IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 03-1118

SBC COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), respondent certifies as follows:

A. Parties:

1. Parties Before the Court

SBC Communications, Inc. ("SBC") is the petitioner in this case. The Federal Communications Commission ("FCC" or "Commission") and the United States of America are respondents. Core Communications, Inc. and Z-Tel Communications, Inc. have intervened.

2. Party to the Proceeding Below

The proceeding below was an enforcement action imposing a monetary forfeiture against SBC Communications, Inc., for violations of a condition contained in an FCC order approving the transfer of radio licenses from Ameritech Corp. to SBC in connection with the merger of the two companies. Accordingly, SBC is the sole party to the proceeding below.

B. Ruling Under Review:

SBC Communications, Inc., Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 19923 (2002) ("*Order*") (JA 10).

The *Order* under review references and expressly incorporates reasoning found in the Commission's document initiating the forfeiture proceeding against SBC. *See SBC Communications, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002) ("*NAL*").

C. Related Cases:

The *Order* under review has not previously been before this Court or any other court.

In *SBC Communications, Inc. v. FCC*, No. 03-1147 (D.C. Cir. filed May 23, 2003), SBC has filed a petition for review of a related FCC order adjudicating an administrative complaint involving similar issues. See *Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc*., Memorandum Opinion and Order, 18 FCC Rcd 7568 (2003). By order dated July 3, 2003, the court granted the FCC's unopposed motion to hold SBC's petition for review in abeyance pending resolution of an administrative petition for reconsideration currently before the agency.

The United States District Court for the Eastern District of Michigan has issued an opinion addressing similar issues. *Michigan Bell Tel. Co. v. Chappelle*, 222 F.Supp.2d 905 (2002). SBC has appealed the District Court's judgment to the Sixth Circuit; the case has been briefed but oral argument has not yet been scheduled. *See Michigan Bell Tel. Co. v. Chappelle*, No 02-2168 (6th Cir. filed Sept. 11, 2002).

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1996 Act or Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Arkansas/Missouri 271 Order	Memorandum Opinion and Order, *Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri,* 16 FCC Rcd 20719 (2001)
Competitive LEC or CLEC	competitive local exchange carrier
FCC or Commission	Federal Communications Commission
Illinois Order	*Investigation into tariff providing unbundled local switching with shared transport* (Illinois Commerce Commission, July 10, 2002)
Incumbent LEC or ILEC	incumbent local exchange carrier
Indiana Order	*AT&T Communications of Indiana, Inc.,* Cause No. 40571-INT-03 (Indiana Utility Regulatory Commission, Nov. 20, 2000), 2000 WL 33180473
JA	Joint Appendix
LATA	local access and transport area
Local Competition Order	First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, *modified on recon.,* 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications, Inc. v. FCC, 5*35 U.S. 467 (2002)
Merger Order	Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control,* 14 FCC Rcd 14712 (1999), *vacated in part, Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)

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Michigan Order	*In the matter of the application of Ameritech Michigan for approval of a shared transport cost study and resolution of disputed issues related to shared transport,* Case No. U-12622 (Mich. P.S.C. March 19, 2001), 2001 WL 401417, *aff'd Michigan Bell Tel. Co. v. Chappelle,* 222 F. Supp. 2d 905, 909-13 (E.D. Mich. 2002), *appeal pending, Michigan Bell Tel. Co. v. Chappelle,* No. 02-2168 (6th Cir. filed Sept. 11, 2002)
Michigan Cost Order	*In the Matter, on the Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs and To Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services for Ameritech Michigan,* Case No. U-11280, 183 P.U.R.4th 1 (Mich. Pub. Serv. Comm'n 1998)
Michigan 271 Order	Memorandum Opinion and Order, *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended,to Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137*,* 12 FCC Rcd 20543 (1997)
NAL	*SBC Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002)
Ohio Order	*In the matter of AT&T Communications of Ohio, Inc's. and TCG's Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio,* Case No. 00-1188-TP-ARB (Public Utilities Commission of Ohio, June 21, 2001)
Order	*SBC Communications, Inc., Apparent Liability for Forfeiture,* Forfeiture Order, 17 FCC Rcd 19923 (2002)
Shared Transport Order	Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460 (1997), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998), *vacated and remanded sub nom. Ameritech Corp. v. FCC*, 526 U.S. 1142 (1999), *reinstated in part, Southwestern Bell Tel. Co. v. FCC*, 199 F.3d 996 (8th Cir. 1999)
Supplemental Order Clarification	Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000)

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Texas Arbitration Award	*Complaint of Birch Telecom of Texas, LTC, L.L.P. and Alt Communications, L.L.C. Against Southwestern Bell Telephone Company for Refusal to Provide IntraLATA Equal Access Functionality, and Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company for Violating Unbundled Network Elements Provisions of the Interconnection Agreement,* Arbitration Award, Docket Nos. 20745 and 20755 (Pub. Util. Comm'n of Texas, Nov. 4, 1999)
Texas PUC	Texas Public Utility Commission
Triennial Review Order	*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (released Aug. 21, 2003), 2003 WL 22175730
UNE	unbundled network element
UNE Remand Order	Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999), *rev'd and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003)
Wisconsin Order	*Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc.,* 05-MA-120 Arbitration Award (Pub. Serv. Comm. Of Wisconsin, Oct. 12, 2001)

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Federal Communications Commission ("FCC") released the order in this case, *SBC Communications, Inc. Apparent Liability for Forfeiture* ("*Order*"), 17 FCC Rcd 19923 (2002) (JA 10), on October 9, 2002. Thirty days later, SBC Communications, Inc. ("SBC"), timely filed a petition for reconsideration of the *Order* with the FCC. SBC withdrew its petition on April 24, 2003, paid the forfeiture amount assessed in the *Order* a day later, and filed its petition for review in this Court on April 28, 2003. Under this Court's decision in *AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003), the Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUES PRESENTED FOR REVIEW

Ever since the FCC's initial orders implementing the Telecommunications Act of 1996, the Commission has required incumbent local exchange carriers to provide competitive carriers access to the incumbents' shared network transmission facilities – or "shared transport." Ameritech Corp. ("Ameritech") alone among the Bell operating companies steadfastly refused to comply with this requirement. When SBC acquired Ameritech in 1999, the FCC addressed this deficiency by requiring Ameritech to provide a shared transport offering to competitors comparable to that provided by SBC in Texas. Accordingly, the agency conditioned its approval of the license transfers associated with the merger on SBC's commitment to offer shared transport in the Ameritech states under terms and conditions substantially similar to those that SBC offered in Texas as of August 27, 1999. Subsequently, SBC repeatedly refused competitors' requests to use shared transport to carry intraLATA toll calls in the five Ameritech states even though, as of August 27, 1999, SBC allowed competitive carriers in Texas to use shared transport for such calls. SBC's repeated and willful refusals prompted the FCC in the *Order* on review to assess a $6 million forfeiture against the carrier. The issues presented by SBC's petition for review are:

1. Did the *Merger Order* give SBC fair notice that it was required to offer shared transport for intraLATA toll calls to competitive carriers in the Ameritech states?

2. Assuming a forfeiture was warranted, did the Commission act reasonably in assessing a forfeiture in the amount of $6 million?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are attached at the Addendum to this brief.

COUNTERSTATEMENT[1]

I. Statutory and Regulatory Background

A. The Telecommunications Act of 1996

Throughout most of the United States, local telephone service has long been dominated by a single local exchange carrier, defined as incumbent local exchange carrier ("ILEC"), in each service area. 47 U.S.C. § 151(h). Such incumbents, including the regional Bell operating companies ("BOCs"), own almost all of the loops (the wires that connect subscribers' telephones to telephone company switches) in their service areas, along with the switches themselves and the transport trunks that carry calls between switches. The Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 151 *et seq*., undertook to break the ILECs' monopoly, and increase competition in all telecommunications markets. *See generally Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 477, 491-93 (2002).

To accomplish that objective, Congress imposed "a host of duties" on each incumbent carrier, the "[f]oremost" of which is the "obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). Section 251(c)(3) of the statute requires ILECs to allow competitive carriers ("CLECs") to lease unbundled elements of their networks at just and reasonable cost-based rates to enable those competitive LECs to offer competing telecommunications services. 47 U.S.C. § 251(c)(3). The 1996 Act entrusts the FCC with the task of "determining what network elements should be made available" to requesting carriers. 47 U.S.C. § 251(d)(2).

[1] For the Court's convenience, a chronology of events is included at the Addendum to this brief.

B. The Commission's Shared Transport Orders

"Transport" refers to the transmission paths that convey telephone calls between switches within a telecommunications network. This is done either through the "exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier" – known as dedicated transport – or through the "use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier" – known as shared transport. *See* 47 C.F.R. § 51.319(d)(1); *see also Local Competition Order*, 11 FCC Rcd 15499, 15631 n.480 (1996)(subsequent history omitted).

This case involves shared transport. Shared transport is the network element that carries traffic from multiple carriers, including the incumbent, over the ILEC's transport links between its switches and offices. In every order in which the FCC has addressed network unbundling under the 1996 Act, the Commission has required incumbents to unbundle the "shared transport" network element. *Local Competition Order*, 11 FCC Rcd at 15714-22 (¶ 440, ¶¶ 428-451); *see generally id.* at 15616-775 (¶¶ 226-541); *Shared Transport Order*, 12 FCC Rcd 12460, 12484-85 (¶¶ 40-43) (1997) (subsequent history omitted), *UNE Remand Order*, 15 FCC Rcd 3696, 3862-66 (¶¶ 369-79) (1999) (subsequent history omitted); *Triennial Review Order*, 2003 WL 22175730 (¶ 534, n.480) (rejecting SBC's argument that requesting carriers should not be allowed to use shared transport for intraLATA toll traffic). The Commission also has made clear that CLECs are free, in the absence of explicit restrictions, to use unbundled network elements "for not only telephone exchange services and exchange access services, but also for toll services." *See, e.g., Local Competition Order*, 11 FCC Rcd at 15681 (¶ 361).

