

**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

**REPLY COMMENTS OF MCI**

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**I. INTRODUCTION AND SUMMARY**

As WorldCom, Inc. (“MCI”) demonstrated in its comments, the Commission does not have the authority to alter the pick-and-choose rule in the manner proposed in its Notice of Proposed Rulemaking.<sup>1</sup> The vast majority of commenters agree with that conclusion. A handful of commenters, however, argue that the FCC should adopt a rule that would require carriers to adopt agreements in their entirety under Section 252(i) of the Communications Act of 1934, as amended (the “Act”),<sup>2</sup> or not at all. As

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<sup>1</sup> *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, Report and Order and Order On Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 721 (2003) (FCC 03-36), *as modified by* Errata, 18 FCC Rcd 19020 (2003) (FCC 03-227) (“*Notice*”).

<sup>2</sup> 47 U.S.C. § 252(i).

demonstrated below, the FCC may not, as a matter of law, read Section 252(i) to mean that requesting carriers are obligated to adopt all elements of an agreement. Even if that were not the case, sound public policy counsels against adopting such a rule.

In addition, the FCC should reject the request by Verizon that the Commission clarify that voluntarily negotiated terms are not subject to Section 252. As shown below, the plain language of the Act confirms that voluntarily negotiated interconnection agreements, including those containing network elements not required by the Commission's rules, are subject to the state filing and approval requirements of Section 252(e), and, in turn, the obligations of Section 252(i). Similarly, the FCC must disregard the "requests" of BellSouth and USTA for forbearance from enforcing the requirements of Section 252(i). In addition to being procedurally defective, those requests do not meet the requirements of Section 10(a) of the Act, and, in any event, are barred by Section 10(d).<sup>3</sup>

Finally, to the extent that the FCC desires to improve the existing pick-and-choose process, it should implement national rules providing for expedited adoption procedures similar to those adopted in California. By streamlining and expediting the Section 252(i) adoption process, such rules would assist competitive carriers in entering local markets more quickly and efficiently.

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<sup>3</sup> *Id.* § 160(a), (d).

## II. DISCUSSION

### A. **The Plain Language of the Act Precludes the FCC from Adopting a Rule that Requires Carriers to Opt Into Agreements in Their Entirety or Not at All**

In response to the FCC's request for alternative proposals, a few commenters, most notably Verizon and SBC, urge the FCC to reinterpret Section 252(i) to require requesting carriers to adopt agreements in their entirety.<sup>4</sup> Those commenters argue that, as long as the Commission provides a reasoned basis for doing so, it has ample authority to depart from its existing pick-and-choose rule.<sup>5</sup> Verizon asserts that the FCC's reasons for adopting the pick-and-choose rule in 1996, including its concerns regarding "poison pills," have since proven untrue, and that this subsequent experience provides a sufficient rationale for the FCC to reinterpret Section 252(i).<sup>6</sup> SBC and Verizon also argue that requiring carriers to adopt entire agreements would be consistent with Congress' preference for voluntarily negotiated agreements and would restore incentives to negotiate innovative arrangements.<sup>7</sup> As explained below, even if the FCC could adopt a rule requiring carriers to adopt agreements in their entirety (which it cannot), none of the arguments in support of the proposal warrants a change in the current rule.

#### 1. **As a Matter of Law, Section 252(i) Cannot be Read to Require Competitors to Adopt Agreements in Their Entirety**

Although it is true that an agency generally has the ability to alter its rules, the Commission lacks the authority to adopt a rule that contravenes the plain language of the

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<sup>4</sup> See, e.g., SBC Comments at 7-8; Verizon Comments at 7-9; Verizon Wireless Comments at 4-8. (Unless otherwise indicated, all comments cited herein were filed in CC Docket No. 01-338 on October 16, 2003.)

<sup>5</sup> See, e.g., SBC Comments at 7-8; Verizon Comments at 7-9.

<sup>6</sup> Verizon Comments at 4-5, 9.

