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July 23, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: Ex Parte Comments of El Paso Networks, LLC in CC Docket 00-45,
Revised Petition Of MCI WorldCom, Inc. For Declaratory Ruling
Regarding the Process For Adoption Of Agreements Pursuant To
Section 252(i) of The Communications Act and Section 51.809 of The
Commission's Rules

Dear Ms. Salas:

El Paso Networks, LLC, through undersigned counsel, respectfully submits the following *ex parte* comments, in CC docket number 00-45, consistent with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206.

El Paso Networks, LLC ("El Paso") is a certificated competitive local exchange carrier that provides wholesale telecommunications services offering end-to-end connectivity and service innovation to its customers, who generally are themselves providers of telecommunications or information services (or both). Currently, El Paso is operating its network in Austin, Dallas, and San Antonio, Texas while its networks in Houston and Fort Worth, Texas are near completion. El Paso is also expanding beyond Texas, and has used and will continue to use, its section 252(i) rights to obtain interconnection agreements with incumbent LECs.

Based on its experience obtaining interconnection agreements with incumbent LECs pursuant to section 252(i) of the Act and section 51.809 of the Commission's rules, El Paso fully supports the petition filed by MCI WorldCom in the above captioned docket, and urges the Commission to act on the petition in order to facilitate the ability of requesting carriers such as El Paso to quickly enter new markets and compete with the incumbent LECs.

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In particular, El Paso supports MCI WorldCom's request that the Commission declare that a requesting carrier's adoption of an existing interconnection agreement previously approved by the state commission is not subject to further state commission approval. Such a ruling would be consistent with the plain meaning of the statute. Section 252(i) provides that a "local exchange carrier shall make available [services and facilities] ... to any other requesting telecommunications carrier upon the same terms and conditions as those provided in [an approved] agreement." (Emphasis supplied.) It does *not* say that the local exchange carrier "shall negotiate" or "shall agree to make available"; it says "shall make available." Further, Section 252(e)(1) provides that any "interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission." Terms adopted under section 252(i) are not an "agreement adopted by negotiation or arbitration," and therefore are not subject to the approval requirement of section 252(e)(1).

In the alternative, the Commission should grant the petition, at a minimum, to encompass adoptions of entire agreements, where there is little need for further state commission review.¹ El Paso would also support a scheme that allowed incumbents a narrow window in which to object to such adoption, similar to the interim rule in place in Texas and the advice letter adoption process in place in California.²

In its efforts to obtain interconnection agreements with ILECs using section 252(i) and the Commission's rule in section 47 C.F.R. § 51.809, El Paso has encountered a patchwork quilt of rules that differ from ILEC to ILEC and from state to state. In states that do not have a rule similar to Texas and California, the ILECs are able to "game" the system, and place roadblocks that delay competitive entry and add to the costs competitors incur to compete. As an example of ILEC intransigence, El Paso has attached to this letter a filing before the New York Public Service Commission ("NYPSC") petitioning NYPSC to declare El Paso's adoption of the Verizon-Sprint interconnection agreement effective as a matter of law, regardless of Verizon's consent. This filing was necessary because Verizon's standard practice requires requesting carriers to sign an adoption letter that unlawfully adds terms to the adoption of an existing

¹ See, e.g., *Comments of the New York Department of Public Service*, CC Docket 00-45, filed March 31, 2000, supporting the petition with respect to adoption of entire agreements, in contrast to adoptions where the requesting carrier uses its "pick and choose" rights.

² El Paso has experience with the advice letter adoption process in California. The Commission's ruling should specify that any telecommunications carrier, whether certificated or not by the state commission, can adopt an interconnection agreement previously approved by the state commission. The language of section 252(i) is clear that the right to adopt previously approved interconnection agreements applies to "telecommunications carriers" and is not limited to carriers with valid certifications to provide intrastate services. At a minimum, the Commission should ensure that telecommunications carriers with *pending* certification applications are not denied the use of section 252(i) during the certification process. Such a result would be consistent with section 51.301(c)(4) of the Commission's rules which prohibit an incumbent LEC from "[c]onditioning negotiation on a requesting telecommunications carrier first obtaining state certifications." The Commission's policy rationale underlying section 51.301(c)(1) should apply equally in the section 252(i) context.

