

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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In the Matter of the Request for Arbitration of Verizon California Inc. Pursuant to Section 252(i) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to Affirm Verizon's Denial of Blue Rooster Telecom, Inc.'s Request to Adopt the Interconnection Agreement between Blue Casa Communications, Inc. and Verizon California Inc. Because a Reasonable Period of Time Has Elapsed.

A. 10-04-029

**CONCURRENT OPENING BRIEF OF
BLUE ROOSTER TELECOM, INC. (U7169C)**

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
John L. Clark
505 Sansome Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321

Attorneys for Blue Rooster Telecom, Inc.

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BLUE ROOSTER TELECOM, INC. (U7169C)**

Pursuant to the briefing schedule adopted by Administrative Law Judge Hallie Yacknin on May 28, 2010, Blue Rooster Telecom, Inc. ("Blue Rooster") hereby submits its opening brief on the legal issues of (1) whether Blue Rooster is entitled to adopt the previously-approved interconnection agreement ("ICA") between Verizon California, Inc. ("Verizon") and Blue Casa Communications, Inc. ("Blue Casa"), and, if not, (2) whether Blue Rooster is entitled to commence operations pursuant to an order requiring Verizon to honor all of the provisions of that Verizon/Blue Casa ICA to which Verizon does not have an actual, good faith objection, pursuant to Rule 7.3.2 of Resolution ALJ-181.

INTRODUCTION

Blue Rooster is a newly-certified competitive local exchange carrier (“CLEC”) based in San Luis Obispo.¹ On March 30, 2010, Blue Rooster filed an advice letter pursuant to Resolution ALJ-181 seeking to adopt the existing Verizon/Blue Casa ICA, as amended,² in accordance with Blue Rooster’s rights under 47 U.S.C. § 252(i).

After it received the advice letter, Verizon notified Blue Rooster that Verizon no longer deems the Verizon/Blue Casa ICA to be available for adoption. Verizon contended that, under Federal Communications Commission (“FCC”) Rule 51.809(c),³ Verizon is required to make an ICA available for adoption under § 252(i) only for “a reasonable period of time” and that, although the ICA still governs the interconnection relationship between Verizon and Blue Casa, a “reasonable period of time” has expired since the date that the ICA first went into effect, which was August 2004.

Over a subsequent period of weeks, Blue Rooster and Verizon attempted to reach agreement on potential amendments that might be made to a newer ICA that Verizon would allow Blue Rooster to adopt. However, that effort was unsuccessful, and on April 23, 2010, Verizon filed its request for arbitration of Blue Rooster’s adoption advice letter.⁴

As Blue Rooster shows below, Verizon has failed to meet its burden to establish a reasonable basis for denying Blue Rooster’s request to adopt the Verizon/Blue Casa ICA.

¹ Blue Rooster received authority to operate as a partial-facilities-based and resale local exchange carrier and interexchange carrier by Decision No. 10-03-018, which was issued on March 11, 2010, in Application 09-09-017.

² As discussed below, the Verizon/Blue Casa ICA has been amended since the date it first went into effect in order to reflect subsequent changes of law. Each of these amendments is part of the ICA that Blue Rooster has sought to adopt.

³ 47 C.F.R. § 51.809(c).

⁴ Request for Arbitration of Verizon California Inc., April 23, 2010 (“*Verizon Arbitration Request*”)

Verizon has incorrectly asserted that the Verizon/Blue Casa ICA does not reflect current law, and has failed to present any other valid reason for refusing to allow Blue Rooster to interconnect and obtain necessary facilities and services from Verizon on the same rates, terms, and conditions that are available to Blue Rooster's competitors. In short, Verizon's refusal to accept Blue Rooster's adoption of the Verizon/Blue Casa ICA is both unreasonable and discriminatory, which violates the fundamental purpose of Congress' enactment of 47 U.S.C. § 252(i).⁵