<sup>7</sup> SBC Comments at 3-4; Verizon Comments at 2-3.

Act.<sup>8</sup> As the Commission acknowledged in the *Notice*, the Supreme Court has held that the current pick-and-choose rule “tracks the pertinent [statutory] language almost exactly” and is the “most readily apparent” reading of Section 252(i).<sup>9</sup> Moreover, the plain language of Section 252(i) expressly distinguishes between “any interconnection, service, or network element provided under an agreement,” which incumbents must make available on an individual basis, and the entire agreement.<sup>10</sup> In its brief before the U.S. Court of Appeals for the Eighth Circuit, the FCC explained that requiring carriers to adopt all the terms of an agreement, as Verizon and SBC propose here, would violate a cardinal principle of statutory construction by rendering the phrase “any interconnection, service, or network element” superfluous: “[C]ompelling requesting carriers to elect

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<sup>8</sup> The BOCs cite a number of cases for the proposition that nothing prevents the FCC from changing its pick-and-choose rule based on a reasoned analysis. *See, e.g.*, Verizon Comments at 9; SBC Comments at 7-8; *see also* BellSouth Comments at 6 n.14 & cited materials. Those cases, however, are inapposite, either because they are premised upon a finding that the agency’s revised interpretation is a reasonable construction of the statutory language, or because they involve the reinterpretation of clearly discretionary statutory language. *See, e.g., Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (“Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest.”) (emphasis added); *Clinchfield Coal Co. v. Federal Mine Safety & Health Comm’n*, 895 F.2d 773, 777 (D.C. Cir. 1990) (“unless Congress has spoken clearly,” an agency is free “to select among reasonable interpretations”) (emphasis added); *OXY USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) (replacing a “gravity” valuation methodology with an “assay” methodology based on a finding that the prior rates resulting from the “gravity” methodology no longer complied with the statute’s “just and reasonable” standard).

<sup>9</sup> *Notice* ¶ 721.

<sup>10</sup> 47 U.S.C. § 252(i). The legislative history further supports this distinction. In the words of Congress, Section 252(i) was intended to require incumbent LECs to “mak[e] available to other carriers the *individual elements of agreements* that have been previously negotiated.” Report of the Senate Committee on Commerce, Science and Transportation on S.652, S. Rep. No. 104-23, at Title I, Sec. 101 (discussion of “[n]ew section 251(g)”) (1995) (emphasis added), *available at*: <<http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr023&dbname=cp104&>> (“S. Rep. No. 104-23”).

entire agreements instead of particular services or network elements would drain the phrase ‘any interconnection, service, or network element’ of independent meaning.”<sup>11</sup> Neither Verizon nor SBC provides a sound legal basis for departing from the Commission’s earlier findings. Consequently, as MCI explained more fully in its comments, the Commission may not, as a matter of law, read Section 252(i) to mean that requesting carriers are obligated to adopt all elements of an agreement.<sup>12</sup>

**2. As a Policy Matter, the FCC Should Not Require Carriers to Adopt Entire Agreements Under Section 252(i)**

Even assuming *arguendo* that the FCC could reinterpret Section 252(i) to require carriers to adopt agreements in their entirety, the arguments offered by SBC and Verizon in favor of their proposal fall well short of establishing a reasoned basis for such a change. As an initial matter, the FCC has rejected as “faulty” the premise that, in enacting the local competition provisions of the Act, Congress somehow gave priority to negotiated agreements over arbitrated ones.<sup>13</sup> The FCC has explained previously that, far from preferring negotiations, “the Act confines negotiations to a brief initial period, giving priority to arbitrations conducted by the expert State commissions.”<sup>14</sup>

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<sup>11</sup> Brief for Respondents FCC and United States, No. 96-3321, at 114 (8th Cir. Dec. 23, 1996) (“8th Circuit Brief”). Indeed, the FCC itself has repeatedly stated that the existing rule is the *only* reasonable interpretation of Section 252(i). See MCI Comments at 5-6.

