

October 24, 2014

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Joint Application for Approval of an Interconnection Agreement between Embarq Minnesota, Inc. d/b/a CenturyLink and Integra Telecom of Minnesota, Inc.**
Docket No. P5643,430/IC-14-779

Dear Dr. Haar:

The Department submits these comments revising its previous recommendation that the Commission **approve** the interconnection agreement either at a Commission hearing or by way of the standing order process ordered on August 25, 2000, made in its September 22, 2014 comments.

The petition was filed on: September 12, 2014

Interconnection Agreement Type: Negotiated

Wireless or Wireline: Wireline

The Petition was filed by:

Jason D. Topp
Associate General Counsel-Regulatory
CenturyLink
200 South 5th Street, Room 2200
Minneapolis, MN 55402

The Department recommends the proposed Negotiated Agreement ("Agreement") be rejected. The Department is available to answer any questions the Commission may have.

Sincerely,

/s/ BRUCE L. LINSCHIED
Financial Analyst

/s/ BONNIE J. JOHNSON
Telecommunications Analyst

BLL/BJJ/lt
Attachment

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET No. P5643,430/IC-14-779

I. BACKGROUND

On September 12, 2014, CenturyLink submitted a copy of a Negotiated Interconnection Agreement (Agreement) between Embarq Minnesota, Inc. dba CenturyLink (CenturyLink) and Integra Telecom of Minnesota, Inc., to the Minnesota Public Utilities Commission (Commission).

On September 22, 2014, the Minnesota Department of Commerce (Department) filed comments recommending that the Commission approve the interconnection agreement either at a Commission hearing or by way of the standing order process ordered on August 25, 2000.

The Department files these revised comments after additional analysis was performed on the Negotiated agreement.

II. STATEMENT OF ISSUES

Whether the companies have negotiated an agreement that does not discriminate against a telecommunications carrier not a party to the agreement; is consistent with the public interest, convenience, and necessity; and state law.

III. LEGAL REFERENCES

The Telecommunications Act of 1996 (the Act) is designed to open the nation's telecommunications markets to competition using three strategies:

1. Requiring incumbent local exchange carriers to permit competitive local exchange carriers (CLECs) to purchase services at a wholesale price and resell them to customers.
2. Requiring incumbent local exchange carriers to permit CLECS to interconnect with their networks on just, reasonable, and non-discriminatory terms; and

3. Requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.

Under the Act, CLECs are to seek agreements on interconnection issues with incumbent local exchange carriers, who are required to negotiate in good faith (47 U.S.C. §§251(c), 252(a)(1), 252(b)(5)). All agreements reached must be submitted to the state commission for approval (47 U.S.C. §252(a) and (e)).

The state commission has exclusive authority¹ to approve or reject these agreements, making written findings as to any deficiencies (47 U.S.C. §252(e)(1)). Negotiated agreements may be rejected for the following reasons: 1) They discriminate against a telecommunications carrier who is not a party to the agreement; 2) implementing them would be inconsistent with the public interest, convenience, and necessity; 3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements (47 U.S.C. §252(e)(2) and (3)).

The Act also requires local exchange carriers to provide interconnection services and network elements to any requesting telecommunications carrier on the same terms and conditions found in any state commission-approved agreement to which the incumbent carrier is a party (47 U.S.C. § 252(i)).

Minn. Stat. §237.16 is the statutory authority governing local exchange competition, and Minn. Rules 7812.1600-2100 establish procedures for intercarrier negotiations.

IV. ANALYSIS

After the Department performed additional analysis, the Department determined that the Agreement meets the Commission's requirements except with regard to the language in Sections 9.3 (Applicable Law Section 9) and 16.2.4 and 16.2.8, (Dispute Resolution Section 16).

Choice of Law and Venue - Section 9.3 provides as follows:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and **shall be subject to the exclusive jurisdiction of the State or of the federal courts of Monroe, Louisiana.** In all cases, choice of law shall be determined without regard to a local State's conflicts of law provisions. (Emphasis added).

Dispute resolution Section 16.2.4 and 16.2.8 provides as follows:

¹ 47 USC §252(e) (1). (Subject to FCC authority to do so only if a State Commission first refuses to do so.)

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint **with any court, commission or agency of competent jurisdiction** seeking resolution of the dispute. The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute. (Emphasis added).

16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. The Parties shall submit a copy of each such order to the Commission, the Department Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

The Department believes that the provision in Section 9.3, which purports to remove the Commission's jurisdiction over this Agreement, and afford "exclusive jurisdiction" instead to courts of Louisiana is not likely to encourage competition in Minnesota or to be in the public interest. At best, the Agreement is ambiguous because the "exclusive jurisdiction" of the "courts of Louisiana" provision of Section 9.3 is inconsistent with Section 16.2.4, which affords jurisdiction of disputes to courts, agencies and commissions with "competent jurisdiction."

