

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

<b>In the Matter of</b>	)	
	)	
<b>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</b>	)	<b>CC Docket No. 01-338</b>
	)	
<b>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</b>	)	<b>CC Docket No. 96-98</b>
	)	
<b>Deployment of Wireline Services Offering Advanced Telecommunications Capability</b>	)	<b>CC Docket No. 98-147</b>
	)	

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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The National Association of State Utility Consumer Advocates (“NASUCA”) submits these comments in the above-captioned proceeding. NASUCA opposes the revisions to the “pick- and-choose” rules that are proposed by the Federal Communications Commission (“Commission”), and demonstrates why the revisions would be contrary to both law and policy.

**I. INTRODUCTION.**

NASUCA is an association of 43 advocate offices in 41 states and the District of Columbia. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and Federal regulators and in the courts. NASUCA has consistently championed the rights and benefits that are to accrue to consumers under the Telecommunications Act

of 1996.<sup>1</sup> As an organization composed of members from across the Nation, NASUCA can present uniquely the viewpoint of agencies whose charters are to promote and protect the interests of consumers and the public interest.

In the instant Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup>, the Commission proposes to reconfigure the rules implementing Section 252(i) of the Act.<sup>3</sup> Specifically, Section 252(i) of the Act provides that a “local exchange carrier shall make available any interconnection, service or network element provided under agreement approved under [Section 252] to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement.” In implementing the statute, the Commission ruled – over the objections of incumbent carriers – that the statute entitles a carrier to avail itself of any *single* term or condition of an approved agreement without accepting *all* the terms or conditions of that agreement.<sup>4</sup>

In the instant rulemaking, the Commission has tentatively concluded that “a modified approach would better serve the goals embodied in section 252(i) and sections 251-252 generally.”<sup>5</sup> The

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<sup>1/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the Act,” and all references to the Act will be to the Act as it is codified in the United States Code.

<sup>2/</sup> *In the Matter of 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: Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003), at paras. 713-729 (“NPRM”).

<sup>3/</sup> 47 U.S.C. § 252(i).

<sup>4/</sup> 47 C.F.R. § 51.809(a)-(c).

<sup>5/</sup> *NPRM* at para. 713.

Commission proposes that if an incumbent local exchange carrier (“ILEC”) does not file a Statement of Generally Available Terms (“SGAT”)<sup>6</sup> with the local commission, then the current pick-and-choose rule will be effective. If an ILEC files an SGAT, however, then a competitive local exchange carrier (“CLEC”) will be able to opt-into interconnection agreements only on an “all or nothing” basis.<sup>7</sup>

As described in the *NPRM*, when the Commission initially sought comment on implementation of Section 252(i) in 1996, CLECs argued that the requesting carriers should be entitled to “opt into” terms and conditions on an individual term and condition basis, without a requirement to opt into the entire agreement in which a particular term or condition is contained. ILECs, on the other hand, argued that this “pick-and-choose” approach would “deter meaningful negotiations.”<sup>8</sup>

As described below, this proceeding is also linked explicitly to the Petition for Forbearance and Rulemaking that was filed by Mpower Communications in May 2001.<sup>9</sup> In the Mpower proceeding, Mpower and other parties maintained that the “pick-and-choose” option precludes meaningful

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<sup>6</sup>/ See 47 U.S.C. § 252(f).

<sup>7</sup>/ *NPRM* at para. 725.

<sup>8</sup>/ *NPRM* at para. 715.

<sup>9</sup>/ *Mpower Communications Corp.: Petition for Forbearance and Rulemaking*, CC Docket No. 01-117 (filed May 25, 2001) (“Mpower petition”); see, also, *NPRM* at paras. 713, 714. On October 14, 2003, Mpower filed a letter in these dockets and in the docket of the Mpower proceeding to withdraw the petition. The withdrawal was requested because “current telecommunications industry circumstances do not provide adequate incentives for the May, [sic] 2001 Flex Contract proposal, as originally envisioned by Mpower, nor the filing of a Statement of Generally Available Terms & Conditions discussed in the Commission’s Notice of Proposed Rulemaking . . . to work satisfactorily.” Letter from Douglas G. Bonner, Counsel for Mpower Communications Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1 (Oct. 14, 2003). The recognition by a previous opponent of “pick and choose” that under current industry conditions the Commission’s proposal “will not promote more flexible and open negotiations between incumbent LECs and competitive LECs than exist under current pick-and-choose interconnection rules . . .” (*id.* at 2) casts substantial doubt on that proposal.

negotiations between parties. In its petition, Mpower, a CLEC, argued that the pick-and-choose rule “inhibit[s] innovative deal-making.”<sup>10</sup> The Commission solicited comments and reply comments on the Mpower petition, and consolidated that proceeding with the Triennial Review when it issued a companion *NPRM* with the *Triennial Review Order*.<sup>11</sup> The Commission incorporated the Mpower proceeding into the instant *NPRM*, and stated that parties who responded to the Mpower petition need not resubmit comments in the instant proceeding.<sup>12</sup>

For the reasons set forth herein, NASUCA submits that the pick-and-choose rule should be retained in its current form because that method is most consistent with the language of the statute and best supports the Act’s goal of introducing competition to the telecommunications marketplace. Additionally, no evidence, let alone compelling evidence, that would justify changing the status quo has been offered by either the Commission or parties in the Mpower proceeding.

**II. THE PICK-AND-CHOOSE RULE SHOULD BE RETAINED IN ITS CURRENT FORM BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT CHANGE.**

**A. REVISION OF THE PICK-AND-CHOOSE RULE REQUIRES RIGOROUS REVIEW.**

The Commission tentatively concludes that it has the authority to amend the pick-and-choose rule, based on separate statements of the United States Supreme Court.<sup>13</sup> Specifically, even though the

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<sup>10</sup>/ *NPRM* at para. 717.