<sup>12</sup> See MCI Comments at 4-8.

<sup>13</sup> 8th Circuit Brief at 115 (“Yet again, the incumbents are relying on the faulty premise that the Act has made free-form negotiations the principal means of opening local phone service to competition.”).

<sup>14</sup> *Id.* at 115; see also *id.* at 115-116 (“Most of the incumbents’ objections to the FCC’s [pick-and-choose] rule stem from the fundamental misunderstanding of the place of negotiations in the overall framework of the Act.”).

Moreover, industry experience to date does not suggest that the current regime impedes carriers from freely negotiating contracts that benefit both the incumbent and competitive carrier. As MCI indicated in its comments, the Act and the FCC's rules already permit incumbent and competitive LECs to negotiate voluntary interconnection agreements without regard to the interconnection and unbundling requirements of Section 251(b) and (c).<sup>15</sup> The FCC's rule also requires a competitor to accept all other "legitimately related" provisions in a contract,<sup>16</sup> and exempts incumbent LECs from making a provision available in certain circumstances.<sup>17</sup> Despite these protections, incumbent LECs continue to claim that they seldom make significant concessions in return for a trade-off for fear that other carriers will obtain the benefits of the trade-off without the cost.<sup>18</sup> In MCI's experience, the fact that certain incumbent LECs refuse to

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<sup>15</sup> See 47 U.S.C. § 252(a)(1).

<sup>16</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1315 (1996) ("Local Competition Order"). SBC claims that certain competitive LECs, including MCI, have attempted to avoid compliance with the FCC's "legitimately related" requirement. SBC Comments at 5 & n.9. In fact, the arbitration proceeding referenced by SBC was an extremely complex case involving both adopted and arbitrated terms. In light of the unique circumstances of the case, MCI argued that, with regard to certain arbitrated terms, it should not be required to accept provisions that had been deemed "legitimately related" for purposes of an adoption. The Texas Commission agreed with MCI. See *Petition of MCI Metro Access Transmission Service, LLC et al. for Arbitration with Southwestern Bell Telephone Co. under the Telecommunications Act of 1996*, Texas PUC Docket No. 24542, Revised Arbitration Award at 233-38 (Oct. 16, 2002), available at: <[http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/24542\\_279\\_369735.PDF](http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/24542_279_369735.PDF)>.

<sup>17</sup> See 47 C.F.R. § 51.809(b). As the Supreme Court recognized, these additional limitations on the ability of competitive carriers to pick and choose are "more generous to incumbent LECs than § 252(i) itself." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

<sup>18</sup> See, e.g., Verizon Comments at 2-3 & n.5 (relying on statements from Mpower's Petition, which has since been withdrawn); SBC Comments at 3-4 (providing no support for its assertions).

negotiate anything more than what is required unequivocally by law is far more likely to be due to the lopsided bargaining power between incumbent and competitive LECs, rather than to the existence of the pick-and-choose rule.<sup>19</sup>

Verizon further claims that the FCC's past concerns about incumbent LECs misusing "poison pills" have not materialized, and thus the pick-and-choose rule is no longer necessary to deter such conduct. To the contrary, the alleged failure of incumbent LECs to misuse poison pills in the past does not undercut the potential threat of such behavior in the future. Under the current rule, competitive LECs have the ability to pick and choose different provisions from different agreements. Thus, the incumbent LEC receives no benefit from a poison pill because the competitor can avoid adopting that term. Under Verizon's and SBC's proposed rule, however, incumbent LECs would have a substantial incentive to use poison pills to limit the ability of other carriers to opt into an otherwise favorable agreement.<sup>20</sup>

Qwest also argues that any attempt to use poison pills would be limited by the Act's good faith and nondiscrimination requirements.<sup>21</sup> In practice, the likelihood that a violation of Section 251(c)(1)'s good faith duty will be detected and punished is extraordinarily low. Indeed, in the seven years since the Act was passed, the FCC has *never* found a violation of the Act's good faith requirements.<sup>22</sup> As a result, it is highly

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<sup>19</sup> MCI Comments at 15-16.

