BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	
ADVANCED TELECOM GROUP, INC.,	)	Docket No. UT-990355
NEXTLINK WASHINGTON, INC.	)	
ELECTRIC LIGHTWAVE, INC.	)	
FRONTIER LOCAL SERVICES, INC., AND	)	
FRONTIER TELEMANAGEMENT, INC.	)	
	)	
For a Declaratory Order or Interpretive and	)	
Policy Statement on 47 U.S.C. Section 252(i)	)	
And 47 C.F.R. Section 51.809	)	

SUPPLEMENTAL COMMENTS OF AIRTOUCH PAGING

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TABLE OF CONTENTS

SUPPLEMENTAL COMMENTS OF AIRTOUCH PAGING

AirTouch Paging ("AirTouch"), by its attorneys, hereby files its Supplemental Comments in response to the *Notice of Opportunity to File Supplemental Comments* ("*Notice*") released in the above captioned proceeding.[1]

I.Introduction

As an initial matter, AirTouch applauds the effort of the Washington Utilities and Transportation Commission ("WUTC") to promulgate a policy statement and guidelines regarding the implementation and utilization of Section 252(i) of the Communications Act of 1934, as amended by, *inter alia*, the Telecommunications Act of 1996 (the "Act").[2] Section 252(i) establishes important rights to assist telecommunications carriers seeking to interconnect to a local exchange carrier ("LEC") network in reaching agreement quickly while guarding against discrimination by later agreements. Section 252(i), if properly implemented and enforced, can level the playing field in the context of interconnection relationships by ensuring that all telecommunications carriers have available to them the same terms and conditions for interconnection.[3] Section 252(i) also serves as an important check against a LEC's misuse of its significant market power in the course of interconnection negotiations. Thus, the effective implementation of Section 252(i) rights is essential to a fully competitive local telecommunications market. The WUTC properly recognized the importance of Section 252(i) by inviting comments on the captioned petitions to assist it in establishing broad policy guidelines governing Section 252(i) elections by telecommunications carriers in the state of

[1] Service date October 15, 1999.
[2] Of course, the WUTC's authority in this area is subject to, and must be exercised in accordance with, the Federal Communications Commission's Rules implementing the requirements of Section 252(i), namely 47 C.F.R. 51.809.
[3] In AirTouch's view, Section 252(i) is a specific form of nondiscrimination protection and is an extension of Sections 201 and 202 of the Act.

Washington.

AirTouch also commends the WUTC for releasing its Draft Interpretive and Policy Statement (the "Draft Statement") so promptly after initial comments were submitted. AirTouch is concerned, however, that the Draft Statement: (a) misreads the proper manner in which 252(i) elections can be made; (b) incorrectly limits the universe of telecommunications carriers which have 252(i) rights; and (c) fails to adequately recognize that the FCC and the federal courts have concurrent jurisdiction with respect to 252(i) disputes. AirTouch will address its concerns in greater detail below.

II.Discussion

Although AirTouch supports many of the WUTC's proposed guidelines for Section 252(i) implementation, certain of the draft principles must be modified to make them consistent with the language and intent of the Act and the FCC rules. AirTouch's proposed modifications are set forth below in greater detail below. As requested in the *Notice*, AirTouch also provides specific suggested revisions to the text of the draft principles.

A. Principle One

AirTouch agrees conceptually with this principle, but strongly disagrees that agreements adopted pursuant to Section 252(i) constitute negotiated agreements under Section 252(a) of the Act. The Act contemplates three different ways for telecommunications carriers to arrive at interconnection agreements: (a) voluntary negotiation pursuant to Section 252(a); (b) arbitration pursuant to Section 252(b); or (c) adoption of an existing interconnection agreement pursuant to Section 252(i). As the WUTC has itself recognized, Section 252(i) provides an important and in some ways unique avenue to pursue agreements because it allows the requesting carrier to immediately enter into an agreement without the cost and time required to negotiate or arbitrate

an agreement. Indeed, the WUTC's own records no doubt reflect that most new interconnection agreements arise out of adoptions pursuant to Section 252(i) of prior approved interconnection agreements. It would be most unfortunate for the WUTC to fail to acknowledge the unique category of "adopted agreements" - - as opposed to "arbitrated" or "negotiated" agreements.

