

**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 Service Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	

REPLY COMMENTS OF T-MOBILE USA, INC.

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SUMMARY

The statutory language of Section 252(i) leaves no room for the adoption of the “all or nothing” rule that the Commission proposes. The longstanding “pick and choose” provisions of the FCC’s rules indeed serve as the basis for the non-discrimination measures that are at the heart of local competition. Indeed, in its December 1996 8th Circuit Respondents Brief, the FCC has already provided an answer to the question it poses in the *Section 252(i) FNPRM* – “[t]he language that Congress chose for Section 252(i) permits only one interpretation” – namely pick and choose. Many commenting parties noted that abrogation of pick and choose, contrary to the Commission’s clear intent, would result in greater ILEC intransigence and more burdensome arbitrations.

The “SGAT as an alternative” arrangement possesses numerous flaws and is not workable. It would add uncertainty and multiple layers of litigation complexity – clearly counterproductive and unnecessary particularly at this critical juncture in the effort to enhance local competition.

Consistent with the FCC’s *FNPRM* invitation, T-Mobile advances the concept of National LEC/CMRS Interconnection Contracts as a different, more efficient approach for promoting meaningful commercial negotiations between ILECs and CMRS providers. This would provide a framework for negotiation and, when necessary, federal arbitration of national interconnection contracts. Facilitating ILEC-CMRS interconnection would be a great boon to residential competition and conserve enormous resources for both ILECs and CMRS carriers.

Finally, should some version of an “all-or nothing” approach be adopted, the FCC should at least retain “pick and choose” for any contracts that an ILEC negotiates with its CMRS affiliates.

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REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) hereby replies to the comments filed on October 16, 2003 in response to the further rulemaking proceeding that the Commission has commenced regarding its interpretation of the “pick-and-choose” statute, Section 252(i) of the Communications Act.¹

I. SECTION 252(i) IS NOT AMBIGUOUS, SO THE COMMISSION DOES NOT POSSESS THE LEGAL AUTHORITY TO ALTER ITS INTERPRETATION OF THE STATUTE

Numerous commenters demonstrate that the existing FCC “pick-and-choose” rule “is required as a matter of statutory mandate” and that the plain text of Section 252(i) does “not

¹ See *Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, Docket Nos. 96-98, 98-147, 01-338, *Further Notice of Proposed Rulemaking*, FCC 03-36, ¶¶ 713-29 (Aug. 21, 2003), summarized in 68 Fed. Reg. 52307 (Sept. 2, 2003)(“*Section 252(i) FNPRM*”).

permit the adoption of the ‘all-or-nothing’ rule that the Commission proposes.”² The Commission has consistently interpreted Section 252(i) as requiring the “pick-and-choose” rule. For example, in its 1996 *Local Competition Order*, the Commission ruled that this statute is susceptible to only one reading:

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."³

The Commission further determined that use of individual provisions in agreements is also “mandated by section 252(a)(1), which requires that agreements shall include ‘charges for interconnection and each service or network element included in the agreement,’ and section 251(c)(3), which requires incumbent LECs to provide ‘non-discriminatory access to network elements on an unbundled basis.’”⁴

The Commission similarly told the Eighth Circuit in the ILEC appeal of the *Local Competition Order* that the “*statutory language simply leaves no room for the incumbent LECs’ suggested interpretation*”:

The language that Congress chose for Section 252(i) *permits only one interpretation*, the interpretation that informs the FCC’s non-discrimination rule.⁵

² Excel *et al.* Comments at 2. See also WorldCom/MCI Comments at 4-8; American Farm Bureau *et al.* Comments at 4-10; PACE and CompTel Comments at 3-5; US LEC *et al.* Comments at 1-3; Z-Tel Comments at 13-17.

³ *First Local Competition Order*, 11 FCC Rcd 15499, 16138 ¶ 1310 (1996).

⁴ *Id.* at 16139 ¶ 1314.

⁵ WorldCom/MCI Comments at 6 nn.13-14, quoting Brief for Respondents FCC and United States, No. 96-3321, at 110, 114 (8th Cir., Dec. 23, 1996)(emphasis added).