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CC Docket No. 00-45

agreement previously approved by the state commission. When El Paso objected to those terms, Verizon refused to consent to El Paso's adoption.

Commission action on this petition should ensure that competitors obtain interconnection agreements with the ILECs in a timely fashion and should aim to prevent the anti-competitive tactics in which the incumbent LECs regularly engage. These tactics add unnecessary delays to what should be a simple and routine process. The relief MCI WorldCom requests will eliminate a weapon from the ILECs' arsenal of tactics used to impede competitive entry into their monopoly markets. The Commission should grant the relief requested by MCI WorldCom since it is consistent with the plain language and pro-competitive goals of the Communications Act.

Respectfully,



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July 20, 2001

FEDERAL EXPRESS

The Honorable Janet Hand Deixler
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: El Paso Networks, LLC Petition for Expedited Approval of its Adoption of the Interconnection Agreement between Verizon-NY f/k/a Bell Atlantic-NY and Sprint Pursuant to Section 252(i) of the Communications Act

Dear Secretary Deixler:

El Paso Networks, LLC ("El Paso"), through undersigned counsel, respectfully petitions the New York Public Service Commission ("Commission") to promptly approve its adoption of the interconnection agreement between Verizon New York, Inc., formerly known as Bell Atlantic-NY, and Sprint Communications Company, L.P. ("Sprint Agreement"), which was previously approved by the Commission in Case 99-C-1389. Pursuant to section 252(i) of the Communications Act, requesting carriers are permitted to adopt provisions of existing interconnection agreements made between an incumbent local exchange carrier such as Verizon and any other requesting carrier, such as El Paso, "upon the same terms and conditions as those provided in the agreement."¹

As explained below, Verizon has unreasonably refused to consent to El Paso's adoption of the Sprint Agreement, unless El Paso would agree to additional and changed terms and conditions unilaterally imposed by Verizon. Verizon has also unreasonably delayed El Paso's adoption of the Sprint Agreement. Accordingly, El Paso requests that the Commission declare that El Paso's adoption of the terms became effective and enforceable immediately upon delivery of notice to Verizon on April 10, 2001, and that Verizon's consent to such adoption is not required by the Act; or, in the alternative, order Verizon to grant such consent immediately and without conditions.

¹ 47 U.S.C. § 252(i) (1996).

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Background

On April 10, El Paso notified Verizon that it intended to adopt the Sprint Agreement in New York. Complying with Verizon's procedures, El Paso submitted Verizon's standard section 252(i) form to Verizon's designated representative Ms. Renee Ragsdale via facsimile and overnight delivery. On April 19, El Paso responded to Verizon's request that it complete another form in order for Verizon to process the adoption of the Sprint Agreement. El Paso's letter and 252(i) forms are attached as Exhibit 1.

On May 10, 2001, Verizon replied to El Paso that it would accept El Paso's adoption of the Sprint agreement when El Paso countersigned an adoption letter. Verizon's proposed adoption letter addressed to Mr. Pete Manias of El Paso is enclosed as Exhibit 2.

El Paso refused to sign the letter as proposed by Verizon and returned, via electronic mail on June 28, 2001, a "redlined" version that removed language to which El Paso objected, attached as Exhibit 3. Ms. Ragsdale, on July 12, 2001, informed El Paso that Verizon could not sign the adoption letter without the language that El Paso proposed to remove.

Argument: Verizon's Demands are Improper under Section 252(i)

El Paso requests that the Commission declare that its adoption of the Sprint Agreement is effective as a matter of law without requiring Verizon's consent; or, in the alternative, order Verizon to acknowledge El Paso's adoption in a form that does not impose additional terms on El Paso's adoption of the Sprint Agreement.

