorari by the U.S. Supreme Court resulting in a different decision, the effect of the court's decision is the ultimate elimination of certain legal unbundling requirements.

Although the mandate for *USTA II* has not yet issued, *USTA II* will constitute an Intervening Law/Change in Law event. Any position taken heretofore by SBC in its TRO change in law negotiations or dispute resolution proceedings, including any contract language proposed by SBC is subject, therefore, to modification based upon *USTA II*. SBC does not waive, and reserves all rights, to make such modifications to its positions and language proposals, and to invoke Intervening Law/Change in Law or similar provisions in the interconnection agreement(s), or any amendment thereto, with regard to *USTA II*, or with respect to any future lawful and effective FCC rules and associated FCC and judicial orders. SBC expects to be providing such modified contract language to CLEC in the near future. In the interim, CLEC should not represent any SBC position or language proposal presented prior to the release of *USTA II* as a complete or accurate representation of SBC's position or language proposal.

Enclosed you will find a copy of the non signature-ready Lawful UNE Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you via email within 24 hours.

If you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues.

If you have any questions, please contact Keisha Rivers at 214/464-0401.

Sincerely,

Contract Notices Manager
SBC Telecommunications, Inc.

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

AFS-3

July 13, 2004

VIA UPS 2ND DAY AIR

Bruce T. Frankiewich
VP-Legal & Reg Affairs
American Fiber Systems, Inc
100 Meridian Center
Suite 250
Rochester, NY 14618

Re: Notice of Issuance of a Post-*USTA II* Amendment to Existing Interconnection Agreement(s)

Dear Bruce T. Frankiewich:

As you know, on June 16, 2004, the D.C. Circuit's mandate issued in *United States Telecom Association v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II*"). Among other things, the Court vacated the FCC's unbundling rules relative to mass market local switching, DS1 and DS3 loops, DS1 and DS3 transport and dark fiber loop and transport. Here's how we intend to comply with the mandate and ensure that our existing, effective interconnection agreements are conformed to current governing law.

Enclosed is a Post-*USTA II* Amendment. As an initial matter, it will serve to bring your interconnection agreement(s) into conformity with the *USTA II* decision as to

1) switching,
2) DS1 and DS3 loops,
3) DS1 and DS3 transport, and
4) dark fiber loop and transport

This amendment simply implements the D.C. Circuit's *USTA II* decision and modifies your interconnection agreement(s) to reflect the fact that the FCC's rules requiring that these network elements be made available are vacated, and thus the affected elements are no longer available as UNEs under your agreement(s). Enclosed you will find a copy of the non- signature-ready Post-*USTA II* Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you. Because our Post-*USTA II* Amendment simply implements the law as reflected in the *USTA II* decision, there is no need for negotiations related to this amendment. If you disagree, please contact us immediately.

As you are already aware, SBC has committed to the FCC to continue to provide the mass market UNE-P (1-3 voice grade lines), DS1 and DS3 loops dedicated to a single customer, and DS1 and DS3 transport between SBC central offices, and to not unilaterally increase the applicable state-approved prices for these facilities at least through the end of 2004. We intend to abide by that commitment, notwithstanding the amendment of your interconnection agreement(s) to conform with the *USTA II* decision outlined above.

Previously, as part of a separate process to bring your interconnection agreement(s) into conformity with *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and the FCC's Triennial Review Order ("TRO"), we provided you with proposed conforming contract language, including our "Lawful UNE" Amendment language. To the extent our companies are already engaged in negotiations and/or other activities, including dispute resolution proceedings, to conform your interconnection agreement(s) to the *USTA I* decision and TRO, SBC will continue to pursue amendment language pursuant to *USTA I* and those portion of the TRO that were unaffected by *USTA II*. Accordingly, the Post-*USTA II* Amendment we provide you with this letter is independent of that process and supplements, but does not supplant, that process or that previously-provided language.

Nothing set forth in this letter or our proposed language waives or otherwise limits our ability to seek any other relief that might be available under any legal rulings, including but not limited to *USTA I*, TRO or *USTA II*, and including any rights SBC may have arising from the federal courts' determination that certain of the FCC's unbundling rules were never lawful. In addition, SBC expressly reserves all rights to pursue additional relief, including but not limited to, seeking modification of existing, effective contracts to include additional modifications justified by *USTA I*, TRO or *USTA II*.

Please contact your assigned account manager to initiate commercial agreement negotiations, or if you have any questions or need further information.

Sincerely,

Notices Manager

AFJ 4

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

November 14, 2003

Subject: No Response Received to October 30, 2003 Negotiations Notice Letter

Dear Mr. Frankiewich,

On or about October 30, 2003, your company received a letter from SBC Arkansas, SBC California, SBC SNET, SBC Illinois, SBC Indiana, SBC Kansas, SBC Michigan, SBC Missouri, SBC Nevada, SBC Oklahoma, SBC Ohio, SBC Texas and SBC Wisconsin d\b\a SBC Communications, Inc. (SBC) notifying CLEC, among other things, of a recent change in law event that impacts the rates, terms and conditions of the Interconnection Agreement between American Fiber Systems, Inc. ("CLEC") and, as applicable, SBC Arkansas, SBC California, SBC SNET, SBC Illinois, SBC Indiana, SBC Kansas, SBC Michigan, SBC Missouri, SBC Nevada, SBC Oklahoma, SBC Ohio, SBC Texas and SBC Wisconsin (hereinafter referred to as "SBC"). The change in law is occasioned by the issuance of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003, and effective October 2, 2003.

By the letter, SBC provided notice that it was enforcing its rights to negotiate any and all conforming changes which may be needed to the Agreement(s) to conform it to the TRO and USTA which included, but was not be limited to, the following subjects:

- Network Elements no longer Required to be offered as UNEs
- Declassification of Unbundled Network Elements based upon Non-Impairment Findings or Presumptions
- Implementation of Line Sharing Grandfathering
- Removal of any broadband service references
- Qualifying Service Conditions
- Eligibility Criteria
- Scope of Shared Transport and SS7 availability with ULS
- Scope of CNAM, LIDB, 800, LNP, AIN availability with ULS
- Redefinition of certain Network Elements

SBC proposed that the Negotiations Start date for conforming modifications for TRO and USTA to the Interconnection Agreement(s) between the Parties in the above mentioned state(s) be set on 01/13/04. Consequently, if agreement between the Parties on conforming modifications is not reached, the Parties will engage in dispute resolution procedures set forth in the Agreement(s) by 12/30/03, or as otherwise agreed by the Parties.

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

At this point, SBC has not received confirmation from your company on the acceptance of the proposed negotiation dates. If the foregoing Negotiations Start Date and date for proceeding to dispute resolution are acceptable, please sign in the space below and fax a copy to Keisha Rivers attention at **(214) 464-8528 by November 19, 2003**. In the event the Negotiations Start Date and dispute resolution date proposed in this letter are different than any dates already contemplated by the Agreement(s), the Parties agree that their agreement to the dates proposed in this letter constitute an agreed and valid amendment to the Agreement(s). If CLEC still does not respond to SBC's request for negotiations by **November 28, 2003**, SBC will have no choice but to attempt to resolve this issue by initiating the Dispute Resolution Procedures set forth in the Parties' Interconnection Agreement, or pursuing other available remedies.

Should you have any questions or need further information, please contact me at (216) 822-8551.

Sincerely,

Janice Mullins

Account Manager

Agreed to by American Fiber System's authorized representative:

AFJ 5

KELLY, JON (Legal)

From: MULLINS, JANICE K (AIT)
Sent: Tuesday, December 09, 2003 10:28 AM
To: 'Frankiewich, Bruce'
Subject: American Fiber Systems TRO 12-9-03

Importance: High

Bruce,

I just wanted to follow-up with the voicemail I left last week on 12/3/03. I understand that AFS has agreed to the proposed timeline to begin negotiations with SBC regarding TRO. To begin negotiations are there any terms and conditions from the TRO which AFS is interested in incorporating into its new agreements? Also, a TRO Amendment will be offered later this week if AFS wants to amend any recently negotiated contracts. Let me know how AFS would like to proceed.

