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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996	)))	DOCKET NO. UT-990355
....	)	Interpretive and Policy Statement (First Revision)

INTRODUCTION

1. The Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* (Act), is intended to foster local exchange competition by imposing certain requirements on incumbent local exchange companies (ILECs) that are designed to facilitate the entry of competitive local exchange companies (CLECs). Pursuant to Section 252(i) of the Act, local exchange carriers must "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

2. Section 252 of the Act sets forth the procedures through which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services from an ILEC. Section 252(e)(1) of the Act states that any interconnection agreement resulting from negotiation or arbitration must be submitted to the Commission for approval. In addition to the general procedures for approving negotiated or arbitrated agreements set forth in Section 252 of the Act, the Commission implemented supplemental procedures to serve as guidelines in proceedings under the Act.[1]

3. The Commission has concluded that in the event that parties revise, modify, or amend an agreement approved by the Commission, the revised, modified, or amended agreement will be deemed a new agreement under the Act. The new agreement must be submitted to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant provisions of state law, prior to taking effect. A request by a telecommunications carrier with an existing agreement that an ILEC make available an arrangement under Section 252(i) also constitutes a request to revise, modify, or amend the agreement. Accordingly, the Commission has concluded that a Section 252(i) request is not self-executing and must be submitted to the Commission for approval.[2] Likewise, a request by a carrier without an existing interconnection agreement also must be submitted to the Commission for approval.

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[1] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Interpretative and Policy Statement, WUTC Docket No. UT-960296, 170 PUR4th 367 (June 28, 1996).

[2] *NEXTLINK Washington, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-990340, Commission Order Adopting Recommended Decision, In Part, and Modifying Recommended Decision, In Part (September 9, 1999) (NEXTLINK Order).

4. These conclusions are consistent with the FCC's policy of leaving to state commissions, in the first instance, the details of the procedures for making arrangements in approved agreements available to requesting carriers on an expedited basis.[3] Different procedures must be instituted to implement Section 252(i) requests depending on whether the requesting party is subject to an existing agreement. In all instances, the procedures instituted by the Commission provide parties with non-discriminatory, expedited means for taking advantage of available arrangements in any existing approved agreement.

5. The Federal Communications Commission (FCC) has described Section 252(i) as a "primary tool" of the Act for preventing improper discrimination among carriers.[4] The FCC specifically requires that the incumbent must make available provisions of an agreement "without unreasonable delay." 47 C.F.R. § 51.809(a). This rule commonly is called the "pick and choose" rule.

PROCEDURAL HISTORY

6. On June 15, 1999, Advanced TelCom Group, Inc., NEXTLINK Washington, Inc., Electric Lightwave, Inc., Frontier Local Services, Inc., and Frontier Telemanagement, Inc. (collectively "Petitioners") filed a petition requesting that the Commission issue a declaratory order or an interpretive and policy statement regarding implementation of the pick and choose rule. The petitioners alleged that their efforts to "pick and choose" provisions from existing interconnection agreements have demonstrated uncertainty as to the implementation of the pick and choose rule.

7. On June 29, 1999, the Commission served a Notice of Receipt of Petition for Declaratory Order or Interpretive and Policy Statement and Opportunity to Submit Statement of Fact and Law by July 16, 1999, on interested persons. The Commission received statements of fact and law from AirTouch Paging, Inc., U S WEST, Inc., and GTE NW, Corp. in response to this notice. On October 15, 1999, the Commission issued further notice to file supplemental comments regarding the draft interpretive and policy statement. In response, the Commission received comments from the Joint Petitioners, Airtouch Paging, U S WEST, GTE, American Telephone Technology, Inc. (ATTI), Covad Communications Company (Covad), MCI Worldcom, Inc. and Level 3 Communications, Inc. (MCI), and Sprint Communications Company L.P. and United Telephone Company of the Northwest d/b/a/ Sprint (Sprint).

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[3] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, 16141, First Report and Order (August 8, 1996) (Local Competition Order).

[4] Id. at 16132

8. In preparing this Interpretive and Policy Statement, the Commission reviewed the petition, the statements of fact and law, and supplemental comments from all parties.

STATEMENT OF POLICY

9. The Commission issues this interpretive and policy statement pursuant to WAC 480-09-200 and applicable provisions of the Administrative Procedure Act (APA), including RCW 34.05.010(8), (10), and RCW 34.05.230. The general purpose of the statement is to establish guidelines for parties seeking to pick and choose pursuant to Section 252(i) of the Act, and to inform the telecommunications industry of how the Commission plans to implement the requirements of Section 252(i) and the pick and choose rule.