II. The Merger Order

Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether an application to transfer certificates of public convenience and necessity and radio licenses is in the public interest. *See* 47 U.S.C. §§ 214(a), 310(d). Thus, in 1998, when SBC sought to acquire Ameritech, the two companies applied to the Commission for approval to transfer certificates and radio licenses from Ameritech to SBC. *See generally Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)("*ASCENT")*.

Although the Commission found that the proposed merger threatened to harm consumers and that the asserted benefits of the proposed merger were insufficient to outweigh these significant harms, the Commission ultimately approved the transfers because SBC agreed to adhere to a set of "significant and enforceable" conditions designed to mitigate those harms. *Merger Order,* 14 FCC Rcd 14712, 14716 (¶¶ 2-3) (1999), *vacated in part, ASCENT*, 235 F.3d 662. SBC had proposed those conditions and submitted them to the FCC in an effort to win approval of the merger. The proposed conditions were modified as a result of extensive negotiations between the companies and FCC staff, and the Commission solicited public comment on them. In its *Merger Order*, the FCC specifically noted that those conditions had changed the public interest balance, and found that the merger should be approved "assuming the Applicants' ongoing compliance with the conditions described in this Order." *Id*. at (¶ 4).

This case arises from the FCC's subsequent determination that SBC failed to comply with one of the *Merger Order* conditions, relating to shared transport. Shared transport had long been a contentious issue in the Ameritech states. Despite FCC rules requiring all incumbent

LECs to unbundle shared transport, Ameritech, by its own admission, had never complied.[2] In 1997, for example, the Commission issued an order denying Ameritech's application under 47 U.S.C. § 271 to provide long distance service in Michigan. In that order, the FCC explained why Ameritech's purported shared transport offering was not sufficient. *Michigan 271 Order,* 12 FCC Rcd 20543, 20707-711 (¶¶ 311-18) (1997). The Commission also specifically noted that the inability of competitive carriers to route intraLATA toll traffic would have a negative effect on the local exchange market. *Id.* at 20738-40 (¶¶ 377-78) (expressing "concerns that discontinuing or refusing to provide intraLATA toll service to customers that elect to switch to another local service provider may threaten a competing LEC's ability to compete effectively in the local market and thus may be inconsistent with the procompetitive goals of the 1996 Act").

In the *Merger Order*, the FCC noted that "Ameritech has vigorously resisted implementing" shared transport in its territory. 14 FCC Rcd at 14888 (¶ 425); *see also id*. at 14949 (¶ 569 n.1105) (citing comments by competitive carriers complaining about "Ameritech's recalcitrance" in opening its markets to competition, including its conduct with respect to shared transport). The FCC added that its adoption of the shared transport condition "should not be construed as Commission approval of the lawfulness of Ameritech's current shared transport policy." *Id*. at 14877 (¶ 396 n.742).

Paragraph 56 of the *Merger Order* conditions, which SBC proposed in an initial draft, was designed to remedy "Ameritech's historic refusal to provide 'shared transport,'" (*Declaration of Martin E. Grambow* at ¶ 4) (JA 182), by requiring SBC to implement fully the

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[2] *See* Br. of Plaintiff-Appellant Ameritech Michigan in *Michigan Bell Telephone Co. v. Chappelle*, No. 02-2168 (6th Cir.) at 26 ("Ameritech, more than any other ILEC, had opposed the FCC's original requirement to unbundle shared transport, even for local exchange service, and was continuing to oppose any shared transport obligation in the *UNE Remand* proceeding").

shared transport element in the Ameritech states. To remove any doubt as to precisely what was required, the paragraph 56 shared transport condition pointed the merged entity in the direction of Texas, with the purpose of raising Ameritech up to SBC's performance level in that state. Specifically, the condition required SBC to offer shared transport in the Ameritech region under at least the same terms and conditions as those that SBC provided to competitive carriers in Texas on a specific date.[3] The FCC emphasized that this condition obligates Ameritech "to provide shared transport until a final Commission order or a final, non-appealable judicial decision determines that SBC/Ameritech is not required to provide shared transport" in its operating territory. *Merger Order*, 14 FCC Rcd at 14876-77 (¶ 396). SBC accepted this condition by electing to proceed with its merger subject to the terms of the *Merger Order*. *See P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (acceptance of FCC license constitutes accession to all conditions imposed on the license).

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[3] In its entirety, paragraph 56 states:

> Within 12 months of the Merger Closing Date (but subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport), SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999. Subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport, SBC/Ameritech shall continue to make this offer, at a minimum, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area.

Merger Order, Appendix C, 14 FCC Rcd at 15023-24 (¶ 56); *see also id*. at 14876-77 (¶ 396) (discussing shared transport condition).

When it approved the merger, the Commission stated that "SBC/Ameritech has committed to implement and offer in the Ameritech states the same version of shared transport that SBC has implemented in Texas." *Merger Order*, 14 FCC Rcd at 14888 (¶ 425). The agency made clear that it expected the merged entity to "implement each of the[] conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefit of these conditions." *Id*. at 14858 (¶ 360). Indeed, the Commission stated its intent "to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions." *Id*. Those enforcement mechanisms also included "imposing fines and forfeitures," as well as adjudicating administrative complaints filed against the merged entity under 47 U.S.C. § 208. *Id.* at 14885 (¶ 415). The FCC added: "We do not expect that any enforcement penalties or compliance mechanisms will become merely an acceptable cost of doing business." *Id.* Separate statements by individual commissioners voting to approve the transfer emphasized their heavy reliance upon SBC's assurances that it would fully and in good faith implement its commitments embodied in the conditions.[4] Further underscoring the serious nature of the merger conditions, the Commission promptly assembled a team of staff members

[4] Although Commissioner Ness voted to approve the merger, she noted that "[w]hile I agree with my colleagues that, on balance, the merger conditions tip the scale in favor of approval of the merger, they are no panacea." She added that "[w]hether these conditions are successful will depend in large measure on the good faith efforts of the merged companies to meet both the letter and the spirit of the requirements. SBC has assured the Commission that it intends to do so, and I rely heavily on these representations." Separate Statement of Commissioner Susan Ness, 14 FCC Rcd at 15173. Commissioner Tristani articulated similar concerns in voting to approve the merger: "By voting to approve the transaction based on these conditions, I am accepting the companies' assurances that they will fully implement all the commitments they have made." Separate Statement of Commissioner Gloria Tristani. *Id*. at 15216.

charged with overseeing SBC's compliance with the *Merger Order,* including the shared transport condition. *See Public Notice*, 1999 WL 1009831 (Nov. 8, 1999).

III. The Commission's Forfeiture Authority

The Communications Act gives the FCC various enforcement powers. As pertinent here, under section 503(b) of the Act, any person who the Commission determines has willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission is liable for a monetary forfeiture penalty. 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a). In order to impose such a forfeiture, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why the Commission should not impose such a forfeiture penalty. 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

The statute defines a "willful" violation as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission . . . ." 47 U.S.C. § 312(f)(1). *See Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) (discussing legislative history of section 312(f)(1) indicating Congressional intent to apply the section 312 definition to section 503(b) forfeiture proceedings).[5] The statute defines "repeated" as "the commission or omission of [an] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2).

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[5] *See also Liability of Chesapeake Broadcasting Corp., Licensee of AM Radio Station WASA, Havre de Grace, MD, for a Forfeiture*, 2 FCC Rcd 252, 253, (¶¶ 9-10) (1987) (stating that, in the forfeiture context, willfulness does not require showing of "intent to deceive the Commission or to violate the Act or the Rules").

Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $120,000 for each violation by a common carrier, or each day of a continuing violation, up to a statutory maximum of $1,200,000 for a single act or failure to act. 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2). In determining the appropriate forfeiture amount, the Commission considers the factors set forth in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(D); *see also* 47 C.F.R. § 1.80(b)(4).

IV. The Notice of Apparent Liability

On December 8, 2000, CoreComm Communications, Inc. ("Core"), sent a letter to the chief of the FCC's Common Carrier Bureau complaining that SBC's network element offerings were inadequate in the former Ameritech states.[6] Core specifically complained that SBC's conduct with respect to shared transport violated the paragraph 56 *Merger Order* condition.[7] Core asserted that SBC refused to permit Core to use shared transport "to transport intraLATA toll traffic[8] between CoreComm's customers and Ameritech's customers (or other carriers'

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[6] Letter from Bruce Bennett, CoreComm National Director of Regulatory and Carrier Relations, to Dorothy Atwood, Chief, Common Carrier Bureau, FCC, December 8, 2000, at 1 (JA 71).

[7] *Id*. at 4-5 (JA 74-75).

[8] "IntraLATA toll" service refers to calls that originate and terminate within a single local access and transport area, or LATA. The LATA concept was introduced in the *Modification of Final Judgment* governing the AT&T divestiture; the Bell companies were permitted to provide only intraLATA services after the divestiture. *U.S. v. American Tel. and Tel. Co*., 552 F. Supp. 131, 141 (D.D.C. 1982). IntraLATA service may be provided either as part of a customer's flat-rate local exchange service, or as a toll call, depending on classifications made by state regulators. *See SBC Communications Inc. v. FCC,* 138 F.3d 410, 412 n.1 (D.C. Cir. 1998). IntraLATA toll service is also referred to as "local toll" service. *See, e.g, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* 18 FCC Rcd 5099, 5143 (¶ 113) (2003).

customers) just as Ameritech uses those same facilities to route its intraLATA toll traffic end-to-end. Instead, Ameritech requires competing carriers to take intraLATA toll traffic off Ameritech's network and transport it to a switch, or point of presence, on the competing carrier's network, thus artificially increasing the competing carrier's costs of providing service."[9]

Core's letter prompted the FCC's Enforcement Bureau to investigate.[10] The staff sent a letter of inquiry to SBC requiring the company "to submit a sworn written response to a series of questions relating to SBC's compliance with paragraph 56 of the merger conditions" by May 2, 2001. *NAL*, 17 FCC Rcd 1397, 1398 (¶ 4)(JA 126). In a series of written filings submitted over a number of months, SBC offered an evolving array of arguments as to why its conduct was not unlawful.

