

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

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

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Intercarrier interconnection agreements are critical to the proper functioning of the telecommunications market. The Commission's uniform national framework, by and large, provides a reasonable basis for eliminating unnecessary disputes about certain aspects of each interconnector's basic obligations, including the incumbent local exchange carrier's ("ILECs") obligation to make individual portions of voluntary or state arbitrated interconnection agreements available for adoption under the Commission's "pick and choose" rule. ILECs and their interconnecting competitors, however, do not enjoy equal bargaining power in the interconnection negotiation process and ILECs continue to utilize their effective control of the interconnection negotiation process to their advantage against competitive carriers. Elimination of the pick and choose rule will only widen this gap in bargaining power and advance the entrenched market power the ILECs continue to hold in local markets. Any reinforcement of entrenched market power, particularly as condoned by a Commission rule, would undermine and be contrary to the competitive goals of the Communications Act of 1934, as amended.

As an initial matter, the Commission cannot eliminate the statutory requirement that features a pick and choose option, and replace it with an "all or nothing" condition. The proposed rule change is inconsistent with Section 252(i)'s express language as well as the provision's purpose, *i.e.*, to help prevent discrimination among carriers and to make the interconnection negotiation process more efficient. A straight all or nothing approach will have the opposite effect – it will increase the amount of time necessary for negotiations and, in some cases, lead to protracted, costly arbitration proceedings. The proposal also represents an unexplained, wholesale departure from the Commission's past interpretation of the language and purpose of Section 252(i).

The *Further Notice* is premised on the apparent assumption that all carriers enjoy equal bargaining power and that elimination of the pick and choose rule will promote a fairer process in the striking of interconnection agreements. However, as the comments demonstrate, competitive carriers continue to struggle with the ILECs to achieve even minor concessions, and are routinely forced to accept terms with which they do not agree in order to avoid multi-state arbitration. Indeed, many commenters cite to their own experiences demonstrating not only the problems they have encountered and continue to encounter in their negotiations with ILECs, but also how they have used the pick and choose rule (both directly and indirectly) as an effective bargaining tool. The record lacks any corroboration of the ILECs' blanket assertions that they are disadvantaged *as a result of the pick and choose rule*.

Finally, using "SGATs" as an alternative to a robust pick and choose option is not a viable solution. SGATs are not "interconnection" agreements under the Act, and SGATs do not originate from negotiations between the ILECs and their competitors. In fact, SGATs, which are more like tariff filings than "agreements," and typically are not the result of any review by the state commissions. Nor do they reflect the best terms and rates that ILECs make available to competitors. SGATs simply are not comparable to interconnection agreements, and the mere fact of their existence does not justify their use as a substitute for a robust pick and choose rule.

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking seeking comment on the current rule implementing Section 252(i) (*i.e.*, the “pick and choose rule”), under which requesting carriers are permitted to opt into individual portions of interconnection agreements.¹ Any modification of the current rule that would limit or eliminate a competitor’s ability to select specific individual provisions from previously negotiated or arbitrated incumbent local exchange carrier (“ILEC”) agreements is unjustified. More importantly, any proposed change would undermine the significant benefits

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, ¶ 713 (rel. August 21, 2003) (“*Further Notice*”).

the rule confers upon competitors negotiating interconnection arrangements with ILECs that continue to have overwhelming market and bargaining power.

I. INTRODUCTION

Nextel is a leading Commercial Mobile Radio Service (“CMRS”) provider, offering a range of valuable digital wireless services in its licensed markets nationwide. Nextel’s ability to continue entering new markets and to serve new and existing customers is partially dependent on the ability of Nextel to interconnect on reasonable terms with ILECs offering service in those markets. Even for facilities-based service providers such as Nextel, ILEC interconnection is essential for an ILEC’s end user customers to call and be called by Nextel customers.