It is important for the WUTC to maintain clear distinctions between negotiated, arbitrated and adopted agreements in order to give proper effect to the statutory scheme. For example, it is clear under certain rulings of the FCC and the courts that Section 252(i) rights are not subject to the procedures for negotiation and arbitration of agreements specified in Sections 252(a) and 252(b) of the Act. Thus, the FCC has ruled that "a carrier seeking interconnection, network elements, or services pursuant to Section 252(i) need not make such requests pursuant to the procedures for initial Section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." Implementation of the Local Competition Provisions of the 1996 Act, 11 FCC Rcd 15499, para 1321(1996). And, the Federal District Court for the Northern District of California has confirmed that the 135 to 160 day negotiating period that governs Section 252(a) interconnection requests does not control Section 252(i) requests. AirTouch Paging of California v. Pacific Bell, No. C-98-2216 MHP, 1999 U.S. Dist. LEXIS 16615 (N.D.CA, 1999). These decisions demonstrate the important distinction between negotiated and adopted agreements.

Maintaining that distinction is particularly important given Section 252(e) of the Act which requires state commission approval only of agreements "adopted by negotiation or arbitration." Nowhere does the Act provide that agreements adopted pursuant to Section 252(i)

should either be considered negotiated or required to be approved by the state commission.[4] In order to avoid doing violence to the statutory scheme, agreements adopted pursuant to Section 252(i) cannot properly be deemed "negotiated."[5] Consequently, state commission approval cannot be required in the context of adoption of an earlier agreement pursuant to Section 252(i).[6]

AirTouch also respectfully submits that Principle One, as well as the remaining principles, should be revised to reflect that the obligation to make previously approved agreements available is an obligation of all LECs, not only incumbent LECs (or "ILECs"). The Act delineates with great precision the classes of carriers who bear each of the obligations set forth in Sections 251 and 252. Notably, Section 252(i) does not impose the Section 252(i) obligations only on ILECs but rather expressly extends the obligation to a "local exchange carrier." Since Congress so carefully identified varying tiers of LECs and associated obligations, Congress' utilization of the phrase "local exchange carrier" rather than "incumbent local exchange carrier" or "ILEC" must be read as an intentional effort to obligate all LECs in this regard. This also makes sense from a policy perspective because it requires all local carriers to establish interconnection relationships on the same terms with all other carriers in that market;

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[4] This reading also eliminates any possible "daisy chain" issues. If an agreement adopted under Section 252(i), is considered negotiated under Section 252(a), then the adopted agreement itself would allow other carriers to opt into the 252(i) adoption agreement. AirTouch's reading prevents the daisy-chain in the way contemplated by Congress in the Act.

[5] While parties may wish to voluntarily seek state commission approval of such adopted agreements, and AirTouch supports their ability to chose to do so, AirTouch respectfully submits that such prior approval may not be made a condition of the exercise of Section 252(i) rights. AirTouch submits that the state commissions' role with respect to Section 252(i) should be not in the approval of agreements adopted pursuant thereto but, rather, in the protection and preservation of carriers' Section 252(i) rights. AirTouch believes that state commissions should share this role with federal courts and the FCC so that parties to a dispute have available to them the necessary avenues for redress of grievances under this Section of the Act. Recent federal court precedent supports this view. AirTouch Paging of California v. Pacific Bell, supra.

[6] This is true even if the agreement is the result of pick and choose. Pick and choose merely allows the requesting carrier to select provisions from various previously approved interconnection agreements rather than just adopting one in its entirety.

thus, promoting interconnection among and between all carriers.

