

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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
	)	

**Joint Reply Comments of the American Farm Bureau, Inc.,  
Anew Telecommunications Corporation d/b/a Call America,  
Creative Interconnect, Inc., the Utilities Commission of New Smyrna Beach,  
and A+ American Discount Telecom, LLC**

---

James M. Smith  
DAVIS WRIGHT TREMAINE, LLP  
1500 K Street, N.W.  
Suite 450  
Washington, DC 20005-1272  
Phone (202) 508-6600  
Facsimile (202) 508-6699

Their Attorney

November 10, 2003

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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
	)	

**Joint Reply Comments of the American Farm Bureau, Inc.,  
Anew Telecommunications Corporation d/b/a Call America,  
Creative Interconnect, Inc., the Utilities Commission of New Smyrna Beach,  
and A+ American Discount Telecom, LLC**

---

The American Farm Bureau, Inc., Anew Telecommunications Corporation d/b/a Call America, Creative Interconnect, Inc., the Utilities Commission of New Smyrna Beach, and A+ American Discount Telecom, LLC (the “SAFE-T Joint Commenters”), by their attorney, respectfully submit these Joint Reply Comments in response to the Commission’s *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> The Joint Commenters, ranging from nationwide integrated service providers to small, regional CLECs, are members of the Save America Free Enterprise in Telecommunications Coalition (“SAFE-T”)

---

<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98, 98-147 and 01-338 (rel. August 21, 2003) (the “*Further Notice*”).

## I. INTRODUCTION

The record amassed in the initial comments in this proceeding is remarkable for its near-unanimity of industry views on the efficacy of and ongoing need for the Commission's existing "pick-and-choose" rule: ILECs, which absent the rule would have all the leverage in interconnection negotiations, favor abolition of the rule; while CLECs, which without the rule would have utterly no bargaining power in such negotiations, almost universally defend the existing rule and support its retention.<sup>2</sup> If, as the *Further Notice* posits, the pick-and-choose rule "stifles innovation" in interconnection negotiations, and thereby frustrates the wishes of both sides to the negotiation, one would imagine that there would be a far greater – or at least *some* – division of opinion among CLECs, and some support among competitive providers for the Commission's proposal. The fact that there is virtually *no* support for the *Further Notice* among competitors speaks volumes about both the relative bargaining power of the parties absent the rule, and ultimately about the validity of the *Further Notice's* suppositions in proposing to abolish it.

Instead, what the initial comments make clear is that the ILECs present no real evidence that their interconnection negotiations would be more "innovative" if they are relieved of the pick-and-choose rule. Rather, they merely parrot approvingly the Commission's hypothesis in the *Further Notice* – which did little more than cite the concerns of these ILECs<sup>3</sup> and a single CLEC which has since withdrawn its earlier position and now supports retention of the rule. That CLEC cites ILEC abuses of the interconnection negotiation process since the filing of its petition, and concludes that the "pick-and-choose rule is the only way CLECs, both struggling

---

<sup>2</sup> Of the 47 CLECs that filed initial comments, either individually or jointly, 46 favored retention of the current rule. Only one CLEC, PAETEC Communications, supported the Commission's proposal.

<sup>3</sup> See, e.g., Comments of BellSouth at 2; SBC *passim*.

competitors and new entrants, can in any sense maintain some type of equal footing with ILECs with respect to bargaining power.”<sup>4</sup>

It is most telling that most of the commenting ILECs are not even willing to acquiesce to the Commission’s minimalist “SGAT” proposal. Verizon and BellSouth dismiss that option as “unnecessary,” while SBC declares that “no rational ILEC would avail itself of this burdensome option.”<sup>5</sup> Not to be outdone, USTA rejects both the SGAT approach and even the Commission’s residual proposal to allow adoption of existing agreements on an “all or nothing” basis, declaring flatly: “USTA seeks nothing less than the complete elimination of the pick-and-choose rule.”<sup>6</sup> This audacious proposal would, of course, render Section 252(i) of the Telecommunications Act a nullity, inasmuch as even Qwest acknowledges that “the Communication Act’s language appears to mandate the availability of pick-and-choose as a non-discrimination measure.”<sup>7</sup>

Beyond the volumes spoken by the ILECs’ intransigence to *any* meaningful implementation of the Telecom Act’s interconnection requirements, the opening comments in this proceeding effectively illuminate four essential facts: (1) that any modification of the existing rule would deprive small CLECs of the *only* bargaining power they possess in seeking fair interconnection terms; (2) that modification of the rule as contemplated in the *Further Notice* would invite anticompetitive discrimination; (3) that the Commission’s “SGAT alternative” is both wholly inadequate to prevent such discrimination and badly flawed for both legal and practical reasons; and (4) there is no record evidence supporting a substantive change in the rule.

---

<sup>4</sup> See Comments of Mpower Communications Corp. at 6, 9-10.

<sup>5</sup> Comments of Verizon at 5; BellSouth at 6; SBC at 4.

<sup>6</sup> Comments of USTA at 5.

<sup>7</sup> Comments of Qwest at 8.