The process Verizon imposes upon CLECs to adopt existing interconnection agreements under section 252(i) of the Act is unlawful under the Act and the Federal Communications Commission ("FCC") rules, and serves no legitimate purpose. The only discernible purpose of Verizon's adoption process is to add to the expenses and delays competitors such as El Paso incur to compete with Verizon in New York. By approving El Paso's adoption of the Sprint Agreement and ordering Verizon to recognize that adoption the Commission can adhere to principles expressed by the Department of Public Service before the FCC last year that "competitive local exchange carriers should not be required to endure needless delays to compete. Nor should incumbent carriers benefit from anticompetitive behavior."²

² Comments of the New York Department of Public Service, CC Docket 00-45, *Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, filed March 31, 2000.

Section 252(i) provides that:

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS - A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The FCC has established that a party adopting a previously approved interconnection agreement under section 252(i) “need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis.”³ Without such a rule, the “non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251.”⁴ The FCC has further observed that “[n]egotiation is not required to implement a section 252(i) opt-in arrangement; indeed, *neither party may alter the terms* of the underlying agreement.”⁵ Thus, the FCC established that ILECs must make previously approved interconnection agreements “available without unreasonable delay.”⁶ El Paso notified Verizon of its adoption request in April, and it took Verizon an entire month to provide El Paso with its standard form adoption letter (which, as described above, improperly proposed to supplement the terms of the underlying agreement). The Commission should consider the delay in Verizon’s initial response to El Paso’s notice of adoption an unreasonable delay.⁷

El Paso objects to provisions in Verizon’s adoption letter that attempt to create for Verizon additional rights that it clearly does not have under the Act or the FCC’s rules. Specifically El Paso objects to paragraphs 4 and 5 which assert Verizon’s ability to reject El Paso’s adoption or subsequent use of the agreement and Verizon’s assertion of rights related to changes in the law subsequent to El Paso’s adoption of the Sprint Agreement.

In paragraph 5 of its original adoption letter, Verizon attempts to reserve for itself a right to deny adoption of the terms or application of the agreement under specific circumstances, “at

³ *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321.

⁴ *Id.*

⁵ *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, Memorandum Opinion and Order, FCC 99-199, at ¶ 4 (released August 3, 1999) (emphasis added).

⁶ 47 C.F.R. § 51.809(a) (2000).

⁷ El Paso recognizes that it took six weeks to respond to Verizon’s May 10, 2001 adoption letter. Nonetheless, it took Verizon one month to respond to El Paso’s adoption request. In California, for example, CLECs can have an effective agreement approved in 16 days, so clearly Verizon has the ability to respond promptly when it desires. See CAL. PUC ALJ-181, Rule 7 (2000).

any time.” Although Verizon claims that the language in the adoption letter mirrors the applicable rule, upon inspection it is apparent that Verizon has omitted important procedural aspects from the rules as well as added rights that do not exist in the rule. The applicable FCC rule, 47 CFR §51.809(b), allows Verizon to refuse adoption or interconnection *only* after it *proves* its claims to the state commission, clearly precluding the unilateral action Verizon proposes in the adoption letter.⁸

Verizon’s paragraph 5 further exceeds the scope of section 51.809 by stating that it may deny interconnection or adoption of the Sprint Agreement “to the extent that Verizon otherwise is not required to make the terms available to El Paso under applicable law.” There is no basis in the Act, the FCC’s rules, this Commission’s rules and decisions, or in the Sprint Agreement, that supports Verizon’s position. Section 252(i) states that the agreement must be made available on “the same terms and conditions as those provided in the agreement.” Moreover, rule 51.809(b) provide Verizon and other ILECs relief from their obligation under section 252(i) under two circumstances: 1) a showing of higher costs to serve the requesting carrier as compared to the carrier in the original agreement and 2) where providing the service to the requesting carrier is not technically feasible.⁹ Verizon clearly seeks, through paragraph 5 of its adoption letter, to impose new terms on El Paso’s adoption of the Sprint Agreement, something it is clearly not permitted to do.¹⁰

⁸ 47 C.F.R. § 51.809 reads:

§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

⁹ See 47 C.F.R. § 51.809(b)(1-2).