A hallmark of the Commission’s interconnection framework has been the creation of a set of uniform national rules that state commissions can apply in the context of arbitration, or that interconnectors may look to in the course of negotiations to determine what the Commission believes to be a reasonable outcome.² This approach has saved new entrants and other non-incumbent telecommunications carriers an enormous amount of wasted effort in litigating and relitigating the scope of basic interconnection rights in one state after another. The Commission’s current pick and choose rule is one such uniform national interconnection rule that plays an important role in setting expectations of parties to an interconnection negotiation. As explained herein, the Commission should do nothing that undercuts the effectiveness of its current pick and choose rule to provide the carrier requesting interconnection of an ILEC with

²*See, e.g.*, 47 C.F.R. § 51.703 (establishing that LECs must establish reciprocal compensation arrangements for the transport and termination of traffic); 47 C.F.R. § 51.705 (requiring that rates for ILEC transport and termination must be based on forward-looking costs); 47 C.F.R. § 51.707 (setting ILEC default proxy rates for transport and termination of traffic); 47 C.F.R. § 51.711 (requiring that rates for transport and termination be symmetrical); 47 C.F.R. § 51.715 (establishing interim transport and termination pricing with a true-up process).

the means to request some, but not all of an interconnection agreement executed by another party.

As the initial round of comments demonstrate, “the ability of competitive carriers to pick and choose terms from other agreements is critical to the negotiation of nondiscriminatory interconnection agreements under Section 252.”³ Indeed, continuation of the existing pick and choose rule provides the correct incentives and flexibility to allow for *meaningful* interconnection negotiations.⁴ The existing rule imposes minimal, if any, burden on the ILECs and the alternative, having to adopt an entire agreement that may contain irrelevant, unsuitable or competitively harmful provisions, simply would promote a bargaining pattern where ILECs would favor their affiliates and require those who wanted something different to pursue an expensive and unpredictable 50 state arbitration process. If the Commission is sincere about promoting meaningful marketplace negotiations and encouraging facilities based competition, it needs to maintain the pick and choose rule and find other means of promoting competitor options in the interconnection negotiation and arbitration process.

II. THE STATUTORY REQUIREMENTS EMBODIED IN THE PICK AND CHOOSE RULE CANNOT BE ELIMINATED.

The *Further Notice* “seek[s] comment on the Commission’s legal authority to alter its interpretation of the statute.”⁵ Nextel agrees with those commenters that suggest that the Commission’s authority to institute a wholesale elimination or modification of the pick and

³ WorldCom (MCI) Comments at 8.

⁴ See CLEC Coalition Comments at 8.

⁵ *Further Notice* at ¶ 721.

choose rule is not unlimited.⁶ Certainly, the Commission is free to re-interpret its view of the statute so long as the reinterpretation is grounded both in the statute's language and purpose. However, in this instance, the Commission's proposed reinterpretation of Section 252(i) as expressed in the pick and choose rule is not consistent with the language of the statute or its express purpose.⁷

Indeed, the plain language of the Act requires retention of the rule. Section 252(i) of the Act is straightforward:

"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."⁸

As one commenter observed, "Section 252(i) is unusual among the statute's many provisions in terms of simplicity and clarity."⁹ The language expressly states that ILECs must make *individual provisions* available upon request, not whole agreements. While Congress could have mandated that ILECs make available to requesting carriers *any agreement* to which

⁶ See, e.g., WorldCom (MCI) Comments at 4-5; Comments of the American Farm Bureau, Inc., et al. at 4; Z-Tel Comments at 14-15; PACE/CompTel Comments at 3-4; ALTS Comments at 3; CLEC Coalition Comments at 3-5.

⁷ The Commission, in its *Secondary Markets* proceeding, recently reinterpreted what it believed Section 310 of the Act meant in proscribing unauthorized *de facto* transfer of control of a radio license. This reinterpretation should pave the way for new forms of spectrum leasing and management and greater radio licensee flexibility in light of evolving wireless markets. It is noteworthy, however, that the Commission, in its Section 310 reinterpretation, was not reacting to the experience of only a few years, but overruling a precedent that had been in place for forty years that it viewed as outdated and out of step with evolving forms of spectrum management. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 00-230, FCC 03-113 (rel. Oct. 6, 2003).

⁸ 47 U.S.C. § 252(i).

⁹ Comments of the American Farm Bureau, Inc., et al. at 4.

they are a party, it did not. Instead, Congress required ILECs to make available to requesting carriers “*any interconnection, service or network element* provided under an agreement . . . to which it is a party.”

