BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
John A. Tuma	Commissioner

In the Matter of the Adoption of an Interconnection Agreement by Hiawatha Broadband Communications, Inc. pursuant to Section 252(i)

In the Matter of the Adoption of an Interconnection Agreement by Federated Telephone Cooperative pursuant to Section 252(i)

ISSUE DATE: April 12, 2016

DOCKET NO. P-6267, 5561/IC-15-1020

DOCKET NO. P-430, 523, 5561/IC-16-94

ORDER APPROVING ADOPTION OF INTERCONNECTION AGREEMENTS

PROCEDURAL HISTORY

Hiawatha Broadband Communications, Inc. (Hiawatha or HBC), a competitive local exchange carrier (CLEC), is interconnected with Embarq, Minnesota, Inc. d/b/a CenturyLink EQ (CenturyLink), an incumbent local exchange carrier (LEC),[1] to exchange telecommunications traffic. Their interconnection is governed by an interconnection agreement that has now expired, but renews automatically until replaced (the Hiawatha agreement).[2]

On November 9, 2015, Hiawatha proposed to replace the Hiawatha agreement with the terms of the Commission-approved agreement that CenturyLink had earlier entered into with Hutchinson Telecommunications, Inc. (the Hutchinson agreement),[3] under 47 U.S.C. § 252(i). On November 23, CenturyLink stated that Hiawatha must first disclose where and how it intends to interconnect.

On December 2, 2015, Hiawatha petitioned the Commission to compel CenturyLink to implement Hiawatha's request to adopt the terms of the Hutchinson agreement under section 252(i) of the federal Telecommunications Act of 1996 (the 1996 Act).[4] The Commission assigned this matter to Docket No. P-6267, 5561/IC-15-1020 (the Hiawatha docket).

[1] 47 U.S.C. § 251(h).

[2] *See* Docket No. P-6267,430/IC-10-183.

[3] *See* Docket No. P-421, 5561, 430/ IC-14-189, *In the Matter of the Petition of Hutchinson Telecommunications for Arbitration of an Interconnection Agreement with CenturyLink EQ Pursuant to 47 U.S.C. § 252(b)*, Interconnection Agreement compliance filing (August 5, 2015).

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

On December 11, 2015, CenturyLink filed a letter stating that it needs information from Hiawatha so that it may first evaluate the cost to CenturyLink of providing the interconnection agreement to Hiawatha.

By December 31, 2015, the Commission had received comments from CenturyLink, Hiawatha, and the Minnesota Department of Commerce (the Department). In addition, Federated Telephone Cooperative (Federated), another CLEC, petitioned to intervene.

On January 21, 2016, CenturyLink and Federated filed reply comments. Federated also asked to adopt the Hutchinson interconnection agreement; the Commission assigned Federated's adoption request to Docket No. P-430, 523, 5561/IC-16-94 (the Federated docket).

On February 9, 2016, CenturyLink stated that Federated's request raised issues identical to those raised by Hiawatha's request; consequently CenturyLink filed in the Federated docket the comments and reply comments it had filed in the Hiawatha docket.

On February 10, 2016, the Department filed comments in the Federated docket restating the arguments it had made in the Hiawatha docket.

On February 26, 2016, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Summary

The Commission will do the following:

- Deny CenturyLink's request for information from Hiawatha and Federated on the grounds that (1) the 1996 Act does not compel the carriers to provide this information as a condition of adopting a Commission-approved contract, and (2) the requested information is not relevant to the determination of cost differences under 47 C.F.R. § 51.809(b)(1).

- Approve Hiawatha's and Federated's requests to adopt the terms of the Hutchinson agreement on the grounds that CenturyLink has not established that the costs of providing the Hutchinson agreement to these CLECs would be greater than the costs of providing it to Hutchinson.

II. Legal Background

The federal Telecommunications Act of 1996 promotes competition in the local exchange market by, among other things, permitting competitive local exchange carriers (CLECs) to interconnect their networks with the networks of incumbent telephone companies, thereby permitting the exchange of telecommunications traffic. A CLEC has the discretion to adopt the terms of an agreement that the local telephone company has already established with another CLEC.[5]

[5] 47 U.S.C. § 252(i); 47 C.F.R. § 51.809.