The Commission considered these same issues in Docket No. P6594, 421/IC-06-1452. In that Docket the Commission agreed with the Department's analysis that similar provisions in which venue and jurisdiction were outside of Minnesota and applied laws of another state to interconnection agreements authorized by the Commission regarding interconnection in Minnesota to be contrary to the public interest.²

The Agreement currently before the Commission is contrary to the public interest for the following reasons:

- By selecting a venue in Louisiana, CenturyLink may achieve selection of law, because, in cases where interpretation of an agreement or of a choice of law provision is in dispute (*i.e.*, where the parties disagree whether "the services are being provided" in Louisiana, it is doubtful that a Louisiana court would have authority to remand the matter to the Minnesota Commission. A CLEC that challenged a Louisiana court's interpretation of Minnesota law would be required to commence a separate action before the Commission (which would likely be challenged by CenturyLink as improper duplicative litigation). Even if the Agreement allowed for Commission review of a Louisiana decision, the CLEC challenging the Louisiana court's interpretation of Minnesota law would need to

² In the Matter of the Joint Application for Approval of a Negotiated Agreement for Interconnection and Resale between American Telco, LLP and Qwest Corporation, Docket No. P-6594, 421/IC-06-1452.

await Commission review and disapproval of a final order, followed by a re-litigation of the dispute, if required. Better would be for actions involving Minnesota Commission-approved agreements to be addressed by the Commission or by Minnesota courts which would have the ability to refer a matter within the Commission's primary authority to the Commission, where necessary.

- Even more troubling, the Agreement appears to contemplate that³ Louisiana courts are given “exclusive” jurisdiction. If disputes are resolved in a distant forum, it is also highly unlikely that the Minnesota public agencies – the Department and the Residential Utilities Division of the OAG – or other Minnesota carriers or consumers would seek to intervene or participate in matters affecting the public interest in Minnesota. As a result, it is likely that the interpretation of Minnesota law by courts in a distant state will deviate farther and farther from uniformity, and it is unlikely that matters affecting the public interest in Minnesota will be beneficially influenced by involvement of the public agencies or affected third parties.
- The surrender of primary jurisdiction by the Commission could have far-reaching and unintended consequences as to matters not presently foreseeable. The Dispute Resolution section of this Agreement is unacceptable because it too purports to share Commission jurisdiction over disputes arising under the Commission-approved agreement to agencies other than the Commission. “Disputes” that are subject to this provision are defined in the Agreement as all matters “relating to” the Agreement, including ones that could change the terms of the Agreement, how the Agreement is interpreted, or how a change of law is implemented by modifying the Agreement. All of these types of disputes are, at present, exclusively within the Commission's authority, as part of its exclusive authority to approve interconnection agreements.⁴ If the Commission allows CenturyLink to require parties to go to a distant jurisdiction to resolve any matter relating to a Commission-approved Agreement, at minimum, the Minnesota Commission needs to retain its authority to approve or to reject the outcome of the dispute.
- Finally, the Department does not believe that the negotiation of an Interconnection Agreement is always a negotiation between equals. In certain cases it has been very difficult and costly for a CLEC to make any changes to an Agreement or amendment. A Minnesota CLEC may be forced to accept dispute resolution language that puts the CLEC at a disadvantage by making Louisiana the location, if CenturyLink is the Party filing the complaint and selects Louisiana as the venue. The Department supports instead preserving the parties' opportunity to choose a

³ If the Commission were to approve this proposed negotiated Agreement, it is reasonably likely that CenturyLink would subsequently claim that the Commission acquiesced or approved this delegation of its authority to other decision makers.

⁴ 47 USC §252(e) (1). Normally, the FCC, not foreign courts, acquires this authority if the State fails to exercise it.

Louisiana court without making Louisiana the location if CenturyLink files the complaint.

In its January 17, 2007 Order in Docket No. P6594, 421/IC-06-1452, the Commission considered these issues and required the following provisions for the Dispute Resolution section:

5.18.2 If the designated representatives have not reached a resolution of the dispute within fifteen (15) Days after the written notice (or such longer period as agreed to in writing by the Parties), then either Party may bring a claim to the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

5.18.2.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

5.18.2.2 Any final and binding order resulting from a dispute resolved under the procedures of section 5.18.2.1⁵ may be entered in any court having jurisdiction thereof. The parties shall submit a copy of each such order to the Commission, the Department of Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

The language ordered by the Commission in Docket No. P6594,421/IC-06-1452, or language to the same effect, should be contained in all interconnection agreements in Minnesota.