The significance of this express language cannot be overlooked. In practical terms, each interconnection agreement is necessarily specific to the carriers and the markets they cover, where their switches are located, where they need physical interconnection, unbundled network elements, collocation, whether they have or want meet point billing arrangements, how they deal with both local and transit traffic, *etc.* Tying adoption of any part of an interconnection agreement to all of the agreement might require carriers to adopt terms that are useless, and in some cases harmful to each carrier’s specific circumstances and impose unnecessary costs or require network rearrangements. An all-or-nothing approach is the opposite of the pick and choose right established by Section 252(i).

It is a fundamental principle of statutory construction that the Commission must first look to the plain language of Section 252(i). “If the intent of Congress is clear, that is the end of the matter, for the . . . agency[] must give effect to the unambiguously expressed intent of Congress.”¹⁰ The Commission does not possess authority to ignore Congress’ explicit instructions. In this regard, the text of Section 252(i) plainly distinguishes between the individual terms of existing interconnection agreements and entire agreements.

The legislative history of the Act affirms this distinction. According to Congress:

New section 251(g) requires a local exchange carrier to make available any service, facility, or function provided under an interconnection agreement to which that local exchange carrier is a party to any other telecommunications carrier that requests such service, facility, or function on the same terms and conditions as are provided in that agreement. *The Committee intends this requirement to help prevent discrimination*

¹⁰ *Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-3 (1984).

*among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated.*¹¹

The “all or nothing” proposal in the *Further Notice* thus is contrary to the purpose of Section 252(i) that Congress expressed upon enactment of the provision.

The Commission’s proposed departure from its past interpretation of Section 252(i), is also puzzling, as it represents a departure from a straightforward plain meaning application of the statute. In its 1996 *Local Competition Order*, for instance, the Commission concluded that the “text of [S]ection 252(i) supports requesting carriers’ ability to choose among individual provisions contained in publicly filed interconnection agreements.”¹² In fact, the Commission determined that there was no other reasonable reading of the statute, noting specifically that “Congress drew a distinction between ‘any interconnection, service, or network element[s] provided under an agreement,’ which the statute lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, *would render as mere surplusage the words ‘any interconnection, service, or network element.’*”¹³

This interpretation was affirmed by the Supreme Court in the landmark *Iowa Utilities Board* decision: “[I]t is hard to declare the FCC’s [pick and choose] rule unlawful when it tracks the pertinent statutory language almost exactly The FCC’s interpretation is not only

¹¹ S. REP. NO. 104-230, at 21-22 (1995) (emphasis added).

¹² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1310 (1996) (“*Local Competition Order*”) (subsequent history omitted).

¹³ *Id.* (emphasis added).

reasonable, it is the most readily apparent.”¹⁴ Thus, the high court concluded, that a carrier that “wants one term from an existing agreement” is not “required to accept all the terms in the agreement.”¹⁵

Given the language of the statute, the contemporaneous legislative history, the Commission’s prior four-square interpretation and the Supreme Court’s affirmation of that interpretation as consistent with Section 252(i) itself, there is no basis to implement or justify any reinterpretation that cuts off the right of a carrier to adopt individual terms or services offered in a particular ILEC interconnection agreement. And, there is no obvious reason for the Commission to upset the settled interpretation that has worked well to provide competitive interconnectors with additional negotiating options against carriers with overwhelming market dominance.

III. THE FURTHER NOTICE IS BASED ON ASSERTIONS RATHER THAN FACTUAL EVIDENCE.

Citing ILEC assertions, but no hard data, the *Further Notice* tentatively concludes that “the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned.”¹⁶ A rule change with such potentially negative consequences to competition deserves and requires far more than repetition of flawed assumptions provided by self-interested parties.¹⁷

¹⁴ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 388, 396 (1999).

¹⁵ *Id.* at 395-96.

¹⁶ *Further Notice* at ¶ 722.

¹⁷ *See Transcontinental Gas Pipe Line Corp. v. FERC*, 907 F.2d 1211 (D.C. Cir. 1990) (It is a fundamental principle of administrative law that “[a]n agency’s determination must reflect reasoned decisionmaking that has adequate support in the record and must include an “understandable” agency analysis and rationale.”) (emphasis added).