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551

AFS 6

American
FIBER SYSTEMS
Corporate Offices:
100 Meridian Centre
Suite 250
Rochester, NY 14618-3979

Phone: (585) 340-5400 ext. 129
Fax: (585) 756-1966
info@americanfibersystems.com
bfrankiewich@americanfibersystems.com

March 9, 2004

VIA FEDERAL EXPRESS
Contract Management
ATTN: Notices Manager
Four SBC Plaza, 9th Floor
311 S. Akard Street
Dallas, Texas 75202-5398

Re: TRO Amendment to the Interconnection Agr. b/t SBC & American Fiber Systems, Inc. (M2A for Missouri & 13 State for Kansas, Ohio & Connecticut)

Dear Sir or Madam:

On March 2, 2004 the DC Circuit court released its opinion in USTA II case. The court's opinion invalidated significant portions of the FCC's Triennial Review Order. As such, per the Change in Law provision of the above referenced Interconnection Agreements, AFS hereby provides notice that the processing of the amendment should be suspended pending the outcome of any appeal of the USTA II decision. Please advise as to how SBC intends to proceed regarding this matter.

Please note that the contact information you have listed in the 13 State Agreement, is incorrect. If you have not already done so, please revise your records to indicate the following contact information for AFS: American Fiber Systems, Inc., ATTN: Bruce T. Frankiewich, VP of Legal & Regulatory Affairs, 100 Meridian Centre, Suite 250, Rochester, New York 14618, Fax (585) 756-1966.

Thank you.

Very truly yours,

Bruce T. Frankiewich
Vice President of Legal
& Regulatory Affairs

cc: Janice Mullins via e-mail

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

AFS 7

March 11, 2004

Amy Gilchrist
American Fiber Systems, Inc
VP of Regulatory
100 Meridian Centre
Rochester, NY 14618

Subject: SBC[1] Lawful UNE Amendment

Dear Sir or Madam:

As you know, by letter dated October 30, 2003,[2] SBC invoked the change in law provision(s) of your SBC interconnection agreement(s) and provided your company notice of intent to negotiate modifications to the interconnection agreement(s) to conform it (them) to findings of the FCC's Triennial Review Order, released August 21, 2003 and effective October 2, 2003 ("TRO"), and the D.C. Circuit Court of Appeals' decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). Following that notification, we have engaged in correspondence and/or discussion with your company regarding a negotiations schedule, and may have exchanged contract language proposals toward that end.

In order to ensure that your interconnection agreement(s) reflect only lawful obligations with regard to the provision of access to unbundled network elements, SBC encloses an amendment ("Lawful UNE Amendment") that would add language to your interconnection agreement(s) and modify it so that it reflects applicable law. This language supplements and serves to modify language that may have been previously provided to you pursuant to our October 30, 2003 notice. It is our hope that it may streamline further negotiations and facilitate a quick conclusion. It remains SBC's position that SBC has no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and another telecommunications carrier's own elements or UNEs in commingled arrangements beyond those required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. This language and any associated positions will be part of any dispute resolution proceeding that may arise out of our recent negotiations, prompted by our October 30, 2003 notice.

---

[1] Denotes one or more SBC ILECs (including Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a SBC Michigan, Nevada Bell Telephone Company d/b/a SBC Nevada, The Ohio Bell Telephone Company d/b/a SBC Ohio, Pacific Bell Telephone Company d/b/a SBC California, The Southern New England Telephone Company d/b/a SBC Connecticut and Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma and/or SBC Texas, and Wisconsin Bell, Inc. d/b/a SBC Wisconsin), as applicable, who have previously corresponded with CLEC regarding change in law negotiations arising from the FCC's Triennial Review Order.

[2] On November 11, 2003, SBC sent CLEC a letter noting typographical errors in the October 30, 2003 letter, and providing corrections of those errors for CLEC's convenience.

Further, we have received many questions regarding the issuance of a recent D.C. Circuit opinion reversing, vacating and remanding various TRO rules and findings. As you are likely aware, on March 2, 2004, following remand and appeal of the D.C. Circuit's decision in *USTA I*, the D.C. Circuit issued another decision, *USTA v. FCC*, Case No. 00-1012 (D.C. Cir. 2004) ("*USTA II*"), ruling that the FCC's TRO is unlawful in many respects. Significantly, among other things, the Court vacated the FCC's nationwide impairment determination with respect to mass market switching, DS1 and DS3 dedicated transport, hi-cap loops and dark fiber loop and transport. Absent a rehearing or a grant of certiorari by the U.S. Supreme Court resulting in a different decision, the effect of the court's decision is the ultimate elimination of certain legal unbundling requirements.

Although the mandate for *USTA II* has not yet issued, *USTA II* will constitute an Intervening Law/Change in Law event. Any position taken heretofore by SBC in its TRO change in law negotiations or dispute resolution proceedings, including any contract language proposed by SBC is subject, therefore, to modification based upon *USTA II*. SBC does not waive, and reserves all rights, to make such modifications to its positions and language proposals, and to invoke Intervening Law/Change in Law or similar provisions in the interconnection agreement(s), or any amendment thereto, with regard to *USTA II*, or with respect to any future lawful and effective FCC rules and associated FCC and judicial orders. SBC expects to be providing such modified contract language to CLEC in the near future. In the interim, CLEC should not represent any SBC position or language proposal presented prior to the release of *USTA II* as a complete or accurate representation of SBC's position or language proposal.

Enclosed you will find a copy of the non signature-ready Lawful UNE Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you via email within 24 hours.

If you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues.

If you have any questions, please contact Keisha Rivers at 214/464-0401.

Sincerely,

Contract Notices Manager
SBC Telecommunications, Inc.

AFS 8

KELLY, JON (Legal)

From: MULLINS, JANICE K (AIT)
Sent: Friday, March 19, 2004 12:19 PM
To: 'Frankiewich, Bruce'
Subject: FW: SBC Lawful UNEs Amendment 3-19-04

Bruce,

Attached is the Lawful UNE documents (amendment & request form) that were not included in your package. If you have any questions after reading this through you can contact Keisha Rivers directly at 214-464-0401. Keisha said it wasn't necessary to set up a conference call for Monday so after you read through the documents please contact Keisha directly.


LawfulUNEs-Amend ment-for your ...


Lawful UNEs ıendment Req Form

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

LAWFUL UNES AMENDMENT TO INTERCONNECTION AGREEMENT BETWEEN SBC ILEC d/b/a SBC STATE AND CLEC

This Lawful UNEs Amendment is to the Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 (the "Amendment") by and between SBC ILEC d/b/a SBC State[1] ("SBC State") and CLEC ("CLEC").

WHEREAS, SBC State and CLEC are parties to a certain Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Act"), as may have been amended prior to the date hereof (the "Agreement");

WHEREAS, pursuant to Section 252(a)(1) of the Act and the terms of their Agreement, the Parties wish to amend the Agreement to ensure that the obligations related to unbundled network elements remain consistent with applicable law; and

1. NOW, THEREFORE, in consideration of the promises and mutual agreements set forth herein, the Parties agree to amend the Agreement as follows:

The following Sections "Lawful Provision of Access to Unbundled Network Elements ("Lawful UNEs")" and "Transition Procedure" are hereby added to the Appendix, Agreement, Article or Section of the Agreement related generally to unbundled network elements, and shall apply, notwithstanding any language in the Agreement to the contrary, including, without limitation, any intervening law, change in law or other substantively similar provision. If the Agreement already contains terms and conditions generally related to SBC ILEC's obligation to provide access to unbundled network elements under the Act, then such terms and conditions shall be replaced by the following Sections in their entirety. *Further, all references in the Agreement to "UNE(s)" or "unbundled network elements" shall be deemed to have been replaced or supplemented, as applicable, with the defined term "Lawful UNEs"* as set forth in Section "Lawful Provision of Access to Unbundled Network Elements," below:

1. Lawful Provision of Access to Unbundled Network Elements ("Lawful UNEs")

1.1 This [*Appendix/Agreement, Article or Section*] of the Agreement sets forth the terms and conditions pursuant to which **SBC ILEC** will provide CLEC with access to unbundled network elements (UNEs) under Section 251(c)(3) of the Act in **SBC ILEC** 's incumbent local exchange areas for the provision of Telecommunications Services by CLEC; provided, however, that notwithstanding any other provision of the Agreement, **SBC ILEC** shall be obligated to provide UNEs only to the extent required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, and may decline to provide UNEs to the extent that provision of the UNE(s) is not required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. UNEs that **SBC ILEC** is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders ("Lawful UNEs"), shall be referred to in this Agreement as "**Lawful UNEs**."

