

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act Of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

**COMMENTS OF SPRINT CORPORATION**

Sprint Corporation, pursuant to the Public Notice released on September 26, 2003 (DA 03-2979), hereby respectfully submits its comments on the issues raised in the Further Notice of Proposed Rulemaking (FNPRM) in the above-captioned proceedings (FCC 03-36, released August 21, 2003). In this FNPRM, the Commission has solicited comment on whether it should reconsider its rule implementing section 252(i) of the Communications Act of 1934, as amended. The currently effective “pick-and-choose” rule (47 C.F.R. Sections 51.809 (a)-(c)) allows requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements. The Commission has now tentatively concluded (FNPRM, para. 713) that once an incumbent LEC (ILEC) obtains state approval of a statement of generally available terms and conditions (SGAT) pursuant to section 252(f) of the Act, the ILEC and competitive carriers then would be permitted to negotiate alternative agreements that third parties could opt into only in their entirety or not at all. Where the ILEC does not

have a state-approved SGAT, the pick-and-choose rule would continue to apply to all approved interconnection agreements.

Sprint opposes this revised interpretation of section 252(i) for two reasons. First, the Commission's rationale for eviscerating the pick-and-choose rule, which is a key factor in CLECs' ability to compete, is unsupported by actual experience. The Commission's proposal, like Mpower's "Flex contract" approach to interconnection negotiations,<sup>1</sup> is based on unrealistic assumptions about ILECs' willingness to make concessions to their CLEC competitors, and about ILECs' and CLECs' relative bargaining power. Second, conditioning a pick-and-choose rule, which would apply to all ILECs, on a regulatory construct (the SGAT) which applies only to the BOCs is problematic from a statutory viewpoint, imposes an undue burden on non-BOC ILECs, and re-introduces an unwelcome element of uncertainty regarding a previously litigated issue.

**1. The Rationale for Relaxing the Pick-and-Choose Rule Is Flawed.**

In this FNPRM, the Commission posits that the currently effective pick-and-choose rule should be relaxed because it "discourages...give and take negotiations" (para. 722), and that its proposed alternative interpretation of section 252(i) will encourage ILECs and CLECs to negotiate "innovative commercial" arrangements (para. 720). Unfortunately, the basic premise underlying the Commission's analysis – that ILECs will ever willingly make concessions to CLECs which are contrary to the ILECs' own self-interest – is unrealistic.

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<sup>1</sup> See Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose," CC Docket No. 01-117. Mpower has since withdrawn its petition (see footnote 3 below).

Sprint agrees that ILEC-CLEC interconnection negotiations and arrangements have tended to be “adversarial, regulation-based relationships” (*id.*, para. 719, citing a January 17, 2003 RBOC *ex parte* letter). However, we do not believe that such relationships are due to the pick-and-choose rule *per se*, or that this rule has significantly impeded negotiations between ILECs and third party competitors. The problem is not, as the Commission suggests (FNPRM, para. 722), that the pick-and-choose rule discourages ILECs from making *quid pro quo* concessions. Rather, the issue here is whether ILECs are willing to make any concessions at all to their competitors, absent explicit regulatory requirements and on-going pressure from federal and state regulators. As Sprint explained in the Mpower proceeding,<sup>2</sup> CLECs and ILECs have opposing business interests in the interconnection context, with the financial and competitive harm to ILECs directly related to the success of their CLEC competitors. Relaxing the currently effective pick-and-choose rule is unlikely to make ILECs more willing to negotiate innovative, cooperative terms with their CLEC competitors, because any concessions will only enhance the CLECs’ ability to compete with the ILECs. Indeed, even Mpower, which had previously urged adoption of its Flex contract proposal as a means of fostering innovative and cooperating interconnection agreements, now concedes that “under current industry conditions, ... a Flex Contract regime will not promote more flexible and open negotiations between incumbent LECs and competitive LECs than exist under existing pick-and-choose interconnection rules.”<sup>3</sup>

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<sup>2</sup> See Sprint’s comments filed in CC Docket No. 01-117, filed July 3, 2001, p. 2.

<sup>3</sup> See Letter dated October 15, 2003 from Douglas Bonner, Counsel for Mpower Communications Corp., to the Secretary of the FCC, withdrawing Mpower’s May 25, 2001 petition in CC Docket No. 01-117.

Moreover, ILECs and CLECs do not come to the negotiating table with equal bargaining power. The ILECs have bottleneck control over something (a ubiquitous network) to which CLECs must have access in order to provide local and exchange access service; the CLECs, in contrast, have relatively little in return to offer to the ILECs. Without adequate regulatory spurs, including the pick-and-choose rule, ILECs will have little if any incentive to make any concessions at all to their CLEC competitors. Contrary to the Commission's expectations, relaxing the rule will not encourage ILECs to act in a manner contrary to their financial and competitive self-interest.

