June 23, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Re: *Pick & Choose NPRM*, CC Docket Nos. 01-338, 98-147, 96-98

Dear Ms. Dortch:

OneEighty Communications, Inc. ("OneEighty") urges the Commission to reject its tentative conclusion, and the ILECs related proposals, to eliminate the pick and choose rule.

OneEighty, a competitive local exchange carrier, is a leading integrated communications provider of facilities-based telecommunications solutions in Montana. OneEighty offers business customers local exchange and long distance services, Internet access, web hosting, and data services, delivering voice and data services over high-speed broadband connections. OneEighty filed comments and reply comments in this proceeding regarding the Commission's proposed change to the so-called "pick and choose" rule.[1] OneEighty is filing these *ex parte* comments to respond to several recent filings by incumbent local exchange carriers ("ILECs") suggesting that the Commission modify or eliminate the pick and choose rule.. Adopting the ILECs' suggestions would be contrary to the Commission's stated goal of promoting competition, would be harmful to competitors, competition and the public interest, and would serve only to benefit the ILECs. It would be particularly harmful to small CLECs, like OneEighty that are less likely to be able to enter into special arrangements with ILECs.

OneEighty is Montana's only independent facilities-based CLEC. The other Montana facilities-based CLECs are affiliates of incumbent coops. These companies' business plans reflect their rural-LEC roots and do not have the same concern about access to UNE loops.

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[1] CC Docket Nos. 01-338, 98-147, and 96-98, Comments of US LEC Corp., TDS Metrocom, LLC, Globalcom, Inc., Lightship Telecom, LLC, and OneEighty Communications, Inc. (October 16, 2003); CC Docket Nos. 01-338, 98-147, and 96-98, Reply Comments of US LEC Corp., TDS Metrocom, LLC, Globalcom, Inc., Lightship Telecom, LLC, and OneEighty Communications, Inc. (November 10, 2003). OneEighty incorporates these filings by reference.

National carriers that do business in Montana do so through resale or UNE-P and do not appear to have a commitment to building facilities in the state. Consequently, there is *no* other carrier in Montana who has a business plan that is similar to OneEighty, much less a larger carrier with the market strength to negotiate an interconnection agreement with Qwest on an even playing field. Without pick-and-choose, OneEighty will be left to accept the standard SGAT or opt in to an agreement in its entirety, which clearly will not be optimized for a small facilities-based carrier.

OneEighty has worked diligently to develop its own network, independent from the ILEC. It has done so by building both fiber and copper facilities, and negotiating last-mile agreements with other companies. Despite an aggressive plan to grow its own network, OneEighty does not have the capital to overbuild the ubiquitous Qwest network paid for by captive rate-payers (in fact it could be argued that this would not be a wise use of capital, even if it were available). In order to continue to compete effectively, it is critical to have access to the ILEC unbundled network elements which allow last-mile access. OneEighty's ability to retain access at favorable rates is based on access to pick and choose. The elimination of pick-and-choose would have a profound impact on OneEighty's ability to negotiate reasonable prices and provisioning alternatives over the long term. The upshot may be that it becomes economically unfeasible to continue to grow the business, and OneEighty may be forced to close its doors, leaving Qwest as the only facilities based provider in the region once again. If this came to pass, history suggests that Montana consumers would see a slow-down in innovation and likely price increases for their telecommunication service.

Small carriers like OneEighty are a real source of innovation in the industry. In its service region, OneEighty pioneered shared-tenant delivery of broadband services in the mid 1990's, as well as the creation of bundled telecom services in the late '90's. OneEighty has sparked sufficient competition in the region that they serve that Qwest has started to significantly reduce the prices that it charges for comparable services and offer a larger variety of services.

Moreover, it is patently clear that OneEighty has been good for the region. OneEighty meets the needs of local businesses (as demonstrated by its more than 3,400 Internet and more than 1,300 voice customers) by providing better service than Qwest,[2] and has helped lower prices for business customers in general. This development has all been predicated on a business plan born out of the 1996 Act, which is based on UNE-Loops and transport, and an aggressive focus on building facilities. Abruptly changing the rules of engagement will have a substantial deleterious effect on OneEighty and local business customers, to the direct benefit of Qwest.

OneEighty agrees with others that neither the record cited by the Commission in its FNPRM, nor the record gathered in response, supports a conclusion that the existing pick and

[2] OneEighty has received only two customer complaints from the Montana Public Service Commission since its formation, both of which were immediately resolved.

choose rule frustrates the possibility of parties reaching negotiated agreements.[3] The Supreme Court found the FCC's interpretation of the obligations imposed by Section 252(i) to be the most readily apparent from the language of the statute and noted that the rule tracked the pertinent statutory language almost exactly.[4] Nothing has changed since the Commission first implemented the pick and choose rule that would warrant a different interpretation of the statute now. The ILECs, in an attempt to provide some justification for the Commission's tentative conclusion, identify a parade of horribles they claim result from the current rule;[5] however, there is no evidence in the record that the rule actually produces these results. In fact, the ILECs' own data demonstrates that the specter of CLECs choosing only certain provisions arises in a small minority of interconnection adoptions[6] and, even in those cases, the ILECs have not demonstrated that their perceived fears are actually realized. Elimination of the option to pick and choose interconnection provisions will thus have only a limited, if any, effect on the ILECs, but will be significantly detrimental to CLECs and to competition.