[1] Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a SBC Michigan, Nevada Bell Telephone Company d/b/a SBC Nevada, The Ohio Bell Telephone Company d/b/a SBC Ohio, Pacific Bell Telephone Company d/b/a SBC California, The Southern New England Telephone Company d/b/a SBC Connecticut and Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma and/or SBC Texas, and Wisconsin Bell, Inc. d/b/a SBC Wisconsin.

1.1.1 By way of example only, if terms and conditions of this Agreement state that **SBC ILEC** is required to provide a Lawful UNE or Lawful UNE combination or other arrangement including a "Lawful UNE Dedicated Transport," and Dedicated Transport is not a Lawful UNE under lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, then **SBC ILEC** shall not be obligated to provide the item as an unbundled network element, whether alone or in combination with or as part of any other arrangement under the Agreement.

1.2 Nothing contained in the Agreement shall be deemed to constitute consent by **SBC ILEC** that any item identified in this Agreement as a UNE or Lawful UNE is a network element or UNE under Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, that **SBC ILEC** is required to provide to CLEC alone, or in combination with other network elements or UNEs (Lawful or otherwise), or commingled with other network elements, UNEs (Lawful or otherwise) or other services or facilities.

1.3 The preceding includes without limitation that **SBC ILEC** shall not be obligated to provide combinations (whether considered new, pre-existing or existing) or other arrangements (including, where applicable, Commingled Arrangements) involving **SBC ILEC** network elements that do not constitute Lawful UNEs, or where Lawful UNEs are not requested for permissible purposes.

1.4 Notwithstanding any other provision of this Agreement or any Amendment to this Agreement, including but not limited to intervening law, change in law or other substantively similar provision in the Agreement or any Amendment, if an element described as an unbundled network element or Lawful UNE in this Agreement should cease to be a Lawful UNE at any time, then the Transition Procedure defined in Section 2, below, shall govern. For purposes of the Agreement "cease to be a Lawful UNE" means any situation where **SBC ILEC** is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act. The Parties agree that, notwithstanding the Effective Date of this Amendment, such situations include, but are not limited to (a) the issuance of the mandate in *United States Telecom Association* v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); or (b) by operation of the *Triennial Review Order* released by the FCC on August 21, 2003 in CC Docket Nos. 01-338, 96-98 and 98-147 (the "Triennial Review Order" or "TRO"), which became effective as of October 2, 2003, including rules promulgated thereby; or (c) the issuance of a legally effective finding by a court or regulatory agency acting within its lawful authority that requesting Telecommunications Carriers are not impaired without access to a particular network element on an unbundled basis; or (d) the issuance of the mandate in the D.C. Circuit Court of Appeals' decision, *United States Telecom Association* v. FCC, Case No. 00-1012 (D.C. Cir. 2004) ("USTA II"); or (e) the issuance of any valid law, order or rule by the Congress, FCC or a judicial body stating that **SBC ILEC** is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act.

1.4.1 By way of example only, an element described as an unbundled network element or Lawful UNE in this Agreement can cease to be a Lawful UNE on a categorical basis, on an element-specific, route-specific or geographically-specific basis or a class of elements basis. Under any scenario, Section 2 "Transition Procedure" shall apply.

2. Transition Procedure

2.1 SBC ILEC shall only be obligated to provide Lawful UNEs under this Agreement. To the extent an element described as a Lawful UNE or an unbundled network element in this Agreement should cease to be a Lawful UNE, **SBC ILEC** may discontinue the provision of such element, whether previously provided alone or in combination with or as part of any other arrangement with other Lawful UNEs or other elements or services. Accordingly, in the event one or more elements described as Lawful UNEs or as unbundled network elements in this Agreement should cease to be Lawful UNEs, **SBC ILEC** will provide written notice to CLEC of its discontinuance of the element(s) and/or the combination or other arrangement in which the element(s) has been previously provided. During a transitional period

of thirty (30) days from the date of such notice, **SBC ILEC** agrees to continue providing such element(s) under the terms of this Agreement. During such 30-day transitional period, the following options are available to CLEC with regard to such element(s), including the combination or other arrangement in which the element(s) were previously provided:

(a) CLEC will cease ordering new UNE that are identified as not lawful in the SBC ILEC notice letter referenced in paragraph 2.1 within 30 days of the date of such notice letter. SBC reserves the right to audit the CLEC orders transmitted to SBC and to the extent that the CLEC has processed orders and such orders are provisioned after this 30 day period, SBC ILEC also reserves the right to default the rates for such to market-based rates.

(b) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or

(c) **SBC ILEC** and CLEC may agree upon another service arrangement or element (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous access product or service may be substituted, if available.

i. In the case of UNE-P, the substitute product or service shall be Resale; and

ii. In the case of loops and transport, the substitute product or service shall be the analogous access product, if available.

Notwithstanding anything to the contrary in this Agreement, including any amendments to this Agreement, at the end of that thirty (30) day transitional period, unless CLEC has submitted an disconnect/discontinuance LSR or ASR, as applicable, under (a), above, and if CLEC and **SBC ILEC** have failed to reach agreement, under (b), above, as to a substitute service arrangement or element, then **SBC ILEC** may, at its sole option, disconnect the element(s), whether previously provided alone or in combination with or as part of any other arrangement, or convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service, if available.

2.2 The provisions set forth in this Section 2 "Transition Period" are self-effectuating, and the Parties understand and agree that no amendment shall be required to this Agreement in order for the provisions of this Section 2 "Transition Period" to be implemented or effective as provided above. Further, Section 2 "Transition Period" governs the situation where an unbundled network element or Lawful UNE under this Agreement ceases to be a Lawful UNE even where the Agreement may already include an intervening law, change in law or other substantively similar provision. The rights and obligations set forth in Sections 1 and 2, above, apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

2. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in Paragraph 1, above (for example, all references in the Agreement to "UNE(s)" or "unbundled network elements" shall be deemed to have been replaced or supplemented, as applicable, with the defined term "Lawful UNEs" as set forth in Section "Lawful Provision of Access to Unbundled Network Elements," above). The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement.

3. Nothing in this Amendment shall be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement.

4. Upon written request of either Party, the Parties will amend any and all Agreement pricing schedules to accurately reflect the terms and conditions of this Amendment.

5. Notwithstanding any contrary provision in the Agreement, this Amendment, or any SBC ILEC tariff, nothing contained in the Agreement, this Amendment, or any SBC ILEC tariff shall limit SBC ILEC's right to appeal, seek

reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the State Commission, the FCC, any court or any other governmental authority related to, concerning, or that may affect SBC ILEC's obligations under the Agreement, this Amendment, any SBC ILEC tariff, or Applicable Law.

6. Any performance measures and remedies identified in the Agreement apply solely to UNEs which SBC ILEC is obligated to offer under Section 251(c)(3) of the Act. If an unbundled network element or Lawful UNE under this Agreement ceases to be a Lawful UNE, SBC ILEC will have no obligation to report on or pay remedies for any measures associated with such element, notwithstanding any language to the contrary in the Agreement.

7. In entering into this Amendment and carrying out the provisions herein, neither Party waives, but instead expressly reserves, all of its rights, remedies and arguments with respect to any orders, decisions, legislation or proceedings and any remands thereof and any other federal or state regulatory, legislative or judicial action(s), including, without limitation, its intervening law rights (including intervening law rights asserted by either Party via written notice predating this Amendment) relating to the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further government review: the United States Supreme Court's opinion in Verizon v. FCC, et al, 535 U.S. 467 (2002); the D.C. Circuit's decision in United States Telecom Association, et. al ("USTA") v. FCC, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, the D.C. Circuit's March 2, 2004 decision in USTA v. FCC, Case No. 00-1012 (D.C. Cir. 2004); the FCC's Triennial Review Order, released on August 21, 2003, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 (FCC 03-36) and the FCC's Biennial Review Proceeding which the FCC announced, in its Triennial Review Order, is scheduled to commence in 2004; the FCC's Supplemental Order Clarification (FCC 00-183) (rel. June 2, 2000), in CC Docket 96-98; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001) ("ISP Compensation Order"), which was remanded in WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002), and as to the FCC's Notice of Proposed Rulemaking on the topic of Intercarrier Compensation generally, issued In the Matter of Developing a Unified Intercarrier Compensation Regime, in CC Docket 01-92 (Order No. 01-132), on April 27, 2001 (collectively "Government Actions"). Notwithstanding anything to the contrary in this Agreement (including this and any other amendments to the Agreement), SBC ILEC shall have no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and CLEC's own elements or UNEs in commingled arrangements beyond those required by the Act, including the lawful and effective FCC rules and associated FCC and judicial orders. Notwithstanding anything to the contrary in the Agreement and this Amendment and except to the extent that SBC ILEC has adopted the FCC ISP terminating compensation plan ("FCC Plan") in an SBC ILEC state in which this Agreement is effective, and the Parties have incorporated rates, terms and conditions associated with the FCC Plan into this Agreement, these rights also include but are not limited to SBC ILEC's right to exercise its option at any time to adopt on a date specified by SBC ILEC the FCC Plan, after which date ISP-bound traffic will be subject to the FCC Plan's prescribed terminating compensation rates, and other terms and conditions, and seek conforming modifications to this Agreement. If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) ("Provisions") of the Agreement and this Amendment and/or otherwise affects the rights or obligations of either Party that are addressed by the Agreement and this Amendment, specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party ("Written Notice"). With respect to any Written Notices hereunder, the Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications to the Agreement. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the Written Notice, any disputes between the Parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in this Agreement.

