

Minnesota Public Utilities Commission

Staff Briefing Paper

Meeting Date: August 10, 2017.....** Agenda Item # 18

Companies: Tekstar Communications, Inc. (Tekstar); Frontier Communications of Minnesota, Inc. (Frontier) & Citizens Telecommunications Company of Minnesota, LLC (Citizens)

Docket No. Docket No. P-5542, 405/IC-17-507
In the Matter of Tekstar’s Petition to Seek Interconnection with Frontier Pursuant to Section 252(i) of the Telecommunications Act of 1996

Docket No. P-5542, 407/IC-17-508
In the Matter of Tekstar’s Petition to Seek Interconnection with Citizens Pursuant to Section 252(i) of the Telecommunications Act of 1996

Issues: Should the Commission approve Tekstar’s requests for interconnection?

Staff: Kevin O’Grady651-201-2218

Relevant Documents

Tekstar Petition re: Frontier (17-507) June 27, 2017
Tekstar Petition re: Citizens (17-508) June 27, 2017
DOC Comments (17-507) June 30, 2017
DOC Comments (17-508) July 3, 2017
Frontier/Citizens Comments (17-507 & 17-508) July 7, 2017

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Background

On June 27, 2017, Tekstar filed two petitions, one seeking approval to adopt an existing Interconnection Agreement (ICA) with Frontier and one seeking approval to adopt an existing ICA with Citizens.

On June 30 and July 3, 2017, the Minnesota Department of Commerce (DOC) filed comments recommending approval of both petitions.

On July 7, 2017, Frontier and Citizens jointly filed comments objecting to Tekstar's petition to unilaterally adopt the ICAs.

Background

The Companies & the Petitions

Tekstar is a Competitive Local Exchange Carrier (CLEC) authorized, initially, by the Commission to provide facilities-based local service in Minnesota in the Detroit Lakes exchange within the service area of US WEST (now CenturyLink QC), an Incumbent Local Exchange Carrier (ILEC) (Docket 97-1081, October 31, 1997). Subsequently, the Commission approved Tekstar's expansion into all exchanges within the service areas of a number of ILECs, including Frontier and Citizens (Docket 16-81, February 12, 2016).

Currently, Teleport Communications America (Teleport – a CLEC) and Frontier are interconnected pursuant to a negotiated ICA approved by the Commission (Docket 14-628, August 18, 2014).

Currently, Woodstock Telephone Company (Woodstock – a CLEC) and Citizens are interconnected pursuant to a negotiated ICA approved by the Commission (Docket 11-313, May 4, 2014).

Tekstar's petitions seek approval to interconnect with Frontier and Citizens under the same terms and conditions that govern, respectively, the Frontier/Teleport and Citizens/Woodstock

interconnections. That is, Tekstar seeks to “adopt” or “opt into” the two ICAs pursuant to § 252(i) of the federal Telecommunications Act of 1996 (Act).

Opening Markets to Competition

On February 8, 1996, the President signed into law the Telecommunications Act of 1996 establishing requirements and procedures intended to open existing local telecommunications markets to competition. The Federal Communications Commission (FCC), charged by Congress with the task of implementing the Act, summarizes the purpose of the Act, as follows:

The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.¹

With respect to the goals of the Act, the FCC states:

... [Two of the] principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market²

Local Competition Order

The *Local Competition Order* (often called the *First Report and Order*) provides the initial and core regulatory framework for opening local markets. That *Order* comprises a monumental

¹ Federal Communications Commission. First Report and Order. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act*. FCC 96-325, CC Docket 96-98, August 1, 1996 (*Local Competition Order*), ¶ 1, footnote omitted.

² *Local Competition Order*, ¶ 3.

discussion totaling over 1,300 paragraphs and over 3,200 footnotes. In the opening pages of the *Order*, the FCC makes a point from which much of its subsequent discussion proceeds:

[T]he removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers. Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. ... [A]n incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.³

Further, when discussing the necessity of developing national rules, the FCC stated:

We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. **The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power** in part because many new entrants seek to enter national or regional markets.⁴

Thus, the *Local Competition Order* recognizes that ILECs and CLECs are differently placed and, as such, ILECs are obligated to allow and accommodate market entry. **However, the *Local Competition Order* does not grant CLECs unlimited access to ILEC networks.** Sections 251 and 252 set principals to guide the balancing of ILEC and CLEC rights and obligations.

³ *Local Competition Order*, ¶ 10, footnotes omitted.

⁴ *Local Competition Order*, ¶ 55; emphasis added.

Interconnection Agreements

ICAs establish the working relationship between ILECs and CLECs. However, ICAs that are negotiated or arbitrated pursuant to §§ 251 and 252 are unlike typical contractual relationships. The FCC noted a fundamental difference between ICAs and typical commercial agreements:

Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants.⁵

Sections 251 and 252

Section 251 sets forth the duties of telecommunications carriers, addressing (1) the necessity of interconnecting networks, (2) compliance with technical guidelines and standards, (3) access to rights-of-way, (4) intercarrier compensation, (5) provision of interconnection facilities and equipment for the movement of traffic, and/or unbundled network elements, and (6) the duty to negotiate in good faith. The Minnesota Commission approved the Frontier/Teleport and Citizens/Woodstock ICAs pursuant to this section.

Section 252 addresses the procedures for negotiation, arbitration and approval of ICAs. It sets forth processes and time lines, and it addresses decision criteria governing the review of contracts by state commissions. Of immediate importance to the issue at hand is § 252(i).

