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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mpower Communications Corp.	)	CC Docket No. 01-117
For Establishment of New Flexible Contract	)	
Mechanism Not Subject to "Pick and Choose"	)	

COMMENTS OF

Z-TEL COMMUNICATIONS, INC.

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No. of Copies rec'd 0+6
List A B C D E

July 3, 2001

SUMMARY

As proposed, Mpower's petition contains several serious conceptual and legal flaws. Most notably, the proposal fails to take into account the fundamental disparity in ILEC-CLEC bargaining power. Contrary to Mpower's assertion, regulations do not stand in the way of ILEC-CLEC contracts – instead, the very existence of these contracts *depends* on such regulation. In particular, Section 252(i) plays an important role in mitigating the large transaction costs faced by CLECs in the Section 251-252 process. In addition, the current regime does permit ILECs and CLECs to enter into specialized arrangements, including volume and term discounts.

Mpower's proposal also suffers from other significant legal and policy failings. The proposal implicates but does not consider the important jurisdictional principles embodied in Section 2(b). The proposal also could promote "greenmail" agreements between ILECs and CLECs in which favorable rates, terms, or conditions would be openly dangled in front of CLECs in exchange for regulatory support.

In conclusion, Z-Tel strongly believes that the Commission should focus its efforts on improving the Section 251-252 process. Entering into and enforcing effective interconnection agreements is a difficult and costly task for a CLEC. The Commission should swiftly adopt policies – such as an alternative dispute resolution system – that are designed at lowering these costs of entry.

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In its Petition for Forbearance and Rulemaking, Mpower Communications touches upon a critical and fundamental fact of the local telecommunications market today: incumbent local exchange carriers do not treat wholesale services to competitive carriers as a market opportunity and instead view CLECs "merely as a regulatory burden."[1] As one of the nation's largest consumers of unbundled network elements ("UNEs") and other wholesale services from incumbent LECs, Z-Tel Communications, Inc. ("Z-Tel") shares Mpower's concern and desire to incent incumbent LECs to treat their wholesale customers as customers and not burdens.

Unfortunately, the prescription Mpower proposes will not cure the disease. However well-intentioned, Mpower's proposal fails to take fully into account the fundamental disparity in bargaining position between ILECs and CLECs that necessitates oversight of the ILEC-CLEC interconnection process.

That said, Z-Tel commends and welcomes Mpower's attempt to bring the fundamental questions of ILEC-CLEC bargaining power to the Commission's attention. But instead of creating a new, federal interconnection agreement regime, Z-Tel believes the Commission

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1 Petition for Forbearance and Rulemaking, *In the Matter of Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose"*, CC Docket No. 01-117, filed May 25, 2001 (hereinafter "FLEX Petition") at 4.

should actively initiate and take steps to improve the Section 251-252 agreement process already in place. The Commission should put in place policies and procedures that will have Section 251-252 interconnection agreements operate more like the "contracts" they really are and less like "tariffs". In particular, the Commission should implement a nationwide, nonexclusive alternative dispute resolution process for disputes arising out of interconnection agreements.

I. THE CONCEPT OF ILEC-CLEC "BARGAINING"

The key flaw in the FLEX Petition is its underlying initial assumption that ILECs will, in fact, begin to treat CLECs like "good business partners" if only ILECs had the ability to write wholesale agreements with CLECs that are not subject to "pick and choose."[2] Virtually all CLECs, including Z-Tel, have received the common ILEC negotiation script response, "Though I would like to provide arrangement X to you, I'd then have to provide it to everybody – so I won't give it to you." But to turn that negotiation rhetoric into a fundamental premise for a radical shift in interconnection policy fails to understand fully the dynamic of the ILEC-CLEC "negotiation" process.

A. The Disparity in ILEC-CLEC IA Bargaining Power

ILEC-CLEC interconnection discussions are usually not business-to-business "negotiations." This is because all CLECs (even those that build all of their own facilities) *must* have an interconnection agreement with the local ILEC – and because the ILEC generally can get along perfectly well without having a single such agreement.[3] When the components of unbundled entry and resale are included, CLEC dependence on access to the ubiquitous ILEC

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2 *Id.* at 4-5.

