

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

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

**REPLY 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 reply 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 replies herein to initial comments filed by other interested parties to this proceeding.

NASUCA is an association of 44 advocate offices in 42 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 1996.¹

^{1/} 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.

The record in this proceeding does not support modification, let alone elimination, of the pick-and-choose rules. The comments demonstrate that the parties who are protected by the rules are in favor of their retention, while the ILECs, who perceive a disadvantage in having to abide by these statute-based rules, argue for their removal or modification. The Commission's proposal to eliminate or modify the pick-and-choose rule would have the effect of frustrating entry by competitive local exchange carriers ("CLECs"). Further, in support of the statutory mandates enacted in recognition of imbalances among the power enjoyed by the ILECs and the needs of nascent competitors, NASUCA submits that consumer interests also would be affected adversely by modification or elimination of the pick-and-choose rule.

Commenters representing a range of industry participants, from Bell Operating Companies ("BOCs"), CLECs, state utility commissions, and independent organizations, offered opinions variously rejecting and supporting the Commission proposal. Although the weight to be given to any commenter's submission may be affected by understanding the author's role in the industry (*i.e.*, incumbents generally favor elimination of the pick-and-choose rule, and competitors favor retention of the rule), the comments of Mpower Communications Corp. ("Mpower"), a CLEC, are particularly powerful.

The Commission's NPRM was based in large part upon a petition submitted by Mpower in May 2001. In that petition, Mpower urged modifications to the existing regulatory structure governing pick-and-choose. Now, however, in a stunning about-face, Mpower has withdrawn its petition only two days before initial comments in the instant were due, and has submitted comments that articulate a

well-reasoned basis for why the Commission should not tamper with the current pick-and-choose structure. Mpower's comments are worthy of attention independent of any past company action, but the fact that these statements emanate from the entity that initially laid the proposal to eliminate the pick-and-choose rule on the table encourages, if not demands, paying greater attention to them.

Mpower submits, succinctly and plainly, that "it serves no legitimate purpose to eliminate the pick-and-choose rule protections which ensure that all competitions have access to essentially the same state-arbitrated and negotiated terms as all other carriers."² The company now avers that "[a]lthough most of the incumbent LEC side of the wireline industry, and particularly the Bell Operating Companies, may want to abandon completely the Commission's pick-and-choose rule, such action would lead to greater instability and chaos in the telecommunications market."³ It is noteworthy that the party whose petition initiated the NPRM now clarifies that elimination of the pick-and-choose would have undue adverse affects upon the industry.

Indeed, Mpower is not alone in this observation. The Association of Local Telecommunications Services ("ALTS") predicts that any change to the pick-and-choose rule will "set the industry on a new course of protracted litigation." ALTS warns that the only parties who "would benefit from such confusion would be those that control most of the consumer base and bottleneck facilities – the ILECs."⁴ These comments are consistent with the general tone of comments submitted –

^{2/} Comments of Mpower at 4.

^{3/} Comments of Mpower at 5.

^{4/} Comments of ALTS at 4.

most CLECs objected to the Commission proposal, while ILECs called for an end to the pick-and-choose regime.

As an example of the quality of the ILEC arguments, however, SBC Communications, Inc. (“SBC”) proclaimed, in calling for an end to pick-and-choose, that “[t]he Commission’s existing pick-and-choose rule is inconsistent with the structure and goals of section 252.”⁵ SBC overlooks the fact that the United States Supreme Court noted 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.⁶ As articulated by US LEC Corp., et al., “the pick-and-choose rules were not the policy choices adopted by the Commission to implement an ambiguous statute. They were the necessary consequences of the Commission’s reading of a straightforward statute.”⁷ Indeed, as Z-Tel Communications, Inc., noted, Congress recognized the disparities in the bargaining power among the parties and set into place the rules of Section 252 in an effort to balance the scales.⁸

ILEC attempts to use market dominance and strength to exact inequitable interconnection terms from would-be competitors were discussed in NASUCA’s initial comments, in which Verizon New Jersey’s efforts to avoid Bell Atlantic/GTE merger condition obligations, impose improper caps on

⁵/ Comments of SBC at 3.

⁶/ *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999).

⁷/ Comments of US LEC Corp., et al., at 12.

⁸/ Comments of Z-Tel Communications, Inc., at 1.

CLEC charges, and introduce onerous credit terms were described.⁹ The New Jersey BOC's parent corporation, Verizon, claims that "[t]he pick-and-choose rule has fostered the continuation of adversarial, regulation-based relationships rather than the mutually beneficial business relationships between ILECs and CLECs that Congress foresaw."¹⁰ Contrary to Verizon's statement, however, Congress actually foresaw that ILECs and CLECs would be polarized in their positions from the outset, and understood that their negotiations would require regulatory oversight in order to ensure that the CLECs survived the ILECs control of bottleneck facilities. Pick-and-choose is part of this necessary design.¹¹

The BOC confusion continues with BellSouth's statement that "[f]orbearance from enforcing § 252(i) is consistent with the public interest"¹² The instant proceeding, however, is a rulemaking proceeding, not a forbearance proceeding under Section 160 of the Act. The Commission did not frame the proceeding as dealing with forbearance, and neither BellSouth nor any other party has submitted a Section 160-sufficient analysis.

