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March 25, 2004

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

The attached document responds to arguments made by MCI in its December 18, 2003 ex parte filing and demonstrates why elimination of the “pick and choose” rule is a key step in promoting meaningful negotiations of interconnection agreements between incumbent local exchange carriers and competitive local exchange carriers. The rule has discouraged the type of give-and-take negotiations that would produce benefits for both the CLEC and the ILEC, because another CLEC can come along and opt into the “take” without any “give” in return. Verizon demonstrates that the Commission has authority to do away with the rule, and that it should exercise that authority promptly. The Commission should not adopt the so-called “streamlined” opt-in procedures advocated by MCI, which in reality are antithetical to effective negotiations and would create profound administrative problems.

Pursuant to Section 1.1206(a)(1) of the Commission’s Rules, this letter is being provided to you for inclusion in the public record of the above-referenced proceedings. If you have any questions regarding this matter, please call me at (202) 515-2535.

Sincerely,

A handwritten signature in black ink that reads "Clint E. Odom".

Clint Odom

Attachment

cc: Michelle Carey
Tom Navin
John Minkoff

The Commission Should Eliminate the “Pick and Choose” Rule

MCI is wrong in arguing that the pick and choose rule “ain’t broke, don’t fix it.” The rule definitely is “broke.” It has discouraged the type of give-and-take negotiations that would produce benefits for both the CLEC and the ILEC, because another CLEC can come along and opt into the “take” without any “give” in return. Eliminating the pick and choose rule¹ is a key step in permitting meaningful negotiations to occur. The Commission has authority to do away with the rule, and it should exercise that authority promptly. It should not heed calls to adopt so-called “streamlined” opt-in procedures, which in reality are antithetical to effective negotiations and create profound administrative problems.

There is an urgent need to address this issue now, as the Chairman has called for voluntary commercial negotiations between carriers in the wake of the DC Circuit Court’s Opinion in *USTA II*. To create market-based incentives for CLECs and incumbents to negotiate commercial alternatives to the UNE-platform and other elements, it is critical that the Commission make clear that any such individually negotiated access arrangements are not subject to pick and choose under Section 252(i).

1. The Pick-and-Choose Rule Precludes Meaningful Negotiations.

As the Commission pointed out in the Pick-and-Choose NPRM, the pick-and-choose rule “discourages the sort of give-and-take negotiations that Congress envisioned.” *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, at ¶ 722 (2003) (“NPRM”). The current rule makes it virtually impossible for an ILEC to give something in one part of an interconnection agreement in exchange for a concession by a CLEC in another part. This is true because, as the Supreme Court noted, “every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant,” without regard for the concession made by the original CLEC in exchange for that benefit. *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 395 (1999).

Notably, several state PUCs support elimination of the rule, precisely because of its deleterious impact on negotiations. The Florida PSC, for example, pointed out that “the negotiation of interconnection agreements has been and is severely hindered” by the “outdated” pick-and-choose requirement. Comments of Florida PSC at 5 (filed Oct. 15, 2003). The New York DPS likewise noted that “applying an all-or-nothing rule to the terms of approved agreements should provide negotiating parties greater latitude to craft creative agreements that might expand the range of available services and options.” Comments of NY DPS at 2 (filed Oct. 16, 2003). And, the Ohio PUC stated its agreement with the FCC that the current rule “could stifle innovation and flexibility.” Ohio PUC at 3 (filed Oct. 16, 2003).

In contrast, no party has presented any evidence that the current rule creates marketplace benefits. Although MCI has suggested that the rule enables a CLEC to “[c]raft customized agreements consistent with business plans,” *see* MCI Dec. 18, 2003 *ex parte* at 4, precisely the opposite is true: as Verizon’s experience shows, the rule undermines any incentive or ability to negotiate tailored agreements. In particular, while almost 40 percent of Verizon’s 3,600 effective interconnection agreements were adoptions of entire existing agreements, fewer than 2 percent (60 agreements) represent cases where a CLEC adopted only a portion of an existing agreement. The Commission therefore is correct in finding that “incumbent LECs seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without making any trade-off at all.”² This cannot be what Congress intended.

Nor is the rule necessary to “[a]void re-litigation of previously decided issues,” as MCI claims. MCI Dec. 18, 2003 *ex parte* at 4. To the contrary, CLECs can avoid re-litigation merely by adopting an

¹ 47 C.F.R. § 51.809 (2003).