<sup>20</sup> See MCI Comments at 13-14 (explaining that incumbent LECs would have the same incentive to misuse poison pills under the FCC's SGAT proposal).

<sup>21</sup> See Qwest Comments at 11.

<sup>22</sup> In fact, despite a number of competitor complaints, the FCC has found only one violation of the requirements of Section 251(c) since the Act was passed in 1996. See *Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962 (FCC 03-96) (2003).

unlikely that the prospect of enforcement of the duty to negotiate in good faith will be sufficient to deter incumbent LECs from attempting to use poison pills or otherwise discriminate amongst competitors.

Verizon also argues that the FCC need not condition its reinterpretation of the pick-and-choose rule on the availability of an SGAT because “CLECs already have numerous approved interconnection agreements to choose from.”<sup>23</sup> To the contrary, because most interconnection agreements have a term of only two to three years, existing agreements will continue, at most, for only a short period of time before they will be subject to re-negotiation, at which time they will no longer be available for adoption. The FCC should also reject Verizon’s argument that incumbent LECs should be allowed to designate a single interconnection agreement or state tariff, rather than an SGAT, that would be subject to pick and choose.<sup>24</sup> Allowing an incumbent LEC to designate a single interconnection agreement would permit the incumbent to control or limit the terms on which it provides access and interconnection, thus providing an opportunity for significantly more anticompetitive behavior than the SGAT proposal. For example, an incumbent LEC could designate a single interconnection agreement that included specific network architecture requirements (such as multiple interconnection points per LATA) or addressed only limited unbundling duties (such as access to loops but not other network elements). Similarly, state interconnection tariffs lack general contract terms and conditions and can also be revised unilaterally – with no opportunity for competitors to

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<sup>23</sup> Verizon Comments at 6.

<sup>24</sup> See *id.* at 7 & n.19; see also CenturyTel Comments at 7 (proposing an “SGAT-equivalent” that would require carriers to take “*all* terms related to the individual ... element” rather than only those terms that are “legitimately related”).

raise objections. These alternative proposals are even more flawed than the SGAT proposal, and should be rejected.<sup>25</sup>

Verizon Wireless further argues that the FCC should adopt rules governing adoption of entire agreements, including clarifying that Section 252(i) applies to all interconnection agreements (not just those involving an incumbent LEC).<sup>26</sup> The FCC should reject Verizon Wireless' erroneous claim that the negotiation, arbitration and approval requirements of Section 252 govern agreements among all carriers. In fact, subsections 252(a) (agreements arrived at through negotiation) and 252(b) (agreements arrived at through compulsory arbitration) apply only when an *incumbent* local exchange carrier receives "a request" for negotiation.<sup>27</sup> Section 252(e)'s approval process in turn provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission."<sup>28</sup> Accordingly, Section 252(e)'s requirement that carriers file agreements for state commission approval and Section 252(i)'s requirement that carriers make available "any interconnection, service, or network element provided under an agreement *approved under this section*" do not apply to an interconnection agreement unless one of the parties to that agreement is an incumbent LEC.<sup>29</sup>

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<sup>25</sup> See MCI Comments at 17-20.

<sup>26</sup> Verizon Wireless Comments at 6-7 & n.14.

<sup>27</sup> See 47 U.S.C. § 252(a)-(b).

<sup>28</sup> *Id.* § 252(e)(1); see also *id.* § 252(e)(2)(A)-(B) (confirming that 252(e)(1)'s references to agreements adopted by negotiation and arbitration refer back to subsections 252(a) and (b), respectively).

<sup>29</sup> *Id.* § 252(e), (i) (emphasis added).

