BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rules Relating to Pick and Choose Provisions of the Telecommunications Act of 1996	Docket No. UT-990391
	COMMENTS OF RHYTHMS LINKS, INC.

INTRODUCTION

Rhythms Links, Inc. ("Rhythms") is a nationwide provider of high-performance, high-speed data services, primarily using digital subscriber line (DSL) technology for high-speed local access to and from end users' desktops. It provides highly reliable data networking solutions to residential and business consumers in Washington. Rhythms is a competitive local exchange carrier (CLEC), and has substantial experience negotiating with ILECs around the country and has on occasion, sought to exercise rights under 252(i) to adopt either individual elements, services, interconnection arrangements or entire agreements.

Rhythms believes that adoption of rules, based on a proper interpretation of 252(i) will facilitate rapid introduction of competition in Washington state and lead to quicker and broader-based provision of new services for Washington consumers. Rhythms urges the Commission to adopt clear, simple, and practical rules implementing 252(i) of the Telecommunications Act of 1996 ("1996 Act").

Adoption of formal rules would serve the pro-competitive purposes of the 1996 Act as well as the principles of nondiscrimination inherent in Section 252(i). Rhythms believes such rules would largely be consistent with the 10 principles already enunciated by the Commission in its Interpretative and Policy Statement on 252(i) (Policy Statement) adopted at the Commission's Open Meeting on November 30, 1999. However, Rhythms believes certain

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principles still require some adjustment to be consistent with the goals of section 252(i).

More specifically, Rhythms suggests adoption of rules that are consistent with the following principles:

(1) Under the rules, a requesting carrier should be able to adopt new elements, services, or interconnection arrangements at any time by filing a notice requesting adoption with the Commission, *effective immediately upon such filing.* As the Commission already has approved the adopted agreement or arrangement, there seems little reason for an additional approval step.

(2) The rules should ensure rapid adoption of terms under 252(i) by limiting delays that may be sought by incumbent local exchange carriers (ILECs) and the number and breadth of other terms and conditions that ILECs may claim to be adopted provisions that are reasonably related. In particular, ILECs should not be able to block adoption by a claim of excessive costs – this would simply invite disputes and delays.

(3) The rules also should clarify that Section 252(i) rights are exercisable at any time during the term of the original agreement. This is particularly important given US West's track record of filing appeals and contesting interconnection agreements, which places a hold over the use of 252(i) rights, especially during the early time period because it would lead to unnecessary administrative burdens.

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Adherence to these principles will ensure that the right of CLECs to exercise pick and choose under 252(i) cannot be turned into another barrier to effective competition in Washington state.

THE NEED FOR RULES

Rhythms strongly urges the Commission to adopt formal rules to govern the 252(i) process in Washington state. Although Rhythms agrees with many of the principles described by the Commission in its Policy Statement, Rhythms believes that the adoption of formal rules will more effectively serve competitive entry for CLECs in Washington state. Formal rules will provide clearer guidance, and help deter ILECs from further delaying or frustrating the use of 252(i) by CLECs.

The Commission's Policy Statement and the revised principles described therein, state that it "*may revise this statement or adopt rules replacing this statement.*"[1] Therefore, where Rhythms disagrees with any of the principles or that disagreement is reflected in draft rule language, Rhythms provides an explanation under the relevant principle outlined below. In accordance to the Commission's request for draft language for proposed rules, Rhythms makes the following suggestions:

* * *

[1] *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996 Interpretative and Policy Statement (November 30, 1999), Para. 31.*

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Suggested Draft Rule Language

New Chapter _____

Notice

A requesting carrier may, at any time, give notice that it will adopt, from an ILEC's approved agreements under the 1996 Act, an existing agreement in whole, or an existing set of terms governing the chosen network element(s), service(s) or interconnection arrangement(s). The requesting carrier will serve its notice on the applicable ILEC at the same time as it files the notice with the Commission.

