

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Repository Case in Which to)
Receive Feedback and Other Suggestions)
Concerning Staff’s Proposed Consolidation and) Case No. TW-2014-0295
Simplification of the Commission’s)
Telecommunications Rules)

**Chariton Valley Telecom Corporation
Comments Regarding Proposed Rule 4 CSR 240-28.080 (2)**

Introduction

Staff’s most recent draft of 4 CSR 240-28.080 (2) contains a modification that would permit approval of the adoption of an interconnection agreement (ICA) whose original term has expired, but which remains in effect due to renewal or extension provisions of the ICA.

With due respect to AT&T, the proposed modification would not allow adoption of an “expired” ICA. Rather, it would allow adoption of an ICA whose *original term* has expired, but remains in effect pursuant to renewal or extension provisions. The ICA would remain adoptable, but *only for so long as it remains subject to renewal or extension*.

Chariton Valley Telecom Corporation (“Chariton Valley”) supports this modification for the following reasons.

Reasoning

This proposed modification is simple and reasonable. It is needed because most ICAs have renewal or extension provisions that allow the ICA to last beyond the original term. These provisions place the ILEC in the position of being able to discourage adoption, which is contrary to the intent of the 1996 Local Competition Act.

An actual experience will demonstrate: ILEC A had an ICA with Competitor B. This ICA was approved by the MoPSC in 2006. This ICA had an original 3 year term expiring in 2009, with provisions for up to six six-month extensions, and with provisions for further extension of the ICA until it was replaced by a newly approved ICA.

In 2014 this ICA was still in effect between ILEC A and Competitor B¹. In 2014 Chariton Valley asked ILEC A to sign the necessary documentation for Chariton Valley to adopt the same ICA that Competitor B was operating under. ILEC A refused on the grounds that the ICA's "original term had expired", even though the ICA was still in use by Competitor B more than 5 years after the original term had ended. Rather than bearing the expense of litigating the issue, and risking more delay to competitive entry, Chariton Valley entered into a different ICA proposed by ILEC A.

To the best of the Chariton Valley's knowledge, the 2006 ICA between ILEC A and Competitor B is still in effect. Had the proposed rule change now under discussion been in effect in 2014, Chariton Valley would have had a prescribed right to adopt the ICA for so long as it remained subject to renewal or extension. Both Competitor B and

¹ This was over 5 years after the original term had expired, and over 2 years after the six six-month extension periods had expired.

Chariton Valley would have been placed on identical contractual footing, competing with ILEC pursuant to the same ICA.

Legal Justification

Adoption of ICAs was required by the 1996 Telecommunications Act to allow quick competitive entry into an ILEC's local market. 47 USC 252 (i) requires a LEC 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." Adoption provides the new competitor an alternative to the separate ICA request/negotiation/arbitration/approval process available under 47 USC 252, which can take a year to complete, and which requires the expenditure of significant private and public resources.

The FCC's rule, 47 CFR 51.809 (a), requires the ILEC to make available *without unreasonable delay*² 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." Subsection (b) of this rule allows the MoPSC to refuse adoption, but only if the ILEC initiates a proceeding and proves to the MoPSC's satisfaction that either (1) its costs of providing interconnection to the adopter is greater

² No guidance is given to the MoPSC or Missouri carriers as to what constitutes "unreasonable delay".

than providing interconnection to the original ICA negotiator, or (2) providing interconnection to the carrier requesting adoption is not technically feasible.

The position of AT&T (and that of ILEC A in the example above) gives the ILEC an advantage the federal statute and rule never intended. Instead of avoiding adoption only when the ILEC sustains the burden of convincing the MoPSC that adoption would result in excessive costs, or is not technically feasible, this position allows the ILEC to discourage or avoid adoption without having to go to the MoPSC at all.

AT&T's reliance upon 47 CFR 51.809 (c), and the case of *Bellsouth v Universal Telecom*, 454 F.3d 559 (6th Circuit 2006), do not change the analysis. 51.809(c) simply specifies that an approved ICA 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.*³ This FCC rule does not say or mean that an ICA is not adoptable when it is in renewal or extended terms.

The 6th Circuit's *Bellsouth* decision cited by AT&T does not support AT&T's position. In that case Bellsouth argued the "reasonable period of time" expired due to FCC Orders that Bellsouth claimed invalidated certain provisions of the ICA after its approval. The District Court and the Court of Appeals upheld the Kentucky Public Service Commission's decision that the ICA was adoptable notwithstanding Bellsouth's

³ This subsection also fails to provide the MoPSC or Missouri telecommunications carriers with guidance as to what constitutes "unreasonable delay".

argument. Nothing in the *Bellsouth* case stands for the proposition that an ICA can't be adopted while in renewal or extension terms.

Conclusion

The proposed modification to the Commission's rule, if adopted, would eliminate this confusion as to the adoptability of an ICA currently in use. It would create a presumption that an ICA is adoptable, even if it is in its renewal or extension term, for so long as it remains subject to renewal or extension. It would avoid allowing ILECs to position and structure ICAs to discourage adoption. It would promote the ability of ILEC local competitors to compete on equal footing.

/s/ _____
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