<sup>11</sup>/ *NPRM* at paras. 713, 714.

<sup>12</sup>/ *NPRM* at para. 714. NASUCA did not submit comments in the Mpower proceeding.

<sup>13</sup>/ *NPRM* at para. 721.

Supreme Court stated that the Commission’s pick-and-choose rule “tracks the pertinent language of the statute almost exactly” and is “the most readily apparent” reading of the rule, the Court also stated that whether the pick-and-choose rule would actually “impede negotiations” is a question that is beyond the Court’s expertise.<sup>14</sup> NASUCA submits that although the Commission has authority to amend its rules, the grounds to do so in this case are insufficient to support such action.

In 1997, the U.S. Court of Appeals for the Eighth Circuit vacated the pick-and-choose rule, cautioning that ILECs would be “reluctant” to make best offers “for fear” that the same terms would have to be granted to other opting-in parties who would not make responsive return offers similar to those provided by the original CLEC contracting party.<sup>15</sup> In *Iowa Utilities Board*, the Supreme Court reversed the Eighth Circuit, stating that the Commission’s interpretation was the “most readily apparent” reading of the statute.<sup>16</sup> Strikingly, the Supreme Court approved the “most readily apparent” reading, even though it acknowledged that an approach requiring adoption of an entire agreement, rather than its parts, would be “eminently fair.”<sup>17</sup> The manner in which the Commission incorporated nearly the exact

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<sup>14/</sup> *Id.*, citing *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (hereinafter “*Iowa Utilities Board*”).

<sup>15/</sup> *Iowa Utilities Board*, 525 U.S. at 377, citing decision from which appeal taken, *Iowa Utilities Board v. FCC*, 120 F.3d 753, 801 (8<sup>th</sup> Cir. 1997).

<sup>16/</sup> *Iowa Utilities Board*, 525 U.S. at 396.

<sup>17/</sup> *See Iowa Utilities Board*, 525 U.S. at 395-396.

language of the statute<sup>18</sup> into the rule demonstrated the strength of the Commission's interpretation, and the ability of that interpretation to withstand Supreme Court review.

The instant *NPRM* is disconcerting in that the Commission proposes a rule change even though the Supreme Court has actually upheld the Commission's prior implementation of the Act in the rule. The Commission is attempting, in rewriting a rule that tracks the current statutory language, to effectively rewrite the statute. Although the Supreme Court acknowledged that other interpretations of Section 252(i) could have been fair, the Commission would now be required to explain its departure from a pick-and-choose regime that tracks the statutory language to an "all or nothing" approach that does not track the statutory language. Although the Commission is not bound forever by its prior decisions, it must nonetheless provide a explanation when it departs from clear precedent to effect a

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<sup>18/</sup>

The Commission's pick-and-choose rule provides, in relevant part:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. 47 C.F.R. 51.809 (1997).

By comparison, Section 252(i) of the Act states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this 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. 47 U.S.C. § 252(i).

change in policy.<sup>19</sup> No such explanation has been provided in support of the Commission's tentative conclusion.<sup>20</sup>

The Commission sets forth the basis of its tentative conclusion as follows:

Mpower contends that, “[f]rom the standpoint of innovative and effective contracting,” negotiations under the pick-and-choose regime are “reminiscent of the Gobi Desert.” Incumbent LECs generally echo this sentiment, stating that “the pick-and-choose rule has produced one-size-fits-all agreements that function much like generally applicable tariffs.” We tentatively conclude based on our experience since 1996 that Mpower and other commenters are correct that the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned.<sup>21</sup>

Although the Bell Operating Companies (“BOCs”) and other ILECs offer predominantly “one-size-fits-all” agreements,<sup>22</sup> the Commission's finding that this condition is caused by the pick-and-choose rule lacks any basis. This reality is, instead, the result of ILECs' strength in negotiations, and the ILECs' offering of “take-it-or-leave-it” contracts (which are also “one-size-fits-all”). The Commission has correctly recognized the effect, but has failed to identify the cause.

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<sup>19/</sup> *Orion Communications, Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997), *rehearing denied, cert. denied, Biltmore Forest Radio, Inc. v. FCC*, 525 U.S. 820 (1998).

<sup>20/</sup> *See NPRM* at para. 713.

<sup>21/</sup> *NPRM* at para. 722 (internal citations omitted).

<sup>22/</sup> The “one size fits all approach” is apparently applied over BOC-wide regions. *See, i.e., In the Matter of the Application of SBC Communications, Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Michigan: Memorandum Opinion and Order*, WC Docket No. 03-138, FCC 03-228 (rel. Sep. 17, 2003), at para. 181 (noting the security deposit conditions “in SBC's generic 13-state interconnection agreement”).

As described in Section B, current market conditions demonstrate that ILECs negotiate from a position of strength. Further, it is apparent from the record compiled in the Mpower proceeding that a reasoned analysis for departing from the pick-and-choose regime cannot be made in light of those current market conditions. As articulated by the D.C. Circuit, the Commission in “changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”<sup>23</sup>

Some modification of the pick-and-choose rule may be warranted in the future when BOCs and other ILECs are not market dominant. This is consistent with the holding of the Court of Appeals for the DC Circuit that “changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so.”<sup>24</sup> Accordingly, it is possible that the Commission could amend the pick-and-choose rule in a sufficiently competitive marketplace. In the current reality, however, the BOCs and other ILECs maintain market dominance, and the pick-and-choose should therefore be maintained in its current state. Further, any modification to the pick-and-choose rule should be implemented on a reasonably sufficient granular basis.<sup>25</sup>

In contrast to the Mpower petition, the instant *NPRM* seeks comment on a substantive rule change, rather than mere forbearance from application of a rule pursuant to Section 160 of the Act.