Alternatively, carriers can establish the terms under which they interconnect their networks via good faith negotiations[6] or, if negotiations reach an impasse, by arbitration.[7]

47 U.S.C. §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.

Interpreting this statute, the Federal Communications Commission (FCC) adopted 47 C.F.R. § 51.809, titled *Availability of agreements to other telecommunications carriers under section 252(i) of the Act*, as follows:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC 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….
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> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
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> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
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> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.

III. Parties

The Minnesota Department of Commerce (the Department) is the state agency representing the broad public interest in telecommunications matters.[8]

Hiawatha and Federated are competitive local exchange carriers (CLECs).[9]

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[6] 47 U.S.C. § 251(c)(1).

[7] 47 U.S.C. § 252(e).

[8] *See* Minn. Stat. § 216A.07, subd. 3; 7812.0100, subp. 29.

[9] *See* Minn. R. 7812.0100, subp. 12.

CenturyLink is an incumbent local exchange carrier (LEC).[10] CenturyLink offers "Contract Templates" for CLECs seeking interconnection agreements. CenturyLink states that it is willing to enter into agreements that conform to the templates and, alternatively, that CLECs may use the template terms as a starting point to negotiate a new interconnection agreement.[11]

IV. Positions of the Parties

A. The CLECs

The CLECs seek to adopt the terms and conditions of the Hutchinson interconnection agreement under 47 U.S.C. § 252(i). They argue that CenturyLink is resisting their request to avoid providing the CLECs access to certain information under that interconnection agreement. In particular, the Hutchinson agreement provides for CenturyLink to disclose information about all the locations where CenturyLink has established facilities for interconnection with a telecommunications carrier.[12] This information would enable the CLECs to identify the most advantageous method of interconnecting with CenturyLink's network.

B. CenturyLink

CenturyLink offers five rationales for declining to implement the CLECs' request to adopt the terms of the Hutchinson interconnection agreement.

First, CenturyLink argues that the only situations in which a commission is authorized to approve an interconnection agreement are those in which the agreement has been reached through arbitration or negotiation, and neither of those conditions obtains in the current case.[13] CenturyLink justifies this claim by citing 47 U.S.C. § 252(e)(1), which states:

> APPROVAL REQUIRED - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

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[10] *See* 47 U.S.C. § 251(h).

[11] *See* http://www.centurylink.com/wholesale/clec_contract_templates.html (accessed February 8, 2016).

[12] Hutchinson agreement, Section 39.2, states:

> CenturyLink shall disclose to CLEC three pieces of information -- (1) the CenturyLink EQ switch code; (2) the Point of Interconnection CLLI [Common Language Location Identifier] code or the physical location, and (3) the interface level -- for all locations within a LATA where CenturyLink has established facilities for interconnection with a third party carrier. This existing interconnection information shall be provided within 15 Business Days of a written request from CLEC that specifies the geographic area of the customers it plans to serve. CLEC may request additional information regarding the individual points of interconnection.

[13] Hiawatha Docket, CenturyLink Comments, at 4 (December 31, 2015); Federated Docket, CenturyLink Comments, at 4 (February 9, 2016).

Second, CenturyLink argues that § 252(i) does not authorize a CLEC to adopt an existing interconnection agreement without the incumbent's participation and consent.[14] CenturyLink justifies this claim by citing 47 C.F.R. § 51.809(b)(1), which states that the obligation to allow adoption of an interconnection agreement does not apply where an incumbent proves that "[t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement." CenturyLink also cites *New Edge Network, Inc. v. FCC,*[15] in which the Ninth Circuit Court of Appeals upheld the FCC's adoption of this rule.

Third, CenturyLink argues that the CLECs must disclose their interconnection plans so as to enable CenturyLink to make an informed judgement about the cost of interconnection, and thus whether to grant its consent. In support of this claim, CenturyLink cites three authorities:

- 47 C.F.R. § 51.301(b) states that "[a] requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section."

- 47 C.F.R. § 51.301(c)(8) states that "[r]efusing to provide information necessary to reach agreement" demonstrates bad faith.