3 Robert Atkinson, chief interconnection negotiator for Teleport Communications, founding member of ALTS and later Deputy Chief of the FCC's Common Carrier Bureau, has colorfully described his initial, pre-Act interconnection "negotiations" with New York Telephone Company as follows: "Glad to see you...have some coffee...have

network places even further emphasis on the interconnection agreement. Five years after passage of the Act, the level of competitive entry based on non-incumbent network facilities is small. The Commission's most-recent *Local Competition Report* showed that as of December 2000, incumbent LEC facilities supported over 97% of the local exchange lines in the country.[4]

The framework of 1996 Act recognizes this disparity of bargaining power and takes into account that ILECs face little, incentive to "negotiate" arrangements that would lead to a diminishment of their market power. The provisions of Sections 251 and 252 and Commission rules are attempts by Congress and the Commission to rectify this bargaining power disparity by giving CLECs legal rights to certain, basic contract clauses, including Section 252(i). The interconnection agreement process set forth in Sections 251 and 252 is based on solid transaction cost economic principles.

B. The Economics of Contract Bargaining and the 1996 Act

A fundamental principle of contracts is that contracts are entered when firms see mutual gain. In a standard commercial negotiation process, each party determines its "bottom line" – the price or terms at which it will or will not enter into a contact. Therefore, each party comes to the negotiation table with a range of acceptable outcomes. The process of "negotiation" occurs within the area where the range of options under discussion are within the acceptable range for both parties. A conceptual diagram of the negotiating dynamic is shown in Figure 1.[5]

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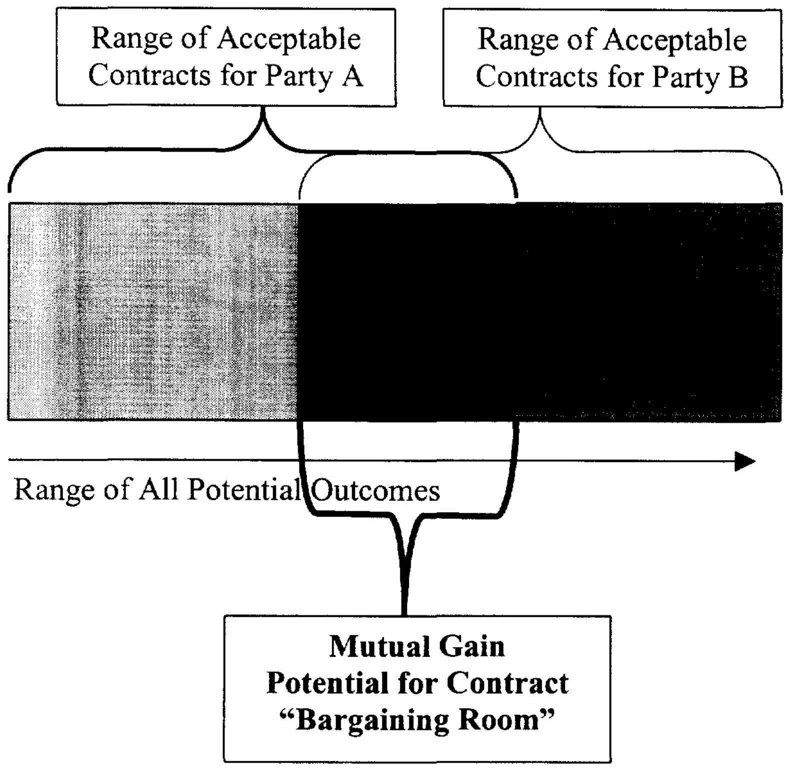
a donut...drop dead." Richard D. Tomlinson, *Tele-Revolution: Telephone Competition at the Speed of Light* 30 (2000).

4 FCC Common Carrier Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of December 31, 2000* (May 2001) at Tables 1, 3 (5.748 million non-incumbent facility lines of 193,818,048 total lines, or 2.97%) (*Local Competition Report*).

5 For a discussion of the economics of contracts generally, *see* Werner Z. Hirsch, *Law and Economics: An Introductory Analysis*, ch. 5 (1999) and Eric Brosseau, *L'économie des contrats: Technologies de l'information et coordination interentreprises.*

Figure 1. Standard Negotiation With Mutual Gain[6]



