IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-73800 (AND CONSOLIDATED CASES)

NEW EDGE NETWORK, INC., *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251 and 252, incumbent providers of local telephone service must open their network facilities to potential competitors. If an incumbent negotiates a network access agreement with one of its competitors, and if state regulators approve the agreement, section 252(i) requires the incumbent to "make available any interconnection, service, or network element provided" under the agreement "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

In 1996, the Federal Communications Commission adopted initial rules to implement section 252(i) by allowing requesting carriers, in specified circumstances, to "pick and choose" isolated provisions from another carrier's agreement without having to accept all the terms and conditions of the agreement. After years of experience under this rule, however, the Commission determined in 2004 that the rule had on balance hindered negotiations between incumbents and competing carriers. To address that situation, the agency revisited its interpretation and implementation of section 252(i), and replaced the qualified pick-and-choose rule with a new rule requiring any carrier that requests a particular provision from another carrier's agreement to accept all the terms of the original agreement. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494 (2004) ("*Order*") (Petitioners' Record Excerpts ("PRE"), Tab 41). The new rule is commonly called the "all-or-nothing" rule. This case presents two issues for review:

(1) whether the so called "all-or-nothing" rule reflects a reasonable interpretation of section 252(i) of the Communications Act; and

(2) whether the Commission adequately explained why it replaced the pick-and-choose rule.

COUNTERSTATEMENT

A. The Telecommunications Act Of 1996

For most of the last century, American consumers generally could buy local telephone service from only one source: the incumbent local exchange carrier ("ILEC") that served the area where the consumers lived (*e.g.*, Pacific Bell in San

Francisco). Until the 1990s, regulators treated local phone service as a natural monopoly. "States typically granted an exclusive franchise in each local service area" to the ILEC that owned and operated the local telephone network. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T*").

Rejecting the natural monopoly theory, and in an effort to open local telephone markets to competition, Congress substantially amended the Communications Act by adopting the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act among other things preempts state laws and policies that impede competition, such as the policy of granting exclusive local franchises. 47 U.S.C. § 253. In addition, it imposes on ILECs "a host of duties intended to facilitate market entry by competitors." *AT&T*, 525 U.S. at 371. Most significantly, the statute requires each ILEC "to share its network with competitors." *Ibid.* (citing 47 U.S.C. § 251(c)). Pursuant to section 251, competing local exchange carriers ("CLECs") can obtain access to an incumbent's network in three ways: by interconnecting their own facilities with the incumbent's network; by leasing elements of the incumbent's network on an unbundled basis; and by buying an incumbent's retail telephone services at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). Congress directed the FCC to adopt initial rules to implement the network access provisions of section 251 within six months of the statute's enactment. *Id.* § 251(d)(1).

Congress gave the process of negotiation between ILECs and CLECs a central role in establishing interconnection arrangements. *See generally* 47 U.S.C. § 252. Section 252 authorizes ILECs and CLECs to set the terms and conditions of

their own network-sharing arrangements by negotiating interconnection agreements on a state-by-state basis. 47 U.S.C. § 252(a). Incumbents as well as CLECs have a statutory duty to negotiate such agreements in good faith. *Id.* § 251(c)(1). If negotiations reach an impasse, the parties can request arbitration of any disputed issues by the state commission that regulates telecommunications in the relevant state. *Id.* § 252(b). All interconnection agreements – whether negotiated or arbitrated – must be submitted to the state commission for approval. *Id.* § 252(e)(1). Before approving an arbitrated interconnection agreement, the state commission must ensure that the agreement complies with the requirements of section 251, the pricing standard prescribed by section 252(d), and the FCC's regulations implementing those provisions. *Id.* § 252(c)-(e); *AT&T*, 525 U.S. at 377-85. Negotiated agreements need not satisfy these requirements; indeed, the Act authorizes ILEC-CLEC negotiations "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1), 252(e)(2)(A).

This case involves a dispute over the interpretation of section 252(i), one of the statutory provisions governing the establishment and implementation of interconnection agreements. Section 252(i) states:

> A local exchange carrier shall 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).

B. The FCC's Initial Implementation Of Section 252(i)

In compliance with the timetable prescribed by section 251(d)(1), the FCC in August 1996 promulgated rules to implement the local competition provisions of the 1996 Act.[1] The Commission construed section 252(i) to permit a rule that would allow CLECs to "pick-and-choose" among the particular provisions of any previously approved interconnection agreement between an ILEC and another CLEC. Under such a rule, subject to several qualifications imposed by the Commission, any CLEC could adopt discrete sections from any other CLEC's interconnection agreement without having to adopt the agreement in its entirety. *Local Competition Order* ¶¶ 1309-1323 (PRE, Tab 4). In adopting that rule, the FCC considered and rejected arguments that a pick-and-choose approach would impede the process of negotiating interconnection agreements "by making [ILECs] less likely to compromise." *Id.* ¶ 1313 (PRE, Tab 4).

The FCC's pick-and-choose rule required each ILEC to make available to requesting carriers any individual provision, contained in any state-approved interconnection agreement to which the ILEC is a party, on the same rates, terms, and conditions as those provided in the agreement. *Local Competition Order* ¶ 1314 (PRE, Tab 4); 47 C.F.R. § 51.809(a) (1996) (PRE, Tab 4). The Commission qualified this rule in several ways. An incumbent was not required to provide an individual item from an agreement if the cost of providing that item to the

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utilities Board*"), *aff'd in part and rev'd in part, AT&T*, 525 U.S. 366.

requesting carrier were greater than the cost of providing it to the original party to the agreement, or if providing that item to the requesting carrier were technically infeasible. 47 C.F.R. § 51.809(b). In addition, an incumbent was required to make individual items in an agreement available to others only for a reasonable time after the agreement was approved by a state commission. 47 C.F.R. § 51.809(c).

Most importantly as it turned out, the Commission allowed an incumbent carrier to require a requesting carrier, under the pick-and-choose rule, to accept those terms and conditions that were "legitimately related to the purchase of the individual element being sought." *Local Competition Order* ¶ 1315 (PRE, Tab 4). Thus, a CLEC requesting an item under the rule would be entitled to obtain the item, subject to the cost, technical feasibility, and reasonable time conditions. And the question as to which terms and conditions were "legitimately related" to the purchase of that item was open to dispute on a case-by-case basis. The pick-and-choose rule thus was not a rule granting "an unconditional right to CLECs to adopt the terms of any interconnection agreement the ILEC has with another CLEC." *Global NAPs, Inc. v. Verizon New England*, 1st Cir. No. 04-1711, slip op. at 22 (decided Jan. 19, 2005); *see also AT&T*, 525 U.S. at 396 (pointing out that the "legitimately related" provision of the FCC's rule limits CLEC entitlement).

