CenturyLink™

**Jason D. Topp**
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January 21, 2016

Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

**Re: In the Matter of the Adoption of an Interconnection Agreement by Hiawatha Broadband Communications, Inc. Pursuant to Section 251(i)**
**MPUC Docket No. P-6267, 5561/IC-15-1020**

Dear Mr. Wolf:

Enclosed for filing are Embarq Minnesota, Inc. dba CenturyLink EQ's Reply Comments regarding the above-referenced matter.

Very truly yours,

/s/ Jason D. Topp

Jason D. Topp

JDT/bardm

Enclosure

cc: Service List

200 South 5th Street, Room 2200
Minneapolis, MN 55402

www.centurylink.com

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

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|---|---|
| Beverly Jones Heydinger | Chair |
| Nancy Lange | Commissioner |
| Dan Lipschultz | Commissioner |
| John Tuma | Commissioner |
| Betsy Wergin | Commissioner |

**Re: In the Matter of the Adoption of an Interconnection Agreement by Hiawatha Broadband Communications, Inc. Pursuant to Section 251(i)**
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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA )
) ss
COUNTY OF HENNEPIN )

Dianne Barthel hereby certifies that on the 21st day of January, 2016, she e-filed a true and correct copy of Embarq Minnesota, Inc. dba CenturyLink EQ's Reply Comments by posting it on www.edockets.state.mn.us. Said document was also served on the service list via U.S. mail and e-mail as designated with the Minnesota Public Utilities Commission.

/s/ Dianne Barthel
Dianne Barthel

Subscribed and sworn to before me
this 21st day of January, 2016.

/s/ LeAnn M. Cammarata
Notary Public

My Commission Expires Jan 31, 2020

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| Jason | Topp | jason.topp@centurylink.com | CenturyLink | 200 S 5th St Ste 2200<br><br>Minneapolis,<br>MN<br>55402 | Electronic Service | No | OFF_SL_15-1020_Official |
| Daniel P | Wolf | dan.wolf@state.mn.us | Public Utilities Commission | 121 7th Place East<br>Suite 350<br>St. Paul,<br>MN<br>551012147 | Electronic Service | Yes | OFF_SL_15-1020_Official |

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

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| **Beverly Jones Heydinger** | **Chair** |
| **Nancy Lange** | **Commissioner** |
| **Dan Lipschultz** | **Commissioner** |
| **John Tuma** | **Commissioner** |
| **Betsy Wergin** | **Commissioner** |

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| **In the Matter of the Adoption of an Interconnection Agreement by Hiawatha Broadband Communications, Inc. pursuant to Section 252(i)** | **Docket No. P-6267, 5561/IC-15-1020** |

# EMBARQ MINNESOTA, INC. DBA CENTURYLINK EQ'S REPLY COMMENTS

## INTRODUCTION

Hiawatha Broadband Communications, Inc. ("HBC") is an experienced CLEC that has offered service for a number of years in Minnesota. It has expanded its service territory and seeks to change its interconnection agreement. It has a business plan that includes an interconnection arrangement with Embarq Minnesota, Inc. dba CenturyLink EQ ("CenturyLink EQ"). It stands to reason that HBC has some sort of plan regarding how it will interconnect. The question this proceeding presents is whether or not HBC has a legal right to keep such information secret at the time that it requests to opt in to an existing interconnection agreement.

CenturyLink EQ does not contend that HBC has an obligation to provide information that it does not have. In the unlikely event HBC has no idea how it wants to interconnect, it is entitled to communicate that fact (subject to a duty of good faith). However, if HBC has information regarding the place and manner in which it is likely to request interconnection, it has an obligation pursuant to 47 U.S.C. § 251(c)(1) as a "requesting telecommunications

carrier" to ". . . negotiate in good faith . . ." The obligation to negotiate in good faith includes the obligation to provide "information necessary to reach agreement"[1] and the costs associated with an interconnection agreement request are a limitation on the ability of a CLEC to opt in to an existing interconnection agreement.[2]

CenturyLink EQ requests that the Commission clarify that HBC has such obligations. This approach not only is required by controlling statutes and rules but also makes sound policy sense. It encourages parties to be straightforward with each other and to work together to resolve issues rather than have them resolved by commissions or the courts. By contrast, the approach suggested by the Department of Commerce ("Department") and HBC would incentivize CLECs to sandbag incumbent carriers and withhold any information that might suggest that its opt-in request would be more expensive than the interconnection provided in the original agreement. By the time the incumbent carrier could find out such information, the CLEC would already have an interconnection agreement in place. This Commission should not encourage such an approach.

CenturyLink EQ submits these reply comments in response to those submitted by the Department and HBC.