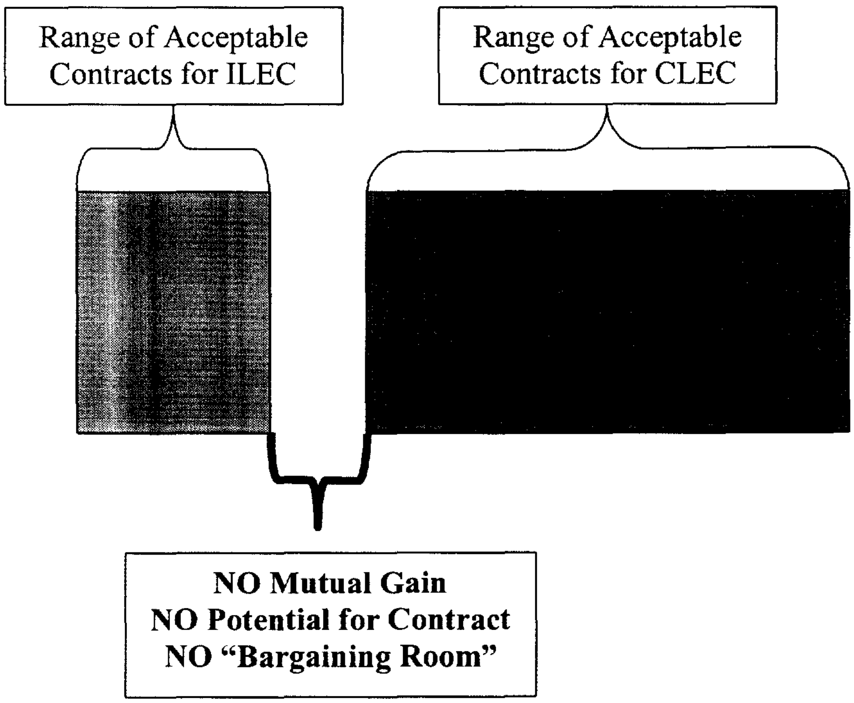
In the context of ILEC-CLEC "negotiations," however, the ILEC's possession of a monopoly position means that there is not necessarily *any* area where mutual gain exists. This is because an ILEC's assessment of its gains or losses from entering into or not entering into an interconnection agreement are skewed by its desire to maintain its dominant, market position and its knowledge that it can prevent CLEC entry by refusing to enter into an IA.[7] In this situation,

[6] Figure 1 and the figures that follow show on one continuum the range of "all potential outcomes" from a contract. In Figure 1, note that not all potential outcomes are acceptable to both Party A and Party B, but there is a set of outcomes that are acceptable to both parties, the area of mutual gain denoted by a black box. The range of potential outcomes involves all terms and conditions of a contract (such as time of delivery) but can perhaps be best understood in the context of a sale of a commodity good like wheat between Party A, a distributor, and Party B, a farmer. Party A may only be willing to buy wheat up to $10/bushel, and Party B may be willing to sell only for over $8/bushel. The range of $8-10 is the area where both parties will gain by having a contract and is the area where negotiations will occur. From a public policy perspective, there may be no need to intervene in this process to determine which price between $8-10 is appropriate.

[7] It is axiomatic economics that possessing a monopoly is more profitable than operating a business in a competitive market. As a result, when presented with an interconnection

an ILEC necessarily faces a greater "loss" from entering into an effective IA with a CLEC (because successful entry means it will lose its monopoly) and greater "gain" from not entering into an IA (because the refusal means that no entry will occur). Indeed, it is not unreasonable to posit that because of the pervasive impact market power has on the process, an ILEC's range of acceptable interconnection outcomes may not intersect with the range of acceptable interconnection outcomes CLECs need to enter the market – as in Figure 2.

Figure 2. ILEC-CLEC "Negotiations" with No Intervention



When this situation occurs, "private negotiations" between ILECs and CLECs will not necessarily result in effective agreements and interconnection.

It is important to note that the sharp reduction in acceptable range of ILEC interconnection options generally results from the dominant, monopoly position ILECs possess.

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negotiation situation, an ILEC will rationally consider the damage to its dominant market position that would happen if it were to enter into a contract that would permit a new entrant to attack and diminish that market share.

The framers of the 1996 Act recognized this disparity in bargaining power and decided that leaving the development of local competition solely to the whims of this "negotiation" process – which may be sufficient for any particular CLEC – would not necessarily result in sufficient marketwide entry. As a result, Congress and the Commission affirmatively put in place a process to ensure certain that adequate interconnection agreements are implemented. Sections 251 and 252 of the Act, and implementing regulations, are deliberate interventions in the "negotiation" process designed to ensure that interconnection agreements contain certain minimum rates, terms and conditions.

In particular, Sections 251 and 252 –

- Require that ILECs negotiate interconnection agreements (IAs) with CLECs in "good faith";
- Require that IAs provide "nondiscriminatory" access to unbundled network elements at cost-based rates;
- Require that ILECs sell through IAs interconnection, UNEs, and resale services at nondiscriminatory prices determined pursuant to FCC rules and state commission determinations;
- Put in place a mechanism to arbitrate quickly "all" rates, terms and conditions upon which ILECs and CLECs cannot agree;
- Provide CLECs the ability to ensure that an IA be in place within 9 months of the initial request;
- To ensure nondiscrimination and expedite the process, provide a CLEC the ability to pick-and-choose interconnection agreement provisions provided by the ILEC to other CLECs.