And, the Commission told the Supreme Court that a rule prohibiting competitors from taking advantage of “pick-and-choose” would read “‘any * * * element’ (of an agreement) to mean ‘all elements.’ That is not what Congress wrote or meant.”⁶

Incumbent local exchange carriers (“ILECs”) now urge the Commission to reverse itself, change its long-standing interpretation of Section 252(i), and re-read Section 252(I) as permitting an “all-or-nothing” rule, whereby competitive carriers would be prohibited from using individual provisions in interconnection agreements. The ILECs advance three reasons in support of their position, but none has merit.

First, the ILECs contend that the Commission has the authority to change its interpretations of the Communications Act.⁷ Of course, agencies can change their interpretation of their enabling statutes – when “the statute is silent or ambiguous with respect to the specific issue.”⁸ But where, as here, “Congress has directly spoken to the precise question at issue, . . . 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.”⁹ In this regard, even one of the ILECs urging the Commission to change its interpretation of Section 252(i) concedes that the plain language of the statute “appears to mandate the availability of pick-and-choose as a non-discrimination measure.”¹⁰

⁶ WorldCom/MCI Comments at 6 n.12, *quoting* Reply Brief for the federal Petitioners and Brief for the Federal Cross-Respondents, 1997 U.S. Briefs 826, 49 n.33 (June 17, 1998).

⁷ *See, e.g.*, CenturyTel Comments at 4-5; SBC Comments at 7-8.

⁸ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

⁹ *Id.* at 842-43.

¹⁰ Qwest Comments at 8.

ILECs next assert there is “no indication that Congress intended the current interpretation to be the only reading of the statute.”¹¹ This argument, however, cannot be squared with the plain language of the statute, as the Commission has previously recognized. Moreover, Congress was very clear in its legislative history that Section 252(i) was enacted “to help prevent discrimination among carriers and to make interconnection more efficient *by making available to other carriers the individual elements of agreements that have been previously negotiated.*”¹² Similarly, in adopting Section 252(i), Congress rejected a House bill provision that closely resembles the Commission’s current “all-or-nothing” proposal.¹³ In short, Congress could not have made its intent over “pick-and-choose” more unequivocal and unambiguous.

ILECs finally contend that the Supreme Court ruled in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999) that Section 252(i) is ambiguous and therefore susceptible to several meanings.¹⁴ The Court made no such ruling and, in fact, the Court stated that “pick-and-choose” is “the most readily apparent” reading of the statute.¹⁵ It bears remembering that the issue before the Court was limited to whether the Eighth Circuit erred in vacating the Commission’s “pick-and-choose” rule. In reversing the Eight Circuit order, it was not necessary for the Court to hold that there is only one interpretation of Section 252(i). The Court’s *dicta* that ILECs rely upon certainly will not prevent federal courts, or the Supreme Court, from considering a challenge that any new Commission interpretation of Section 251(i) is inconsistent with the plain commands of the statute.

¹¹ CenturyTel Comments at 5.

¹² S. REP. NO. 104-23, 104th Cong., 2d Sess., at 21-22 (1995)(emphasis added). *See* American Farm Bureau *et al.* Comments at 4-5.

¹³ *See* American Farm Bureau *et al.* Comments at 5-6.

¹⁴ *See, e.g.*, BellSouth Comments at 6-7; Qwest Comments at 8-10; SBC Comments at 7-8; USTA Comments at 3-4; Verizon Comments t 8.

The Commission has asked whether it possesses the “legal authority to alter its interpretation of” Section 252(i).¹⁶ As noted, the Commission has already answered this question: “The language that Congress chose for Section 252(i) permits only one interpretation” – namely, pick-and-choose.¹⁷

While the Commission cannot lawfully re-interpret Section 252(i), it could exercise its forbearance authority (assuming the statutory forbearance criteria were present) if it wanted to prevent competitive carriers from utilizing “pick-and-choose.”¹⁸ However, the Commission did not seek comment on this alternative,¹⁹ and T-Mobile, like the commenters, will therefore not address the forbearance standard here. If any ILEC believes that forbearance from the “pick-and-choose” statute is appropriate, it may submit a Section 10 forbearance petition.

II. THE COMMENTS IDENTIFY NUMEROUS FLAWS WITH AN “ALL-OR-NOTHING” APPROACH

The ILEC position in this proceeding is a simple one: “trust us” because, while we have refused in the past to engage in meaningful “give-and-take” negotiations, we promise in the future to engage in meaningful negotiations if the Commission abrogates its “pick-and-choose”

¹⁵ *AT&T*, 525 U.S. at 395.

¹⁶ *Section 252(i) FNPRM* at ¶ 721.