IN WITNESS WHEREOF, this Amendment to the Agreement was exchanged in triplicate on this _____ day of _____, 2004, by SBC ILEC, signing by and through its duly authorized representative, and CLEC, signing by and through its duly authorized representative.

CLEC

By: _____

Name: _____
(Print or Type)

Title: _____
(Print or Type)

Date: _____

FACILITIES-BASED OCN # _____

ACNA _____

SBC ILEC d/b/a SBC State by SBC Telecommunications, Inc., its authorized agent

By: _____

Name: _____
(Print or Type)

Title: *For/* President – Industry Markets

Date: _____

TO: CONTRACT MANAGEMENT
FOUR SBC PLAZA, 9TH FLOOR
DALLAS, TX 755202

1—800-404-4548

FROM: _____

FAX: _____ TELEPHONE: _____

E-MAIL: _____ ***You will receive signature ready Amendment within 24 hours from receipt via email.*

Amendment – Lawful UNEs Request Form

Amendment Preparation Information

Carrier Legal/Certified Name	
Official Notice Name	
Official Notice Title	
Official Notice Address (cannot be PO Box) Suite/Room Number	
Official Notice City/State/Zip Code	
Official Notice Telephone Number	
Official Notice Fax Number	
Official Notice E-mail Address	
Type of Agreement to be amended	
OCN	
ACNA	

Please note that the failure to provide accurate and complete information may result in return of the form to you and a delay in processing your request.

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

AFS 9

July 13, 2004

VIA UPS 2ND DAY AIR

Amy Gilchrist
VP-Regulatory
American Fiber Systems, Inc
100 Meridian Center
Suite 150
Rochester, NY 14618

Re: Notice of Issuance of a Post-*USTA II* Amendment to Existing Interconnection Agreement(s)

Dear Amy Gilchrist:

As you know, on June 16, 2004, the D.C. Circuit's mandate issued in *United States Telecom Association v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II*"). Among other things, the Court vacated the FCC's unbundling rules relative to mass market local switching, DS1 and DS3 loops, DS1 and DS3 transport and dark fiber loop and transport. Here's how we intend to comply with the mandate and ensure that our existing, effective interconnection agreements are conformed to current governing law.

Enclosed is a Post-*USTA II* Amendment. As an initial matter, it will serve to bring your interconnection agreement(s) into conformity with the *USTA II* decision as to

1) switching,
2) DS1 and DS3 loops,
3) DS1 and DS3 transport, and
4) dark fiber loop and transport

This amendment simply implements the D.C. Circuit's *USTA II* decision and modifies your interconnection agreement(s) to reflect the fact that the FCC's rules requiring that these network elements be made available are vacated, and thus the affected elements are no longer available as UNEs under your agreement(s). Enclosed you will find a copy of the non- signature-ready Post-*USTA II* Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you. Because our Post-*USTA II* Amendment simply implements the law as reflected in the *USTA II* decision, there is no need for negotiations related to this amendment. If you disagree, please contact us immediately.

As you are already aware, SBC has committed to the FCC to continue to provide the mass market UNE-P (1-3 voice grade lines), DS1 and DS3 loops dedicated to a single customer, and DS1 and DS3 transport between SBC central offices, and to not unilaterally increase the applicable state-approved prices for these facilities at least through the end of 2004. We intend to abide by that commitment, notwithstanding the amendment of your interconnection agreement(s) to conform with the *USTA II* decision outlined above.

Previously, as part of a separate process to bring your interconnection agreement(s) into conformity with *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and the FCC's Triennial Review Order ("TRO"), we provided you with proposed conforming contract language, including our "Lawful UNE" Amendment language. To the extent our companies are already engaged in negotiations and/or other activities, including dispute resolution proceedings, to conform your interconnection agreement(s) to the *USTA I* decision and TRO, SBC will continue to pursue amendment language pursuant to *USTA I* and those portion of the TRO that were unaffected by *USTA II*. Accordingly, the Post-*USTA II* Amendment we provide you with this letter is independent of that process and supplements, but does not supplant, that process or that previously-provided language.

Nothing set forth in this letter or our proposed language waives or otherwise limits our ability to seek any other relief that might be available under any legal rulings, including but not limited to *USTA I*, TRO or *USTA II*, and including any rights SBC may have arising from the federal courts' determination that certain of the FCC's unbundling rules were never lawful. In addition, SBC expressly reserves all rights to pursue additional relief, including but not limited to, seeking modification of existing, effective contracts to include additional modifications justified by *USTA I*, TRO or *USTA II*.

Please contact your assigned account manager to initiate commercial agreement negotiations, or if you have any questions or need further information.

Sincerely,

Notices Manager

KELLY, JON (Legal)

From: MULLINS, JANICE K (AIT)
Sent: Tuesday, October 05, 2004 12:10 PM
To: 'Nighan, Michael'
Cc: 'Frankiewich, Bruce'
Subject: RE: Contract questions for AFS 10-5-04c

American Fiber Systems, Inc US...

Nighan,

Please see attached letter dated 7/13/2004.

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

-----Original Message-----
From: Nighan, Michael [mailto:mnighan@americanfibersystems.com]
Sent: Tuesday, October 05, 2004 11:47 AM
To: MULLINS, JANICE K (AIT)
Cc: Frankiewich, Bruce
Subject: RE: Contract questions for AFS

Janice:

In looking over my files I can't seem to find a copy of the July 13 letter you mentioned below. Can you send me a copy of the original? Thanks.

MJNighan

-----Original Message-----
From: MULLINS, JANICE K (AIT) [mailto:jm7567@sbc.com]
Sent: Wednesday, July 14, 2004 2:40 PM
To: Nighan, Michael
Cc: Frankiewich, Bruce
Subject: RE: Contract questions for AFS

Michael,

I think where the confusion comes from is that SBC contacted AFS in October 2003 about change in law events that impact the rates, terms and

conditions of the AFS's Agreements due to the Triennial Review Order. Bruce Frankiewich sent a letter dated 3/9/2004 where AFS provided notice to SBC that the processing of any amendment should be suspended pending the outcome of any appeal of the USTA II decision. SBC as of yesterday sent letters (including AFS) to continue to pursue amendment language pursuant to USTA I and those portion of the TRO that were unaffected by USTA II.

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

-----Original Message-----
From: Nighan, Michael [mailto:mnighan@americanfibersystems.com]
Sent: Tuesday, July 13, 2004 3:26 PM
To: MULLINS, JANICE K (AIT)
Subject: RE: Contract questions for AFS
Importance: High

Janice:

Now I'm confused. It's my understanding that the existing SBC 13 state interconnection agreement with American Fiber Systems expired on Dec. 26, 2003 and that SBC notified AFS on Oct. 30, 2003 of it's intention to renegotiate a replacement. On Dec. 2 AFS formally accepted this proposal and SBC stated that it intended to initiate negotiations on Dec. 15 with a target completion date of March 12, 2004. However I can not find any indication that SBC has ever presented a written proposed replacement agreement to AFS. It is also my understanding (if I read the current agreement correctly) that the terms and rates stay in effect until replaced by a new agreement, or until Oct 2, 2004 (10 months after AFS' acceptence of SBC's proposal to negotiate a replacement agreeement). Obviously we need to get matters clarified REALLY SOON or else AFS could find itself without an interconnection agreement less than three months from now.