**B. The FCC Should Clarify That Voluntarily Negotiated Terms Regarding “De-listed” Elements Are Subject to the Requirements of Section 252, Including Section 252(i)**

In its comments, Verizon requests that the FCC clarify that individual arrangements containing terms negotiated “outside the requirements of section 251(c)(3)” – including “de-listed” UNEs – “are not subject to section 252(i) at all, let alone to [the FCC’s] pick-and-choose [rule].”<sup>30</sup> According to Verizon, 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.”<sup>31</sup> As explained below, the plain language of the Act confirms that voluntarily negotiated interconnection agreements, including those containing network elements not required by the Commission’s rules, are subject to the state filing and approval requirements of Section 252(e), and, in turn, the obligations of Section 252(i).

Under the Act, the requirements imposed by Section 252(i) apply to any agreement approved by a state commission under Section 252, whether arbitrated or negotiated.<sup>32</sup> An incumbent LEC’s obligation to file negotiated agreements for approval under Section 252 is in turn governed by Section 252(a). That section provides that “[u]pon receiving a request for interconnection, services, or network elements pursuant to

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<sup>30</sup> Verizon Comments at 4; *see also* BellSouth Comments at 3 n.9.

<sup>31</sup> Verizon Comments at 4. On a related note, SBC argues that, to the extent a term in an interconnection agreement is not an “interconnection, service and/or unbundled network element[],” it cannot be adopted under Section 252(i) *except* when the agreement identifies that term as part of a concession related to a Section 252(i) term, in which case SBC argues that competitors *must* adopt the term. *See* SBC Comments at 2-3 & n.5. Incumbent LECs, however, should not have the ability to decide unilaterally whether a term is an “interconnection, service or network element” that is available for adoption.

<sup>32</sup> 47 C.F.R. § 51.809(a); 47 U.S.C. § 252(e)(1).

section 251, an incumbent [LEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.”<sup>33</sup> Under the statute, therefore, incumbent LECs are required to file agreements that contain provisions governing access to network elements that the FCC requires incumbents to unbundle, although the agreement may also contain provisions relating to interconnection and access that are not covered by the FCC’s rules.<sup>34</sup>

Moreover, Verizon’s claim that it is not required to file agreements that relate solely to interconnection and access to network elements not covered by the FCC’s rules ignores the plain language of Section 252(a). Section 252(a) by its terms applies to any agreement between incumbent LECs and competitive LECs concerning interconnection or access to network elements “without regard to the standards set forth in subsections (b) and (c)” or the FCC’s rules implementing those provisions.<sup>35</sup> In other words, Section 252(a) clearly covers agreements containing provisions relating to interconnection and access to network elements that incumbents are not required by state or FCC rules to

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<sup>33</sup> 47 U.S.C. § 252(a); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 763-764 (8th Cir. 2000) (“[Section 252(a)] begins by making reference to a competitor’s ‘request . . . pursuant to section 251.’ Upon receiving such a request, the competitor and the ILEC ‘may negotiate and enter into a binding agreement’ without regard for the interconnection and unbundled network element access standards of § 251(b) and (c).”), *reversed on other grounds, Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

<sup>34</sup> *See, e.g., Local Competition Order* ¶ 244 n.523 (parties to voluntary negotiations under Section 252 “can agree to provide unbundled network elements that differ from those identified by the Commission”); *Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031, ¶ 15 (2002) (noting Verizon’s stipulation that “its interconnection agreements in the former Bell Atlantic territory ‘typically contain terms in addition to those listed in 47 U.S.C. § 251(c)(1)-(6).’”); *id.* ¶ 12 (“The fact that the agreement included other provisions does not take it out of the ambit of section 251(c).”).

<sup>35</sup> 47 U.S.C. § 252(a).

offer to competitive LECs. Section 252(e)(1) requires carriers to submit those negotiated agreements to state commissions for approval and, after approval, Section 252(i) in turn obligates incumbent LECs to make the provisions of such agreements available to competitive LECs.<sup>36</sup>

In sum, incumbent LECs must continue to file negotiated interconnection agreements with the state commission for approval, including those agreements that relate to access to network elements that incumbent LECs are not required to make available on an unbundled basis.<sup>37</sup> Once approved, incumbent LECs are obligated by Section 252(i) to make the provisions of such agreements available to competitive LECs under the FCC's pick-and-choose rule.