^{9/} See Comments of NASUCA at 15-22.

^{10/} Comments of Verizon at 2.

^{11/} NASUCA notes that PAETEC Communications, Inc. ("PAETEC"), a CLEC that supports the Commission proposal, is a facilities-based CLEC and less subject to ILEC dominance in negotiation. NASUCA submits that the Commission must account for the needs of UNE-P and other non-facilities-based CLECs in any ruling in this matter.

^{12/} Comments of BellSouth at 4.

Qwest Communications International, Inc.'s ("Qwest") complaint that pick-and-choose "pushes the ILECs into rigid and defensive positions during negotiations"¹³ describes aptly the ILEC position in any interconnection negotiation, since it is the logical inclination of any business to defend against government-mandated destruction of its monopoly position.¹⁴ That incursion, however, is precisely what Congress prescribed in the Act. That this complaint emanates from Qwest is ironic, in light of the fact that Qwest was found to have used interconnection agreements as a tool to secure the support (or non-opposition) of CLECs in other regulatory proceedings.¹⁵

One of the commenters to this proceeding noted the existence of BOC interconnection agreements that are applied on a BOC "footprint-wide" basis.¹⁶ NASUCA also raised this issue in initial comments, and reiterates its position that if the ILEC imposes terms and conditions across a

¹³/ Comments of Qwest at 4.

¹⁴/ Qwest has elsewhere exhibited what can be characterized as, at best, a misunderstanding of the Act. The company has argued, "When exercising opt-in rights under Section 252(i), a CLEC may not select only those provisions of an interconnection agreement that are most desirable to it." *Qwest Corp. v. Minnesota Public Utilities Commission*, USDC Minn., Civil File No. 03-3426, Complaint, (Jun. 19, 2003) at para. 14. This is, of course, directly contrary to the Commission rule that was upheld by the Supreme Court in *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (*see note 6, above, and accompanying text*). On the other hand, in that complaint, Qwest also argued that a carrier cannot demand that a rate from a five-year agreement be incorporated in a three-year agreement. NASUCA submits that a precise reading of the Commission Order implementing the pick-and-choose rule reveals that such an arrangement would not be contemplated under the regulation, in any event. *See, i.e., 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*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15,449 (rel. Aug. 8, 1996) ("*First Report and Order*"), at para. 1315 ("For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment."). The company is arguing already well-settled points.

¹⁵/ *See* Comments of NASUCA at 13.

¹⁶/ *See* Comments of PAETEC at 3 ("In the SBC region, the 13-State and the 'x2A' agreements have also proven popular.").

footprint that crosses state lines, then carriers should be able to “cross state lines” and opt-into terms and conditions offered to their industry peers. Accordingly, the standards established by the Bell Atlantic/GTE Merger Conditions¹⁷ 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.¹⁸

NASUCA submits that elimination of the pick-and-choose rule would be the death knell for many CLECs. As noted by the State of California, pick-and-choose has enabled small carriers to avoid the cost of negotiation and arbitration with recalcitrant ILECs.¹⁹ This view is echoed by LecStar Telecom, which stated that it “and other CLECs cannot realistically threaten to go to arbitration due to the substantial cost relative to the small organization’s resources.”²⁰ Even the Iowa Utilities Board, which supports the SGAT-based option as a “workable” alternative, states that pick-and-choose is “working well and it is not time to change it yet.”²¹

^{17/} *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.

^{18/} See Comments of NASUCA at note 49, and accompanying text.

^{19/} Comments of the People of the State of California and the California Public Utilities Commission at 4.

^{20/} Comments of LecStar Telecom, Inc., at 4.

^{21/} Comments of the Iowa Utilities Board at 7, 8.

The Act provides the regulatory groundwork for the opening of previously monopolistic local telephone service markets to competition. A result of this transition will necessarily be the loss of market share for incumbents, and market share gains by new competitive entities. Congress recognized that incumbents would be reluctant to open up their network capacity and functions to competitors, and therefore prescribed a method by which parties could negotiate interconnection under the watchful eye of state public utility commissions, which would have the authority to approve or disapprove of any agreement. The Act provides safeguards for each party, including the guarantee of a return of cost plus reasonable profit for the ILEC on the one hand and, on the other hand, the ability for CLECs to avail themselves of previously-negotiated terms and conditions that were accorded to their industry peers. The market is evolving, albeit slowly. The protections accorded by the Act are still necessary to ensure that the progress realized thus far is not short-circuited, and that both consumers and the competitive entities that will serve them will continue to enjoy the marketplace advantages intended by the Act.

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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