Content of Notice

The requesting carrier will include with its notice of adoption the proposed language of the agreement or set of terms. The requesting carrier may alter only the language in the existing agreement or set of terms that identifies the requesting carrier and its address(es), employees, and agents. The requesting carrier will also identify any existing agreement it has and whether the proposed adoption will supplement, or replace in whole or in part, its existing agreement and the duration of each agreement or set of terms.

Objection to Notice

Any ILEC receiving a notice of adoption pursuant to these new rules (WAC _____) must object to the proposed adoption by filing its objection within ten (10) calendar days of actual receipt of the adoption notice. If no objection is received by the Commission within that period, the adoption will be deemed to have occurred and will be approved by the Commission at the next Commission public meeting.

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Content of Objection

The ILEC may only object to an adoption notice under these rules (WAC _____) on the grounds that (a) the proposed adoption is not technically feasible, (b) the costs of following the adopted agreement or set of terms is materially greater than in the original agreement and will *materially and adversely* affect the ILEC, or (c) the requesting carrier seeks to exclude terms or conditions that are reasonably related to the requested set of terms.

Improper Bases of Objection

The following shall not be a proper basis for objection: (a) as to lack of technical feasibility, any objection that fails to explain why the requesting carrier is differently situated than the carrier with the original agreement; (b) as to greater costs, any objection that fails to explain why the ILEC's costs are material and will adversely affect the ILEC's operations and are not recovered under the original agreement through either recurring or non-recurring charges; and (c) as to a claim that reasonably related terms were excluded, any objection that fails to explain why the excluded terms are necessary to the proposed adoption, or any objection which relies on language in the original agreement that categorically states excluded terms are reasonably related.

Expedited Procedure

The Commission shall resolve appropriate objections under a new WAC rule for 252(i) disputes pursuant to its expedited procedures in WAC 480-09-530. A requesting carrier is not required to engage in negotiations prior to petitioning for enforcement under 252(i). Prior to the first hearing, the requesting carrier may file an answer responding to the ILEC's objection. If the Commission determines that the requesting carrier's response sufficiently overcomes the ILEC's objection, it may approve the proposed adoption by the requesting carrier. The

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Commission will consider imposition of penalties if the ILEC's objections are frivolous, raised in bad faith or interposed for delay.

* * *

In the following paragraphs, Rhythms states the basis of its agreement with certain principles adopted by the Commission, but provides additional explanation as to its disagreement with other principles for further consideration by the Commission and its staff.

Principles 1 and 4

Rhythms agrees with the Commission's conclusion that it should not differentiate between negotiated and arbitrated arrangements when considering requests under Section 252(i). There are many reasons why a requesting carrier might combine negotiated terms with adoption of existing terms, or adoption of terms from two or more different agreements. For instance, because of a particular carrier's chosen business plan or technology, it might find it helpful to adopt an existing collocation arrangement, while developing new ordering processes for unbundled loops. Both the competitive process and Washington consumers will benefit from the flexibility that is supported by Principles 1 and 4.

Principle 2

Given the need for speed and simplicity in the 252(i) process, a requesting carrier should be able to choose its own combination of elements, services, or arrangements (or an entire agreement), but necessarily will be constrained by existing language. As is provided in the suggested rules above, the requesting carrier should only substitute identifying language for itself.

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Principle 3

Rhythms does not concur that existing agreements may only be made available to requesting carriers in their amended form. It is not clear to Rhythms why the flexibility underlying Principles 1 and 4, is not also applied to Principle 3. Rhythms, however, agrees that requesting carriers should not be automatically bound to any subsequent amendments to the original agreement, particularly where the adopting carrier had no knowledge of such amendments at adoption or when negotiated. Indeed, forcing the adopting carrier to accept subsequent amendments is antithetical to the competitive process and it could place carriers with different needs and plans in lockstep with each other's contractual arrangements.

Principle 5

Rhythms supports the proposition that requesting carriers can supplement or enhance their existing agreements by adopting new or additional items during the term of their original agreement. Not only will this help avoid discrimination, it will also permit competitive carriers to improve technology or service quality and avoid freezing in place outmoded or inefficient arrangements.