A. The Commission Relies Too Heavily on ILEC Assertions Regarding the Current State of the Market and the Effect of the Pick and Choose Rule on Present-Day Negotiations.

As the majority of comments filed demonstrate, a crucial flaw in the *Further Notice* is the uncritical acceptance of ILEC assertions that competitive carriers somehow enjoy equal bargaining power with ILECs and that elimination of the pick and choose rule somehow will encourage more fair and equitable interconnection agreements.¹⁸ The premise of the tentative conclusion appears to be that ILECs are “somehow being taken advantage of by widespread pick and choose contracting abuses, or conversely, that the CLECs will suddenly receive better treatment and numerous concessions in closed door give and take negotiations with incumbent ILECs.”¹⁹

To support this tentative conclusion, however, the *Further Notice* cites only to assertions (and not to any facts or case studies) presented by ILECs of purported abusive use of pick and choose that discourages give and take negotiations envisioned by Congress.²⁰ In fact, the ILEC claims of “cherry picking” are completely exaggerated. The evidence in the record refutes claims that competitive carriers have been able to “abuse the negotiation process” by selecting terms or services other parties already have negotiated. As one commenter notes, “pick-and-choose has not been the unbridled free-for-all that ILECs have portrayed. Rather, the record demonstrates that CLECs often have been denied the rights afforded by the pick-and-choose rule.

¹⁸ See, e.g., CLEC Coalition Comments at 9; Sprint Corporation Comments at 2; LecStar Comments at 3; ALTS Comments at 5; Z-Tel Comments at 3; WorldCom (MCI) Comments at 10.

¹⁹ See LecStar Comments at 3.

²⁰ See *Further Notice* at n. 2144.

. . [and it is the] ILECs that have undermined and abused the current rule, and not the CLECs.”²¹

Without any examples of actual competitor abuse, there is no reason to upset the existing rule and put in its place a rule that is inconsistent with the statute and that will create further confusion and uncertainty for interconnectors.²²

Furthermore, the Commission cannot ignore what it knew in 1996 when it established its uniform federal interconnection framework: the state of the marketplace is far from any ideal of true competition and as a result, Commission policies and rules cannot treat every party as the same and expect a fair outcome. Based on Nextel’s experience, there simply is little or no give and take in the negotiation process with large or small ILECs and this is not a consequence of the pick and choose rule. The fact is that ILECs still maintain dominant power and can force competitors to enter interconnection agreements on a “take it or leave it” basis. If a competitive carrier does not agree, it is typically compelled to weigh the cost of simultaneous arbitration of an issue in multiple states. Even the CLEC Mpower – who recently withdrew its FLEX proposal²³ – recognizes the current ILEC ability to force competitive carriers into accepting unfavorable terms or arbitration:

²¹ CLEC Coalition Comments at 16.

²² Certainly from Nextel’s vantage point as an interconnector, there are far more pressing interconnection issues that deserve Commission attention and positive action in the near term – such as action on the illegal use by a growing number of rural ILECs of unilateral state-filed wireless termination tariffs to assess non-reciprocal access-type charges on wireless carriers, as well as action on a long pending petition for declaratory ruling on routing and rating of wireless traffic. *See* T-Mobile, Western Wireless, Nextel Communications and Nextel Partners Petition for Declaratory Ruling, CC Docket No. 01-92, at 1 (filed September 6, 2002); and Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs, CC Docket No. 01-92 (filed May 9, 2002).

²³ Mpower filed a petition for forbearance and rulemaking requesting Commission consideration of its “FLEX” proposal alternative to the pick and choose rule. *See* Mpower Communications Corp. Petition for Forbearance and Rulemaking, CC Docket No. 01-117 (filed May 25, 2001).