On review of the *Local Competition Order*, the Eighth Circuit vacated the pick-and-choose rule. *Iowa Utilities Board*, 120 F.3d at 800-01. It concluded that the rule "would thwart the negotiation process" under section 252 by discouraging the "give-and-take" that is "essential to successful negotiations." *Id.* at 801. The court reasoned that an ILEC "would be very reluctant [in negotiations with a

CLEC] to make a concession on one term in exchange for a benefit on another term when faced with the prospect" under the pick-and-choose rule "that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit." *Ibid.* The Eighth Circuit held that the pick-and-choose rule reflected an "unreasonable" statutory construction that "conflicts with the Act's design to promote negotiated agreements." *Ibid.*

The Supreme Court reversed the Eighth Circuit's invalidation of the pick-and-choose rule. *AT&T*, 525 U.S. at 395-96. The Court acknowledged that the ILECs' alternative proposal for implementing section 252(i) – a rule that would require a carrier "who wants one term from an existing agreement … to accept *all* the terms in the agreement" – "seems eminently fair." *Id.* at 395-96 (emphasis in original). The Supreme Court, moreover, did not suggest that such a rule would be impermissible under section 252(i). But the Court found no basis for the Eighth Circuit's determination that the FCC's approach was unreasonable. Noting that the general pick-and-choose requirement stated in the rule "tracks the pertinent statutory language almost exactly," the Supreme Court declared: "The FCC's interpretation [of section 252(i)] is not only reasonable, it is the most readily apparent." *Id.* at 396. In response to the ILECs' assertion that the pick-and-choose rule would "significantly impede negotiations," the Court concluded that any assessment of the rule's impact on future negotiations was "a matter eminently within the expertise of the Commission and eminently beyond [the Court's] ken." *Ibid.*

C. The Order On Review

In May 2001, Mpower Communications Corporation, a CLEC, petitioned the FCC to forbear, pursuant to its authority under section 10 of the 1996 Act, 47 U.S.C. § 160, from applying the pick-and-choose rule to certain designated agreements that Mpower dubbed "FLEX contracts." For those contracts, Mpower proposed that CLECs "should only be allowed to opt into the entire agreement … rather than be able to pick just 'the best parts' of the deal." Mpower Petition at 8 (PRE, Tab 7). Mpower maintained that the Commission should adopt this new approach because the pick-and-choose regime had stifled "innovative and effective contracting" between ILECs and CLECs: "There is a great sameness and very little meaningful choice. The ability to innovate and the incentive to do so are sorely needed." Mpower Petition at 9 (PRE, Tab 7).

Several ILECs filed comments on Mpower's forbearance petition, agreeing that the pick-and-choose rule had obstructed meaningful negotiations between ILECs and CLECs.[2] The four largest ILECs later reiterated this point in another proceeding and urged the FCC to abolish the pick-and-choose rule. Letter from Dee May, Verizon, to Marlene Dortch, FCC, CC Docket No. 01-338, Jan. 17, 2003 (RER, Tab 4).

The Commission in 2003 issued a further notice of proposed rulemaking ("FNPRM") in an ongoing proceeding concerning local interconnection

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[2] *See, e.g.,* Verizon Comments on Mpower Petition at 2 (Record Excerpts of Respondents ("RER"), Tab 1); BellSouth Comments on Mpower Petition at 2 (RER, Tab 2); USTA Reply Comments on Mpower Petition at 3-4 (RER, Tab 3).

requirements, in which it proposed to revisit the pick-and-choose rule.[3] In the *FNPRM*, the Commission sought comment on whether it "should eliminate the pick-and-choose rule and substitute an alternative interpretation of section 252(i)." *FNPRM* ¶ 720 (PRE, Tab 8). After several years of experience with the rule, the Commission tentatively concluded in the *FNPRM* that "Mpower and other commenters are correct that the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned." *FNPRM* ¶ 722 (PRE, Tab 8).

The comments submitted in this proceeding included affidavits from negotiators of interconnection agreements, who asserted that, contrary to the Commission's original expectation, the pick-and-choose rule had effectively

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17409-16 (¶¶ 713-729) (2003) ("*FNPRM*") (PRE, Tab 8). The Commission released the *FNPRM* as part of its *Triennial Review Order*, which established rules governing access to unbundled network elements. Those rules were affirmed in part, remanded in part, and vacated in part by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). Shortly after the Commission issued the *FNPRM*, Mpower withdrew its forbearance petition. *See* PRE, Tab 10.

stymied give-and-take negotiations between ILECs and CLECs.[4] The comments also included evidence that disputes over carriers' rights and obligations under the pick-and-choose rule had spawned protracted delays in negotiations. In particular, the record contained assertions that ILECs and CLECs often disagreed over which terms and conditions were "legitimately related" to requests for particular services or facilities. *Order* ¶¶ 15-17 (PRE, Tab 41). *See also* BellSouth Hendrix Affidavit (RER, Tab 14); Comments of Florida Public Service Commission at 5-7 (RER, Tab 5).

On the basis of this record, the FCC revisited its implementation of section 252(i) and replaced its pick-and-choose rule. As a threshold matter, it determined that section 252(i) did not unambiguously mandate a pick-and-choose rule. *Order* ¶¶ 6-8 (PRE, Tab 41). Specifically, the Commission rejected the contention that the phrase "any interconnection, service, or network element" itself left room for "only one permissible reading of section 252(i)." *Order* ¶ 7 (PRE, Tab 41). The

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[4] *See* Letter from Mary L. Henze, BellSouth, to Marlene Dortch, FCC, May 11, 2004, Affidavit of Jerry D. Hendrix (RER, Tab 14); Letter from Robert W. McCausland, Sage Telecom, to Marlene Dortch, FCC, June 30, 2004, Declaration of James H. Sturges (RER, Tab 15); Letter from Clint Odom, Verizon, to Marlene Dortch, FCC, March 25, 2004 (RER, Tab 13); PAETEC Comments at 2-4 (PRE, Tab 20); Comments of Florida Public Service Commission at 3-7 (RER, Tab 5); Comments of Ohio Public Utilities Commission at 3 (RER, Tab 6); Comments of New York State Department of Public Service at 2 (RER, Tab 7); SBC Comments at 3-4 (RER, Tab 8); CenturyTel Comments at 3-4 (RER, Tab 9); Qwest Comments at 3-6 (RER, Tab 10); BellSouth Comments at 4-6 (RER, Tab 11); Verizon Wireless Comments at 1-3 (RER, Tab 12); Verizon Comments at 2-3 (PRE, Tab 24); SBC Reply Comments at 3-6 (PRE, Tab 35); BellSouth Reply Comments at 1-2 (PRE, Tab 28).

agency pointed out that the entirety of section 252(i) must be considered, and that the statute requires that any requested interconnection, service, or network element be made available "upon the same terms and conditions" as those provided in an existing interconnection agreement. *Ibid.* (quoting 47 U.S.C. § 252(i)). The Commission found that this qualifying clause "creates ambiguity" because the statute's allusion to "the same terms and conditions" could reasonably be read to encompass all of the terms and conditions contained in an agreement. *Ibid.*

The Commission cited the Supreme Court's *AT&T* decision as support for the conclusion that "section 252(i) is ambiguous." *Order* ¶ 8 (PRE, Tab 41). Although the Supreme Court upheld the pick-and-choose rule as a reasonable implementation of section 252(i), it did not hold that such an interpretation was "compelled by the statute." *Ibid.* To the contrary, the Court stated that the alternative reading of section 252(i) that the ILECs had advanced in the litigation – an "all-or-nothing" rule that would require requesting carriers to accept all the terms in an agreement – "seems eminently fair." *AT&T*, 525 U.S. at 396. The Commission observed that it was unlikely that the Court "would declare another possible interpretation of section 252(i), *i.e.*, the all-or-nothing rule, to be 'eminently fair,' but then restrict the Commission's discretion to only the pick-and-choose rule." *Order* ¶ 8 (PRE, Tab 41). In the Commission's view, the statutory analysis in *AT&T* demonstrated the Supreme Court's recognition that "the Commission has leeway to reinterpret section 252(i)." *Order* ¶ 6 (PRE, Tab 41).

Having found that it could permissibly construe the statute to authorize an all-or-nothing approach, the Commission determined that replacing the pick-and-

choose rule with an all-or-nothing rule would best "promote the meaningful, give-and-take negotiations envisioned by the Act." *Order* ¶ 10 (PRE, Tab 41). Under the new rule, in order for a CLEC to exercise its right under section 252(i) to obtain an interconnection, service, or network element from another carrier's agreement, it must "adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement." *Order* ¶ 1 (PRE, Tab 41). The new rule is designed to prevent third-party CLECs from avoiding the trade-offs made by the parties that negotiated the original agreement. The Commission reasoned that if such a third party could no longer evade those trade-offs, ILECs would have "increased incentives to engage in meaningful give-and-take negotiations," which in turn would enable competing carriers "to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely." *Order* ¶ 14 (PRE, Tab 41).