Moreover, even if Verizon were able to establish valid, good faith reasons for rejecting Blue Rooster's adoption of certain provisions of the Verizon/Blue Casa ICA, Verizon cannot support its knowing and willful disregard of the Commission's requirement in Rule 7.3.2 of Resolution ALJ-181 that Verizon immediately implement the remaining provisions of the ICA. Verizon's contention that this rule has been preempted by the FCC's elimination of the so-called "pick-and-choose" rule,⁶ which formerly allowed CLECs to formulate ICAs or amend existing ICAs by picking and choosing from provisions among other ICAs, is specious. Blue Rooster has sought to adopt the Verizon/Blue Casa ICA in its entirety, including all amendments. The only picking and choosing taking place, here, is Verizon's picking and choosing which Commission rules it will follow and which CLECs will be denied an opportunity to compete on a nondiscriminatory basis.

⁵ See, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (1996) 11 FCC Rcd 15499 ("First Report and Order"), ¶ 1315.

⁶ See, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (2004) 19 FCC Rcd 13494 ("All-or-Nothing Order").

I. WHEN CONSIDERED IN LIGHT OF THE UNDERLYING PURPOSES OF 47 U.S.C. § 252(i) AND THE FCC’S RULES IMPLEMENTING THAT SECTION, IT IS CLEAR THAT VERIZON HAS FAILED TO PROVIDE A VALID BASIS FOR REJECTING BLUE ROOSTER’S ADOPTION REQUEST

A. Verizon’s Interpretation of FCC Rule 51.809(c) Does Not Conform to the FCC’s Purpose in Adopting That Rule and Would Undermine the Fundamental Intent of § 252(i)

Section 252(i) of the Telecommunications Act of 1996⁷ states that, “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.”

The fundamental purpose of this section is to prevent discrimination.⁸ Thus, in construing the FCC’s rule limiting the ability of CLECs to adopt existing ICAs to a “reasonable period of time,” which is a clear departure from the plain language of § 252(i),⁹ it is important to understand the FCC’s reasons for doing so in order to avoid undermining Congress’ goal in enacting that section.

The reasons given by the FCC for the “reasonable period of time” rule were specific. The FCC found the rule appropriate in order to resolve incumbent LECs’ concerns about potential “technical incompatibility” and because “pricing and network configuration choices are likely to change over time.”¹⁰ As the FCC explained, “Given this reality, it would not make any sense to permit a subsequent carrier to impose an agreement or term upon an

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified in scattered sections at Title 47, United States Code (“1996 Act”), at 47 U.S.C. § 252(i).

⁸ See, *First Report and Order*, ¶ 1315 (this section is “the primary tool of the 1996 Act for preventing discrimination under Section 251); also, see, *All-or-Nothing Order*, ¶¶ 18-19.

⁹ There is no reference to “reasonable time” or other temporal considerations in § 252(i).

¹⁰ *First Report and Order*, ¶ 1319.

incumbent LEC *if the technical requirements of implementing that agreement or term have changed.*”¹¹

In light of the underlying purpose of § 252(i) and the underlying rationale for FCC Rule 51.809(c), there is no sound basis for Verizon’s assertion that a “reasonable period of time” for an ICA to remain available can be measured simply by reference to linear time or whether the ICA is still in “initial” term or, instead, is in evergreen term. Rather, as both this Commission and courts have held, the notion of what constitutes a “reasonable” period of time requires consideration of the particular circumstances of each case and, contrary to the holdings of the few other state commissions cited in Verizon’s arbitration request, cannot be determined simply on the basis of the passage of some period of time. “[W]e have not adopted a strict definition of what constitutes a ‘reasonable’ period of time ‘but since circumstances may vary, we will make that determination on a case-by-case basis.’”¹² “The FCC, to our knowledge, has yet to construe ‘reasonable’ period of time under § 51.809(c), but as BellSouth acknowledges elsewhere in its brief, ‘a flexible standard is implicit in the FCC’s use of the term “reasonable.’” [Cite omitted.] ‘Reasonable’ plainly is a relative term, dependent on context and circumstances”¹³

Thus, FCC Rule 51.809(c) is not an open invitation for incumbent LECs, such as Verizon, to refuse a requested adoption of an “older” ICA without regard for whether there actually is any good reason to deem the ICA out of date. Indeed, taking Rule 51.809(c) out of context by ignoring the FCC’s rationale for creating that exception from the plain directive of § 252(i) and adopting a “one-size-fits-all” all test of what constitutes a “reasonable” period of

¹¹ *Id.*, emphasis added.