[G]iven the still nascent state of competition in the telecommunications market, the Commission's pick-and-choose rule is the only way CLECs, both struggling competitors and new entrants, can in any sense maintain some type of equal footing with ILECs with respect to bargaining power. If ILECs are not required to offer pick-and-choose to CLECs, ILECs will possess the power to force CLECs to arbitrate every issue of importance, thus substantially driving up the cost of, and delaying, entry and expansion. Forcing arbitration is an effective delay tactic.²⁴

This is the club that ILECs with vastly superior resources and entrenched monopoly advantage continue to wield. Indeed, as one commenter correctly points out, "the FCC's proposal to eviscerate the pick and choose rule ignores the fundamental disparity in bargaining power between ILECs and CLECs that the provisions of Section 251 and Section 252 were intended to remedy."²⁵

The problem with the current state of interconnection negotiations between ILECs and competitive carriers does not rest with the pick and choose rule and thus rewriting the rule to be much tougher on competitors will not achieve the Commission's stated aims. The problem is that the ILECs continue to maintain the power to tip the scales in their favor by the threat of full scale multistate arbitration if an interconnector does not accede to their views, even if those

Under the original Mpower FLEX Proposal, the ILEC and CLEC would voluntarily negotiate a wholesale agreement that other carriers could opt into as a "package deal" – that is, they would be required to accept the entire agreement "rather than be able to pick just 'the best parts' of the deal." Only the Commission would be permitted to enforce the terms of FLEX contracts, and such terms would not be admissible in any "unrelated proceeding." On October 14, 2003, Mpower withdrew its petition. *See* Letter from Douglas G. Bonner, Counsel for Mpower Communications Corp., to the Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (Oct. 14, 2003).

²⁴ Mpower Comments at 6.

²⁵ Z-Tel Comments at 17. *See also* Local Telephone Competition: Status as of December 31, 2002, Tables 1, 3 (June 2003) (noting that the ILECs continue to exercise control of 87% of end user switched access lines, and carriers with extensive networks continue to depend on ILECs for last-mile facilities. Of the 13% of end user lines served by competitors, three-quarters rely on the ILEC for local loops).

views are anticompetitive or even illegal. Indeed, as Sprint correctly recognizes, the “problem is not as the Commission suggests . . . 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.”²⁶

In addition, full consideration has not been given within the *Further Notice* of the potential for abuse that would result without the pick and choose rule. If competitive carriers are required to adopt whole agreements without the ability to select individual provisions, one likely potential abuse is for ILECs to insert “poison pills” into agreements with affiliates and potentially with carriers that have no interest in the pricing or terms of a service that is not crucial to them. At that point, agreements would become unsuitable for adoption by third parties. As the Commission itself, recognized, “failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement.”²⁷ By making their agreements unsuitable for future third-party use by competitors, the ILECs could effectively sidestep their obligations to make agreements available to other parties, while proclaiming compliance with the Act.

²⁶ Sprint Comments at 3. *See also* ALTS Comments at 5 (“it is not the existence of pick-and-choose that impedes meaningful negotiations. Rather, it is the insurmountable bargaining leverage that ILECs wield in the negotiation process and their refusal to negotiate in good faith with CLECs that impede meaningful negotiations. Negotiations between ILECs and CLECs are not negotiations among parties with equal bargaining power, and the ILECs feel no compulsion, beyond the anemic threat of possible regulator enforcement of sections 251 and 271, to negotiate fair and meaningful agreements with CLECs.”).

²⁷ *Local Competition Order*, 11 FCC Rcd at ¶ 1312.

Such a regime would have another, albeit indirect, pernicious effect: parties that have been able to avoid arbitration and the expense and uncertainty of arbitration will be required to spend resources on fighting the ILEC before the state commission and not in the competitive marketplace. Thus, a predictable result of an all or nothing rule would be a precipitous rise in forced arbitrations, which raises interconnectors' costs and benefits ILECs, not the public.

The *Further Notice* relies far too heavily upon unsubstantiated ILECs claims that they have suddenly become disadvantaged in the local markets as a result of the pick and choose rule. The Commission must be wary of ILEC blanket assertions that their bargaining power has somehow evaporated or been drastically reduced.

B. Any Perceived Imbalance Created by the Pick and Choose Rule is Offset by the Countervailing Benefits the Rule Provides.