- *Global NAPS v. Verizon*[16] held that the good faith obligations associated with an arbitration proceeding apply in the context of CLEC's request to adopt an existing interconnection agreement under § 252(i).[17] CenturyLink quotes the decision as follows:

  Global NAPs [asks] the court to read an implicit limitation on the good faith requirement of § 252(b)(5) -- that CLECs are not bound by the terms of § 252(b)(5), if they attempt to opt into a previously available contract. Global NAPs says that this is the effect of § 252(i). But § 252(i) says nothing of the sort. Rather, it is written in terms of an obligation on the part of ILECs to make agreements available to potential CLECs, not as an unconditional right on the part of CLECs to modify their clear obligations under earlier subsections of § 252. We read the sections consistently, and conclude that § 252(i) is not an implicit limit on the binding effect of the arbitration provisions of § 252(b)(5). In this context, there is nothing ambiguous about the terms of § 252(b)(4)(C) and (b)(5).

[14] *Id.*

[15] 461 F.3d 1105 (9th Cir. 2006).

[16] *Global NAPS, Inc. v. Verizon New Eng., Inc*., 396 F.3d 16 (1st Cir. 2005), *cert denied*, 544 U.S. 1061 (2005).

[17] Hiawatha Docket, CenturyLink Reply Comments at 5 (January 21, 2016); Federated Docket, CenturyLink Reply Comments at 5 (February 9, 2016).

Fourth, CenturyLink argues that if CLECs will not disclose their interconnection plans before adopting an interconnection agreement under § 252(i), an incumbent such as CenturyLink would have no practical means to evaluate whether the agreement would result in higher costs as contemplated by 47 C.F.R. §51.809(b). Instead, the incumbent would be left to speculate about how the CLEC would intend to interconnect.[18]

Moreover, CenturyLink claims to have grounds to suspect that serving the CLECs would be more expensive than serving Hutchinson. Hutchinson is affiliated with an incumbent LEC with its own plant, whereas it is unclear that the CLECs have similar affiliations.[19]

Fifth, CenturyLink argues that it has no duty to disclose information about its own network under the terms of Hutchinson interconnection agreement until the agreement is adopted.[20]

C. The Department

The Department recommends that the Commission grant the CLECs' requests to approve their adoption of the Hutchinson agreement.

The Department argues that § 252(i) requires only that a CLEC request adoption of an interconnection agreement previously approved by the Commission. The statute does not appear to contemplate that the requestor provide additional information.

47 C.F.R. § 51.809(b) provides an exemption if permitting the CLECs to adopt the Hutchinson agreement would cause CenturyLink to incur greater cost than it incurred with Hutchinson. But the Department is not aware of any facts that would indicate that CenturyLink would incur any greater costs in this case. In particular, the Department disputes CenturyLink's claim that the Hutchinson agreement relied heavily on the specific network interconnection arrangements that were unique to Hutchinson, noting that the language of the Hutchinson agreement addressing interconnection arrangements is not specific to Hutchinson.[21]

Finally, to qualify for the exemption provided by 47 C.F.R. § 51.809(b), CenturyLink must bear the burden of demonstrating that the cost of interconnecting with the CLECs would exceed the cost of interconnecting with Hutchinson. According to the Department, CenturyLink has not done so.

V. Commission Action

A. Summary

As previously noted, 47 U.S.C. § 252(i) states that –

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[18] *Id*. at 5-6.

[19] *Id*. at 6.

[20] *Id*. at 7.

[21] Hutchinson agreement, Sections 37 (Local Interconnection Trunk Arrangement), 38 (Network Interconnection Methods), and 39 (Points of Interconnection).

> 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 Commission finds that the CLECs are telecommunications carriers requesting the same terms and conditions of interconnection, services, and network elements as provided under the Hutchinson agreement, to which CenturyLink, a local exchange carrier, is a party. Applying the facts to the statute, the Commission concludes that CenturyLink must make the terms of the Hutchinson agreement available to the CLECs.

B. Purpose of 47 U.S.C. § 252(i)

Generally, CenturyLink's arguments founder on a failure to distinguish between the laws that govern negotiation and arbitration and the laws that govern a CLEC's discretion to adopt an existing Commission-approved interconnection agreement.

In its order adopting rules implementing the competitive provisions of the 1996 Act (the Local Competition Order),[22] the FCC identified the purpose of § 252(i) as follows:

> [S]ection 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251.[23]
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> * * *
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> We … conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. 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. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.[24]
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[22] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act*, FCC 96-325, CC Docket 96-98, First Report and Order (August 1, 1996).

