ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2005

BRIEF FOR RESPONDENTS

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

NO. 03-1147

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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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
Competitive LEC or CLEC	competitive local exchange carrier
Core	CoreComm Communications, Inc.
FCC or Commission	Federal Communications Commission
Incumbent LEC or ILEC	incumbent local exchange carrier
LATA	local access and transport area
NAL	notice of apparent liability
UNE	unbundled network element
Z-Tel	Z-Tel Communications, Inc.

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Federal Communications Commission ("Commission") released the order on review on April 17, 2003. *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc., et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568 (2003) ("*Complaint Order*") (JA 7). SBC Communications, Inc. ("SBC") filed its petition for review on May 23, 2003. The Court's jurisdiction rests on 28 U.S.C. § 2342(l) and 47 U.S.C. § 402(a).

STATEMENT OF ISSUES PRESENTED

As a condition for approving SBC's 1999 merger with Ameritech Corp. ("Ameritech"), the Commission ordered SBC to offer access to the "shared transport" element of its telephone network to competitors in five Midwestern states. SBC in those states, however, repeatedly refused to honor competitors' requests to use that network element to route intraLATA toll traffic.[1] In October 2002, the Commission assessed a $6 million forfeiture against SBC for separate violations of the merger condition in each of the five states. *See SBC Communications, Inc.,* Forfeiture Order, 17 FCC Rcd 19923 (2002) ("*Forfeiture Order")*.[2] This Court affirmed, rejecting SBC's various challenges to the Commission's enforcement action. *SBC Communications, Inc. v. FCC*, 373 F.3d 140 (D.C. Cir. 2004) (*SBC I*).

While SBC's challenge to the forfeiture was pending in this Court, the Commission in April 2003 adjudicated a complaint lodged against SBC by certain competitors under 47 U.S.C. § 208. Following the ruling set forth in its *Forfeiture Order*, the Commission unanimously held that SBC had violated the same merger condition, in the same five states, on the basis of the same conduct – that is, by repeatedly refusing competitors' requests to use the shared transport network element to carry intraLATA toll traffic. SBC now petitions for review of that decision.

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[1] "IntraLATA toll" service refers to calls that originate and terminate within a single local access and transport area, or "LATA." The antitrust decree governing AT&T's divestiture of its Bell Operating Companies ("BOCs") introduced the LATA concept and permitted the divested BOCs such as SBC to provide only intraLATA services. *U.S. v. American Tel. and Tel. Co*., 552 F. Supp. 131, 141 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

[2] *See also SBC Communications, Inc*., Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002) ("*NAL*") (order in which the Commission first proposed the $6 million forfeiture).

This case presents the following issues for the Court:

(1) Does SBC have standing to challenge the *Complaint Order*?

(2) Does the judgment in *SBC I* preclude SBC in this case from relitigating whether the Commission lawfully held the company liable for violating the merger condition?

(3) If issue preclusion does not bar SBC's arguments, did the Commission reasonably determine that SBC had violated the merger condition?

STATUTES AND REGULATIONS

Pertinent statutes and regulations that are not reproduced in petitioner's brief are attached at Addendum A to this brief.

COUNTERSTATEMENT

Much of the regulatory and procedural background relevant to the present dispute is set out in *SBC I*. *See* 373 F.3d at 142-47. Accordingly, we highlight only the most salient background facts and describe the history and holding of the *Complaint Order* on review.

I. BACKGROUND

A. Statutory Framework

Transfer of Control of Lines and Licenses. The Communications Act of 1934, as amended ("Act"), requires merging telephone carriers to seek Commission approval to transfer control of lines and licenses, which the agency may grant only if it determines that the proposed transfer serves the public interest. 47 U.S.C. §§ 214(a), 310(d). The Act authorizes the Commission to attach conditions to any such approval to ensure that the transaction serves the public interest. 47 U.S.C. §§ 214(c), 303(r). The merged entity has a "duty" to comply with the terms of the Commission's order approving the transfer, including any conditions. 47 U.S.C. § 416(c).

Unjust and Unreasonable Carrier Practices. The Act also requires that a common carrier's rates and practices be just and reasonable and declares "unlawful" any rate or practice found by the Commission to be unjust and unreasonable. 47 U.S.C. § 201(b).

Complaints Against Common Carriers. The Commission is required to adjudicate complaints filed by "[a]ny person" alleging that a common carrier has violated the Communications Act. 47 U.S.C. § 208(a). The Act directs the Commission to adjudicate such complaints "in such manner and by such means as it shall deem proper," *id*., and authorizes the agency to award damages, 47 U.S.C. § 209.

Unbundling of Network Elements. To spur competition in local telephone markets, Congress amended the statute in 1996 to require an incumbent local exchange carrier ("incumbent LEC" or "ILEC") such as SBC to lease to requesting competitors, at cost-based rates, certain "network elements" specified by the Commission. 47 U.S.C. §§ 251(c)(3), (d)(1), (d)(2), 252(d)(1). Terms and conditions of this obligation – called "unbundling" – are set forth in an "interconnection agreement" and may be negotiated between the parties or, when the parties cannot agree, prescribed by a state public utility commission through compulsory arbitration. 47 U.S.C. §§ 252(a), (b). Those terms and conditions negotiated by the parties may deviate from the statutory standards, 47 U.S.C. § 252(a)(1), but those established through binding arbitration must meet the requirements of section 251(c) and the Commission's rules, 47 U.S.C. § 252(c). The parties must submit any interconnection agreement to the state commission for approval, 47 U.S.C. § 252(e), and the incumbent LEC must make network elements that it provides under a state-approved agreement available to other competitors on an "opt-in" basis, 47 U.S.C. § 252(i).

B. The Commission's *Merger Order*

In 1998, when SBC sought to acquire Ameritech, the two companies applied for FCC approval under sections 214(a) and 310(d) of the Communications Act to transfer certificates and radio licenses from Ameritech to SBC. Although the Commission found that the merger as proposed would have anticompetitive effects that were not outweighed by its benefits, the Commission ultimately approved the transfers because SBC agreed to adhere to a set of "significant and enforceable" conditions designed to mitigate those anticompetitive effects. *Merger Order*, 14 FCC Rcd 14712, 14716 (¶ ¶ 2-3) (1999), *vacated in part on other grounds*, *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). Those conditions were critical to the Commission's approval. They "change[d] the public interest balance" and ultimately persuaded the Commission to conclude that the transaction would serve the public interest, convenience, and necessity, "assuming the Applicants' ongoing compliance with the conditions." *Merger Order*, 14 FCC Rcd at 14717 (¶ 4). The Commission committed to enforce those conditions through a variety of mechanisms, including the imposition of monetary forfeitures under 47 U.S.C. § 503 and the adjudication of complaints filed under 47 U.S.C. § 208. *Id.* at 14885 (¶ 415).

One of those conditions, proposed by SBC itself, required SBC to "offer" the "shared transport" element of its network to competitors in the five Midwestern states (Illinois, Indiana, Michigan, Ohio, and Wisconsin) formerly served by Ameritech. "Transport" refers to transmission paths that convey telephone calls between switches within a telephone network. So-called "shared" transport refers to the network element that carries the traffic of more than

one customer or carrier, including traffic of the incumbent LEC, over the incumbent LEC's transmission links between its switches and offices.[3]

This case – like the case this Court decided in *SBC I* – arises from the Commission's determination that SBC had violated the shared transport merger condition. Shared transport had long been a contentious issue in the Ameritech states. Despite Commission rules requiring incumbent LECs to provide requesting competitors access to the shared transport network element, Ameritech, by its own admission, had never complied.[4]

To remedy Ameritech's recalcitrance in providing shared transport, paragraph 56 of the *Merger Order* conditions required SBC to offer competitors in the former Ameritech states the same shared transport service that SBC offered competitors in Texas as of August 27, 1999.[5]

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[3] In contrast, so-called "dedicated" transport – which is not at issue in this case – involves the exclusive use of interoffice transmission facilities dedicated to a specific customer or carrier.

[4] *See, e.g.,* Br. of Plaintiff-Appellant Ameritech Michigan in *Michigan Bell Tel. 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"). In the *Merger Order*, the Commission 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).

[5] In its entirety, paragraph 56 states:

This required SBC to permit competitors to use shared transport to route not only local, but also intraLATA toll traffic, because on that date, SBC was offering shared transport for intraLATA toll traffic to two Texas competitors. *See SBC I*, 373 F.3d at 147. SBC accepted this condition by electing to proceed with its merger subject to the terms and conditions of the *Merger Order*.

C. The Genesis of the Dispute Between SBC, and Core and Z-Tel, Over Shared Transport

In late 2000, one of SBC's competitors, CoreComm Communications, Inc. ("Core"), sent a letter to the Commission's staff alleging that SBC was violating the paragraph 56 shared transport merger condition by refusing to permit the carrier to route intraLATA toll traffic over shared transport facilities.[6] In response to that letter, the Commission initiated an investigation. The Commission sent SBC a letter of inquiry directing the company to submit a sworn written response to a series of questions, and attaching a copy of the letter from Core.[7]

> 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).

[6] *See* Letter from Bruce Bennett, Core National Director of Regulatory and Carrier Relations, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, December 8, 2000, at 2-5 (JA 24, 27-28).

[7] *NAL*, 17 FCC Rcd at 1398 (¶ 4).

SBC's multiple responses over a period of months advanced varying and evolving theories why the paragraph 56 merger condition did not require it to offer shared transport for intraLATA toll traffic. Those responses made clear that SBC had repeatedly refused to honor competitors' requests for shared transport for intraLATA toll traffic and that it was litigating this issue in state commission proceedings throughout the former Ameritech region.[8] SBC also disputed the Commission's jurisdiction to enforce the merger condition, insisting that the "subject to state commission approval" language in paragraph 56 meant that enforcement of that condition required resort to state arbitration procedures.[9] SBC did not, however, pursue that jurisdictional claim in subsequent phases of the administrative proceeding or on judicial review.

D. The Commission's *Forfeiture Order*

At the end of its investigation, the Commission concluded that SBC had, in fact, violated the merger condition in each of the five former Ameritech states, and imposed a $6 million forfeiture as a penalty for those violations. The Commission determined that SBC had refused to offer, and had affirmatively opposed requests for, shared transport for intraLATA toll traffic. The Commission found that SBC had opposed requests in Illinois and Michigan by litigating in favor of tariff restrictions that would have prohibited competitors from using shared transport to route intraLATA toll traffic, and in Indiana, Ohio, and Wisconsin by forcing arbitration on the issue. *Forfeiture Order*, 17 FCC Rcd at 19936 (n.70).

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[8] *See*, *e.g.*, *Forfeiture Order*, 17 FCC Rcd at 19936 (n.70) (listing tariff or arbitration proceedings in each of the five former Ameritech states); *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"), *aff'd*, 93 Fed.Appx. 799, 2004 WL 603932 (6th Cir., Mar. 23, 2004).

[9] *NAL*, 17 FCC Rcd at 1405 (¶ 19).

E. This Court's *SBC I* Decision

SBC petitioned for review of the *Forfeiture Order*, and Core and Z-Tel Communications, Inc. ("Z-Tel") intervened in support of the Commission. SBC advanced an array of theories why the paragraph 56 merger condition had not put the company on "fair notice" that it must offer shared transport for intraLATA toll traffic. SBC also complained that the amount of the forfeiture was unreasonably high. This Court rejected those claims. *SBC I*, 373 F.3d 140.

As to the scope of the merger condition, the Court held that paragraph 56 "plainly says" that SBC was required to provide shared transport for intraLATA toll traffic, and thus clearly placed SBC on notice of its obligations under the merger condition. *Id.* at 147. Rebuffing SBC's "vigorous attempts to create ambiguity" regarding the scope of the merger condition, *id.*, the Court characterized SBC's claims variously as "a nonstarter," *id.*, "unpersuasive," *id*. at 148, "irrelevant," *id.*, "not reasonable," *id.*, "unavailing," *id.*, "incorrect," *id*. at 149, and "def[ying] linguistic convention," *id*.

The Court also upheld the amount of the forfeiture. The Court found that the Commission acted "well within its discretion" in finding SBC's "recalcitrant behavior" both "substantial and widespread." *Id*. at 152. And it held that the agency reasonably linked the amount of the forfeiture to, among other things, SBC's private benefit from "inflicting harm on its competitors" by "litigating over the extent of SBC's shared-transport obligation in the five Ameritech states." *Id*.

SBC did not seek rehearing before this Court or file a petition for certiorari in the Supreme Court.

II. THE ORDER ON REVIEW

Meanwhile, in early 2001, Core and Z-Tel attempted to obtain relief regarding shared transport through Commission-sponsored settlement negotiations with SBC.[10] When that effort failed, Core and Z-Tel in August 2001 filed a formal complaint against SBC under 47 U.S.C. § 208. In that complaint, Core and Z-Tel alleged that they had purchased access to the shared transport network element from SBC, but that SBC had refused to allow them to use that element to transport intraLATA toll traffic throughout SBC's 13-state region. That consistent and widespread refusal, they maintained, violated, among other things, 47 U.S.C. § 251(c)(3) and the Commission's implementing rules, as well as the paragraph 56 shared transport merger condition.

The Commission granted the complaint in part and denied it in part.[11] It denied Core's and Z-Tel's claims as to eight states – specifically, those states outside the former Ameritech region that were not subject to the paragraph 56 merger condition. The Commission found no section 251 or rule violation in Connecticut and Nevada because the record revealed that neither Core nor Z-Tel had purchased the shared transport network element from SBC in those states. *Complaint Order* at para. 26 (JA 17). Similarly, the Commission found no violation in Texas, Oklahoma, Missouri, Kansas, and Arkansas because the record revealed that SBC had allowed Core and Z-Tel to use the shared transport network element to carry intraLATA toll traffic in

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[10] *See* Complaint Exhibit 12 (March 15, 2001, letter from Bruce Bennett, National Director, Regulatory and Carrier Relations for Core, to Frank Lamancusa, Enforcement Bureau, FCC) (JA 33).

[11] Before reaching the merits, the Commission rejected SBC's claim that the agency lacked jurisdiction to adjudicate the complaint. *Complaint Order* at paras. 12-19 (JA 11-15). As in *SBC I*, SBC in this case has not challenged the Commission's jurisdiction to enforce the terms of its *Merger Order*. Nor has SBC asked the Court to review the *Complaint Order's* assertion of jurisdiction to adjudicate complaints alleging violations of section 251 and the Commission's implementing rules (despite SBC's passing suggestion (Br. at 11 n.5) that the Commission's determination on that issue is unlawful). Hence, neither jurisdictional ruling is before the Court for review.

those states. *Id.* at para. 27 (JA 18). The Commission likewise found no section 251 or rule violation in California. That was so, the Commission explained, because Z-Tel had opted into an existing interconnection agreement that Z-Tel stipulated did not require SBC to provide shared transport for intraLATA toll traffic. Nor was there any evidence in the record that Z-Tel had attempted to obtain access to shared transport for this purpose through the modification or change of law provisions in the agreement. On those specific facts, the Commission denied that portion of the complaint. *Id.* at paras. 28-35 (JA 18-21).[12]

The Commission granted the complaint regarding the five former Ameritech states that *were* subject to the paragraph 56 merger condition. *Id.* at paras. 20-25 (JA 15-17). Core and Z-Tel alleged that SBC had violated that merger condition in the former Ameritech region by refusing to offer shared transport for intraLATA toll traffic. According to the record, when Core and Z-Tel told SBC they wanted shared transport for intraLATA toll traffic in the Ameritech states, SBC told them as to Michigan and Illinois that "the SBC ILECs are under no obligation to renegotiate Z-Tel's agreements to add such language,"[13] and as to the Ameritech region generally that "the Ameritech ILECs are not obligated to permit CLECs to use 'shared transport' for the routing of intraLATA interexchange traffic under Paragraph 56 of the SBC/Ameritech

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[12] Z-Tel sought reconsideration of the Commission's holding regarding California, which the agency denied in May 2004. *See* Order on Reconsideration, 19 FCC Rcd 8447 (2004) ("*Reconsideration Denial Order*") (JA 99). Z-Tel then filed a petition for review (No. 04-1217) of that order. This Court dismissed part of Z-Tel's petition for lack of jurisdiction. *See* Order, No. 03-1147, 2004 WL 2091548 (D.C. Cir. Sept. 17, 2004). Z-Tel responded by withdrawing the remainder of its petition, *see* Order, No. 03-1147, 2004 WL 2348271 (D.C. Cir. Oct. 15, 2004), and thus the *Reconsideration Denial Order* is not before the Court for review.

[13] Complaint Exhibit 4 (February 8, 2001, letter from Adam E. McKinney, SBC Communications, Inc., to Michael B. Hazzard) (JA 32).

Merger Conditions."[14] Thus, much as SBC had forced competitors to litigate this issue in each of the Ameritech states, it also forced Core and Z-Tel to litigate it before the Commission.

Consistent with, and in express reliance on, the *Forfeiture Order*, the Commission held that SBC had violated the same merger condition, in the same five states, on the basis of the same conduct. Specifically, the Commission ruled:

> Paragraph 56 requires [SBC] to offer shared transport for intraLATA toll to carriers who request it. Here it did not do so. Rather than agreeing to make any necessary amendments to its interconnection agreements, [SBC] responded to requests by asserting that it was not required to provide shared transport for intraLATA toll. Accordingly, we find that [SBC] violated paragraph 56 of the *Merger Order Conditions*, and in so doing, engaged in an unjust and unreasonable practice under section 201(b) of the Act.

Complaint Order at para. 25 (JA 17).