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<sup>23/</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

<sup>24/</sup> *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir 1992), *cert. denied*, *Galaxy Communications, Inc. v. FCC*, 506 U.S. 816 (1992).

<sup>25/</sup> *See, U.S. Telecom Ass’n. v. FCC*, 290 F.3d 415, 425-428 (D.C. Cir. 2002).

Section 160 provides that the Commission shall forbear from application of any regulation or provision of the Act where application (1) is not necessary to ensure just, reasonable, and nondiscriminatory services, (2) is not necessary for the protection of consumers, and (3) where elimination is otherwise consistent with the public interest.<sup>26</sup> As stated by the D.C. Circuit “[t]he three prongs . . . are conjunctive . . . [t]he Commission could properly deny a petition for forbearance if it finds that any of the three prongs is unsatisfied.”<sup>27</sup> The Commission has thus transformed the Mpower proposal into a rule change. The legal implications of a change to the pick-and-choose regime, however, require no less rigor than is demanded in a forbearance proceeding. Relaxation of the pick-and-choose rule is not warranted when BOCs and other ILECs remain dominant carriers.

**B. CURRENT MARKET CONDITIONS DEMONSTRATE THAT ILECS NEGOTIATE FROM A POSITION OF STRENGTH.**

**1. ILECs Enjoy an Inherent Position of Strength in Negotiations.**

The comments in the Mpower petition proceeding showed that the party lines drawn seven years ago have not changed. The local telephone marketplace is still one that is characterized by dominant players – the ILECs – and nascent competitors who require wide-open access to the incumbent network in order to ensure successful and meaningful competition. In the proceeding that generated the Local Competition Order, ILECs argued against the pick-and-choose rule that was ultimately promulgated; would-be CLECs, by contrast, supported the pick-and-choose rule because it

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<sup>26</sup>/ See 47 U.S.C. § 160.

<sup>27</sup>/ *Cellular Telecomms. and Internet Ass’n. et al. v. FCC*, 330 F.3d 502, 507 (D.C. Cir. 2003).

would enable them to create the best interconnection agreements.<sup>28</sup> The openness fostered by the pick-and-choose regime ensures that an ILEC cannot discriminate against a CLEC by offering one carrier a better deal than the other; it ensures that all potential competitors have access to network features and functions at the best terms and conditions.

ILEC complaints about the lack of a “give and take” in the pick-and-choose environment are structurally hollow. In the first instance, the interconnection rules establish that network elements must be priced in such a manner so as to provide the ILEC with a reasonable profit.<sup>29</sup> Therefore, the ILEC does not lose money on the interconnection agreement, no matter how attractive the deal might be for the CLEC. Second, and as demonstrated below, there is grave doubt as to whether any meaningful “give and take” actually occurs in the course of negotiating interconnection agreements.

The intuitive and logical perception that an ILEC negotiates from a position of strength was confirmed in the Mpower petition proceeding. USTA’s comment there that the current rules “impede the ability of parties to negotiate voluntary agreements that are in the best interests of competitive carriers and ILECs” is simply incorrect.<sup>30</sup> To the contrary, WorldCom stated, “For incumbent LECs, perhaps negotiations will feel voluntary, but for competitive LECs there will be certain pressures to concede to the ILEC in order to gain access to critical elements.”<sup>31</sup> The Commission has recognized

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<sup>28</sup>/ See *NPRM* at para. 715

<sup>29</sup>/ 47 U.S.C. § 252(d)(1)(B).

<sup>30</sup>/ Reply Comments of United States Telecom Association at 3.

<sup>31</sup>/ Reply Comments of WorldCom at 2.

that access to critical elements must also be available as quickly as possible, and has therefore determined that Section 252(i) rights may be exercised on an expedited basis.<sup>32</sup> Accordingly, a carrier may notify the ILEC that it is exercising its rights under Section 252(i) by delivering to the ILEC notice that identifies the agreement and provides information regarding to whom invoices and other communications should be sent.<sup>33</sup> In light of these previous rulings, and the continued dominance of ILECs in their local markets, there is no rational basis for restricting the pick-and-choose rule.

## **2. The Secret Agreements of Qwest.**

The pervasive attempts of market dominant ILECs to evade the requirements of the Act can be seen in the actions of Qwest Corporation (“Qwest”), which was fined \$29.95 million by the Minnesota Public Utilities Commission (“MPUC”) for violations of the Act that had the effect of shirking obligations imposed by Section 252(i).

In February 2003, the MPUC adopted an administrative law judge decision finding Qwest in violation of Sections 252(a), 252(e), and 251(b)(1) of the Act, as well as various state anti-

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<sup>32/</sup> See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange and Commercial Mobile Radio Service Providers: First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15,449 (rel. Aug. 8, 1996) (“*First Report and Order*”), at para. 1321.

