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

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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

REPLY COMMENTS OF AT&T CORP.

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LIST A B C D E

TABLE OF CONTENTS

SUMMARY 1
ARGUMENT 2
CONCLUSION 6

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, DA 01-1348, released on June 4, 2001, AT&T Corp. ("AT&T") respectfully submits these Reply Comments in response to the Petition for Forbearance and Rulemaking ("Petition") submitted by Mpower Communications Corp. ("Mpower").

SUMMARY

The Comments confirm that Mpower's "FLEX" contract proposal is fundamentally flawed and does not remotely satisfy the mandatory forbearance criteria of 47 U.S.C. § 160 ("Section 160"). Mpower's proposal is based upon the erroneous premise that incumbent local exchange carriers ("ILECs") are eager to enter into interconnection agreements with their potential competitors and that only the ILECs' obligations under 47 U.S.C. §§ 252(i) and 252(e) stand in the way of widespread voluntary arrangements. The reality, of course, is that ILECs have little or no incentive to negotiate with potential competitors and every incentive to engage in discrimination to prevent any significant erosion of their local monopolies. And the regulatory restraints that Mpower's proposal would help ILECs to evade are among the most

important safeguards against such discrimination. Mpower's FLEX contract proposal therefore would not enhance competition, but instead would further the ILECs' ability to exercise their market power and their ability to circumvent the Act's core nondiscrimination goals and requirements. Mpower's Petition should be denied.

ARGUMENT

The CLEC comments in this proceeding are unanimous in their opposition to the FLEX contract proposal that would, in practice, do away with the nondiscrimination protection provided by Sections 252(i) and 252(e).¹ These comments demonstrate that, contrary to Mpower's view, "regulations do not stand in the way of ILEC-CLEC contracts – instead, the very existence of these contracts *depends* on such regulation." Z-Tel at i.² Put another way, "ILECs arrive at the negotiating table, not because they desire new wholesale customers, but *because* of the requirements of the Act." Focal at 3 (emphasis added).

That conclusion is only reinforced by the comments of the ILECs, who argue that dealings between ILECs and CLECs should not be subject to *any* regulatory constraints. See BellSouth Comments to Mpower's Petition for Forbearance and Rulemaking ("BellSouth") at 4 (seeking to expand Mpower proposal by arguing that "the FLEX contract mechanism must not be subject to any of the obligations in section 251 and 252"); *accord* Comments of Verizon

¹ See Opposition of the Ass'n of Communications Enterprises ("ASCENT") at 4; Comments of Covad Communications Company ("Covad") at 2; Opposition of Focal Communications Corp. ("Focal") at 1-2; Comments of Sprint Corporation ("Sprint") at 2-3; Comments of WorldCom Inc. ("WorldCom") at 1; Comments of Z-Tel Communications ("Z-Tel") at i.

² ASCENT at 6 (explaining that Mpower's suggestion that "ILECs actually want CLECs as wholesale customers" is refuted by the "penalties" racked up by Verizon and SBC for their participation in a "host" of "anti-competitive stratagems"); Covad at 5 ("The Commission knows well that incumbent LECs have never, and will never, embrace competition in the local network as a business opportunity"); Sprint at 3 ("the ILEC has every incentive to make it as difficult as possible (given regulatory constraints) for a CLEC to use its network.").

(“Verizon”) at 3 (FLEX contract proposal must be “without regulatory compulsion or sanction”); Comments of Qwest Corporation (“Qwest”) at 1 (same). Indeed, the ILECs support Mpower’s proposal only to the extent that their conduct would be free of all regulatory constraints. *See, e.g.,* BellSouth at 2 (“both parties must have the complete freedom to negotiate without the regulatory constraints placed on ILECs”). But absent regulatory constraints that discourage anticompetitive discrimination, ILECs, with their ubiquitous local networks and substantial market power, would have both the incentive and the ability to discriminate in favor of preferred CLECs that pose little competitive threat and against any CLEC that could threaten their enduring local monopolies. *Id.* at 2-3.³ Mpower’s proposal ignores this market reality and therefore fails at the most general level because “regulatory policy cannot be predicated on a fanciful market view.” ASCENT at 6.

