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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 TO COMMENTS ON MPOWER'S
PETITION FOR FORBEARANCE AND RULEMAKING

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SUMMARY

Mpower urges the Commission to initiate a rulemaking to consider the FLEX contract model Mpower proposed in its Petition.

Because the existing UNE-based interconnection model will not be maintained forever in its current form, CLECs and ILECs must work together to develop a contract arrangement that can provide an appropriate transition mechanism as local markets become more competitive. Mpower's proposed model encourages CLECs and ILECs, as wholesale business partners, to negotiate voluntary flexible or "FLEX" contracts that exist outside the governance of Section 251 and 252 of the 1996 Act and minimize regulatory oversight.

CLECs and ILECs should attempt to replace their combative and extreme attitudes to each other with a more cooperative and compromising approach to resolving interconnection issues. Cooperation is a far better alternative to new legislation or regulation that will otherwise inevitably be imposed. Such cooperative efforts to resolve interconnection issues can occur through a rulemaking, in trade associations, and in individual CLEC-to-ILEC contacts.

The FLEX contract proposal would not replace or eliminate the existing UNE interconnection model, but would serve as a voluptuary alternative and also as a transition plan for interconnection as competition develops and certain UNEs are no longer available nationwide. FLEX contracts would be discretionary, and the UNE model would continue to exist for some time to come for those parties that wished to continue to participate under the existing rules. To avoid discrimination and "poison

pills” and to resolve contractual issues, the FLEX model would have to contain adequate enforcement mechanisms. There may have to be special rules to ensure that ILECs do not use FLEX contracts to favor their affiliated CLECs.

Finally, the Commission has the legal authority to implement the FLEX contract program since it will complement, and not replace, the existing UNE-based interconnection agreement regime.

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**REPLY TO COMMENTS ON MPOWER'S
PETITION FOR FORBEARANCE AND RULEMAKING**

Mpower Communications Corp. ("Mpower") hereby submits its Reply to Comments filed in response to the Petition for Forbearance and Rulemaking that Mpower filed in the above-captioned proceeding ("Petition"). In the Petition, Mpower requested that the Federal Communications Commission ("Commission") initiate a rulemaking proceeding in which to consider the establishment of a new flexible contract mechanism ("FLEX contracts") governing interconnection between incumbent local exchange carriers ("ILECs") and competitive locale exchange carriers ("CLECs").

I. Introduction

Since the passage of the Telecommunications Act of 1996 ("1996 Act"), CLECs and ILECs have engaged in a protracted struggle before legislators, regulators, and the courts regarding how to implement the law that Congress viewed as the blueprint for the development of local competition. It is now an appropriate time to reassess where this path has led and to consider a forward-looking plan to achieve Congress' pro-competitive goals. Mpower recognizes that, while continuing to be essential to the initiation of competition, the unbundled network element ("UNE") model for

interconnection will not be maintained forever in its current form. In its Petition, Mpower proposes a new FLEX contract model that will complement and co-exist with today's UNE-based interconnection regime. Mpower's proposal represents a starting point for developing a new contract model that could both ease the tensions between the parties during the transition period and provide a safer, more efficient transition to a more competitive marketplace.

The FLEX contract model would be separate and distinct from the current UNE interconnection regime, which would continue to be governed by Sections 251 and 252 of the 1996 Act. As wholesale business partners, CLECs and ILECs would voluntarily negotiate flexible or "FLEX" contracts that similarly situated CLECs would also be able to adopt. Such FLEX contracts would exist outside traditional regulatory approval mechanisms, and carriers would not be able to "pick and choose" provisions, but would be free to adopt each other's contracts only in their entirety.

It is important that the Commission start to consider alternatives to today's UNE-based interconnection model. The UNE construct will be necessary for the foreseeable future, especially with respect to "last mile" loop facilities that would require extraordinary capital resources to duplicate. As CLECs and other market participants build competitive alternatives to existing network transport and switching components, however, application of the "impair" test to these facilities may ultimately result in the removal of some UNEs from the Commission's mandatory list. Rather than facing a flash-cut to a "no UNE" environment for these critical network facilities, Mpower envisions a well-reasoned transition model that supplements the UNE construct in the

short run and provides a new “safety net” as the transition to a competitive market continues.