<sup>33/</sup> See *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, FCC 99-199, at para. 8, n. 25 (rel. Aug. 3, 1999); see also *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, DA 99-1552 (rel. Aug. 5, 1999), at para. 8, n. 27.

discrimination statutes.<sup>34</sup> Specifically, Qwest executed one oral and eleven written interconnection agreements with certain CLECs, and did not submit any of them to the MPUC for approval. In failing to file these agreements, Qwest violated Sections 252(a) and 252(e) of the Act. Further, and more egregious (and perhaps underlying the motive for not filing these agreements), Qwest provided terms, conditions, or rates to certain CLECs that “were better than the terms, rates, and conditions that it made available to other CLECs and, in fact, kept those better terms, conditions, and rates a secret from the other CLECs.”<sup>35</sup> The ILEC’s attempt to hide the terms from public view demonstrates the carrier’s reluctance to comply with measures that are prescribed by the Act and intended to open markets to competition. The MPUC found that by offering non-publicly disclosed terms to some CLECs that were better than the publicly available terms that were available to other CLECs, Qwest violated non-discrimination provisions of Section 252. Indeed, this secreting away of the agreements undermined the intent of the Section 252(i) and the pick-and-choose structure, which “enable[s] smaller carriers who lack bargaining power to obtain favorable terms and conditions – including rates – negotiated by large IXCs, and speed the emergence of robust competition.”<sup>36</sup>

The terms that were offered to one CLEC in Minnesota, but effectively denied to others, included a 10 percent discounts on the aggregate billed charges for all purchases from November 2000

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<sup>34/</sup> See *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements: Order Assessing Penalties*, Docket No. P-421/C-02-197 (Feb. 28, 2003) (“Qwest Initial Order”); see, also, *Order After Reconsideration on Own Motion*, P-421/C-02-197 (Apr. 30, 2003). Qwest has filed an appeal, but has not disputed the underlying existence of unfiled agreements. See *Qwest Corporation v. Minnesota Public Utilities Commission, et al.*, Civ. File No. 03-3476 (D. MN.)

<sup>35/</sup> Qwest Initial Order at 4.

<sup>36/</sup> *First Report and Order* at para. 1313.

until December 2005. The MPUC also found a “‘consulting’ arrangement contained in the agreement a sham designed to conceal the discount that Qwest agreed to provide . . . .”<sup>37</sup> Another CLEC enjoyed a 6.5 to 10 percent discount on UNEs, switched access, wholesale long distance, and tariffed services. Most incredibly, however, Qwest secured by way of these secret contracts the agreement of several CLECs to, variously, not oppose Qwest’s Section 271 application<sup>38</sup> nor the Qwest merger and, where opposition to the merger had already been filed, to withdraw it.<sup>39</sup> No clearer frustration of the Act’s intentions could be produced: an ILEC achieves, through violation of the Act’s provisions, total frustration of the goals of the Act to open the market to free and fair competition. The bullying nature of the BOC is evident in the description offered by an MPUC Commissioner:

And then a second thing too that disturbs me about this and – by reading your – by reading the FCC’s order and reading your post-hearing – your comments, your most recent comments that discuss that is that throughout this proceeding it’s Qwest that seems to be making the unilateral decision as to whether or not an interconnection agreement should or should not be filed. And, I mean, there’s even circumstances where one of the CLECs wanted a written agreement and suggested it wanted – they wanted it to be filed, and the company absolutely refused. So that disturbs me, that the holder of the product, the holder of the ability for the CLECs to be able to compete is the one that’s unilaterally making the decisions as to whether or not agreements should or shouldn’t be filed.<sup>40</sup>

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<sup>37</sup>/ Qwest Initial Order at 4, 5.

<sup>38</sup>/ See 47 U.S.C. § 271.

<sup>39</sup>/ Qwest Initial Order at n. 12.

<sup>40</sup>/ *In the Matter of the Consideration of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements: Transcript of Record, Oct. 21, 2002*, Minnesota Public Utilities Commission Docket No. P-421/C-02-197, at 27, 28.

Minnesota is not the only state in which Qwest's tactic of entering into secret agreements has come under scrutiny: the Arizona Corporation Commission ("ACC"), the Colorado Public Utilities Commission ("CPUC"), and the Washington State Utilities and Transportation Commission ("WUTC") have confronted this issue. A proposed settlement in Arizona between ACC staff and Qwest disposes of allegations that Qwest failed to file certain agreements undertaken with CLECs for ACC approval, as well as allegations that "Qwest improperly entered into settlement agreements with CLECs that resulted in the nonparticipation by such CLECs in the [Arizona] Commission docket evaluation Qwest's application under Section 271 of the Telecommunications Act, all without the [Arizona] Commission's knowledge."<sup>41</sup> The proposed settlement includes Qwest's agreement to pay an "Aggregate Cash Payment Amount" of \$5.197 million, as well as "Voluntary Contributions" of at least \$6 million to various private and state-funded programs and organizations, and discounts to non-favored CLECs valued at about \$10 million.<sup>42</sup> The WUTC is currently investigating allegations that Qwest failed to file interconnection agreements for WUTC approval, as well as allegations that Qwest settled "numerous" disputes by paying other telecommunications companies to not oppose Qwest

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<sup>41/</sup> *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996; In the Matter of U.S. West Communications, Inc.'s, Compliance with Section 271 of the Communications Act of 1996; Arizona Corporation Commission v. Qwest Corporation: Notice of Filing Settlement Agreement and Request for an Expedited Procedural Conferences*, Arizona Corporation Commission Docket Nos. RT-00000F-02-0271, T-00000A-97-0238, T01051B-02-0871, Settlement Agreement ("Arizona Settlement") at 1 (Jul. 25, 2003).

<sup>42/</sup> Arizona Settlement at 3.

positions in various proceedings.<sup>43</sup> The CPUC also has a pending docket investigating Qwest's failure to file a number of interconnection agreements for CPUC approval.<sup>44</sup>

Acknowledging that under the terms of the proposed Arizona Settlement, Qwest admitted no wrongdoing, and acknowledging the fact that the WUTC proceeding has yet generated no findings other than the Complaint, and that the CPUC investigation is ongoing, NASUCA submits that the pattern across the states indicates the ILEC's use of market dominance to subvert and undermine the clear intent of the Act. The use of unfiled interconnection agreements undermines entirely the effectiveness of the Commission's pick-and-choose rules by preventing CLECs from availing themselves of terms that were available only to certain favored industry peers. In light of these actions, it is imperative that the Commission keep open all avenues to competition, including the pick-and-choose rule that enables CLECs to enjoys terms and conditions made available to other carriers.

