

Minnesota Public Utilities Commission
Staff Briefing Paper

Meeting Date: March 21, 2014..... ** Agenda Item # 2

Company: Hutchinson Telecommunications, Inc. and CenturyLink

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 Pursuant to 47 U.S.C. § 252(b)

Issues: I. Should the Commission grant Hutchinson’s petition for arbitration?
II. If the petition is granted, what procedures should govern the arbitration?

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Relevant Documents

Hutchinson Petition for Arbitration March 3, 2014

The attached materials are work papers of Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

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Background

On February 8, 1996, the President signed into law the Telecommunications Act of 1996 (Act or Federal Act), which establishes requirements and procedures intended to open existing telecommunications markets to competition.

Under § 252(a) of the Act, a telecommunications carrier can request an incumbent local exchange carrier (ILEC) to negotiate an agreement for interconnection, services, or network elements to facilitate entry into the ILEC's local market. Such a request gives rise to a corresponding duty on both carriers to negotiate in good faith. Under § 252(b) either carrier may petition the relevant State commission to arbitrate any issues the parties have not resolved through negotiation.

The Act contemplates a two-part process for the review of arbitrated interconnection agreements (ICAs). First, the Commission is tasked with resolving all disputed issues pursuant to §§ 252 (b) through (d). Subsequently, the Commission must review all terms of the ICA, both arbitrated and negotiated, pursuant to § 252(e). Today's hearing addresses only issues associated with the first task.

The Petition

Hutchinson's Petition

Hutchinson requests that the Commission arbitrate the unresolved issues between Hutchinson and CenturyLink in accordance with Sections 251 and 252 of the Telecommunications Act and Minn. R. part 7812.1700. Hutchinson further requests that the Commission approve an interconnection agreement with CenturyLink that includes all of the terms agreed to by the parties and the terms proposed by Hutchinson with respect to any disputed issue.

Although there are a large number of issues that have not been resolved, from Hutchinson's perspective, there are two categories of unresolved issues that are particularly significant: (1) meet-point interconnection; and (2) defined terms. Hutchinson believes that a resolution of these issues would likely pave the way for a negotiated resolution of most, if not all, of the remaining issues and would substantially narrow the scope of the arbitration. The specific disputed contract language is highlighted in Exhibit B of Hutchinson's petition.

Response to Hutchinson's Petition

At the time this briefing paper was prepared Commission staff had not received comments from CenturyLink regarding Hutchinson's petition. CenturyLink's comments are due by March 28, 2014.

Staff Analysis

Hutchinson's petition raises two initial issues: (i) should the Commission grant the petition and undertake further proceedings on the merits? and (ii) if the petition is granted, what procedures should govern the arbitration?

I. SHOULD THE COMMISSION GRANT HUTCHINSON'S PETITION FOR ARBITRATION?

Section 252(b)(1) of the Act establishes the right of a negotiating party to request arbitration by a State commission as follows:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(2)(A) requires the petitioner to provide, at the same time it submits its petition, "all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties."

Exhibit B of Hutchinson's petition identifies the specific contract language in dispute and each party's proposed resolution. Note that the Commission or its designee can require additional information under § 252(b)(4)(B) as the need for more information becomes apparent later in the proceeding.

Hutchinson states that the parties have agreed that the 135-day to 160-day arbitration window encompasses the dates of February 5 to March 1, 2014. Hutchinson filed its petition on March 3, noting that March 1st is a Saturday.

Commission Options:

- I.a Grant Hutchinson’s petition for arbitration.
- I.b Do not grant Hutchinson’s petition for arbitration.

Staff recommends option I.a.

II. WHAT PROCEDURES SHOULD GOVERN THE ARBITRATION?

The Act provides for arbitration by state commissions, but provides little guidance on how arbitration should be conducted. The Act, however, does provide two clear guideposts for these proceedings. First, the Act establishes the Commission as the final decision-maker in the arbitration, providing that the state commissions “shall resolve each issue . . . by imposing appropriate conditions . . . upon the parties to the agreement.” 47 U.S.C. § 252(b)(4)(c). Second, it places arbitrations within tight time constraints, requiring state commissions to complete an arbitration within nine months after the date on which the ILEC received the request to negotiate. 47 U.S.C. § 252(b)(4)(c).

According to Hutchinson’s petition the parties have agreed that March 1st is the 160th day since it requested negotiations of CenturyLink. As such, negotiations began on September 22, 2013, and consequently the Commission must complete the arbitration by June 22, 2014 (June 23rd as June 22nd falls on a Sunday), approximately 13 weeks from the date of this meeting. The FCC is authorized to preempt a state commission’s jurisdiction over a proceeding within 90 days after receiving or taking notice of the state commission’s failure to act within the prescribed time frame for an arbitration. 47 U.S.C. § 252(e)(5); 47 C.F.R. § 51.801(b).

