

**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
	)	
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

**BELLSOUTH'S COMMENTS**

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following comments in response to the *Notice of Proposed Rulemaking* in these proceedings.<sup>1</sup> BellSouth agrees that the Commission should re-examine its seven year-old “pick-and-choose” rule in order to restore Congress’s goal of meaningful marketplace negotiation.

**BACKGROUND**

The Commission notes that in 1996 it adopted the arguments of competitive local exchange carriers (“CLEC”) that they should be entitled to “opt into each distinct term and condition in an interconnection agreement approved pursuant to section 252,” and that this “has allowed competitive carriers to ‘pick and choose’ any provision in an approved interconnection

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<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, ¶¶ 713-29 (rel. Aug. 21, 2003) (“NPRM”).

agreement between another competitor and an incumbent LEC.”<sup>2</sup> The Commission now acknowledges that, based on its actual “experience since 1996” and the comments of interested parties, “the pick-and-choose rule discourages the sort of give and take negotiations that Congress envisioned.”<sup>3</sup>

The Commission reasonably concludes that the record produced in response to the Mpower May 25, 2001 Petition<sup>4</sup> “indicates that 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.”<sup>5</sup> The Commission’s abiding concern today is to both “restore market-based incentives to negotiate” and “protect competitors from discrimination.”<sup>6</sup> Consequently, it seeks comment on “whether an alternative interpretation of section 252(i) could restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination.”<sup>7</sup>

With respect to the Commission’s first concern, to “restore market-based incentives to negotiate,” a new market-driven regulatory response is needed. As the Commission correctly concludes, modification or elimination of the current requirement is particularly necessary in light of possible future developments in proceedings related to the Commission’s *Triennial*

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<sup>2</sup> *Id.*, ¶ 715.

<sup>3</sup> *Id.*, ¶ 722.

<sup>4</sup> *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, Petition for Forbearance and Rulemaking (filed May 25, 2001) (“Mpower Pet.”).

<sup>5</sup> *NPRM*, ¶ 722.

<sup>6</sup> *Id.*, ¶ 729.

<sup>7</sup> *Id.*, ¶¶ 724, 729.

*Review Order.*<sup>8</sup> If, as a consequence of new state or federal proceedings, incumbent carriers are at some point no longer required to provide requesting CLECs with all the network elements necessary for the UNE platform, it is imperative that the Commission have put into place policies designed to provide market-based incentives for incumbents and CLECs to negotiate innovative commercial alternatives to the UNE platform, that are not subject to pick-and-choose under § 252(i).<sup>9</sup>

With respect to the Commission's second concern, to "protect competitors from discrimination," sufficient safeguards exist within the Act. Regardless of the approach selected by the Commission to restore market-based incentives for carriers to engage in give-and-take negotiations, there is an overarching statutory commandment against any common carrier's unjust or unreasonable discrimination in "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly" as well as a prohibition against giving "any undue or unreasonable preference or advantage" to "any particular person" or "class of persons," and subjecting "any particular person" or "class of persons" to "any undue or unreasonable prejudice or disadvantage."<sup>10</sup> Thus, combined with state

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<sup>8</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

<sup>9</sup> To the extent an element of the current UNE-P need no longer be made available as an unbundled network element for purposes of § 251(c)(3), a commercially negotiated agreement that calls for the provision of that element is no more within the scope of § 252 than is a provision dealing with issues entirely unrelated to the subject matter of §§ 251 and 252. See letter from Dee May, Executive Director, Federal Regulatory, Verizon, (on behalf of BellSouth Corporation, SBC Communications, Inc., Qwest Communications International Inc. and the Verizon telephone companies) to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (Jan. 17, 2003) ("*January ex parte*").

<sup>10</sup> 47 U.S.C. § 202(a).

oversight over § 251 agreements, requesting carriers are provided ample protection in a new, market-based regulatory paradigm. Current conditions and the Mpower record justify a new, market-friendly regulatory response.

**I. THE COMMISSION SHOULD FORBEAR FROM APPLICATION OF § 252(i).**

In light of its experience since 1996, and the ample record supporting the tentative conclusions set forth in the *NPRM*, the Commission should forbear from application of § 252(i) to SGATs or individually negotiated interconnection agreements. Congress's clear preference is for carriers to establish interconnection arrangements without the need for excessive regulatory intervention; it sought to stimulate the kind of vibrant give-and-take common in ordinary commercial negotiations, in the expectation that the parties themselves are far better equipped than government to devise arrangements that meet their individual needs.<sup>11</sup> After more than 6 years of experience with the pick-and-choose rule, it should now be obvious that the rule as interpreted by CLECs actually discourages the kind of negotiations that Congress envisioned.