MJNighan

-----Original Message-----
From: MULLINS, JANICE K (AIT) [mailto:jm7567@sbc.com]
Sent: Monday, July 12, 2004 4:10 PM
To: Nighan, Michael
Subject: RE: Contract questions for AFS

I'm sorry ICA is Interconnection Agreement. Are you in negotiations

right now for a new 13 State and if so what states were included?

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

-----Original Message-----
From: Nighan, Michael [mailto:mnighan@americanfibersystems.com]
Sent: Monday, July 12, 2004 3:06 PM
To: MULLINS, JANICE K (AIT)
Subject: RE: Contract questions for AFS

Janice,

Thanks for the update. But I need some further clarification. First, what is an "ICA"?
And secondly, where do we stand on the renewal of the entire 13 State interconnection agreement that SBC is seeking?

MJN

-----Original Message-----
From: MULLINS, JANICE K (AIT) [mailto:jm7567@sbc.com]
Sent: Monday, July 12, 2004 11:39 AM
To: Nighan, Michael
Subject: RE: Contract questions for AFS

Michael,

Contract Management shows American Fiber Systems has approved ICAs in CT, KS, MO, OH & OK.

The difference between the two Amendments is that one is for ISP-Bound traffic only and one is for ISP-Bound traffic & all 251/252 traffic.

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

-----Original Message-----
From: MULLINS, JANICE K (AIT)
Sent: Friday, July 09, 2004 1:28 PM
To: 'Nighan, Michael'
Subject: Contract questions for AFS

Michael,

Just wanted to acknowledge that I'm verifying with Contract Management the difference between the two appendices you questioned for ISP. I'm also validating what contracts are still in effect for AFS. I show KS, MO, OK, OH, but questionable on CT so I'm waiting on validation on this. Soon as I hear back I will let you know.

Thank You,

Janice Mullins
Local Account Manager
SBC Midwest
216-822-8551
jm7567@sbc.com

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

ACN-1

October 30, 2003

John Tassone
ACN Communications Services, Inc
Senior Director of Local Svc. Dev.
c/o Cassara Management Group
2440 Ridgeway Ave, Ste 120
Rochester, NY 14626

Re: Change in Law Notice under the approved Interconnection Agreement between ACN Communications Services, Inc ("CLEC") and one or more of the following SBC ILECs: SBC California, SBC Illinois, SBC Michigan and SBC Ohio (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear John Tassone:

Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May of 2002 that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's 2002 notice were postponed, in part because of the pendency of the TRO. SBC's 2002 invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

Subject to the above, this is to advise that (subject to any stay, appeals or associated review of the TRO), SBC is requesting to establish a negotiations schedule to negotiate the conforming changes SBC wishes to negotiate as a result of the TRO and USTA. In particular, SBC is providing notice by way of this letter that it is enforcing its rights to negotiate any and all conforming changes which may be needed to the Agreement(s) to conform it to the TRO and USTA which will include, but not be limited to, the following subjects:

- Network Elements no longer Required to be offered as UNEs
- Declassification of Unbundled Network Elements based upon Non-Impairment Findings or Presumptions
- Implementation of Line Sharing Grandfathering
- Removal of any broadband service references
- Qualifying Service Conditions
- Eligibility Criteria

- Scope of Shared Transport and SS7 availability with ULS
- Scope of CNAM, LIDB, 800, LNP, AIN availability with ULS
- Redefinition of certain Network Elements

SBC proposes that the Negotiations Start date for conforming modifications for TRO and USTA to the Interconnection Agreement(s) between the Parties in the above mentioned state(s) be set on 10/31/03. Consequently, if agreement between the Parties on conforming modifications is not reached, the Parties will engage in dispute resolution procedures set forth in the Agreement(s) by 03/12/04, or as otherwise agreed by the Parties.

It is anticipated that this time period will allow both Parties to review language proposals and to conduct any additional discussions or negotiations which may be required in an attempt to reach agreement on as many issues as possible.

If the foregoing Negotiations Start Date and date for proceeding to dispute resolution are acceptable, please sign in the space below and fax a copy to Keisha Rivers' attention at **(214) 464-8528**. In the event the Negotiations Start Date and dispute resolution date proposed in this letter are different than any dates already contemplated by the Agreement(s), the Parties agree that their agreement to the dates proposed in this letter constitute an agreed and valid amendment to the Agreement(s).

Should you have any questions or need further information, please contact your assigned Account Manager.

Sincerely,

Notices Manager
Contract Management

Agreed to by CLEC's authorized representative:

_____

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

November 11, 2003

VIA OVERNIGHT DELIVERY, FAX OR EMAIL

John Tassone
ACN Communications Services, Inc
Senior Director of Local Svc. Dev.
c/o Cassara Management Group
2440 Ridgeway Ave, Ste 120
Rochester, NY 14626

Re: Correction of Prior TRO/*USTA* Change in Law Notice under the approved Interconnection Agreement between ACN Communications Services, Inc ("CLEC") and SBC Arkansas, SBC California, SBC SNET, SBC Illinois, SBC Indiana, SBC Kansas, SBC Michigan, SBC Missouri, SBC Nevada, SBC Oklahoma, SBC Ohio, SBC Texas and SBC Wisconsin (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear John Tassone:

On October 30, 2003, pursuant to our existing Interconnection Agreement(s) ("Agreement(s)"), SBC notified CLEC of a change in law event (specifically, the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003, and effective October 2, 2003), that impacts the rates, terms and conditions of the Agreements. In the second paragraph of the notice letter(s), SBC correctly informed you that it had previously delivered CLEC a change in law notice related to the decision issued by the D.C. Circuit Court of Appeals in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*). Inadvertently, SBC stated that the *USTA* notice letter was sent in 2002. In fact, the *USTA* notices were sent in 2003. For your convenience, below is a reprint of the second paragraph of the October 30, 2003 letter, with the mistaken 2002 references corrected:

> Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May ***2003*** that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's ***2003*** notice were postponed, in part because of the pendency of the TRO. SBC's ***2003*** invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

We trust this inadvertent error has not caused you any undue inconvenience. If CLEC has any questions or concerns regarding this letter or the associated negotiations, it should contact its account manager.

Sincerely,

Notice Manager

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

October 30, 2003

John Tassone
ACN Communications Services, Inc
Senior Director of Local Svc. Dev.
c/o Cassara Management Group
2440 Ridgeway Ave, Ste 120
Rochester, NY 14626

Re: Change in Law Notice under the approved Interconnection Agreement between ACN Communications Services, Inc ("CLEC") and one or more of the following SBC ILECs: SBC California, SBC Illinois, SBC Michigan and SBC Ohio (hereinafter referred to as "SBC") ("Interconnection Agreement")

Dear John Tassone:

Pursuant to applicable provisions of the Interconnection Agreement(s), SBC hereby notifies CLEC of a change in law event that impacts the rates, terms and conditions of the Agreement. The change in law occurs as a result of the recent effective date (October 2, 2003) of the FCC's Triennial Review Order, FCC 03-36 ("TRO"), released August 21, 2003. Also, SBC notified you between late April and early May of **2003** that the Agreement(s) was/were impacted by the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). Negotiations pursuant to SBC's **2003** notice were postponed, in part because of the pendency of the TRO. SBC's **2003** invocation of the *USTA* change in law event has continued and SBC plans to seek modifications of affected terms of the Agreement(s) pursuant to that invocation as well as the TRO.

Subject to the above, this is to advise that (subject to any stay, appeals or associated review of the TRO), SBC is requesting to establish a negotiations schedule to negotiate the conforming changes SBC wishes to negotiate as a result of the TRO and USTA. In particular, SBC is providing notice by way of this letter that it is enforcing its rights to negotiate any and all conforming changes which may be needed to the Agreement(s) to conform it to the TRO and USTA which will include, but not be limited to, the following subjects:

- Network Elements no longer Required to be offered as UNEs
- Declassification of Unbundled Network Elements based upon Non-Impairment Findings or Presumptions
- Implementation of Line Sharing Grandfathering
- Removal of any broadband service references
- Qualifying Service Conditions
- Eligibility Criteria

- Scope of Shared Transport and SS7 availability with ULS
- Scope of CNAM, LIDB, 800, LNP, AIN availability with ULS
- Redefinition of certain Network Elements

SBC proposes that the Negotiations Start date for conforming modifications for TRO and USTA to the Interconnection Agreement(s) between the Parties in the above mentioned state(s) be set on 10/31/03. Consequently, if agreement between the Parties on conforming modifications is not reached, the Parties will engage in dispute resolution procedures set forth in the Agreement(s) by 03/12/04, or as otherwise agreed by the Parties.