### **3. The New Jersey Experience Provides Examples of ILEC Leverage.**

The New Jersey experience also demonstrates why the pick-and-choose regime must remain intact in the imperfect world of negotiated agreements where ILECs retain market power. Nearly all local New Jersey BOC (Verizon New Jersey, hereinafter referred to as "Verizon NJ") interconnection

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<sup>43/</sup> *Washington Utilities and Transportation Commission v. Advanced Telecom Group, Inc.; Allegiance Telecom, Inc.; AT&T Corp.; Covad Communications Company; Electric Lightwave, Inc.; Eschelon Telecom, Inc. f/k/a Advanced Telecommunications, Inc.; Fairpoint Communications Solutions, Inc.; Global Crossing Local Services, Inc.; Integra Telecom, Inc.; MCI Worldcom, Inc.; McLeod USA, Inc.; SBC Telecom, Inc.; Qwest Corporation; XO Communications, Inc. f/k/a Nextlink Communications: Amended Complaint and Notice of Prehearing Conference*, Washington State Utilities and Transportation Commission Docket No. UT-033011, at 3 (Sep. 8, 2003).

<sup>44/</sup> *See In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation: Order Opening Docket and Setting Procedural Schedule*, Colorado Public Utilities Commission Docket No. 021-572T (Oct. 16, 2002).

agreements submitted for local commission approval in New Jersey follow a standard “form letter” approach, with usually only the names of the parties being changed from agreement to agreement. The lack of individuality and apparent “take it or leave it” character of the agreements reinforces the market power of and the effect of that market power in negotiations. Specific examples of Verizon NJ’s exercise of market power include:

**(a) Attempts to Avoid Merger Condition Obligations.**

Many Verizon NJ agreements include conditions that limit the Bell Atlantic/GTE Merger Conditions.<sup>45</sup> The provision states,

For the purpose of Appendix D, Sections 31 and 32, of the Merger Order, such provisions shall not be deemed to have been voluntarily negotiated or agreed to by Verizon and shall not be available to carriers pursuant to Appendix D, Sections 31 and 32 of the Merger Order.’<sup>46</sup>

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<sup>45/</sup> Additionally, the Bell Atlantic/GTE Merger Conditions, as established by the Commission, extended 252(i) across state lines. *In the Matter of Application of 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, (rel. Jun.16, 2000) (“Merger Order”), Apdx. D at paras. 31 and 32. These conditions permit a carrier to adopt in Verizon territory the terms and conditions of any interconnection agreement voluntarily negotiated prior to the Merger Closing Date in former-GTE or former-Bell Atlantic territories, provided that no interconnection agreement or unbundled network element (“UNE”) from an agreement negotiated prior to the Merger closing date in the former-Bell Atlantic service area can be extended into the former-GTE service area, and vice-versa.

<sup>46/</sup> *See, i.e., In the Matter of Interconnection Agreement Between Verizon New Jersey, Inc., and Trucom Corporation, Inc.*, New Jersey BPU Docket No. TO01120836; *In the Matter of Interconnection Agreement Between Verizon New Jersey, Inc., and American Network Services, Inc.* New Jersey BPU Docket No. TO01100681; *In the Matter of Resale Agreement Between Verizon New Jersey, Inc., and Capital Telecommunications, Inc.*, New Jersey BPU Docket No. TM02070395; *In the Matter of Application of Verizon New Jersey, Inc., and Covista, Inc. for Approval of a Resale Agreement Under Section 252(e) of the Telecommunications Act of 1996*, New Jersey BPU Docket No. TM01100664; *In the Matter of Interconnection/Resale Agreement Between Verizon New Jersey, Inc. and Lightwave Communications, Inc.*, New Jersey BPU Docket No. TM02090697; *In the Matter of Interconnection Agreement Between Verizon New Jersey, Inc. and Teleconex, Inc.*, New Jersey BPU Docket No. TO01110800; *In the Matter of Interconnection Agreement Between Verizon New Jersey, Inc. and DSLnet Communications, LLC*, New Jersey BPU Docket No. TO03040280. The Merger Conditions have expired, but Verizon NJ included this standard during the years that the Merger Conditions were effective.

As the Commission is aware, the Bell Atlantic/GTE Merger Conditions permit a carrier to adopt in Verizon territory the terms and conditions of any negotiated interconnection agreement in effect in former-GTE or former-Bell Atlantic territories.<sup>47</sup> Section 252(a) of the Act describes “Agreements Arrived at Through Negotiations” as being “Voluntary Negotiations.” Therefore, the standard interconnection Agreements in New Jersey would qualify under Sections 31 and 32 of the Merger Order as voluntary negotiated in-region post-merger agreements that must be made available to any requesting carrier in accordance with the terms and conditions of the Merger Order. Yet, Section 37.2.2 of the standard interconnection Agreements served to avoid the clear requirements of the Merger Order and deny competitive carriers the benefits of Sections 31 and 32 by declaring that the provisions “shall not be deemed to have been voluntarily negotiated or agreed to by Verizon.”<sup>48</sup> The “take it or leave it” nature of these Agreements tended to coerce CLECs into relinquishing rights granted to them by the Commission. This is a compelling example of how Verizon NJ wields its ILEC market power in the negotiation of interconnection agreements.<sup>49</sup>

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<sup>47/</sup> *Id.*, at Appendix D, para. 32. The condition is limited to the extent that no interconnection agreement or unbundled network element from an agreement negotiated prior to the Merger closing date in the former-Bell Atlantic service area can be extended into the former-GTE service area, and vice-versa.