¹⁰ *Global Naps Order* at ¶ 4.

Through paragraph 4 of the adoption letter, Verizon further attempts to add additional terms to El Paso's adoption of the Sprint Agreement. In essence, Verizon asserts a non-existent right unilaterally to decline to perform under the contract, based on its interpretation of results in currently ongoing court or regulatory proceedings. Verizon states that as a result of these proceedings "certain provisions of the terms may be void or unenforceable." In contrast, section 8.3 of the Sprint Agreement, approved by the Commission, provides that if there is a change in law, the parties are obliged to negotiate a new provision consistent with that change in law.¹¹ In addition, the parties are mutually protected in section 8.4, which provides if a party is no longer obliged to furnish a specific service, element, or facility it may discontinue providing that service upon sixty days notice to the other party.¹² This provision protects both parties so that one party may not unilaterally withhold performance under the agreement. Instead, the agreement requires notice thereby allowing the other party to contest or negotiate the withdrawal of service so that it does not effect the carrier's ability to serve its customers.

Nowhere in the contract does it state that the terms become void or unenforceable upon a change in the law. The terms specified in the agreement were approved by the Commission, and El Paso will not agree to the alteration of those terms that Verizon proposes through its adoption letter.

In addition, Verizon's paragraph 4 further seeks to preserve its right to attack the rules and decision underlying its obligation reflected in the Sprint Agreement. This language serves no legitimate purpose in the letter and is confusing, since similar language, drafted more

¹¹ Section 8.3 reads:

8.3 In the event that a change in Applicable Law materially affects any material terms of this Agreement or the rights or obligations of either SPRINT or BA hereunder or the ability of SPRINT or BA to perform any material provision hereof, the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action.

¹² Section 8.4 reads:

8.4 Notwithstanding anything herein to the contrary, in the event that as a result of any unstayed decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that BA or SPRINT shall not be required to furnish any service, facility, arrangement or benefit required to be furnished or provided to SPRINT or BA hereunder, then BA or SPRINT may discontinue the provision of any such service, facility, arrangement or benefit ("Discontinued Arrangement") to the extent permitted by any such decision, order or determination by providing sixty (60) days prior written notice to SPRINT or BA, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff or Applicable Law) for termination of such service, in which event such specific period and/or conditions shall apply. Immediately upon provision of such written notice to SPRINT, SPRINT shall be prohibited from ordering and BA shall have no obligation to provide new Discontinued Arrangements.

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precisely and approved by the Commission, exists in section 29 of the General Terms and Conditions *and* in Part II, section 1.4 of the Agreement.¹³

Verizon recognizes that CLECs will object to the additional terms it insists on adding through its standard adoption letter. El Paso attempted to negotiate with Verizon to eliminate the language altogether or at a minimum alter the language to accurately reflect the law, the FCC rules and terms of the Sprint agreement. Verizon refused.

Instead, Verizon offers El Paso and other CLECs the choice of filing a separate letter renouncing the objectionable terms in the Verizon adoption letter. In addition, Verizon will allow El Paso and other CLECs the opportunity to add a footnote objecting to the provisions with which the CLEC disagrees. In either circumstance, Verizon requires the CLEC to countersign the adoption letter. El Paso will not and can not countersign the letter since it seeks to add terms that are not included in the Sprint Agreement, in direct contravention of the requirement in section 252(i) that Verizon provide El Paso with the same terms it provided Sprint.