SBC's first response on May 2, 2001, revealed that it had received – and rejected – requests from competitive carriers to use the shared transport network element to carry intraLATA toll traffic in all five Ameritech states. *Id.* at ¶ 12 n.27 (JA 129-30). In that filing, SBC asserted a number of justifications for its conduct. Letter from Sandra L. Wagner, SBC, May 2, 2001 (JA 82). As to the *Merger Order,* SBC asserted that it was not "offering" shared transport for intraLATA toll in Texas on August 27, 1999, because it was making that facility available for intraLATA toll only pursuant to an order of the Texas Public Utility Commission ("Texas PUC"). SBC also argued that the facilities at issue did not constitute shared transport,

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[9] *Id.* at 3 (JA 73).

[10] Subsequently, Core and another CLEC, Z-Tel Communications, Inc., filed a formal complaint against SBC pursuant to 47 U.S.C. § 208. The FCC granted that complaint in part, and denied it in part. *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc.,* 18 FCC Rcd 7568 (2003), *petition for administrative reconsideration pending, petition for review pending SBC Communications v. FCC*, No. 03-1147 (D.C. Cir. filed May 23, 2003).

and thus did not have to be unbundled under Commission rules. And, finally, SBC asserted that the FCC lacked authority to enforce the *Merger Order,* an argument that it soon abandoned.

Over two and a half months later, on July 23, SBC filed a second response raising a new set of arguments as to why its actions did not violate the *Merger Order*. Letter from Christopher M. Heimann, SBC (July 23, 2001) (JA 96). This letter committed to writing novel arguments that SBC had raised in a meeting with Commission staff. In this filing, SBC argued for the first time that the *UNE Remand Order* had superseded the requirement to offer the same terms for shared transport as in Texas. SBC also argued that the *UNE Remand Order* did not require it to unbundle shared transport to carry intraLATA toll traffic. On October 10, 2001, SBC filed yet another paper purporting to demonstrate that its shared transport offering did not violate the *Merger Order*. Letter from Sandra L. Wagner, SBC (Oct. 10, 2001) (JA 108).

The Commission released its *NAL* on January 18, 2002, unanimously finding that SBC had "apparently willfully and repeatedly violated" the shared transport condition in the *Merger Order*. The *NAL* proposed a $6 million forfeiture, *NAL* at ¶ 6 (JA 127). The *NAL* came ten months after the staff had sent the inquiry letter to SBC and just three months after SBC's last significant substantive pleading.

The reasoning behind the *NAL* was straightforward:

- paragraph 56 of the merger conditions required SBC to offer "shared transport in the Ameritech states on terms 'substantially similar to (or more favorable than)' the most favorable terms it offered in Texas as of August 27, 1999";[11]

- on that date, "SBC had at least two interconnection agreements in Texas pursuant to which it offered CLECs the option of using shared transport to route intraLATA toll calls, without restriction, . . . ";[12]

- in the five Ameritech states, SBC nevertheless rejected carriers' requests to use shared transport for intraLATA toll traffic;[13]

- thus, SBC had apparently violated paragraph 56 of the merger conditions.[14]

A critical step in this analysis was determining the scope of SBC's shared transport offering in Texas, since that defined the scope of SBC's shared transport obligation in the Ameritech states. In finding that SBC was offering shared transport to route intraLATA toll traffic in Texas as of August 27, 1999, the Commission relied on a decision by a Texas PUC

[11] *NAL* at ¶ 6 (JA 127).

[12] *Id.* at ¶ 7 (JA 127).

[13] *Id*.

[14] *Id*. at ¶ 6 (JA 127).

arbitration panel interpreting contracts in place on that date between SBC and two competitive carriers.[15] *Id.* at ¶ 13 (JA 130).

In the *NAL,* the Commission rejected the arguments raised by SBC in its multiple written filings. The Commission found that the shared transport condition in the *Merger Order* was not restricted to the use of shared transport for local service. *Id*. at ¶ 15 (JA 132). The Commission also noted that the definition of shared transport did not include such a restriction, and that the Commission's rules prohibited incumbents from imposing such usage restrictions. *Id.* (citing 47 C.F.R. § 51.309(a)). In addition, the Commission rejected SBC's argument that the shared transport merger condition had been terminated by the *UNE Remand Order*. *Id.* at ¶ 17 (JA 132-33). The Commission stated that "nothing in the UNE Remand Order appears to supersede the requirements imposed by paragraph 56." *Id*. at ¶ 18 (JA 133).

The Commission found that SBC had "refused to offer shared transport for end-to-end routing of intraLATA toll calls, and indeed [had] affirmatively opposed requests for such service before the state commissions." *Id.* at ¶ 16 (JA 132). The Commission therefore concluded that

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[15] The two competitors were Birch Telecom of Texas, Ltd., L.L.P. ("Birch") and Sage Telecom, Inc. ("Sage"). The arbitration panel's decision is referred to in the *NAL* (and the Commission's subsequent *Order*) as the "*Texas Arbitration Award*." As set out in the *NAL*, "[a]t the beginning of 1999," Birch and Sage "were using shared transport purchased from SBC to route intraLATA toll calls between their end user customers and customers served by SBC." *NAL* at ¶ 9 (JA 128). In April 1999, SBC informed competitive carriers that it intended to stop offering shared transport for that purpose. *Id*. In response, Sage and Birch filed complaints with the Texas PUC protesting SBC's proposed action. *Id*. at 1400-01 (¶ 10) (JA 128-29). The Texas arbitrators temporarily enjoined SBC from discontinuing service pending a decision on the complaint, and thus SBC continued to make shared transport available pending the issuance of the *Texas Arbitration Award* in November 1999, and the subsequent decision by the Texas PUC on December 1, 1999 affirming the *Texas Arbitration Award*. *Id.* at 1401 (¶ 11) (JA 129). SBC did not seek judicial review of the Texas PUC order. *See* Sworn Statement of Michael C. Auinbauh attached to Letter from Sandra L. Wagner, May 2, 2001 at 4 (JA 87) (*Texas Arbitration Award* has not been modified, reversed, or overruled).

"SBC has apparently violated the requirements of the *Merger Order* in at least five instances." *Id.* at ¶ 21 (JA 134). Each violation was "continuing" under 47 U.S.C. § 503(b)(2)(B) and 47 C.F.R. § 1.80(b)(2). Those violations began "on October 8, 2000 (12 months after the close of the merger), and continu[ed] at least until the date of SBC's May 14, 2001 response to the [FCC Enforcement] Bureau's letter of inquiry in four of the five Ameritech states (*i.e.* Ohio, Indiana, Illinois, and Wisconsin), and until March 2001 in Michigan." *Id.* at ¶ 21 (JA 134).

The Commission proposed the statutory maximum forfeiture of $1.2 million for five continuing violations in each of the five former Ameritech states. *Id.* at ¶¶ 21, 22 (JA 134-35). The FCC determined that the statutory maximum was appropriate for a number of reasons. First, the Commission had emphasized in the *Merger Order* that it would "hold SBC to a high standard of compliance." *Id*. at ¶ 22 (JA 134). Second, the Commission found it "particularly egregious that SBC refused to make shared transport available on the same terms available in Texas, even after the *Texas Arbitration Award* made not only 'ascertainably certain,' but abundantly clear, what SBC's obligations under its interconnection agreements were." *Id*. (citation omitted). The FCC noted that SBC's apparent violations "have forced other carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to provide." *Id*. Finally, the Commission took into account SBC's ability to pay. Noting SBC's revenues of more than $51 billion in 2000, the Commission determined that the statutory maximum was appropriate in order to ensure that the forfeiture amount was not "merely an affordable cost of doing business." *Id.* (citation omitted).

V. The Forfeiture Order

On March 5, 2002, SBC filed a detailed response to the *NAL* in which it repeated many of its earlier points and presented new arguments. After reviewing that response, the Commission,

by unanimous vote, rejected SBC's arguments, found that SBC had willfully and repeatedly violated the requirements of the *Merger Order,* and assessed a $6 million forfeiture in its *Order* released on October 9, 2002. The Commission acknowledged that under *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), the agency could impose a forfeiture for violations of the paragraph 56 merger condition only if that requirement was "sufficiently clear." *Order* at ¶ 5 n.13 (JA 12). The Commission concluded that the "merger condition's shared transport requirements are abundantly clear," and that SBC, "acting in good faith," should have been able to identify with "ascertainable certainty" its "obligation to offer to CLECs in the Ameritech region shared transport for intraLATA toll service." *Id*. (citing *Trinity Broadcasting*). In so holding, the FCC incorporated by reference its reasoning in the *NAL* as to arguments SBC had merely repeated, and provided further analysis concerning SBC's new arguments. *Id*. at ¶ 6 (JA 13). *See also id.* at ¶ 5 n.17 (JA 13).

The Commission rejected for a second time SBC's argument that the *Merger Order* imposed only a "local" shared-transport obligation that did not extend to intraLATA toll traffic. *Id.* at ¶¶ 12-15 (JA 15-19). The Commission rejected for a second time SBC's argument that the *Merger Order* obligations had been superseded by the Commission's *UNE Remand Order*. *Id.* at ¶¶ 17-19 (JA 19-20).