<sup>48/</sup> Further, since the Merger Condition is substantially similar to pick-and-choose, and in fact extends further by making provisions available in other states, Verizon NJ’s attempt to deny competitive carriers Merger Condition benefits reflects an institutional philosophy to hinder competition by limiting access to already-approved agreements.

<sup>49/</sup> NASUCA submits that, given the use of standard interconnection agreements by BOCs across their respective footprints, the standards established by the Merger Conditions should be revived and expanded to include all BOCs, thereby permitting a competitor to a BOC affiliate in one state to avail itself of any term or condition that is available from another BOC affiliate. Differences in local pricing would be addressed consistent with the Merger Conditions.

**(b) Improper Caps of CLEC Charges.**

Another condition to many of the standard Verizon NJ interconnection agreements that acts as potential impediment to competition is Section 3 of the so-called Pricing Attachment.<sup>50</sup> This section provides:

Notwithstanding any other provision of this Agreement, the Charges that [CLEC] bills Verizon for [CLEC's] Service shall not exceed the Charges for Verizon's comparable Services, except to the extent that [CLEC] has demonstrated to Verizon, or, at Verizon's request to the Commission or the FCC, that [CLEC's] costs to provide such CLEC Services to Verizon exceeds the Charges for Verizon's comparable Services.

The New Jersey Board of Public Utilities (the local commission) and the Commission have each established procedures for challenging whether a carrier's rate is unjust and unreasonable.<sup>51</sup> The above-quoted provision is an attempt to deviate from those established procedures by imposing a different obligation on CLECs through a resale provision. In addition, this condition may be inconsistent with Commission rules that establish a benchmark rate for interstate switched exchange access services that can be charged by CLECs.<sup>52</sup> If Verizon NJ or its long distance affiliate has concerns about the interstate switched access charges imposed by a CLEC, then it could pursue that

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<sup>50/</sup> See note 36, *supra*, for a sample list of agreements in which these terms and conditions can be found.

<sup>51/</sup> See *N.J.S.A.* 48:2-21 and 21.1, *N.J.S.A.* 48:3-1 and 3-2, *N.J.A.C.* 14:-7.1 *et seq* (Subchapter 7 entitled "Bills and Payment for Service"), and 47 U.S.C. §§ 201-203, 205, 208.

<sup>52/</sup> See 47 C.F.R. 61.26. The benchmark rate is reduced over a three-year period from \$0.025 per minute to \$0.012 per minute. See *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers: Seventh Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001). The benchmark rate does not apply to rural CLECs, which may charge rates above the benchmark so long as the rate is otherwise consistent with 47 C.F.R. 61.26(e).

issue in accordance via applicable regulations, rather than a one-sided provision in an interconnection agreement. It is noteworthy that the Commission rejected a provision imposing caps on CLEC charges proposed by Verizon Virginia, Inc., in a

Memorandum Opinion and Order issued on July 17, 2002.<sup>53</sup> Yet, despite the existence of applicable regulations and Commission rejection of similar measures attempted by its Virginia sister company, Verizon NJ continues to include this provision in interconnection agreements. This is yet another example of tactics undertaken by the local company based on market power, and further proof that broad access to negotiated terms, such as that provided by pick-and-choose, must continue.

**(c) Credit Terms.**

Another example of Verizon NJ's superior bargaining power is the imposition of a collection of expansive credit assurance terms that is beginning to appear in interconnection agreements. Entitled "Assurance of Payment," this provision sets forth onerous credit obligations that are onerous compared

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<sup>53/</sup> See *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and Expedited Arbitration; In the Matter of Petition of Cox Virginia Telecom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration; In the Matter of Petition of AT&T Communications of Virginia, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.: Memorandum Opinion and Order*, CC Dockets No. 00-218, 00-249, 00-251, DA 02-1731 (rel. Jul. 17, 2002), at paras. 581-589. The interconnection agreement provision may violate the filed rate doctrine and result in discrimination to the extent that another CLEC will be charged the tariff rate offered by the CLEC while Verizon NJ pays only its comparable rate.

to those imposed by currently-effective access tariffs.<sup>54</sup> The provisions are similar to proposed tariff modifications that were set for investigation by the Commission, and ultimately withdrawn by Verizon NJ's parent company.

On July 25, 2002, Verizon Corporation ("Verizon") filed for Commission approval of interstate access tariff revisions that would permit the carrier to require at any time additional security deposits or advance payments from a customer based on several new criteria.<sup>55</sup> In response, the Commission

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<sup>54/</sup> See *In the Matter of Interconnection Agreement Between Verizon New Jersey, Inc. and CAT Communications International, Inc., d/b/a CCI*, New Jersey BPU Docket No. TO03020136. The provisions include: (1) upon request of Verizon NJ, CLEC "shall at any time and from time to time provide to Verizon adequate assurance of payment of amounts due (or to become due)," and; (2) that assurance of payment may be requested by Verizon NJ (a) if prior to or after the Effective Date CLEC fails "to timely pay a bill rendered to CLEC by Verizon or its affiliates," or (b) if in Verizon NJ's "reasonable judgment" CLEC is "unable to demonstrate that it is creditworthy," or "admits its inability to pay its debts as such debts become due," or, (c) CLEC "has commenced a voluntary case (or has had a case commenced against it) under the US Bankruptcy Code or any other law relating to bankruptcy, insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made assignment for the benefit of creditors or is subject to receivership or similar proceeding." See Section 6 of the Agreement.

