

Minnesota Public Utilities Commission
Staff Briefing Paper

Meeting Date: May 12, 2016 ** Agenda Item # 3

Companies: Hiawatha Broadband Communications, Inc. & CenturyTel of Minnesota

Docket No. P-6267, 551, 430/IC-16-236
In the Matter an Interconnection Agreement between Hiawatha Broadband
Communications, Inc. and CenturyTel of Minnesota

Issues: Should the Commission approve Hiawatha’s and CenturyTel’s request to adopt
and modify the TDS Metrocom-CenturyTel interconnection agreement (ICA)?

Staff: Kevin O’Grady.....651-201-2218

Relevant Documents

TDS Metrocom-CenturyTel ICA (14-194)..... March 25, 2014
Joint Petition to Adopt and Modify ICA..... March 17, 2016
Joint Petition to Amend ICA..... April 6, 2016
DOC Comments..... April 13, 2016
Joint Petition to Amend ICA (replaces April 6th petition)..... April 26, 2016
DOC Comments..... April 29, 2016

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Filing Summary

On April 8, 2014, the Commission approved, pursuant to § 252(e) of the Telecommunications Act, an ICA negotiated by TDS Metrocom and CenturyTel (Docket 14-194).

On March 17, 2016, CenturyTel and Hiawatha jointly petitioned the Commission to adopt and modify the TDS Metrocom-CenturyTel ICA initially approved almost two years earlier.

April 6, 2016, CenturyTel and Hiawatha jointly petitioned the Commission to further amend the TDS Metrocom-CenturyTel ICA that they had petitioned to adopt on March 17, 2016.

On April 13, 2016, the Minnesota Department of Commerce (DOC) filed comments recommending approval of the Companies' petitions.

On April 26, 2016, CenturyTel and Hiawatha filed a replacement for the amendment filed on April 6, 2016.

On April 29, 2016, DOC filed comments recommending approval of the Companies' replacement amendment.

Issues

This Briefing Paper addresses two separate petitions filed jointly by CenturyTel and Hiawatha.

Regarding the first petition (March 17th) Staff agrees with DOC's recommendation to approve adoption of the TDS-Metrocom ICA, but disagrees with the standard of analysis used by DOC to assess the modifications to that adopted ICA sought by the parties. However, Staff agrees with DOC that the requested modifications should be approved (but for different reasons).

Regarding the second petition (April 26th; a replacement for the one filed on April 6th) Staff agrees with the DOC that the amendments sought by the Companies meet the requirements of § 252(e): the terms do not discriminate against a carrier not a party to the agreement, and the terms are not inconsistent with the public interest, convenience and necessity.

Modifications at Issue re: March 17th Petition

The Companies' March 17th petition seeks to modify, or amend, the terms of the ICA in two main ways. The first may be characterized as a ministerial change. Section 2 states: "For the purposes of this Agreement, CLEC is hereby substituted in the Adopted Agreement for Hutchinson Telecommunications, Inc." Staff speculates there may be a clerical error here. The parties may have meant to make reference to TDS Metrocom, not Hutchinson. As Hutchinson is not mentioned in the TDS Metrocom ICA, granting the parties request would have no effect.

The second modification is of concern to Staff, in terms of the standard of review to be applied to the modifications sought. Section 7 of the TDS Metrocom ICA addresses the effective date, term and termination of the ICA. It comprises several pages of language but the following terms are most salient here:¹

- 7.1. Effective Date. Subject to Section 6.1, this Agreement shall become effective on the date of Commission Approval ("Effective Date"); however the Parties may agree to implement the provisions of this Agreement upon execution by both Parties.
- 7.2. Term. This Agreement shall continue for a period of three (3) years after execution by both Parties (the "Initial Term), unless terminated earlier in accordance with the terms of this Agreement. If neither Party terminates this Agreement as of the last day of the Initial Term, this Agreement shall continue in force and effect on a month-to-month basis unless and until terminated as provided in this Agreement.

The parties' March 17th filing modifies the above terms, as follows:

- 4.1 This Agreement, if an initial Agreement shall become effective on the date of Commission Approval ("Effective Date"); however the Parties may agree to implement the provisions of this Agreement upon execution by both Parties. However, the initiation of a new account, any new provision of service or obligation or any revision to currently existing services or obligations may take up to 60 days to accommodate any required initial processes.
- 4.2 In the event that the Parties currently have an existing Interconnection Agreement, this Agreement shall replace the existing Interconnection Agreement

¹ TDS Metrocom ICA, Docket 14-194, filed March 25, 2014, approved April 8, 2014.

in its entirety beginning on the Effective Date. However, nothing relieves the Parties from fulfilling all obligations incurred under that prior Interconnection Agreement.

- 4.3 The expiration date of this Adoption Agreement shall be the same as the expiration date of the agreement that is being adopted, which is March 24, 2017.

DOC argues that the terms sought by the parties on March 17th are “the same” as those expressed in the TDS Metrocom ICA and, as such, are part of the adoption process. Staff disagrees with the analysis. First, it is not clear that the terms are “the same” (why modify them if they are the same). Second, and of greater significance is the application of a “sameness” standard that is not contemplated by the Act, is unnecessary, and creates confusion where there is clarity.

ICA Approval

The Act contemplates two main alternative paths toward approval of ICAs: (1) negotiation (which may require resolution via arbitration) and (2) adoption. The review standards for those paths differ.

