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

SECOND REPORT AND ORDER

Adopted: July 8, 2004 **Released: July 13, 2004**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements. Commissioner Adelstein approving in part, dissenting in part, and issuing a statement. Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. On August 21, 2003, the Commission initiated this Further Notice of Proposed Rulemaking[1] to determine whether it should change its interpretation of section 252(i) of the Communications Act of

[1] *See 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*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*FNPRM*), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *petitions for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

burdensome and difficult to implement, and is unnecessary given the other protections against discrimination, we decline to impose this condition.

27. ***Parties' Proposed Alternatives.*** As an alternative proposal, several parties request that we clarify or modify the "legitimately related" requirement rather than replacing the pick-and-choose rule. These parties argue that by refining the rule, the Commission could provide more certainty to reduce disputes and alleviate incumbent LECs' concerns about cherry picking without abandoning the pick-and-choose rule altogether.[91] We are not persuaded that modifying "legitimately related" short of an all-or-nothing rule would eliminate disputes sufficiently to encourage give-and-take negotiations. Apart from the difficulties raised by continually drawing lines and identifying trade-offs, we reject the notion that we should even assess whether provisions are legitimately related in a trade-off.[92] Indeed, given the nature of give-and-take negotiations, we conclude that under our new interpretation, all of the provisions of a particular agreement taken together should be properly viewed as legitimately related under section 252(i). In a genuine give-and-take negotiation, otherwise unrelated provisions could be traded off for one another. By allowing these trade offs under a modified "legitimately related" rule, the incumbent LEC would continue to be burdened with demonstrating that the provisions are legitimately related, leading to the disputes that currently impede give and take in interconnection negotiations. We believe it would be difficult to craft a "legitimately related" rule that would eliminate these disputes. We believe, however, that compliance with an all-or-nothing rule can be readily determined, eliminating many of the problems associated with the pick-and-choose rule in the last eight years of negotiations. Thus, we conclude that an all-or-nothing rule is more likely to facilitate give-and-take negotiations than trying to clarify or modify the "legitimately related" requirement.

28. We also reject commenters' proposals that call for us to maintain a separate pick-and-choose regime for arbitrated agreements even if we were to adopt an all-or-nothing approach for negotiated agreements.[93] First, we find that section 252(i), which expressly applies to agreements approved under

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[90]*See, e.g.,* Sprint Comments at 6-7; CenturyTel Comments at 6-7; Verizon Comments at 5-7; *see also* CLEC Coalition Reply at 14-16; AFB *et al.* Reply at 6. In the *FNPRM*, we proposed to allow non-BOC incumbent LECs to file "SGAT-equivalent" interconnection agreements with state commissions. *See FNPRM*, 18 FCC Rcd at 17415, para. 727 n.2151.

[91]*See, e.g.*, CLEC Coalition Comments at 18; AFB *et al.* Reply at 9; CLEC Coaliton Reply at 17-19; Letter from John J. Heitmann, Counsel for KMC, Xspedius, CompTel, Focal, ALTS, NuVox, SNiP LiNK, and XO, to Magalie R. Salas, Secretary, FCC, CC Docket No. 01-338, Attach. at 2 (filed May 27, 2004) (KMC *et al.* May 27, 2004 *Ex Parte* Letter); Letter from John R. Delmore, Senior Attorney – Federal Advocacy, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1 (filed May 13, 2004).

[92]*See, e.g.*, BellSouth Hendrix Aff. at para. 7 ("In a true negotiation, unrelated contract provisions left to be resolved are often 'horse-traded.' For example, BellSouth may agree to a CLEC's requested provision in exchange for the CLEC's agreement to an unrelated provision.").