Principle 6

It is not clear to Rhythms why expired provisions should not be made available absent a showing that cost or technological constraints have changed substantially or there has been a change in law, since the agreement was in effect and bound the ILECs at one point in time. Certain provisions, despite expiration, will continue to be applicable to agreements between requesting carriers and ILECs. Subjecting requesting carriers to need to re-negotiate such provisions will delay competition and increase costs to requesting carriers.

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Principle 7

Given the benefits of 252(i), particularly for carriers with older agreements that may no longer reflect best current practices, policy or technology, requesting carriers should not be time-barred from seeking new and improved provisions. Such a provision would provide ILECs with additional incentive to appeal or contest agreements to place a hold over 252(i) rights, and might lead to administrative burdens in distinguishing which carriers waited on their adoption rights too long. Nevertheless, Rhythms agrees that it is appropriate that carriers already subject to existing agreements should be able to improve or supplement those agreements.

Principle 8

See comments to Principle 6.

Principle 9

The Commission should have grave concerns with ILECs seeking to show that technological or cost considerations block new carriers from using existing arrangements or agreements. In fact, it is difficult to conceive of the existence of such considerations given the use of common equipment systems and procedures across the industry, although ILECs certainly will have an incentive to claim they exist. With regard to cost clauses in particular, the Commission should rarely, if ever, give them merit because of their more subjective nature and the ILECs' control of cost information. In any event, where such claims are made, it is vital that the Commission expeditiously resolve them and remove the means, to the extent possible, for ILECs to misuse this process for their own ends.

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Principle 10

Rhythms strongly supports the Commission's requirement that the ILEC bear the burden of proof and that the "reasonably related" standard must be stringently applied to avoid ILEC gamesmanship.

In addition, the Commission should be reminded of the great potential for mischief where ILECs insist on language in agreements that determines in advance that numerous items or terms are "reasonably related," or claims after execution that a new requesting carrier must accept every new provisions in order to opt into a single arrangement. The Commission is well justified in its skepticism concerning ILECs claims and in placing the burden on ILECs in this respect. Moreover, the Commission expressly should make plain that it will disregard language in an agreement subsequent to adoption which seeks to bind later parties as to which terms are "reasonably related."

PROCEDURES

Rhythms respectfully urges the Commission to reconsider certain aspects of the principles adopted in its Policy Statement, by adopting formal rules that ensure that CLECs right to pick and choose under 252(i) are easily implemented and enforceable by this Commission. Rhythms continues to be concerned that the Comission's Policy Statement does not make sufficiently clear that enforcement of the right to pick and choose under 252(i) is not first subject to a negotiation process. Not only will a negotiation process cause delays, it will create disputes where none should exist and defeat the very purpose of a statutory provision, eliminating unnecessary time delays and other costs associated with negotiations under the 1996 Act. Instead, requesting carriers should be permitted to simply notify the Commission which provisions or

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agreements they wish to adopt. This notice procedure was recently adopted in California[2] as it avoids needless delay and expense in the adoption process.

A simple process of notification will better serve 252(i)'s twin objectives of increased competition and forestalling discrimination, especially when coupled with rules that place the burden on ILECs to dispute adoption, and establishment of an expedited dispute resolution process. The creation of a two-step process requiring petitions and answers to enforce a requesting carrier's right to pick and choose specific terms and conditions, or entire agreements, will only further delay and complicate use of 252(i) by CLECs. In the three years since passage of the 1996 Act, it is clear that ILECs will use every conceivable opportunity to delay and litigate against competitive entry. Rather than provide further vehicles and opportunities for ILECs to continue to deter competition, the Commission should put the burden on the ILECs and force them to object to a simple notification of adoption.

DATED this 3rd day of December, 1999.

Respectfully Submitted,
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by: _____
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[2] *Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996, Rule 7. Process for Adopting a Previously Approved Agreement (or Portions of an Agreement) Pursuant to 252(i), California Public Utilities Commission, (Approved November 18, 1999).*

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