Although some commenters claimed that elimination of the pick-and-choose rule would place CLECs at a "disadvantage in negotiating leverage" vis-à-vis ILECs, the Commission concluded that any such disadvantage would be "outweighed by the potential creativity in negotiation that an all-or-nothing rule would help promote." *Order* ¶ 14 (PRE, Tab 41). Moreover, the agency observed that although CLECs could engage in negotiations in order to obtain acceptable network access arrangements under the new rule, they did not need to do so: "Requesting carriers with limited resources will have the option of adopting a suitable agreement in its entirety, as is common practice today, if they decline to pursue negotiated interconnection agreements." *Ibid.*

In addition, the Commission determined that retention of the pick-and-choose rule was "unnecessary" to prevent unlawful discrimination by ILECs because "existing state and federal safeguards against discriminatory behavior are sufficient." *Order* ¶ 18 (PRE, Tab 41). Section 251(c) requires ILECs to provide interconnection, services, and network elements on nondiscriminatory terms and conditions. 47 U.S.C. § 251(c)(2)-(4). As the Commission pointed out, the Communications Act provides several mechanisms for enforcing this nondiscrimination mandate, including state commission rejection of discriminatory agreements under section 252(e)(2), federal court review of state determinations regarding interconnection agreements under section 252(e)(6), and FCC resolution of discrimination complaints under section 208. *Order* ¶ 20 (PRE, Tab 41). The Commission found that these statutory safeguards would deter ILECs from inserting onerous terms – so-called "poison pills" – into interconnection agreements that, although acceptable to the particular CLEC, would make the agreement unattractive to subsequent CLECs that might opt in. *Order* ¶ 21 (PRE, Tab 41). The Commission further noted that the all-or-nothing rule itself protects against discrimination. Under that rule, an ILEC "will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers." *Id*. ¶ 19 (PRE, Tab 41).

Previously, the Commission had rejected an all-or-nothing approach out of concern that such a rule might not effectively prevent discrimination. But that concern – expressed before the Commission had any practical experience with the

mechanics of interconnection agreements – had been premised on a prediction that "few new entrants would be willing to elect an entire agreement." *Order* ¶ 18 (PRE, Tab 41) (quoting *Local Competition Order* ¶ 1312 (PRE, Tab 4)). Contrary to that prediction, the record in this proceeding showed that "in practice [CLECs] frequently adopt agreements in their entirety." *Order* ¶ 18 (PRE, Tab 41). Indeed, the record showed that about half of all interconnection agreements duplicate a pre-existing agreement. *See id.* ¶ 21 n.78. In view of that common practice, the Commission concluded that "the pick-and-choose protections against discrimination are superfluous." *Ibid.*

After the Commission published its new rule in the Federal Register, various CLECs filed petitions for review of the *Order* in several courts of appeals. By virtue of a lottery conducted pursuant to 28 U.S.C. § 2112(a), the Judicial Panel on Multidistrict Litigation ordered the consolidation of all of the petitions in this Court. Some of the petitioners then filed an emergency motion to stay the *Order* pending judicial review. By order dated August 24, 2004, this Court denied the stay motion.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

Although the Commission itself uses the shorthand phrase, "all-or-nothing" is something of a misnomer for the Commission's new rule. To be sure, the rule does not permit a CLEC to "pick-and-choose" among the piece parts of an existing interconnection agreement and select only those parts that, in isolation from the agreement as a whole, appear to the CLEC to be the best possible bargains. If the CLEC is shopping within the boundaries of an ILEC's agreements, it must either

take an entire agreement (including the parts it does not regard as a good bargain) or not take anything at all from the agreement. Hence the name of the rule: "all-or-nothing."

But this does not mean that the only alternative the CLEC has to taking the whole agreement is to take "nothing." Contrary to petitioners' occasional suggestions, the Commission has not required CLECs to "adopt all the terms for *all* the services and network elements in a single interconnection agreement or take none at all, even if [the CLEC] needs and seeks only a single service or network element." Cox Br. 21. *See also* Cox Br. 31; CompTel Br. 3; New Edge Br. 14. A CLEC always is free to negotiate with an ILEC to obtain the individual items of interconnection it needs, without regard to their availability in another CLEC's existing negotiated agreements. The ILEC (as well as the CLEC) in such a case has an obligation "to negotiate in good faith." 47 U.S.C. § 251(c)(1). This process is backed by the right to arbitration. Indeed, it was in large part to ensure the usefulness and integrity of this negotiation process – a central feature of the 1996 Act – that the FCC decided to abandon its pick-and-choose rule, which it found to be a deterrent to effective negotiation.

The phrase "pick-and-choose" also should not be taken literally. A CLEC seeking to obtain an item from an existing agreement under the pick-and-choose rule faced qualifications in terms of cost, technical feasibility, and timeliness. In addition, and most importantly, an ILEC under that rule was permitted to impose on the requesting CLEC all of the terms and conditions that were "legitimately related to the purchase of the individual element being sought." *See AT&T*, 525

U.S. at 395-96. Disputes over which terms and conditions were "legitimately related" were among the obstacles to negotiation that prompted the Commission to revise its rules. *Order* ¶ 16 (PRE, Tab 41).

* * * *

On review, the petitioners challenge both the agency's statutory construction and its decision to replace the pick-and-choose rule with a rule the agency found to be more consistent with the objectives of the 1996 Act. Neither challenge has merit.

1. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397. The 1996 amendments to the Communications Act include many ambiguous provisions. Section 252(i) is one of them. In this case, the FCC reasonably interpreted the ambiguous terms of section 252(i) to authorize the all-or-nothing rule it chose to adopt to replace the pick-and-choose rule.

Under section 252(i), CLECs may request from an ILEC "any interconnection, service, or network element" provided under the ILEC's state-approved agreement with another CLEC, and the ILEC must make the requested item available "upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). Originally, the Commission construed the statutory phrase "the same terms and conditions" to mean those provisions that are "legitimately related" to the requested service or facility. The Commission's 1996 rule allowed CLECs to adopt isolated provisions from another carrier's interconnection agreement with an ILEC without having to adopt the whole

agreement. It is unclear, however, whether the phrase "the same terms and conditions" in section 252(i) refers to some or all of an existing agreement's provisions. Given this ambiguity, the Commission in this proceeding permissibly construed section 252(i) to authorize a rule under which a carrier requesting a discrete provision under an existing agreement must accept all of the terms and conditions set forth in the agreement.

The Supreme Court's decision in *AT&T* supports the reasonableness of the Commission's interpretation of section 252(i). While the Court in that case held that the Commission's pick-and-choose rule reflected a "reasonable" reading of section 252(i), it also treated the ILECs' proposed alternative all-or-nothing rule as worthy of examination by a policymaker. *AT&T*, 525 U.S. at 396. In addition, in assessing whether the Commission's particular interpretation of section 252(i) would "significantly impede negotiations," the Court expressly deferred to the Commission's "expertise." *Ibid.* The Commission properly exercised that expertise here.

2. The Commission's 1996 decision to adopt a pick-and-choose rule rested on three predictions: (1) the rule would hasten the development of competition under the newly enacted statute; (2) pick-and-choose would not dampen incumbents' incentive to negotiate; and (3) the all-or-nothing approach proposed by the ILECs would, as a practical matter, be more likely to undermine CLECs' statutory right to opt-in because few requesting carriers would be willing to adopt entire agreements. The record in this proceeding – reflecting several years of

disappointing experience under the pick-and-choose regime – thoroughly refuted all three assumptions.

