

**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

REPLY COMMENTS OF VERIZON

The opponents of the elimination of the “pick-and-choose” rule offer only empty words in their comments, not facts or logic. They have nothing but words to refute the Commission’s logical conclusion in the Notice “that the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned.”¹ They do not even try to show that “the sort of give-and-take negotiations that Congress envisioned” have taken place under the six years of the “pick and choose” regime — indeed, they mostly complain about the lack of true negotiations. And yet they want to continue the system that they admit has not worked.

Nor do they have any facts to rebut the Commission’s finding 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.”² Again they typically complain about the way ILECs have behaved under the current rule, so much so that one wonders why they want the current regime continued. If the Commission is correct that ILECs have not made “significant concessions” under “pick and choose” — and no commentator says

¹ Notice ¶ 722.

² Notice ¶ 722.

that the Commission is wrong about this — then elimination of the rule can only improve the situation.

Significantly, most of the commentators with the front-row seats at the negotiation and arbitration process — the state agencies — agree with the Commission’s conclusions and urge elimination of the rule. Thus,

“Based on the FPSC’s experience in numerous arbitrations between the state’s ILECs and CLECs, the negotiation of interconnection agreements has been and is severely hindered by a well-intentioned but outdated regulatory requirement — the ‘pick-and-choose’ rule. We firmly believe the current ‘pick-and-choose’ rule hampers negotiation and forces regulatory decisions that are best left to the parties that must abide by the ultimate terms of the contract.”³

“[A]pplying an all-or-nothing rule to the terms of approved agreements should provide negotiating parties greater latitude to craft creative agreements that might expand the range of available services and options since the CLEC and ILEC negotiate with the knowledge that third-party CLECs cannot ‘pick’ certain benefits without ‘choosing’ the concomitant concessions.”⁴

“The Ohio Commission agrees with the FCC that its current pick and choose rule could stifle innovation and flexibility for the provision of interconnection services. In addition to generating significant disincentives and intransigence on behalf of the ILEC not to make any concessions to accommodate a particular CLEC need or situation, the current rule could also work to the detriment of a competitive local exchange carrier (CLEC) that entered in to the initial contract by providing subsequent carriers with competitive advantages.”⁵

The Florida commission summed it up well: “The best regulator of agreements is the marketplace.”⁶

The one state commission to support the current rule, California’s, points to the 320 interconnection agreements that have been filed in the state⁷ and concludes generally that the rule

³ FL PSC at 5.

⁴ NY DPS at 2.

⁵ OH PUC at 3.

⁶ FL PSC at 5.

⁷ CA PUC at 3.

has “worked well.”⁸ But it does not say how many of these agreements actually used “pick and choose.” Nor does it respond to the Commission’s conclusion 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.” In fact, much of the California commission’s support of the rule seems to be based on “the CPUC’s limited and scarce resources”⁹ and its concern that the rule’s elimination would “impose[] additional burdens on the state.”¹⁰

Equally interesting is that only one of the CLECs opposing elimination of the “pick-and-choose” rule offers any facts to show that the rule has actually been of any benefit in the marketplace. But the stories told by that one carrier, WorldCom, don’t really make its case. WorldCom first says that the rule permitted one of its affiliates, in two states, to use contract provisions from agreements entered into by another affiliate,¹¹ without any suggestion that the ILEC would not have been willing to use the alternative wording anyway. WorldCom’s other example is its use of terms from an ILEC’s SGAT in its interconnection agreement,¹² which would still be permissible under the Commission’s proposal to eliminate the “pick-and-choose” rule (though most commentators oppose conditioning elimination of the rule on the existence of an SGAT). Finally, WorldCom says that the rule has permitted it “to obtain provisions that were

⁸ CA PUC at 5.

⁹ CA PUC at 5.

¹⁰ CA PUC at 5.

¹¹ WorldCom at 11-12.

¹² WorldCom at 12.

previously arbitrated and ‘won’ by other CLECs.”¹³ WorldCom could still get this benefit after the elimination of “pick and choose” simply by adopting the arbitrated agreement.

Several opponents claim that elimination of the rule would result in more arbitrations.¹⁴ This could be the case only if CLECs had actually used “pick and choose” to avoid arbitrations. But the record is that the rule has been rarely used in practice.¹⁵ And even where it has been used, there might still have been arbitrations over other contested issues. Moreover, even with elimination of the rule, CLECs will have many agreements to choose from and there is no reason to believe that the parties will have to resort to arbitration any more often than they do today.¹⁶

ALTS’ opposition filing offers a perfect example of the harm caused by the rule. It says that before the *Triennial Review Order* some CLECs would have been willing to “forgo access to broadband loops in exchange for better treatment on other matters.”¹⁷ But under “pick and choose,” an ILEC could never give the CLEC “better treatment on other matters” because it would have to give that same better treatment to every CLEC that was not willing to “forgo access to broadband loops.” If this is truly the sort of negotiation that ALTS wants for its members, it should support elimination of the rule.

¹³ WorldCom at 12.

¹⁴ *E.g.*, WorldCom at 19; PACE at 8-9; CA PUC at 4. Z-Tel (at 10) similarly says that the rule “lowers industry transaction costs.”

¹⁵ 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.

¹⁶ Retention of the rule could even increase disputes and arbitrations if ILECs do try to negotiate special terms for individual carriers, as they would have to litigate over whether there are differences between carriers and whether various terms were related.