¹⁷ *See note 5 supra*.

¹⁸ *See* 47 U.S.C. § 160.

¹⁹ The only question the FCC sought comment on was whether it should adopt “an alternative interpretation of section 252(i).” *Section 252(i) FNPRM* at ¶ 720. *See also id.* at ¶ 713 (“[W]e seek comment on whether the Commission should alter its interpretation of section 252(i).”); *id.* at ¶ 721 (“[W]e seek comment on the Commission’s legal authority to alter its interpretation of the statute.”); at ¶ 724 (“We also seek comment on whether any new rule adopted pursuant to an alternative interpretation of section 252(i)”); *id.* at ¶ 727 (“We seek comment on the reasonableness of interpreting section 252(i) to allow carriers to opt into entire agreements, but not individual provisions.”); *id.* at ¶ 728 (“We tentatively conclude that limiting carriers’ opt-in rights to entire agreements . . . would be consistent with the text of section 252(i).”). In contrast, the FCC did not ask for comment on the Section 10 forbearance criteria.

rule.²⁰ Competitive carriers, with near unanimity,²¹ describe in their comments the fatal flaw in this argument: ILECs have “nothing to gain and everything to lose by cooperating with [competitive carriers] that seek to take away customers and build alternative networks.”²² In the end, Congress enacted the “pick-and-choose” statute for a reason: ILECs lack the incentives to engage in ordinary commercial negotiations with their competitors so long as they retain dominant market power. Accordingly, the current “pick-and-choose” regime must remain in place – unless the Commission is willing to permit ILECs to control the future development of competition for residential and small business customers.

A. THERE IS NO REASON TO BELIEVE THAT ILECs WILL ENGAGE IN MEANINGFUL NEGOTIATIONS IN THE ABSENCE OF A “PICK-AND-CHOOSE” RULE

The Commission has proposed to replace its “pick-and-choose” rule with an “all-or-nothing” rule. The Commission advances this proposal because it has tentatively concluded that the “pick-and-choose” rule “discourages the sort of give-and-take negotiations that Congress envisioned,” and it bases this conclusion on the fact that “incumbent LECs seldom make significant concessions.”²³ The Commission commenced its *FNPRM* in the hope of finding new ways “to promote more meaningful commercial negotiations.”²⁴

There are three fundamental flaws with this tentative analysis. First, there is no evidence in the record – and no reason to believe – that ILECs with dominant market power will engage in meaningful negotiations if the “pick-and-choose” rule is abrogated. The comments convincingly

²⁰ Qwest is more cautious with its “trust us” promise, stating only that the pick-and-choose rule is “not an insignificant part” of the contract negotiation “problem.” Qwest Comments at 4.

²¹ The principal exception among the numerous competitive carriers filing comments was Verizon Wireless. Of course, Verizon Wireless is owned by the largest ILEC, and it is also the largest wireless carrier.

²² Z-Tel Comments at 1.

²³ *Section 252(i) FNPRM* at ¶ 722.

demonstrate that the lack of “ILEC concessions” is due not to the “pick-and-choose” rule, but rather to the facts that (a) ILECs wield dominant market power, which translates into superior bargaining power during contract negotiations, and (b) ILECs have no economic incentive to assist competitive carriers that are attempting to take away ILEC customers.

The ILECs do not allege they have lost their market power. According to the Commission’s most recent data, ILECs still serve 90 percent of all residential and small business LEC customers.²⁵ Commission data further show that CLECs use ILEC “last mile” facilities (UNEs, resale) in serving over 74 percent of their customers.²⁶ Thus, seven years after the 1996 Act, ILECs still control over 97 percent of the facilities used to serve the residential/small business LEC market – either directly, or indirectly *via* control over the facilities used by their competitors that provide service on an UNE or resale basis.

This market power translates into superior power at the negotiating table. The fundamental problem is that, so long as ILECs possess market power, the concept of “mutual gain” that governs ordinary contract bargaining simply does not apply to ILECs. Rather, ILECs sit at the negotiating table and execute (or arbitrate) contracts because they are “*compelled to enter into agreements that they would not agree to absent the dictates of the 1996 Act*”:

And within the range of agreements that comply with the law, ILECs do not “negotiate” in the same way normal commercial negotiations happen. Rather, “negotiations” concern the parameters and requirements of the legal regime – under which the ILEC seeks to do as little as possible.²⁷

²⁴ *Id.* at ¶ 713.