10. This interpretive and policy statement is not an order of the Commission, nor is it binding on the Commission or parties who may come before it in formal proceedings. This statement is the current opinion held by the Commission regarding Section 252(i) of the Act. The Commission intends to use these principles in developing its opinions and decisions regarding interconnection agreements that come before it.

11. This interpretive and policy statement is not a rule. The Commission believes that a policy statement is more flexible than a rule with respect to pick and choose, and therefore is preferable to a rule at this time.

PRINCIPLES FOR IMPLEMENTING SECTION 252(i) IN INTERCONNECTION AGREEMENTS

12. This statement consists of the following ten principles to guide the Commission as it fulfills its regulatory obligation to implement Section 252(i) of the Act and the FCC's pick and choose rule. The Commission intends that these principles be read as a whole in order to effectuate the Commission's overall policy.

13. <u>Principle 1</u>: Many interconnection agreements approved by the Commission are the result of an ILEC making all of the arrangements contained in a previously approved hybrid agreement (negotiated, in part, and arbitrated, in part) available to a requesting carrier under Section 252(i). FCC Rule 51.809(a) provides that an ILEC must make available any individual interconnection, service, or network element arrangement contained in any approved agreement. The Commission does not differentiate between negotiated and arbitrated arrangements when considering requests under Section 252(i). Thus, parties may request approval of an interconnection agreement that is a hybrid of negotiated and arbitrated terms, and of individual arrangements that result from pick and choose.

14. Principle 2: Except for changes in the names of the parties, internal references, or other minor changes, a requesting carrier that requests an existing agreement in its entirety, or to receive individual arrangements in an agreement, must adopt the original contract language verbatim.

15. Principle 3: An interconnection arrangement that has been amended must be made available pursuant to Section 252(i) only in its amended form. A requesting carrier that adopts a Commission-approved agreement under 252(i) shall not be bound automatically by any subsequent amendments to the original agreement.

16. Principle 4: Arrangements approved as the result of arbitration, as well as negotiation, are subject to requests under 252(i) and the pick and choose rule. Section 252(i) and the pick and choose rule entitle a requesting carrier to gain access to any individual interconnection, service, or network element arrangement on the same terms and conditions in any approved interconnection agreement, regardless of whether the agreement is arbitrated, negotiated, or both.

17. Principle 5: An interconnecting carrier that enters into a negotiated or arbitrated agreement may modify its agreement by invoking 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 new entrants to enter the local exchange market 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 an ILEC's ability to discriminate among CLECs.

18. Principle 6: The "reasonable period of time" during which arrangements in any interconnection agreement (including entire agreements) must be made available for pick and choose by a requesting carrier extends until the expiration date of that agreement. A requesting carrier may not receive arrangements from any agreement after the expiration date.

19. Principle 7: Any subsequent interconnection arrangement between an incumbent carrier and any requesting carrier (including any new entire agreement) must be made available pursuant to Section 252(i) to carriers who have already entered into interconnection agreements with that particular incumbent carrier. The "reasonable period of time" during which a subsequent arrangement must be made available to carriers with existing agreements is nine (9) months after the Commission approves the subsequent arrangements.

20. Principle 8: An interconnection agreement or arrangement made available pursuant to Section 252(i) must be made available for the specific time period during which it is provided under the interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be made available to other carriers only until December 31, 2000.

21. Principle 9: Pursuant to 47 C.F.R. § 51.809(b), an ILEC is not obligated to make available any individual interconnection, service, or network element arrangement contained in any Commission-approved agreement to which it is a party if the ILEC proves to the Commission that: (1) the cost of providing the particular interconnection, service, or element to the requesting telecommunications carrier exceeds the cost of providing it under the original agreement, or (2) the provision of the individual interconnection, service, or element is not technically feasible. If an ILEC claims that the cost of providing the interconnection, service, or element to a requesting carrier exceeds the cost of providing it under the original agreement, the ILEC must submit comprehensive cost support to demonstrate the higher cost. In such a case, the Commission expects that the cost support will be consistent with the economic and cost principles set forth in the Commission's generic costing and pricing docket, In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale et al., Docket Nos. UT-960369, -960370, -960371.

22. Principle 10: An ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements. An ILEC may impose additional terms and conditions as part of an arrangement only if the ILEC proves to the Commission that the interconnection, services or elements comprising the arrangement are either technically inseparable or are related in a way that separation will cause an increase in underlying costs. Arrangements are not "legitimately related" solely because they were negotiated jointly or through *quid pro quo* bargaining.

PROCEDURES FOR IMPLEMENTING THE REQUIREMENTS OF SECTION 252(i) AND THE PICK AND CHOOSE RULE IN INTERCONNECTION AGREEMENTS

When must an ILEC Respond to a Request That it Makes Available an Arrangement Contained in Any Approved Agreement?