The pick and choose rule has increased competitors' ability to enter into more efficient and fair negotiations with incumbent LECs, without any perceived countervailing disadvantage to the ILECs involved in the negotiations. Indeed, the rule offers an efficient mechanism by which competitive carriers can avail themselves of another option that obviates the need for intensive ILEC negotiations every two or three years with potential additional arbitration. However, even if the ILECs' assertions that the current pick and choose rule may result in a reticence by ILECs to engage in "give and take" negotiations to give special concessions, such "hesitancy" on the part of the ILECs is wholly offset by the countervailing benefits of the rule.²⁸ As one commenter notes: "the pick-and-choose rule may result in imperfect agreements . . . but

²⁸ See, e.g., Comments of the American Farm Bureau, Inc., *et al.* at 11.

agreements that nonetheless are far superior to what a small CLEC would be able to negotiate on its own with a monopoly ILEC that holds all the leverage.”²⁹

Competitors’ experience with the pick and choose rule demonstrates the rule’s effectiveness. Unlike the ILECs, the comments filed by competitive carriers provide concrete examples of the rules’ effectiveness, and how CLECs and other carriers have been unfairly treated by ILECs throughout the interconnection process.³⁰ LecStar, a small CLEC based in Atlanta, for example, re-negotiated an interconnection agreement with BellSouth last year. According to LecStar, the negotiations took approximately 7 months, with LecStar ultimately opting into an existing interconnection agreement with changes using pick and choose rules. During the negotiations, LecStar sought 27 modifications to the agreement and utilized pick and choose provisions from 2 other interconnection agreements to address certain requirements. The majority of these requested 27 modifications, however, went unmet by BellSouth during negotiations. Because arbitration is not a realistic option for most small CLECs, including LecStar, LecStar “had no choice but to close the open items where negotiations had failed to establish common ground.”³¹ Critically, LecStar further notes that the negotiations “would have

²⁹ *Id.* at 12.

³⁰ *See, e.g.*, Comments of the American Farm Bureau, Inc., *et al.* at 3. (“Several of the[] Joint Commenters have fruitfully invoked the pick-and-choose rule in negotiating their interconnection agreements with ILECs, and all share the firm conviction that the current rule enhances competition and, specifically, enables smaller competitors who otherwise would have little or no negotiating leverage to attain fair and non-discriminatory interconnection arrangements with ILECs.”); CLEC Coalition Comments at 11 (the current pick and choose rule has been “necessary for minimizing the potential for discrimination and lowering barriers to entry.”).

³¹ LecStar Comments at 2-3.

been *completely* unsatisfactory if pick and choose rules had not been available to LecStar to assist in our negotiations.”³²

MCI, citing to its own experiences, states that it has been able to take advantage of the rule in a variety of ways. For instance, MCI has used the pick and choose rule to adopt individual provisions from other interconnection agreements. In addition, MCI states that the existence of the formal pick and choose request process, has “enabled MCI to obtain desired provisions without necessarily exercising its formal rights.”³³ *Thus, without making a formal pick and choose request, MCI has been able to obtain provisions by referring to those provisions that were previously arbitrated and “won” by other CLECs.*³⁴

Nextel has made similar use of the rule. Indeed, pick and choose is an important bargaining tool that can be effective to invoke on an informal basis to obtain from the ILECs similar terms to what the ILECs either offered or were required through arbitration to provide to other carriers. In addition, the pick and choose rule will remain important to Nextel and other CMRS competitors as interconnection agreements are renegotiated based on the Commission’s findings that CMRS providers now qualify for access to UNEs. Indeed, CMRS carriers will, where appropriate, make use of the ILECs’ facilities at the cost-based rates they are already providing to other competitive carriers. There is no reason for CMRS providers to have to engage in renegotiation or arbitration of pre-established UNE rates.

Furthermore, maintaining the current pick and choose rule provides some assurance that there will be fairer interconnection negotiations between the ILECs and all competitors,

³² *Id.* at 3 (emphasis in original).

³³ WorldCom (MCI) Comments at 12.

³⁴ *Id.* (emphasis added).

including ILEC subsidiaries. Indeed, it has been Nextel’s experience that ILEC-owned CMRS providers are able repeatedly to negotiate and re-negotiate (with their parent ILEC) interconnection terms that are more favorable than those that Nextel or other non-ILEC affiliated CMRS carriers can. As such, the “pick and choose” rule remains an important component of successful and *nondiscriminatory* interconnection negotiations.