**C. The FCC May Not Forbear from Enforcing the Requirements of Section 252(i)**

USTA and BellSouth respond to the FCC's *Notice* by arguing that the FCC should forbear from applying Section 252(i) entirely.<sup>38</sup> As an initial matter, neither party

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<sup>36</sup> The Commission's recent ruling in the *Qwest Order* is not to the contrary. There, the Commission refused to adopt Qwest's request for a sweeping ruling that Section 252(a) did not cover agreements relating to access to "network elements that have been removed from the national list of elements subject to mandatory unbundling." *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, ¶ 3 (2002). Instead, the Commission simply concluded that state commissions have the responsibility for determining "whether a particular agreement is required to be filed as an 'interconnection agreement.'" *Id.* ¶¶ 9-10.

<sup>37</sup> These agreements must also include any terms relating to access to checklist elements under Section 271. *See* S. Rep. No. 104-23, at Subtitle B, Sec. 221 (discussion of "[n]ew section 255(b)") ("the competitive checklist ... set[s] forth what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251").

<sup>38</sup> *See* BellSouth Comments at 4-6; USTA Comments at 4-5. BellSouth and USTA base their request for forbearance in part on a petition for declaratory ruling filed by Mpower Communications, which subsequently has been withdrawn. *See* Letter from

offers a shred of evidence supporting its argument that forbearance from Section 252(i) is warranted under the relevant statutory test.<sup>39</sup> In addition, BellSouth's and USTA's requests are procedurally defective. The Commission's rules require a forbearance petition to be filed as a "separate pleading."<sup>40</sup> Moreover, "[a]ny request which is not in compliance with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c), and is not subject to the deadline set forth therein."<sup>41</sup> BellSouth's and USTA's requests, made in their comments, obviously are not in compliance with this requirement and, therefore, must be disregarded under the Commission's rules.

Even if BellSouth and USTA were to file a formal petition, Section 10(d) of the Act bars the requested relief. Section 10(d) states in relevant part:

the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.<sup>42</sup>

Section 251(c)(2) and (3) require incumbent LECs to provide interconnection and unbundled access "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."<sup>43</sup> Section 252 in turn sets forth the manner in which incumbent LECs must provide interconnection to a requesting carrier, including Section 252(i)'s requirement that incumbent LECs permit requesting carriers to opt into

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Douglas G. Bonner, Counsel for Mpower Communications, to Marlene H. Dortch, FCC, CC Docket Nos. 01-117, 01-338, 96-98, & 98-147 (Oct. 14, 2003).

<sup>39</sup> 47 U.S.C. § 160(a).

<sup>40</sup> 47 C.F.R. § 1.53.

<sup>41</sup> *Id.*

<sup>42</sup> 47 U.S.C. § 160(d).

<sup>43</sup> *Id.* §§ 251(c)(2)(D) & 251(c)(3).

individual contract terms.<sup>44</sup> The plain language of Section 251(c) thus unambiguously incorporates by reference Section 252(i)'s pick-and-choose requirements,<sup>45</sup> and Section 10(d) expressly prohibits the FCC from forbearing “from applying the requirements of section 251(c)” until those requirements have been “fully implemented.”<sup>46</sup>

As MCI previously has shown,<sup>47</sup> the most reasonable construction of the “fully implemented” requirement in section 10(d) is that it is satisfied “when markets are deemed competitive.”<sup>48</sup> Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the

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<sup>44</sup> *Id.* § 252(i); 47 C.F.R. § 51.809.

<sup>45</sup> *Accord Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, Memorandum Opinion and Order ¶¶ 5-6 (rel. Nov. 4, 2003) (FCC 03-271) (confirming that the requirements of Section 272 are incorporated by reference into Section 271 for interLATA services requiring prior authorization under Section 271(d)(3)); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (“where . . . the statute's language is plain, ‘the sole function of the courts is to enforce it according to its terms.’”) (citation omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 & n.12 (1987) (the “ordinary and obvious meaning” of a statutory phrase “is not to be lightly discounted”) (citations omitted); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1983) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

<sup>46</sup> 47 U.S.C. § 160(d).