Negotiations under the pick-and-choose rule were typically plagued by protracted disputes over how to interpret the rule's qualifications in the context of particular requests. Given the contentious nature of pick-and-choose negotiations – particularly disputes over which terms and conditions were "legitimately related" to the requested items – the Commission had good reason to believe that its new all-or-nothing rule, which is much simpler to administer, would lead to more efficient negotiations. This was especially true because CLECs commonly were opting into the entirety of existing agreements notwithstanding their pick-and-choose option.

The Commission also reasonably predicted that the new rule would give ILECs greater incentives to negotiate new agreements. It reasoned that ILECs would more readily negotiate trade-offs with individual CLECs under the new rule because they would no longer be concerned that a requesting carrier under a pick-and-choose regime might subsequently obtain the benefit of some parts of an agreement without accepting the negotiated concessions reflected in other parts.

Finally, the Commission concluded that the elimination of pick-and-choose would not meaningfully diminish the protection of CLECs from discrimination. It found that various statutory safeguards, in tandem with the new rule, would be adequate to prevent discriminatory conduct by ILECs.

The Commission's decision to change its rules was based not only on its experience with the former rule as compiled in the agency record, but also on

reasonable predictive judgments concerning matters within the agency's expertise. Those expert judgments are entitled to substantial judicial deference.

STANDARD OF REVIEW

Petitioners contend that the FCC's revised interpretation of 47 U.S.C. § 252(i) rests on an unlawful reading of the Communications Act. In assessing this claim, the Court must apply the standard of review articulated in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. This is the "first step" of *Chevron* analysis. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [agency's decision] is based on a permissible construction of the statute." *Id.* at 843.

If the Court finds statutory silence or ambiguity and reaches the "second step" of *Chevron*, it must determine the statute's meaning "by giving deference to the governing agency's interpretation of the statute's language." *City of Los Angeles v. United States Department of Commerce*, 307 F.3d 859, 869 (9th Cir. 2002) (quoting *Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001)). In that situation, the Court asks whether it is "compell[ed] to reject the agency's construction." *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999) (internal quotations omitted), *cert. denied*, 528 U.S. 1086 (2000). Unless the Court has a compelling reason to conclude otherwise, the FCC's "plausible" interpretation of an ambiguous provision of the Communications Act "is entitled to

deference." *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1245 (9th Cir. 1999). If the Commission's "reading fills a gap or defines a term in a reasonable way in light of the Legislature's design," the Court must "give that reading controlling weight," even if the agency's interpretation "is not the answer [the Court] would have reached if the question initially had arisen in a judicial proceeding." *City of Los Angeles,* 307 F.3d at 873 (quoting *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998)); *see also Chevron,* 467 U.S. at 843 n.11.[5]

The same deference applies when an agency changes its prior interpretation of an ambiguous statute. "It is not [this Court's] function to second-guess the agency that Congress has charged with administering a statute merely because a party that has lost a particular round of administrative policymaking would prefer a return to the previous rule …." *National Medical Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 669 (9th Cir. 1992).

Petitioners also argue that the Commission did not adequately explain its decision to replace the pick-and-choose rule. Under the standard of review

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[5] Some petitioners maintain that "deference is not appropriate" when a court reviews a challenge to an agency's interpretation of ambiguous statutory language. CompTel Br. 3. They base this assertion on *Barlow v. Collins*, 397 U.S. 159, 166 (1970) – a case that was decided 14 years before *Chevron*. In *Barlow*, the question was whether a statute precluded judicial review of agency action altogether. There is no question here that this Court has the authority to review the FCC's *Order*, so *Barlow* is inapposite. In any event, even if petitioners' view that *Barlow* limits judicial deference to agency interpretations of ambiguous statutes were correct, that approach would not have survived *Chevron*, which established the deferential standard of review that courts have been applying to agency rulemaking orders for the last two decades.

prescribed by the Administrative Procedure Act, the Commission's decision "may be overturned only" if it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953 (9th Cir. 2003) (quoting 5 U.S.C. § 706(2)(A)). Judicial review under this standard is "highly deferential, presuming the agency action to be valid." *Irvine Medical Center v. Thompson*, 275 F.3d 823, 830-31 (9th Cir. 2002) (internal quotations omitted). "Within this narrow review," the Court "cannot substitute [its] judgment for that of the [agency], but instead must uphold" the FCC's decision so long as the Commission has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance*, 336 F.3d at 953-54 (internal quotations omitted); *see also Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The fact that an agency changes its mind does not deprive its decision of deference so long as it acknowledges the change and provides a reasonable explanation. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Even "greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions." *AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095, 1099 (D.C. Cir. 2004) (quoting *NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982)); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981). To the extent that the FCC based its decision in this case on predictions about how its new rule would affect interconnection negotiations, the

Commission's "predictive judgment regarding a matter within its sphere of expertise is entitled to particularly deferential review." *Fresno Mobile Radio, Inc. v. FCC,* 165 F.3d 965, 971 (D.C. Cir. 1999) (internal quotations omitted).

ARGUMENT

I. THE COMMISSION REASONABLY CONSTRUED SECTION 252(i) TO PERMIT ITS ALL-OR-NOTHING RULE.

"The language in section 252(i) does not limit the Commission to a single construction" of the statute. *Order* ¶ 7 (PRE, Tab 41). Section 252(i) requires an ILEC to "make available any interconnection, service, or network element" that it provides to a CLEC under a state-approved agreement to any other requesting carrier "*upon the same terms and conditions as those provided in the agreement.*" 47 U.S.C. § 252(i) (emphasis added). The statute's reference to "the same terms and conditions" lends itself to at least "two different, reasonable interpretations." *Order* ¶ 6 (PRE, Tab 41). The Commission originally read those words to mean the "terms and conditions" that "relate solely to the individual interconnection, service, or element being requested under section 252(i)." *Local Competition Order* ¶ 1315 (PRE, Tab 4). That statutory construction laid the foundation for the

FCC's pick-and-choose rule.[6] But the statutory phrase "the same terms and conditions as those provided in the agreement" also can reasonably be construed to include *all* of the terms and conditions contained in the agreement. In the proceeding below, the Commission permissibly adopted this alternative interpretation. *Order* ¶¶ 6-10 (PRE, Tab 41).

A. The Commission's Interpretation Is Consistent With The Supreme Court's *AT&T* Decision.

The Commission's new approach is consistent with the Supreme Court's decision in *AT&T*. In that case, the Court generally observed that the 1996 Act as a whole is "in many important respects a model of ambiguity," and that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397. Consistent with those basic premises, the Supreme Court did not hold that the pick-and-choose rule was compelled by the statute. Rather, it held that the FCC's reading of section 252(i) to authorize a pick-and-choose regime was "reasonable." *AT&T*, 525 U.S. at 396. At the same time, the Court stated that the ILECs' alternative proposal for

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[6] At the same time, the Commission qualified its rule with a provision that allowed ILECs to show that certain terms and conditions they wanted to impose on requesting CLECs, over and above those that "relate solely" to the requested item, were "legitimately related" to the item. *Local Competition Order* ¶ 1315 (PRE Tab 4). The Commission's original interpretation of the statute and its pick-and-choose rule thus did not allow a CLEC unfettered discretion to pick and choose. *See AT&T*, 525 U.S. at 396 (pointing out that the "legitimately related" provision of the pick-and-choose rule limits CLEC entitlement under the statute and stating that section 252(i) "certainly demands no more than that").

implementing section 252(i) – the very same all-or-nothing approach that the Commission now has adopted – "seems eminently fair." *Ibid.*

Some petitioners contend that the Court in *AT&T* construed section 252(i) to mandate a pick-and-choose rule. New Edge Br. 24-26; Cox Br. 35-36, 41-43. That claim cannot withstand scrutiny. If the Supreme Court had concluded that the statute mandated a pick-and-choose rule, it would not have considered whether the FCC's statutory interpretation was "reasonable." *See AT&T,* 525 U.S. at 396. Nor would the Court have deferred to the Commission's "expertise" in evaluating whether the rule would "significantly impede negotiations." *See ibid.* Under *Chevron* "step one," the agency's reasons for selecting the pick-and-choose approach would have been entirely irrelevant if Congress had unambiguously directed the Commission to adopt a pick-and-choose rule. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In approving the Commission's policy reasons for adopting the pick-and-choose rule, the Supreme Court indicated that it considered the language of section 252(i) to be susceptible to more than one reasonable interpretation.