Based upon the foregoing, the WUTC should strike the first two sentences of draft Principle One. The WUTC also should strike from the last sentence the following text: "and of individual arrangements that result from pick and choose." Also, the WUTC should change any and all references from "ILECs" to "LECs."

B. Principle Two

Generally, AirTouch agrees with this principle as stated. The reference to "other minor changes" should, however, be clarified to make clear that the contemplated "minor changes" are only those necessary to effect the substitution of parties.

C. Principle Three

AirTouch agrees with the portion of Principle Three providing that requesting telecommunications carriers who adopt WUTC-approved agreements pursuant to Section 252(i) are not automatically bound by subsequent amendments to the underlying agreement. This principle properly recognizes that forcing carriers to be subject to such amendments would have a significant chilling effect on carriers' exercise of Section 252(i) rights. However, AirTouch respectfully submits that the other portion of the principle, which provides that amended agreements may be adopted only in their amended form, should be revised. This portion of the principle appears to create an absolute bar against a telecommunications carrier adopting a pre-amendment form of an agreement. AirTouch respectfully submits that an absolute bar of this nature is not consistent with the intent of Section 252(i).

The appropriateness of allowing a requesting carrier to adopt a pre-amendment form of an agreement depends upon the facts of the particular circumstances. For example, an amendment which merely reflects change in the particular circumstances between the two original parties to

the agreement, but not an intent on the part of the LEC to cease offering the particular service which was the subject of the pre-amended form of agreement, should be subject to opt-in requests, provided that the carrier seeking to opt-in meets the standards set by Section 51.809 of the FCC's rules. For example, the interconnecting carrier and the LEC might decide to amend the agreement to reflect a new category or class of services offered by the interconnecting carrier while others who don't offer that service would naturally prefer the previous version of the agreement. The WUTC should have a flexible principle that accommodates this result. In this way, subsequent telecommunications carriers will be permitted to opt-into arrangements that the LEC is continuing to offer, and the LEC will have the ability, consistent with Section 252(i) and Section 51.809 of the FCC's Rules, to oppose the opt-in request based upon the demonstrations set forth by the WUTC in draft Principle Nine. In this way, telecommunications carriers which may enter the market later in time will not be disadvantaged by the amendment of an agreement.[7] Stated another way, since a requesting carrier is allowed to "pick and choose" provisions from a previously-approved agreement, it certainly is within the realm of possibility that the carrier will not choose the amended provisions of an agreement. In light of the foregoing, the WUTC should not establish a rule prohibiting *per se* the adoption of a pre-amendment form of agreement. Rather, the WUTC, FCC or court should address disputes in this regard on a case-by-case basis.

AirTouch requests that the text of the first sentence of draft Principle Three be revised to read as follows: "An interconnection arrangement that has been amended must be made available

[7] For example, a new entrant carrier may negotiate an agreement that provides for certain switching and transport charges because the carrier does not have a switch at that time. After the carrier installs a switch, the LEC and the carrier may amend the agreement to eliminate the switching and transport that are no longer needed. If a new entrant comes along before the agreement is amended, it would be able to use the same agreement to enter the market. However, if the new carrier needs the pre-amendment agreement and it enters the market after the agreement is amended, they would have to negotiate a new agreement. This makes no sense from a public policy standpoint.

pursuant to Section 252(i) in its amended form; such amended arrangement also must be made available in its pre-amended form providing that such availability is consistent with the limitations contained in Section 252(i) of the Communications Act and Section 51.809 of the FCC's Rules."

D. Principle Four

AirTouch agrees with Principle Four, that agreements which are arbitrated, negotiated, or both, are subject to the rights afforded by Section 252(i). This reading is fully consistent with the statutory language, which provides that agreements approved by state commissions (*i.e.*, those arrived at pursuant to arbitration and/or negotiation) must be made available to other telecommunications carriers.

