

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

In the Matter of

Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers

CC Docket No. 01-338

COMMENTS OF VERIZON

The record the Commission developed in response to Mpower's 2001 petition established that the "pick-and-choose" interpretation of section 252(i) has impeded marketplace negotiations of interconnection agreements. The Commission may change this interpretation now, and Verizon urges it to do so promptly, so that the round of negotiations brought about by the *Triennial Review* order can benefit from the rule's elimination.

The record supports elimination of the "pick and choose" rule entirely. The Commission should not condition the change on a local carrier's having an approved statement of generally available terms of interconnection ("SGAT"). Most ILECs do not have SGATs, and the Act provides for SGATs only for Bell LECs. The lack of an SGAT, however, does not mean that carriers that want to interconnect will have to go through full interconnection negotiations. This is because each ILEC already has numerous agreements available to choose from. Only if none of these agreements meets the new carrier's needs will it need to negotiate. And that negotiation, of course, is not a bad thing — it is exactly what section 252 contemplates. There is no need for the Commission to put carriers and state commissions through otherwise unnecessary SGAT proceedings.

The fact that the Commission interpreted section 252(i) differently seven years ago does not prevent it from adopting a new rule now. “Pick and choose” was just one of the rules that section 252(i) would have permitted in 1996, and the Commission may change its approach now as long as it explains why it is doing so. The record gives the Commission all it needs to provide such an explanation.

1. The Commission Should Eliminate the “Pick-and-Choose Rule.”

The Commission is correct “that the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned.”¹ This is because “incumbent LECs seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without making any trade-off at all.”²

The conclusion that the “pick-and-choose rule” inhibits the negotiation process that was central to Congress’ new paradigm for the industry is fully supported by the record on the Mpower petition.³ The existing rule permits a CLEC to cherry-pick provisions, without any obligation to accept all the remaining provisions of the agreement. The pick-and-choose rule has fostered the continuation of adversarial, regulation-based relationships rather than the mutually beneficial business relationships between ILECs and CLECs that Congress foresaw. The Commission should promote more meaningful commercial negotiations by eliminating that rule now.

The record also shows that the rule makes it virtually impossible for ILECs to “give a little” in one part of an interconnection agreement in exchange for some concession from the CLEC in another. This is because the ILEC could not be sure that it would not be required to

¹ Notice ¶ 722.

² Notice ¶ 722.

³ Notice ¶ 722.

provide the same “give” to every CLEC that wanted it without getting the concession in return. The Supreme Court noted this fact — “every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant,” without regard to the concession made by the original CLEC in exchange for that benefit.⁴ As one CLEC observed, “There is a great sameness and very little meaningful choice [in interconnection agreements]. The ability to innovate and the incentive to do so are sorely needed.”⁵ The record contains no evidence to the contrary.

There have been no “benefits” to offset these negative effects, as CLECs have rarely used the opportunity given by the rule to “pick and choose” terms in different agreements. While many CLECs have found it convenient to avoid the negotiation process by opting-in under section 252(i), only a tiny fraction have elected to “pick and choose.” Of Verizon’s more than 3600 effective interconnection agreements, 1420 were adoption of existing agreements. In only 60 cases, however, did the CLEC adopt only a portion of the agreement, a tiny fraction of all Verizon’s agreements.

This real-world experience disproves the prediction on which the Commission based its decision in 1996, that “few new entrants would be willing to elect an entire agreement. . . .”⁶ New entrants have, in fact, been quite willing to accept entire agreements that others have negotiated and have not wanted or needed to pick and choose.

⁴ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 395 (1999).

⁵ Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to “Pick and Choose,” CC Docket No. 01-117 at 9 (filed May 25, 2001).

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 1312 (1996) (1996 Order).

Eliminating this rule is even more important now, after the Commission's decision in the *Triennial Review* proceeding. That order changed policies in several areas and indicated the Commission's expectation that these changes may spark new rounds of negotiations under change-of-law provisions in existing interconnection agreements.⁷ The Commission should promptly eliminate the "pick-and-choose rule" to ensure that LECs can engage in the give-and-take negotiations that Congress envisioned.