**Background**

HBC has been in business since 1992. It started to provide service in Winona and has been providing telecommunications service to an expanding list of communities for over a decade. HBC is a sophisticated provider in the cities it serves.[3] On October 23, 2015, HBC

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[1] 47 C.F.R. § 51.301(b)(2015) (imposing the obligation to negotiate in good faith on requesting carriers and (c)(8)(imposing the obligation to provide information)).
[2] 47 C.F.R. § 51.809(b).
[3] HBC Corporate Video describing its business is available at https://www.youtube.com/watch?feature=player_embedded&v=mUuMYRzRaTk (retrieved January 13, 2016).

filed a request to expand its service territory to include the cities of New Trier and Miesville.[4] CenturyLink EQ is the incumbent provider for New Trier and a portion of Miesville. In connection with the filing, HBC filed revised tariff pages reflecting the new service area.[5]

On November 10, 2015, HBC communicated with CenturyLink EQ that it wished to replace its existing interconnection agreement and opt in to CenturyLink EQ's interconnection agreement with Hutchinson Telecommunications, Inc. ("HTI") pursuant to 47 U.S.C. § 252(i). CenturyLink EQ responded on November 23, 2015, with the following message:

> After internal review, as far as the adoption of the Hutchinson Telecommunications Agreement in the Embarq territory, please provide information on the specific type of interconnection services and points of interconnection that you will need. As you may be aware, the Hutchinson Traffic Exchange Agreement was the result of an arbitration decision that relied heavily on the specific network interconnection arrangements that were unique to Hutchinson. CenturyLink needs a better understanding of the specific CLEC network arrangements currently in place for Gardonville[sic] and of the interconnection request in order to determine if the costs are greater than the costs of providing it to the CLEC that originally negotiated the agreement, consistent with 47 CFR 51.809 (b)(1).

HBC refused to provide any information in response to this request and instead filed this complaint on December 1.

## Discussion

CenturyLink EQ has filed comments describing its view of the legal obligations relevant to this docket. These reply comments will respond to points made by the Department and HBC.

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[4] Initial Filing, *In the Matter of the Request to Amend the Certificate of Authority of Hiawatha Broadband Communications Inc. to Expand its Service Area,* MPUC Docket No. P-6267/SA-15-945 (Oct. 23, 2015).
[5] *Id.*

## I. The Department overstates CLEC rights under 47 U.S.C. § 252(i).

The Department takes the position that 47 U.S.C. § 252(i) requires CenturyLink EQ to make the HTI interconnection agreement available to requesting CLECs without any further exchange of information. It relies on the language of the statute which 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." The Department argues that "[t]he statute requires only that HBC *request* the adoption, and does not appear to contemplate that the requestor provide additional information, nor does it provide for circumstances under which the request may be rejected or disallowed."[6]

The Department's description of the statute is at odds with decisions reached in federal court. FCC rules interpreting Section 252(i) include a number of limitations on the right to opt in, including requirements that the CLEC take an entire agreement rather than pick and choose portions of the agreement. The obligation is limited to a reasonable time period and is also limited where the costs associated with the opt-in request are higher than the costs of the original agreement. The limitations have been challenged in court. In reviewing those challenges, courts have found ambiguity in the statute and have upheld the rules (as well as the limitations on the right to opt in) as reasonable interpretations of the statute.[7]

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[6] Comments of the Minnesota Department of Commerce, 2 (Dec. 31, 2015).

[7] *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 2006 U.S. App. LEXIS 22091, 39 Comm. Reg. (P & F) 349 (9th Cir. Cal. 2006).

Courts have not only found the rules to be appropriate but have confirmed that the obligation of good faith applies to requests to opt-in pursuant to Section 252(i). In *Global Naps v. Verizon*,[8] the CLEC argued that it had a right under Section 252(i) to opt-in to an existing interconnection agreement rather than accept the adverse results of an arbitration. The court rejected its argument and held that good faith obligations associated with an arbitration proceeding applied in the context of a request to opt-in:

> Global NAPs responds by asking 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).[9]

(Emphasis added). This same analysis applies to the good faith obligations associated with a carrier requesting interconnection. CLECs have an obligation to negotiate in good faith under 47 U.S.C. § 251(c)(1). There is no language in Section 252(i) that eliminates this obligation, and there is no reason to believe the obligation disappears simply because a CLEC requests to opt in to an existing agreement.

## II. CenturyLink EQ cannot be expected to provide proof that the costs of interconnection with HBC are high when HBC has hidden how it intends to interconnect.

The Department and HBC argue that CenturyLink EQ's position that it is entitled to interconnection information "puts the cart before the horse" and eliminates a CLEC's right to

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[8] *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 396 F.3d 16, 2005 U.S. App. LEXIS 969, 34 Comm. Reg. (P & F) 1390 (1st Cir. Mass. 2005).
[9] *Id.* at 25.

interconnection information under the interconnection agreement. It claims that FCC Rule 47 C.F.R. §51.809(b) is irrelevant because CenturyLink EQ has not provided proof that the costs of providing the agreement to HBC are higher than the costs of providing interconnection to HTI.