SBC also argued that it had substantially complied with the *Merger Order,* because the *NAL* related only to a subset of the traffic that uses shared transport. *Id*. at ¶ 20 (JA 20). The Commission did not agree, noting that "[f]or those CLECs seeking intraLATA toll shared transport, SBC's refusal to offer it was anti-competitive and thus significant." *Id*.; *see also id*. at ¶ 24 (JA 22) ("In state after state, throughout the Ameritech region, SBC forced competing

carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport.").

SBC also contended that the amount of the forfeiture was excessive, but the Commission rejected this argument. *Id*. at ¶¶ 25-27 (JA 22-24). As it had in the *NAL*, the Commission noted that SBC had "repeatedly violated the clear terms of the merger condition," that "the potential competitive impact of SBC's violations [was] substantial," and that – given the company's "total operating revenues of nearly $46 billion" in 2001 – a lesser forfeiture would have no deterrent effect. *Id*. at ¶ 24 (JA 22). Accordingly, the Commission assessed the forfeiture proposed in the *NAL*. *Id*. at ¶ 28 (JA 24).

SBC timely filed a petition for reconsideration of the *Order* with the FCC. In April 2003, as the FCC's staff was in the final stages of completing a draft reconsideration order to present to the Commission for a vote, SBC withdrew its petition and paid the $6 million forfeiture. *See* Letter from Michael K. Kellogg, dated April 24, 2003 (JA 235). SBC's action came after this Court's decision in *AT&T Corp. v. FCC*, 323 F.3d 1081, 1083-85 (D.C. Cir. 2003), which held for the first time that a regulated entity may pay an FCC-imposed forfeiture and obtain judicial review in the court of appeals under 47 U.S.C. § 402(a). SBC filed its petition for review of the *Order* in this Court on April 28, 2003.

VI. State Rulings

The Commission noted in the *NAL* that SBC had challenged CLEC requests to use shared transport for intraLATA toll traffic before each of the state utility commissions in the five Ameritech states. *NAL* at ¶ 12 n.27 (JA 129). Four of those states eventually ruled that the company was required to permit competing carriers to use shared transport for intraLATA toll

traffic.[16] Michigan's decision was affirmed by the federal district court for the Eastern District of Michigan. SBC has appealed that decision to the Sixth Circuit; the case has been briefed and is awaiting a date for oral argument.

STANDARD OF REVIEW

The Commission's *Order* is based upon an interpretation of the paragraph 56 shared transport condition in the *Merger Order.* The Commission's interpretation of its own order "is controlling unless clearly erroneous." *MCI WorldCom Network Services, Inc. v. FCC,* 274 F.3d 542, 547 (D.C. Cir. 2001)(citation omitted); *see also Qwest Corp. v. FCC,* 252 F.3d 462, 467 (D.C. Cir. 2001) ("We review the Commission's interpretation of its regulation under highly deferential standards, and would reverse only a clear misinterpretation"); *Trinity Broadcasting*, 211 F.3d at 625 (same).

Imposition of a forfeiture penalty requires that SBC had fair notice of what the agency expected of it. Thus, in reviewing whether the Commission properly imposed a forfeiture

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[16] *Indiana Order* (Indiana Utility Regulatory Commission, Nov. 20, 2000), 2000 WL 33180473, at 39-40 (Ameritech Indiana "must allow AT&T to use Ameritech Indiana's shared transport for intraLATA toll traffic . . . as a result of the FCC's Merger Conditions"); *Michigan Order, (*Mich. P.S.C. March 19, 2001), 2001 WL 401417, *aff'd Michigan Bell Tel. Co. v. Chappelle,* 222 F. Supp. 2d 905, 909-13 (E.D. Mich. 2002) (affirming Michigan Public Service Commission order requiring Ameritech to "make its shared transmission facilities available for routing intraLATA traffic, including traffic that would be rated as toll calling under Ameritech Michigan's tariffs"), *appeal pending, Michigan Bell Tel. Co. v. Chappelle,* No. 02-2168 (6th Cir. filed Sept. 11, 2002); *Wisconsin Order* (Pub. Service Comm. of Wisconsin, Oct. 12, 2001) at 60 ("AT&T can use the shared transport network to transport all calls to and from its End User customers, including intraLATA . . . calls"); *Ohio Order* (Public Utilities Commission of Ohio, June 21, 2001), at 17-18 ("the Commission agrees with AT&T on this issue that Ameritech must offer shared transport for intraLATA toll"); *see also Ameritech Ohio,* 2001 WL 1563354 (Ohio P.U.C., Oct. 4, 2001) at 18 (noting that the Commission had recently concluded in its arbitration case that Ameritech must offer shared transport for intraLATA toll). All of these states except Wisconsin based their rulings, at least in part, upon the merger conditions. Illinois never ruled on this issue in the proceeding cited in the *NAL,* however, because Ameritech eventually filed a tariff allowing the use of shared transport for intraLATA toll traffic there. *See Illinois Order* (Illinois Commerce Commission, July 10, 2002), at 28 (¶ 111).

against SBC for its violations of the *Merger Order,* the court must determine whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *Id*. at 628.

The Commission's determination of the forfeiture amount is reviewed under an arbitrary and capricious standard. *Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir.), *cert. denied*, 537 U.S. 815 (2002). The reviewing court is required to "'presume the validity' of the agency's action, . . . a presumption [that SBC] can overcome only by demonstrating that the forfeiture constitutes a 'clear error of judgment.'" *Id.* at 1322 (citations omitted).

SUMMARY OF ARGUMENT

The FCC's *Merger Order* was designed to remedy Ameritech's long-standing refusal to provide shared transport. It did this by establishing a merger condition that directed SBC to Texas. Specifically, SBC agreed that it would raise Ameritech up to SBC's level, by making shared transport available in the Ameritech states under the same terms and conditions that SBC had made available in Texas as of August 27, 1999. On that "snapshot" date, competitors in Texas were using SBC's shared transport offering to carry both local and intraLATA toll traffic. The plain terms of the merger condition thus obligated SBC to provide the same in the Ameritech region. But SBC did not do so, repeatedly refusing competitors' requests in all five Ameritech states. The FCC straightforwardly determined that this refusal violated the plain terms of the *Merger Order* and that SBC's actions warranted a monetary forfeiture.

That should be the end of this case. SBC, however, has raised a series of arguments asserting that the *Merger Order* required it to provide shared transport only to carry local traffic (or, at least, that it was reasonable for SBC to believe this to be the case). SBC's arguments fly

in the face of the clear, express language of not only the *Merger Order,* but also other Commission orders that make clear that SBC may not unilaterally impose such usage restrictions. SBC's interpretation of its obligations is not merely wrong, but unreasonable.

SBC argues that the merger condition is ambiguous by reason of its reference to the Texas offering. Yet it was SBC who proposed this reference, precisely in order to make its obligations as clear as possible. That reference unambiguously required SBC to replicate its Texas shared transport offering in the Ameritech region.

SBC asserts that it was not "offering" shared transport for intraLATA toll traffic in Texas within the meaning of the merger condition, even though it was contractually obligated to provide shared transport for intraLATA toll traffic to two CLECs. SBC's unduly narrow definition of "offer," which would encompass only action that it undertook voluntarily, makes no sense in the context of a merger condition specifically designed to compel the carrier to take action it had staunchly resisted in the past. If the merger condition were limited to only that which SBC did on a purely voluntary basis in Texas, then SBC's entire shared transport offering presumably would be excluded, since SBC provides shared transport only because the Communications Act compels it to do so.

SBC tries to escape the clear obligations of the *Merger Order* by arguing that those obligations were "subsumed" by the Commission's *UNE Remand Order*, issued nearly a year before they ever took effect. But the *UNE Remand* rules, too, clearly required SBC to provide shared transport for intraLATA toll traffic; those rules required that elements be unbundled to provide *any* telecommunications service, and expressly prohibited SBC from unilaterally imposing usage restrictions of the type they argue for here. In any event, the *UNE Remand Order* did not relieve SBC of its obligations under the *Merger Order.* Those obligations, by their

express terms, remain in place until a final FCC order or final non-appealable judicial decision determines that SBC is not required to provide shared transport. The *UNE Remand Order* clearly did not contravene the shared transport condition in the *Merger Order*.

SBC tries to support its interpretation by noting that the *Merger Order* and other orders make reference to local competition and unbundled local switching. But nothing in the agency's orders suggests that SBC's unbundling obligation is limited to local traffic.

SBC argues that "the parties that negotiated" the merger condition – *i.e.,* SBC's representatives – intended it to apply only to local traffic. But such extrinsic evidence is immaterial in the face of an unambiguous provision, and SBC offers no evidence establishing that the Commission shared this claimed intent. The language of the condition speaks for itself.

SBC also argues that the *Order* conflicts with the FCC's *Supplemental Order Clarification* and this court's *CompTel* opinion. But neither of those decisions had been made at the time the merger condition was imposed. The *Supplemental Order Clarification* addressed an entirely different issue (whether in certain circumstances the Commission may restrict the availability of unbundled elements to specific services, not whether it must do so). And the *CompTel* decision, which was not issued until after the *Order,* not only addressed a different issue, but expressly declined to address the question of whether the Commission can order unbundling for multiple services.

The final issue is whether the amount of the forfeiture was arbitrary and capricious. SBC does not come close to proving that it was. The forfeiture amount – which is fully consistent with the Commission's approach in other cases involving anti-competitive conduct – reasonably reflects SBC's repeated violations, the competitive impact of those violations, and the need to make the forfeiture substantial enough to serve as a deterrent given SBC's vast revenues.