The entrenched positions and perspectives have encouraged an “us against them” attitude between CLECs and ILECs that has allowed little room for compromise and cooperation. Each “side” continues to move away from the center to propose increasingly rigid and extreme positions. The Regional Bell Operating Companies (“RBOCs”) and many other ILECs strongly support the Tauzin-Dingell Bill.¹ In addition, with the notable exception of Qwest, the RBOCs propose the virtually instantaneous elimination of all high-capacity loop and transport UNEs.² In response to these and other extremist legislative, regulatory, and judicial threats to their existence, the CLECs have fought back by calling for the structural separation of the RBOCs’ wholesale and retail businesses. Mpower submits that such extremism – on both sides – must be replaced with a moderate approach that motivates ILECs to market network services to their CLEC wholesale customers instead of focusing on denying them access to essential facilities.

Mpower believes that its proposal for traditional business contracts (that will coexist with the UNE model until effective competition develops) offers a promising and less time- and resource-intensive approach than these and other extreme alternatives. Mpower’s proposal starts to chip away at the “command” mentality of intercarrier relationships that has developed over many years through monopolization, legislation, and regulation. The FLEX contract model is a logical next step that moves cautiously

¹ H.R. 1542 The Internet Freedom and Broadband Deployment Act of 2001. This bill would eliminate the need for regulatory approvals to use new interLATA data networks and would also eliminate advanced service UNEs for CLECs.

away from government mandates and regulation. FLEX contracts could represent a win-win/business-to-business solution, driven by evolving business needs. Moreover, just as Mpower's proposal retains the UNE model as a "safety net" critical in today's market, FLEX contracts will provide CLECs with a viable network access alternative as the UNE model devolves.

II. The Importance of Industry Cooperation

Mpower believes that it is critical for CLECs and ILECs to work *cooperatively* to implement a parallel and alternative mechanism to compliment the UNE model on a going-forward basis. Such cooperation can and should be encouraged on all fronts to develop an appropriate deregulatory framework: in a rulemaking proceeding, through internal trade industry association discussions, and between individual CLECs and ILECs that stand to gain from running their businesses in a more cooperative atmosphere. Joint cooperation is a far better alternative to new legislation or regulation that will inevitably be imposed if the industry fails to resolve such issues on its own.

A Commission rulemaking proceeding would provide an appropriate forum for the industry to refine and enhance Mpower's FLEX contract proposal. Both individual companies and trade associations could provide significant input and resources to the process of formulating a new carrier interconnection model. Further, Mpower believes that the Commission would welcome and encourage such efforts. Commissioner Michael Copps recently praised cooperation between an RBOC (Qwest) and CLECs for working together to formulate an innovative resolution to a difficult collocation issue. A Commission rulemaking focused on the FLEX contract proposal would provide a similar

² See Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory, Unbundling of High-Capacity Loops, and Dedicated Transport, DA 01-911 (April 5, 2001).

opportunity for CLECs and ILECs to work together to resolve interconnection issues as well.

Organizations such as the Association for Local Telecommunications Services and the United States Telecom Association (“USTA”)³ serve important roles in defining and advocating regulatory proposals. The challenge now is for the CLEC and ILEC members of these and other trade associations to “park their weapons at the door,” sit down together, and forge an industry consensus on this matter before government imposes a more extreme solution on either side. CLECs and ILECs alike should use the associations, not to find the flaws in Mpower’s proposal, but to evaluate it constructively and seek ways to make it a more viable model.

Finally, it is incumbent upon both CLECs and ILECs to evolve a better business environment on an individual company basis. Competitive carriers are not going away, and until they have achieved a substantial degree of network construction, neither will the ILECs’ obligation to provide interconnection to their networks be removed. Both “sides” have an opportunity to help develop the regulatory framework and contract arrangements that allow them to benefit individually from what has heretofore been a forced association.

III. Industry-Defined Transition Mechanism Needed

Mpower’s proposal represents a moderate, but important step that adds to the current interconnection regime a new track that offers CLECs and ILECs incentives to negotiate “win-win” contracts for interconnection. Some parties commenting in this proceeding raise issues already identified by Mpower in its Petition as requiring the

additional thought and exploration available through a rulemaking proceeding. In the instant Reply, Mpower will attempt to address some of concerns that commenting parties raised, but it believes that this dialogue can best be continued in a rulemaking proceeding.