The Court also described the ILECs' alternative "all-or-nothing" interpretation of section 252(i) as "eminently fair," *AT&T,* 525 U.S. at 396 – suggesting that it would be a permissible interpretation for policymakers to consider. Despite the importance of that statement, some petitioners try to turn it to their own advantage, asserting that although the Supreme Court found an all-or-

nothing approach "eminently fair in the abstract, it went on to conclude that the language of Section 252(i) … precluded such an interpretation." New Edge Br. 25. The Supreme Court did no such thing. While the Court stated that the pick-and-choose rule chosen by the Commission embodied "the most readily apparent" interpretation of section 252(i), *AT&T*, 525 U.S. at 396, it did *not* hold or even imply that a "pick-and-choose" construction of the statute was the *only conceivable* reading. Nor did it say that the all-or-nothing approach was foreclosed by section 252(i). As the Commission has explained, "it does not stand to reason that the Court would declare another possible interpretation of section 252(i), *i.e.*, the all-or-nothing rule, to be 'eminently fair,' but then restrict the Commission's discretion to only the pick-and-choose rule." *Order* ¶ 8 (PRE, Tab 41).[7]

B. The Commission Reasonably Interpreted The Language Of Section 252(i).

Petitioners maintain that the statutory phrase "any interconnection, service, or network element provided under an agreement" requires ILECs to provide to a requesting CLEC any existing contractual terms pertaining to a discrete service or facility, and forbids ILECs from requiring that those terms be accompanied by other terms and conditions in the original agreement. New Edge Br. 18-21;

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[7] Petitioners' reliance on *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), is unavailing. *See* CompTel Br. 31; Cox Br. 38-39, 46-47. The Court in that case found that the Commission had adopted a rule that was based on an interpretation of statutory language that "goes beyond the meaning that the statute can bear." *MCI*, 512 U.S. at 229. In this case, by contrast, the Commission adopted a statutory construction that the Supreme Court itself has described as "eminently fair." *AT&T*, 525 U.S. at 396.

CompTel Br. 19-23; Cox Br. 26-27, 31. In the *Order*, the Commission rejected that claim, finding that the ILECs' duty to make network access available under section 252(i) is limited by the clause "under the same terms and conditions as those provided under the agreement." The Commission interpreted the words "the same terms and conditions" to permit a rule that requires the requesting carrier to submit to *all* of the terms and conditions set forth in the agreement. That is a reasonable interpretation of ambiguous statutory language.

In disputing the Commission's reading of "the same terms and conditions," petitioners contend that this phrase unambiguously refers only to those terms and conditions within the agreement that specifically apply to the requested interconnection, service, or network element. New Edge Br. 21-26; CompTel Br. 23-26; Cox Br. 28, 31-35. Yet petitioners themselves acknowledge that the text of section 252(i) is open to varying interpretations. New Edge, for example, recognizes that the Commission's original pick-and-choose rule allowed an ILEC to impose all terms and conditions from the existing agreement that are "legitimately related" to the service or facility requested by a CLEC, and that the Supreme Court held that the FCC's reading of the statute to permit that rule, "if not the only possible interpretation, is clearly a reasonable one." New Edge Br. 27. Terms and conditions "legitimately related" to the requested interconnection item constitute a broader category than terms and conditions that specifically apply only to the requested item. *See also* CompTel Br. 31-32 (the Supreme Court did not hold that the pick-and-choose rule was compelled by the statute; indeed, the Court suggested that "the Commission may, in its expertise, clarify and modify" the rule

to promote more productive negotiations). In light of the undisputed permissibility of the Commission's former rule, which limited the "pick-and-choose" rights of CLECs, the statute cannot plainly require the unqualified pick-and-choose rule that petitioners suggest.

Some petitioners purport to find clarity in the phrase that follows "the same terms and conditions" in section 252(i): the phrase "as those provided in the agreement." They contend that this phrase "plainly refers to discrete terms and conditions contained *in* an interconnection agreement, not to the entire agreement." New Edge Br. 22 (emphasis in original). Not necessarily. The language in question just as reasonably could refer to *all* the terms and conditions "provided in the agreement," and thus clarify that the terms and conditions to which the requesting CLEC must agree are limited to those set forth in the written agreement itself. The text of section 252(i) simply does not specify whether "the same terms and conditions" means merely some of the terms and conditions "provided in the agreement" that the parties have executed, or all of them.

There is no pertinent legislative history to remove this ambiguity (if such use of legislative history is permissible at all). Petitioners make much of a reference to "individual elements" in a single sentence in a 1995 Senate report on an earlier version of the legislation. New Edge Br. 22-23; CompTel Br. 26-30; Cox Br. 30-31. In that sentence, a Senate committee stated that in its earlier version of what became section 252(i), it intended to require ILECs to make available to competitors "the individual elements of agreements that have been previously negotiated." S. Rep. No. 23, 104th Cong., 1st Sess. 22 (1995) (PRE, Tab 2). This

Court has been appropriately "hesitant … to interpret isolated remarks in committee hearings or reports as expressions of the intent or knowledge of Congress."[8] The Senate report, in any event, does not discuss – let alone clarify – the statutory language that the Commission found to be ambiguous: "upon the same terms and conditions as those provided in the agreement." The dispute is not over whether "individual elements of agreements" must be made available: The Commission agrees with petitioners that they must. Such elements must be made available, however, "upon the same terms and conditions as those provided" in a previously approved agreement, and the Senate Report casts no light on the meaning of the disputed language. The Commission reasonably found that it was not clear whether the statute means some or all of the agreement's terms and conditions. *See Order* at n.26 (PRE, Tab 41).[9]

Some petitioners assert that it is "nonsensical" to read section 252(i) to require a requesting carrier who seeks to obtain one item of network access from an existing agreement, without negotiating with the ILEC, to accept "unrelated" terms and conditions in the agreement. CompTel Br. 24-25. This assertion

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[8] *Wilson v. Watt*, 703 F.2d 395, 402 n.14 (9th Cir. 1983) (quoting *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979). *See also Multnomah Legal Services Workers Union v. Legal Services Corp.*, 936 F.2d 1547, 1555 (9th Cir. 1991).

[9] The First Circuit in a January 19, 2005, opinion held in a different context that section 252(i) is ambiguous. *Global NAPs, Inc. v. Verizon New England*, *supra*, 1st Circuit No. 04-1711. That court also stated, with particular pertinence to this case, that section 252(i) "is written in terms of an obligation on the part of ILECs to make *agreements* available to potential CLECs." Slip op. at 20 (emphasis added).

incorrectly assumes that some aspects of network access under an approved agreement necessarily and categorically can be deemed "unrelated" to others. Such an assumption ignores the realities of contract negotiations, which are the source of the agreements in question. "In a genuine give-and-take negotiation, otherwise unrelated provisions could be traded off for one another." *Order* ¶ 27 (PRE, Tab 41). For example, an ILEC in negotiations leading to an agreement might be willing to provide a certain kind of interconnection or collocation to a CLEC who agreed to pay a higher price for the ILEC's network elements. Because such an agreement might reflect bargains that span the full range of commercial relationships between ILEC and CLEC, it is reasonable for the Commission to conclude that "all of the provisions of a particular agreement taken together should be properly viewed as legitimately related under section 252(i)." *Ibid.* The Commission was influenced by the difficulties carriers and state commissions encountered in determining which terms and conditions were "legitimately related" within the meaning of the qualification to the pick-and-choose rule. *Order* ¶¶ 16-17.[10] Indeed, the agency's experience with the "legitimately related" provision disproves the idea of discrete and divisible provisions within an agreement. It was

[10] Intervenor AT&T suggests in its brief that the Commission should have toughened its "legitimately related" qualification rather than abandon pick-and-choose entirely. AT&T Br. 12. Apart from the fact that an agency's rulemaking decision is not unlawful simply because there were other things it might have done, AT&T's suggestion undercuts the argument of the petitioners that this is a *Chevron* step one case in which the plain meaning of section 252(i) requires a pick-and-choose regime. If, as AT&T acknowledges, the FCC had discretion to adjust its "legitimately related" qualification to ensure that the ILEC retained the benefit of its bargain, nothing is left of petitioners' "plain meaning" argument.

eminently sensible for the Commission to abandon the search for relatedness and focus on the entire agreement.