23. Requests that an ILEC makes available without unreasonable delay any individual interconnection, service, or network element arrangement contained in any agreement approved by the Commission must be presented by the requesting carrier to an appropriate representative of the ILEC in writing, and specify the particular arrangement requested and any relevant terms in an existing agreement to be superseded. A CLEC must allow an ILEC reasonable time to consider the request before petitioning the Commission for enforcement of its Section 252(i) rights. Both parties shall act in good faith. An ILEC shall respond to a request that it make available an arrangement contained in any approved agreement within fifteen business days after receipt.

24. The ILEC's written response must state all objections to the request and all exceptions to its duty to make arrangements available under Section 252(i).

What Procedures Should a Requesting Carrier Without an Existing Interconnection Agreement Follow?

25. The Commission adopted WAC 480-09-530 to establish an expedited process to resolve disputes between parties to existing interconnection agreements approved by the Commission pursuant to Section 252(e) of the Act; however, the Commission intends to follow certain procedures set forth in WAC 480-09-530 when a requesting carrier without an existing interconnection agreement seeks to enforce its rights pursuant to Section 252(i).

26. If an ILEC states objections or exceptions to a Section 252(i) request, a telecommunication carrier without an existing interconnection agreement seeking to enforce its statutory rights on an expedited basis may unilaterally file a Petition for Enforcement of Section 252(i) with the Commission, and serve the ILEC as set forth in WAC 480-09-530(1)(b). The ILEC may file an answer to the petition as set forth in WAC 480-09-530(2). Either party may amend its petition or answer as set forth in WAC 480-09-530(3).

27. The Commission will appoint an administrative law judge to preside over the proceeding and conduct a prehearing conference as set forth in WAC 480-09-530(4) and (5)(a). The presiding officer will serve a recommended decision on the parties within 60 days of the date the petition was filed, and shall include a schedule for review of the recommended decision by the Commission no later than 80 days after the date the petition was filed.

28. The Commission will review the recommended decision as set forth in WAC 480-09-530(6), and the Commission will serve a final decision on the parties as set forth in WAC 480-09-530(7). The Commission may take the petition for approval of a Section 252(i) request under advisement if a petition for arbitration is filed by the same parties while resolution of the Section 252(i) issues are pending. In that event, the Section 252(i) issues will be resolved contemporaneously with disputed issues in the arbitration, and the Commission's arbitration procedures will control the proceeding.

What Procedures Should a Requesting Carrier With an Existing Interconnection Agreement Follow?

29. The FCC has concluded that § 252(i) entitles all parties with interconnection agreements to exercise pick-and-choose rights regardless of whether they expressly include such terms in their agreements.[5] Thus, all interconnection agreements implicitly include such terms, unless expressly waived therein. A carrier with an existing interconnection agreement seeking remedies for alleged violations of Section 252(i) may obtain expedited relief under WAC 480-09-530.

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[5] Local Competition Order, 11 F.C.C.R. at 16139.

30. A requesting telecommunications carrier is not required to engage in negotiations prior to petitioning for enforcement. However, a requesting carrier must specifically identify the requested arrangement and any terms to be superseded in the existing agreement. The requesting carrier also is relieved of its duty to give written notice of its intent to file a petition for enforcement of its Section 252(i) request under WAC 480-09-530(1)(c). In all other respects, the provisions of WAC 480-09-530 shall apply.

Expedited Process for Adoption of A Previously Approved Agreement in its Entirety Under Section 252(i)

31. When a carrier adopts a previously approved interconnection agreement in its entirety, the parties to that agreement must notify the Commission of the adoption. The notice shall identify the parties, state the intent to adopt a specific agreement in its entirety, the effective date, and the term of the agreement. If no objection is received within 15 days of the date the notice is filed, the carrier's request for adoption will be effective on the 16th day. If the Commission receives objections to a carrier's adoption of a previously approved agreement in its entirety, the Commission will either approve or reject the agreement within 90 days of the date the agreement is filed with the Commission. The Commission will reject such an agreement only if it finds that the agreement, as adopted by the parties, discriminates against any carrier not a party to the agreement, or if the agreement is not consistent with the public interest, convenience and necessity.

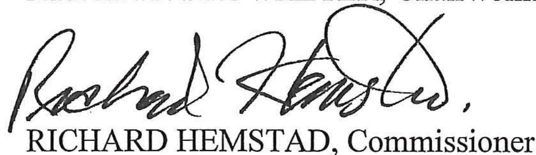
CHANGES IN POLICY

32. As the Commission, and other state commissions, gain more experience in resolving issues raised under Section 252(i), the Commission may revise this Statement or adopt rules replacing this Statement.

Dated at Olympia, Washington and effective this 12th day of April, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner