

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Petition of Global NAPs, Inc., for)
Pre-emption of the Jurisdiction of the New)
Jersey Board of Public Utilities Pursuant)
to Section 252(e)(5) of the)
Telecommunications Act of 1996)

CC Docket No. 99-154

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice dated May 7, 1999, AT&T Corp. ("AT&T") hereby submits these Reply Comments on the Petition of Global NAPs, Inc. ("Global NAPs") for Pre-emption of the Jurisdiction of the New Jersey Board of Public Utilities pursuant to Section 252(e)(5) of the Communications Act, filed May 5, 1999 ("Petition").

AT&T's Reply Comments respond briefly to two erroneous arguments advanced by Bell Atlantic and Ameritech. First, Bell Atlantic's argument that Section 252(i) of the Act allows new entrants to opt-in only to those provisions of interconnection agreements that implement incumbent LEC's federal obligations under Section 251 is directly at odds with the relevant statutory language. Bell Atlantic at 4. Section 252(i) states that a LEC must make available "any interconnection, service, or network element provided under an agreement approved under this section." 47 U.S.C. § 252(i) (emphasis added). Section 252(i) is not merely duplicative of Section 251, but is a broad antidiscrimination provision. It mandates that whatever an ILEC provides to one CLEC under an interconnection agreement must be made available to other requesting carriers. This provision applies without regard to whether the incumbent LEC is otherwise obliged by Section 251 to provide the

requested item. For example, Section 252(i) applies to provisions to which an incumbent LEC agrees as part of the negotiation process -- even if not required by Section 251.¹ Under the clear terms of § 252(i), such additional requirements, when "provided under an agreement approved under [Section 252]," must be made available to other requesting carriers.²

Further, even if the plain language of section 252(i) did not foreclose the incumbents' contrary arguments, the Commission has ample authority under the Communications Act to order incumbent LECs to provide "just" and "reasonable" pick-and-choose opportunities for intercarrier compensation arrangements. *See, e.g.*, 47 U.S.C. § 201. Indeed, the Commission has already recognized in the *ISP-Bound Traffic NPRM* that it has authority, "as a matter of federal policy," to require that "the inter-carrier compensation for this interstate [ISP-bound] telecommunications traffic" be governed "by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act." *See Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Notice of Proposed Rulemaking, ¶ 30 (Feb. 26, 1999). By that same authority, the Commission could also require the provisions of such agreements to be made available to other requesting carriers in the manner set forth in Rule 809. *See* 47 C.F.R. § 51.809.

Second, both Bell Atlantic and Ameritech argue that a competing LECs' ability to opt-in to any provision in an interconnection agreement is absolutely limited by the expiration date of the original agreement -- *i.e.*, if a competing LEC opts-in to a network element arrangement of an

¹ Like arbitrated agreements, negotiated agreements are also subject to approval under Section 252 and therefore must be made available to other requesting carriers under Section 252(i).

² For example, if a state required an incumbent LEC to provide an unbundled network element that the Commission's rules did not, no one would suppose that a requesting carrier could not obtain that element pursuant to a pick-and-choose election under § 252(i).

agreement that is set to expire in three months, the competing LEC's opt-in also expires in three months. See Bell Atlantic at 4; Ameritech at 3-8. No such arbitrary cut-off of pick-and-choose rights can be reconciled with the Act or the Commission's existing pick-and-choose rules. The Act provides simply that a requesting carrier is entitled to opt-in "upon the same terms and conditions as those provided" in the original agreement. Thus, if the original agreement, for example, made network elements available to the original requesting carrier for three years, the most natural reading of the Act is that the new requesting carrier is entitled to the same three year term. Bell Atlantic and Ameritech complain that treating the original carrier and the new carrier the same, as the Act contemplates, would violate "common sense" because incumbents "would be stuck forever with a bad deal." Ameritech at 5.³ But the Commission's rule already permits the incumbent LECs to refuse an opt-in upon an appropriate showing; for example, Rule 809(b) permits an incumbent to refuse an opt-in when it can show that such an arrangement would not be technically feasible or that serving the requesting carrier would be more costly than serving the original requesting carrier. 47 C.F.R. § 51.809(b). The Commission's existing rule, which places the burden on an incumbent LEC to establish that an opt-in requests is not appropriate, is plainly preferable to the arbitrary cut-off proposed by Ameritech and Bell Atlantic. The Commission should reaffirm that CLECs are permitted

³ Ameritech never explains what it means by a "bad deal," or why the Commission's rules should permit ILECs to refuse opt-ins whenever they feel a particular deal is "bad." Indeed, Ameritech is seeking little more than the right to relitigate again and again issues it has lost. To the extent Ameritech is merely referring to legitimate cost differences or issues of technical feasibility, Rule 809 already permits the ILECs to refuse an opt-in upon an appropriate showing.

to opt into provision of an interconnection agreement for a full term subject only to the limitations set forth in Rule 809.⁴

Finally, AT&T concurs with MCI that carriers have the option of challenging an incumbent LEC's denial of an opt-in request at the Commission, without first seeking a state commission determination. Indeed, the Commission has expressly stated as much in the *Local Competition Order*: "Because of the importance of section 252(i) in preventing discrimination . . . we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies." *Local Competition Order*, ¶ 1321. Nonetheless, where, as here, a requesting carrier invokes the Section 252 arbitration process, Section 252(e) applies to a "failure to act." As AT&T showed in its comments, the Commission should: (1) affirm that it will not hesitate to exercise its Section 252(e)(5) authority when a state fails to carry out its responsibilities in a timely manner, on a claim either that (a) a party to an arbitration decision refuses to negotiate or join in the submission of an agreement that conforms to that decision, or (b) an incumbent LEC has not responded in a timely manner to a competitive LEC's pick and choose request, and (2) establish a rebuttable presumption in § 252(e)(5) proceedings that a state's failure to act within three months in either of these situations is unreasonable.

⁴ AT&T has confirmed in the *ISP-Bound Traffic* proceeding that it would not object if the Commission were to make clear that the Commission's final rules governing ISP-bound traffic will provide a basis for incumbents to break the chain of pick-and-choose elections regarding such traffic when existing agreements expire. See *Inter-Carrier Compensation for ISP-Bound Traffic NPRM*, CC Docket Nos. 96-98 and 99-68, Comments of AT&T Corp., p. 21 (filed April 12, 1999). There is no reason, however, to adopt the ILECs' erroneous interpretation of Rule 809 itself, which would impair the ability of CLECs to opt into interconnection agreements in all circumstances.

Respectfully submitted,

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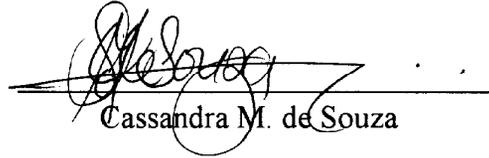

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Certificate of Service

I, Cassandra M. de Souza, do hereby certify that I caused one copy of the foregoing Reply Comments of AT&T Corp. to be served by First Class mail on all parties on the attached service list, this 3rd day of June, 1999.


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