C. The Commission Did Not Err In Revisiting Its Interpretation Of Section 252(i).

The petitioners correctly point out (New Edge Br. 20-21; CompTel Br. 41-43; Cox Br. 28, 31-35) that the Commission previously rejected an "all-or-nothing" reading of section 252(i), concluding that such an interpretation would fail to give meaning to the words "any interconnection, service, or network element." *Local Competition Order* ¶ 1310 (PRE, Tab 41). Upon further reflection in the light of experience under the Act, the Commission determined that an all-or-nothing rule would not render those words superfluous. Finding merit in the Eighth Circuit's analysis of this language, the Commission reasonably explained that the words "any interconnection, service, or network element" do not foreclose an all-or-nothing rule because those words "could simply indicate than an [ILEC] would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept the terms of the entire agreement." *Order* ¶ 7 (PRE, Tab 41) (quoting *Iowa Utilities Board*, 120 F.3d at 801 n.22).[11]

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[11] Petitioners contend that the Commission cannot properly rely on the Eighth Circuit's analysis of section 252(i) because the Supreme Court reversed that court's ruling on the pick-and-choose rule. CompTel Br. 43; Cox Br. 34. The Supreme Court rejected the Eighth Circuit's ruling that section 252(i) did not *permit* a pick-and-choose rule. The Supreme Court did not hold that section 252(i) *requires* such a rule. Nor did the Court question the Eighth Circuit's separate conclusion that an "all-or-nothing" interpretation of section 252(i) was reasonable. Indeed, as discussed above, the Supreme Court itself described such a rule as "eminently fair." *AT&T*, 525 U.S. at 396.

Cox contends that the Commission failed to explain how its all-or-nothing rule can be reconciled with its prior position that the statute "mandated" pick-and-choose. Cox Br. 29-30, 34-35. But Cox is wrong to suggest that the Commission adopted its original rule on the basis of a conclusion that the 1996 Act "mandated" pick-and-choose. Rather, in the order adopting that rule, the Commission as a matter of discretion chose to interpret section 252(i) in a manner that authorized its adoption of pick-and-choose. The Commission stated in that order, "We conclude that the text of section 252(i) *supports* requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements." *Local Competition Order* ¶ 1310 (PRE, Tab 4) (emphasis added). The Commission also found in that order that "practical concerns" reinforced its interpretation. *Id*. ¶1312. And it stated further, "We also *choose* this interpretation despite concerns" that pick-and-choose might impede negotiations. *Id.* ¶ 1313 (emphasis added). This is the language of discretionary, policy-based interpretation, not of following a perceived statutory mandate.

Nor did the Commission determine in 1996 that sections 251(c)(3) and 252(a)(1) mandated pick-and-choose, either separately or in conjunction with section 252(i), as Cox erroneously asserts (Cox. Br. 29-30, 34-35). Instead, the Commission correctly observed that those two provisions of the 1996 Act "mandated" the provision of unbundled access to network elements and the inclusion of itemized charges for individual services and facilities in interconnection agreements. *Local Competition Order* ¶ 1314 (PRE, Tab 4). Those two statutory requirements can easily accommodate either a pick-and-

choose rule or the Commission's new all-or-nothing regime. Sections 251(c)(3) and 252(a)(1) plainly do not "mandate" a pick-and-choose rule, and the Commission never said that they did.

It is true that, in defending the pick-and-choose rule before the Eighth Circuit, FCC counsel argued, *inter alia*, that the plain language of section 252(i) required such a rule. *See* PRE, Tab 5. The Commission itself, however, did not adopt this view in either the *Local Competition Order* or any other order. *See SEC v. Chenery*, 318 U.S. 80, 87-88 (1943). Under *Chevron*, moreover, an agency would not forfeit its discretion to construe an ambiguous statute if it failed to perceive the ambiguity when it first addressed the statute. *See Bank of America, N.A. v. FDIC*, 244 F.3d 1309, 1318-19 (11th Cir. 2001) (agreeing with an agency's "current position" that a statute is ambiguous even though the agency "had previously disavowed that interpretation").

The Commission is entitled – indeed, may be obliged – to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. "[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal…, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). This Court has specifically recognized that an agency may alter its reading of an ambiguous statute "in response to changing economic conditions and policy concerns." *Redlark v. Commissioner of Internal Revenue*, 141 F.3d 936, 940 (9th Cir. 1998). It was not improper, therefore, for the Commission to draw on policy considerations

to inform its decision to change its interpretation of section 252(i). *See* CompTel Br. 25; Cox Br. 46.[12]

Finally, Cox has no basis for suggesting (Cox Br. 39-43) that the FCC is "judicially estopped" from eliminating the pick-and-choose rule. In the first place, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60 (1984). The Supreme Court has explained that "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, at 784 (1981)). The doctrine of judicial estoppel does not apply in cases like this one, where "estoppel would compromise a governmental interest in enforcing the law." *New Hampshire*, 532 U.S. at 755. The FCC should not be estopped from exercising its authority to revise its interpretation of this statute in response to changing conditions or policy concerns. *See Chevron*, 467 U.S. at 863-64.

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[12] The Commission's interpretation of another provision of the 1996 Act underwent a similar metamorphosis, with ultimate judicial approval. The Commission at first determined that section 251(c)(3), which requires ILECs to provide unbundled elements of their networks to requesting CLECs, prohibited any restrictions on the use of those elements. The agency later altered its view, concluding that section 251(c)(3) could fairly be read to permit use restrictions. The D.C. Circuit affirmed the agency's new reading of the statute, holding that the Commission had reasonably revised its interpretation in the light of intervening events. *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 12-13 (D.C. Cir. 2002).

In any event, this case does not meet the prerequisites for judicial estoppel. In arguing for Supreme Court reversal of the Eighth Circuit's invalidation of the pick-and-choose rule, the FCC and the United States presented the argument described in one of the brief's headings: "The Commission's Interpretation Of Section 252(i) Is Reasonable." Reply Brief for the Federal Petitioners, *FCC v. Iowa Utilities Board*, at 48, 1998 WL 396945 (PRE, Tab 6). While the government asserted that the FCC had interpreted section 252(i) "to mean exactly what it says," it went on to argue that the Commission's interpretation "was at least reasonable." *Id.* at 49. Even if the Supreme Court construed the brief to contend that section 252(i) compelled a pick-and-choose approach, the Court did not accept such a contention. It held that the pick-and-choose rule reflected a reasonable interpretation of the statute. *AT&T*, 525 U.S. at 395-96. Under these circumstances, when a court has upheld an agency's initial interpretation of a statute as reasonable, the agency remains free later to adopt a different reasonable interpretation of the same statute. *See Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1134-36 (9th Cir. 1988) (en banc).