ARGUMENT

I. The Merger Condition Gave SBC Fair Notice That It Was Obligated to Provide Shared Transport for IntraLATA Toll Traffic in the Ameritech Region

This case is straightforward. The *Merger Order* required SBC to offer shared transport in the Ameritech states on the same terms it offered in Texas as of August 27, 1999. On that date, SBC offered shared transport for intraLATA toll traffic in Texas. The *Merger Order* therefore required SBC to offer shared transport for intraLATA toll traffic in the Ameritech states. SBC did not do so. *Order* at ¶ 5 & n.17 (JA 12-13).

The *Merger Order* directed SBC to look to its Texas shared transport offering in order to eliminate disputes over what was required in the Ameritech states. SBC's shared transport obligation under the merger condition is thus defined by the scope of its obligations in Texas as of a date certain. To determine what that scope was, the Commission properly looked to interconnection agreements between SBC and two competitive LECs, Birch and Sage. Those agreements, which had been in effect well before the "snapshot" date of August 27, 1999, defined SBC's unbundling obligations toward those competitors – including its shared transport obligation. And the Texas PUC – the agency assigned by the 1996 Act to approve interconnection agreements and to arbitrate disputes between the parties (*see* 47 U.S.C. §§ 252(b) and (c)) – determined that the interconnection agreements with Birch and Sage required SBC to provide shared transport for intraLATA toll traffic, as well as local traffic.

The FCC noted the *Texas Arbitration Award's* holding that "[t]he use of the common transport UNE, or any other UNE, for that matter, cannot be limited in any way by the type of

traffic that passes through it." *Order* at ¶ 9 (citing *Texas Arbitration Award* at 39) (JA 15).[17] Because the Texas PUC had found that the Texas agreements offered competing carriers the ability "to use the shared transport UNE to route intraLATA toll calls end-to-end, without the restrictions that SBC sought to impose in the Ameritech states," *NAL* at ¶ 11 (JA 129), the FCC properly concluded that "the *Texas Arbitration Award* clearly stated SBC's obligation to provide shared transport for intraLATA toll calls." *Order* at ¶ 7 (JA 14). The Commission thus correctly held that the *Merger Order* condition – linked directly to and defined by the Texas offering – required SBC to offer those same terms in the Ameritech states. Because SBC indisputably did not do so in each state in the Ameritech region over a period of many months, the FCC correctly ruled that SBC repeatedly and willfully violated the merger condition.[18]

The PUC decision did not impose a new requirement on SBC that sprang into life with the *Texas Arbitration Award*, but rather constituted a conclusive interpretation of the agreements as they existed on August 27. That is, on August 27, 1999, SBC was contractually obligated to provide shared transport for intraLATA toll calls to Birch and Sage. As the FCC correctly found in the *Order,* the Texas state decisions show that SBC was providing shared transport for intraLATA toll traffic "before, during, and after" the snapshot date of August 27, 1999. *Order* at ¶ 5 n.17 (JA 13).

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[17] "UNE" means unbundled network element. The term "common transport" as used by the Texas PUC is synonymous with the term "shared transport" as used in the *Merger Order*. *Order* at ¶ 9 n.26 (JA 15).

[18] In an apparent oversight, SBC's brief does not mention the definition of the term "willful" in the Communications Act nor the FCC precedent bearing on the meaning of that term in the forfeiture context. *See* Pet. Br. at 16.

Any reasonable interpretation of the merger condition requires one to take into account the regulatory background and circumstances surrounding that condition. The *Merger Order* was intended to raise Ameritech's performance to SBC's level by requiring SBC to implement shared transport in the Ameritech states on the same terms and conditions it had implemented in Texas. *See Declaration* of *Martin E. Grambow* at ¶ 5 (JA 183); *Declaration of John T. Lenahan* at ¶¶ 9-10 (JA 195-96); *Declaration of Paul K. Mancini* at ¶ 2 (JA 205-06). As explained below, SBC's proposed interpretation of the condition fundamentally conflicts with that purpose.

II. SBC's Attempts to Create Ambiguity Do Not Excuse its Failure to Comply with the Clear Terms of the Merger Condition

The Commission in its *Order* assumed that its enforcement action is governed by the "ascertainable certainty" test set forth in *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), and *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). Indeed, the FCC began its analysis by discussing that fact. *Order* at ¶ 5 n.13 (JA 12). *See also id*. at ¶ 5 n.18 (JA 13); *NAL* at ¶ 22 n.51 (JA 134-35). SBC, however, makes only abbreviated references to those cases in its brief. And it makes *no* attempt to relate the facts of those cases to the circumstances here.

That is because this case is not like *Trinity Broadcasting* and *General Electric*. *See Order* at ¶ 5 n.18 (JA 13) (distinguishing these cases). The merger condition put SBC on explicit notice that it must replicate its Texas shared transport offering in the five former Ameritech states in order to remedy Ameritech's longstanding resistance to the general shared transport rules binding on all incumbent LECs. The merger conditions, including the shared transport condition, were critical to the FCC's ultimate approval of the SBC/Ameritech license transfers, ultimately tipping the public interest balance in the merged entity's favor. The agency made

clear its expectation that SBC would implement the merger conditions fully and in good faith, and that it planned to enforce the conditions by imposing forfeitures and other remedies. The agency has consistently interpreted the shared transport merger condition, and every state commission and court to rule on the matter has agreed with the FCC's interpretation. The Commission's decision in this case thus suffers from none of the deficiencies that led this Court to overturn agency enforcement action in *General Electric* and *Trinity Broadcasting*.[19]

SBC argues that the *Merger Order* itself was ambiguous, because nothing in the "plain language" of paragraph 56 identifies precisely what SBC was offering in Texas as of August 27, 1999. Pet. Br. at 33. SBC aims either to persuade the court that its obligations were not "ascertainably certain," or to justify introducing extrinsic evidence of SBC's subjective intent when it accepted the merger conditions. Simply having to look to the terms of SBC's Texas offering as of the snapshot date to define the scope of the *Merger Order* requirements does not, however, make the condition ambiguous. Indeed, SBC's assertion that the condition is ambiguous seems directly contrary to its representations to the FCC in proposing the condition. SBC stated repeatedly in the forfeiture proceeding that it had proposed the Texas benchmark date specifically to make the scope of its shared transport obligation *more precise*. *See* SBC

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[19] *See General Electric*, 53 F.3d 1330-34 (scope of regulation insufficiently clear to warrant a fine when, among other things, the agency's interpretation of a key term in the regulation was contrary to its ordinary meaning; the regulation was ambiguous on its face as to whether the conduct was prohibited; different divisions of the enforcing agency disagreed about the meaning of the regulation; a subsequent legislative proposal by the agency underscored the ambiguity of the existing regulation; and the agency's position "subtly shifted" throughout the case); *Trinity Broadcasting*, 211 F.3d at 628-32 (court vacated FCC's denial of license renewal where the agency presented confused theories; failed to provide a relevant definition for a key regulatory term, thus entitling the applicant to rely on the agency's prior interpretation of a nearly identical regulation; had granted the applicant's prior license applications without raising concerns; and had not sanctioned other broadcasters when a regulation lacked clarity).

Response to NAL at 4 (Ameritech representatives insisted on a provision that would "*set in stone*" the requirements of the shared-transport offer); *Grambow Declaration* ¶ 6 (JA 183-84) ("commitment to 'offer' in Ameritech what was being 'offer[ed]' in Texas was intended to *create certainty*") (JA 146); *Lenahan Declaration* ¶ 13 (JA 199) ("Ameritech insisted upon locking-in the precise nature of the commitment . . . Paragraph 56 accordingly contained a 'snapshot date'"); *Mancini Declaration* ¶ 11 (JA 210) ("critical aspect of the drafting of paragraph 56 was the effort to *ensure certainty* in the parameters of the obligation.") (emphasis added). The fact that SBC now disagrees with the FCC (and the Texas PUC) about the scope of the Texas offering does not make the condition ambiguous. *See Bennett Enterprises, Inc. v. Domino's Pizza*, 45 F.3d 493, 497 (D.C. Cir 1995) (contract not ambiguous merely because parties later disagree on its meaning).

SBC also advances a number of other arguments for its belief that its shared transport obligation under the *Merger Order* was unclear. We address each of its arguments.

A. The Shared Transport Obligations in the *Merger Order* Include a Duty to Offer Shared Transport for IntraLATA Toll Traffic

The *Merger Order* defined SBC's obligations by reference to its August 27, 1999, shared transport offering in Texas, which included shared transport for intraLATA toll traffic. SBC nevertheless asserts that its obligations were limited to providing shared transport to transmit only local telephone calls, either because the *Merger Order* implies this or because that was the parties' intent. But SBC has no reasonable basis for such a reading of the conditions.

Starting with the premise that local and intraLATA toll services are wholly separate and distinct services and markets, SBC contends that the *Merger Order* (as well as the Commission's more general unbundled element rules, see below) should be read as addressing only the local

services market. But SBC's basic premise is incorrect. Local exchange service and intraLATA toll service (sometimes known as "local toll") are not entirely unrelated services and markets. First, the Commission stated in the *Order* that "intraLATA toll traffic does affect local competition." *Order* at ¶ 15 (JA 18-19). That view should have come as no surprise to SBC/Ameritech – the Commission had expressly addressed this relationship two years before the *Merger Order* in its 1997 order denying Ameritech's section 271 application for Michigan. The Commission stated there that Ameritech's actions with respect to intraLATA toll service "may threaten a competing LEC's ability to compete effectively *in the local market* and thus may be inconsistent with the procompetitive goals of the 1996 Act." *Michigan 271 Order,* 12 FCC Rcd at 20738-40, (¶¶ 77-78) (quoted at *Order* at ¶ 15 n.47) (JA 19) (emphasis in *Order*).