E. Principle Five

AirTouch respectfully submits that a request to adopt an agreement (or portion thereof) pursuant to Section 252(i) of the Act should not constitute an "amendment" to an existing agreement between the two carriers. As the WUTC notes in the draft principles, amendments to agreements must be filed with and approved by the WUTC. As was pointed out in the discussion above concerning Principle One, agreements adopted pursuant to Section 252(i) do not require prior approval of the state commission. Transforming the adoption of an agreement under Section 252(i) into an amendment to an agreement would subvert the express language of the Act in this regard.[8] Instead, AirTouch submits that all Section 252(i) requests should be treated separately from the negotiation and arbitration process. The state commission should be

[8] As mentioned with respect to principle one above, Section 252(e)(1) only applies to agreements "negotiated or arbitrated" under the Act requiring 252(i) opt-in requests as amendments requiring approval would create a situation where 252(i) opt-in amendment becomes subject to 252(i) opt-in requests. This makes no sense and creates the possibility of "daisy chain" problems.

concerned solely with enforcing Section 252(i) rights.[9]

[9] Of course, there may exist independent sources of authority for the state commission to require that certain agreements between telecommunications carriers be filed with the state commission.

This draft principle also should be revised to reflect that the obligations under Section 252(i) apply to all LECs, not just ILECs, as discussed above. Finally, this principle should be modified to reflect that the rights under Section 252(i) run to the benefit of all telecommunications carriers, not just competitive LECs (or "CLECs") or carriers providing "local exchange telecommunications." Section 252(i) expressly provides that agreements must be made available to other "telecommunications carriers." There is no public policy basis to exclude any other telecommunications carrier and indeed the Act would prohibit such discrimination.[10]

AirTouch submits that the text of Principle Five should be revised to read as follows:

> Principle 5: An interconnecting carrier that enters into a negotiated or arbitrated agreement may invoke its rights under Section 252(i) and the pick and choose rule during the term of its agreement. The intent of the pick and choose rule is to allow all telecommunications carriers to reach interconnection arrangements quickly by taking interconnection under an already-approved agreement without incurring the costs of negotiation and arbitration. In addition, the pick and choose rule constrains LECs' ability to discriminate among telecommunications carriers.

F. Principles Six and Seven

AirTouch agrees with the concept in draft Principle Six that previously approved agreements should be available for adoption by other telecommunications carriers for the entire term. AirTouch submits that this is the appropriate approach for at least two reasons. First, as long as the LEC party to the underlying agreement is offering the agreement to other carriers, it should be available to other requesting carriers.[11] This will avoid LEC discrimination between

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[10] Indeed, the FCC has found that LECs may not discriminate against a carrier that attempts to exercise its 252(I) rights due to the type of customers that the requesting carrier serves, or the type of services that the requesting carrier offers. See: In the Matter of Implementation of the local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, ¶1318.

carriers. Thus, this principle is consistent with the Act. Second, it makes sense. As AirTouch suggested in its initial Comments filed in this proceeding, the carrier seeking to adopt a previously approved agreement pursuant to Section 252(i) should receive the same rights as did the underlying carrier.

AirTouch respectfully submits that there is no reason to distinguish between carriers with existing interconnection agreements and carriers without such agreements for the purpose of determining what is a "reasonable time" during which an underlying agreement must be made available for adoption. Carriers with existing agreements do not have any greater access to other approved agreements than do carriers without such agreements. Also, the exercise of Section 252(i) rights by carriers with or without existing interconnection agreements is identical. AirTouch respectfully submits that the "reasonable time" during which an agreement must be made available should be the entire term of the agreement, regardless of the existence of an interconnection agreement between the parties.

AirTouch also submits that draft Principles Six and Seven should be revised as discussed above to reflect that the obligations of Section 252(i) apply to all LECs.

Based upon the foregoing, AirTouch submits that the text of these draft principles should be revised as follows: (a) in Principle Six, the two references to "ILECs" should be changed to "LECs;" and (b) in Principle Seven, the reference in the first sentence to "incumbent carrier" should be changed to "LEC," and the last two sentences should be deleted.