<sup>55/</sup> *Verizon Telephone Companies Tariff FCC Nos. 1, 11, 14, and 16, Transmittal No. 226* (filed July 25, 2002). The criteria include:

- (1) if the customer had fallen in arrears in its account balance in any two months out of any consecutive twelve-month period;
- (2) if the customer owed \$250,000 or more that is thirty days or more past due;
- (3) if the customer or its parent (defined as an entity that owns an equity interest in more than 50 percent of the customer) informed Verizon or stated publicly that it was unable to pay its debts as such debts become due;
- (4) if the customer or its parent had commenced voluntary or involuntary receivership or bankruptcy;
- (5) if the customer's or its parent's senior debt securities were below investment grade as defined by the Securities and Exchange Commission; or
- (6) if the customer's or its parent's senior debt securities were rated the lowest investment grade rating category by a nationally recognized statistical rating organization and are put on review by the rating organization for a possible downgrade.

See 1<sup>st</sup> Revised Page 2-26, section 2.4.1(A)(2).

noted that current access tariff deposit provisions had since 1984 contained protections against uncollectibles, which permitted LECs to require deposits only in limited circumstances.<sup>56</sup> These provisions balance the needs of “the telephone company to . . . avoid non-recoverable costs imposed by bad credit risks” against the burdens placed on access customers.<sup>57</sup> In crafting these terms, the Commission had rejected LEC proposals that were “extremely burdensome, potentially anticompetitive, too broadly drawn, or simply unfair,”<sup>58</sup> unreasonably onerous to customers, and potentially discriminatory in violation of sections 201(b) and 202(a) of the Act.<sup>59</sup>

Verizon’s 2002, tariff proposal, along with similar proposals filed by other BOCs,<sup>60</sup> was set for investigation by the Commission. All were ultimately withdrawn by the companies. The Commission stated that it had “serious concerns” about the provisions, and the potential that they could be used against customers in a discriminatory manner. Further, the Commission expressed “concern[] about the

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<sup>56</sup> / *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief: Policy Statement*, WC Docket No. 02-202, at para. 6 (rel. Dec. 23, 2002) (“*Policy Statement*”) citing *Access Tariff Order*, CC Docket No. 83-1145, 97 FCC 2d 1082, 1169.

<sup>57</sup> / *Policy Statement, id.*, at para. 6.

<sup>58</sup> / *Id.*

<sup>59</sup> / The Commission has reviewed a proposed modification to the 1984 deposit provisions only once previously. In 1987, BellSouth sought revisions similar to certain of the instant proposed revisions. The Commission did not allow a deposit increase, but did shorten from 30 (thirty) days to 15 (fifteen) days the notice period if the customer received its bill within three days after the billing date. *Policy Statement* at para. 7.

<sup>60</sup> / These incumbent LECs are Iowa Telecommunications Services, Inc. (Iowa Telecom), BellSouth Telecommunications, Inc., (BellSouth); SBC Communications, Inc., (SBC), and the National Exchange Carrier Association (NECA).

potential burden that increased deposits and advance payments would impose on interstate access customers.”

The Commission also stated

We believe that the criteria listed in the various tariff revisions for triggering an increased deposit, advance payment, or shortened notice period may not be as objective as the incumbent LECs claim. These criteria could be used to disadvantage a competitor vis-à-vis the incumbent LEC’s own retail operations, or a large retail end-user customer who purchases interstate access. Broad, subjective triggers that permit the incumbent LEC considerable discretion in making demands, such as a decrease in “credit worthiness” or “commercial worthiness” falling below an “acceptable level,” are particularly susceptible to discriminatory application. We are also concerned by opponents’ claims that almost no competitive carrier, including large carriers such as AT&T, would escape a deposit demand triggered by a low, downgraded, or potentially downgraded rating of its debt securities. Opponents further claim that almost all carriers with debt securities ranked below investment grade pay their interstate access bills on time, and that even bankrupt carriers continue to pay their access bills so that they can continue to serve their customers.<sup>61</sup>

The similar terms in the interconnection agreement are an attempt to impose conditions that were effectively rejected by the Commission, and highlight the ILECs’ market power and superior bargaining position. The position of strength that results from these provisions exists even now while the balancing mechanism of pick-and-choose is in effect, and evidences the imperative that the Commission must not further solidify ILECs’ ability to control negotiated agreements by reducing the options that are available to CLECs via the pick-and-choose rule.

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<sup>61</sup> *Policy Statement* at para. 20 (internal citations omitted).

### C. THE SGAT PROPOSAL IS UNREASONABLE.

The Commission's proposal to replace pick-and-choose with an SGAT-based regime is at best inefficient, and at worst undermines the clear intent of the statute. Pick-and-choose is an efficient method of handling interconnection agreements, bringing competition to the marketplace by permitting potential competitors access to the best terms that other competitors have negotiated. Pick-and-choose eliminates the opportunity for ILECs to favor certain parties at the expense of others, and serves as a critical tool to level the playing field for all carriers. By contrast, the SGAT is essentially a tariff and offers none of the benefits for CLECs that should be obtainable through the negotiated agreements envisioned by the Act. Further, the SGAT lacks a Commission-approved methodology for setting state commission-approved rates, as well as the risk that the rates might not best reflect the lowest price at which certain elements could be made available. It is possible that a final SGAT would reflect a negotiated agreement between the ILEC and the state commission, rather than an agreement between the ILEC and a CLEC.

The proposal to replace the pick-and-choose rule with an "all or nothing" approach that would be combined with an SGAT is not an adequate alternative.<sup>62</sup> The SGAT would replace the limited impact that a CLEC may have in negotiations with the market-dominant ILEC with no impact at all. The statute authorizing SGAT does not ensure CLEC input into the creation of the SGAT terms. The SGAT statute provides only that the State commission may review the statement, which may or may

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<sup>62/</sup> Pursuant to 47 U.S.C. § 252(f), SGATs may be filed by BOCs. The Commission stated in the *NPRM* that under a non-pick-and-choose regime, non-BOC ILECs would be permitted to file a single interconnection agreement for state approval that would be designated as an SGAT-equivalent. *See NPRM* at note 2151.

not include the solicitation of comments from affected parties.<sup>63</sup> Further, the solicitation of comments from interested parties at the time the SGAT is submitted does not provide for participation of later-arriving CLECs who enter the market after an SGAT proceeding has been concluded.