From the beginning of the use of the LATA concept, intraLATA toll service went hand-in-hand with local exchange service – not with interLATA toll service. Under both the *Modification of Final Judgment* and the 1996 Act superseding that judgment, the Bell Operating Companies were permitted to provide both local exchange and intraLATA toll service; only interLATA service was forbidden to them. 552 F. Supp. at 131; 47 U.S.C. § 271. This Court, too, has observed that "[i]nterLATA service refers to what consumers know as long-distance service; intraLATA to what they know as local service (although some intraLATA calls may be 'toll' calls, depending upon classifications made by the state regulatory bodies)." *SBC Communications,* 138 F.3d at 412 n.1 (*citing M. Kellogg et. al*., Federal Communications Law 227-34 (1992)).

Despite this history, SBC argues that the language of the *Merger Order* limits the shared transport obligation to local exchange service because "the language of the merger condition itself makes no reference" to an intraLATA toll requirement. Pet. Br. at 2. But, of course, it

does – as explained in detail above, the reference to SBC's Texas offering as of the snapshot date unambiguously incorporated that offering in its entirety, including the fact that it extended to the transport of intraLATA toll traffic.

SBC points to the unremarkable fact that shared transport, as a practical matter, is provided in conjunction with "unbundled local switching," and asserts that this implies that the shared transport obligation is necessarily limited to local exchange traffic. Pet. Br. at 29-31. Shared transport is provided in conjunction with unbundled local switching, but a "local switch" does not switch only local traffic. As the Commission stated in the *Order*, the word "local" in the term "local switching," is "descriptive of the physical switching facility itself and not the services for which a carrier may use the switch." *Order* at ¶ 15 n.46 (JA 18-19). A local switch is simply one that has both line and trunk side connections, as compared with a tandem switch, which connects one trunk to another. Harry Newton, *Newton's Telecom Dictionary*, 18th ed., at 438, 722.[20] A local switch takes traffic coming from an end user's home telephone equipment via the local loop, and switches it onto trunks into the rest of the telephone network, and vice versa. All traffic to and from the customer – whether local or toll, intrastate, interstate or international goes through this switch. There is no separate intraLATA toll switch.

Similarly, the "unbundled local switching" element is defined in the *UNE Remand Order* and the *Local Competition Order* not in terms of the type of traffic that is to be switched, but in terms of "the basic function of connecting lines and trunks." *Local Competition Order,* 11 FCC Rcd at 15705 (¶¶ 410); *UNE Remand Order,* 15 FCC Rcd at 3805 (¶ 244) (adopting the same

[20] A line side connection is a local loop, connecting the customer premise to the network. *Newton's Telecom Dictionary* at 431. A trunk side connection is a connection within the network. *Id.* at 768.

definition). A "local switch" is no more limited to the transmission of local traffic than is a "local loop."

Commission rules outside the section 251 context also make clear that "local switching" refers to facilities that switch not only local, but also long distance traffic. For example, since 1987 the Commission has had a rule titled "local switching," 47 C.F.R. § 69.106, that governs how local exchange carriers (such as SBC) charge interexchange carriers (such as AT&T and Sprint) for interstate access services, *i.e.*, "the use of local telephone company facilities to originate and terminate *long distance* calls." *See Access Charge Reform,* 11 FCC Rcd 21354, 21358 n.5 (1996) (emphasis added). "Local" switching thus relates not only to local but also to interexchange calls. The fact that shared transport is used with unbundled local switching does not imply that only local traffic may be transported.

SBC also argues that a reference to a Michigan Public Service Commission decision in a footnote in the *Merger Order* implies a limitation to local traffic. Pet. Br. at 31. SBC both misreads the Michigan decision and exaggerates its importance in the *Order*. The *Michigan Cost Order* does not hold that the shared transport obligation is limited to local service. That order rejected a proposal by AT&T and MCI to require expressly that shared transport be offered for both local and long-distance calling, but it did so only as a procedural matter, not as a substantive determination.[21] Indeed, as SBC is aware, when the Michigan PSC did address shared transport for intraLATA toll as a substantive matter, it found that Ameritech was obligated to permit

[21] At the outset of the order, the Michigan PSC recognized that many of the parties' comments and proposals were outside the scope of the proceeding. The AT&T and MCI proposal was one such extraneous proposal, and the PSC decided not to consider it at that stage of the proceeding. It directed Ameritech to comply with the terms of an earlier order addressing shared transport. *Michigan Cost Study Order*, 183 P.U.R. 4th 1, 12 (1998).

competing LECs to use shared transport to route intraLATA toll traffic. The Michigan PSC relied on both the *Merger Order* and the FCC's *UNE Remand* rules in making this finding.[22] SBC could not reasonably conclude, on the basis of the Commission's brief reference to this Michigan order, either that it was not required to provide shared transport for intraLATA toll or that its obligation to do so was unclear.

SBC next tries to limit the merger condition to local traffic by invoking the purported "intent of the parties that negotiated the merger conditions." Pet. Br. at 29. As support, SBC points to affidavits from a number of SBC employees and a former member of the law firm of Kellogg, Huber, Hansen, Todd & Evans (now an employee of the Department of Justice), each of whom represented SBC during the merger proceedings at the FCC. In the *Order,* however, the Commission properly relied on the *Merger Order* to speak for itself, and correctly concluded that SBC's affidavits could not "serve to contradict the plain language of the merger condition." *Order* at ¶ 12 n.30 (JA 16).

As noted above, SBC itself proposed the Texas benchmark to "'pin down' the precise nature of the [shared transport] obligations." *Declaration of Martin E. Grambow* at ¶ 6 (JA 183). *See also* Pet. Brief at 11. In a reversal, SBC now argues that the Texas benchmark itself is unclear, choosing to rely on one-sided extrinsic evidence rather than the plain language of the

[22] *Michigan Order* (Mich. P.S.C. March 19, 2001), 2001 WL 401417. The Michigan PSC's decision was upheld by the United States District Court for the Eastern District of Michigan, *Michigan Bell Tel. Co. v. Chappelle,* 222 F. Supp. 2d 905 (2002), and SBC has appealed that decision to the Sixth Circuit, *Michigan Bell Tel. Co. v. Chappelle,* No. 02-2168 (6th Cir. filed Sept. 11, 2002).

Merger Order to determine its obligations. Because the *Merger Order* is clear, however, there is no reason even to consider the affidavits.[23]

But even if the affidavits were relevant in this context – and they are not – they do not advance SBC's position. SBC claims that the affidavits show the "intent of the parties," but SBC cites no evidence whatsoever that the *Commission* intended to limit the shared transport obligation under the merger condition to local traffic. And the affidavits demonstrate only that SBC never expressly discussed the issue of intraLATA toll traffic with Commission staff.[24] The affidavits provide no good faith basis for reading the *Merger Order* contrary to its plain terms.

The *Merger Order* does not limit SBC's obligation to provide shared transport for intraLATA toll traffic. Indeed, as noted below, the Commission's rules in effect at the time of the *Merger Order* explicitly prohibited carriers unilaterally from imposing such a service limitation on the use of UNEs. In these circumstances, SBC had no reasonable grounds to conclude that the merger condition permitted it to limit its shared transport offering in the Ameritech region to something less than it offered in Texas.

Finally, pointing out that its obligation under the merger condition is to offer shared transport in the Ameritech states under terms and conditions like those SBC "offers" in Texas as of the snapshot date, SBC insists that it was not "offering" shared transport for intraLATA toll traffic there on August 27, 1999. SBC argues that making an "offer" is a voluntary step, and that

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[23] By analogy to contract law, where the document is clear on its face, courts do not look to extrinsic evidence of intent to guide their interpretation. *See, e.g., Amerada Hess Pipeline Corp. v. FERC,* 117 F.3d 596, 604 (D.C. Cir. 1997); *Papago Tribal Util. Auth. v. FERC,* 723 F.2d 950, 955 (D.C. Cir. 1983).

[24] *See Mancini Declaration* at ¶¶ 3, 7 (JA 206, 208)("[a]t no time during the merger condition discussions and negotiations was the existence or implications of the Texas PUC proceeding ever discussed").

SBC provided shared transport for intraLATA toll calls only under legal compulsion. SBC plucks a single definition of "offer" from one dictionary to argue that the term implies a degree of "volition" that is "entirely absent from the shared transport services SBC provided in Texas." Pet. Br. at 34.

SBC's semantic argument fails at several levels. First, other definitions of "offer" do not imply voluntariness. *Webster's New International Dictionary* (1933), for example, defines the word "offer" as "to hold out; tender & proffer." *Id*. at 1493. "Holding out" is descriptive of the activity that makes one a common carrier (such as SBC). And this Court has recognized that a "holding out" may occur either as a result of "regulatory compulsion" or as a voluntary act. *National Ass'n of Reg. Util. Comm'n v. FCC*, 525 F.2d 630, 643 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). SBC thus may "hold out" or "offer" a service either voluntarily or as a result of regulatory compulsion, and its action is no less an "offer" when it is compelled.[25]

More importantly, SBC's argument conflicts with the context of the *Merger Order* by depriving the shared transport condition of any meaning at all. SBC and other incumbent LECs provide access to unbundled elements – including shared transport – because the Communications Act and the FCC implementing rules require them to so. 47 U.S.C. §§ 251(c)(3), (d)(2). All UNE offerings to competitors are made under regulatory compulsion. SBC's unreasonable interpretation of "offer" would require the absurd finding that SBC did not

[25] Dictionary definitions aside, this Court recently observed that "it is crucial to understand the context in which [a] word is used in order to comprehend its meaning." *Cellular & Telecommunications Ass'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003). As explained in the next paragraph, SBC's reading of the term "offer" contradicts "the context in which [it] is used" in the *Merger Order*.

"offer" shared transport in any form in Texas (or any UNE, for that matter) because it did not provide that element voluntarily.

B. The Shared Transport Condition Was Not Affected by the Commission's *UNE Remand Order*

The paragraph 56 *Merger Order* obligation is "subject to . . . the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport." The Commission properly found in the *Order* that this language "can only mean that the shared transport obligation of paragraph 56 will remain in place until the merger condition sunset date, unless the terms of another order directly contravene it." *Order* at ¶ 19 (JA 20).