CenturyLink EQ cannot provide such proof at this time because it can at best speculate as to how HBC intends to interconnect. Under the Department's approach, a CLEC that did intend a significantly more expensive interconnection arrangement would be incented to sandbag the ILEC, withhold information about the method of its intended interconnection and render the limitations in the rule meaningless by only revealing details of its plans after the agreement is in effect. The rules related to opt-in should be read in conjunction with the rules related to negotiating in good faith to prevent such a result.

There is some reason to believe that the costs associated with HBC's interconnection request might be different from the costs associated with the HTI agreement. HTI is affiliated with an incumbent provider and therefore was able to take advantage of existing incumbent facilities. The existence of ILEC facilities was a significant factor identified by the Commission in adopting interconnection language in the HTI arbitration.[10] HBC does not appear to be affiliated with an ILEC, and it is unclear whether or not a request from HBC will require CenturyLink EQ to build new facilities or expand existing capacity. CenturyLink EQ should be entitled to sufficient information to draw a comparison between this interconnection request and the request of HTI.

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[10] *See, e.g., In the Matter of the Petition of Hutchinson Telecommunications, Inc., for Arbitration of an Interconnection Agreement with Embarq Minnesota Inc., dba CenturyLink EQ*, MPUC Dkt. P-421. 5561, 430/IC 14-189 (Jan. 16, 2015), adopted by Commission in its Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement (June 10, 2015), ¶¶ 121, 128.

## III. CenturyLink EQ is not attempting to evade the requirements of Section 39.2 of the HTI agreement. It is determining whether it has the obligation to offer those terms to HBC.

HBC and the Department argue that CenturyLink EQ is seeking to evade requirements to provide interconnection information under Section 39.2 of the HTI interconnection agreement. Section 39.2 imposes broad network disclosure requirements on CenturyLink EQ if a CLEC requests such information. The Department recommends that the Commission order impose the interconnection agreement and advises CenturyLink EQ that the obligations of Section 39.2 apply.

These suggestions should be rejected. Section 39.2 is irrelevant because the agreement has not yet been adopted. The obligations at issue in this proceeding are the obligation to negotiate in good faith and the incumbent's obligation to allow a CLEC to opt in to an existing agreement. The good faith obligation requires that a party provide information in its possession to assist in the negotiation. In the unlikely event HBC has no idea where it intends to interconnect or how it intends to do so, it should just say so. If it has tentative plans, it should also just say so. As long as it has provided such information in good faith, CenturyLink EQ can then make a decision regarding whether or not opt in is appropriate. If HBC were to provide that information to CenturyLink EQ before the Commission meets to hear its petition, this entire dispute might be resolved without Commission action.

CenturyLink EQ has demonstrated its ability to follow this process. It requested precisely the same information from Gardonville Telephone when it requested adoption of the HTI interconnection agreement. Gardonville provided the requested information and

CenturyLink EQ agreed to adoption of the agreement. The Commission approved the agreement on October 30, 2015 in Docket No: P-527, P430/IC-15-897.

If the proposed interconnection agreement sought by HBC ultimately is agreed upon, CenturyLink EQ understands that it has an obligation to provide interconnection information to HBC as specified in Section 39.2 and that such information may impact HBC's ultimate choice of an interconnection arrangement. What HBC and the Department advocate, however, is that HBC should be entitled to hide any existing interconnection plans before CenturyLink EQ is required to make such a decision. The Commission should reject such an approach.

## IV. The obligations of Section 39.2 are irrelevant to this dispute.

HBC stated in its December 2 petition that, by "asserting [that] the CLEC must first disclose where and how it wants to interconnection before it will be allowed to adopt the ICA . . . CenturyLink is attempting to circumvent the network disclosure terms of the HTI ICA . . . ."

The Department recommends that the Commission make clear in its order that CenturyLink EQ has the obligation to provide the Section 39.2 network information to any requesting CLEC choosing to adopt the HTI/CenturyLink EQ ICA prior to requiring details about the CLEC's proposed interconnection. The obligation does not apply while negotiations are in progress.

## CONCLUSION

CenturyLink EQ respectfully requests that the Commission reject HBC's request and make clear that HBC's obligation to negotiate in good faith includes an obligation to provide CenturyLink EQ with information regarding the location and manner in which it intends to

interconnect. Once HBC provides such information, CenturyLink EQ will promptly respond to HBC's opt-in request.

Dated this 21st day of January, 2016.

EMBARQ MINNESOTA, INC. DBA
CENTURYLINK EQ

/s/ Jason D. Topp

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