Although Verizon claims that the CLEC can countersign the letter only to the provisions in paragraph 1, the fact remains that the CLEC must sign the letter and thereby acknowledges the additional provisions. Moreover, paragraph 7 states that Verizon reserves its right to seek relief in the event El Paso attempts to apply the terms in a manner that conflicts with paragraphs 3-6. It is unconscionable that CLECs be required to acknowledge these terms in order to adopt an interconnection agreement previously approved by the Commission. Such a requirement clearly violates the plain language of section 252(i), the FCC's rules and decisions.

Requested Relief

The Commission should declare that El Paso's adoption of the terms of the Sprint Agreement became effective by operation of law on April 10, 2001, upon Verizon's receipt of the adoption notice, and that Verizon's consent to the adoption is not required by law. Section 252(i) provides that a "local exchange carrier *shall make available* [services and facilities] ... to any other requesting telecommunications carrier upon the same terms and conditions as those provided in [an approved] agreement." (Emphasis supplied.) It does *not* say that the local exchange carrier "shall negotiate" or "shall agree to make available"; it says "shall make available." Further, Section 252(e)(1) provides that any "interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission." Terms

¹³ Section 29.0 reads:
29.0 RESERVATION OF RIGHTS

Nothing contained within this Agreement shall limit either Party's right to appeal, seek reconsideration of, or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance, or statute issued by the Commission, the FCC, any court, or any other governmental authority relating or pertaining to either Party's obligations under the Act or this Agreement, including but not limited to the Arbitration Order.

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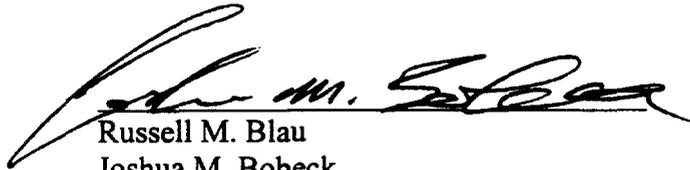
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adopted under section 252(i) are not an "agreement adopted by negotiation or arbitration," and therefore are not subject to the approval requirement of section 252(e)(1). Accordingly, the Commission should declare that El Paso's adoption of the Sprint Agreement terms became effective by operation of law upon notice to Verizon, without regard to Verizon's consent and without any need for further action by this Commission; and that Verizon is required to comply with those adopted terms.

In the alternative, if the Commission believes that Verizon's consent is required to effectuate El Paso's adoption, it should order Verizon to give that consent immediately and unconditionally, in accordance with its obligations under Section 252(i). Verizon is permitted to object to an adoption only under the limited circumstances set forth in 47 CFR § 51.809(b); in this case, it has had ample time in which to do so and it is now far too late to raise any objection.

For the foregoing reasons, El Paso respectfully requests that the Commission approve its adoption of the Sprint Agreement on an expedited basis and require Verizon to acknowledge such adoption on an expedited basis.

Respectfully submitted,



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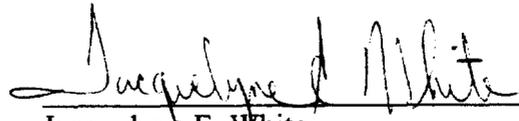
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Service List (w/o Exhibits)

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of El Paso Networks, LLC, Petition for Expedited Approval of its Adoption of the Interconnection Agreement between Verizon-NY f/k/a/ Bell Atlantic-NY and Sprint Pursuant to Section 252(i) of the Communications Act on all known parties to 95-C-0657, 94-C-0095, 91-C-1174, 96-C-0036, 93-C-0103, and 93-C-0033 by mailing a properly addressed copy via first-class mail with postage prepaid to each party named in the official service list. Executed on July 20, 2001, at 3000 K Street, NW, Suite 300, Washington, DC 20007-5116.



Jacquelyne E. White

Cases 95-C-0657, 94-C-0095,
91-C-1174, and 96-C-0036
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CASES 95-C-0657, 94-C-0095, 91-C-1174, and
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