¹² D. 00-04-066, *mimeo.*, p. 9.

¹³ *BellSouth Telecomms., Inc. v. Universal Telecomm., Inc.* (6th Cir. 2006) 454 F.3d 559, 564.

time would result in an overly-expansive interpretation of that rule and open the door to unreasonable and insupportable discrimination by incumbent LECs, contrary to the fundamental purpose of § 252(i).

B. The Verizon/Blue Casa ICA Is Not Out-of-Date and Remains Appropriate for Adoption Under § 252(i)

Verizon’s request for arbitration asserts that “[i]n the years since the Commission approved the Pac-West agreement, telecommunications law and the industry have changed significantly, and the Pac-West ICA does not reflect these changes.”¹⁴ However, whether or not the Pac-West ICA has been amended or not is irrelevant. While the Verizon/Blue Casa ICA, itself, was an adoption of the Verizon/Pac-West ICA, Blue Rooster is not seeking to adopt the Verizon/Pac-West ICA; Blue Rooster is seeking to adopt the Verizon/Blue Casa agreement, which has been amended to reflect all developments occurring since the date it went into effect. These developments include: (i) an amendment adopted pursuant to D. 06-07-033 and D. 06-02-035 to reflect changes in the availability of unbundled network elements ordered by the FCC in its *Triennial Review Order*¹⁵ (“TRO”) and *Triennial Review Remand Order*¹⁶ (“TRRO”); and (ii) an amendment to establish revised pricing for unbundled network elements, as ordered by D.07-10-033 and D.06-03-025. Blue Rooster is not aware of any other developments that result in any need to update the Verizon/Blue Casa ICA.

¹⁴ *Verizon Arbitration Request*, p. 3.

¹⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (2003) 18 FCC Rcd. 16978.

¹⁶ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (2005) 20 FCC Rcd 2533.

1. Verizon's Assertion That the Verizon/Blue Casa ICA Does Not Appropriately Address Changes in Law Relating to Compensation for ISP-Bound Traffic Are Without Merit

With respect to its assertion that the Verizon/Blue Casa ICA is out-of-date, Verizon states: "Most notably, the Pac-West ICA predates two FCC orders clarifying how carriers should be compensated for Internet Service Provider ('ISP') traffic, [footnote omitted] a matter that has generated substantial litigation over the years, including at least one case pending before the Commission involving dueling interpretations of the Pac-West ICA on this issue. [Footnote omitted.]"¹⁷ However, while there have, indeed, been two ISP-related FCC orders since the date that the Pac-West agreement was adopted, Verizon has grossly overstated their relevance.

The first ISP-related order cited by Verizon is the "*Core Forbearance Order*,"¹⁸ which granted forbearance from the "growth caps" and "new markets" rule of the "*ISP Remand Order*."¹⁹ By this order, certain limitations on CLECs' rights to receive compensation for terminating ISP-bound traffic were eliminated. While the *Core Forbearance Order* was not reflected by an amendment to the Pac-West ICA (nor, to Blue Rooster's knowledge, to any of that ICA's progeny), the Pac-West ICA and the Blue Casa ICA both allow the ICAs to be amended to reflect that change of law. Specifically, Section 11 of the "Interconnection Attachment," which governs the payment of compensation of call termination for ISP-bound traffic, states:

¹⁷ *Verizon Arbitration Request*, p. 3.

¹⁸ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order* (2004) 19 FCC Rcd 20179.

¹⁹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* (2001) 16 FCC Rcd 9151.

