COMMISSIONERS:
LILA A. JABER, CHAIRMAN
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

STATE OF FLORIDA

DIVISION OF EXTERNAL AFFAIRS
CHARLES H. HILL
DIRECTOR
(850) 413-6800

Public Service Commission

October 15, 2003

VIA ELECTRONIC FILING

Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW - Portals II, TW-A325
Washington, DC 20554

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

Dear Ms. Dortch:

Forwarded herewith are Comments of the Florida Public Service Commission in the above docket(s) with regard to the pick-and-choose rule, pursuant to Section 252(i) of the Federal Telecommunications Act.

Sincerely,

/ s /

Cynthia B. Miller, Esquire
Office of Federal and Legislative Liaison

CBM:tf
cc: Brad Ramsay, NARUC

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
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Service Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION
ON FURTHER NOTICE OF PROPOSED RULEMAKING

The Florida Public Service Commission (FPSC) files these comments in response to the Federal Communications Commission's (FCC's) Further Notice of Proposed Rulemaking on the FCC rule implementing section 252(i) of the Federal Telecommunications Act. Specifically, the FPSC endorses elimination or revision of the current "pick-and-choose" rule.

The FPSC believes the FCC has legal authority to revise the "pick-and-choose" rule.

The FPSC agrees with the FCC's tentative conclusion that the FCC may change its interpretation of section 252(i). (¶721) As the Supreme Court stated in *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999), determining whether the "pick-and-choose" rule "will significantly impede negotiations (by making it impossible for favorable interconnection-service of network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the [FCC] and eminently beyond our ken."

The FPSC would add that in Chevron *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984), the Supreme Court stated that an agency's revised interpretation would still deserve deference because "an initial agency interpretation is not instantly carved in stone" and for the agency to engage in informed rulemaking, it "must consider varying interpretations and the wisdom of its policy on a continuing basis." Furthermore, the Supreme Court stated in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983), that "agencies do not establish rules of conduct to last forever." Of course, if the FCC chooses to alter its interpretation of section 252(i), the FPSC would point out that it must articulate its reason for doing so, and its reasoning must be supported by substantial record evidence. Id.

The FPSC also agrees with the FCC's tentative conclusion that ambiguous language in section 252(i) provides sufficient leeway for the FCC to alter its interpretation of section 252(i) to limit opt-in rights to the entire agreement.(¶728) Like the FCC, the FPSC believes that the phrase "upon the same terms and conditions as provided in the agreement" in section 252(i) could be reasonably interpreted to mean that carriers must opt into entire agreements, not just individual provisions.

The FPSC notes that the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), provided a good analysis on how the FCC's current interpretation of section 252(i) conflicts with the Act's design to promote negotiated binding agreements. Although the Eighth Circuit's decision was ultimately reversed and remanded by *AT&T Corporation*, 525 U.S. at 366,

the FPSC believes that the Court's reasoning may be helpful when reviewing whether the FCC should change its interpretation of section 252(i).

In *Iowa Utilities Board*, 120 F.3d at 800, the Eighth Circuit observed that "[t]he structure of the Act reveals the Congress' preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements." The Eighth Circuit concluded that the FCC's pick-and-choose rule "would thwart the negotiation process and preclude the attainment of binding negotiated agreements." Id. In reaching this conclusion, the Eighth Circuit reasoned that

> [d]uring a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit. In this manner, the FCC's rule would discourage the give-and-take process that is essential to successful negotiations. Moreover, negotiated agreements will, in reality, not be binding, because, according to the FCC, an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers. See First Report and Order, p. 1316. This result conflicts with the Act's requirement that agreements be "binding," 47 U.S.C.A. §252(a)(1), and is an additional impediment to subsequent negotiations, because an incumbent LEC will be even more hesitant to make concessions in subsequent negotiations when it knows that such concessions would be available to all of the competing carriers with which it previously had agreements.

Id.

The FPSC has had misgivings about the "pick-and-choose" rule.

In comments filed April 9, 1999, with the FCC in Docket No. 96-98 on Implementation of the Local Competition Provision, the FPSC urged that the FCC should hold a generic investigation into its interconnection rules. The FPSC also stated, "We believe that the Commission's interpretation of Sec. 252(i) significantly reduces competitors' incentives to negotiate an agreement.

A competitive carrier can minimize its expenses by selecting portions of other CLEC agreements without having to concede away other issues. ILECs will have little incentive to negotiate agreements since other CLECs would likely cannibalize any new agreement."

The FPSC comments further stated that, over time, this process would create a "best-of-breed" contract based entirely on previously negotiated agreements. This creation, which may bear a striking resemblance to a tariff, would effectively defeat both the need and purpose of negotiation. The FPSC also urged that the ability of a CLEC to use conditions or rates from a pre-existing contract should expire at the same time the original contract terminates.