SUMMARY OF ARGUMENT

This case is nothing more than "another attempt by the same part[y] and the same counsel to elicit from this court a narrow interpretation" of SBC's duties under the shared transport merger condition. *See Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). Despite this Court's unequivocal rejection of its prior attempt in *SBC I*, SBC returns with yet more theories why it should not be held liable for having violated the merger condition. But its latest theories are not properly before the Court, and in all events are no more persuasive than the claims this Court rejected in *SBC I.*

This case is the same as *SBC I* in all material respects. The same merger condition is at issue. The same five states are at issue. The same behavior is at issue – SBC's multi-year record of refusing to offer shared transport for intraLATA toll traffic in the former Ameritech states,

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[14] Complaint Exhibit 1 (August 8, 2001, letter from Darryl W. Howard, SBC Telecommunications, Inc., to Michael Hazzard) (JA 38, 40).

thereby inflicting harm on its competitors by forcing them to litigate over the extent of SBC's shared transport obligation on a state-by-state basis. *See SBC I*, 373 F.3d at 152. The result should likewise be the same.

As a threshold matter, the Court should dismiss SBC's petition for want of jurisdiction because SBC has not demonstrated that it has standing. Specifically, SBC has not shown that the *Complaint Order*, which merely mirrors the liability determination in the earlier *Forfeiture Order*, has caused the company any injury, much less an injury likely to be redressed by the requested relief. *E.g., Rainbow/Push Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003).

If the Court reaches the merits, it should deny SBC's petition for review. The issue in this case is whether the Commission reasonably found that SBC's behavior violated the terms of the shared transport merger condition. SBC litigated and lost that issue in *SBC I*, resolution of that issue was necessary to the judgment in that case, and application of issue preclusion here would result in no unfairness to SBC. *See Qwest Corp. v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001). SBC's latest claim is merely a new legal theory, one that the company failed to raise in the prior litigation. Accordingly, the doctrine of issue preclusion bars SBC from belatedly raising that newly minted theory in this case. *E.g.*, *Hall v. Clinton*, 285 F.3d 74, 81 (D.C. Cir. 2002).

Moreover, the Commission's determination of liability in this case was reasonable and consistent with the purpose of the condition to remedy Ameritech's historic refusal to provide shared transport. It also is consistent with *SBC I,* in which this Court upheld the Commission's decision to impose the largest forfeiture in its history after finding that SBC had violated the merger condition by forcing competitors, including Core and Z-Tel, to litigate to obtain shared transport for intraLATA toll traffic through tariffs and interconnection agreements. SBC admits

that Core and Z-Tel asked SBC to provide them with shared transport for intraLATA toll calls in the Ameritech states, and admits that the company refused to do so. SBC Br. at 2, 13. That should be the end of the case. As in *SBC I,* the Commission properly found that SBC had violated the requirement of the *Merger Order* to "offer" shared transport.

SBC now maintains (Br. at 16) that the Commission could have held SBC liable for violating the merger condition only if the agency had found that SBC violated the terms of its interconnection agreements with Core or Z-Tel. That interpretation would render the merger condition meaningless. It also is foreclosed by *SBC I*, in which this Court upheld the Commission's determination of liability without a finding that SBC violated any interconnection agreement.

ARGUMENT

I. STANDARD OF REVIEW

To prevail on review, SBC must demonstrate that the Commission's *Complaint Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action, *see*, *e.g.*, *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000), and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment, *see*, *e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)." *Cellco Partnership,* 357 F.3d at 93-94; *accord, MCI WorldCom Network Services, Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001) (reviewing Commission interpretation of merger condition arising out of Bell Atlantic/GTE merger).

The *Complaint Order* on review is based upon an interpretation of the paragraph 56 shared transport condition in the Commission's *Merger Order,* as well as an application of the

Commission's *Forfeiture Order*. The Commission's interpretation of its own order imposing a merger condition, set forth in the context of resolving a complaint filed under section 208, is controlling unless clearly erroneous. *MCI WorldCom*, 274 F.3d at 547 (citation omitted).[15] Consistent with that principle, this Court defers to the Commission's "reasonable application of its own precedents." *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 658 (D.C. Cir. 2004) (citing *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740, 747 (D.C. Cir. 2001)).

SBC nonetheless claims entitlement to *de novo* review on the basis of its suggestion (Br. at 18) – offered without citation to authority – that the Commission's merger condition is "akin" to a consent decree. That claim is foreclosed by *MCI WorldCom*, in which this Court applied traditional principles of deferential review in upholding a Commission interpretation of a merger condition. 274 F.3d at 547, 548. SBC's proffered distinction (Br. at 18, n.7) of *MCI WorldCom* fails, as the Court nowhere in that opinion stated or even hinted that judicial deference is appropriate only when the Commission and the regulated entity subject to the merger condition agree on the meaning of that condition. And the implicit "principle" underlying SBC's position – that the standard of review varies depending on whether a regulated entity subject to a merger condition agrees or disagrees with the Commission's interpretation of that condition – is self-evidently incorrect and would eviscerate the doctrine of judicial deference to agency decision making.

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[15] *See also Qwest Corp.*, 252 F.3d at 467 (Court reviews Commission's interpretation of its regulation "under highly deferential standards, and would reverse only a clear misinterpretation"); *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1069 (D.C. Cir. 2004) (Court gives "controlling weight" to Commission's interpretation of its own regulations "unless it is plainly erroneous or inconsistent" with the regulations) (citation omitted).

II. SBC LACKS STANDING TO CHALLENGE THE *COMPLAINT ORDER*

To establish standing under Article III, SBC bears the burden of showing a "'substantial probability'" that it has sustained (1) an injury in fact that is (2) fairly traceable to the challenged action and (3) likely to be redressed by the requested relief. *Rainbow/PUSH Coalition*, 330 F.3d at 542 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)); *see also KERM, Inc. v. FCC*, 353 F.3d 57, 59 (D.C. Cir. 2004). The injury must be both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Village of Bensenville v. FAA*, 376 F.3d 1114, 1118 (D.C. Cir. 2004). SBC does not satisfy those standards in this case.