Current Protections. Some parties commenting on the Petition expressed concern that the FLEX contract model might undermine the existing UNE regime.⁴ Mpower believes, however, that the UNE model will not be sustainable over the long term to meet the expanding and varied interconnection business plans of CLECs. As new networks are built by various entities and as the elimination of access to some categories of ILEC facilities no longer impairs the CLECs' ability to provide telecommunications services, some UNEs may disappear. CLECs need to face this probability and be prepared if and when it occurs. Mpower's proposal – which can serve as an essential safety net during the transition period – does not seek to alter the existing UNE model whatsoever. It is not the adoption of FLEX contracts that will be the major threat to the current interconnection regime available to CLECs as certain parties fear,⁵ but rather the development of competition that will render the UNE model no longer necessary. As effective competition develops and spreads and as the UNE interconnection model gradually recedes, the FLEX contract model could emerge as the routine business-to-business vehicle for intercarrier network arrangements.

³ In January 2001, Mpower accepted the USTA's invitation to join its newly founded CLEC Council in furtherance of a decision of the USTA's Board of Directors to form a "bigger tent" in which CLECs and ILECs could come together and seek consensus on industry regulatory matters.

⁴ AT&T Corporation ("AT&T") Comments at 1 and 8, WorldCom, Inc. ("WorldCom") Comments at 6.

⁵ *Id.*

Mandatory. Because the FLEX contract model is voluntary (as both CLECs and ILECs believe it should be),⁶ the UNE model will continue to be available in its entirety for those parties that wish to avail themselves of its provisions. ILECs will not be able to force FLEX contracts upon unwilling CLECs, as the entire Section 251-252 process (as well as the Section 208 complaint procedure) will remain in tact. Nothing in Mpower's proposal modifies the state-based negotiation and arbitration procedures for UNE-based interconnection agreements, and it will remain in full force – so long as the state of competition justifies its continued existence.

Poison Pills and Discrimination. Some parties express concern that FLEX contracts could include “poison pills” that would render them discriminatory because, by design, they could be unavailable for other parties to adopt.⁷ Mpower recognized this potential risk in its Petition and agrees that the FLEX contract model must contain protections and enforcement procedures necessary to counter any discrimination.

Mpower anticipates, however, that many carriers will have the incentive actively to pursue their own FLEX contracts, based on their individual business motivations and the opportunity for both parties to benefit from such arrangements. There is increasing evidence that the ILECs are recognizing the importance of the revenues and margins they generate from their wholesale customers. Mpower pointed out in its Petition that several ILECs specifically touted their rapid increase in wholesale revenues in their annual reports.⁸ It also believes that some RBOCs have initiated commission-incentive programs for their wholesale sales forces. These facts alone should assuage the concerns

⁶ AT&T Comments at 3, BellSouth Corporation Comments at 2, Focal Communications Corp. (“Focal”) Comments at 4, Verizon Telephone Companies Comments at 3.

⁷ ASCENT Comments at 8, Covad Communications Company (“Covad”) Comments at 6, Focal Communications Corp. (“Focal”) Comments at 4-6, and Z-Tel Communications, Inc. Comments at 11.

of commenting parties, such as Focal, who suggest that ILECs would never want CLECs as customers,⁹ and therefore would lack the incentive to negotiate non-mandated arrangements with CLECs.

On the whole, Mpower foresees that CLECs and ILECs could find common goals in their shared interest in filling their networks with traffic, achieving a profit, and generally succeeding in their business plans. The FLEX contract proposal requires no regulatory oversight for the negotiation of the contracts themselves, and the right combination of public access to FLEX contracts (on websites), appropriate usage restrictions (if necessary to avoid poison pills), and a streamlined enforcement procedure should enable the proposed construct to succeed. Moreover, the adoption of FLEX contracts should encourage ILECs to develop new, generic wholesale offerings and to negotiate arrangements with individual CLECs that provide the types of network arrangements each CLEC specifically needs.

Enforcement. It would be naïve, however, to suggest that discrimination could not occur, and Mpower recognizes that its proposal will not work if it lacks the appropriate mechanisms and recourse to discourage and/or prevent such abuse. There are two specific occasions where enforcement would be necessary, and each should be handled separately. First, to the extent that CLECs and ILECs enter into contracts that contain poison pills that specifically prevent other competitors from benefiting from particular terms, the Commission should have a role in preventing the ensuing discrimination. Although Mpower does not have a preference for a specific enforcement mechanism, it believes that any such mechanism must operate rapidly (to address

⁸ Mpower Petition at 5.

contract adoption disputes) and must encourage private dispute resolution between parties, as appropriate.