G. Principle Eight

AirTouch agrees with the underlying theme espoused in Principle Eight: that the party

[11] This should be the case regardless of whether the agreement is in its original term, or in a renewal term, or is still in effect otherwise. This would prevent LECs from choosing very short terms to defeat 252(i) rights and subsequently allowing them to be renewed endlessly.

adopting and the party to the underlying agreement should not be subject to discriminatory treatment. In other words, both parties should enjoy the same economic and other benefits of the agreement to which they both are parties. If a party opting into an agreement is left with only the remaining term, several perverse incentives are created for delay. First, LECs would be incented to delay honoring an

opt- in request if delay will deny the requesting carrier the full benefits of the agreement. Second, carriers may be disincented to enter into agreements pursuant to Section 252(i) toward the end of an initial term if they are forced to accept a very short remaining term and uncertainty concerning the renewal process. This would have a significant chilling effect on the exercise of Section 252(i) rights.

Based upon this fundamental premise, AirTouch respectfully submits that draft Principle Eight should be revised to provide that a carrier exercising its Section 252(i) rights is entitled to either: (a) an agreement that has the same period as the underlying agreement, (*e.g.*, from "x" date until "x" date, in the case of an agreement which specifies a date-certain termination date); or (b) an agreement that runs for the same duration as the underlying agreement (*e.g.*, from the effective date of the adoption for a period of "x" years, as provided in the underlying agreement, where only the duration of the agreement is specified but no terminal date is noted). It is only in this way that a carrier adopting an agreement pursuant to Section 252(i) will receive the same terms of an arrangement as the party to the underlying agreement. Otherwise a requesting carrier who requests an agreement nine months into its two year term may be precluded from getting the remaining 15 months of the benefit of the agreement that the underlying carrier received. In some cases, agreements only make sense when they are available during the same entire term, so this will serve the public interest benefits of promoting local competition. Therefore, it is only in

this way that discrimination may be avoided.

In light of the foregoing, AirTouch respectfully submits that draft Principle Eight should be revised to read as follows:

> Principle 8: An interconnection arrangement requested pursuant to Section 252(i) must be made available for the same period of time as the underlying interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that included a fixed term with a date-certain termination date of December 31, 2000, the economic terms of that agreement should be available to requesting carriers for the entire term (*i.e.*, from the underlying agreement's effective date to the specified termination date). If the interconnection arrangement was included in an agreement that provided a duration (*e.g.*, two years) but not a specific termination date, then the economic terms of the agreement should be available for a period of two years from the new agreement's effective date. In that context, the parties also may voluntarily agree that the two-year term will run concurrently with the two-year term of the underlying agreement. The purpose of requiring that the terms of the underlying agreement are made available for the same term and/or duration of the underlying agreement is to ensure non-discriminatory treatment of carriers, including the carrier who negotiates or arbitrated the initial agreement. This also creates incentives for LECs and other telecommunications carriers to negotiate in good faith, knowing that their agreement will be available to other telecommunications carriers on an equal basis.

H. Principle Nine

AirTouch supports the concepts embodied in draft Principle Nine, but believes that the draft principle should be refined in order to make it more accurate and complete. First, as discussed above, the draft principle should be revised to reflect that Section 252(i) obligations apply to all LECs. Also, the draft principle requires a LEC disputing a Section 252(i) request to demonstrate that the costs of providing the requested interconnection, service or element are different for the requesting carrier or that such provision is not technically feasible. The principle

then specifies what the LEC must prove to demonstrate a cost difference. The principle should also, but does not currently, specify the proof needed to demonstrate technical infeasibility and the level of proof required. Finally, the principle should be revised to reflect the established policy that not only state commissions, but also the FCC and federal courts are appropriate avenues for relief in a Section 252(i) dispute. See, e.g. AirTouch Paging of California v. Pacific Bell, supra.