SBC has sustained no injury as a result of the *Complaint Order* because that order simply echoes the Commission's holding, in the *Forfeiture Order*, that SBC's past behavior violated the merger condition in the Ameritech states. The *Complaint Order* thus does nothing to increase SBC's "injury" beyond that the company sustained when the Commission issued the *Forfeiture Order* and the company paid the $6 million forfeiture. Although section 209 of the Act authorizes the Commission to award damages if warranted, the Commission has not directed SBC to pay any damages to Core or Z-Tel for its past violations of the merger condition in this case, because those complainants elected not to submit a supplemental complaint requesting damages within the sixty-day limitations period set forth in the Commission's rules, *see* 47 C.F.R. § 1.722(e) (2003), and are therefore barred from doing so now. Nor did the *Complaint Order* direct SBC to undertake any specific action in the future to remedy its past misconduct.

Thus, granting SBC's request (Br. 30) to vacate the *Complaint Order* will not redress any cognizable harm. Vacatur of the *Complaint Order* cannot redress the injury SBC sustained as a result of the *Forfeiture Order*, as that latter order was affirmed by this Court and is now a final decision. And, as explained above, there is no injury to redress from the follow-on *Complaint*

Order. Accordingly, SBC lacks standing to challenge the *Complaint Order*, and the Court should therefore dismiss SBC's petition for review for want of jurisdiction.

III. THE JUDGMENT IN *SBC I* PRECLUDES SBC'S ATTEMPT TO RELITIGATE WHETHER THE COMMISSION LAWFULLY HELD THE COMPANY LIABLE FOR VIOLATING THE MERGER CONDITION

SBC maintains (as it did in *SBC I*) that the Commission acted unlawfully in holding SBC liable for violating the paragraph 56 merger condition. But the Court has already resolved that issue adversely to the company in *SBC I.* The judgment in that case precludes SBC's renewed attempt here to challenge the lawfulness of the Commission's liability finding.

Under the doctrine of issue preclusion (collateral estoppel), "judgment in a prior suit can preclude relitigation of an issue actually litigated and necessary to the outcome of the first action so long as no unfairness results." *Qwest Corp*., 252 F.3d at 466. The party seeking to invoke issue preclusion in a subsequent case need not show that its adversary raised precisely the same arguments in support of its claim in the earlier litigation: "[O]nce an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992*), cert. denied*, 506 U.S. 1078 (1993).[16] When, as here, the "previously litigated 'issue was one of law, new arguments may not be presented to obtain a different determination of that issue.'" *Id.*, *quoting Restatement (Second) of Judgments* § 27, comments at 253. Issue preclusion bars a party from relitigating an issue decided adversely to that party by a court of

[16] *Accord, Securities Industry Ass'n v. Board of Governors of Federal Reserve System*, 900 F.2d 360, 364 (D.C. Cir. 1990) (preclusion "results from the resolution of a question in issue, not from the litigation of specific arguments directed to the issue").

competent jurisdiction irrespective of the particular legal arguments that litigant seeks to present in the subsequent litigation.

This case "satisfies [the] requirements" for issue preclusion.[17] *First*, the issue SBC seeks to raise – whether the Commission lawfully held SBC liable for violations of the merger condition – was sharply contested by the parties in the prior litigation and submitted for judicial determination. SBC strenuously challenged the scope of the merger condition as well as the reasonableness of the Commission's decision to impose a substantial forfeiture for those violations; and the Commission defended its enforcement action, including the remedy it chose for SBC's multiple violations.

Second, the issue in this case was actually and necessarily determined by this Court in *SBC I*. By affirming as reasonable the Commission's decision to impose a substantial forfeiture penalty against SBC, this Court necessarily held that the Commission had acted lawfully in finding SBC in violation of the merger condition in the Ameritech states. Indeed, the Court was unequivocal on the liability issue: "SBC's failure to offer shared-transport service in five separate states violated the clear terms of the merger condition and … this noncompliance continued for some time." *SBC I*, 373 F.3d at 152. The Court could not have upheld the imposition of the forfeiture penalty unless the Commission's underlying liability determination was lawful. Thus, the issue of the lawfulness of the Commission's liability determination necessarily falls within the compass of the *SBC I* judgment.[18] And SBC did not seek rehearing

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[17] *Beverly Health & Rehab. Services, Inc. v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003). *See also Hall*, 285 F.3d at 80; *Yamaha Corp*., 961 F.2d at 254.

[18] SBC's brief (p. 11) concedes the point: "In *SBC,* this Court affirmed the FCC's finding of liability."

or certiorari as to the Court's holding, "making it a final judgment with preclusive effects." *Qwest Corp*., 252 F.3d at 466.

Third, SBC can show no unfairness or special circumstances that would justify a refusal by this Court to give preclusive effect to its judgment in *SBC I*. SBC, facing the largest forfeiture ever assessed by the Commission against a common carrier, litigated the case vigorously – and lost. Neither the controlling facts nor legal principles have changed since the *SBC I* judgment. On the contrary, "the factual and legal context in which the issues of this case arise has not materially altered since" *SBC I*, and therefore "normal rules of preclusion should operate." *Montana v. United States*, 440 U.S. 147, 162 (1979).

SBC now contends (Br. at 16) that the Commission could not lawfully have held the company liable for violating the merger condition unless it found that SBC violated the terms of its interconnection agreements with Core and Z-Tel. But that is not a new issue; rather, it is simply a new *legal theory*. *See Hall*, 285 F.3d at 81. SBC could have raised that theory in *SBC I* (but for the fact that it did not raise it with the Commission), as it "is related to the subject-matter and relevant to the issue[] that [was] litigated and adjudicated previously." *Yamaha Corp*., 961 F.2d at 257-58 (citation omitted). For whatever reason, SBC did not argue this theory in *SBC I* (or to the Commission) even though that case presented the same issue: Whether the Commission lawfully held SBC liable for violating the merger condition in the Ameritech states by rejecting competitors' requests for shared transport to carry intraLATA toll traffic.[19] In these

[19] The *Forfeiture Order* was premised on the fact that SBC had forced the matter to arbitration, and that this constituted a violation of the merger condition. With this Court's judgment affirming the Commission's ruling, it therefore is not open to SBC to argue that the Commission could not lawfully have held SBC liable for violating the merger condition unless the agency found that the company had violated the terms of its interconnection agreements with Core and Z-Tel.

circumstances, the doctrine of issue preclusion bars SBC from belatedly raising its new legal theory in this case. *Hall*, 285 F.3d at 81 (issue preclusion bars theory that appellant could have raised in earlier litigation); *Yamaha Corp*., 961 F.2d at 257-58 (same); *Securities Industry Ass'n*, 900 F.2d at 364-65 (same).