[23] *Id.* ¶ 1296.

[24] *Id.* ¶ 1321.

> [The advantage of § 252(i) is that] small entities may be able to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration.[25]

In short, the FCC clarified two aspects of § 252(i). First, the statute guards against discrimination by adopting a general policy that every CLEC is entitled to "most favored nation" status—that is, every CLEC is presumed to have the option of adopting the terms established for other CLECs. In this fashion, no CLEC could obtain—through inadvertence or collusion with an incumbent—an unfair regulatory advantage over other CLECs.

Second, the FCC clarified that CLECs are entitled to use § 252(i) to obtain an interconnection agreement without subjecting themselves to the burdens of negotiation and arbitration.

This understanding of the purposes of § 252(i) provides a context for addressing the concerns raised by CenturyLink.

C. CenturyLink's Objections

While CenturyLink raises five objections to granting the CLECs' request, the Commission finds none of them persuasive.

First, the Commission finds no support for CenturyLink's claim that the Commission lacks authority to approve a CLEC's choice to adopt the terms of a Commission-approved interconnection agreement under § 252(i). CenturyLink correctly cites 47 U.S.C. § 252(e)(1) for the proposition that the Commission may approve interconnection agreements adopted via negotiation or arbitration. But § 252(e)(1)'s silence regarding § 252(i) in no way alters the plain text of § 252(i). To the contrary, the FCC declared that state commissions have jurisdiction over making interconnection agreements available to requesting carriers under § 252(i).[26] Indeed, CenturyLink itself has cited with approval the Commission's approval of another CLEC's adoption of the Hutchinson agreement under § 252(i).[27]

Second, the Commission finds no support for CenturyLink's claim that a CLEC requires an incumbent's participation and consent in order to adopt the terms of an existing, Commission-approved interconnection agreement.

CenturyLink correctly observes that 47 C.F.R. § 51.809(b)(1) permits CenturyLink to avoid providing interconnection according to the terms of an existing interconnection agreement under § 252(i) if "[t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement." But the rule requires CenturyLink to bear the burden of proof

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[25] *Id*. ¶ 1438.

[26] See FCC's Local Competition Order, supra n. 21.

[27] *In the Matter of the Joint Application for Approval of an Interconnection Agreement between Gardonville Cooperative Telephone Association and Embarq Minnesota, Inc. d/b/a CenturyLink*, Docket No. P-527, 430/IC-15-897, Order Approving Agreement (October 26, 2015).

regarding this claim. The fact that a rule places a burden on CenturyLink does not thereby authorize CenturyLink to impose a burden on other parties.

Finally, the *New Edge Network*[28] decision provides no support for CenturyLink's claim. In that case the Ninth Circuit Court of Appeals upheld, among other things, the FCC's rule barring CLECs from using § 252(i) to adopt only parts of an interconnection agreement (the so-called "pick and choose" rule). Because Hiawatha and Federated are seeking to adopt the Hutchinson agreement in its entirety, the Ninth Circuit's ruling is entirely consistent with their efforts.

Third, the Commission is not persuaded that 47 C.F.R. § 51.809(b)(1) requires CLECs to disclose their interconnection plans to CenturyLink before adopting the terms of an existing, Commission-approved interconnection agreement under § 252(i). In particular, a CLEC's refusal to provide the information requested by CenturyLink does not violate the CLEC's duty to negotiate in good faith under 47 C.F.R. § 51.301. This is because the choice to adopt the terms of an existing interconnection agreement does not represent a choice to negotiate under the Act. Rather, adopting the terms of an agreement under § 252(i) is a substitute for negotiating (and potentially arbitrating) terms under § 252(a) and (b). Consequently the FCC rules governing negotiations do not apply to the current case.

In citing *Global NAPs* to support its claim, CenturyLink misconstrues the case. According to CenturyLink, the case demonstrates that the good faith obligations associated with an arbitration proceeding apply in the context of a CLEC's request to adopt an existing interconnection agreement under § 252(i).[29] To the contrary, the case demonstrates that the obligations associated with arbitrations apply to arbitrations. In *Global NAPs*, a CLEC petitioned to arbitrate the terms of interconnection with an incumbent, but then sought to evade those arbitrated terms by adopting the term of a different agreement under § 252(i). The state regulatory commission denied the CLEC's request on the grounds that the arbitration was binding on both parties, and the court upheld the commission.