Verizon and Pac-West hereby agree that the rates, terms and conditions set forth below represent the Parties' understanding of how the Parties will implement the FCC Internet Order [the *ISP Remand Order*]. In the event that the FCC Internet Order is vacated in whole or in part, or materially modified, then the Parties shall undertake good faith efforts to negotiate an amendment to this Agreement within 90 days of the effective date of such vacatur or modification, as required to conform the Agreement to the terms of the decision vacating or modifying the FCC's Internet Order and Applicable Law.

Thus, the ICAs provide a mechanism for either party to seek an amendment to reflect the *Core Forbearance Order* if they so desire (realistically, though, only a CLEC would seek this particular amendment).

Verizon has not provided any explanation of why the foregoing change-of-law provision does not resolve any problem that Verizon sees in the ICA's current failure to reflect the *Core Forbearance Order*. Just as importantly, Verizon has not indicated "what it is about the [*Core Forbearance Order*] that makes adoption of the [Verizon/Blue Casa ICA] infeasible, unduly costly, or otherwise indicative that an unreasonable time for adopting the agreement has run."²⁰ Therefore, the FCC's issuance of the *Core Forbearance Order* does not support Verizon's position.

The second ISP-related order cited by Verizon is a decision issued by the FCC following review and remand of the *ISP Remand Order*. This order,²¹ however, actually changed nothing of substance relating to the Verizon/Pac-West ICA or the Verizon/Blue Casa ICA. Instead, it merely explained and confirmed, in response to a court-issued mandate, the

²⁰ See, *BellSouth Telecomms., Inc. v. Universal Telecomm., Inc.*, *supra*, 454 F.3d 559, at 563.

²¹ *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services* (2008) 24 FCC Rcd 6475.

intercarrier compensation regime for ISP-bound traffic adopted by the *ISP Remand Order*, which is currently reflected in both of those ICAs. Blue Rooster cannot imagine what change Verizon believes needs to be made to either of those ICAs in order to reflect this alleged “change of law” Apparently, Verizon cannot either, as it has not sought any such amendment. What is more, even if Verizon could point to some revision that should be made to the ICA, Verizon has given no reason why such revision could not be made under the change-of-law provision noted above.

2. The Existence of an Outstanding Dispute Relating to Compensation for ISP-Bound Traffic Does Not Justify Removing the Verizon/Blue Casa ICA From the List of Agreements That Are Available for Adoption

The existence of the pending complaint proceeding cited by Verizon²² is also irrelevant. That proceeding concerns competing interpretations of ICA provisions that are intended to conform to and carry out specific compensation policies adopted by the Commission relating to ISP-bound VNXX traffic.²³ While Verizon asserts in its arbitration request that its “newer interconnection agreements contain updated language designed to avoid such disputes,”²⁴ the manner in which the “newer agreements” avoid such disputes is by unilaterally reversing longstanding Commission policies. The “newer” agreements clearly eliminate the right of CLECs to be compensated for ISP-bound VNXX traffic (contrary to Commission policy) and, instead, clearly compel CLECs to pay access charges to Verizon for such traffic (contrary to Commission policy). Thus, the “newer” agreements avoid disputes only by violating long-established policies that the Commission continues to support.²⁵

²² *Verizon Arbitration Request*, p. 3 and footnote 5.

²³ *See, generally*, Post Hearing Merits Brief of Verizon California, Inc., C.08-02-013/C.09-06-025, dated March 17, 2010.

²⁴ *Verizon Arbitration Request*, p. 3.

²⁵ *See, e.g.*, Late-Filed Reply Comments of the California Public Utilities Commission, FCC WC Docket No. 09-8 (April 3, 2009).

Of course, Verizon's desire to violate public policy is not sufficient reason to call an ICA "outdated." Moreover, once the Commission resolves the complaint proceeding, the meaning of the subject ICA provisions will no longer be a continuing subject of dispute.

3. The ICAs That Verizon Has Agreed to Make Available for Adoption, Not the Verizon/Blue Casa ICA, Are the Ones That Are Out-of-Date

While Verizon's petition also contends that the Verizon/Pac-West ICA does not reflect other developments that have taken place since that agreement first went into effect,²⁶ Verizon does not identify such developments or explain what changes to the "older" ICAs are needed to reflect those changes. Indeed, it is not the "older" ICAs, but Verizon's "contemporary" ICAs that actually need to be updated.