At the same time it put in place these requirements, Congress decided that an "interconnection agreement", rather than a state or federal tariff, was a preferred means of effectuating local entry.[8] Incidentally, both the Congress and the Commission left sufficient room in this process for fully-negotiated agreements as well.

However, it is important not to confuse the *existence* of IA contracts with the fallacy that these contracts always "mutual gain." In other words, the fact that Sections 251 and 252 require ILECs to enter into contracts *does not* mean that these contracts are always "negotiated". Simply because these IAs are enforceable contracts does not mean that the range of ILECs' acceptable outcomes now intersect with the range of acceptable outcomes of CLECs. *See* Figure 3.

[8] This decision was no doubt inspired by the "great tariff" debates of the past several decades, which began with the Bell System filing its controversial and unlawful TELPAC tariff in 1961 and which continued with Bell's discriminatory H-Lo tariff in 1973, the ENFIA tariff of 1978, and the never-ending RBOC "Video Dialtone" tariffs that preceded the 1996 Act. By requiring that local competition proceed pursuant to *contracts*, and not tariffs, Congress clearly intended that contract law principles of enforcement take precedence.

Figure 3. The 1996 Act and ILEC-CLEC "Negotiations"

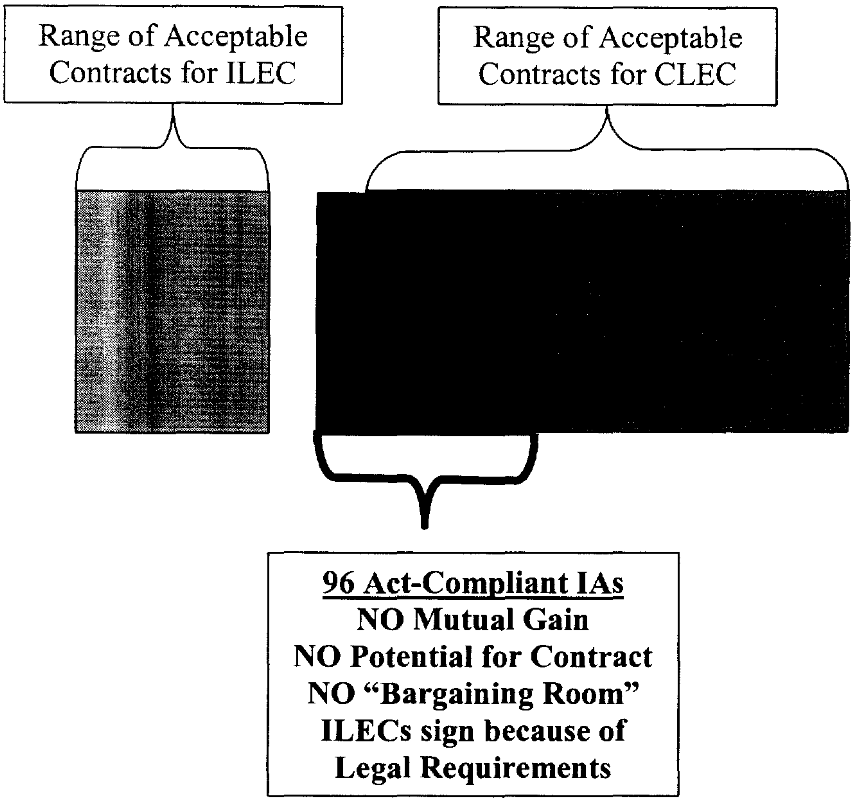

Figure 3 raises two important points. First, one cannot and should not necessarily regard the "black box" range of 96-Act compliant IAs shown in Figure 3 as being "negotiated" the same manner as the "black box" range of acceptable contracts in Figure 1. ILECs sign the IAs shown in Figure 3 because they are required to do so, not because of economic mutual gain.[9] While there may be a range of agreements that comply with the law, ILECs generally do not "negotiate" in that range the same way normal commercial negotiations happen. Instead, these "negotiations" are over the parameters and requirements of the legal regime in which the ILEC seeks to do as little as possibly as simply as possible. Usually, these "negotiations" are instead a

[9] In certain interconnection negotiations, ILEC negotiators have frankly told the writer precisely this. *Also see* note 3, *supra*.

series of increasingly-complex "gotcha" clauses proposed by ILECs that may have as their sole justification a footnote in a FCC or state commission order.