The Commission wants ILECs to consider continuing offering capabilities that are removed from the list of UNEs, outside the requirements of section 251(c)(3), and has concluded that it is important for it to adopt policies designed to provide market-based incentives for incumbents and CLECs to negotiate innovative commercial arrangements.⁸ If that is to happen, it is crucial that the Commission make it clear that such individually negotiated arrangements are not subject to section 252(i) at all, let alone to pick-and-choose. Section 252 applies only to "a request for interconnection, services, or network elements pursuant to section 251," and agreements that go beyond what is required by section 251 are, therefore, not subject to section 252 in general and section 252(i) in particular. Whether or not the "pick-and-choose rule" is eliminated, the Commission should confirm that such provisions are not subject to adoption.

The Notice reports that "commenters argue that if competitive carriers were required to opt into an entire agreement rather than individual provisions, incumbent LECs would insert 'poison pills' into agreements to make them unsuitable for adoption by third parties."⁹ This concern is not well founded. First, this assumes that ILECs want to discourage adoption of existing agreements — that ILECs would rather to go through full, time-consuming negotiations

⁷ E.g., *Triennial Review Order* ¶¶ 583, 696, 700.

⁸ Notice ¶ 720.

⁹ Notice ¶ 723.

(and possible arbitrations) with every CLEC, rather than having CLECs adopt agreements that already exist. This is simply not true, and there is no reason an ILEC would want to make the process unnecessarily cumbersome. Whatever incentive an ILEC was said to have had to delay interconnection in 1996, when competition under the 1996 Act was just beginning,¹⁰ no one can seriously make that claim now, when there are already numerous competitors in every local market. Second, there has been no suggestion that any of the many existing agreements contains “poison pill” provisions, and such agreements would be available to other carriers after “pick and choose” is eliminated.

The Notice asks whether any new rule “should be applied to all existing approved interconnection agreements or only those interconnection agreements approved prior to the adoption of such new rule.”¹¹ There is no reason to continue the discredited “pick-and-choose rule” for any agreements, even older ones. New entrants have not used “pick and choose” on these agreements to any meaningful extent, and having different opt-in rules for different agreements would only lead to misunderstandings among carriers and increase transaction costs, with no benefit to anyone.

The Notice proposes a new regime in which ILECs would have the choice of either providing interconnection under a state-approved SGAT or continuing to be subject to the “pick-and-choose rule.”¹² This is unnecessary and should be rejected.

¹⁰ See *1996 Order* ¶ 1312.

¹¹ Notice ¶ 724.

¹² Notice ¶ 725.

Requiring an SGAT is unnecessary because CLECs already have numerous approved interconnection agreements to choose from.¹³ The Notice suggests that this SGAT “condition would guarantee competitors access to a minimum set of terms and conditions for interconnection and access to UNEs or resale (or services provided pursuant to section 251).”¹⁴ But this “guarantee” is unnecessary in light of the fact that competitors will have many different agreements to choose from, all of which provide “terms and conditions for interconnection and access to UNEs or resale (or services provided pursuant to section 251).” The Commission need do nothing more.

Moreover, the Act provides only for Bell operating companies to file SGATs¹⁵ and does not provide any authority for non-BOC LECs to file or the states to approve such filings. Therefore, it might simply be impossible for most LECs, including Verizon’s non-BOC LECs, to use this option. In addition, experience has shown that SGATs have not been particularly popular even with carriers that are allowed to have them, as, for example, Verizon has SGATs in only four of the smaller states in which its BOC LECs operate.¹⁶

Recognizing the limited availability of the SGAT option, the Notice suggests that it could “allow non-BOC incumbent LECs to file a single interconnection agreement for state approval and designate it as an SGAT-equivalent that is subject to the current pick-and-choose rule.”¹⁷

¹³ Individual Verizon telephone companies have more than 3600 interconnection agreements in effect in different states.

¹⁴ Notice ¶ 725.

¹⁵ 47 U.S.C. § 252(f).

¹⁶ New Hampshire, Vermont, Connecticut and Maryland. And SGATs have not been popular with CLECs, as Verizon currently has only four interconnection agreements that resulted from the CLEC’s electing an SGAT.

¹⁷ Notice n.2151.