Section 252(i)

The sum of Congress' statement regarding ICA adoption is contained in the single sentence comprising § 252(i):

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 FCC established the following rules:

⁵ *Local Competition Order*, ¶ 15.

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. . . .⁶

And,

Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.⁷

Party Comments

Tekstar's requests for adoption is brief and unambiguous:

Subject to Commission approval, Tekstar Communications, Inc. hereby notifies the Commission it will adopt the following interconnection agreements pursuant to Section 252(i) of the Act ...

Tekstar notified Frontier and Citizens of its intent at the time that its request was filed with the Commission.

DOC reviewed the Frontier/Teleport and Citizens/Woodstock ICAs pursuant to FCC and Commission statutes and rules and past Commission decisions. DOC recommended approval of Tekstar's request.

Frontier/Citizens states that it was caught unaware of Tekstar's desire to adopt ICAs, learning of it only upon Tekstar's submission to the Commission. Frontier/Citizens argues that since the ICAs are three and six years old, respectively, those agreements should be ineligible for adoption, exceeding the "reasonable period of time" referred to in § 51.809(c). Frontier/Citizens makes reference to the FCC's *Local Competition Order*:

⁶ 47 C.F.R § 51.809(a).

⁷ 47 C.F.R § 51.809(c), emphasis added. Section 51.809(b) establishes two constraints upon a CLEC's ability to adopt an ICA, one related to cost of interconnection and one related to technical feasibility. Frontier/Citizens does not make reference to that section focusing, rather, on "reasonable period of time" in § 51.809(c).

We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.⁸

Staff Analysis

“Pool” of ICAs

Sections 252(h) and (i) effectively create a “pool” of state-approved ICAs from which a CLEC may draw:

A State commission shall make a copy of each agreement approved under subsection [252](e) [whether negotiated or arbitrated] ... available for public inspection and copying within 10 days after the agreement or statement is approved. ...

And,

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.

Purpose of § 252(i)

The FCC, in its 1996 *Notice of Proposed Rulemaking* (NPRM), clearly articulated the primary purpose of § 252(i):

⁸ *Local Competition Order*, ¶ 1319.

Section 251 requires that interconnection, unbundled element, and collocation rates be “nondiscriminatory” and prohibits the imposition of “discriminatory conditions” on the resale of telecommunications services. **Section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251.**⁹

The FCC clarified its understanding of “nondiscriminatory”:

We conclude that the term “nondiscriminatory” in the 1996 Act is not synonymous with “unjust and unreasonable discrimination” in section 202(a), but rather is a more stringent standard.¹⁰

In addition to its concerns regarding discrimination against requesting carriers, the FCC sees § 252(i) as a means of expediting competition:

We ... conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress’s stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.¹¹

In its Final Regulatory Flexibility Analysis, with reference to § 252(i), the FCC notes:

Moreover, small entities may be able to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power **without having to incur the costs of negotiation and/or arbitration.**¹²

⁹ Federal Communications Commission. Notice of Proposed Rulemaking. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act*. FCC 96-182, CC Docket 96-98, April 19, 1996, ¶ 269, emphasis added.

¹⁰ *Local Competition Order*, ¶ 859, footnote omitted.

¹¹ *Local Competition Order*, ¶ 1321, emphasis added.

¹² *Local Competition Order*, ¶ 1438, emphasis added.

Thus, the FCC perceives the purposes of § 252(i) to be (1) protection against discrimination between requesting carriers by an ILEC, (2) a means to expedite agreements between carriers, and (3) a means of reducing the cost of interconnection for small carriers.

The Requested ICAs

Staff believes that, currently, Frontier provides interconnection to Teleport, and Citizens provides interconnection to Woodstock. The original contract terms have expired but the parties continue to be governed by the ICAs for successive six-month terms. Section 12.1 of the Frontier/Teleport ICA states:

This Agreement will become effective upon the first business day following the date this Agreement has been approved by the Commission and will continue for a period of one (1) year unless terminated earlier under the conditions set forth herein. This Agreement will be automatically renewed for successive periods of six (6) months after the initial term unless either Party provides the other Party with no less than ninety (90) day's prior, written notification of its intent to terminate this Agreement, or its desire to renegotiate at the end of the initial or any successive period. ...¹³

Reasonable Period of Time & Discrimination

The FCC has not established a precise definition of a "reasonable period of time," leaving this Commission the discretion to make that determination. However, as Frontier/Citizens noted, the FCC has indicated that "reasonable" may hinge on the degree to which network configuration, technology and pricing have changed since the initial approval of an ICA.

Frontier/Citizens has not provided any evidence to suggest that its current ICAs are in some way obsolete, simply asserting that they are too old. And if, as Staff believes, Frontier/Citizens continues to operate under the ICAs when it could seek to terminate them in a few months, there is no support for an argument of obsolescence.

Given that § 252(i) appears to be Congress' primary tool for preventing discrimination among CLECs by an ILEC (as the FCC has stated), Staff recommends the Commission approve Tekstar's petition.

¹³ The Citizens/Woodstock ICA uses nearly identical terms.

Commission Options

1. Approve Tekstar's request to adopt the Frontier/Teleport and Citizens/Woodstock ICAs pursuant to § 252(i) of the Act.
2. Deny Tekstar's request.
3. Take other action.

Staff recommends option #1.