Negotiation/Arbitration

Sections 252(a) and (b) of the Act address negotiation and, where negotiation fails, arbitration. Whether negotiated or arbitrated, in whole or in part, an ICA is reviewed by the standard stated in § 252(e). Specifically, an agreement may only be rejected if (1) it discriminates against a carrier not a party to the agreement, (2) its implementation is not consistent with the public interest, convenience and necessity, or (3) if arbitrated, it does not meet standards set forth in § 251. Section 252(e) review is also applied to negotiated amendments to ICAs. Further, negotiated agreements and negotiated amendments, if not rejected by a state commission, are deemed approved within 90 days of submission pursuant to § 252(e)(4).

Adoption

Section 252(i) compels ILECs to “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.” As such, § 252(i) allows a CLEC, unilaterally, to adopt an ICA that has already been approved pursuant to § 252(e). The ILEC is relieved of this obligation where it can persuade a state commission that (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 (2) the provision of a particular agreement to the requesting carrier is not technically feasible (47 C.F.R. 51.809). The Commission's review of adoption requests faces no statutory timelines.

DOC Analysis

DOC appears to have reviewed the modifications sought by the parties on a "sameness" standard and finding the terms to be "the same" has characterized the terms as part of the § 252(i) adoption process (see Section 5 of the checklist in the DOC comments): the three-year term in the TDS Metrocom ICA is "the same" as the date-certain termination date of March 24, 2017, in the March 17th request.

Staff Recommendation re: March 17th Petition

The Parties' March 17th submission can be viewed as two distinct requests: (1) a request to adopt an ICA and (2) a request to modify that adopted ICA. Staff believes that DOC has conflated these two requests by analyzing the modifications not as amendments, but rather as part of the adoption request because the modifications are the same as the original language.

Staff believes that the Act has given regulators a bright line between adoptions and negotiated/arbitrated agreements. Treating any and all modifications to an adopted agreement as amendments hews to that bright line. And, as such, any and all modifications can be reviewed pursuant to the § 252(e) standard.

The "sameness" standard has no foundation in the Act and would require the development of a set of criteria to determine "sameness." There is much room in the "sameness" standard for debate, not just in comparing terms, but in determining when the standard should apply – when modifications are sought in the same document requesting adoption? – when modifications are sought a week after the adoption is requested? – six months after the adoption is requested?

Further, by recognizing the March 17th modifications as amendments there is no need to develop a "sameness" standard. "Sameness" is irrelevant. The modifications can be reviewed pursuant to § 252(e): do the modifications discriminate against a carrier not a party to the agreement, and are they consistent with the public interest, convenience and necessity?

Setting aside the general argument above, it can be argued that an ICA wherein the contract term is specified only as a time interval (say, three years) is substantively different from an ICA that specifies termination at a date certain (even if that date is the three-year anniversary). In the late 1990s, PacBell (an ILEC) entered an ICA with Cook Telecom (a CLEC). That ICA specified a

two-year term without setting a date certain. Many months later AirTouch (another CLEC) sought to adopt the PacBell-Cook ICA. AirTouch argued that PacBell was obligated to provide the ICA for a full two years as specified in the PacBell-Cook ICA. The U.S. District Court found in favor of AirTouch stating that the relevant effective date was the date of approval of the adoption, **not** the effective date of the original PacBell-Cook ICA.² The Court dismissed PacBell's argument that such a finding would allow "leap-frogging" by AirTouch and other CLECs, finding that PacBell is protected by FCC rules that would prevent adoption where it can persuade a state commission that (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 (2) the provision of a particular agreement to the requesting carrier is not technically feasible (47 C.F.R. 51.809).

The discussion above regarding PacBell is offered only as support for the notion that there is much room for debate as to whether the TDS Metrocom ICA termination language is the same as the March 17th modification requested by CenturyTel and Hiawatha. DOC and the Companies appear to agree that the modified termination language is the same as the original term. But, as argued above, the Commission does not need to make that finding.

Staff recommends that the Commission find that the modifications sought by the parties be reviewed as amendments pursuant to § 252(e) and, further, that the Commission find that the amended terms satisfy the requirements of § 252(e): the terms do not discriminate against a carrier not a party to the agreement, and their implementation is not inconsistent with the public interest, convenience and necessity.

Staff Analysis re: April 26th Petition

The Companies' April 26th petition seeks to amend ICA terms regarding Governing Law and Dispute Resolution. DOC supports approval of the amendment as meeting the requirements of § 252(e). Staff agrees with DOC's recommendation.

² AirTouch Paging of California v. Pacific Bell, No. C-98-2216 MHP, 1999 WL 33732597, 12-13 (N.D.C. May 10, 1999)

Commission Options re: March 17th Petition

1. Approve the parties March 17th request for adoption of the TDS Metrocom ICA.
Approve the modifications to the adopted TDS Metrocom ICA as being the same as the terms found in the TDS Metrocom ICA.
2. Approve the parties March 17th request for adoption of the TDS Metrocom ICA.
Approve the modifications to the adopted TDS Metrocom ICA as amendments meeting the standards set forth in § 252(e).
3. Take other action.

Staff recommends option #2.

Commission Options re: April 26th Petition

1. Approve, pursuant to § 252(e), the Companies' April 26th requested amendments.
2. Deny the Companies' April 26th requested amendments as discriminatory and/or not consistent with the public interest.
3. Take other action.

Staff recommends option 1.