The Commission should reject this requirement as unnecessary.¹⁸ However, if the Commission allows a non-BOC to designate a single interconnection agreement to be subject to “pick and choose,” then it should offer that option to the Bell companies as well, rather than requiring an SGAT.¹⁹ And the Commission should allow the LEC (BOC or non-BOC) to designate an already-approved agreement for this purpose and not require it to file a new one for special approval. The LEC, of course, should be allowed to designate a different agreement or to update or change the designated agreement to respond to legal, regulatory or other changes.

The Commission should impose no conditions on the elimination of the “pick-and-choose” obligation. New entrants have, and will continue to have, many agreements to choose from. The Commission should not force carriers and state regulators to go through unnecessary proceedings over SGATs or model agreements.

2. The Commission May Change Its Regulations Now.

The Notice first asks whether the Commission has the legal authority to change the regulation it adopted in 1996 to implement section 252(i).²⁰ The answer is that it does.

¹⁸ Moreover, it is not at all clear that the Commission could create pseudo-SGAT option for non-BOC LECs. The section 252(f) SGAT provision was included in the Act for one very narrow purpose — to be the basis for a BOC “Track B” application under section 271(c)(1)(B) to ensure that a Bell company could apply for interLATA authority even if no facilities-based provider had requested interconnection. It was not an option that all BOCs were required or even expected to pursue, and it was not offered to non-BOC LECs at all. One circuit court has concluded that “a state may [not] create an alternative method by which a competitor can obtain interconnection rights” different those that are prescribed in the Act. *Wisconsin Bell, Inc. v. Ave M. Bie*, 340 F.3d 441, 442 (7th Cir. 2003). The Commission is no less bound by the terms of the Act than a state regulatory agency is, and it cannot create alternative interconnection methods either.

¹⁹ If it has one, a LEC should also be allowed to designate its state interconnection tariff.

²⁰ Notice ¶ 721.

The approach the Commission adopted in 1996 was just one of the approaches that the statute would have permitted. Section 252(i) requires that a LEC make interconnection, services and network elements available to a requesting carrier “upon the same terms and conditions” as they were provided under other approved agreements. The question is what the phrase “upon the same terms and conditions” means — does it refer narrowly only to the specific terms and conditions for an individual service or element or is it to be read more broadly as referring to the totality of the arrangement between the two carriers.

The Commission has recognized “the ambiguous nature” of the language of this section.²¹ It has also acknowledged that the language of section 252(i) did not compel the result it reached in 1996. As the Commission phrased it at the time, “the text of section 252(i) *supports*” the conclusion that the Commission reached,²² its rule “comports with the statute”²³ and “we *choose* this interpretation” of the statute.²⁴ The fact that the language of the statute was open to different interpretations is also shown by the Commission’s resort to the legislative history of the provision.²⁵ It is also clear in light of the Supreme Court’s deferral to “the expertise of the Commission” in reinstating the Commission’s rule.²⁶ If application of the Commission’s expertise, now based on seven years of real-world experience, leads to a different

²¹ Notice ¶ 728.

²² *1996 Order* ¶ 1310.

²³ *1996 Order* ¶ 1314.

²⁴ *1996 Order* ¶ 1313.

²⁵ *1996 Order* ¶ 1311. The Commission relied on language in the report on the Senate bill; in conference, however, “the Senate recede[d] to the House” as to this provision (H. Rep. 104-458, 104th Cong, 2d Sess. at 126 (1996)), so the Senate language was not adopted into the law.

²⁶ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999).

conclusion, there is nothing in the statute or the decisions affirming the original construction that would prevent the Commission from adopting it.

And, as a general matter, there is nothing that prevents an agency from changing its rules. An agency may change course by “supply[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed.”²⁷ Section 252(i) requires only that an incumbent carrier make the relevant services available to a requesting carrier “upon the same terms and conditions.” The Commission is free to determine, in light of its experience under the Act and in furtherance of the Act’s preference for negotiated agreements, that this statutory text is now best understood to require CLECs to accept all the terms and tradeoffs in an agreement, not merely the individual terms that it prefers. This would ensure that an incumbent cannot restrict a particular service to a specific carrier, and that a second entrant can step into the shoes of the earlier one if it wishes to accept the deal the earlier one has made.

²⁷ *OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) (internal quotation marks omitted).

Conclusion

The Commission should unconditionally eliminate the “pick-and choose rule” and declare that section 252(i) permits carriers to adopt interconnection agreements in their entirety.

Respectfully submitted,


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