

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	CC Docket No. 01-338
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, PETITION FOR CLARIFICATION**

Mountain Telecommunications, Inc. (“MTI”), by its attorneys, hereby files its reply to oppositions concerning MTI’s Petition for Reconsideration or, in the Alternative, Petition for Clarification (“MTI’s Petition”) regarding the Second Report and Order issued in this proceeding.¹ Only two parties – MCI, Inc. (MCI) and Verizon on behalf of the Verizon Telephone Companies (Verizon) – opposed MTI’s petition. As described in this reply, neither of those parties provide any persuasive legal or policy reason not to grant the requested clarification or reconsideration sought by MTI. In addition, notwithstanding Verizon’s assertion, MTI’s petition is in full conformance with the Commission’s rules governing reconsideration in rulemaking proceedings.

As explained in MTI’s Petition, in the All-or-Nothing Rule Order, the Commission modified its interpretation of Section 252(i) of the Communications Act of 1934, as amended (47 U.S.C. § 252(i)), which requires that a “local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (Second Report and Order), FCC 04-164, released July 13, 2004 (“All-or-Nothing Rule Order”).

section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.” Specifically, the Commission replaced its prior interpretation of Section 252(i), which allowed requesting carriers to “pick and choose” individual provisions from publicly-filed interconnection agreements, with a requirement that requesting carriers opt in to entire agreements rather than specific provisions of agreements. Paragraph 22 of the All-or-Nothing Rule Order states that “volume and term discounts may be included in agreements so long as the volume or term of the discount is not discriminatory.” In its Petition, MTI requested the Commission to clarify paragraph 22 in a manner such that volume commitment-based discounts be limited to volume commitments within any one state in recognition of the fact that the network elements and services provided pursuant to those agreements are, by definition, intrastate services, and the prices for those network elements and services should be based on the costs of providing those services within specific states.

The Commission should grant MTI’s Petition because it comports with the law governing interconnection agreements. MCI and Verizon misstate and misunderstand MTI’s Petition. MTI does not claim that volume discounts are not permitted nor that carriers may not enter into interconnection agreements with incumbent local exchange carriers (“ILECs”) that cover multiple states.² Moreover, MTI does not object to the use of multistate volume discounts simply because it is not a CLEC serving multiple states.³ Rather, MTI asserts only that rates charged for network elements or services provided within a particular state, including rates based on the volumes of network elements or service committed to be purchased by CLECs, be based on the costs incurred by ILECs in providing such network elements or services within that state,

² See MCI Opposition, at 5.

³ See *id.* at 3.

including any cost savings experienced by the ILEC as a result of CLEC commitments to purchase specified quantities of said elements or services within that state.⁴ MTI's Petition merely requests that the Commission clarify that all rates charged by ILECs pursuant to state-approved interconnection agreements, whether they are standard rates or volume discounted rates, must comply with the law governing interconnection agreements, and must respect the jurisdictional nature of the network elements or services being provided pursuant to those agreements.

Section 252(d)(1) of the Communications Act (47 U.S.C. § 252(d)(1)) requires that charges for interconnection and network elements be “based on the cost . . . of providing the interconnection or network element . . . and . . . nondiscriminatory.” As MCI points out in its opposition, “[i]t is well-established that whether prices are discriminatory depends on whether they are cost-based and offered to all carriers willing to meet their requirements.”⁵ Moreover, all interconnection agreements must be submitted for approval to the State commission.⁶ Thus, the state commission must ensure that all charges for network elements and services to be provided within that state as set forth in the interconnection agreement must be cost-based and nondiscriminatory – based on the costs incurred for providing said network elements or services within that state.

Basing volume discounts on multi-state commitments is not consistent with the law governing interconnection agreements or with the law governing separation of interstate and

⁴ Indeed, MTI agrees with MCI's position that carriers should be entitled to receive volume discounts for intrastate elements, such as loops, so long as those discounts are based on loops purchased within a particular state. See MCI Opposition, at 3-4, n.9.

⁵ MCI Opposition, at 9 (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, ¶¶ 859-60 (1996) (“Local Competition Order”).

⁶ 47 U.S.C. § 252 (e)(1).

intrastate costs.⁷ The unbundled network elements and services provided pursuant to state-approved interconnection agreements are used by CLECs to provide local (*i.e.*, intrastate) service. Intrastate service, by definition, is only provided within a certain state; it is not a service that spans multiple states. Neither is it an interstate service. Therefore, the cost of providing network elements or service in one state has no relevance to the determination of whether the price for providing such network elements or service within another state is cost-based.