As noted by Blue Rooster in its response to Verizon's request for arbitration, the "contemporary" ICAs offered by Verizon do not reflect the Commission's *TRO/TRRO* decisions.²⁷ Further, the "contemporary" ICAs do not include provisions to encourage billing accuracy (*e.g.*, a right on the part of the CLEC to withhold payment for billings that are the subject of a good faith dispute or, alternatively, performance penalties, such as the "performance incentives" that impose penalties on to Pacific Bell Telephone Company for excessive billing errors pursuant to D. 02-03-023 and subsequent decisions in R. 97-10-016/I. 97-10-017). Moreover, the "contemporary" ICAs impose rates that the Commission specifically rejected in D. 06-02-035 on the ground that they were not supported by relevant cost showings. In addition, the "contemporary" ICAs eliminate the ability of CLECs to obtain cost-based entrance facilities for interconnection, contrary to their rights under the *1996 Act*, as determined by the Commission in D.06-02-035 and D. 06-03-014, and confirmed by the Ninth Circuit only three

²⁶ *Verizon Arbitration Request*, p. 4.

²⁷ D. 06-07-033 and D. 06-02-035.

months ago.²⁸ Finally, as noted above, the “contemporary” ICAs unilaterally reverse and conflict with longstanding Commission policy regarding ISP-bound VNXX traffic.

The fact is, the “contemporary” ICAs are not “contemporary” at all; instead, they are merely reactionary attempts to undo some of the few favorable provisions in ICAs that CLECs have won over the years.

C. Verizon Has Failed to Meet Its Burden of Proof

As the foregoing shows, Verizon has not met its burden of proof under Rule 7.3.1 of Resolution ALJ-181. While the Verizon/Blue Casa ICA was first established a number of years ago, it has been amended to reflect all subsequent developments, and its provisions remain suitable for governing relationships between Verizon and CLECs. Indeed, Verizon continues to interconnect with Blue Casa, Telscape Communications, Inc., Utility Telephone, Inc., Airespring, Inc., CCT Telecommunications, Inc., A+ Wireless, Inc., Preferred Long Distance, Inc., Pac-West Telecomm, Inc., O1 Communications, Inc., Mpower Network Services, Inc., Bright House Networks, LLC, and undoubtedly other CLECs under ICAs that are virtually the same as the Verizon/Blue Casa ICA, all of which ICAs are in evergreen term.

Verizon’s refusal to afford Blue Rooster the opportunity to interconnect, obtain facilities, and services, and compete on the same basis as all these other CLECs is blatant discrimination. Verizon has not shown, and cannot show, any cost or other legitimate differences that would justify its refusal to interconnect with and serve Blue Rooster on the very same basis as any of these other CLECs.

Moreover, it should be noted that singling out Blue Rooster for the purpose of forcing a lengthy negotiation and arbitration to take place at this point in order to allow the terms

²⁸ *Pac. Bell Tel. Co. v. Cal. PUC* (9th Cir. 2010) 597 F.3d 958.

of the ICA to be “re-visited,” as Verizon apparently wants to do, is, in and of itself, discriminatory and anti-competitive.²⁹ If the Verizon/Blue Casa ICA is so out-of-date, as Verizon contends, there is no reason why Verizon could not give notice of termination to all the CLECs who interconnect under the terms of that agreement (in its various forms), thereby ensuring that all CLECs are placed on a level playing field and, incidentally, allowing all affected CLECs to jointly participate in a single, economical and efficient arbitration if they so desire rather than being placed in positions where they are grossly-overmatched and can be picked off one-by-one as Verizon is doing here.