[93]*See, e.g.,* Cox Comments at 8-10; Letter from Jonathan Lee, Sr. Vice President – Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed June 9, 2004) (CompTel/ASCENT June 9, 2004 *Ex Parte* Letter); Letter from Jason D. Oxman, General Counsel, ALTS, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed July 1, 2004) (ALTS July 1, 2004 *Ex Parte* Letter); Letter from J.G. Harrington, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1-2 (filed June 30, 2004). *But see* Letter from Terri Hoskins, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-4 (filed June 30, 2004).

section 252, does not differentiate between negotiated and arbitrated agreements.[94] Second, we are not convinced by the argument that we must retain pick-and-choose for arbitrated agreements because the rationale for our tentative conclusion – that the pick-and-choose rule creates disincentives for give-and-take negotiations – does not apply in the context of arbitrated agreements.[95] As discussed above, the primary purpose of section 252(i) is to prevent discrimination.[96] In the context of arbitrated interconnection agreements, requesting carriers are protected from discrimination primarily by the arbitration process itself.[97] Continuing to apply the pick-and-choose rule to arbitrated agreements, therefore, is an overly broad means of fulfilling the statutory purpose of protecting against discrimination. Moreover, we believe that maintaining separate regimes for negotiated and arbitrated agreements would be unnecessarily difficult to administer in practice. Accordingly, we do not find it necessary to adopt separate regulatory regimes for negotiated and arbitrated agreements as suggested by commenters. We affirm, however, that parties are under a statutory obligation to negotiate in good faith.[98] For example, any carrier attempting to arbitrate issues that have previously been resolved in an arbitration solely to increase another party's costs would be in violation of the duty to negotiate in good faith and could be subject to enforcement.

29. A number of commenters in this proceeding propose variations of the all-or-nothing or pick-and-choose approaches, or seek various clarifications of the current requirement.[99] We decline to adopt these proposed variations or clarifications because, as discussed above, we find that the all-or-nothing rule we adopt here will better facilitate give-and-take negotiations while, at the same time, eliminating disputes regarding the scope of "legitimately related."[100] We do not intend for this rulemaking to create new, potentially disruptive disputes that could bring negotiations to a standstill. To the extent that carriers attempt to engage in discrimination, such as including poison pills in agreements, we expect state commissions, in the first instance, will detect such discriminatory practices in the review and approval process under section 252(e)(1). Discriminatory provisions include, but are not limited to, such things as inserting an onerous provision into an agreement when the provision has no reasonable relationship to the

[94] 47 U.S.C. § 252(i). We also note that section 252(e), which requires "[a]ny interconnection agreement adopted by negotiation or arbitration" to be submitted for approval, does not differentiate between the two types of agreements. 47 U.S.C. § 252(e)(1).

[95] *See* CompTel/ASCENT June 9, 2004 *Ex Parte* Letter at 2.

[96] *See* para. 18, *supra*; *Local Competition Order*, 11 FCC Rcd at 16139, para. 1315.

[97] *See also* para. 20, *supra*. An argument can even be made that arbitrated agreement language is more nondiscriminatory than negotiated agreement language.

[98] 47 U.S.C. § 251(c)(1).

[99] *See, e.g.*, CLEC Coalition Comments at 18-21; Cox Comments at 8-11; MCI Comments at 20-22; CLEC Coalition Reply at 17-19; MCI Reply at 15-17; NASUCA Reply at 7; Z-Tel Comments, CC Docket No. 01-117, at 15-19; KMC *et al.* May 27, 2004 *Ex Parte* Letter at 2; Letter from Mary L. Henze, Assistant Vice President – Federal Regulatory, BellSouth, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. 1 at 1-2 (filed Apr. 27, 2004) (BellSouth Apr. 27, 2004 *Ex Parte* Letter); MCI Dec. 18, 2003 *Ex Parte* Letter, Attach. 1 at 6.

[100] Several parties participating in this proceeding also seek Commission pronouncements regarding a host of issues beyond those raised in the *FNPRM*. *See, e.g.*, Verizon Comments at 4 (seeking a declaration that agreements governing network elements no longer subject to mandatory unbundling are not subject to section 252(i) nor the pick-and-choose rule); Birch Reply at 4-5 (proposing structural separation of incumbent LECs into wholesale and retail operations); T-Mobile Reply at 13-15 (urging the Commission to adopt a procedure for federal arbitration of national interconnection agreements). This Order does not take a position on any issue outside the scope of the *FNPRM*.