Moreover, rates contained in interconnection agreements must be approved by the appropriate state commission, not by a panel of state commissions located in each of the states in which an ILEC provides network elements and service and in which the CLEC purchases network elements or services from the ILEC. A particular state commission does not have authority to approve a rate for network elements or services based on the quantities of network elements or services purchased by the CLEC in other states. Thus, as stated in MTI's Petition, no ILEC should be allowed to discriminate in favor of a requesting carrier in one state based on that requesting carrier's commitments to purchase services or network elements from that ILEC in other states. The granting of MTI's Petition will ensure that volume discounted rates are cost-based and nondiscriminatory.

Both MCI and Verizon claim that the availability of volume discounts based on services purchased in multiple states is beneficial to CLECs. Verizon notes that allowing multiple states

⁷ See Smith v. Illinois Bell Telephone Co., 282 U.S. 133(1930). In that case, the Supreme Court stated as follows: "The separation of the intrastate and interstate property, revenues, and expenses . . . is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation" (282 U.S. at 148). The underlying premise of Smith v. Illinois Bell is a valid today as it was 74 years ago. Intrastate costs must be separate from interstate costs. Just as intrastate costs must be separated from interstate costs, so too must intrastate costs of different states be separated from each other. Volume discounts which aggregate service quantities from multiple states are facially inconsistent with that cardinal principal of jurisdictional pricing.

to count towards volume commitment gives CLECs greater flexibility to achieve higher discount levels.⁸ MCI characterizes the multistate volume discounts as an “important incentive and negotiating tool for the nation’s largest competitive carriers” and asserts that the absence of this tool is “antithetical to the promotion of competition.”⁹ These positions, however, are self-serving and untenable. Competition for local services – services that are provided solely on an intrastate basis – is not facilitated by pricing that is based on services purchased in multiple states and that is available only to the largest national or regional CLECs. If only national or regional CLECs benefit from the pricing flexibility of multistate volume discounts, such discounts do not serve as an incentive for carriers to serve the consumers in a particular state, and therefore, do not encourage competition on the local level. Furthermore, a tool used to determine the pricing of intrastate services that ignores state boundaries does not promote competition for those services nor will it remedy the “current tumultuous state of the CLEC sector.”¹⁰ Whatever ills currently ail the CLEC sector will not be “cured” by allowing ILECs to bestow favorable price breaks for intrastate network elements and services to a limited number of the largest national CLECs based upon those companies national or regional buying power.

Finally, MTI’s request for reconsideration, or in the alternative, clarification, of paragraph 22 in the All-or Nothing Rule Order complies with the Commission’s procedural rules. Section 1.429(c) of the Commission’s Rules provides that a “petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken should be

⁸ See Verizon Opposition, at 5.

⁹ See MCI Opposition, at 4. Apparently, MCI’s competitive model consists of a market in which only the ILECs and a few national carriers compete with each other. That model seems to have no place for efficiently managed, regional carriers which have been responsible for much of the growth in competition in telecommunications markets, including local services markets.

¹⁰ See MCI Opposition, at 8.

changed.”¹¹ MTI’s Petition fully meets the requirements of Section 1.429 by specifically advising the Commission as to the manner in which it wants the Commission to clarify the type of volume discounts that are considered not to be discriminatory. Verizon, incorrectly relying on Section 1.106 of the Commission’s Rules – a rule not applicable to Commission rulemaking proceedings -- contends that MTI was required to cite to a finding of fact or conclusion of law that MTI believed to be erroneous. Section 1.106 does not apply to petitions for reconsideration in rulemaking proceedings.¹²

Moreover, MTI is not seeking adoption of new restrictions on volume and term discount contracts. As explained below, the clarification sought by MTI is consistent with existing law. MTI’s Petition merely requests the Commission to clarify that volume discount provisions in interconnection agreements are permissible only when such volume discounts are based on recovering costs incurred by ILECs in their provision of network elements and intrastate services within a state.

¹¹ 47 C.F.R. § 1.429(c).

¹² See 47 C.F.R. § 1.106(a).

WHEREFORE, for the reasons set forth in this reply and in MTI's Petition, MTI respectfully urges the Commission either to clarify or, if necessary, to reconsider paragraph 22 of the All-or-Nothing Rule Order in accordance with the views expressed in this reply and MTI's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle D. Diedrick, an Executive Assistant with the law firm of Greenberg Traurig, LLP, hereby certify that on November 9, 2004, a true and correct copy of the foregoing Reply to Oppositions to Petition for Reconsideration Or, in the Alternative, Petition for Clarification was filed via Electronic Mail with the following, unless otherwise noted:

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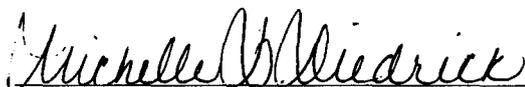
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