The Department believes that it is important for the Commission to retain its jurisdiction over dispute resolution. The Department recommends that the following provisions replace and supplement the existing provisions of the Agreement:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and shall be subject to the exclusive jurisdiction of the State or of the federal courts of Minnesota.

⁵ The Commission Order states section 5.18.3 (Waiver of Jury Trial and Class Action) , however, reference to that section is incorrect. During negotiations of the revised language, section numbers were changed and the reference to 5.18.3 was not corrected to 5.18.2.1, which was intended.

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint with the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

16.2.4.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

16.2.4.2 The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute.

16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. Any final or binding order resulting from a dispute resolved under the procedures of section 16.2.4.1 may be entered in any court having jurisdiction thereof. The Parties shall submit a copy of each such order to the Commission, the Department Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

V. COMMISSION ALTERNATIVES

A. Reject the Agreement unless the Parties agree to:

- 1) retract the provisions in Section 9.3 on page 28, 16.2.4 on pages 33 and 34, and 16.28 on page 34, and
- 2) replace the retracted language with the following provisions:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and shall be subject to the exclusive jurisdiction of the State or of the federal courts of Minnesota.

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint with any court, commission or agency of competent jurisdiction seeking resolution of the dispute the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

16.2.4.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

16.2.4.2 The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute.

16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. Any final or binding order resulting for a dispute resolved under the procedures of section 16.2.4.1 may be entered in any court having jurisdiction thereof. The Parties shall submit a copy of each such order to the Commission, the Department Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

If the Commission rejects the Agreement, the Department recommends that the Commission expedite the process of approving a revised agreement that conforms to the Commission's decision. This may include delegating authority to the Executive Secretary to examine any revisions filed by the Parties, confirm that the deficiencies have been corrected as recommended, and issue a letter to the Parties approving the revised agreement as of the date of filing.

- B. Reject the Agreement, but take no action with respect to processing a revised agreement.
- C. Approve the Agreement with modifications.
- D. Approve the Agreement.

VI. DEPARTMENT RECOMMENDATION

- A. Reject the Agreement unless the Parties agree to:
 - 1) retract the provisions in Section 9.3 on page 28, 16.2.4 on pages 33 and 34, and 16.2.8 on page 34, and
 - 2) replace the retracted language with the following provisions:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and shall be subject to the exclusive jurisdiction of the State or of the federal courts of Minnesota.

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint with any court, commission or agency of competent jurisdiction seeking resolution of the dispute the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

16.2.4.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

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16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. Any final or binding order resulting for a dispute resolved under the procedures of section 16.2.4.1 may be entered in any court having jurisdiction thereof. The Parties shall submit a copy of each such order to the Commission, the Department Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

If the Commission rejects the Agreement, the Department recommends that the Commission expedite the process of approving a revised agreement that conforms to the Commission's decision. This may include delegating authority to the Executive Secretary to examine any revisions filed by the Parties, confirm that the deficiencies have been corrected as recommended, and issue a letter to the Parties approving the revised agreement as of the date of filing.

CERTIFICATE OF SERVICE

I, Linda Chavez, hereby certify that I have this day served copies of the following document on the attached list of persons by electronic filing, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

MINNESOTA DEPARTMENT OF COMMERCE – COMMENTS

Docket Nos. **P4643,430/IC-14-779**

Dated this **24th** day of **October, 2014**.

/s/Linda Chavez

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes	OFF_SL_14-779_IC-14-779
Linda	Chavez	linda.chavez@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 55101-2198	Electronic Service	No	OFF_SL_14-779_IC-14-779
Douglas	Denney	douglas.denney@integratelcom.com	Integra Telecom	1201 Lloyd Blvd, Suite 500 Portland, OR 97232	Electronic Service	No	OFF_SL_14-779_IC-14-779
Burl W.	Haar	burl.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_14-779_IC-14-779
Kim	Isaacs	kdisaacs@integratelecom.com	Integra Telecom, Inc.	6160 Golden Hills Dr. Golden Valley, MN 55416	Electronic Service	No	OFF_SL_14-779_IC-14-779
John	Lindell	agorud.ecf@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_14-779_IC-14-779
Jeffrey T.	Nodland	JEFF.NODLAND@CENTURYLINK.COM	CenturyLink	1801 California St FL 10 Denver, CO 80202	Electronic Service	No	OFF_SL_14-779_IC-14-779
Jason	Topp	jason.topp@centurylink.com	CenturyLink	200 S 5th St Ste 2200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-779_IC-14-779