The application of issue preclusion in this case safeguards legitimate interests of the Court, the public, and the agency. By barring SBC from relitigating the lawfulness of the Commission's liability determination, issue preclusion "protects [the Commission] from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana,* 440 U.S. at 153-54. The Court should not entertain SBC's attempt to relitigate the lawfulness of the Commission's finding that SBC violated the merger condition by refusing competitors' requests to use shared transport for intraLATA toll traffic.

IV. THE COMMISSION REASONABLY FOUND THAT SBC HAD VIOLATED THE *MERGER ORDER*

In all events, the Commission properly determined that SBC violated the *Merger Order* and was therefore liable under section 208 of the Act. Indeed, there is no question that SBC violated the shared transport merger condition, which, like all the merger conditions, was critical to the Commission's approval of SBC's acquisition of Ameritech. *See Forfeiture Order* and *SBC I.* The Commission has already imposed a $6 million forfeiture on SBC for pursuing a strategy of denying competitive LECs access to shared transport for intraLATA toll traffic. The Commission found that SBC had effectuated that strategy by forcing competitive LECs to litigate in tariff and arbitration proceedings in order to obtain service. *Forfeiture Order,* 17 FCC

Rcd at 19936 (¶ 26 & n.70). In fact, some of the specific actions cited in the *Forfeiture Order* to support the liability finding involved matters in which Core and Z-Tel were parties.[20]

In the *Complaint Order,* the Commission addressed SBC's behavior as it related specifically to Core and Z-Tel in the Ameritech states. SBC was on clear notice that it was obligated to offer Core and Z-Tel shared transport for intraLATA toll traffic, because paragraph 56 "plainly says that SBC was required to provide such service." *SBC I,* 373 F.3d at 147. The record before the Commission showed that when Core and Z-Tel requested service, however, SBC told them unequivocally that "the SBC ILECs are under no obligation to renegotiate Z-Tel's agreements to add such language,"[21] and that "the Ameritech ILECs are not obligated to permit CLECs to use 'shared transport' for the routing of intraLATA interexchange traffic under Paragraph 56 of the SBC/Ameritech Merger Conditions."[22] In other words, SBC simply said "no." The question thus is whether the Commission acted reasonably when it found that SBC had thereby failed to "offer" shared transport for intraLATA toll traffic as required by paragraph 56.

The use of the word "offer" in the merger condition established an obligation affirmatively to advance a proposal for shared transport for intraLATA toll traffic, which SBC

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[20] Z-Tel was a party to the Illinois tariff proceeding cited in note 70 of the *Forfeiture Order*, *see* Illinois Commerce Commission Service List for *Investigation Into Tariff Providing Unbundled Local Switching With Shared Transport,* Case No. 00-0700; and both Core and Z-Tel were parties to the cited Michigan tariff proceeding, *see Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport,* Opinion and Order, Case No. U-12622, at 2 (Mich. Pub. Serv. Comm'n, March 19, 2001) (noting that the administrative law judge granted Core and Z-Tel leave to intervene in the proceeding).

[21] Complaint Exhibit 4 (February 8, 2001, letter from Adam E. McKinney, SBC Communications, Inc., to Michael B. Hazzard) (JA 32).

[22] Complaint Exhibit 1 (August 8, 2001, letter from Darryl W. Howard, SBC Telecommunications, Inc. to Michael Hazzard) (JA 38, 40).

indisputably did not do. SBC can scarcely claim not to have understood what was required of the company. SBC has previously told this Court that "'offer' means '[t]o present for acceptance or rejection,' or '[t]o put forward for consideration.'" *SBC I,* 373 F.3d at 147. Moreover, SBC's actions in implementing the merger condition (so long as intraLATA toll traffic was not involved) show that it understood the nature of its affirmative obligation to make shared transport available.

In the forfeiture proceeding, SBC submitted the declaration of Quentin C. Patterson, Ameritech's Project Manager for unbundled network elements, to explain the steps that SBC had taken to comply with the paragraph 56 shared transport condition for traffic other than intraLATA toll.[23] According to Mr. Patterson, in advance of the effective date of the condition, SBC had drafted new contractual provisions for the shared transport offering. Carriers could obtain shared transport "via an interconnection agreement or an updated 13-State generic interconnection agreement," and "[t]hose contracts were made available by October 8, 2000, with requesting carriers having been alerted to the upcoming offering in an accessible letter." In addition, the company had filed intrastate tariffs with each state in the region, as an alternative means for carriers to obtain shared transport. Patterson declaration at ¶¶ 7-8, Attachment G to SBC Response to Notice of Apparent Liability (attached at Addendum B to this brief). Thus, with regard to services that SBC considered to fall within the merger condition, the company had affirmatively put forward proposals to competitive LECs interested in obtaining shared transport – that is, SBC had "offered" shared transport as required by the merger condition.

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[23] Mr. Patterson's declaration also described separate steps that SBC had taken to implement an interim shared transport offering pursuant to the related paragraph 55 merger condition.

By contrast, SBC had taken none of these steps to offer shared transport when intraLATA toll traffic was involved. Instead, SBC had filed tariffs that excluded intraLATA toll traffic, and when Core, Z-Tel, and other carriers challenged that exclusion, SBC had forced them to litigate the issue. And when Core and Z-Tel requested shared transport for intraLATA toll traffic, SBC simply had told them that it would not provide, and would not discuss that service. It is difficult to see how SBC's denial of Core's and Z-Tel's requests could constitute an "offer" of shared transport within any commonly understood meaning of the word. The Commission, therefore, ruled that SBC had violated the *Merger Order*:

> [t]o the extent that Ameritech's existing agreements with the Complainants did not make available shared transport for intraLATA toll, the *Merger Order* required Ameritech to agree to the necessary amendments to do so. When Core and Z-Tel asked for this functionality, however, Ameritech just said 'no.' That refusal self-evidently constituted a failure to offer under paragraph 56.