It is anticipated that this time period will allow both Parties to review language proposals and to conduct any additional discussions or negotiations which may be required in an attempt to reach agreement on as many issues as possible.

If the foregoing Negotiations Start Date and date for proceeding to dispute resolution are acceptable, please sign in the space below and fax a copy to Keisha Rivers' attention at **(214) 464-8528**. In the event the Negotiations Start Date and dispute resolution date proposed in this letter are different than any dates already contemplated by the Agreement(s), the Parties agree that their agreement to the dates proposed in this letter constitute an agreed and valid amendment to the Agreement(s).

Should you have any questions or need further information, please contact your assigned Account Manager.

Sincerely,

Notices Manager
Contract Management

Agreed to by CLEC's authorized representative:

_____

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

March 11, 2004

John Tassone c/o Cassara Management Group
ACN Communications Services, Inc
Senior Director of Local Svc. Dev.
2440 Ridgeway Ave, Ste 120
Rochester, NY 14626

Subject: SBC[1] Lawful UNE Amendment

Dear Sir or Madam:

As you know, by letter dated October 30, 2003,[2] SBC invoked the change in law provision(s) of your SBC interconnection agreement(s) and provided your company notice of intent to negotiate modifications to the interconnection agreement(s) to conform it (them) to findings of the FCC's Triennial Review Order, released August 21, 2003 and effective October 2, 2003 ("TRO"), and the D.C. Circuit Court of Appeals' decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). Following that notification, we have engaged in correspondence and/or discussion with your company regarding a negotiations schedule, and may have exchanged contract language proposals toward that end.

In order to ensure that your interconnection agreement(s) reflect only lawful obligations with regard to the provision of access to unbundled network elements, SBC encloses an amendment ("Lawful UNE Amendment") that would add language to your interconnection agreement(s) and modify it so that it reflects applicable law. This language supplements and serves to modify language that may have been previously provided to you pursuant to our October 30, 2003 notice. It is our hope that it may streamline further negotiations and facilitate a quick conclusion. It remains SBC's position that SBC has no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and another telecommunications carrier's own elements or UNEs in commingled arrangements beyond those required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. This language and any associated positions will be part of any dispute resolution proceeding that may arise out of our recent negotiations, prompted by our October 30, 2003 notice.

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[1] Denotes one or more SBC ILECs (including Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a SBC Michigan, Nevada Bell Telephone Company d/b/a SBC Nevada, The Ohio Bell Telephone Company d/b/a SBC Ohio, Pacific Bell Telephone Company d/b/a SBC California, The Southern New England Telephone Company d/b/a SBC Connecticut and Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma and/or SBC Texas, and Wisconsin Bell, Inc. d/b/a SBC Wisconsin), as applicable, who have previously corresponded with CLEC regarding change in law negotiations arising from the FCC's Triennial Review Order.

[2] On November 11, 2003, SBC sent CLEC a letter noting typographical errors in the October 30, 2003 letter, and providing corrections of those errors for CLEC's convenience.

Further, we have received many questions regarding the issuance of a recent D.C. Circuit opinion reversing, vacating and remanding various TRO rules and findings. As you are likely aware, on March 2, 2004, following remand and appeal of the D.C. Circuit's decision in *USTA I*, the D.C. Circuit issued another decision, *USTA v. FCC*, Case No. 00-1012 (D.C. Cir. 2004) ("*USTA II*"), ruling that the FCC's TRO is unlawful in many respects. Significantly, among other things, the Court vacated the FCC's nationwide impairment determination with respect to mass market switching, DS1 and DS3 dedicated transport, hi-cap loops and dark fiber loop and transport. Absent a rehearing or a grant of certiorari by the U.S. Supreme Court resulting in a different decision, the effect of the court's decision is the ultimate elimination of certain legal unbundling requirements.

Although the mandate for *USTA II* has not yet issued, *USTA II* will constitute an Intervening Law/Change in Law event. Any position taken heretofore by SBC in its TRO change in law negotiations or dispute resolution proceedings, including any contract language proposed by SBC is subject, therefore, to modification based upon *USTA II*. SBC does not waive, and reserves all rights, to make such modifications to its positions and language proposals, and to invoke Intervening Law/Change in Law or similar provisions in the interconnection agreement(s), or any amendment thereto, with regard to *USTA II*, or with respect to any future lawful and effective FCC rules and associated FCC and judicial orders. SBC expects to be providing such modified contract language to CLEC in the near future. In the interim, CLEC should not represent any SBC position or language proposal presented prior to the release of *USTA II* as a complete or accurate representation of SBC's position or language proposal.

Enclosed you will find a copy of the non signature-ready Lawful UNE Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you via email within 24 hours.

If you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues.

If you have any questions, please contact Keisha Rivers at 214/464-0401.

Sincerely,

Contract Notices Manager
SBC Telecommunications, Inc.

SBC Telecommunications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard
Dallas, TX 75202-5398

July 13, 2004

VIA UPS 2ND DAY AIR

Joseph M Sudo
Consultant
ACN Communications Services, Inc
6811 Kenilworth Ave
Suite 300
Riverdale, MD 20730

Re: Notice of Issuance of a Post-*USTA II* Amendment to Existing Interconnection Agreement(s)

Dear Joseph M Sudo:

As you know, on June 16, 2004, the D.C. Circuit's mandate issued in *United States Telecom Association v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II*"). Among other things, the Court vacated the FCC's unbundling rules relative to mass market local switching, DS1 and DS3 loops, DS1 and DS3 transport and dark fiber loop and transport. Here's how we intend to comply with the mandate and ensure that our existing, effective interconnection agreements are conformed to current governing law.

Enclosed is a Post-*USTA II* Amendment. As an initial matter, it will serve to bring your interconnection agreement(s) into conformity with the *USTA II* decision as to

1) switching,
2) DS1 and DS3 loops,
3) DS1 and DS3 transport, and
4) dark fiber loop and transport

This amendment simply implements the D.C. Circuit's *USTA II* decision and modifies your interconnection agreement(s) to reflect the fact that the FCC's rules requiring that these network elements be made available are vacated, and thus the affected elements are no longer available as UNEs under your agreement(s). Enclosed you will find a copy of the non- signature-ready Post-*USTA II* Amendment, and an amendment request form which can be faxed to the number at the top of the form. Upon SBC's receipt of your completed request form, a signature-ready amendment will be prepared and sent to you. Because our Post-*USTA II* Amendment simply implements the law as reflected in the *USTA II* decision, there is no need for negotiations related to this amendment. If you disagree, please contact us immediately.

As you are already aware, SBC has committed to the FCC to continue to provide the mass market UNE-P (1-3 voice grade lines), DS1 and DS3 loops dedicated to a single customer, and DS1 and DS3 transport between SBC central offices, and to not unilaterally increase the applicable state-approved prices for these facilities at least through the end of 2004. We intend to abide by that commitment, notwithstanding the amendment of your interconnection agreement(s) to conform with the *USTA II* decision outlined above.

Previously, as part of a separate process to bring your interconnection agreement(s) into conformity with *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and the FCC's Triennial Review Order ("TRO"), we provided you with proposed conforming contract language, including our "Lawful UNE" Amendment language. To the extent our companies are already engaged in negotiations and/or other activities, including dispute resolution proceedings, to conform your interconnection agreement(s) to the *USTA I* decision and TRO, SBC will continue to pursue amendment language pursuant to *USTA I* and those portion of the TRO that were unaffected by *USTA II*. Accordingly, the Post-*USTA II* Amendment we provide you with this letter is independent of that process and supplements, but does not supplant, that process or that previously-provided language.

Nothing set forth in this letter or our proposed language waives or otherwise limits our ability to seek any other relief that might be available under any legal rulings, including but not limited to *USTA I*, TRO or *USTA II*, and including any rights SBC may have arising from the federal courts' determination that certain of the FCC's unbundling rules were never lawful. In addition, SBC expressly reserves all rights to pursue additional relief, including but not limited to, seeking modification of existing, effective contracts to include additional modifications justified by *USTA I*, TRO or *USTA II*.