Various state commissions agree, and urge the Commission to maintain the status quo with pick and choose. According to the California Public Utilities Commission (“CPUC”), for example, “[s]ince the implementation of the 1996 Act, in California’s experience, the current pick and choose rule has worked quite well in providing the incentive and impetus for CLECs to enter into interconnection agreements with an ILEC in order to compete in local markets. . . . Thus, far from impeding meaningful negotiations . . . the current pick and choose rule has greatly facilitated the entry of CLECs into the local exchange market in California.”³⁵ Citing to relevant statistics, the CPUC notes that “[o]ver 320 interconnection agreements between CLECs and the ILEC have been filed with the CPUC over the last seven years. Of these, over 98 percent are the result of voluntary negotiations between the parties. Thus, far from impeding meaningful negotiations. . . the current pick and choose rule has greatly facilitated the entry of CLECs into the local exchange market in California.”³⁶

The Iowa Utilities Board cites to similar positive experience with the rule: “It would appear the current pick and choose rule helps new CLECs enter the market, as each CLEC does not have to enter into expensive and potentially protracted negotiations with the ILEC; instead,

³⁵ CPUC Comments at 3.

³⁶ *Id.*

the CLEC is able to gain the same rates, terms, and conditions that other CLECs have.”³⁷ Like the CPUC, the Board provides relevant state statistics, noting that since 1997, the first year of any state interconnection agreement filings, a total of 144 negotiated interconnection agreements have been filed with the Iowa Utilities Board.³⁸ Based on this, it is plain that the Commission should abandon this *Further Notice* because it would undermine the meaning of Section 252(i).

IV. THE SGAT PROPOSAL IS NOT AN ADEQUATE SUBSTITUTE FOR THE EXISTING PICK AND CHOOSE RULE.

The Commission tentatively concludes that once an ILEC has obtained state PUC approval of its Statement of Generally Available Terms and Conditions (“SGAT”), it should not be required to make individual provisions of its other interconnection agreements available to third-party competitors. Thus, competitors would only be able to choose the terms available under the SGAT or opt into entire previously-negotiated ILEC agreements.³⁹

The SGAT proposal is unworkable for a number of reasons. For one, SGATs are not “interconnection” agreements under the Act, and “do not derive from negotiations between the RBOCs and interconnecting carriers.”⁴⁰ They are not a true alternative to an interconnection agreement, instead, they provide a quick way to get basic service to enter a market while pursuing a carrier-specific bilateral interconnection arrangement. SGATs are more akin to *general tariffs* that reflect little to no competitive carrier input and certainly no broad ranging

³⁷ Iowa Utilities Board Comments at 3-4.

³⁸ *Id.* at 3.

³⁹ *Further Notice* at ¶ 713.

⁴⁰ RICA Comments at 6.

examination of the cost-based nature of the rates offered.⁴¹ As the Commission acknowledged in the *Triennial Review Order*, the mere availability of a tariffed service did not establish any presumption that there was no need to furnish a similar service or function as an unbundled network element. Similarly, *the availability of an SGAT proves nothing about whether a viable, efficient pick and choose option should be withdrawn from the market*. The SGAT is not always an acceptable substitute.

As many commenters observed, SGATs typically receive minimal, if any, state commission review, and generally do not confer the same rights as negotiated interconnection agreements. As such, they do not conform to the requirements of Sections 251 and 252 of the Act. Thus, SGATs should not be accorded any automatic deference as a reasonable substitute for the proposed withdrawal of the pick and choose option.

V. CONCLUSION

The record does not support the proposed elimination of the pick and choose rule. Quite the contrary, the comments demonstrate the need for its continued existence. The rule assists in counter-balancing the unequal bargaining power that favors the ILECs over their competitors because of the risk, expense, and uncertainty that the competitor faces in an arbitration battle if it does not accept ILEC terms of interconnection, however far they might be from ideal.

⁴¹ CLEC Coalition Comments at 17.

This agenda cannot be the Commission's agenda. There is a demonstrated continued need for rules that encourage efficient and reasonably fair ILEC-competitive carrier negotiations. Competitive carriers need a variety of options, as no one size fits all solution takes account of every interconnector's needs and business plans. The existing pick and choose rule thus serves as an important tool for competitors in the interconnection negotiation process. No abuses of the process have been demonstrated and the Commission has no record to eliminate or radically modify the rule.

Respectfully submitted,

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