To further reinforce the fact that ILECs do not suffer harm from pick and choose, a Consumer Federation of America study report[7]makes the point that "A recent rigorous analysis of the actual revenues paid by CLECs and cost data filed by RBOCs challenges the claim that the TELRIC regime is "confiscatory" or amounts to "subsidized competition." This analysis finds that "using actual payment by a representative CLEC and publicly available ARMIS expense, the wholesale business, taken alone, is profitable for the BOCs." If RBOCs contend that continuation of pick and choose would pose a financial hardship, the data of the past seven years does not bear it out.

Not surprisingly, the ILECs are in favor of a proposal that will greatly increase their leverage in negotiations with competitors. Under the existing rules, a CLEC may elect to forego the expense and delay of negotiating an entire interconnection agreement by either adopting an existing agreement in its entirety or choosing portions of previously-approved interconnection agreements to assemble a complete agreement. No two CLECs are exactly alike, nor do they have identical business plans. As a result, an agreement that meets the needs of one CLEC may not be suitable for another CLEC in all respects. If the pick and choose rule is eliminated, CLECs will have no option but to negotiate and/or arbitrate entire interconnection agreements or

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[3] CC Docket Nos. 01-338, 98-147, and 96-98, CompTel *Ex Parte* Comments (June 9, 2004).

[4] *AT&T Corp. v. Iowa Utils. Bd.*, 199 S. Ct. 721, 738 (1999).

[5] *See, e.g.*, CC Docket Nos. 01-338, 98-147, and 96-98, Verizon *Ex Parte* Comments (March 25, 2004); CC Docket Nos. 01-338, 98-147, and 96-98, BellSouth *Ex Parte* Comments (June 4, 2004); CC Docket Nos. 01-338, 98-147, and 96-98, SBC *Ex Parte* Comments (April 29, 2004).

[6] CC Docket Nos. 01-338, 98-147, and 96-98, Verizon *Ex Parte* Comments, at 1 (March 25, 2004) (fewer than 2% of interconnection adoptions represent cases where a CLEC adopted only a portion of an existing agreement).

[7] Consumer Federation of America, *Competition at the Crossroads: Can Public Utility Commissions Save Local Phone Competition?* October 2003

provisions to which the ILECs have already agreed. Clearly the ILECs would benefit from, and thus seek, a regime in which they can impose greater costs on their competitors by requiring multiple negotiations of the same issues; however, such a regime does not promote the pro-competition goals of the Act.

The significant anticompetitive effect of eliminating the pick and choose rule can be summed up in a simple example. Assume two CLECs with different business plans and operations seek to enter into interconnection agreements with an ILEC. The first CLEC, CLEC A, negotiates an interconnection agreement that includes terms and conditions consistent with its business plan. Under the current rules, CLEC B has several options.

1) It can negotiate an entirely new interconnection that is consistent with its operations.

2) It can adopt CLEC A's interconnection agreement in its entirety, including those provisions that are not consistent with its operations that differ from those of CLEC A.

3) Third, it can pick and choose those portions of CLEC A's interconnection agreement that address aspects of its operations that are similar to CLEC A's operations, and either adopt provisions of another agreement, including the ILEC's standard agreement, that address aspects of its operations that differ from CLEC A's operations or negotiate the remaining provisions.

Elimination of the pick and choose rule would severely limit these options and benefit only the ILECs.

At its core, the ILECs' concern with the pick and choose rule is that it eliminates their ability to force their terms and conditions on CLECs or to increase the cost of interconnection through protracted negotiations or arbitrations. For example, of the three options described above, only the third provides CLECs an opportunity to obtain reasonable interconnection terms and conditions efficiently and with minimal cost. The first option should not pose any unusual concerns for the ILEC as it represents the ILECs' *quid pro quo* scenario and is in fact required by the Act. On the other hand, this option can be prohibitively expensive for CLECs, particularly smaller CLECs such as OneEighty with limited resources, and can unreasonably delay interconnection. Where an ILEC refuses to interconnect without an approved interconnection agreement in place, lengthy delays resulting from negotiations can effectively preclude a competitor's entry into a market. The second option, which is also required by the Act, is the one option proposed by the ILECs as a reason for elimination of the pick and choose rule.[8] However, as noted above, unless the second CLEC's operations are virtually identical to the CLEC that initially negotiated the interconnection agreement, this option is not feasible. Even

[8] CC Docket Nos. 01-338, 98-147, and 96-98, *Ex Parte* Comments of BellSouth, BellSouth's 252(i) Proposal Absent Forbearance, at 1 (April 27, 2004).

under the third option, the ILECs should not object to a CLEC bearing the costs and delay of negotiation or adopting portions of the ILEC's template agreement. Thus, the only real problem the ILECs have with the third option is that it may enable a CLEC to obtain interconnection terms more quickly and efficiently. But, this is precisely the result intended by Section 252(i) of the Act.