²⁵ See Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2002*, at Table 2 (June 2003).

²⁶ See *id.* at Table 3.

²⁷ Z-Tel Comments at 9 (emphasis in original). See also WorldCom/MCI Comments at 16.

The Commission recognized shortly after the 1996 Act became law that ILECs have “scant, if any, economic incentive to reach agreement” with carriers that seek to “reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market.”²⁸ Little has changed in the intervening seven years, given that ILEC still possess dominant market power.²⁹ Indeed, as one ILEC acknowledges, “the basic premise underlying the Commission’s [FNPRM] analysis – that ILECs will ever willingly make concessions to CLECs which are contrary to the ILEC’s’ own self interest – is unrealistic”:

[T]he 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. . . . [Competitive carriers] and ILECs have opposing business interests in the interconnection context, with the financial and competitive harm to ILECs directly related to the success of their CLEC competitors.³⁰

The comments further demonstrate that abrogation of the “pick-and-choose” rule would “actually create incentives for ILECs to be *less* cooperative” and would “only encourage the ILECs to be more unreasonable.”³¹ The loss of “pick-and-choose” would mean that competitive carriers would have fewer options available to them in dealing with an incumbent that does not want to deal. If ILECs are not required to offer “pick-and-choose,” a competitive carrier’s choice basically would be limited to adopting another interconnection contract *in toto* (even though it may not fit the carrier’s needs), or arbitrating issues of importance. Arbitration is expensive, time-consuming and uncertain, especially if the ILEC decides to arbitrate the same issue in multiple states at the same time.³² As noted by WorldCom/MCI, which has perhaps had

²⁸ *First Local Competition Order*, 11 FCC Rcd 15499, 15570 ¶ 141 (1996).

²⁹ In fact, the situation has worsened in one respect because the “Section 271 carrot” is now gone. See WorldCom/MCI Comments at 8-9.

³⁰ Sprint Comments at 2-3.

³¹ US LEC *et al.* Comments at 4 (emphasis in original).

³² See, e.g., Cox Comments at 4-5; WorldCom/MCI Comments at 19,

more extensive experience than any other carrier in dealing with ILECs, abrogation of the “pick-and-choose” rule will “likely result in more, not fewer, arbitrated agreements” and thereby eliminate “many of the efficiencies of the current system.”³³

The abrogation of “pick-and-choose” will be especially onerous for wireless carriers like T-Mobile that seek to negotiate a second or third generation interconnection contract. Today, new term contracts can be updated quickly *via* the “pick-and-choose” rule. It appears that under the Commission’s proposal, carriers would lose the option to update contracts on a piecemeal basis and will instead be given the choice of adopting a different agreement in its entirety, adopting provisions from an outdated SGAT, or arbitrating the new terms (and, if the ILEC insists, arbitrating the old terms that would otherwise be renewed).

The second flaw with the Commission’s tentative analysis is that while Congress did enact the Act to encourage “give-and-take” negotiations,³⁴ it also recognized that ILECs with dominant market power do not have the incentive to engage in meaningful commercial negotiations. Indeed, Congress adopted its “pick-and-choose” statute precisely because it recognized this problem – namely, meaningful commercial negotiations with incumbents cannot occur until meaningful competition develops, thereby eliminating their market power and making bargaining power more equal.

The third major flaw with the Commission’s tentative conclusion is that the Commission assumes that the “pick-and-choose” rule has prevented ILECs from negotiating innovative, “customized” agreements. This is not the case. In fact, the Commission adopted several limitations to its “pick-and-choose” rule (*e.g.*, the different cost of service exception, the

³³ WorldCom/MCI Comments at 18-19. *See also* M-Power Comments at 6.

³⁴ *See Section 252(i) FNPRM* at ¶ 722.

“legitimately related” provision requirement) precisely so competitive carriers that are not similarly situated cannot “cherry pick” custom provisions in other contracts.

