Minnesota Public Utilities Commission

Staff Briefing Paper

Meeting Date: May 12, 2016 ..... ** Agenda Item # 2

Companies: Hiawatha Broadband Communications, Inc. & CenturyLink EQ

Docket No. P-6267, 430/IC-16-230
In the Matter an Interconnection Agreement between Hiawatha Broadband Communications, Inc. and CenturyLink EQ

Issues: Should the Commission approve Hiawatha's and CenturyLink's request to adopt and modify the Hutchinson-CenturyLink interconnection agreement?

Staff: Kevin O'Grady.....651-201-2218

Relevant Documents

Hiawatha-CenturyLink Joint Petition (16-230) ..... March 16, 2016
Order Approving Adoption of Interconnection Agreements (15-1020)..... April 12, 2016
DOC Comments (16-230)..... March 25, 2016

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.

This document can be made available in alternative formats (e.g., large print or audio) by calling 651-296-0406 (voice). Persons with hearing loss or speech disabilities may call us through their preferred Telecommunications Relay Service.

Filing Summary

On December 2, 2015, in Docket 15-1020, Hiawatha Broadband Communications, Inc. (Hiawatha or HBC) asked the Commission to "compel CenturyLink EQ to proceed with HBC's requested ICA [Interconnection Agreement] adoption pursuant to Section 252(i) of the Act without further delay." Hiawatha sought to adopt the terms and conditions of the ICA that currently governs the relationship between Hutchinson Telecommunications, Inc.

On February 26, 2016, the Commission met to consider Hiawatha's petition. The Commission approved the adoption request (in Docket 15-1020).

March 16, 2016, Hiawatha and CenturyLink, jointly, sought approval of the adoption of the Hutchinson ICA and of modifications to that ICA. That request was assigned Docket No. 16-230)

On April 12, 2016, the Commission issued its *Order Approving Adoption of Interconnection Agreements* in Docket 15-1020 formalizing the decision made at the February 26th meeting.

Issues

Staff wishes to bring two elements of the March 16th joint filing to the attention of the Commission:

First, the adoption request has already been approved by the Commission's April 12th *Order* in Docket 15-1020. Thus, there is no need to re-approve the adoption. A redundant approval may lead to the confusion as to the Commission's decision and cloud the paper trail for carriers and agency staff interested in ICAs.

Second, Staff disagrees with the standard of analysis used by DOC to assess the modifications to the adopted Hutchinson ICA sought by the parties. However, Staff agrees with DOC that the requested modifications should be approved (but for different reasons).

Prior Approval

On April 12, 2016 the Commission approved Hiawatha' adoption of the Hutchinson-CenturyLink ICA: "The requests of Hiawatha and Federated to adopt the terms of the Hutchinson agreement are approved." (Docket 15-1020)

Modifications Sought

The parties to the ICA seek to modify, or amend, the terms of the adopted agreement 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."

The second modification is of concern to Staff, in terms of the standard of review to be applied to the modifications (Staff does not oppose the substance of the modification). Section 5 of the Hutchinson ICA addresses the effective date, term and termination of the ICA. It comprises two full pages of language but the following terms are most salient here:[1]

> 5.1. Effective Date. Subject to Section 4.1, 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.
>
> 5.2. Term. This Agreement shall be in effect 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 16th 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.

[1] Hutchinson ICA, Docket 14-189, filed August 5, 2015, approved August 21, 2015.

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 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 July 16, 2018.

DOC argues that the terms sought by the parties on March 16th are "the same" as those expressed in the Hutchinson ICA and, as such, are part of the adoption process. Staff disagrees with the analysis. First, it is debatable 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, a 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 its 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 Hutchinson ICA is "the same" as the date-certain termination date of July 16, 2018, in the March 16th request.

Staff Analysis

The Parties' March 16th 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 demarcation 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 should 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 16th 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 Hutchinson ICA termination language is the same as the March 16th modification requested by CenturyLink 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 believes the relevant analysis for all modifications, even if requested in the same document requesting adoption, requires the Commission to look to § 252(e).

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

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

carrier not a party to the agreement, and their implementation is not inconsistent with the public interest, convenience and necessity.

With respect to the adoption request, Staff recommends denial because the adoption request has already been approved by the Commission's April 12th Order in Docket 15-1020. Thus, there is no need to re-approve the adoption. A redundant approval may lead to the confusion as to the Commission's decision and cloud the paper trail for carriers and agency staff interested in ICAs.

Commission Options:

1. Approve the parties March 16, 2016 request for adoption of the Hutchinson ICA. Approve the modifications to the adopted Hutchinson ICA as being the same as the terms found in the Hutchinson ICA.

2. First, reject the parties' March 16, 2016 adoption request as unnecessary given the Commission's prior approval of the adoption request on April 12th in Docket 15-1020. Second, approve the modifications to the adopted Hutchinson ICA as amendments meeting the standards set forth in § 252(e).

3. Take other action.

Staff recommends option #2.