

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

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

**REPLY COMMENTS OF BIRCH TELECOM, INC.**

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November 10, 2003

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

**REPLY COMMENTS OF BIRCH TELECOM, INC.**

Birch Telecom (“Birch”) respectfully submits these Reply Comments in the above-referenced proceeding.<sup>1</sup> For the reasons cited below, Birch believes that the Commission’s proposal to modify the “pick and choose” rules is unwarranted at this time.

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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 on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, Docket Nos 01-338, 96-98, 98-147 (rel Aug. 21, 2003)(the “Notice”).

## **I. DESCRIPTION OF BIRCH.**

Birch provides competitive local telecommunications services using a combination of its own facilities and UNE-P. As a result of its merger with ionex Telecommunications in March 2003, Birch serves over 170,000 customers with over 500,000 lines in the Southwestern Bell (including Texas), Qwest, and BellSouth regions. Birch serves the “lost” market - customers and areas that would otherwise not see the benefits of competition - targeting small businesses and serving residential customers as well. Birch serves outer suburbs and small towns, as well as the dense business districts of the largest cities throughout its service territory. Birch offers an integrated suite of valued-added services, including local and long-distance voice services, dial-up Internet access, dedicated Internet access services through T-1s and high-speed DSL circuits (SDSL), web hosting and design services, and customer premises equipment, including key systems, PBXs, routers, and integrated access devices for its integrated voice and data offerings.

## **II. THE COMMISSION’S PROPOSED CHANGES TO THE PICK-AND-CHOOSE RULE ARE UNTETHERED FROM MARKETPLACE REALITIES.**

The instant proceeding has its genesis in the laudable but misguided 2001 petition of Mpower Communications seeking Commission establishment of a new paradigm for ILEC and CLEC negotiations to promote “innovative deal-making” between the parties.<sup>2</sup> That petition’s proposals were based on the overly optimistic premise that CLECs and ILECs had a similar

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<sup>2</sup> See Petition of Mpower Communications Corp. For Establishment of New Flexible Contract Mechanism Not Subject to “Pick and Choose,” CC Docket No. 01-117. See also, Letter dated October 15, 2003 from Douglas Bonner, Counsel for Mpower Communications Corp., to the Secretary of the FCC withdrawing Mpower’s May 25, 2001 petition in CC Docket No. 01-117, noting in pertinent part “under current industry conditions, that a Flex Contract regime will not promote more flexible and open negotiations between incumbent LECs and competitive LECs than exist under existing pick-and-choose interconnection rules.” Mpower October 29, 2003 Letter.

objective when entering into interconnection agreements (“ICAs”), a desire to “make competition work.”<sup>3</sup> This is the central fallacy underlying the Commission’s proposal, and the ILEC campaigning to abolish the pick-and-choose rule as it is currently constituted: that ILECs and CLECs have similar business objectives and goals when entering into ICAs. Of course, nothing could be farther from the truth.

As numerous parties point out in their initial comments in this proceeding, barriers to free negotiation of interconnection arrangements between CLECs and ILECs are many and are varied, but in the end have nothing to do with regulatory or process restrictions. Rather, they have everything to do with the simple lack of any rational economic incentive on the part of the ILECs to facilitate competition. In fact, “[r]egulatory intervention - and only regulatory intervention - ensures that monopoly ILECs sign interconnection agreements with their competitors.”<sup>4</sup>

The history of competition in local telecommunications in the years since 1996 is the story of ILEC intransigence in the face of a Congressional mandate that telecommunications consumers in this nation be afforded competitive alternatives for the provision of their local telecommunications services. Seven years after the passage of the 1996 Telecommunications Act, the reason that more purely commercial agreements are not being negotiated between ILECs and CLECs owes to the fact that ILECs have yet to find, or be given by Congress or the Commission, the necessary incentives, economic or otherwise, to act like true providers of wholesale services to competing carriers. So

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<sup>3</sup> Mpower May 25, 2001 Petition at 4.

<sup>4</sup> Comments of Z-Tel Communications, Inc., CC Docket 01-338 (October 16, 2003) at 10.

long as ILECs remain the dominant holders and suppliers of bottleneck elements of the local telecommunications infrastructure, Birch firmly believes that no such incentives will be found.

Birch submits that, but for the political heresy of the argument, and the attendant lack of willpower of public policymakers (with the exception of certain lawmakers such as retiring Senator Ernest Hollings, D-SC) to pursue it, the one sure fix to the problem of making true market-oriented wholesalers out of the ILECs would be their structural separation into separate wholesalers and retailers of services.<sup>5</sup> As even the Commission must recognize, there is a natural and rational tension between the ILECs' roles as suppliers and competitors. In fact, the 1996 Telecommunications Act is premised on this tension, and attempts through its structure and provisions to deal with it, albeit short of imposing actual structural separation. Nevertheless, any expectation that an ILEC could on its own create effective, internally-enforced incentives to promote competition against itself has clearly been proven to be unrealistic. In reality, and not surprisingly, so long as the ILECs remain unified wholesalers/retailers of telecommunications services, they will lack the necessary incentive and underlying inclination to engage in free and fair negotiation of ICAs, much less to open their local markets fully and irreversibly to competition.

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<sup>5</sup> Indeed, as a result of Southwestern Bell Telephone Company's extremely poor delivery of wholesale services to Birch in Texas, Birch filed in October 2002 a Complaint of End User Service Disruption and Petition to Open Investigation into SWBT Structural Separation (Oct. 18, 2002) with the Public Utility Commission of Texas. Birch submits that the lack of direct action by the Texas PUC on Birch's Petition has less to do with the merits of the filing than with the fact that the topic of structural separation is only slightly less politically manageable an issue than true universal service reform and true access charge reform.