The Commission’s rules must presume that carriers will act rationally in light of their own economic interests. Two competitive carriers, each without market power, can conduct meaningful commercial negotiations because each is driven by the concept of mutual gain. This same concept does not apply to an incumbent carrier, however. This is because an ILEC’s assessment of its gains or losses from entering (or not entering) an interconnection agreement are “skewed by its (rational) desire to maintain its dominant market position”:

In general, an ILEC necessarily faces a greater “loss” from entering into an effective [contract] with a [competitive carrier] (because entry means it can no longer collect monopoly profits) and greater “gain” from not entering into a [contract] (because the refusal means that no entry will occur).³⁵

Until ILECs lose their dominant market power, “pick-and-choose” remains “an essential tool for ensuring the ability of [competitive carriers] to negotiate with a reluctant monopolist.”³⁶

B. THE PROPOSED “SGAT AS A BACKSTOP” ALTERNATIVE IS NOT WORKABLE

The Commission has sought comment on an arrangement whereby the “all-or-nothing” approach would be used in those states where a Regional Bell Operating Company (“RBOC”) has filed a Statement of Generally Available Terms (“SGAT”) and this SGAT would be subject to the “pick-and-choose” rule.³⁷ The comments identify numerous flaws with such an arrangement, including:

³⁵ Z-Tel Comments at 5-6.

³⁶ ALTS Comments at 4.

³⁷ See Section 252(i) FNPRM at ¶ 725.

- SGATs were designed for a different purpose (an alternate means for RBOC interLATA relief), and competitive carriers often did not expend their limited resources on contesting SGATs when they were initially filed.³⁸
- Most of the SGATs on file are incomplete and outdated (and in some instances, incompatible with more recent rulings), and RBOCs have little or no incentive to update their SGATs.³⁹
- The Act gives state commissions only 60 days in which to evaluate SGAT proposals, and the SGATs take effect automatically if the state commission does not complete its review (including any reconsideration) within these 60 days.⁴⁰
- State commission resources are limited, and the conduct of new SGAT proceedings would impose unjustified new burdens on them. As the California Commission has stated:

[G]iven the CPUC’s limited and scarce resources and the importance of the TRO and TELRIC proceedings, the CPUC respectfully submits that it makes little sense to require states to divert resources to modify a rule that is not broken, and in fact, has worked remarkably well in California to foster competition.⁴¹

In the end, SGATs are “simply not a reliable vehicle to promote local competition.”⁴²

Moreover, there remains the question of what arrangements should be used for 1,000-plus ILECs other than the four RBOCs, since the SGAT statute by its terms applies only to the four RBOCs.⁴³ Under the arrangement discussed in the *FNPRM*, a non-RBOC would select one of its interconnection agreements and “designate it as an SGAT-equivalent that is subject to the current pick-and-choose rule.”⁴⁴

³⁸ See, e.g., WorldCom/MCI Comments, Attachment 1 at 4 ¶ 6; Rural Independent Competitive Alliance Comments at 5-6; ALTS Comments at 10; US LEC *et al.* Comments at 8.

³⁹ See, e.g., Cox Comments at 7; M-Power Comments at 8-9; WorldCom/MCI Comments at 17; ALTS Comments at 10.

⁴⁰ See 47 U.S.C. § 252(f)(3).

⁴¹ California Public Utilities Commission Comments at 5.

⁴² US LEC *et al.* Comments at 8.

⁴³ See 47 U.S.C. § 252(f)(1). See also Section 252(i) *FNPRM* at ¶ 722.

⁴³ See Section 252(i) *FNPRM* at ¶ 727.

⁴⁴ *Id.* at n.2151.

There are numerous problems with this “SGAT-equivalent” arrangement for non-RBOC ILECs. Most fundamentally, the dominant carrier should not be permitted to “pick-and-choose” which of its interconnection agreements should be the “stock” agreement available to its competitors – because an ILEC will simply select the agreement that is most favorable to it.⁴⁵ In addition, the question arises over what would be done if the agreement the ILEC chooses is incomplete because it does not contain terms, conditions and prices for functionalities that certain competitive carriers require. T-Mobile also notes that Sprint, the nation’s fifth largest ILEC – that is, the largest non-RBOC ILEC – states that the Commission’s proposal would “impose an undue burden on non-BOC ILECs”:

Imposing the SGAT process on non-BOC ILECs would force Sprint’s ILEC companies to commence and litigate such proceedings in each of its 18 states, when there are already numerous interconnection agreements in effect that a CLEC can utilize under the existing pick-and-choose rule.⁴⁶

* * *

Chairman Powell has committed the Commission to “driving out uncertainty” in the regulatory process because there is “no greater threat to an entrepreneur, or any business, than uncertainty. . . . Competitors are risk takers and are incredibly agile in the ability to change, but they must know what to adapt to.”⁴⁷ It took three years (1996-1999) before there was certainty in the application of Section 252(i). Industry is at a critical juncture of competition for residential customers, especially as LEC-wireless porting will soon become available. Now is not the time to inject new uncertainty into the process by adopting a questionable and

⁴⁵ For example, under the FCC’s proposal, an ILEC could offer as its “SGAT-equivalent” the interconnection contract the ILEC “negotiates” with its CMRS affiliate. Through such an arrangement, an ILEC could effectively establish all the terms of “stock” interconnection in much the same way that some rural ILECs have attempted to achieve *via* their wireless termination interconnection tariffs.