² *See* NPRM, ¶ 722

existing agreement in its entirety. For the same reason, MCI is wrong in arguing that the rule is necessary to permit CLECs to “[e]nter the market quickly/efficiently by avoiding prolonged negotiations or resource-intensive arbitrations.” *Id.* And, while MCI proposes that the rule allows CLECs to “[s]olidify non-disputed terms so parties can focus efforts on unresolved issues,” it has presented no evidence that ILECs would be unwilling to agree to “non-disputed terms” in the absence of the pick-and-choose rule. ILECs have every incentive to focus their resources on “unresolved issues,” rather than re-opening matters that already have been resolved.

In short, as the Florida PSC explained (at 5), “[t]he best regulator of agreements is the marketplace.”³ The Commission should heed this advice by eliminating the pick-and-choose rule and instead stating that CLECs may opt into agreements on an all-or-nothing basis. The Commission should not condition elimination of the pick-and-choose rule on the availability of an SGAT. There is little support for this proposal, and for good reason. Requiring an SGAT is not necessary because CLECs already have numerous approved interconnection agreements from which to choose. In addition, the Act provides only for BOCs to file SGATs, and BOCs do not even have SGATs in every state.⁴ Non-BOC ILECs are not authorized to do so, and states are not authorized to approve such filings in any event. If the Commission nonetheless believes it necessary that ILECs make available one agreement that would remain subject to pick-and-choose under the current rule, it should permit ILECs either to designate an already existing agreement or to use their state interconnection tariff, if they have one. There should be no obligation to file and receive approval of a new agreement for this purpose.

2. The Commission Has Authority To Eliminate the Pick-and-Choose Rule.

At the time it was adopted, the current pick-and-choose rule was *a* permissible interpretation of Section 252(i). It is not the *only* permissible interpretation. To the contrary, the statute requires only that an ILEC make interconnection, services, and UNEs available to a requesting carrier “upon the same terms and conditions” contained in other agreements approved under Section 252. As the NPRM recognizes (at ¶ 728), this language is “ambiguous.” Accordingly, the Commission can select a different interpretation – in particular, it can find that the “same terms and conditions” should refer to *all* the terms and conditions in the underlying agreement – as long as it supplies a reasoned basis for doing so.⁵

The CLECs make much of the fact that the Supreme Court reinstated the current rule (after it had been vacated by the Eighth Circuit), having found that its language tracks the statute and is the “most readily apparent” reading of § 252(i). *See, e.g.,* MCI Dec. 18, 2003 *ex parte* at 3. The Court’s statements do not constrain the Commission’s authority to interpret Section 252(i) in a different manner today, as long as it explains its reasons for doing so. The Court expressly deferred to “the expertise of the Commission” in reinstating the rule. *Iowa Util. Bd.*, 525 U.S. at 396. Today, after more than seven years’ experience with the pick-and-choose rule, the Commission’s expertise entitles (indeed, compels) it to change its mind.

³ The only state commission to support the current rule, the California PUC, merely concludes that the rule has worked because 320 interconnection agreements have been filed in the state. Comments of CPUC at 3 (filed Oct. 16, 2003). The CPUC gives no indication, however, whether any of these agreements actually used pick and choose; nor does it respond to the Commission’s tentative conclusion that the rule precludes ILECs from making significant concessions. In fact, much of its support for the rule appears to stem from concern that its elimination would “impose[] additional burdens on the state.” *Id.* at 5. There is no reason to believe this is the case, and even if it were, administrative resource considerations should not be permitted to override the clear public interest benefits of eliminating this barrier to marketplace-driven negotiations.

⁴ Verizon, for example, has SGATs in only four of the smaller states where its BOC LECs operate.

⁵ *See OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995).

In adopting the rule in 1996, the Commission predicted that pick-and-choose made sense because “few new entrants would be willing to elect an entire agreement.” *Local Competition Order*, 11 FCC Rcd 15499, at ¶ 1312 (1996). Verizon’s experience demonstrates that the Commission’s prediction was incorrect: as noted above, some 40 percent of Verizon’s interconnection agreements represent opt-ins of entire existing agreements, while fewer than 2 percent contain opt-ins of only a portion of existing agreements. Plainly, CLECs are perfectly willing to accept entire agreements that others have negotiated and have neither wanted nor needed to pick and chose. Where the basis for adopting a rule in the first place either does not materialize or no longer exists, the rule itself is arbitrary and must be revised.⁶

3. The Commission Should Not Adopt the California Procedural Rules.

In its December 18, 2003 *ex parte*, MCI urged the Commission to adopt procedural rules developed by the California PUC to “streamline” pick-and-choose requests. The Commission should reject this suggestion. As a threshold matter, the relief MCI seeks is not necessary, because there is no evidence that ILECs have been delaying CLECs from opting into existing agreements. Nor is such relief appropriate, because the CPUC’s streamlined opt-in rules are inconsistent with the Commission’s goal of promoting more meaningful negotiations.