## II. UNEQUAL BARGAINING POWER

ILEC parties generally urge the Commission to abolish the pick-and-choose rule based on the complaint that it “interfere[s] with the ability of ILECs and CLECs to engage in the dynamic, innovative interconnection negotiations intended by the Telecommunications Act.”<sup>8</sup> NASUCA reasonably responds that “[s]ome modification of the pick-and-choose rule may be warranted in the future when the BOCs and other ILECs are not market dominant,” but observes that “[t]he local telephone marketplace is still one that is characterized by dominant players – the ILECs – and nascent competitors who require wide-open access to the incumbent network in order to ensure successful and meaningful competition.”<sup>9</sup>

Z-Tel accurately describes the “oxymoron” of ILEC-CLEC “bargaining” in light of the extreme disparity in bargaining power between ILECs and new entrants: “Because the ILECs have inherited a monopoly market share and ubiquitous local networks, they have nothing to gain and everything to lose by cooperating with CLECs that seek to take away customers and build alternative networks.”<sup>10</sup> Z-Tel notes that, in enacting the Telecom Act, Congress was well aware of this disparity, listing no fewer than ten provisions of the Act in which Congress intervened to “balance the scales” between otherwise hopelessly unequal negotiating positions.<sup>11</sup>

Other CLECs document the leverage exercised by ILECs, especially against smaller CLECs that cannot afford arbitration,<sup>12</sup> and Mpower testifies to “the far weaker competitive strength of CLECs today relative to incumbent LECs than existed in July 2001,” when it filed its

---

<sup>8</sup> Comments of Qwest at ii. *See also* SBC at 1; CenturyTel at 3; Verizon at 2; BellSouth at 1.

<sup>9</sup> Comments of NASUCA at 8, 9.

<sup>10</sup> Comments of Z-Tel at 1. *See id.* at 3-4.

<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> *See* Comments of LecStar Telecom at 4-6; US LEC Corp. *et al.* at 3-4.

now-withdrawn petition in the hope of obtaining “Flex” agreements with ILECs.<sup>13</sup> Still others note that now that the Commission has granted Section 271 interLATA authority to ILECs almost everywhere, “the BOCs do not have any incentive to open their markets to competition.”<sup>14</sup> Sprint, itself one of the largest ILECs, concludes that the *Further Notice* proposal “is based on unrealistic assumptions about ILECs’ willingness to make concessions to their CLEC competitors, and about ILECs’ and CLECs’ relative bargaining power.”<sup>15</sup> And importantly, in sharp contrast to the ILECs’ conclusory and circular assertions, the initial comments of the CLEC parties present significant record evidence of ILECs’ abuse of their negotiating leverage and the critical need for the “equalizer” of the statutorily-mandated pick-and-choose rule.<sup>16</sup>

### III. DISCRIMINATION

The ILECs assure that they would never discriminate against CLECs in the absence of the rule, and that in any event “the Act already prevents the enforcement of unreasonably discriminatory interconnection provisions.”<sup>17</sup> Unfortunately, the assurances are belied by actual experience. In particular, as NASUCA and others describe in detail, Qwest’s “secret agreements,” which resulted in the assessment of a \$30 million fine by the Minnesota PUC alone, shows conclusively that ILECs actively attempt to negotiate inherently discriminatory

---

<sup>13</sup> Comments of Mpower at 3-4. *See also id.* at 6.

<sup>14</sup> Comments of PACE Coalition and CompTel at 5. *See also* US LEC *et al.* at 4.

<sup>15</sup> Comments of Sprint at 2.

<sup>16</sup> *See, e.g.*, NASUCA at 11-22; CLEC Coalition at 11, 14-16; MCI at 11-12; LecStar at 2-3, 5-6. These Joint Commenters demonstrated that Congress intended that Section 252(i) “make available to other carriers the individual elements of agreements that have been previously negotiated.” SAFE-T Joint Comments at 5, (*quoting* S. Rep. No. 104-23, 21-22 (1995)). *See generally id.* at 4-6.

<sup>17</sup> CenturyTel at 8. *See also, e.g.*, BellSouth at 3.

interconnection agreements or “side deals” with some parties, to the detriment of others.<sup>18</sup> The residual provisions of Section 202(a) notwithstanding, the Commission’s proposal would necessarily result in discrimination in favor of large CLECs, who may possess some incremental leverage in interconnection negotiations, and against small CLECs, who have none.<sup>19</sup>

#### **IV. THE “SGAT ALTERNATIVE”**

The flaws of the *Further Notice*’s “SGAT alternative” proposal were exposed by all sides in the initial comments. As these Joint Commenters and many others pointed out, SGATs are a BOC-only statutory tool, designed to enable their satisfaction of Section 271 requirements in states where no competition exists, which have now become obsolete with the approval of BOC Section 271 applications in nearly every state.<sup>20</sup> As ILEC, CLEC and State PUC commenters all note, the extension of an SGAT requirement to non-BOC ILECs both is legally problematic and would impose significant new burdens on industry and regulators alike.<sup>21</sup>

Further, as these Joint Commenters pointed out in the initial round, SGATs are an ill-suited, “bare-bones,” relatively little-used vehicle for interconnection arrangements<sup>22</sup> – and for good reasons. Verizon states that “experience has shown that SGATs have not been particularly popular even with carriers that are allowed to have them, as, for example, Verizon has SGATs in only four of the smaller states in which its BOC LECs operate.”<sup>23</sup> As MCI notes, nearly two-

---

<sup>18</sup> See NASUCA at 11-15. See also US LEC *et al.* at 7; PACE Coalition/CompTel at 9.