Second, there is a range (the "black box") of 96-Act compliant IAs that the Commission and state commissions may implement or facilitate. Not all of these IAs are consistent with acceptable CLEC IA outcomes – which may explain in part the vast disparity in local entry throughout the country.[10] In a very real way, the Commission and state commissions can directly affect the level of entry in a state by facilitating and implementing effective interconnection arrangements.

The flaw in Mpower's Petition is that it disregards these parameters of ILEC-CLEC "negotiations." Mpower assumes that ILECs "want to make competition work"[11] and that certain legal requirements from the 1996 Act (namely, Section 252(i)) impair the establishment of "purely voluntary, wholesale arrangement[s]" between ILECs and CLECs.[12] However, the overly-legalistic quality of most ILEC-CLEC "negotiations" today is *not* the result of regulation – it is the result of the fact that ILECs may not have adequate economic incentive to facilitate competition. Regulatory intervention – and only regulatory intervention – ensures that monopoly ILECs sign most IAs with their competitors.

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10 In particular, the *Local Competition Report* demonstrates that there is a growing "competition divide" between states like New York and Texas where entry has taken hold and other states. In particular, 20% of all CLEC entry nationwide in CY2000 occurred in New York State. This disparity is growing – in the second half of 2000, more than one in three of all new CLEC lines were added in New York and Texas, while those states combined represented only 25% of all CLEC entry. *Local Competition Report* at Table 6.

11 FLEX Petition at 4.

12 *Id.* at 7.

C. The Section 252(i) Lowers the Transaction Costs of the IA Process

A fundamental premise of the FLEX contract proposal is that Section 252(i) of the Act somehow stands as a "barrier" to the free "negotiation" of innovative ILEC-CLEC contracts.[13] However, the operation of Section 252(i) actually makes the IA process less costly and efficient for both CLECs and ILECs – and those benefits would be seriously compromised if ILECs were able to opt-out of that system. In short, Section 252(i) helps reduce the transaction costs in entering the market and, as a result, promotes entry.

The process of negotiating and implementing any contract is not without cost. Economics calls these costs "transaction costs", and the nature and impact of transaction costs greatly influences a firm's decision as to whether to sign or reject a potential contract. In the IA context, the Section 251-252 IA process involves substantial legal and regulatory costs from "negotiating" and ultimately arbitrating an acceptable IA that will facilitate entry. Because of the disparate bargaining situation, these transaction costs become extremely important to each CLEC in each state.[14] In addition, the ILEC may have an incentive to increase the costs of the transaction by increasing the transactions costs. As a result, without a policy designed to mitigate the transaction costs, there should be a means to check that incentive.

Section 252(i) mitigates these transaction costs by putting in place state-of-the-art "off-the-shelf" interconnection and access arrangements that are available to other requesting carriers. When one CLEC arbitrates or negotiates a particular interconnection or access arrangement

13 *Id.* at 9 ("interconnection agreements are increasingly standardized . . . There is great sameness and very little meaningful choice.").

14 Indeed, the IA transaction costs a CLEC faces plays a substantial role in what states CLECs enter at what particular time. Answering the question, "Will I have to arbitrate effective rates/adequate performance/etc. in this state?" is usually one of the first questions all aspiring CLECs must answer. States where "off-the-shelf" agreements or legal rights are favorable attract more CLEC entry. This situation may be a cause for the growing "competition divide" described in note 10.

pursuant to Section 251, similarly-situated CLECs are able to take advantage of that arrangement without incurring those same transaction costs. For example, a Commission decision regarding line-sharing or UNE combinations can be implemented much faster and in a much less-costly fashion where Section 252(i) is present.

In the FLEX Petition, Mpower posits "what it would be like" in a world where interconnection contracts do not have to comply with Section 252(i). That world, unfortunately, is one that would permit ILECs to impose substantial transaction costs on CLECs on a serial basis – a scenario that would sharply reduce market entry.

Because Mpower does not envision any substantive regulation of FLEX contracts, those contracts could contain virtually any clause. It could be possible for an ILEC to put in place "poison pills" that would make a FLEX contract unavailable to all other CLECs. An ILEC facing an arbitration on a particular point with a particular CLEC could impose those substantial transaction costs on the CLEC before offering a restrictive FLEX contract that otherwise grants the CLEC's original request as a "settlement". While the first CLEC may be pleased with the result, since the FLEX contract can effectively discriminate among CLECs, the *next* CLEC that seeks a similar arrangement would be required to take all the same steps the first CLEC did, only to reach the same result. And if the ILEC settles with the second CLEC with another FLEX contract, a third CLEC would face the same transaction costs.