It is their status as monopoly wholesalers of services and facilities to their captive CLEC competitors, at the same time as being monopoly retailers of services to the public, that acts as the primary disincentive to the ILECs' engaging in anything resembling commercial negotiations with CLECs, not the pick-and-choose rules. So long as the game remains entirely theirs, as well as the football, CLECs will not play meaningfully in any negotiation process. If, on the other hand, each ILEC were divided into two functionally independent service suppliers, one wholesale, one retail, the "mutual gain" necessary for ILECs to find economic benefit in the negotiation process, and from the ILEC-CLEC relationship overall, would at last take root. However, until a cure for this chemical imbalance in the nature of the ILECs can be found, or be forced by public policymakers, the ILECs will continue to have no incentive, short of a regulatory directive, to enter into anything like market based or market oriented ICA negotiations with CLECs.<sup>6</sup> This is particularly true now that the carrot of 271 relief has been firmly snatched from the stick in virtually all states in each RBOC region around the country, further diminishing ILEC incentives to cooperate in negotiating commercial supply agreements of bottleneck elements with CLECs.

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<sup>6</sup>, not the pick-and-choose rules Comments of Z-Tel at 3-10; Comments of US LEC Corp., TDS Metrocom, LLC, Focal Communications Corporation, Pac-West Telecomm, Inc., Globalcom, Inc., Lightship Telecom, LLC., and Oneeighty Communications Corp. at 4.

Finally, if further evidence of the steadfastly non-commercial nature of CLEC-ILEC ICA negotiations were necessary, it is demonstrated by the lack of performance standards and metrics, and strict enforcement mechanisms, from most if not all ICAs between CLECs and ILECs. Indeed, as other commenters point out, the vast majority of commercial agreements between parties in competitive industries generally include liquidated damages provisions and provisions regarding normal business conduct.<sup>7</sup> Despite the many and varied attempts over the last seven years by CLECs to have such normal commercial terms included as requirements in ICAs, the simple lack of a regulatory imperative that such provisions exist has stymied those efforts. It is Birch's contention that the marketplace for negotiations of commercial contracts between ILECs and CLECs remains subject to the same dynamics now as it did seven years ago, when the Commission believed whole-heartedly in the need for the pick-and-choose rule to provide balance and accessibility in a process otherwise hopelessly controlled by the monopoly phone companies.<sup>8</sup>

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<sup>7</sup> See Comments of the Association for Local Telecommunications Services at 15.

<sup>8</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utils. Board v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. V. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

The wholly predictable, and highly unimaginative, positions and arguments of the ILECs, with the exception of Sprint,<sup>9</sup> is that in addition to having done all that is necessary to open their local markets to competition, the primary barrier to their negotiation of commercial supply contracts with CLECs is the pick-and-choose rule, which shackles their ability to enter into unique agreements with each competitor.<sup>10</sup> These arguments are demonstrably untrue and self-serving. As comments in this proceeding make clear, the ILECs have several options under the current rule to limit the pick-and-choose right of a CLEC, including if there is a higher cost for providing an element or service to a pick-and-choosing carrier than for providing the same element or service to the original CLEC that negotiated the agreement. ILECs also are fully within their rights to refuse to allow pick-and-choose of an element or service on grounds of technical feasibility. Moreover, as the Commission should be well aware, it is not at all uncommon for the ILECs to employ self-help when faced with a CLEC attempting to exercise its pick-and-choose rights.<sup>11</sup> In effect, the pick-and-

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<sup>9</sup> Comments of Sprint Corporation at 2-5, opposing the Commission’s proposal to change the current pick-and-choose rule.

<sup>10</sup> *See, e.g.*, Comments of SBC Communications, Inc. at 3-4; Comments of Qwest Communications International, Inc. at 4-5; Comments of Verizon at 2; Comments of SellSouth Corporation at 2-4.

<sup>11</sup> *See* Joint Comments of the Promoting Active Competition Everywhere (“PACE”) Coalition and the Competitive Telecommunications Association (“CompTel”) at 9; and Comments of the National Association of State Utility Consumer Advocates (“NASUCA”) at

choose rule is only as effective a barrier to free negotiation of ICAs as the ILECs want or need it to be in a given instance, or for the purposes of a given proceeding such as the instant one.

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12-15.

The Commission should note that it is not merely the opinion of the all the CLECs commenting in this proceeding, save for one,<sup>12</sup> that no change in the pick-and-choose rule is warranted at this time, but it is also the opinion of Sprint Corporation, as well as the Public Utility Commissions of California and Iowa, the National Association of State Utility Consumer Advocates, and the American Farm Bureau. In the end, however, where there is a fairly even division of sentiment on both sides of an issue, as there is here, the only rational and supportable action for the Commission to take is no action at all. Given the relative certainty of the language of the statute, as well as the imprimatur of the Supreme Court on the Commission's initial decision implementing the statutory provision in question, it would be unnecessary folly for the Commission to undertake as dramatic a change in the rule as is proposed, and risk the years of litigation that would ensue. A course of action that eschews any precipitous and unwarranted change in the status quo – a proposed change that was predicated on a highly speculative basis of need – would appear not merely safe, but eminently wise.

### **III. CONCLUSION.**

For the foregoing reasons, the Commission should not implement any changes in the Section 252(1) pick-and-choose rule at this time, or for the foreseeable future.

Dated: November 10, 2003

Respectfully submitted,

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<sup>12</sup> See Comments of Pae-Tec Communications, Inc.

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