II. VERIZON HAS NO EXCUSE FOR ITS KNOWING AND WILLFUL FAILURE TO HONOR ALL PROVISIONS OF THE VERIZON/BLUE CASA AGREEMENT TO WHICH IT DOES NOT HAVE A GOOD FAITH OBJECTION

Under the Commission’s rules governing the adoption of existing ICAs, an incumbent LEC may not rely upon its filing of a request for arbitration to delay a CLEC’s entry into the marketplace. Instead, Rule 7.3.2 of Resolution ALJ-181 provides:

Should the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection pursuant to Rule 7.2, effective as of the date of the filing of the arbitration request. Furthermore, to the extent the ILEC seeks arbitration of a particular interconnection, service or element, the ILEC shall immediately honor such provisions subject to retroactive price true-up back to the date when the arbitration request was filed, based on the Commission’s resolution of the arbitration. The effective date of other disputed issues will be set in the arbitration process and could be made effective retroactive to the date when the arbitration request was filed.

Despite this long-established requirement, Verizon has utterly refused to enter into a relationship that will allow Blue Rooster to interconnect and compete in Verizon territory

²⁹ See, *First Report and Order*, ¶ 1321 (in the context of procedures for adopting ICAs under § 252(i) the FCC stated, “We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement”).

unless Blue Rooster recedes from its effort to adopt the Verizon/Blue Casa ICA. Verizon asserts that Rule 7.3.2 is no longer valid, having been implicitly preempted by the FCC's elimination of the so-called "pick and choose" rule.

Verizon's assertion is without merit. The "pick-and-choose" rule was adopted by the FCC in its *First Report and Order* implementing the *1996 Act*. The FCC "pick and choose" rule, which was set forth at 47 CFR § 51.809 (1997), provided, in relevant part:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

In effect, the "pick and choose" rule allowed a CLEC to craft an individualized ICA by taking specific provisions from various existing ICAs and placing them into a single agreement through the § 252(i) adoption mechanism.³⁰ In addition, the rule allowed a CLEC with an existing ICA to amend the ICA to include provisions set forth in other ICAs, again through the § 252(i) adoption mechanism.³¹

Although the Supreme Court held, on review, that the FCC's "pick and choose" rule is not only a reasonable interpretation of § 252(i) but "is the most readily apparent,"³² the FCC subsequently abolished the rule and, in its place, adopted the current "all-or-nothing" rule, which states, in pertinent part:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement *in its entirety* to which it is a party that is approved by a state

³⁰ *First Report and Order*, ¶ 1310.

³¹ *Id.*, ¶ 1316.

³² *AT&T Corp. v. Iowa Utils. Bd.* (1999) 525 U.S. 366, 396; 119 S. Ct. 721; 142 L. Ed. 2d 834.

commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.^[33]

The FCC’s rationale for adopting the all-or-nothing rule was to remove a disincentive to give-and-take bargaining that the FCC believed resulted from the pick-and-choose rule:

We find that the record evidence supports our conclusion that an all-or-nothing rule would better serve the goals of sections 251 and 252 to promote negotiated interconnection agreements because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule. [Footnote omitted.]

.....

The record evidence supports our conclusion that the pick-and-choose rule “makes interconnection agreement negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs” under the Act. [Footnote omitted.] We are persuaded, based on the record before us, that the pick-and-choose rule undermines negotiations by unreasonably constraining incentives to bargain during negotiations. [Footnote omitted.]^[34]

The FCC did not intend, however, to deprive new, small entrants of the ability to quickly and efficiently enter the marketplace through adoption of an existing ICA pursuant to 47 U.S.C. § 252(i): “Requesting carriers with limited resources will have the option of adopting a suitable agreement in its entirety, as is common practice today, [footnote omitted] if they decline to pursue negotiated interconnection agreements.”³⁵

Thus, there is nothing inconsistent between Rule 7.3.2 of Resolution ALJ-181 and the purpose of the “all-or-nothing” rule. Requiring Verizon to immediately implement all of the

³³ 47 CFR § 51.809 (2009), emphasis added.

³⁴ *All-or-Nothing Order*, ¶¶ 12-13.