⁴⁶ Sprint Comments at 6.

unnecessary re-interpretation of Section 252(i) requirements that will undoubtedly lead again to extensive litigation in the federal courts and in numerous states.

III. AN ALTERNATIVE REFORM PROPOSAL: NATIONAL ILEC/CMRS INTERCONNECTION CONTRACTS

The Commission commenced this proceeding “to promote more meaningful commercial negotiations,” and it specifically asked parties to propose “different approaches” in which this objective can be achieved.⁴⁸ T-Mobile submits that there is an entirely different approach that the Commission could adopt that would promote meaningful commercial negotiations between ILECs and CMRS providers – that is, the negotiation and, when necessary, federal arbitration of national interconnection contracts.⁴⁹

Chairman Powell has noted that wireless offers “the most significant competition” to incumbent ILEC voice services,⁵⁰ and the upcoming implementation of LEC-wireless number porting should enhance that competition even further. The Commission should therefore do what it can to facilitate LEC-wireless competition because wireless offers the best hope for residential customers to enjoy a real alternative to ILEC services.

One of the most significant advantages ILECs have over CMRS carriers at the negotiating table is the threat to arbitrate the identical issues in each state where the ILEC operates. Verizon, for example, operates in 30 states; Qwest in 14 states; SBC in 13 states; BellSouth in nine states. This threat is real; ILECs have regulatory staff and resources in each

⁴⁷ Remarks of Michael K. Powell, FCC Chairman, at the Association of Local Telecommunications Services (Nov. 20, 2001).

⁴⁸ *Section 252(i) FNPRM* at ¶¶ 713 and 729.

⁴⁹ While the FCC probably cannot adopt this proposal in this docket (at least without issuing a new NPRM), there is ample APA notice and record evidence in CC Docket No. 01-92 to adopt this proposal.

state they operate, while CMRS carriers' state regulatory staff or resources are extremely limited since they are largely deregulated at the state level.⁵¹ The bargaining positions between ILECs and CMRS carriers would be much more equal if disputes could be arbitrated once and only once – rather than 14 or 30 times.

Negotiations of a national interconnection contract and, if necessary, federal arbitration of disputed provisions, would conserve enormous resources for both ILECs and CMRS carriers alike and, equally important, would begin to provide more parity in bargaining position. In this regard, the Commission has the legal authority to adopt a national interconnection contract approach for LEC-CMRS interconnection.⁵² In fact, T-Mobile's proposal would facilitate the Congressional directive for the Commission to establish "a Federal regulatory framework to govern the offering of all commercial mobile services."⁵³

Section 332(c)(1) provides that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.⁵⁴

ILECs with operations in more than one state would also benefit by the efficiencies associated with a federal arbitration procedure (one arbitration rather than 14 or 30).

⁵⁰ Written Statement of Michael K. Powell, FCC Chairman, *Competition Issues in the Telecommunications Industry*, Before the Senate Committee on Commerce, Science, and Transportation, at 4 (Jan. 14, 2003).

⁵¹ The cost of a single arbitration in one state can approximate \$100,000. See LecStar Comments 5. Thus, an ILEC deciding to arbitrate the identical issue in ten states could impose a cost on the competitive carrier of \$1 million – or more.

⁵² See, e.g., *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001); *Iowa Utilities Board v. FCC*, 120 F.3d 753; 800 n.21 (8th Cir. 1997); *Unified Intercarrier Compensation*, 16 FCC Rcd 9610, 9637-42 ¶¶ 78-89 (2001).

⁵³ H.R. CONG. REP. NO. 103-213, 103d Cong., 1st Sess., at 490 (1993).

⁵⁴ H.R. REP. NO. 103-111, 103d Cong., 1st Sess., at 261 (1993).