Minn. Rules § 7812.1700 set forth in some detail the Commission’s process for addressing arbitration for interconnection agreements. Subparts 1, 2 and 3 address the procedures and format for the filing of a petition for arbitration and the response by the non-petitioning party. Subpart 4 addresses the assignment of an arbitrator:

The commission may appoint a single arbitrator or a panel of arbitrators. The order may include procedural requirements or guidelines for the conduct of the arbitration in addition to those established in this part If the procedures set forth in the commission's order conflict with the procedures established in this part, the commission shall vary the requirements of this part as necessary under part 7829.3200.

Subparts 7 through 18, inclusive, address in detail such matters as arbitrator neutrality, the arbitrator's role and authority, intervenors and participants, discovery, prehearing conferences, and hearings. Subparts 19 and 20 address the arbitrator's recommended decision and the filing of exceptions to that decision.

The Rules dictate a timeline for the arbitration process:

- (a) Subpart 2 provides that the nonpetitioning party shall submit a response to the petition within 25 days after the Commission receives the petition. This subpart reflects the language in § 252(b)(3) of the Act. As such, a response from CenturyLink is expected by March 28, 2014.
- (b) Subpart 4 states that the Commission must meet and assign an arbitrator within 25 days of receiving the petition. That date is March 28, 2014.
- (c) Subpart 16 dictates that the assigned arbitrator must hold at least one prehearing conference no later than ten days after the response to the petition is received. Presuming that CenturyLink files its response on March 28, 2014, the prehearing conference must be scheduled to take place on or before April 7, 2014.
- (d) Subpart 19 provides that the arbitrator issue a recommended decision "no later than 35 days before the date nine months after the request for negotiation that gave rise to the arbitration." Thus, the arbitrator's decision is due no later than May 19, 2014.
- (e) Subpart 21 states that the Commission shall issue a final arbitration decision no later than 35 days after receiving the arbitrator's recommended decision. Provided that the arbitrator submits a recommendation by May 19, 2014, the Commission will have 35 days in which to make a final decision regarding the arbitrated issues before June 23, 2014, the last day the Commission has jurisdiction over the matter.

In summary, the Commission's Rules would dictate the following timeline, assuming all discretionary dates are set using the maximum intervals allowed by the Rules:

Commission Meeting to Assign Arbitrator:	March 21, 2014
CenturyLink Response to Petition:	March 28, 2014 (Not Later Than)
First Prehearing Conference:	April 7, 2014 (Not Later Than)
Arbitrator's Recommendations:	May 19, 2014 (Not Later Than)
Exceptions to Arbitrator's Report:	May 29, 2014 (Not Later Than)
Final Commission Decision:	June 23, 2014 (Not Later Than)

Within the scope of the Rules, the Commission must assign a single arbitrator or a panel of arbitrators (subpart 4) and, in accord with subpart 6:

The arbitrator must be, or the arbitration panel must include, an administrative law judge with the Office of Administrative Hearings or a person with arbitration or adjudicative experience retained by the commission on contract for the purpose of arbitrating under this part. If an arbitration panel is used, the administrative law judge or other experienced arbitrator under contract with the commission shall chair the panel.

In keeping with past practice staff recommends that the Commission assign the matter to one or more administrative law judges (ALJs) from the Office of Administrative Hearings (OAH). In such an assignment the Commission may request that the ALJ(s) conduct the arbitration with deference to the Commission's Rules § 7812.1700.

In the event that there are no issues of fact in dispute the Commission may vary its own rules and decide the issues based on briefing by the parties. At present, staff is unaware of any request to vary its Rules. Part 7829.3200 of the Commission's Rules permits the Commission to vary its Rules when it determines that: (i) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule, (ii) granting the variance would not adversely affect the public interest, and (iii) granting the variance would not conflict with the standards imposed by law.

Commission Options:

- II.a Refer the unresolved issues to the OAH for hearing by one or more ALJs. Request that the ALJ(s) conduct the arbitration with deference to the Commission's Rules § 7812.1700.
- II.b Refer the unresolved issues to a single arbitrator (other than an ALJ with OAH). Request that the arbitrator conduct the arbitration with deference to the Commission's Rules § 7812.1700.
- II.c Create a panel of arbitrators to be chaired by an ALJ from OAH. Request that the panel conduct the arbitration of unresolved issues with deference to the Commission's Rules § 7812.1700.
- II.d Create a panel of arbitrators (excluding an ALJ from the OAH). Request that the panel conduct the arbitration of unresolved issues with deference to the Commission's Rules § 7812.1700.
- II.e Vary the Commission's Rules and retain the matter for hearing by the Commission.

Staff recommends Option II.a.