II. THE COMMISSION REASONABLY DECIDED TO REPLACE THE PICK-AND-CHOOSE RULE WITH AN ALL-OR-NOTHING RULE.

The FCC predicated its 1996 decision to adopt a pick-and-choose rule on three predictive judgments. *First*, the Commission predicted that pick-and-choose would "speed the emergence of robust competition." *Local Competition Order* ¶ 1313 (PRE, Tab 4). *Second*, the Commission dismissed concerns that a pick-and-

choose rule would impede negotiations "by making [ILECs] less likely to compromise." *Ibid*. *Third*, the Commission believed that "few new entrants would be willing to elect an entire agreement" because, among other things, an ILEC could "insert into its agreement onerous terms … in order to discourage subsequent carriers" from adopting the agreement. *Id.* ¶ 1312. On the basis of these three assumptions, the Commission initially rejected the ILECs' proposed all-or-nothing approach in favor of a pick-and-choose rule. The Commission permissibly changed course based upon its reassessment of these factors in light of actual experience since 1996.

A. Industry Experience Under The FCC's Pick-and-Choose Rule Required Changes.

The industry's experience under the pick-and-choose regime did not match the Commission's expectations. That regime necessarily was adopted at a time when the agency had had "no practical experience with the actual mechanics of interconnection agreements." *Order* ¶ 9 (PRE, Tab 41). The record in this proceeding, however, reflected several years of disappointing experience with interconnection negotiations and refuted all three of the key assumptions underpinning the 1996 rule.

First, the record showed that the rule had spawned "substantial delays in finalizing agreements, rather than expediting the process as the Commission

intended." *Order* ¶ 15 (PRE, Tab 41).[13] Attempts by requesting carriers to "pick-and-choose" had often degenerated into "protracted disputes with accusations of anticompetitive motives on both sides." *Id*. ¶ 17. Disagreements over which terms and conditions were "legitimately related" to a requested item were common and contentious. *Id*. ¶ 16.

Second, the record demonstrated that the pick-and-choose rule had effectively "impeded productive give-and-take negotiations" by making ILECs "reluctant" to agree to concessions "for fear of having to defend against unreasonable pick-and-choose requests." *Order* ¶ 17 (PRE, Tab 41).[14] As a result, interconnection negotiations had produced "largely standardized agreements with little creative bargaining to meet the needs of both" ILECs and CLECs. *Order* ¶ 12 (PRE, Tab 41).

Third, the record revealed that the Commission's initial concerns about the feasibility of an all-or-nothing approach had proven unfounded. Notwithstanding the availability of the pick-and-choose option, CLECs had frequently adopted entire agreements, dispelling any notion that they were unwilling to do so. *Order* ¶¶ 18, 21 & n.78 (PRE, Tab 41). Although the Commission had previously expressed concern that ILECs might use onerous terms (or "poison pills") to deter

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[13] *See*, *e.g.*, BellSouth Hendrix Affidavit, ¶ 6 (RER, Tab 5); Comments of Florida Public Service Commission at 5-7 (RER, Tab 8); Qwest Comments at 3-6 (RER, Tab 13); PAETEC Comments at 3 (PRE, Tab 20); Cox Reply Comments at 2-3 (PRE, Tab 32); SBC Reply Comments at 3-4 (PRE, Tab 35).

[14] *See* letters and comments cited in note 4 *supra*.

CLECs from adopting whole agreements, the record contained no evidence of any such discriminatory practices. *Order* ¶ 21 (PRE, Tab 41).[15]

B. The Commission Reasonably Changed Its Rule To Avoid Impeding Negotiations.

Because the record here substantially undermined the FCC's prior assumptions, the agency decided to abandon the pick-and-choose rule. The Commission reasoned that "an all-or-nothing rule would better serve the goals of sections 251 and 252 to promote negotiated interconnection agreements" by encouraging ILECs "to make trade-offs in negotiations that they are reluctant to accept under the [pick-and-choose] rule." *Order* ¶ 12 (PRE, Tab 41). The Commission further concluded that its new rule, properly enforced, would satisfy the primary purpose of section 252(i) by protecting CLECs from discrimination. *Order* ¶¶ 18-24 (PRE, Tab 41). Requesting CLECs under the new rule would be entitled to obtain the same bargain other CLECs had obtained under original agreements and thus would not be victims of discrimination.

Petitioners' attacks on the agency's decision rest on several fundamental misconceptions. First, petitioners wrongly assert that the Commission based its rule change on the premise "that CLECs do not use pick-and-choose." CompTel

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[15] The concern had been that, in negotiating an original agreement, an ILEC might insert an oneous term – a restriction on or a high price for collocation, for example – in an agreement with a CLEC who had no interest in the particular item to which the onerous term applied. The theory was that this "poison pill," which was a matter of indifference to the original CLEC, would make the agreement unacceptable to other CLECs who might seek to use the existing agreement. *See Local Competition Order* ¶ 1312 (PRE, Tab 4). This did not happen, according to the record before the agency.

Br. 35. They misapprehend what the Commission meant when it described the pick-and-choose rule as "superfluous." *See* CompTel Br. 34-37. The agency understood that many CLECs were using pick-and-choose, and it did not suggest otherwise in the *Order*. But it also found substantial evidence that numerous CLECs were adopting entire agreements, *Order* at n.78 (PRE, Tab 41), contrary to its original assumption that "few new entrants would be willing to elect an entire agreement." *Local Competition Order* ¶ 1312 (PRE, Tab 4). That evidence convinced the Commission that "the pick-and-choose rule does not afford requesting carriers protections against discrimination beyond those that would be in place under the all-or-nothing rule." *Order* ¶ 18 (PRE, Tab 41). The Commission thus reasonably concluded that "the pick-and-choose protections against discrimination are superfluous" to ensure this protection. *Ibid*.

The FCC also did not find that the pick-and-choose rule was "not working" because "relatively few requesting carriers invoked" it. *See* New Edge Br. 29. The Commission concluded that the rule had "significantly impede[d] negotiations … by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions." *Order* ¶ 12 (PRE, Tab 41) (quoting *AT&T*, 525 U.S. at 396). The Commission further determined that "disputes over obligations under the pick-and-choose rule" had become "a significant obstacle" to efficient interconnection negotiations. *Order* ¶ 16 (PRE, Tab 41). Because the rule was crippling the negotiation process established by Congress, the Commission had good reason to eliminate pick-and-choose.

Removing this impediment to negotiations advances both congressional intent and sound economic policy. With respect to congressional intent, the 1996 Act places great emphasis on the negotiation process – indeed makes that process a centerpiece of the new competition. Section 252 requires requesting carriers and incumbents to engage in commercial negotiations over interconnection when a CLEC chooses to exercise its rights under the Act. *See* 47 U.S.C. § 252(a), (b); *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 639 (2002) (noting that interconnection negotiations between ILECs and CLECs are "required by the Act"). Not surprisingly, courts repeatedly have recognized the central role Congress intended negotiations to play, on several occasions setting aside state procedures that would "place[] a thumb on the negotiating scales." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1075 (2004). *See also Verizon North, Inc. v. Strand*, 367 F.3d 577, 585-86 (6th Cir. 2004). The new FCC regulation, designed to avoid impeding negotiations, advances this congressional objective.

Removing impediments to the negotiation process also is sound regulatory policy. The complexities of the telecommunications industry make it difficult for regulators to determine precisely what would best facilitate competition. A regime that encourages negotiated outcomes first and reserves regulatory processes as a backstop is likely to promote competition effectively. The pick-and-choose rule, however, tended to reduce incentives to reach negotiated solutions and thus to increase the likelihood of standardized agreements containing provisions imposed through regulation. *Order* ¶¶ 12-13 (PRE, Tab 41).

