

1 **BEFORE THE**
2 **WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

3 Rules Relating to Pick and Choose) Docket No. UT-990391
4 Provisions of the Telecommunications)
5 Act of 1996) **COMMENTS OF TELIGENT SERVICES, INC.**

6 **INTRODUCTION**

7 Teligent Services, Inc. ("Teligent") is a full-service, integrated communications company
8 offering high-quality local, long-distance, high speed data, and dedicated Internet services to
9 small and medium-sized business customers in Washington State. Teligent is a competitive local
10 exchange carrier (CLEC), with substantial experience negotiating with ILECs around the country
11 and has on occasion, sought to exercise rights under 252(i) to adopt either individual elements,
12 services and interconnection arrangements or entire agreements.

13
14 Teligent believes that adoption of rules, based on a proper interpretation of 252(i) will
15 facilitate rapid introduction of competition in Washington state and lead to quicker and
16 broader-based provisioning of new services for Washington consumers. Teligent urges the
17 Commission to adopt clear, simple, and practical rules implementing 252(i) of the
18 Telecommunications Act of 1996 ("1996 Act").

19
20 Adoption of formal rules would serve the pro-competitive purposes of the 1996 Act as
21 well as the principles of nondiscrimination inherent in Section 252(i). Teligent believes such
22 rules would largely be consistent with the 10 principles already enunciated by the Commission
23 in its Interpretative and Policy Statement on 252(i) (Policy Statement) adopted at the
24 Commission's Open Meeting on November 30, 1999. However, Teligent believes certain
25 principles still require some adjustment to be consistent with the goals of section 252(i).

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More specifically, Teligent suggests adoption of rules that are consistent with several principles. The new rules should ensure that a requesting carrier is able to adopt new elements, services, or interconnection arrangements at any time by filing a notice requesting adoption with the Commission. In addition, the rules should allow 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. The rules also should clarify that Section 252(i) rights may be exercised at any time during the term of the original agreement. Adherence to these principles will ensure that the right of CLECs to exercise pick and choose under 252(i) will facilitate effective competition in Washington state.

THE NEED FOR RULES

Teligent strongly urges the Commission to adopt formal rules to govern the 252(i) process in Washington state. Although Teligent agrees with many of the principles described by the Commission in its Policy Statement, Teligent 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 Teligent disagrees with any of the principles or that disagreement is reflected in draft rule

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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1 language, Teligent provides an explanation under the relevant principle outlined below. In
2 accordance to the Commission's request for draft language for proposed rules, Teligent makes
3 the following suggestions:

4 * * *

5 ***Suggested Draft Rule Language***

6 *New Chapter* _____

7 *Notice*

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

13
14 *Content of Notice*

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

21
22 *Objection to Notice*

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

3
4 *Content of Objection*

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

10
11 *Improper Bases of Objection*

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

20
21 *Expedited Procedure*

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

3
4 * * *

5
6 In the following paragraphs, Teligent states the basis of its agreement with certain
7 principles adopted by the Commission, but provides additional explanation as to its disagreement
8 with other principles for further consideration by the Commission and its staff.

9
10 *Principles 1 and 4*

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

19
20 *Principle 2*

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

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Principle 3

Teligent does not concur that existing agreements may only be made available to requesting carriers in its amended form. It is not clear to Teligent why the flexibility underlying Principles 1 and 4, is not also applied to Principle 3. Teligent 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.

Principle 5

Teligent 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 Teligent why expired provisions should not be made available absent a showing that cost or technological constraints have changed substantially, 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. Requiring requesting carriers to re-negotiate such provisions will delay competition and increase costs to requesting carriers.

1 *Principle 7*

2 Given the benefits of 252(i), particularly for carriers with older agreements that may no
3 longer reflect best current practices, policy or technology, requesting carriers should not be
4 time-barred from seeking new and improved provisions. Teligent agrees however, that it is
5 appropriate that carriers already subject to existing agreements should be able to improve or
6 supplement those agreements.

7
8 *Principle 8*

9 See comments to Principle 6.

10
11 *Principle 9*

12 The Commission should have grave concerns with ILECs seeking to show that
13 technological or cost considerations block new carriers from using existing arrangements or
14 agreements. In fact, it is difficult to conceive of the existence of such considerations given the
15 use of common equipment systems and procedures across the industry, although ILECs certainly
16 will have an incentive to claim they exist. In any event, where such claims are made, it is vital
17 that the Commission expeditiously resolve them and remove the means, to the extent possible,
18 for ILECs to misuse this process for their own ends.

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20 *Principle 10*

21 Teligent strongly supports the Commission’s requirement that the ILEC bear the burden
22 of proof and that the “reasonably related” standard must be stringently applied to avoid ILEC
23 gamesmanship.

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

10 PROCEDURES

11 Teligent respectfully urges the Commission to reconsider certain aspects of the principles
12 adopted in its Policy Statement. Teligent continues to be concerned that the Commission's
13 Policy Statement does not make sufficiently clear that enforcement of the right to pick and
14 choose under 252(i) is not first subject to a negotiation process. Not only will a negotiation
15 process cause delays; it will create disputes where none should exist. Instead, requesting carriers
16 should be permitted simply to notify the Commission which provisions or agreements they wish
17 to adopt. This notice procedure was recently adopted in California² as it avoids needless delay
18 and expense in the adoption process.

19
20 A simple process of notification will better serve 252(i)'s twin objectives of increased
21 competition and forestalling discrimination, especially when coupled with rules that place the
22 burden on ILECs to dispute adoption, and establishment of an expedited dispute resolution
23 process. The creation of a two-step process requiring petitions and answers to enforce a

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

1 requesting carrier's right to pick and choose specific terms and conditions, or entire agreements,
2 will only further delay and complicate use of 252(i) by CLECs. In the three years since passage
3 of the 1996 Act, it is clear that ILECs will use every conceivable opportunity to delay and litigate
4 against competitive entry. Rather than provide further vehicles and opportunities for ILECs to
5 continue to deter competition, the Commission should put the burden on the ILECs and force
6 them to object to a simple notification of adoption.

7
8 DATED this 3rd day of December 1999.

9 Respectfully Submitted,

10 ATER WYNNE LLP

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