Indeed, one CLEC has urged the Commission to modify the pick-and-choose rule because it has long "inhibit[ed] innovative deal-making," with the result that "interconnection agreements are increasingly standardized."<sup>12</sup> Forbearance from application of § 252(i) to all interconnection agreements would promote important statutory goals. The concerns that

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<sup>11</sup> January *ex parte* at 2. Thus the Act requires carriers to negotiate in good faith (§ 251(c)(1)), provides an opportunity for state-commission mediation (§ 252(a)(2)), and allows carriers to enter into binding negotiated agreements without regard to the Act's requirements (§ 252(a)(1)).

<sup>12</sup> Mpower Pet. at 9. Two days ago Mpower advised the Competition Policy Division of its "decision to withdraw" its May 25, 2001 petition. Letter from Douglas G. Bonner, LeBoeuf, Lamb, Greene & MacRae L.L.P., to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 14, 2003). Our reference to Mpower's original petition is not meant to be understood as a characterization of Mpower's current position.

Mpower articulated in its petition apply equally well to interconnection agreements entered into under § 252. Indeed, the “Flex contract” originally described by Mpower appears to resemble agreements arrived at through voluntary negotiation under § 252(a)(1) of the Act.

The current rule deters genuine commercial negotiations designed to accommodate the parties’ specific needs. Instead of the individualized agreements reached through the “voluntary negotiations” that Congress envisioned, the pick-and-choose rule has produced something entirely different. Moreover, requesting CLECs are already “protected” by state commission oversight over both negotiated and arbitrated agreements under § 252. States are empowered to determine whether these agreements meet the general interconnection duties of all telecommunications carriers, the specific obligations of all local exchange carriers, and the additional obligations of incumbent local exchange carriers. The continued enforcement of a rule that will only continue to drive general, rather than individualized agreements, is unnecessary.

Continued enforcement of § 252(i) through Commission regulation is simply not necessary to ensure that ILEC interconnection agreements are neither unjustly nor unreasonably discriminatory, because of the protections afforded carriers by the Act in §§ 202 and 251 and state commission oversight under § 252. Enforcement is not necessary for the protection of consumers for the same reasons and because the consequence of freely negotiated, individualized agreements is likely to be the availability of a wider range of differentiated service offerings from competing interconnecting telecommunications carriers. Forbearance from enforcing § 252(i) is consistent with the public interest because the current pick-and-choose rule deters carriers from engaging in robust negotiations that have the promise of producing creative and innovative arrangements individually designed to meet the varying needs of carriers, with the

consequence that these agreements may work to the benefit not only of both parties, but of the customers they serve as well.<sup>13</sup>

**II. A REASONABLE INTERPRETATION OF § 252(i) ALLOWS REQUESTING CARRIERS TO ADOPT OTHER CARRIERS' INTERCONNECTION AGREEMENTS ONLY IN THEIR ENTIRETY.**

Although the best approach is forbearance, limiting requesting carriers' opt-in rights to entire agreements would be consistent with the text of § 252(i), which requires only that an incumbent LEC "make available any interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement."<sup>14</sup> The Commission correctly notes that the ambiguous nature of the italicized phrase prompted the United States Supreme Court to conclude that the appropriate interpretation of § 252(i) is "eminently within the Commission's expertise."<sup>15</sup>

The Commission proposes that by requiring ILECs to file and obtain state approval for an SGAT, it would be reasonable to interpret 252(i) as allowing carriers to opt into entire agreements, but not individual provisions. BellSouth believes that the same market conditions and statutory safeguards described above make an SGAT filing and approval requirement an unnecessary regulatory condition precedent to appropriate, market-driven regulatory oversight. The preservation of the good faith negotiation obligation and statutory non-discrimination safeguards alone, under federal and state regulatory oversight, in light of the market conditions that exist more than seven years after the Commission adopted its current interpretation, are

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<sup>13</sup> January *ex parte* at 3.

<sup>14</sup> 47 U.S.C. § 252(i) (emphasis added). The Commission has ample legal authority to eliminate the pick-and-choose rule and, in the alternative, limit opt-in rights to entire agreements. January *ex parte* at 3-5.

<sup>15</sup> *NPRM*, ¶ 728.

sufficient to both “restore market-based incentives to negotiate” and “protect competitors from discrimination.”<sup>16</sup>

## CONCLUSION

Forbearance is the best means of restoring and achieving Congress’s goal of meaningful marketplace negotiations. In the alternative, the Commission should reinterpret its rule under 252(i) in a manner that does not discourage meaningful marketplace negotiations; under this section carriers should not be allowed to elect provisions of interconnection agreements that are independent of network elements, interconnection arrangements or services and related terms and conditions. Because states retain § 251 oversight, and this Commission retains § 202 enforcement authority, both forbearance or, in the alternative, a modification of the existing rule will “restore market-based incentives to negotiate” and “protect competitors from discrimination.”

Respectfully submitted,

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<sup>16</sup> *Id.*, ¶ 729.

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 16<sup>th</sup> day of October 2003 served the parties to this action with a copy of the foregoing **BELLSOUTH'S COMMENTS** by electronic filing addressed to the parties listed below.

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