In adopting its local competition rules, the FCC stated that Section 252(i) is intended to enable CLECs to obtain access to interconnection on an expedited basis, and concluded that "the nondiscriminatory, pro-competitive purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to Section 251 before being able to utilize the terms of a previously approved agreement."[9] The pro-competitive benefits of a streamlined interconnection negotiation process are also reflected in the Merger Conditions imposed upon Verizon by the Commission in connection with the Bell Atlantic/GTE merger.[10] Specifically, one such Merger Condition requires Verizon to permit a CLEC to adopt a single interconnection agreement for several or all of the Verizon states, thereby providing: (1) a single set of terms and conditions for the CLEC to master; (2) an expeditious, single process for obtaining an interconnection agreement in several states, thereby avoiding the expenditure of significant financial and human resources; (3) speedy entry into Verizon states by enabling a CLEC to adopt a familiar agreement already known to it from another state; and (4) a constraint on the merged company's ability to use its leverage to force CLECs to take a "template" agreement in order to obtain similar interconnection arrangements in all Verizon states at one time. The FCC's clear intent in imposing this condition was to *improve* a CLEC's ability to compete with the merged Verizon entity in order to ensure that the merged company's increased size, improved economies of scale, and larger market share were offset by some additional advantages to its competitors to maintain a theoretical "level playing field." The pick and choose rule provides the same protections and enables CLECs to offset the ILECs' significantly greater negotiating leverage.

The Commission's proposal to permit pick and choose only with respect to an ILEC's Statement of Generally Available Terms ("SGAT"), while favored by the ILECs for obvious reasons, is not a reasonable alternative to the existing pick and choose rule. The SGAT was never intended to be a model interconnection agreement, and, in many cases, has not been subject to meaningful negotiation by the parties. CLECs do not have the resources to address every regulatory issue and, for the most part, have focused on negotiating their own interconnection agreements rather than the terms of the SGATs. As a result, the SGATs reflect

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[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 1312 (rel. Aug. 8, 1996) ("*Local Competition Order*").

[10] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC Rcd 1032, (rel. Jun. 16, 2000) ("*BA/GTE Merger Order*"). The Merger Conditions are Appendix D to the *Merger Order*.

terms proposed by the ILECs with little or no modifications from CLECs and, therefore, generally do not offer pro-CLEC terms and are not a reliable vehicle to promote competition.

Further, the ILECs seek to eliminate any potential for CLEC-favorable provisions in the SGAT by proposing that CLECs not be permitted to arbitrate the terms of an SGAT.[11] Rather, the ILECs would limit a CLEC to an agreement that reflects only the bare minimum requirements necessary to comply with the Act. This proposal would almost certainly ensure that the terms of the SGAT would favor only the ILECs. Along the same lines, the SGATs typically include only the bare minimum requirements under the Act, as interpreted by the ILECs, and do not represent the give and take the ILECs claim is critical to innovative deal-making. Thus, under the Commission's proposal to limit the pick and choose rule to the SGAT, CLECs would be limited to choosing among equally unfavorable SGAT provisions.

Moreover, the concept of "pick and choose" requires the availability of more than one agreement to "pick" and "choose." Under the Commission's proposal to limit the pick and choose rule to the SGAT only, it is not clear what other agreements CLECs might be able to pick and choose from to assemble a complete agreement. Picking and choosing provisions of a single agreement only produces an incomplete agreement. This result turns the pick and choose rule on its head. Clearly the Act does not contemplate that these are the only two options to which CLECs are entitled.

Similarly, if the pick and choose rule is eliminated, state commissions or others may push for industry-developed agreements similar to the T2A in Texas and similar agreements in Kansas, Missouri and Oklahoma. These consensus agreements are not developed overnight and generally only result from lengthy, time consuming and costly proceedings before the state commissions. The delay involved only benefits ILECs. In addition, because the regulatory process to develop such agreements is cost and resource intensive for both the participants and the commission, it would have a significant effect on smaller CLECs to the extent they would even have the incentive or resources to participate. Consequently, the resulting agreement may not actually reflect the interests or concerns of the CLEC industry and, as with any such proceeding, is likely to produce an agreement that favors the participants with the greatest resources and leverage, the ILECs.

In summary, neither the FNPRM nor the evidence submitted in the record support elimination or modification of the Commission's existing pick and choose rule. The rule properly implemented the requirements of Section 252(i) and has existed as a viable option for CLECs seeking a streamlined, cost-effective means to interconnect with the ILEC, obtain access to unbundled network elements and ultimately, to compete to bring innovative, competitive

[11] CC Docket Nos. 01-338, 98-147, and 96-98, BellSouth *Ex Parte* Comments, at 1 (June 4, 2004).

telecommunications services to consumers. The Commission should not revise its rules to eliminate this option or render it useless.

Respectfully,

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