<sup>47</sup> *See* Opposition of MCI, WC Docket No. 03-157, at 27-28 (Aug. 18, 2003).

<sup>48</sup> 141 Cong. Rec. S. 7942, 7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).

need for continued enforcement of sections 251(c) or 271.<sup>49</sup> Because neither BellSouth nor USTA has made such a showing, the requested relief must be denied.

**D. The FCC Should Adopt Procedural Rules for the Current Pick-and-Choose Process**

The California commission confirmed in its comments that, “far from impeding meaningful negotiations,” the ability to pick and choose has “greatly facilitated the entry of CLECs into the local exchange market in California.”<sup>50</sup> Indeed, the California Commission states that over 98 percent of the 320 interconnection agreements filed with it have been the result of voluntary negotiations.<sup>51</sup> As MCI outlined in its comments, to the extent that the FCC desires to improve the existing pick-and-choose process and foster voluntary negotiations, it should implement national rules providing for expedited adoption procedures similar to those adopted in California.<sup>52</sup>

Under the California rules, a party may file, unilaterally, an Advice Letter or Letter of Intent to adopt all or a portion of an existing interconnection agreement. The incumbent LEC is not permitted to propose alterations to the terms of the underlying agreement, and it has 15 days either to approve the request for adoption or to file for arbitration and demonstrate why the request does not meet the requirements of the FCC’s

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<sup>49</sup> Stated differently, the “fully implemented” standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC. *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

<sup>50</sup> Comments of the People of the State of California and the California Public Utilities Commission at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *See* Resolution 181, *California Public Utilities Commission Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996*, Rule 7, “Process for Adopting a Previously Approved Agreement (or Portions of an Agreement) Pursuant to 252(i),” 2000 Cal. PUC LEXIS 864 (2000).

pick-and-choose rule. If the incumbent fails to respond, the contract is automatically deemed effective on the 16th day after the Advice Letter or Letter of Intent is received.<sup>53</sup> If the incumbent LEC files for arbitration, it must specify the terms to which it objects. Any provisions within the adopted agreement that are not subject to the incumbent's objection and request for arbitration are deemed effective on the date that the incumbent files for arbitration.

Accordingly, the FCC should first clarify that competitive carriers should be able to file for adoption unilaterally. Second, the FCC should establish expedited time frames in which the incumbent LEC must act on a request to pick and choose a term or adopt an entire contract. Third, the Commission should clarify that incumbent LECs are not permitted to propose alterations to the terms of the underlying agreement being adopted. Fourth, to the extent that an incumbent LEC files for arbitration of an adoption request, the FCC should require the incumbent to demonstrate why the requested adoption does not meet the requirements of the pick-and-choose rule. Finally, pending resolution of an arbitration, any terms to which the incumbent LEC does not object should be deemed effective. Implementing such procedures on a nationwide basis would streamline and expedite the Section 252(i) adoption process, assisting competitive carriers in entering local markets quickly and efficiently.<sup>54</sup>

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<sup>53</sup> *Id.*, Rule 7.2.

<sup>54</sup> In March 2000, MCI filed a petition for declaratory ruling regarding the procedures governing adoption of interconnection agreements pursuant to Section 252(i) and the FCC's pick-and-choose rule. *See MCI WorldCom, Inc. Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, CC Docket No. 00-45 (filed March 7, 2000). Because MCI has raised many of those same issues in this proceeding, MCI has filed with the FCC to withdraw its petition.

### III. CONCLUSION

MCI urges the Commission to retain its existing pick-and-choose rule. To the extent that the FCC desires to facilitate market-based negotiations, it should clarify or adopt procedural rules similar to those adopted in California, as discussed above.

Respectfully submitted,

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