As opposed to the Section 252(i) process, the sum total transaction costs in Mpower's proposal could be vastly greater. If so, the overall level of CLEC entry into the market would be diminished. Before implementing Mpower's proposal, the Commission should carefully examine the impact the proposal would have on transaction costs.

D. Section 252(i) does not prohibit legitimate specialized contracts

The pick-and-choose rule does not prohibit specialized contracts between CLECs and ILECs. To the contrary, since the *First Local Competition Order*, Commission rules have permitted tailored or specialized interconnection and UNE arrangements, provided that this specialization is based on legitimate reasons. For example, the *First Local Competition Order* explicitly provided that volume and term package deals would be consistent with Sections 251-252 if a legitimate cost difference existed for that package deal.

In fact, Mpower does not provide any examples of a legitimate "package deal" that would not pass muster under the current framework. Mpower states that a FLEX contract would "involv[e] a broad range of business interests, but especially provisioning, quality of service, volume and term discounts and other fundamental terms affecting the business relationship of the parties."[15] However, nothing in Section 252(i) or current rules prohibit an ILEC and CLEC from negotiating a special provisioning, quality, and volume and term discounts. For example, many ILECs have IAs that provide for different levels of quality of loops, such as options for choosing "as-is" loops, or loops certified to support a particular level of xDSL service.

Indeed, Mpower presents no evidence of any arrangement of the sort it lists that has been or would be rejected by the Commission or any state commission. It would appear that the only types of "innovative" deals that would be served by the FLEX process are arrangements that do not involve legitimate factors and must therefore involve certain other "intangible" interests. As discussed in Section II.B below, this type of "special" arrangement must be viewed with the greatest of skepticism and concern.

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15 FLEX Petition at 8.

II. THE PROPOSAL POSES SUBSTANTIAL POLICY AND LEGAL ISSUES

In addition to misunderstanding of the "negotiation" dynamic between ILECs and CLECs, Mpower's FLEX contract proposal suffers from several other serious and fatal flaws.

A. Mpower's Proposal Implicates Significant Jurisdictional Issues

As proposed by Mpower, ILECs and CLECs would be able to enter into FLEX contracts for any wholesale arrangement. As a result, the FLEX proposal would clearly involve contracts relating to local and intrastate services and facilities, and the proposal asks that the Commission pre-empt and limit state authority to investigate and review these contracts.

However well-intentioned by Mpower, there is substantial question as to whether Section 2(b) of the Communications Act permits the Commission to usurp the jurisdiction of state commissions in this manner. Certainly, in the wake of Supreme Court decision in the *Iowa Utilities Board* case, the Commission has the authority to promulgate rules under Section 251 and 252 even if those rules involve or relate to intrastate services and facilities. But that result does not necessarily mean that Section 10 of the Act gives the Commission the ability to "deregulate" the wholesale provision of intrastate services and facilities by all ILECs writ large.

The ability and authority of state commissions to monitor and regulate intrastate services provided by ILECs would be put in substantial question by Mpower's proposal. Mpower asks the Commission to pre-empt state commissions from reviewing FLEX contracts even though those contracts may involve the resale and use of ILEC intrastate network facilities for intrastate services.[16] In addition, the presence of a FLEX contract involving the resale of local services or UNE-like arrangements would not be admissible state proceedings (such as a local retail rate or

16 Mpower notes that the Commission should establish a "national standard which is not subject to differing interpretations in the states." FLEX Petition at 12.

UNE pricing proceeding).[17] As a result, a state commission would be denied complete information about the uses and revenues generated from use of intrastate facilities – an untenable and problematic situation that could cascade throughout the existing separations and universal service support process.

The jurisdictional questions behind Mpower's petition are extremely complex and, unfortunately, entirely unaddressed.

B. The Proposal Could Promote Greenmail Arrangements

As discussed above, the current Section 252(i) process does not prevent ILECs and CLECs from entering into "package deals" for legitimate reasons. In fact, Commission rules explicitly permit volume and term discounts for UNEs and other specialized arrangements could pass muster if examined under that framework.[18]

As discussed above, Mpower does not provide any example of a "package deal" and how that deal would not comply with current rules. It would appear that the only types of "innovative" deals that would be served by the FLEX process are those that do not involve legitimate cost differentials and must therefore involve other purposes. Of greatest concern to the Commission must be "greenmail" arrangements that involve the trade-off of regulatory support in exchange for favorable rates, terms and conditions.

Given the enormous financial issues at stake, it should surprise no one that various RBOCs would seek to buy off CLECs by offering favorable or more-rapid interconnection arrangements in exchange for regulatory support. For example, in Texas, Southwestern Bell

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17 *Id.* at 16. Set aside the obvious and serious constitutional questions raised by any attempt by a federal agency to establish Rules of Evidence for a state government.