Unlike in *Global NAPs*, neither Hiawatha nor Federated has petitioned to negotiate, let alone arbitrate, interconnection terms with CenturyLink. Consequently the obligations of arbitration have no bearing on the current cases.

Fourth, while CenturyLink argues that compelling the CLECs to provide details about their interconnection plans is a practical necessity, the Commission is not persuaded of the utility of CenturyLink's request. At hearing, CenturyLink could not specify the kinds of information that would suffice to meet its needs. And CenturyLink has given no indication of how offering the Hutchinson agreement to the CLECs would result in unusual costs. Indeed, the price terms set forth in that agreement are virtually identical to the terms CenturyLink has offered to all CLECs in its Contract Templates.

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[28] 461 F.3d 1105 (9th Cir. 2006).

[29] Hiawatha Docket, CenturyLink reply comments at 5 (January 21, 2016); Federated Docket, CenturyLink reply comments at 5 (February 9, 2016).

Moreover, whatever interconnection plans the CLECs might provide at this stage, those plans would could very well change when the CLECs receive access to more detailed information about CenturyLink's network, as authorized by the Hutchinson agreement. Consequently the Commission can find no purpose in CenturyLink attempting to assess the cost of interconnection based on information that would be inherently unreliable and susceptible to change. The only way to get sound information from the CLECs about their interconnection plans is to provide them with access to the relevant information about CenturyLink's network.

Fifth, and lastly, the Commission concurs with CenturyLink that the Hutchinson agreement does not impose on CenturyLink the duty to disclose information about CenturyLink's network to any CLEC that is not a party to the Hutchinson agreement. The Commission will therefore approve the CLECs' adoption of the agreement. This will trigger the provisions of that agreement that will cause CenturyLink to disclose information about its network to the CLECs. And that, in turn, should enable the CLECs to proceed with planning their interconnection with CenturyLink.

D. Conclusion

The Commission finds that the 1996 Act imposes no duty on the CLECs to respond to CenturyLink's request for interconnection plans as a condition for obtaining interconnection under § 252(i). Moreover, the Commission finds that CenturyLink has failed to meet its burden of showing how the information it seeks will be relevant to determining how the cost of interconnecting with Hutchison would differ from the cost of interconnecting with either of the CLECs. Any conclusion CenturyLink would reach based on that information would be unreliable because the CLECs may well change their plans when they receive information about the locations where CenturyLink has facilities for interconnection.

The Commission also finds that CenturyLink has failed to provide any evidence that it would incur additional cost to provide the Hutchinson agreement to the CLECs than to provide that agreement to Hutchinson. Consequently CenturyLink is not entitled to an exemption under 47 U.S.C. § 51.809(b). As a result, the Commission will approve the CLECs' request to adopt the terms and conditions of that agreement.

In reaching this conclusion, the Commission does not preclude CenturyLink from pursuing other means to manage interconnection costs. For example, the Hutchinson agreement provides as follows:

> "Meet Point Interconnection Arrangement" means each tele-communications carrier builds and maintains its network to a Meet Point (47 CFR §51.5). *CenturyLink may deny a meet point at a particular point requested by CLEC on the grounds that its build-out of facilities from that point would exceed the limited build-out that would constitute a "reasonable accommodation of interconnection" under Local Competition Order ¶ 553.* CenturyLink must prove that fact to the state commission.[30]

The Commission's decision merely precludes CenturyLink from denying to CLECs their rights under § 252(i).

[30] Hutchinson agreement, definition of "Meet Point Interconnection Arrangement" (emphasis added).

ORDER

1. The request of Embarq Minnesota d/b/a CenturyLink EQ for information from Hiawatha Broadband Communications, Inc., and Federated Telephone Cooperative is denied.

2. The requests of Hiawatha and Federated to adopt the terms of the Hutchinson agreement are approved. The term "CLEC" in the adopted interconnection agreements will refer to Hiawatha and Federated, respectively.

3. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf
Executive Secretary

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