<sup>19</sup> Notably, the solitary CLEC that supports the Commission’s proposal does so with the expectation that abolition of pick-and-choose “will encourage more flexible negotiations, which will accrue particularly to the benefit of facilities-based competitors.” Comments of PAETEC Communications at 6.

<sup>20</sup> See Joint Comments at 8-10; US LEC *et al.* at 8-9.

<sup>21</sup> See, e.g., Sprint at 5-6; Verizon at 1, 6, n.18; Z-Tel at n.8; State of California at 5.

<sup>22</sup> See Joint Comments at 8-10; CLEC Coalition at 17; US LEC *et al.* at 9.

<sup>23</sup> Verizon at 1, 6.

fifths of the states have no SGATs on file, and a third of those are outdated and incomplete.<sup>24</sup> Yet there is no federal or state procedure for keeping SGATs up-do-date. Consequently, as Mpower notes, “once a state approves a SGAT, the terms and conditions of the SGAT will easily become stale and dated as ILECs will have no incentive to update the terms and conditions. SGATs will quickly devolve from state-of-the-art to antiquated, and thus potentially anticompetitive, documents.”<sup>25</sup>

In sum, the initial comments almost universally attest that the use of SGATs as a partial substitute for the pick-and-choose rule is a deeply flawed, unworkable solution. In essence, it tries to force a statutory square peg into a round hole – in an instance where Congress manifestly has already provided the Commission with the round peg.

## V. NO EVIDENCE SUPPORTING REVISION OF THE RULE

As these Joint Commenters observed, the appropriate standard for revisiting and revising the pick-and-choose rule must be the one supplied by the U.S. Supreme Court in *AT&T v. Iowa Utilities Board*, which endorsed the current rule as the “most readily apparent” construction that “tracks the pertinent statutory language almost exactly” – namely, whether the current rule “significantly impede[s] negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions).”<sup>26</sup> No evidence of such impediment has been produced in the comments filed to date. Instead, we have only the bare assertions of the *Further Notice* and the ILEC comments. *Not a single concrete example is*

---

<sup>24</sup> MCI at 2-3, 17, Att. 1.

<sup>25</sup> Mpower at 9.

<sup>26</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 395-96 (1999). See Joint Comments at 7-8.

*given.*<sup>27</sup> On the other side of the ledger, many CLECs testify that the rule has not impeded negotiations. Further, the California PUC (CPUC) testifies that over 98 percent of the over 320 interconnection agreements filed before it

are the result of voluntary negotiations between the parties. Thus, far from impeding meaningful negotiations, which is the tentative basis for the FCC’s proposal..., the current pick and choose rule has greatly facilitated the entry of CLECs into the local exchange market in California. Moreover, the fact that the current pick and choose rule has enabled CLECs to smoothly and quickly enter into interconnection agreements with the ILEC in California was persuasive evidence, among other factors, in support of the CPUC’s finding that SBC had satisfied the requirements of section 271 of the Act to enter the long distance market.

In addition, while the CPUC has arbitrated interconnection disputes between CLECs and the ILEC, *in no case has a CLEC ever complained that the current pick and choose rule was ineffective or should otherwise be modified.* To the contrary, the existing pick and choose rule has enabled smaller carriers to avoid the cost of negotiation and/or arbitration, which in many cases is prohibitively expensive for them.... These carriers generally opt into a larger carrier’s agreement and then pick and choose one or two provisions from other agreements without having to incur the significant cost of negotiation or arbitration.<sup>28</sup>

The Florida PSC, which supports the Commission’s proposal, notes that: “Of course, if the FCC chooses to alter its interpretation of Section 252(i), ... its reasoning must be supported by substantial record evidence.”<sup>29</sup> But as NASUCA observes, “no evidence, let alone compelling evidence, that would justify changing the status quo has been offered by either the Commission or parties [to date].”<sup>30</sup> In light of the Supreme Court’s approval of the rule, Sprint

---

<sup>27</sup> PAETEC cites ILECs’ refusals to agree to “bill-and-keep” arrangements, but then adds that “the ILEC has simply indicated that it is not required by law to provide bill-and-keep, and therefore the subject is closed” – hardly indicative that such a concession would be granted but for the pick-and-choose rule. PAETEC at 4. Moreover, PAETEC cites several examples of amendments that it has successfully negotiated with ILECs. *Id.* at 4-6.

<sup>28</sup> CPUC at 3-4 (emphasis added; citation omitted).

<sup>29</sup> Florida PSC at 2 (citation omitted).

<sup>30</sup> NASUCA at 4.