18 Indeed, as Mpower knows, such differential treatment occurs. For example, the process for ordering an analog and provisioning an analog UNE loop is generally more mechanized than the process for ordering and providing a xDSL-capable UNE loop (despite the fact that in the majority of cases, the physical facility provided is identical).

Telephone Company tried to make a condition of a CLEC receiving the "T2A" interconnection agreement a concession that the CLEC agree that the agreement satisfied SWBT's 271 obligations. Similar, more covert, proposals are routinely made.

Mpower implicitly concedes that FLEX contracts may contain such clauses and actually urges that the Commission not try to regulate or prohibit such "poison pills." Mpower also proposes that the terms of FLEX contracts not be admissible in "unrelated [state or federal] proceedings."[19] The effect of adopting this selection would make the FLEX contract regime the moral equivalent of an offshore tax haven – a place where an incumbent would be free to offer, without consequence, preferential terms to carriers that support its regulatory positions.

Rampant brokering of regulatory positions could undermine faith and confidence in the entire regulatory regime. In *all* regulatory proceedings, the Commission and state commissions generally lack the resources to investigate all issues fully and instead rely upon the veracity and truthfulness of commenters and participants to raise competitive issues. As proposed, an ILEC could openly offer a CLEC a discount on loops if that CLEC supported a particular regulatory position – and even though that arrangement would be posted on the Internet, the Commission or state commission could not consider that pricing in any decision.

III. THE COMMISSION SHOULD IMPROVE THE IA PROCESS

Despite the flaws of its particular proposal, Mpower must be commended for bringing to the Commission's attention problems with the IA negotiation process. The Commission should explore means that would facilitate genuine wholesale arrangements with CLECs. Z-Tel agrees

[19] *Id.* at 15-16.

that it may be "time for a change"[20] – but at this juncture, Z-Tel believes the Commission should focus its efforts on improving the Section 251-252 process.

Improving the Section 251-252 process can have immediate impact on competitive entry. Indeed, because unbundled entry is growing faster than any other means of entry provided for in the 1996 Act, Section 251-252 interconnection agreements play an increasingly important role in the market and, indeed, the nation's telecommunications infrastructure. Nationwide, local service to over 12 million lines is provided pursuant to the unbundling and resale portions of Section 251-252 or similar interconnection arrangements.[21] In addition, unbundled entry pursuant to Section 251 is the key to serving residential consumers. For example, in states where the UNE Platform has taken hold, like New York and Texas, the majority of CLEC lines serve residential consumers.[22] If the IA implementation and enforcement process does not operate smoothly, service to millions of end users are in jeopardy.

Most parties, including the Commission, now routinely recognize that "enforcement" of interconnection obligations is a bedrock principle of local competition. But too often, this debate dissolves into an acknowledgment that "more enforcement must happen" and that fine and forfeiture limits should be increased.

While those are important and necessary steps, effective enforcement requires more. In particular, effective enforcement must be self-executing. Central to the enforceability of legal obligations is the manner in which disputes are resolved.

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20 FLEX Petition at 9.

21 For example, the Commission reported that 12% of Texas subscriber lines were served by CLECs. If one surmises that the nationwide figure that 65% of CLEC lines are provided by resale or unbundling hold in both Texas, service to nearly 8% of the lines in Texas are provided according to the terms of Section 251-252 interconnection agreements. *Local Competition Report* at Tables 4, 6.

22 *Id.* at Table 8.

A key starting point is that Section 251-252 Interconnection Agreements are legally binding contracts. Assessing appropriate models for IA enforcement should involve reflect on how standard, commercial contracts are enforced – namely, through court processes or alternative dispute resolution. This analysis clearly reveals one key "gap" in Sections 251 and 252 -- no explicit post-execution forum for enforcing rights is provided. As a result, parties and states have been struggling since 1996 to determine the proper forum for enforcing these contracts.

Some parties seem to assume that state commissions have the authority to enforce interconnection agreements. However, that assumption does not take into account the fact that many state commissions are prevented by state statutes from taking such a role or awarding contract damages. For example, this issue has stymied and delayed efforts by CLECs to arbitrate certain "business" issues in the State of Florida or develop a Florida performance measurement plan. In addition, many states have challenged the constitutionality of Section 252, with particular regard to the requirement that state commission IA arbitrations be appealed to federal court. The Supreme Court recently granted certiorari on this 11th Amendment issue. In short, the assumption that state commissions enforce interconnection contracts presumes that state commission staffs are equipped with resources or authority to act as like a court enforcing a contract.