Complaint Order at para 21 (JA 16). That holding was reasonable, furthered the purpose of the merger condition to remedy Ameritech's historic refusal to provide shared transport, and is fully consistent with this Court's subsequent holding in *SBC I.*

Notwithstanding the clear language and meaning of the merger condition, SBC argues that the Commission could not reasonably have found that SBC had violated it. SBC's primary contention is that the Commission's ruling against SBC as to the Ameritech states is allegedly inconsistent with its ruling in SBC's favor as to California, a state where the merger condition did not apply. In essence, SBC argues that because it prevailed as to California, so must it prevail in the Ameritech states. But there is no conflict in these separate rulings, as they quite reasonably reflect the different legal obligations that SBC faced in Ameritech versus non-Ameritech states.

In California, SBC was under no affirmative obligation to "offer" shared transport. Rather, SBC was subject only to sections 251 and 252 of the Act and related Commission rules, and the Commission analyzed the case accordingly. In California, Z-Tel had voluntarily opted into an agreement with SBC that, Z-Tel conceded, did not provide for shared transport for intraLATA toll traffic. *Complaint Order* at para. 29 (JA 18-19). The Commission found that Z-Tel was "bound by the terms of its agreement, and that therefore any request to amend the interconnection agreement must comply with any modification or change of law provisions." *Id.* at para. 30 (JA 20). And because Z-Tel had provided no evidence that it had complied with those provisions, or that SBC had violated them, the Commission denied the complaint as to California. *Id.* at para. 31 (JA 20).

In the Ameritech states, by contrast, SBC was subject to "independent obligations under the *Merger Order,*" *SBC I,* 373 F.3d at 150, that required SBC to offer shared transport irrespective of the particulars of interconnection agreements. SBC recognizes (Br. at 16) that the merger condition distinguishes the Ameritech states from California, but contends that this makes no difference. SBC denies that the merger condition had any independent impact, asserting (Br. at 24) that it is "clear that the parties intended the shared-transport obligation to be governed by the same procedural framework as the Commission's unbundling rules – *i.e.,* the interconnection agreement framework set out in section 252." SBC argued to the Commission that its analysis must be the same in the Ameritech region as in California, notwithstanding the existence of the merger condition's independent obligations, because "once the parties have concluded an interconnection agreement, the terms of that agreement – not the Act and not the Commission's rules and orders – alone govern." SBC's Answer, Ex. C (Defendant's Legal Analysis) at 12-13, (JA 47, 51-52), cited at *Complaint Order* at para. 22 (JA 16). According to

SBC, Core and Z-Tel could prove a violation of the *Merger Order* only by proving a violation of their interconnection agreements with SBC. By focusing on the section 252 process rather than on the merger condition's requirement to "offer" shared transport, SBC advances a very restrictive view that would permit the company to avoid advancing any proposal, actively oppose requests for service, and force requesting carriers to expend time and money litigating to obtain what they were already entitled to receive.

SBC relies heavily in its brief on the fact that the paragraph 56 obligation is "subject to state commission approval." SBC, however, did not make this argument before the Commission in the complaint proceeding. Because the Commission did not have an opportunity to address this contention, 47 U.S.C. § 405 bars SBC from raising it for the first time in this Court. *AT&T Corp. v. FCC,* 317 F.3d 227, 239 (D.C. Cir. 2003).

In all events, SBC reads far too much into these words. SBC focused on this clause in the forfeiture proceeding for a different proposition, arguing before the Commission that it deprived the agency of jurisdiction to enforce the *Merger Order* and instead required resort to state commission arbitration procedures. *NAL,* 17 FCC Rcd at 1405 (¶ 19). The Commission rejected that assertion, finding that "[t]he cited clause merely refers to the requirement that the interconnection agreements be approved by the state regulatory body." *Id.* Having failed with that jurisdictional claim, now SBC asserts that the clause effectively deprives the merger condition of its force by requiring resort solely to the terms of its interconnection agreements to determine its obligations in the Ameritech region. But its most recent claim is no more persuasive than its earlier one. Consistent with the Commission's earlier statement, this phrase means only that any new interconnection agreements entered into by competitive LECs, or any

amendments to existing agreements, taking advantage of SBC's offer would require the usual state commission approval.

This Court, too, addressed the meaning of the "subject to" clause in *SBC I* when SBC relied on that language for yet another purpose – to narrow the scope of its obligations. The full text of the relevant clause is "subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport." In *SBC I*, SBC focused on the "future Commission orders" portion, but the Court's rejection of SBC's interpretation in that case is relevant here as well.

SBC asserted that the language "subject to . . . the terms of any future Commission orders" meant that only "subsequent Commission decisions regarding incumbent LECs' unbundling duties under the Act govern SBC's obligations under paragraph 56 of the merger conditions." *SBC I,* 373 F.3d at 149. The Court found that SBC was arguing in effect that the words "subject to" meant "superseded by" or "governed by." *Id.* The Court stated that such a construction "defies linguistic convention," and that the "natural" reading of "subject to" is that it was meant:

> simply to adopt anything in those future orders that, by the terms of such orders, contravened or altered anything in paragraph 56. . . The future orders "condition" the merger conditions in exactly the sense any future order would "condition" an old order: anything in the old order that is contradicted or modified by the new order is void.

Id. Similarly, here SBC's position is that the *Merger Order* obligation to offer shared transport is superseded by or governed by sections 251 and 252. Applying the Court's reasoning, there is nothing in the state approval process, or even section 252 more generally, that contravenes, alters, or is otherwise inconsistent with SBC's obligation to make an affirmative offer of shared transport. SBC's position is no more tenable in this case than in the last.