Please contact your assigned account manager to initiate commercial agreement negotiations, or if you have any questions or need further information.

Sincerely,

Notices Manager

ACN-2

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

March 18, 2004

BY FACSIMILE AND OVERNIGHT DELIVERY

Notices Manager
Contract Management
SBC Communications, Inc.
Four SBC Plaza, 9th Floor
311 S. Akard Street
Dallas, TX 75202

FAX: (214) 464-8528

Re: SBC's March 11, 2004 Proposed "Lawful UNE Amendment"

Dear Sir/Madam:

On behalf of ACN Communications Services, Inc.; Adelphia Business Solutions Operations, Inc. d/b/a TelCove; City Signal Communications, Inc.; Conversent Communications, LLC; CoreComm Illinois Inc.; CoreComm Michigan Inc.; CoreComm Newco Inc.; DSLnet Communications, LLC; El Paso Networks, LLC; Essex Acquisition Corporation; Fiber Technologies Networks, LLC; Globalcom, Inc.; LDMI Telecommunications, Inc.; Mpower Communications Corp.; New Edge Network, Inc. d/b/a New Edge Networks; RCN Telecom Services, Inc.; Southern California Edison Company (Edison Carrier Solutions); Vycera Communications, Inc.; and their respective affiliates, (collectively, the "CLECs"), we are writing regarding your letter of March 11, 2004 proposing a "Lawful UNE Amendment" to the CLECs' interconnection agreements in each of the SBC ILEC region states. The CLECs stand ready in good faith to negotiate any and all necessary amendments to their Agreements based upon changes in the law, subject to the existing change-of-law terms of their Agreements. However, for the reasons set forth below, it would be inappropriate and inefficient for SBC to attempt to seek formal dispute resolution over the terms of its "Lawful UNE Amendment" only eight days after sending the terms of the proposed amendment to CLECs for the first time. Instead, therefore, we propose that the parties initiate negotiations over SBC's proposed amendment if and when a change of law has occurred under the terms of their Agreements and when each party's opening position for such negotiations has become final.

I. If and When SBC Proposes Substantive Terms to Implement the *TRO*, CLECs Will Negotiate in Good Faith in a Timely Manner

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

In any case, while SBC's proposal purports to respond to the *TRO* and the *USTA II* decision,[1] nothing in the proposed "Lawful UNE Amendment" addresses any of the substantive conclusions of either. Thus, the proposed amendment cannot fairly be characterized as a reflection of changes to the substantive unbundling obligations that either party might claim have been altered. SBC's proposed amendment does not set forth revised substantive unbundling obligations; instead, it would replace existing change-of-law provisions, presumably so that SBC could later attempt to rewrite its substantive obligations unilaterally and without further negotiation. This proposal is unwarranted; the Agreements already set forth change-of-law provisions approved by the state commissions that provide the baseline framework for implementing substantive changes necessitated by any change in law. At such time that SBC is prepared to propose such substantive changes, the CLECs will comply with their obligations under the law and the Agreement to negotiate. Nothing contained in either the *TRO* or *USTA II* requires that change-of-law provisions in effective interconnection agreements be modified.

II. SBC Must Comply with Negotiation Intervals Set Forth in its Interconnection Agreements Before Seeking Dispute Resolution

Even once negotiations begin in earnest, SBC cannot simply announce that it will invoke formal dispute resolution procedures a mere eight days after offering a new proposal for the first time. CLECs cannot reasonably be expected to respond to SBC's latest proposal within eight days. Further, the parties' interconnection agreements set forth detailed and more deliberate terms that require the parties to negotiate for a specified number of days before either can petition a state commission for dispute resolution. For example, many agreements based upon SBC's template agreement provide that when initial negotiations to resolve a dispute remain unsuccessful after 45 days, the parties cannot seek resolution from a state commission without first appointing higher level negotiators to negotiate for an additional 45 days before any formal

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[1] *United States Telecom Ass'n v. FCC*, Case No. 00-1012 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

dispute resolution could be initiated at the state commission.[2] Other agreements provide for 90 days of negotiations after a change in law is "legally binding"; *i.e.*, nonappealable.[3] Therefore, the appropriate schedule for negotiations, and if necessary, dispute resolution, would vary based upon the terms of the interconnection agreements.

III. Dispute Resolution Would Be a Waste of Time Because SBC Plans to Revise its Proposed Amendment "In the Near Future"

It would be premature to initiate negotiations or formal dispute resolution since SBC's March 11 letter advises that it will propose yet another replacement TRO amendment "in the near future" to incorporate the impact of *USTA II*. SBC would be asking the states[4] to arbitrate based on a proposal that SBC gave CLECs only a week to review, and which SBC has indicated will be superseded shortly after the dispute resolution was initiated. None of the thirteen state commissions are likely to appreciate such a wasteful use of their limited time and resources.

Moreover, CLECs are unable to negotiate constructively with SBC when SBC disclaims its own proposal and intends to replace it with an unknown new set of terms. For a CLEC to invoke dispute resolution of these issues, it would need to describe SBC's position on the issues to the state commissions, and yet SBC explains that until it releases its new proposal, "CLECs should not represent any SBC position or language proposal presented prior to the release of USTA as a complete or accurate presentation of SBC's position or language proposal." In order to avoid wasting the time of CLECs and the state commissions, SBC may not petition for dispute resolution until after it has presented its "complete and accurate presentation" of its proposal to CLECs for negotiation, and then actually pursued negotiation in good faith as required by the parties' interconnection agreements.

IV. TRO Amendments Need Not be Negotiated Where Replacement Agreements are Currently Being Arbitrated

Where new interconnection agreement arbitrations are now pending, such as in the generic mega-arbitration in Texas, it would be inefficient and perhaps unwelcome to ask state commissions to simultaneously arbitrate amendments to terminated (but temporarily still-effective) agreements. In the already-ongoing proceedings, SBC and CLECs are able to advocate their positions with respect to the changes in law as they will be applied in the new interconnection agreements. Therefore, it should not be necessary to separately negotiate the "Lawful UNE Amendment" or subsequent proposed amendments in these circumstances.

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[2] *See, e.g.*, interconnection agreements between Ameritech-Michigan and Mpower and DSLnet at §§ 10.2, 10.3.

[3] *See, e.g.*, interconnection agreements between Ameritech-Michigan and ACN and LDMI at §§ 29.3, 28.3. Under such agreements, the significant portions of the TRO that remain subject to appeal at this time would not be a part of any change-of-law negotiations until they became unappealable.

[4] Or other fora, as permitted by the Agreements.

V. *USTA II* Does Not "Eliminate" Any UNEs

Finally, SBC is wrong in contending that "[a]bsent a rehearing or grant of *certiorari* by the U.S. Supreme Court resulting in a different decision, the effect of the court's decision is the ultimate elimination of certain legal unbundling obligations." The D.C. Circuit does not have the "ultimate" authority over any part of the 1996 Act. At most, if it ever becomes effective, *USTA II* would vacate rules and remand certain issues to the FCC, but would not necessarily preclude the FCC from adopting new unbundling regulations that are at least as expansive as those set forth in the parties' interconnection agreements. Furthermore, even if *USTA II* becomes effective and no replacement rules from the FCC have been adopted, the unbundling policy and requirements set forth by Congress remain clear and effective under the statutory requirements of Sections 251 and 271. In the absence of implementing regulations from the FCC, states would be the arbiters of which UNEs must be provided as part of Section 252 proceedings. This they have already done by approving the existing interconnection agreements. Thus, regardless of whether any of the parties' agreements would deem an effective *USTA II* as a change of law, there would be no resulting changes to the parties' agreements for a state commission to implement at this time.

VI. Conclusion

CLECs are prepared to negotiate in good faith with SBC once SBC's anticipated new proposal is ready, subject to the terms of their Agreements. For the reasons set forth herein, however, we urge SBC not to act precipitously and in contravention of the interconnection agreements by petitioning for dispute resolution based on your proposed "Lawful UNE Amendment," for which there has not been a reasonable opportunity for negotiation and which you have stated you will soon replace.

In the interim, we would be pleased to discuss these matters further with you at any time.