Enforcement before the FCC does not fare much better. Indeed, while the FCC has established an accelerated dispute resolution process over common carrier market entry disputes, it has affirmatively elected not to resolve disputes involving breach of interconnection agreements.

As a result, when a CLEC believes its IA has been breached, there is substantial question as to where the CLEC should get that dispute resolved. A state or federal court breach of contract action is, of course available, but the presence of supplemental claims related to Commission or state rule violations implicates the doctrine of a "primary jurisdiction" referral to the FCC or state commissions.

The Commission could help rectify this situation by requiring, at the request of a CLEC, that an IA contain a clause that would resolve disputes pursuant to an alternative dispute resolution (ADR) process established by the Commission.[23] In this way, the Commission would give CLECs the ability to put in interconnection agreements a standard, rapid dispute resolution and contract enforcement mechanism. Because the IA would contain as part of its own terms the manner in which disputes may be resolved, the complicated jurisdictional questions over IA enforcement would be resolved.

This ADR process would contain the following ground rules:

- The Commission would adopt the Commercial Arbitration Rules of the American Arbitration Association (AAA), except as modified in the following, and the process would be conducted pursuant to the Federal Arbitration Act (the "FAA").
- The Commission would maintain and administer a list of independent arbitrators that would be utilized to create three-judge panels (for example, each party would select one arbitrator from the list, and the two arbitrators would select the presiding arbitrator from the list).
- Arbitrators and costs would be paid directly by the parties. The Commission may make provision for "losing party pays" to avoid frivolous arbitration.

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23 A similar alternative dispute resolution mechanism was recently proposed by Reps. Cannon and Conyers in H.R. 1698, the American Broadband Competition Act.

- Parties would have the right to take discovery, depositions and testimony in arbitration. Using the authority of the Commission and the FAA, arbitrators would be empowered to compel discovery and testimony and impose sanctions for noncompliance. Unless otherwise agreed to by all parties, the panel would be required to render its final written decision within 60 days of being convened.
- Arbitration panels would have the authority to order payment of direct, compensatory and consequential damages and order specific enforcement of the interconnection agreement. IAs clauses limiting liability for ILEC breaches would not be permitted.
- To promote the public interest and develop a body of caselaw, all decisions and orders by any arbitration panel would be posted on the Internet (an exception from standard commercial arbitration process).
- Arbitration decisions would be enforceable in federal district court pursuant to the Federal Arbitration Act.[24]

This process would put in place a rapid, independent method of enforcing interconnection agreements. The process should explicitly be non-exclusive – the presence of an arbitration process would not limit the Commission's authority to investigate rule violations, the state commission's ability to arbitrate other terms of the agreement or UNE rates, or the authority of the courts to adjudicate breach of contract and other disputes between ILECs and CLECs.

24 The Commission could establish this process through a rulemaking pursuant to Sections 201(b), 251 and 252 of the Act. Outside of establishing the process and maintaining the list of arbitrators, the Commission would have little day-to-day involvement in the process. The arbitrators would be paid by the parties and would not be Commission employees or agents. In the end, Part 51 of the Commission's rules would contain a rule

IV. CONCLUSION

Mpower's proposal, while well-intentioned, contains several serious conceptual and legal flaws – most notably, its failure to take into account the fundamental disparity in ILEC-CLEC bargaining power.

Forbearance from Section 252(i) as proposed will not necessarily result in more competitive markets. Section 252(i) plays a critical role in mitigating the large transaction costs faced by CLECs in the Section 251-252 process. In addition, Section 252(i) results in the rapid implementation of public policy chances to all ILEC-CLEC agreements as swiftly and efficiently as possible. Changing this principle as proposed could substantially increase the sum total transaction costs the CLEC industry must endure to enter the market.

Mpower's proposal also suffers from significant legal and policy failings. The proposal implicates but does not consider the key jurisdictional principles of Section 2(b). The proposal also could promote "greenmail" agreements between ILECs and CLECs in which favorable rates, terms, or conditions would be openly dangled in front of CLECs in exchange for regulatory support.

Instead, Z-Tel believes that the Commission should improve the Section 251-252 process. Entering into and enforcing effective interconnection agreements is a difficult and costly task for a CLEC. The Commission should swiftly adopt policies – such as an alternative

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that would require, at a CLEC's request, that an IA contain a clause incorporating this process as a non-exclusive means of resolving disputes related to the IA.

dispute resolution system – that are designed at lowering these costs of entry. Such policies would rapidly promote competitive entry in all states to all consumers.

Respectfully submitted,

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July 3, 2001