More specifically, because Mpower is unable to identify any substantive difference between FLEX contracts that would be exempt from regulation under Section 252(i) and 252(e) and other interconnection agreements that would remain subject to those provisions, “ILECs will insist that every new agreement be deemed a ‘FLEX contract’ and will insert ‘poison pills’ to ensure that each ‘FLEX contract’ will only be able to be effectively utilized by the negotiating CLEC.” Focal at 1; *see also* AT&T Comments at 3. “This practical impact would harm competition by granting the ILECs substantial power to select favored CLECs for which to provide ‘sweetheart’ deals and discriminate against other CLECs in the negotiating process.” Focal at 1.

³ *See also* Focal at 3 (“[F]ar from embracing the CLECs as wholesale customers, the ILECs are trying to eliminate them altogether”); Z-Tel at 9 (“Regulatory intervention – and only regulatory intervention—ensures that monopoly ILECs sign most IAs with their competitors”).

The comments also confirm that the mere ability of similarly situated CLECs to opt-in to an *entire* “FLEX contract” would not address the potential for unfair and unjust discrimination. As ASCENT explains, “what Mpower refers to as FLEX contracts would be carrier-specific agreements, which either by design or because of the nature of the service arrangement would not be usable by other providers.” ASCENT at 8. As Verizon candidly explains, Mpower’s FLEX contract proposal would allow the “negotiation of unique agreements.” Verizon at 1. Indeed, “[f]ew competing carriers would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans.” WorldCom at 3. In short, the upshot of Mpower’s FLEX contract proposal would be that “CLECs would likely lose opt-in capabilities as well as ‘pick and choose.’” Focal at 4.⁴

Not surprisingly, Mpower has failed to satisfy the mandatory forbearance requirements of Section 160(a). Under the Commission’s precedent, “the decision to forbear from enforcing statutes and regulations . . . must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met.” *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd. 17414, ¶ 13 n.32 (2000)). Mpower provides no such record to support its FLEX contract proposal. *See* ASCENT at 4. Nor do the terse filings of the ILECs, who support aspects of Mpower’s proposal, fill this void; indeed, the ILECs do not even mention the requirements for

⁴ *See also* Sprint at 3 (“Sprint is concerned that the presumably preferential terms in that flex contract would be available as a practical matter only to that one entity”); Covad at 6 (“as the Commission well knows from its tariff proceedings, incumbent LECs are masters at specifying the parameters of ICB tariffs or CSA-type tariff arrangements so as to ensure their applicability to one customer and one customer only”); WorldCom at 4 (noting that forbearance from the “requirements of section 251(i) would encourage incumbent LECs to create contracts that cannot be parsed out”).

statutory forbearance under Section 160. And, as ASCENT properly notes, “Section 706 ‘does not constitute an independent grant of forbearance authority.’” ASCENT at 4 n.11 (*quoting Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, ¶ 69 (1998)).

Because Mpower’s FLEX contract proposal plainly would encourage and facilitate unjust and unfair discrimination, it cannot satisfy the statutory requirement that a party seeking forbearance establish that enforcement of the provisions in question is no longer necessary to ensure ILEC-CLEC contracts are not “unjustly or unreasonably discriminatory.” 47 U.S.C. § 160(a)(1). To the contrary, “continued enforcement of Section 251(i) remains necessary to promote competition and protect consumers.” WorldCom at 1-2. The forbearance that Mpower requests would deny CLECs their “pick and choose” rights in most, if not all, circumstances, and “ILECs would then be able to easily discriminate against particular CLECs by granting certain CLECs sweetheart deals with ‘poison pills’ that prevent other CLECs from obtaining the same deal.” Focal at 9; *see also* AT&T Comments at 6-10; Sprint at 3 (“The potential harm to competition inherent in discriminatory arrangements . . . is contrary to the public interest and should accordingly be avoided”).

Furthermore, removing “the state review and approval process” under Section 252(e) “would only exacerbate this problem” because “[a]ggrieved CLECs would be forced to navigate a new, untried regulatory process to enforce their claims.” Focal at 9. Finally, adoption of the FLEX contract proposal would saddle the Commission with the responsibility of enforcing FLEX contracts in all 50 states throughout the country. *See* Focal at 8; *see also* AT&T Comments at 11-12. “Given the Commission’s extremely limited resources . . . , the Commission should not devote any further resources to this petition.” Covad at 2.

CONCLUSION

Mpower's Petition for Forbearance and Rulemaking should be denied.

Respectfully submitted,

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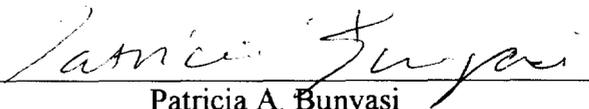
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2001, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 18th, 2001
Washington, D.C.



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