SBC argues that its obligations under the *Merger Order* were "subsume[d]" by the *UNE Remand Order,* and that the general rules adopted in that order did not require SBC to provide shared transport for intraLATA toll traffic. Pet. Br. at 20-21, 27-29. This argument is unavailing for several reasons.

Most importantly, the *UNE Remand* rules, like the merger condition, clearly required SBC to permit carriers who purchased shared transport to carry their local traffic to use the element to carry their intraLATA toll traffic as well. *Order* at ¶¶ 14, 18 (JA 17, 19). The *UNE Remand* rules required incumbent LECs to make available shared transport on an unbundled basis. Absolutely nothing in those rules suggested that a competing carrier that has purchased shared transport for local service could not also use it to provide other services. Indeed, in the *Shared Transport Order,* when describing the original shared transport requirement (which was readopted in the *UNE Remand Order*, 15 FCC Rcd at 3862-66 (¶¶ 369-79)) the Commission expressly stated that "if a requesting carrier purchases access to a network element in order to provide local exchange service, the carrier may also use that element to provide exchange access

and interexchange services." 12 FCC Rcd 12460, 12483-84 (¶ 39) (1997), (citing *Local Competition Order*, 11 FCC Rcd at 15679, (¶ 356)). Similarly, the Commission noted in its order ruling on SBC's application to provide long distance service in Arkansas and Missouri that "a competing LEC might use a combination of network elements that includes transport" for access and *intraLATA toll traffic in addition to local traffic*." *Arkansas/Missouri 271 Order,* 16 FCC Rcd 20719, 20747 (¶ 57 n.160) (2001) (emphasis added).

The *UNE Remand* rules defined the shared transport network element as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(iii). This definition makes no reference to and imposes no limitation on the type of traffic to be transported over the facilities. *Order* at ¶ 14 (JA 17).

The *UNE Remand* rules themselves required that the shared transport element be made available on an unbundled basis, again with no reference to the specific type of service the requesting carrier is providing (emphasis added):

> "[a]n incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of *a telecommunications service,* nondiscriminatory access to network elements on an unbundled basis. . . . " 47 C.F.R. § 51.307(a).
>
> "[a]n incumbent LEC shall provide nondiscriminatory access . . . to interoffice transmission facilities [including shared transport] on an unbundled basis to any requesting telecommunications carrier for the provision of *a telecommunications service.*" 47 C.F.R. § 51.307(d).
>
> "[a]n incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element . . . in a manner that allows the requesting telecommunications carrier to provide *any telecommunications service* that can be offered by means of that network element." 47 C.F.R. § 51.307(c).

Moreover, the *UNE Remand* rules expressly prohibited ILECs from unilaterally imposing use restrictions, providing that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a); *see Order* at ¶ 14 (JA 17). In originally adopting this rule in 1996, the Commission stated that "incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements." *Local Competition Order,* 11 FCC Rcd at 15646 (¶ 292).

SBC nevertheless asserts that it reasonably read the Commission's rules as permitting it unilaterally to restrict the types of telecommunications services that carriers could offer through use of the shared transport element. SBC urges the court to accept that it was reasonable for SBC effectively to revise the Commission's rules, replacing the terms "a telecommunications service" and "any telecommunications service that can be offered by means of that network element" with "local exchange service." And SBC would apparently have the court accept that it was reasonable for SBC to ignore the ban on unilaterally imposed use restrictions set forth in Rule 51.309(a).

SBC notes that the rules requiring unbundling of network elements for the provision of "a telecommunications service" or "any telecommunications service" do not specifically state that this includes intraLATA toll service. But intraLATA toll indisputably is a telecommunications service, and nothing in law or logic would require the FCC to list each service instead of or in addition to the "any telecommunications service" language. SBC's reading, far from reasonable, directly clashes with the language of the network element rules, and SBC's attempt to find an absence of "ascertainable certainty" in the rules has no reasonable basis.[26]

But in any event, the *UNE Remand* rules are not the relevant standard here – the merger condition remains fully in effect, and was not "subsumed" by the *UNE Remand Order*. First, SBC's reading conflicts with the express language of the *Merger Order*. As the Commission noted in the *Order* at ¶ 19 (JA 20), the paragraph 56 merger condition contains a specific sunset date:

> SBC/Ameritech shall continue to make this offer, at a minimum, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area.

Merger Order, 14 FCC Rcd at 15024(¶ 56). As the Commission explained, this condition "obligates Ameritech to provide shared transport until a final order of the Commission or a final

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[26] SBC's claim that the *UNE Remand* rules did not require it to offer shared transport for intraLATA toll traffic is inconsistent with its defense to a related administrative complaint. There, SBC argued that it *did* provide shared transport for intraLATA toll traffic in Missouri, Kansas, Oklahoma, Arkansas, and Texas. The Commission so held, and denied the complaint against SBC as to these states. *See CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc.,* 18 FCC Rcd 7568, 7579 (¶ 27) (2003). SBC does not explain why it provided shared transport for intraLATA toll services in those states if it believed the FCC's rules did not require it to do so.

non-appealable judicial decision determines that SBC/Ameritech is not required to provide shared transport." *Id.* at 14876-77 (¶ 396). Neither the *UNE Remand Order* nor any judicial decision relieved incumbent LECs of the obligation to provide shared transport during the relevant period. To the contrary, the *UNE Remand Order* again required that network element to be unbundled. *UNE Remand Order*, 15 FCC Rcd at 3862 (¶ 369). By the express terms of the condition, therefore, SBC's specific shared transport obligation remained in effect and binding on the company.[27]

Moreover, SBC's interpretation of the *Merger Order* makes little sense. SBC was given until 12 months after the merger closing date, *i.e.,* until at least October 8, 2000, to comply with the paragraph 56 shared transport condition. The *UNE Remand Order* was adopted on September 15, 1999, and released on November 5. It would have made little sense for the Commission to impose a condition that would terminate long before it ever took effect. *See also NAL* at ¶ 17 (JA 132-33).

SBC nonetheless cites two cases for the proposition that the phrase "subject to" means "subordinated to" or "limited by," and contends that the *Merger Order* obligations ceased to apply upon issuance of the *UNE Remand Order*. *See* Pet. Br. at 27. In those cases, the court found that where the rights of two parties directly conflicted, the party whose rights were "subject to" the rights of the other would lose. *Kallman v. Radioshack Corp.,* 315 F.3d 731, 736 (7th Cir. 2002); *Mafrige v. United States,* 893 F. Supp. 691, 701 (S.D. Tex. 1995). They shed no

[27] SBC asserts that parties commenting on the condition during the course of the merger proceeding understood SBC's obligations to be limited by the *UNE Remand Order*. Pet. Br. at 26. The parties SBC refers to, however, opposed approval of the merger, and therefore attacked the proposed conditions as insufficient to change the public interest balance to justify the merger. Their self-interested comments in this context shed no light on the meaning of the merger condition.

light on this situation, where the precise terms of the merger condition indicate that it remains in effect unless and until the FCC issues an order terminating the obligation to unbundled shared transport.

C. The Merger Condition is Consistent with FCC Precedent and This Court's *CompTel* Decision

In a further attempt to cloud the issue, SBC asserts that the *Order* is contrary to the FCC's *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), and this Court's subsequently issued *CompTel* opinion, *Competitive Telecommunications Ass'n v. FCC,* 309 F.3d 8 (D.C. Cir. 2002). Pet. Br. at 20-24. In fact, it is consistent with both.

With its arguments, SBC indirectly challenges the merger condition itself. According to SBC, the Commission "for the first time" disclaimed an "all-or-nothing" approach to the unbundling of network elements in the *Supplemental Order Clarification*, and the *Order* is inconsistent with that approach. Pet. Br. at 22. SBC, however, does not acknowledge that the Commission issued the *Supplemental Order Clarification after* it had adopted and released the *Merger Order*. Its arguments based upon the subsequent order are unavailing, because SBC agreed to be bound by the shared transport merger condition until the Commission expressly released the company from its shared transport obligation. Whatever else the *Supplemental Order Clarification* did, it did not supersede the shared transport merger condition. Neither the *Supplemental Order Clarification* nor the *CompTel* decision satisfies the merger condition's requirements for terminating the shared transport obligation. Even assuming SBC's interpretation of the *Supplemental Order Clarification* was correct – and it is not, for reasons we discuss below – there would be no reason to set aside the *Order* because SBC agreed to comply

with the shared transport merger condition before the *Supplemental Order Clarification* was issued.

In the *Supplemental Order Clarification,* the Commission found that it was not compelled automatically to grant access to a unique combination of network elements known as an enhanced extended link when that combination is used "solely or primarily" outside the local exchange market. *Supplemental Order Clarification,* 15 FCC Rcd at 9595 (¶ 15).[28] The implication of that order, as SBC sees it, is that because the Commission apparently believed that it *could* have chosen to limit the shared transport obligation to local traffic, it was required to consider such a limitation in this forfeiture proceeding. The fact that the Commission did not do so does not create a conflict between the *Order* and the *Supplemental Order Clarification*. *See Order* at ¶ 14 n.44 (JA 17-18).

The fundamental policy concern addressed in the *Supplemental Order Clarification* – the use of unbundled network elements "solely or primarily" outside the local exchange market – is not present in these circumstances. *See Supplemental Order Clarification,* 15 FCC Rcd at 9594-95 (¶¶ 2, 14, 15). As was clear from the beginning of the Commission's investigation in this case, however, the *Order* addressed a situation where competing carriers were seeking to use the shared transport network element to provide a package of services to their customers, including both local and local toll services. *See Letter of Inquiry*, attachment at 4 (JA 79 n.2, 73-74)("the only restrictions on the use of unbundled network elements suggested by this Commission were designed to prevent carriers from using UNEs to bypass access charges where the carrier was not providing some level of local service to the customer. . . . That is not the case here because

[28] Enhanced extended links, or EELs, are a combination of unbundled loop and transport network elements. *See Supplemental Order Clarification,* 15 FCC Rcd at 9588 (¶ 2).