³⁵ *Id.*, ¶ 14.

provisions of the Verizon/Blue Casa ICA to which it has no good faith objection will not impair Verizon's ability or incentive to negotiate with Blue Rooster to develop and bargain for different or innovative ways to address the matters that are of actual good faith concern to Verizon; but it will enable Blue Rooster to enter the marketplace without undue delay and will help ensure that Verizon cannot use the leverage of withholding clearly-established rights to interconnection, unbundled network elements, and other services as a means to force Blue Rooster into accepting unreasonable and discriminatory terms and conditions.

Accordingly, rather than being at odds with the FCC's elimination of the "pick-and-choose" rule, Rule 7.3.2 of Resolution ALJ-181 strikes an appropriate balance of all of the interests underlying the FCC's scheme: the interest in enhancing the incentives for ILECs and CLECs to engage in creative "give-and-take" during negotiations³⁶; the interest in ensuring relative ease of new entry³⁷; and the overarching interest in preventing discrimination³⁸.

By contrast, Verizon's approach disserves all of these interests. Upon asserting that there is even a single provision or price in an ICA that is out of date, Verizon could place itself in a position of awesome superiority in bargaining power over a small, start-up CLEC, not only with respect to that single provision or price but also with respect to all other provisions, because they all would be "out the window." The CLEC could be forced either to negotiate and potentially arbitrate, at very significant delay and expense, any number of issues, or to accept whatever discriminatory or anti-competitive ICA provisions Verizon imposes and suffer the ensuing disadvantages from having done so.

³⁶ See, *All-or-Nothing Order*, ¶¶ 1, 14.

³⁷ See, *id.* at. ¶ 14; also, see *First Report and Order*, ¶ 1321.

³⁸ See, *All-or-Nothing Order*, ¶ 19; *First Report and Order*, ¶ 1315.

Therefore, Rule 7.3.2 of Resolution ALJ-181 is not countermanded by the FCC's abolition of the "pick-and-choose" rule and remains the law in this state. Accordingly, Verizon is required to immediately implement, for Blue Rooster's benefit, all of the provisions of the Verizon/Blue Casa ICA to which Verizon has no good faith objection.

CONCLUSION

Verizon's rejection of Blue Rooster's request to adopt the Verizon/Blue Casa ICA is without merit. Verizon has not provided any valid reason for its arbitration request. Verizon has not shown why any provision of the ICA should be deemed obsolete or otherwise out-of-date. Indeed, Verizon cannot do so because the ICA has been amended over time to conform to all changes in law and continues to adequately serve as the basis for ongoing business and interconnection relationships between Verizon and numerous CLECs.

Therefore, Verizon's attempt to force Blue Rooster into adopting a newer ICA that neither reflects current law or Commission policy should be firmly rejected so that Blue Rooster can go forward with its plans expeditiously to enter the marketplace on a fair, reasonable, and nondiscriminatory basis.

Respectfully submitted June 9, 2010 at San Francisco, California.

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
John L. Clark
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321

By /s/ John L. Clark

John L. Clark

Attorneys for Blue Rooster Telecom, Inc.

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CERTIFICATE OF SERVICE

I, Lisa Chapman, certify that I have on this 9th day of June 2010 caused a copy of the foregoing

**CONCURRENT OPENING BRIEF OF BLUE
ROOSTER TELECOM, INC. (U7169C)**

to be served on all known parties to A.10-04-029 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

Commissioner Dian Grueneich
California Public Utilities Commission
505 Van Ness Avenue, Room 5207
San Francisco, CA 94102

ALJ Hallie Yacknin
California Public Utilities Commission
505 Van Ness Avenue, Room 5032
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of June 2010 at San Francisco, California.

/s/ Lisa Chapman
Lisa Chapman

Service List A.10-04-029
Last Updated 5/24/10

RUDOLPH M. REYES
rudolph.reyes@verizon.com

JOHN L. CLARK
jclark@gmssr.com

ALJ HALLIE YACKNIN
hsy@cpuc.ca.gov

PUC/X119820.v1
06/09/10