The CPUC’s rules permit a CLEC to adopt existing agreements either in whole or in part, simply by notifying the CPUC and the ILEC. The rules do not permit the ILEC to propose any alteration in the underlying agreement, and they compel the ILEC either to approve the request or to file for arbitration within 15 days. A petition for arbitration may be based only on a showing that (1) the costs of serving the requesting carrier are greater than the costs of serving the original CLEC, or (2) the provision of a particular interconnection, service or element to the requesting carrier is not technically feasible. Even if it files for arbitration, the ILEC must “immediately honor the adoption of those terms not subject to objection . . . effective as of the date of the filing of the arbitration request.” If the ILEC does not act by the 15th day, the request for adoption is “deemed effective” on the 16th day.⁷

Permitting a CLEC to pick and choose portions of an agreement on a streamlined basis – the “adoption in part” option – exacerbates the harms of the existing pick-and-choose rule and creates profound administrative problems. As explained above, pick and choose is antithetical to productive marketplace negotiations. The CPUC’s streamlined approach forecloses any opportunity for negotiations about application of the requirement that a CLEC adopt all “legitimately related” terms to a particular adoption request. In addition, the streamlined approach hampers the ability of an ILEC to identify portions of the adopted terms it believes are no longer available for adoption in light of changes in law and the requirement in 47 C.F.R. § 51.809(c) that agreement provisions be made available only for a reasonable period of time. Moreover, a CLEC could utilize a streamlined approach to try to effect other impermissible adoption requests, such as opting to obtain a service from one agreement and a rate from another. The rapid-fire nature of the adoption process under the CPUC’s rules, in short, creates too much opportunity for abuse. It also limits the opportunity for the ILEC and the CLEC to resolve any unclear issues prior to making the terms effective. As a result, the streamlined approach virtually assures significant disputes down the road.

⁶ See *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (the Commission has a “duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would”); *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987) (FCC must “carefully monitor the effects of its regulations and make adjustments where circumstances so require.”); *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (“[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.” (citation and internal quotation marks omitted)); see also *NBC v. United States*, 319 U.S. 190, 225 (1943) (“If time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.”).

⁷ See *Resolution 181: Revises Resolution ALJ-178 Implementing the Provision of Section 252 of the Telecommunications Act of 1996*, 2000 Cal. PUC LEXIS 864, Rules 7.1-7.3 (2000).

Even with respect to the provisions allowing a short-cut process to adopt an agreement “in whole,” the California approach is bad public policy for several reasons:

First, it does not produce a binding agreement signed by both parties. The CPUC’s rules allow the CLEC to adopt an agreement by filing an Advice Letter. Within 15 days thereafter, the ILEC must either send the CLEC a letter approving its request or file a request for arbitration; otherwise, the request is deemed effective on the 16th day.⁸ Accordingly, there is no document executed by both the ILEC and the CLEC. At most, there is an exchange of letters, and if the ILEC does not act within 15 days, there is only the original Advice letter. A bilateral agreement, however, is necessary for implementation and enforcement purposes, such as for seeking payment. (Verizon currently uses a letter agreement for this purpose.)

Second, the CPUC’s rules could enable a CLEC unilaterally to adopt an agreement that is no longer subject to adoption under 47 C.F.R. § 51.809(c), or one that is about to expire. Similarly, a CLEC might – whether unintentionally or in an effort to game the process – seek to adopt an agreement that has not yet been updated by the original parties to reflect a change in law. It might then order a facility or service that is no longer available or for which the terms have changed, or even claim a right to prices that have not been updated in light of changes to the TELRIC rules or modifications to state-set prices.

Third, a CLEC might fail to give proper notice that it has filed for adoption of an agreement (even though such notice is required), depriving the ILEC of the opportunity to raise appropriate objections to the adoption or, at a minimum, delaying orders from the CLEC and causing unnecessary confusion and frustration for both parties.

* * *

For all of these reasons, the Commission should (1) eliminate the current pick-and-choose rule, (2) adopt a new rule stating that CLECs must adopt existing agreements on an all-or-nothing basis, and (3) decline requests to adopt streamlined opt-in procedures.

⁸ See *id.*, Rules 7.1, 7.2.