CoreComm will be providing a package of local and toll services to the customer over the UNE platform facilities"). The *Supplemental Order Clarification,* therefore, was concerned with an entirely different factual situation from that presented in this dispute.

Nor does the *Order* conflict with this Court's *CompTel* decision affirming the *Supplemental Order Clarification* – which was issued approximately two weeks after the FCC assessed the forfeiture against SBC. Initially we note that SBC's reliance on the *CompTel* case is barred by section 405 of the Communications Act. Although SBC raised the *CompTel* decision in its Petition for Reconsideration of the *Order* before the FCC, it withdrew that petition before the Commission had the opportunity to rule on it. Having thus elected to remove this issue from the Commission's consideration and deny the agency an opportunity to address the *CompTel* decision, SBC should not be permitted to raise it here. 47 U.S.C. § 405(a). *See AT&T Corp. v. FCC,* 317 F.3d 227, 235-36 (D.C. Cir. 2003); *Bartholdi Cable Co. v. FCC,* 114 F.3d 274, 279-80 (D.C. Cir. 1997).

In any event, the *Order* does not conflict with *CompTel*.[29] *CompTel* addresses whether the 1996 Act allows the Commission to impose a use restriction in certain circumstances, not whether the statute *compels* the FCC to do so. The court declined to decide whether the statute requires impairment findings to be made on a service-by-service basis. *CompTel*, 309 F.3d at 312. Unlike the situation in *CompTel*, the Commission did not impose restrictions on the use of the shared transport element. Thus, as virtually every state commission and court has concluded, SBC was obligated to permit carriers purchasing the shared transport element to provide local

[29] Commission counsel recognize that this is *post hoc* argument of counsel. But that is the only kind of argument that is available when the agency itself has not had an opportunity to address an issue.

service also to use it to route intraLATA toll traffic. SBC's unilateral decision to impose its own restriction is contrary to law. [30]

III. The Forfeiture Amount Is Reasonable and Appropriate

The court reviews the Commission's determination of the forfeiture amount under an arbitrary and capricious standard. *Grid Radio v. FCC*, 278 F.3d at 1322. Under that deferential standard, the court is required to "'presume the validity' of the agency's action, . . . a presumption [that SBC] can overcome only by demonstrating that the forfeiture constitutes a 'clear error of judgment.'" *Id*. (citations omitted). The Commission's decision easily passes this test.

First – contrary to SBC's repeated suggestion – the forfeiture is fully consistent with recent FCC enforcement actions in other major cases.[31] Moreover, the $6 million forfeiture is appropriate given the serious and widespread nature of the violations. Critically, competitors had to litigate in state after state to enforce their shared transport rights in the Ameritech region – precisely the result the FCC had tried to avoid by imposing the shared transport condition. *See Order* at ¶ 24 (JA 22). Taking into account the factors set out in 47 U.S.C. § 503(b)(2)(D) – SBC's repeated and continued violations of the merger condition in five states, the competitive

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[30] Whatever the statute and case law may require of the FCC when it identifies unbundled network elements through rulemaking under section 251, that is not determinative here. Regulated carriers such as SBC, when seeking FCC approval of license transfers, are free to propose additional measures and conditions that do not coincide with existing statutory and regulatory requirements in order to address public interest harms. And when the FCC conditions approval of the transfers on those proposals, the carrier is bound by them.

[31] *See*, *e.g.*, *Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278 (released Nov. 7, 2003), 2003 WL 22518057 ($12 million damages award); *Verizon Telephone Cos.*, 18 FCC Rcd 3492 (2003) ($5.7 million consent decree); *CCN, Inc*., 13 FCC Rcd 13599 (1998) ($5.7 million forfeiture and revocation of operating authority); *One Call Communications, Inc*., 17 FCC Rcd 18646 (2002) ($5.1 million proposed forfeiture); *Fax.com, Inc.*, 17 FCC Rcd 15927 (2002) ($5.4 million proposed forfeiture).

impact of the company's violations, and SBC's ability to pay – the Commission properly concluded that the statutory maximum forfeiture of $6 million was appropriate. As the FCC explained, a lesser amount would provide little deterrent effect and could be considered merely as a "cost of doing business" for a company of SBC's vast resources. *Order* at ¶ 24 (JA 22).

SBC suggests that the Commission erred in finding five separate violations since "the order is predicted on SBC's single, regionwide determination that it was not required to provide shared transport." Pet. Br. at 36. SBC's approach to defining what constitutes multiple violations would lead to absurd results. For example, under SBC's theory, if the company decided at the highest management levels to ignore entirely the FCC's requirements regarding the new National Do-Not-Call Registry and thereafter unlawfully call millions of consumers on that list, it would have committed only a single violation subject to forfeiture. Similarly, if SBC made a corporate decision to flout its statutory obligation to negotiate in good faith the terms of unbundled access with dozens of competitors throughout its multi-state region (*see* 47 U.S.C. § 251(c)(1)), it would have committed but one violation subject to forfeiture. And under SBC's "skewed" reading, having once refused to make shared transport available on the required terms, SBC "could continue to refuse all requests with impunity and suffer no further consequences." *Order* at ¶ 26 (JA 23). The FCC properly rejected this flawed interpretation, and this Court should as well. The Commission reasonably found five separate, continuing violations of the merger condition due to SBC's refusal to provide shared transport on the required terms to competitors in Indiana, Illinois, Michigan, Ohio, and Wisconsin over a period of many months.

SBC also insists that its violations had no competitive impact. To the contrary, the Commission properly found that, by litigating this issue in state after state, SBC forced its competitors to expend significant time and resources in state proceedings "trying to obtain what

SBC was already obligated to provide." *Id*. at 19935 (¶ 24). SBC's brief does not refute – or even acknowledge – this express holding regarding harm to competitors. This conduct forced the competitors' traffic off SBC's network for no apparent productive reason, inevitably causing delays in the availability of shared transport.[32]

Moreover, the Commission noted the connection between intraLATA toll traffic and local competition. *Order* at ¶ 15 (JA 18-19). The FCC also emphasized its longstanding concerns – expressed directly to Ameritech in 1997 – regarding the potential threat to local competition posed by that company's alleged refusal to provide intraLATA toll service to CLEC customers. *Id*. at ¶ 15 n.47 (JA 19) (citing *Michigan 271 Order*, 12 FCC Rcd at 20738-40 (¶¶ 377-378)). And the agency properly rejected SBC's argument that the company had substantially complied with the merger condition. As the FCC noted, the fact that SBC "chose to refuse to offer only a subset of shared transport does not render its violation insubstantial," and its failure to offer shared transport for intraLATA toll traffic was "anti-competitive" and "significant" for those competitors seeking to provide such service. *Id*. at ¶ 20 (JA 20). For all these reasons, the Commission's decision to impose a $6 million forfeiture for SBC's willful and repeated violations was reasonable and appropriate.

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[32] *Cf. AT&T Corp*., 525 U.S. at 393-95 (upholding FCC rule preventing incumbents from disconnecting previously connected network elements "not for any productive reason, but just to impose wasteful reconnection costs on new entrants"). *See also Texas Arbitration Award* at 9-10 (JA 34-35) (SBC's proposal to reroute intraLATA toll traffic would increase the probability of network failure or performance degradation).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and affirm the *Order*.

Respectfully submitted,

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November 20, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SBC COMMUNICATIONS, Inc.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 03-1118
	)	
RESPONDENTS.	)	
	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13915 words.

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January 9, 2004

FORFEITURE ORDER CHRONOLOGY

August 8, 1996	FCC first orders unbundling of shared transport for all incumbent local exchange carriers "for not only telephone exchange services and exchange access services, but also for toll services." *Local Competition Order*, 11 FCC Rcd at 15681 (¶ 361).
April 15 & 16, 1999	Birch and Sage file complaints in Texas concerning SBC's shared transport obligations under their interconnection agreements.
October 8, 1999	FCC releases *Merger Order* requiring SBC to offer shared transport in the Ameritech states that is "substantially similar to (or more favorable than)" what SBC offers in Texas as of August 27, 1999. *Merger Order*, 14 FCC Rcd at 15023-24 (¶ 56).
November 4, 1999	*Texas Arbitration Award* confirms SBC is contractually obligated to provide shared transport for intraLATA toll; order relates to interconnection agreements that were in effect on *Merger Order's* "snapshot" date (approved by Texas PUC on December 1, 1999).
November 5, 1999	FCC releases *UNE Remand Order.*
June 2, 2000	FCC releases *Supplemental Clarification Order.*
April 12, 2001	FCC opens investigation with letter of inquiry to SBC, after having received letter from Core about SBC's shared transport offering in the Ameritech states.
January 18, 2002	FCC issues *Notice of Apparent Liability* proposing a $6 million forfeiture, gives SBC 30 days to respond.
October 9, 2002	FCC imposes $6 million forfeiture, finding that SBC violated the merger condition by refusing to provide shared transport for intraLATA toll in the Ameritech states, despite the fact that it was providing such transport in Texas "before, during, and after August 27, 1999." *Forfeiture Order,* 17 FCC Rcd at 19925 (¶ 5, n.17).
October 25, 2002	D.C. Circuit issues decision in *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).
November 8, 2002	SBC files petition for reconsideration of *Forfeiture Order.*
April 24, 2003	SBC withdraws petition for reconsideration, pays the forfeiture the next day.
April 28, 2003	SBC files its petition for review in this case.