In light of the foregoing, AirTouch respectfully submits that draft Principle Nine should be revised as follows: (a) all references in the draft principle to "ILECs" should be changed to "LECs;" (b) a sentence should be added before the last sentence in the draft principle which reads as follows "A LEC claiming that the provision of the individual interconnection, service, or element is not technically feasible shall make such demonstration consistent with the Federal Communications Commission's applicable rules and orders, including the *First Report and Or*der issued in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15, 499 (1996); and (c) the first sentence should be revised to read ". . . proves to the Commission, the FCC or a federal court by a preponderance of the evidence . . . ."

I. Principle Ten

As provided above, this draft principle should be revised to reflect that Section 252(i) obligations apply to all LECs.

Therefore, all references to "ILECs" in draft Principle Ten should be revised to read "LECs."

J. Additional Policy Statements

The WUTC's Draft Statement contains additional policies following the ten principles upon which AirTouch has provided supplemental comments. Those additional policies pertain to the implementation of Section 252(i) and, therefore, are similarly critical to carriers' exercise of their rights in this regard.

Paragraphs 23 through 30 of the Draft Statement pertain specifically to how a requesting carrier exercises and enforces its Section 252(i) rights. AirTouch has a common set of comments on these paragraphs. First, to the extent they refer to ILECs and CLECs, they should be revised. Since the obligations and rights of Section 252(i) apply to all LECs and telecommunications carriers, the text of these paragraphs should be revised accordingly. Also, for the reasons discussed above, AirTouch submits that the requirement that Section 252(i) requests be made in the same fashion as 252(a)(1) requests should be removed, since the 252(i) and 252(a)(1) processes are separate and distinct because of the differing roles the statute assigns to state commissions in these two contexts. Finally, to the extent that the paragraphs discuss carriers' filing petitions or otherwise bringing disputes to the WUTC for resolution, AirTouch respectfully submits that the paragraphs should be revised to reflect that such disputes also may be brought before and resolved by the FCC or federal courts, to acknowledge that those bodies also may have jurisdiction over disputes arising out of Section 252(i).

Paragraph 29 provides that since the FCC has ruled that carriers with existing interconnection agreements are entitled to exercise their Section 252(i) rights regardless of whether a provision to that effect is contained in the existing agreement. Therefore, all interconnection agreements are deemed to include this provision unless the parties expressly waive it. While AirTouch agrees with this principle, AirTouch fears that this may cause LECs to

try to force carriers to omit these provisions from their interconnection agreements, by arguing that there presence in the agreement is "automatic." The WUTC should look carefully at agreements which do not contain explicit statement of these rights, because they may reflect the LEC's effort to de-emphasize and not explicitly commit to recognizing carriers' Section 252(i) rights. Also, to the extent that a particular state commission does not believe these provisions are automatically contained in interconnection agreements, parties with agreements covering Washington as well as those other states may be harmed by a failure to include a provision of this nature in the agreement.

Finally, with respect to paragraph 31 which discusses changes in the WUTC's policy, AirTouch respectfully submits that the following words should be submitted at the end of that provision: "after notice and opportunity to comment." AirTouch submits that due process requires that the public be given an opportunity to submit comments to the WUTC before the implementation of any policy change regarding Section 252(i) rights.

III.Conclusion

In sum, AirTouch agrees with the underlying policies in many of the WUTC's draft principles. AirTouch believes the WUTC has made substantial progress toward the establishment of guidelines to permit the effective exercise of Section 252(i) rights. AirTouch believes further that, with the limited modifications to those draft principles proposed above, the WUTC's ultimate policy statement will provide meaningful assistance to carriers seeking to enjoy and/or enforce their Section 252(i) rights.

Based upon the foregoing, AirTouch respectfully requests that the WUTC modify its Draft Statement in accord with these Supplemental Comments.

Respectfully submitted,

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