The statute is clear on its face that interconnection obligations are wholly separate from the SGAT, which is at best an optional device that may be filed by a BOC. The statute states clearly, “The submission or approval of a statement under this subsection *shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under Section 251 of this title.*”<sup>64</sup> As set forth above, the Commission’s current implementation of the pick-and-choose rule tracks the language of the statute. Replacement of the negotiation option with an SGAT effectively undermines the continuing obligation of BOCs to negotiate interconnection agreements, including those incorporating “picked-and-chosen” terms, regardless of an SGAT. A substantively similar problem is created if the SGAT-replacement option is extended to ILECs for whom the SGAT does not exist as a statutorily-provided option.

For these reasons, the proposal to replace the pick-and-choose rule with an SGAT-based replacement has no statutory basis, and should therefore be rejected.

#### **D. MARKET SHARE IS MEANT TO BE LOST.**

The ILECs state their belief that revision of the pick-and-choose rule is necessary to achieve “mutually beneficial business relationships between ILECs and CLECs, as opposed to the adversarial,

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<sup>63/</sup> See 47 U.S.C. § 252(f)(2).

<sup>64/</sup> 47 U.S.C. § 252(f)(5) (emphasis added).

regulation-based relationships that are more typical today.”<sup>65</sup> Yet, the ILECs simply *do not want* to negotiate interconnection agreements that lead to lost market share. The “adversarial, regulation-based relationships” are necessary because the reality in the marketplace is that incumbent monopolists are being forced to open their networks to hungry competitors. The ILEC expressed desire for mutually beneficial relationships is empty, because such relationships are right in front of them – they need only negotiate freely, and fairly.

The party lines drawn among the industry players in this (and other) proceedings should come as no surprise – incumbents aim to preserve their market share, competitors endeavor to chip away at it.<sup>66</sup> Guidance, then, should be taken from the Act, which is “intended to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>67</sup> The pick-and-choose rule promotes the public interest and benefits consumers by

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<sup>65</sup>/ See *NPRM* at para. 719, quoting *ex parte* Letter of Verizon at 3 (Jan. 17, 2003).

<sup>66</sup>/ In Comments submitted in the Mpower petition proceeding, Sprint Corporation was clear about this point:

CLECs and ILECs have opposing business interests here – the CLECs want as many unbundled network elements as they can get, at the lowest possible price, in order to provide service in competition with the ILECs. The ILECs, on the other hand, want to provide as few UNEs as possible, at the highest possible rate, in order to minimize CLECs ability to make competitive inroads into the ILECs’ local service customer base.

Comments of Sprint Corporation at 2.

<sup>67</sup>/ Act, pmb., 110 Stat. 56.

enabling CLECs to opt-into interconnection agreements without the delay and costs associated with negotiation and arbitration, and without the one-sided nature of the SGAT. The Act delineated clearly the general approach to be taken, namely, the opening of incumbent networks to competitors. Within the construct of interconnection, the Act set forth requirements governing interconnection, and agreements related thereto. Yet, Congress foresaw the ILEC hesitation that might play a role in negotiations, and the possibility (if not probability) that voluntary negotiations might at times be hampered by the natural inclination of the ILECs to preserve market share. Accordingly, arbitration mechanisms were built into the Act, as well as Section 252(i), which made all terms available to all parties. The Commission's implementation of the statute tracked the language of the statute. This is the correct and proper approach. Stated bluntly, *if pick-and-choose results in market share loss for the ILECs and whittles their market share downward while bestowing customers upon competitors,* then the Act will have seen its intended effect.

The intentions of the Act, however, have been hindered at every step by ILECs. As noted by the Association of Communications Enterprises, the attitude of the ILECs toward interconnection is evidenced well by

the penalties SBC Communications, Inc. ("SBC") and Verizon have racked up for noncompliance with pro-competitive merger conditions, the legislative and regulatory initiatives launched by the incumbent LECs to free themselves of the constraints imposed by Section 251(c) and 271 of the Act, the incumbent LECs' expanding assault on the UNE-Platform, TELRIC pricing, and the Commission's line sharing mandates, the continuing refusal by incumbent LECs to allow for the

discounted resale of xDSL-based advanced services, and a host of other anti-competitive stratagems.<sup>68</sup>

The Commission noted in the *NPRM* that the Mpower record revealed that “incumbent ILECs 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.”<sup>69</sup> This approach seems to presume that the ILECs would otherwise make significant concessions. Comments submitted by non-ILEC parties to the record, however, reveal the opposite. As noted by WorldCom, even the Commission noted that pick-and-choose is necessary because “[u]nbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions negotiated by large [interexchange carriers], and speed the emergence of robust competition.”<sup>70</sup>

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<sup>68</sup>/ Mpower Proceeding, Opposition of the Association of Communications Enterprises at 6. *See, also*, Comments of Focal Communications at 3, describing fines that ILECs have paid for anti-competitive behavior that was directed at CLECs.

<sup>69</sup>/ *NPRM* at para. 722.

<sup>70</sup>/ Comments of WorldCom at 4, *citing In the Matter of 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, 95-185, 11 FCC Rcd 15499 (Aug. 6, 1996), at para. 1313.

### III. CONCLUSION

For the reasons set forth herein, NASUCA submits that the pick-and-choose rule should be retained in its current form until such time as marketplace evidence supports revision.

Respectfully submitted,

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