Second, the parties to each contract could encounter traditional contractual disputes. While Mpower firmly believes that FLEX contracts should be neither approved nor enforced by state regulatory bodies, it recognizes the need for an enforcement mechanism to deal with contractual issues. Although Mpower does not envision – as some commenting parties do¹⁰ – that the Commission would be burdened as the arbitrator of multiple contracts in all fifty states, the proposal needs to be refined so that it minimizes administrative burdens on all parties.

Mpower, therefore, encourages further dialogue on the matter to ensure that whatever form the ultimate enforcement mechanisms take, they be rapid, non-resource intensive, and involve “mediators” that are fully versed in the complexities of telecommunications issues. Again, Mpower believes that initiating a rulemaking at this juncture would provide the appropriate forum for the parties to work together to identify the appropriate compliance tools.

Affiliates. Mpower agrees with those parties that wish to explore the need for appropriate safeguards to insure that ILECs do not use FLEX contracts to grant their CLEC affiliates preferential treatment.¹¹ Based on network configurations, collocation requirements, or other factors, an ILEC could design a FLEX contract for its CLEC affiliate that would be unavailable to non-affiliates. The proposed rulemaking should explore a range of approaches available to protect against such possible abuse, including

⁹ Focal Comments at 3 (“[T]here is no evidence that the ILECs in any way desire CLECs as wholesale customers.”).

¹⁰ *Id.* at 8, AT&T Comments at 11.

¹¹ Sprint Communications Comments at 3, WorldCom Comments at 3.

potential limitations on the extent of the availability of FLEX contracts to affiliated CLECs or requiring any affiliate FLEX contract to be subject to “pick and choose.”

IV. Commission Authority

Finally, some commenting parties contend that Commission rules and restrictions prevent it from adopting Mpower’s proposal or that Mpower has not made a showing that the Commission can forbear from certain regulatory obligations.¹² In this regard, Mpower points out that the very decision, which emphasized the need for an adequate record also, stated that the Commission’s goal “is to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary.”¹³ Mpower believes that because its proposal does not eliminate any regulatory obligations and its proposal is a forward-looking alternative to the current regime, its limited proposal will meet this test.

Similarly, parties argue that the Commission does not have the authority to eliminate certain features of the current interconnection model. Some contend that the absence of an adopting carrier’s ability to “pick and choose” among provisions in each FLEX contract is a fatal flaw.¹⁴ Another suggests that the Commission is estopped from waiving state commission approval of interconnection agreements.¹⁵ These parties, however, fail to acknowledge that the FLEX contract proposal does not eliminate these elements – at least with respect to the existing UNE interconnection model established under and governed by Sections 251 and 252 of the 1996 Act. That system would remain completely intact, and it is only in the context of the voluntary FLEX contract model (that

¹² AT&T Comments at 5, Focal Comments at 8, WorldCom Comments at 5.

¹³ *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, *First Report and Order*, at ¶13.

¹⁴ AT&T Comments at 9, Covad Comments at 8, Focal Comments at 5.

¹⁵ WorldCom Comments at 5-6.

would exist outside the confines of Sections 251 and 252) that these provisions would not be available.

One commenter submits that the Commission should not undo the “core market-opening provisions of the Act” and create further uncertainty at a difficult time.¹⁶ Mpower would like to emphasize that its proposal does not eliminate *any* of the provisions of the 1996 Act. To the contrary, it is essential to the FLEX contract proposal that the Commission retain the UNE “safety net” in the near term. The proposal supplements the current rules by adding a new “tool” to assist CLECs and ILECs in creating better “business-to-business” solutions as competition begins to increase.

VI. Conclusion

For the foregoing reasons, Mpower requests that the Commission initiate a rulemaking to evaluate the feasibility of adopting “FLEX contracts” as a separate and parallel alternative to the current interconnection regime.

Respectfully submitted,

By /s/ Francis D.R. Coleman

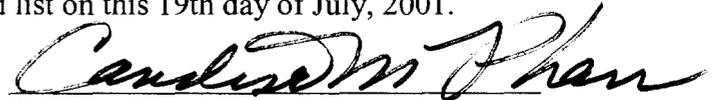
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¹⁶ Covad Comments at 4.

CERTIFICATE OF SERVICE

I, Candise M. Pharr do hereby certify that the attached Reply Comments on Mpower's Petition for Forbearance and Rulemaking have been sent via hand delivery or first class mail to the persons on the attached list on this 19th day of July, 2001.


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