The FPSC distinguished the Most Favored Nation (MFN) clauses in negotiated agreements from the FCC's interpretation of Sec. 252(i). Although MFN clauses may, in some instances, result in the same ability for a CLEC to "pick-and-choose" terms from other contracts, an MFN clause is a voluntary agreement between parties and therefore is not equivalent to the mandatory laws of Section 252(i). If parties believe that MFN clauses in contracts are too strict or too broad, or are interpreted incorrectly through arbitration, then they have the option to renegotiate those terms with more specificity the next time they enter into a negotiated agreement. In contrast, the FCC's interpretation of Sec. 252(i), which the FPSC believes grants global MFN rights to all carriers for any term in any contract, may eventually eliminate the need or reason for negotiated contracts altogether.

In addition, we have expressed frustration with the rule during our proceedings. For example, at the FPSC agenda on February 4, 2003, in Docket No. 021069-TP relating to an Interconnection Agreement between Supra and BellSouth Telecommunications, Inc., FPSC

Commissioners expressed concerns with the partial adoption of previous agreements by other carriers not originally party to the contract.

The best regulator of agreements is the marketplace.

While the FPSC understands that Section 252(i) of the Act does itself make certain requirements, we believe that the existing rule hinders negotiation. The best regulator of agreements is the marketplace. The FPSC is encouraged that the FCC is reviewing this matter. Each party in a contract should generally negotiate from his best strengths. There are surely certain factors, such as credit risks, which would vary among the companies. An ILEC may have reason to withhold certain provisions offered to a more reliable party. Also, as another example, volumes may impact what a contracting party may see as instrumental.

The negotiation of interconnection agreements typically results in provisions that benefit the ILEC as well as provisions that benefit the CLEC. Negotiation also typically results in provisions that burden both parties.

Based on the FPSC's experience in numerous arbitrations between the state's ILECs and CLECs, the negotiation of interconnection agreements has been and is severely hindered by a well-intentioned but outdated regulatory requirement–the "pick-and-choose" rule. We firmly believe the current "pick-and-choose" rule hampers negotiation and forces regulatory decisions that are best left to the parties that must abide by the ultimate terms of the contract.

Rather than being in a position to negotiate what may be mutually beneficial business solutions, companies are bringing many issues to the FPSC for resolution. The FPSC often must

consider issues in the context of arbitrations that the parties should have been able to work out themselves.

ILECs, when faced with the reality that any provision they negotiate with a CLEC may later be adopted by all other CLECs, are understandably reluctant to negotiate creative solutions with individual CLECs. Each CLEC likely has unique characteristics that distinguish it from other CLECs. They may serve in different regions, use different market entry strategies, and target different customer bases. For example, facilities-based competitors like Florida Digital Network may have very different needs than companies pursuing a UNE-P strategy. Under the "pick-and-choose" rule, ILECs that might have negotiated an agreement to address the unique needs of a particular CLEC may very well resist doing so for fear that *all* benefits offered to that CLEC (and *all* benefits offered to all CLECs) will subsequently be adopted by other CLECs and will be adopted without any of the burdens for which the benefits were offered in the first instance. Under the current scheme, CLECs that adopt favorable provisions from other CLEC agreements are not required–nor do they have any incentive–to adopt the corresponding benefits to the ILEC that were an integral part of the original agreement.

Simply put, the *quid pro quo* between an ILEC and a CLEC may be very different from the *quid pro quo* between that ILEC and another CLEC. The issue is one of fundamental fairness: if a party seeks the upside of a contract, it ought to take the downside. This is hornbook business law.

As previously stated, the best regulator of agreements between market participants is the market; however, the existing "pick-and-choose" rule hinders negotiations between market participants. The FPSC firmly believes that regulation ought to remove itself from negotiations

where it can and allow the parties to negotiate mutually beneficial interconnection agreements. Therefore, the FPSC supports elimination or revision of the current "pick-and-choose" rule, consistent with our long-standing policy of encouraging meaningful negotiation and resolution of issues in the telecommunications arena.

The carriers should be held to strict "good faith" negotiation strictures and should be subjected to monetary penalties when they fail to adhere to such practices.

Section 251 (c)(1) sets forth a duty of the Incumbent Local Exchange Carriers to negotiate in good faith the particular terms and conditions of agreements. The requesting carrier also has a duty to negotiate in good faith. Additionally, Section 252(b)(5) sets forth that the refusal to negotiate in good faith in the presence, or with the assistance, of the State Commission shall be considered a failure to negotiate in good faith. The FPSC believes this duty is a key to the success of market solutions. The FCC should rigorously ensure that the parties negotiate in good faith and should assess penalties for failure to do so. Thus, even though the pick-and-choose rule might be eliminated or revised, the duty to negotiate in good faith continues, pursuant to the 1996 Telecommunications Act.

Conclusion

Because the existing rule hinders negotiation, the FPSC urges the FCC to either eliminate the rule or revise it. If the rule is revised, Rule 51.809 should state:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any existing interconnection agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act upon the same terms and conditions provided in the overall agreement.

Either way, the duty to negotiate in good faith remains.

Also, the FPSC urges that the FCC does have the legal authority to make this change.

Respectfully submitted,

/s/

Cynthia B. Miller, Esquire
Office of Federal and Legislative Liaison

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

DATED: October 15, 2003