Some petitioners argue, however, that the FCC's new rule "is incongruous" with Congress's goal "'to shift monopoly markets to competition as quickly as possible.'" CompTel Br. 26 (quoting H.R. Rep. No. 204, 104th Cong., 1st Sess. 89 (1995) (PRE, Tab 1)). They maintain that Congress directed the FCC to give CLECs easy access to incumbents' networks "via affirmative and expansive rules" such as pick-and-choose. CompTel Br. 28. The argument confuses Congress's goal in enacting the 1996 Act with the mechanisms Congress actually enacted. In fact, Congress gave the FCC substantial discretion in making rules to implement individual statutes and to achieve the goal of competition. *See generally AT&T*, 525 U.S. 366. The D.C. Circuit, for example, has stated, in striking down FCC rules that it held went too far in the direction of helping CLECs enter local telecommunications markets, that the purpose of the 1996 Act "is not to provide the widest possible [access]" to ILECs' network facilities, but rather "to stimulate competition by CLECs using their own facilities." *USTA II*, 359 F.3d at 576. What the Act makes absolutely clear, moreover, is that Congress expected ILECs and CLECs in the first instance to conduct "good faith" negotiations and work out their own network-sharing arrangements. *See* 47 U.S.C. § 251(c)(1). The Commission reasonably determined that replacing its pick-and-choose rule would better promote commercially sustainable competition, including the meaningful negotiation between ILECs and CLECs that Congress contemplated. *See Order* ¶¶ 12-17 (PRE, Tab 41).

Petitioners acknowledge that interconnection negotiations under the pick-and-choose rule frequently produced a stalemate. They maintain, however, that the

rule is not to blame. Instead, they ascribe the breakdown in negotiations to ILECs' general unwillingness to provide their competitors access to their network facilities and services. New Edge Br. 29-32; CompTel Br. 45-47; Cox Br. 48-49. Petitioners' argument is largely beside the point. Whatever the other constraints on intercarrier negotiations under the 1996 Act, the Commission was presented with substantial record evidence that the pick-and-choose rule had contributed to the ILECs' reluctance to reach agreements "by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions." *See AT&T*, 525 U.S. at 396. As the Supreme Court noted, the FCC has special "expertise" in assessing the impact of pick-and-choose on interconnection negotiations. *Ibid*. Exercising that expertise in this case, the Commission reasonably concluded, in light of documented experience, that "the pick-and-choose rule undermines negotiations by unreasonably constraining incentives to bargain." *Order* ¶ 13 (PRE, Tab 41).

The Commission reasonably predicted that an all-or-nothing rule would give ILECs greater incentive to negotiate interconnection agreements. This sort of prediction "regarding the actions of regulated entities" is "precisely the type of policy [judgment] that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) (internal quotations omitted). *See California v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996); *California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). The Supreme Court has acknowledged the Commission's unique "expertise" in evaluating how a particular interpretation of section 252(i)

might influence interconnection negotiations. *AT&T*, 525 U.S. at 396. Like the Supreme Court, this Court should defer to the agency's expertise in this area.

Cox asserts that the FCC based its prediction in this case on ILECs' "self-serving statements" that they "would be more willing to negotiate 'creative' interconnection agreements involving more 'trade-offs'" under an all-or-nothing rule. Cox Br. 48. But the Commission did not rely solely on the representations of ILECs. Telecommunications regulators from several states also strongly supported a move from pick-and-choose to all-or-nothing. Drawing upon their first-hand experience with arbitrating and approving interconnection agreements, state commissions in New York, Ohio, and Florida all predicted that interconnection negotiations would be more productive if an all-or-nothing rule were adopted.[16] Two CLECs also advocated a rule change. *See* PAETEC Comments (PRE, Tab 20); Sage Sturges Declaration (RER, Tab 15). Support for the Commission's new rule thus was not limited to the ILECs.

C. The FCC Took Account Of Competing Concerns And Undertook To Monitor And Enforce Its New Rule.

Petitioners speculate that the elimination of pick-and-choose will impair CLECs' ability to compete with ILECs by increasing negotiation and arbitration costs. Cox Br. 50-51; New Edge Br. 44-45. The Commission reasonably rejected that notion. It made the judgment that CLECs as a group would benefit from a

[16] *See* Comments of New York State Department of Public Service at 2 (RER, Tab 7); Comments of Ohio Public Utilities Commission at 3 (RER, Tab 6); Comments of Florida Public Service Commission at 3-7 (RER, Tab 5).

more efficient negotiation process under its all-or-nothing rule because ILECs would have "increased incentives to engage in meaningful give-and-take negotiations." *Order* ¶ 14 (PRE, Tab 41). In addition, the Commission pointed out that if CLECs "with limited resources" wished to avoid the costs of negotiation and arbitration under an all-or-nothing rule, they would "have the option of adopting a suitable agreement in its entirety" – a "common practice" that many CLECs had already employed under the pick-and-choose rule. *Ibid.*

Some petitioners assert that "poison pills will become rampant" under an all-or-nothing rule. CompTel Br. 47. Yet, although many CLECs adopted entire agreements under the pick-and-choose rule, the Commission discerned no substantial record evidence that ILECs had used "poison pills" to try to discourage the adoption of whole agreements. *Order* ¶ 21 (PRE, Tab 41). While the Commission recognized that the pick-and-choose rule itself had "likely served as a deterrent to poison pill provisions to some extent," it reasoned that "if the Act did not already provide adequate protection against" poison pills, ILECs "would have had some degree of incentive to include such terms in agreements given the widespread practice by requesting carriers of adopting entire agreements." *Ibid*. The Commission reasonably projected that these protections would continue to prevent any outbreak of "poison pills" after the elimination of pick-and-choose.

At the same time, the Commission vowed to "take appropriate action as needed" in the event that ILECs engage in discriminatory practices under its new all-or-nothing rule. *Order* ¶ 21 (PRE, Tab 41). The law requires nothing more. The Commission was not required to take action to address a "poison pill" problem

that did not exist at the time of the agency's rulemaking and may never materialize. "This is primarily an enforcement problem," and this Court has held that "the FCC is entitled to adopt a wait and see approach regarding such problems." *California v. FCC*, 4 F.3d 1505, 1515 (9th Cir. 1993).

Petitioners appear to claim that ILECs will not negotiate reasonable interconnection agreements under any circumstances. Congress did not share petitioners' pessimism. If Congress had believed (as petitioners apparently do) that interconnection negotiations were an exercise in futility, it presumably would not have required carriers to negotiate. It could have dispensed with negotiations entirely by asking federal or state regulators to set the terms and conditions of CLECs' access to ILECs' networks. Instead, Congress created a process in which interconnection negotiations play a central part. The Commission concluded that an all-or-nothing rule would better promote the meaningful give-and-take

negotiations that Congress envisioned when it enacted section 252. That reasonable policy judgment should be upheld.[17]

[17] Several petitioners mistakenly claim (CompTel Br. 48-50) that the FCC, by eliminating the pick-and-choose rule, effectively forbore from enforcing section 252(i) without satisfying the statutory prerequisites for forbearance under section 10 of the 1996 Act, 47 U.S.C. § 160. The Commission had no reason to follow the procedures specified in section 10 because it did not engage in forbearance. Section 10 "comes into play only for requirements that exist; it says nothing as to what the statutory requirements are." *USTA II*, 359 F.3d at 579. Section 10 does not apply here because, as we explained in Part I above, no provision of the Communications Act required the Commission to establish a pick-and-choose rule. The FCC did not exercise forbearance here, and it did not purport to rely on section 10 in its ordering clauses. *Order* ¶¶ 71-72 (PRE, Tab 41). If petitioners mean to suggest that the Commission "may not abolish" one of its own rules without satisfying the requirements of section 10 (CompTel Br. 49), they are plainly wrong. There is an obvious difference between forbearing from enforcing a rule and repealing the rule altogether. Section 10 applies only to the former situation and does not alter the Commission's pre-existing authority to adopt – and amend or repeal – rules.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

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IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

NEW EDGE NETWORK, INC., *ET AL.*, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 04-73800 (AND CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 11695 words.

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