Very Truly Yours,

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Richard M. Rindler

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August 5, 2004

VIA OVERNIGHT MAIL

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Re: ACN Communication Services, Inc.; Response to Post-*USTA II* Amendment Notice

On behalf of ACN Communication Services, Inc. ("ACN") this letter is in response to the SBC notice letter dated July 13, 2004, in which SBC provided notice that SBC seeks to amend its interconnection agreements with ACN so that SBC can cease providing unbundled switching and DS1, DS3 and dark fiber loops and transport. SBC has characterized this request as a simple implementation of law and finds that "there is no need for negotiations related to this amendment." The purpose of this letter is to provide notice that, in accordance with the terms of our interconnection agreements with SBC, ACN disputes SBC's interpretation of the state of applicable law and hereby invokes its right to negotiate the terms of any proposed amendment.

In the *Triennial Review Order*, the FCC ordered the parties to negotiate terms for the transition to the regime established by the Order. ACN is committed to negotiate in good faith to implement any changes to the parties' interconnection agreements that are necessitated by a change of law. However, the negotiated amendment process is a necessary prerequisite, among other reasons, to assure that any changes do in fact conform to applicable law.

As an initial matter, under some interconnection agreements, SBC's proposal is premature. Some agreements provide for a specified period of negotiations that start only after a change in law is "legally binding"; *i.e.*, nonappealable.[1] Because *USTA II* remains subject to pending petitions for certiorari before the Supreme Court, the change of law provisions of these agreements have not been triggered as of the date of this letter.

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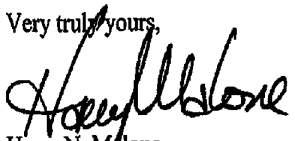
[1] *See, e.g.*, interconnection agreement between SBC - California and ACN, § 8.3.

In any event, ACN does not agree with SBC's suggestion that its proposal, even when ripe, is ready for execution without any negotiation. In that regard, we note that SBC has an obligation to provide UNEs under authority that is independent of the *Triennial Review Order*. First, *USTA II* did not vacate the Commission's rules for high-capacity loops.[2] Second, SBC remains obligated to provide unbundled switching and transport under the terms of the parties' pursuant to the FCC's SBC/Ameritech Merger Conditions,[3] and in some cases, state law, regulation, tariff and/or order. Third, SBC is required in most of its region to continue to provide loops, transport and switching pursuant to its Section 271 obligations and commitments. Fourth, *USTA II* did not find that any of the vacated UNEs were not or could not be required by Section 251. Even SBC's own filings in various proceedings recognize that CLECs are impaired without access to at least some of the UNEs that SBC's proposed amendment would eliminate. Thus, SBC's proposal to eliminate these UNEs across the board would be an unlawful interpretation of section 251 that could not be approved by a state commission under the terms of Section 252(e)(2)(B).

Finally, as you know, the FCC is soon expected to release an interim order that may significantly affect the terms of any proposed amendment. While we look forward to constructive engagement with SBC, we therefore propose that the parties defer negotiation of SBC's proposal until all parties have had the opportunity to consider the new FCC interim order once it is released. If you wish to discuss this matter further, please contact me.

Very truly yours,



Harry N. Malone
Counsel to ACN Communication Services, Inc..

cc: Colleen Jones, ACN
John Tassone, ACN

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2 *See USTA II* at 594. ("To summarize: We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to *these elements*.") (emphasis added). The loop rules may be revised in the FCC's upcoming remand proceeding, but they remain in effect.

3 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 No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 App. C para. 53 (1999) ("*SBC-Ameritech Merger Order*"). Unlike other merger conditions, these have not expired, instead remaining applicable pending a final and nonappealable order in the UNE Remand proceeding. 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 No. 98-141, *Memorandum Opinion and Order*, 17 FCC Rcd 19595 n. 7 (2002).

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April 20, 2004

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RE: ACN Communications Services, Inc.; Adelphia Business Solutions Operations, Inc. d/b/a TelCove; City Signal Communications, Inc.; Conversent Communications LLC; CoreComm Illinois Inc.; CoreComm Michigan Inc.; CoreComm Newco Inc.; DSLnet Communications, LLC; El Paso Networks, LLC; Essex Acquisition Corporation; Fiber Technologies Networks, LLC; Globalcom, Inc.; LDMI Telecommunications, Inc.; Mpower Communications Corp.; New Edge Networks; RCN Telecom Services, Inc.; Southern California Edison Company (Edison Carrier Solutions); Vycera Communications, Inc.; Focal Communications; Choice One Communications Inc.; and their respective affiliates

Dear Sirs:

We are in receipt of your March 18 and 20, 2004 responses (on behalf of the above-named CLECs) to our March 11, 2004 letter enclosing a proposed "Lawful UNEs Amendment" for consideration by the aforementioned CLECs. In your letters, you reject SBC's efforts to engage in negotiations of the Lawful UNEs Amendment until "a change of law has occurred under the terms of [CLECs'] Agreements."

We are confused by your statement because, of course, multiple changes of law have occurred in the recent months. As we clearly stated in our March 11, 2004 letter, the Lawful UNEs Amendment supplements and/or modifies language previously provided in the course of a change in law process initiated in October of 2003, and arising out of the D.C. Circuit Court of Appeals initial 2002 USTA decision ("USTA I"), as well as the FCC's Triennial Review Order, made effective October 2, 2003. Consequently, the contractual time periods relative to change in law negotiations have been honored by SBC.

You also claim that the proposal is "new" and that CLECs were not given enough time to consider it, yet the Lawful UNEs Amendment has the benefit of being shorter and

accomplishing essentially the same goal as the more detailed TRO Amendment language previously proposed by SBC. We have not received meaningful responses from many of the CLECs to our October notice, either; therefore, we're not sympathetic to claims that you have not had enough time to consider these issues. Furthermore, far from being inconsistent with our October 30, 2003 change in law notice, which invoked both USTA I and TRO, the Lawful UNEs Amendment can also be viewed as reflecting the sweeping vacatur of previous unbundling rules by USTA I, in addition to generally reflecting the holdings of the TRO, which declassified or called for the declassification of several network elements.

We also disagree with your suggestion that our Lawful UNEs Amendment language in any way derogates the general unbundling requirements of the 1996 Telecommunications Act, including Sections 251 and 271. As you are aware, the *USTA II* decision recently reinforced prior judicial and FCC rulings that it is the unique role of the FCC to promulgate lawful unbundling rules to implement the Act, including defining specific elements that are required to be unbundled. Without lawful rules in place, there are no such elements and, therefore, no unbundling obligations to be contractually enforced.

You attempt to avoid SBC's lawful overtures for change in law negotiations by claiming that it would be a "waste of time" for CLECs to consider SBC's Lawful UNEs Amendment, given that SBC advised in its March 11th letter that there would likely be further change in law amendments necessary in light of the D.C. Circuit's latest decision in *USTA II*. Of course, the rapid and dramatic changes in law that have occurred within the last six months (much less the ones before that) are not within SBC's control. The parties' agreements call for change in law modification (as you acknowledge) and therefore the parties' contractual intent must be presumed to be to carry out those modification plans. The SBC Lawful UNEs Amendment is designed to streamline the incorporation of future changes in law by introducing a reasonable transition process into the agreement(s). Thus, the Lawful UNEs Amendment is well suited to avoid the "waste of time" that CLECs wish to avoid.

We appreciate your concern that state commission resources may be strained by dispute resolutions flowing from change in law negotiations on top of already ongoing 251/252 arbitration proceedings. The better way to avoid the unnecessary use of scarce resources is, of course, for us to engage in meaningful negotiations and attempt to avoid those dispute resolution proceedings. Apparently, CLECs have chosen not to pursue that course.

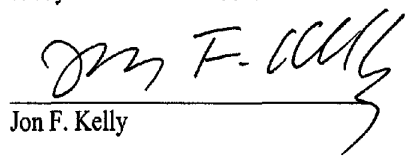
We are disappointed in your response, and will continue to pursue resolution of this matter, consistent with applicable contractual and legal rights and obligations, including the pursuit of resolution via formal dispute resolution if the matter continues to be unresolved by agreement. If you have any questions, please feel to contact me at 214-464-0401.

Sincerely,

Kevin Rivers

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class mail, postage prepaid, on the parties listed below on this 1st day of November 2004.



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CTC Communications Corp.
CTSI, Inc.
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