¹⁷ ALTS at 6.

Some commentators say that elimination of “pick and choose” would allow ILECs to discriminate among CLECs,¹⁸ but they have inconsistent notions of how the ILECs would do this. Some say ILECs would discriminate in favor of their bigger wholesale customers and against smaller CLECs,¹⁹ while ALTS claims ILECs will favor those “carriers that do not pose a significant threat to the ILEC,”²⁰ presumably the smaller competitors. An ILEC can’t discriminate in favor of both large and small CLECs at the same time. And, of course, there could be no discrimination at all because any CLEC, large or small, could adopt any effective agreement.

ALTS warns that elimination of the rule would “allow ILECs to negotiate sweetheart deals with preferred carriers.”²¹ However, ALTS apparently thinks it is perfectly reasonable for a CLEC “forgo access to broadband loops in exchange for better treatment on other matters.”²² These sound like two characterizations of the same transaction. ALTS wants its members to be able to give something up “in exchange for better treatment on other matters” — and Verizon agrees that they should be able to do exactly that and that such an agreement should not be considered a “sweetheart deal.” And it is not “discrimination” for an ILEC to decline to give “better treatment on other matters” to a CLEC that does not forgo something of value — it is

¹⁸ ALTS at iii, 12-14; Mpower at 7; CLEC Coalition at 3; WorldCom at 13.

¹⁹ Mpower at 7; CLEC Coalition at 3. RICA agrees that the ILECs will discriminate in favor larger carriers (RICA at 3-4), and the Joint Commenters claim they will disfavor smaller competitors (Joint Commenters at 3).

²⁰ ALTS at 14.

²¹ ALTS at ii.

²² ALTS at 6.

ordinary bargaining, exactly what was contemplated by the Act. But “pick and choose” makes that bargaining impossible.²³

ALTS then claims that ILECs will favor carriers that support them in public policy debates or that they will “greenmail” CLECs into doing so.²⁴ While dissention in the CLEC ranks might make it harder for ALTS, CLECs *do* have different business plans and, therefore, different regulatory interests. It will not be a priority for a truly facilities-based CLEC to drive UNE rates as low as possible; in fact, low UNE rates make it harder for such a CLEC to compete. Such a CLEC would not have to be “greenmailed” into supporting the ILEC’s efforts to stop UNE prices from being lowered further.

A couple of parties include in their comments a variety of complaints about ILEC conduct.²⁵ Even if these allegations were true — and they aren’t²⁶ — they are irrelevant to the

²³ No matter what ILECs do, ALTS will complain about it. It first says that it opposes “cookie-cutter” ILEC service offerings. ALTS at 11-12. However, it later rails against “carrier-specific contract[s]” that discriminate against other carriers. ALTS at 14-15. To ALTS, both ILEC “cookie-cutter” and “carrier-specific” arrangements are bad.

²⁴ ALTS at 14-15.

²⁵ Mpower at 9-10; NASUCA at 15-21.

²⁶ The “form letter” approach about which NASUCA complains (at 15-16) is used when a CLEC is adopting an entire interconnection agreement, which is the norm even with the “pick-and-choose” option; under these circumstances, nothing more is required. NASUCA says the Verizon added certain language to its standard interconnection agreement in an effort to evade its merger commitments (at 15); these commitment expired on July 17, 2003 (and, therefore, are no longer relevant), and the language was simply in recognition of the fact that certain of the terms in the agreement were the product of state commission arbitrations, and were not voluntarily negotiated by Verizon. NASUCA then complains about a Verizon provision which allows a CLEC to charge as much as Verizon charges for a particular service without any cost showing and requires the CLEC to make such a showing if it wants to charge more (at 18-19); this provision, of course, actually *benefits* CLECs, as it relieves them of having to make a cost showing in most circumstances and has been approved by some state commissions (*Petition*

question the Commission is considering. First, these alleged “bad acts” were perpetrated while the “pick-and-choose” rule was in effect, so the existence of the rule did not, in fact, deter any alleged wrongdoing. Second, the “pick-and-choose” rule was not a remedy for any of the ILEC conduct complained about — the CLECs could not invoke the rule to obtain redress. Finally, if the rule were no longer on the books, the conduct complained of would be no more like to occur than it is now.

Finally, there is little support for conditioning the removal of the “pick-and-choose” requirement on the existence of an effective SGAT. While most ILECs, including Bell companies, do not have SGATs, the lack of an SGAT 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.

of Sprint Communications Co., L.P., etc., Order, DTE 00-54, 2000 WL 33146677, at 20-21 (Mass. D.T.E. Dec. 11, 2000); *Joint Petition of AT&T Communications of New York, Inc., et al.*, Order Resolving Arbitration Issues, Case No. 01-C-0095, at 86 (N.Y.P.S.C. July 30, 2001)); the Commission did not find unreasonable a similar term in the Virginia Arbitration, it rather said that an interconnection arbitration was not the proper place to deal with CLEC rates (*Petition of WorldCom, Inc. etc.*, 17 FCC Rcd 27039 ¶ 588 (2002)). Verizon’s proposed (and withdrawn) credit assurance terms (NASUCA at 19-21) were a reasonable response to the spate of carrier bankruptcies and insolvencies.

Conclusion

Verizon urges the Commission to 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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