Ideally, this national approach would be utilized for all ILEC-CMRS interconnection negotiations. Nevertheless, it might be appropriate to limit this approach at the outset to negotiations between multi-state ILECs and multi-state CMRS carriers. If the procedure is successful, the Commission can then consider expanding the program to additional carriers.

IV. AT MINIMUM, THE COMMISSION SHOULD APPLY “PICK-AND-CHOOSE” TO CONTRACTS BETWEEN ILECS AND THEIR CMRS AFFILIATES

If the Commission does adopt some version of an “all-or-nothing” approach, it should at least retain “pick-and-choose” for any contracts that an ILEC negotiates with its CMRS affiliates.

Congress made clear that it enacted the “pick-and-choose” statute “to help prevent discrimination among carriers,”⁵⁵ and the Commission has recognized that this statute plays an “important” role in “preventing discrimination.”⁵⁶ As one large ILEC acknowledges, the “pick-and-choose” rule was “intended to safeguard against favoritism and discriminatory conduct between interconnecting carriers,” and this rule has “prevented discrimination.”⁵⁷ In short, the rule has been successful in achieving its stated objective.

ILEC interconnection is a critical component of wireless services; few consumers would be interested in wireless service if they could not make and receive calls to ILEC customers. One of the reasons competition has flourished in the wireless market is because all wireless carriers obtain essential ILEC interconnection on equivalent terms and conditions. For example, Verizon cannot negotiate with its affiliate, Verizon Wireless, a contract containing special terms because other wireless carriers not affiliated with Verizon could obtain the identical terms and

⁵⁵ S. REP. NO. 104-23, 104th Cong., 2d Sess., at 22 (1995).

⁵⁶ *First Local Competition Order*, 11 FCC Rcd at 16141 ¶ 1321. *See also Section 252(i) FNPRM* at ¶ 729.

conditions under the “pick-and-choose” rule. The same applies to BellSouth and SBC in their dealings with Cingular, the nation’s second largest wireless carrier. Thus, while ILECs are incented to overprice their interconnection to wireless carriers that are beginning to become direct competitors to ILECs,⁵⁸ at least the ILECs terms of interconnection do not distort competition among wireless carriers.

The elimination of the “pick-and-choose” rule would gut this important non-discrimination protection and thus create the real risk that ILECs and their CMRS affiliates would be able to distort competition in the wireless market. One of the problems with the “all-or-nothing” approach, the Commission has recognized, is that ILECs could insert “poison pill” provisions in interconnection contracts, thereby effectively preventing other competitive carriers from opting into this contract.⁵⁹ A wireless carrier that is owned by, or affiliated with, an ILEC would have no incentive to object to the inclusion of “poison pill” provisions in its interconnection contract. Indeed, given the intensity of competition in the wireless market, an ILEC-affiliated wireless carrier would have every incentive to negotiate very favorable terms and then include as many “poison pill” provisions as possible so as to preclude its wireless competitors (often smaller than the ILEC CMRS affiliate) from obtaining the same favorable terms of interconnection under an “all-or-nothing” regime.

⁵⁷ Qwest Comments at 5.

⁵⁸ The FCC has recognized that “LECs that own CMRS subsidiaries have the incentive to engage in such anticompetitive practices in order to benefit their own CMRS subsidiaries and to protect their local exchange monopolies from wireless competition. At the same time, LEC control of bottleneck local exchange facilities – upon which competing CMRS providers must rely – gives LECs the opportunity to engage in anticompetitive behavior.” *Competitive Safeguards for LEC CMRS*, 12 FCC Rcd 15668, 15689 ¶ 27 (1997).

⁵⁹ See *First Local Competition Order*, 11 FCC Rcd at 16138 ¶ 1312. The FCC acknowledges that this concern “remain[s] valid.” *Section 252(i) FNPRM* at ¶ 724.

The wireless market is a success story. The Commission should not undermine this competition by opening the door for ILECs and ILEC-affiliated wireless carriers to negotiate favorable terms that are available only to ILEC-affiliated wireless carriers. Accordingly, if the Commission decides to modify the “pick-and-choose” rule, it should at minimum continue to apply the rule to interconnection contracts that an ILEC negotiates with its CMRS affiliates.

V. CONCLUSION

For the foregoing reasons, T-Mobile respectfully requests that the Commission retain the current “pick-and-choose” rule and that it consider adopting the national interconnection contract approach that T-Mobile describes above.

Respectfully submitted,

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