Relaxing the pick-and-choose rule also cannot be justified on the basis that such rule results in unbridled cherry picking by CLECs. Under the currently effective rule, ILECs can limit a CLEC's ability to pick and choose a particular service or element if the cost of providing that service or element to the requesting carrier is greater than the cost of providing it to the telecommunications carrier that originally negotiated the agreement, or if provision of the requested service or element is not technically feasible (see Sections 51.809(b)(1)-(2) of the Commission's Rules). These exceptions do restrict a CLEC's ability to obtain a service or element at any rates and terms which are otherwise available to the original requesting party, and thus do limit ILECs' financial and operational exposure to the pick-and-choose rule.

In the original *Local Competition Order*,<sup>4</sup> the Commission concluded that “[s]ince few new entrants 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, requiring requesting carriers to elect an entire

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<sup>4</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16138 (para. 1312) (1996).

agreement would appear to eviscerate the obligation Congress imposed in section 252(i).” As the Commission notes, the Supreme Court has ruled that the currently effective pick-and-choose rule “tracks the pertinent language almost exactly” and is the “most readily apparent” reading of the statute.<sup>5</sup> The Commission clearly risks reversal if it attempts to do an about-face in its interpretation of section 252(i), particularly since there is no evidence that the pick-and-choose rule prevents give-and-take negotiations, or indeed that relaxation of this rule will somehow result in more cooperative or innovative interconnection agreements. A reversal of the Commission’s previous interpretation of section 252(i) would be arbitrary and capricious.

**2. Conditioning a Pick-and-Choose Rule Upon Existence of a State-Approved SGAT Is Problematic.**

As pointed out above, there can be no dispute that the existing pick-and-choose rule is statutorily valid. The alternative interpretation of section 252(i), on the other hand, is problematic for several reasons: it is based on a regulatory construct which applies only to the BOCs; it imposes an undue burden on non-BOC ILECs; and it introduces an element of uncertainty which the telecommunications market -- in particular the competitive segment of this industry -- can ill accommodate.

Under the proposal set forth in the FNPRM, the pick-and-choose rule for all ILECs would be conditioned upon the existence of a state-approved SGAT. However, Section 252(f) specifies that “a *Bell operating company* may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder” (emphasis added). Because SGATs are a regulatory construct which apply

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<sup>5</sup> FNPRM at para. 721, citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999).

only to the BOCs, use of a SGAT standard for both BOCs and non-BOC ILECs is hardly pristine from a statutory perspective.

Moreover, conditioning the pick-and-choose rule upon state approval of a SGAT imposes an undue burden on non-BOC ILECs. Many, perhaps most, BOCs have already obtained state approval of a SGAT as part of the Section 271 approval process; insofar as Sprint is aware, no non-BOC ILEC has obtained state approval of a SGAT. This is hardly surprising. There is no statutory requirement that non-BOC ILECs file a SGAT (Section 271 applies only to the BOCs); the SGAT process is generally more contentious than are individual interconnection negotiations; and the SGAT process is very resource-intensive. Imposing the SGAT process on non-BOC ILECs would force Sprint's ILEC companies to commence and litigate such proceedings in each of its 18 states, when there are already numerous interconnection agreements in effect that a CLEC can utilize under the existing pick-and-choose rule. Thus, to require non-BOC ILECs to undergo the onerous process of obtaining state approval of a SGAT, when, as discussed above, there is no apparent need to re-interpret section 252(i), would impose an undue burden on non-BOC ILECs.

Finally, a reinterpretation of section 252(i) will invariably lead to further wrangling over the legitimacy of such reinterpretation. The original pick-and-choose rule was challenged in the U.S. Court of Appeals, and was ultimately affirmed three years later by the U.S. Supreme Court as the "most readily apparent" reading of the statute. Any Commission decision in the instant proceeding which leads to a revision in the pick-and-choose rule is certain to result in an additional round of court challenges. Additional regulatory uncertainty in an industry still beset by financial turmoil is at best a

distraction, and at worst can inflict severe harm on competitive carriers whose business plans are based in part upon existing, previously litigated rules. Such a result can hardly be considered to be in the public interest.

For the reasons cited above, the Commission should maintain the currently effective pick-and-choose rule, and decline to reinterpret section 252(i).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT CORP** was filed by electronic mail on this the 16<sup>th</sup> day of October, 2003 to the below-listed parties.

A handwritten signature in cursive script that reads "Christine Jackson". The signature is written in black ink and is positioned above a horizontal line.

Christine Jackson

October 16, 2003

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