SBC (Br. at 24) also tries to find support for the notion that the merger condition is subsumed into the section 252 process with a rather convoluted argument focusing on the definition of the terms "offer" and "provide." SBC notes that the *Merger Order* required SBC to "offer" shared transport, while the Act and Commission rules required SBC to "provide" shared transport. "Offer," SBC now asserts, means the same thing as "provide." Therefore, claims SBC, the *Merger Order* requirement could not have been different from the requirement of the Act and rules. To support its assertion that "offer" and "provide" mean the same thing, SBC cites *SBC I,* in which this Court rejected SBC's claim that its involuntary "provision" of shared transport for intraLATA toll traffic in Texas did not constitute an "offer" of service within the meaning of the merger condition. Nothing in *SBC I,* however, supports the blanket assertion that the terms are always synonymous. In any event, the *Complaint Order* was not in any way based on a difference between the words "offer" and "provide," but rather reflected the different legal underpinnings of SBC's obligations pursuant to section 252 and its independent obligations pursuant to the *Merger Order.*

SBC's final argument for collapsing the merger condition into section 252 is its reference to the Commission's enforcement of a merger condition arising from an entirely different order and relating to different parties. *See* SBC Br. at 26-27, citing the Commission's decision in *AT&T Corp. v. Bell Atlantic Corp.,* Memorandum Opinion and Order, 15 FCC Rcd 17066 (2000), *aff'd, MCI WorldCom Network Services v. FCC,* 274 F.3d 542 (D.C. Cir. 2001). That argument is barred by 47 U.S.C. § 405, because SBC never raised it before the Commission. *AT&T Corp.,* 317 F.3d at 239. If SBC believes that the *Complaint Order* is inconsistent with the Commission's order in the *AT&T* case, it should have filed a petition for reconsideration raising this issue with the Commission. In any event, SBC's argument is wrong. The Bell

Atlantic/NYNEX merger order had required Bell Atlantic to offer in negotiations rates based on a forward-looking cost methodology, because the Commission's general rules requiring such pricing were not then in effect. SBC argues that because the Commission found that the Bell Atlantic condition was meant simply to duplicate the 252 process, the SBC condition must similarly be interpreted as having been meant to be implemented only through the section 252 process. SBC ignores not only the differing language of the conditions, but also the different reasons for imposing them, and the fact that the Commission has already been upheld in its decision to assess a forfeiture against SBC for using the section 252 arbitration process to deflect competitive LECs' attempts to take advantage of the shared transport merger condition.

SBC's position in this case is fundamentally inconsistent with both the *Forfeiture Order* and *SBC I*. SBC asserts that it is entitled to invoke the section 252 process, which includes arbitration. But this Court has already upheld the Commission's decision to impose a multi-million dollar forfeiture on SBC for violating the merger condition precisely by forcing competitive LECs into arbitration on the issue of whether they were entitled to obtain shared transport for intraLATA toll. *See Forfeiture Order*, 17 FCC Rcd at 19936 (n.70) (citing the fact that SBC had opposed such requests in state arbitration proceedings in Indiana, Ohio, and Wisconsin). It is not open to SBC to argue at this stage that it was entitled to rely entirely on the section 252 process, which includes the right to go to arbitration, to implement its substantive obligations under the *Merger Order.*

The Commission recognized that the section 252 process could be relevant to SBC's implementation of the paragraph 56 condition, but nothing in the *Merger Order* or the *Complaint Order* supports the notion that the section 252 process was a prerequisite to SBC's obligation to comply with paragraph 56. SBC's own understanding, as evidenced by its own conduct in

implementing the condition, appears to have been that it could comply by means outside section 252, such as by offering generally available tariff terms. To the extent that implementation of paragraph 56 did take place via interconnection agreement amendments, the Commission found that at a minimum, SBC's obligation to "offer" specific terms circumscribed its response to any request to negotiate a new or amended agreement. When presented with a request for shared transport, SBC could not "just say no," but was required to amend interconnection agreements as necessary to provide it. *Complaint Order* at para. 21 (JA 15-16) ("[to] the extent that Ameritech's existing agreements with the Complainants did not make available shared transport for intraLATA toll, the *Merger Order* required Ameritech to agree to the necessary amendments to do so"); *id.* at paras. 23, 25.[24]

SBC's narrow view, as the Commission pointed out, runs counter to the basic purpose of the merger condition, which was to remedy Ameritech's adamant and longstanding refusal to provide shared transport in its region. As the Commission stated, "presumably Ameritech interconnection agreements predating the *Merger Order*, including those with the Complainants in some states, did not provide for shared transport of any kind." *Id.* at para. 24 (JA 16-17). SBC argues that it should nonetheless be able to enforce the terms of those agreements. That would mean that unless a carrier could successfully invoke a modification provision in its agreement to force SBC to provide shared transport, then "those carriers who had been denied

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[24] SBC's passing references (Br. at 21, 22) to *Wisconsin Bell v. Bie,* 340 F.3d 441 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 1051 (2004), are unavailing. In *Wisconsin Bell,* a divided panel of the Seventh Circuit held that the 1996 Act preempted a state tariffing scheme whereby the state exerted pricing control over an incumbent LEC's provision of network elements, forcing the incumbent to reveal its so-called "reservation price," with judicial review in state courts. That scheme, the court found, exceeded the state's circumscribed role under the federal statute and conflicted with the 1996 Act's express denial of jurisdiction to state courts in this matter. *Id.*, at 444-45. None of those concerns are present here, and, as discussed above, this Court has already upheld the Commission's enforcement of the merger condition in circumstances identical to those in this case.

shared transport previously would be unable to amend their agreements to take advantage of a merger condition specifically designed to remedy the situation." *Id.* at para. 24 (JA 17). As the condition was imposed in the first place in light of Ameritech's refusal to comply with those rules,[25] it defies logic to suggest that the *Merger Order* allowed SBC to continue to rebuff requests for shared transport.

[25] *See SBC I* at 144 ("the apparent reason for imposing this obligation . . . was to address Ameritech's prior reluctance to offer unbundled access to shared transport services"); *Merger Order at 14888, para. 435; 14949, para. 569 n. 1105.*

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review for want of jurisdiction. Alternatively, the Court should deny the petition.

Respectfully submitted,

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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, RESPONDENTS.	)	NO. 03-1147

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 9238 words.

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