ORDER NO. 01-895

ENTERED OCT 25 2001

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 414

In the Matter of a Rulemaking and Proposal to Revise OAR 860-016-0000 and OAR 860-016-0020 and add OAR 860-016-0025 to streamline and clarify procedures governing Commission Approval and Acknowledgement of Carrier-to-Carrier agreements submitted under the Federal Telecommunications Act of 1996.	)	ORDER

DISPOSITION: AMENDED RULES ADOPTED

At its March 20, 2001 Public Meeting, the Public Utility Commission adopted Staff's recommendation to initiate a rulemaking proceeding to streamline procedures governing approval and acknowledgement of carrier-to-carrier agreements submitted under the Federal Telecommunications Act of 1996 (the 1996 Act). In Order No. 98-132, the Commission previously adopted rules that established, among other things, procedures for Commission approval of agreements arrived at through negotiation. The rules did not, however, address a requesting carrier's adoption of another agreement or Statement of Generally Available Terms (SGAT).

To supplement agency rules and streamline existing procedures, Staff proposed a rulemaking to revise OAR 860-016-0000 and OAR 860-016-0020, and to add OAR 860-016-0025. On March 21, 2001, the Commission filed a Notice of the Proposed Rulemaking with the Secretary of State, and subsequently served it on persons interested in such matters. The notice set out the amendments proposed by Staff, and included a Statement of Need, Statutory Authority, Principal Documents Relied Upon, and Fiscal and Economic Impact. The notice was published in the Secretary of State's *Oregon Bulletin* on May 1, 2001.

In response to the notice, Qwest Corporation (Qwest), Verizon Northwest, Inc. (Verizon), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), and the Western States Competitive Telecommunications Coalition (Coalition) filed comments. Qwest also requested a hearing pursuant to ORS 183.335(3)(a). On August 1, 2001, the Commission published a notice of rulemaking hearing in the Secretary of State's *Oregon Bulletin*. Michael Grant, an Administrative Law Judge with the Commission, held the hearing on September 5, 2001. At the hearing, Wil Forsyth, attorney, and Dean Randall, authorized representative, appeared on behalf of Verizon; Alex Duarte, attorney, appeared on behalf of

Qwest; Glenn Harris, authorized representative, appeared on behalf of Sprint/United Telephone Company of the Northwest (Sprint); and Michael Weirich, Assistant Attorney General, appeared on behalf of Staff. Sprint, Verizon, Qwest, and the Coalition also filed post-hearing comments.

At its October 22, 2001 Public Meeting, the Commission considered the comments and recommendations of the participants in this matter and entered the decisions set out in this order.

DISCUSSION

Staff's Proposed Rulemaking

Over the past few years, the Commission has approved over 300 carrier-to-carrier agreements submitted pursuant to the 1996 Act. While the rules that govern the Commission's review of these agreements have worked well, Staff believes that they should be modified for two primary reasons. First, Staff notes that the existing rules do not address the review of so-called "opt-in" or "adoption" agreements. Thus, Staff proposes the addition of OAR 860-016-0025 to establish a new section to govern the adoption of previously approved agreements on file with the Commission. These procedures would also apply when carriers have the option in the future to select Qwest's Statement of Generally Available Terms (SGAT) filed pursuant to Section 252(f) of the 1996 Act.

Staff also believes that the rules should be amended to streamline Commission review of submitted negotiated agreements. For example, the existing rules require the Commission to serve notice of all applications to persons who have indicated an interest in receiving such notice. However, while the notice list has numbered over 100, the Commission has yet to receive a single comment from any interested person other than Staff, who reviews every negotiated agreement and makes a recommendation to the Commission. The current notice requirements require significant time and resources, and ultimately slow down the Commission's review of submitted agreements.

Accordingly, Staff proposes amending OAR 860-016-0020 to eliminate the notice requirement. Instead, carriers would be required to submit an electronic copy of the negotiated agreement and a carrier-to-carrier agreement checklist that provides general information about the submitted agreement. The Commission will provide notice of the application by posting the checklist and the agreement on its Internet website for comment.

Finally, Staff proposed minor housekeeping changes. For example, the definitions in amended OAR 860-016-0000 now reference the 1996 Act. In addition, the title of OAR 860-016-0020 is renamed to help follow the Act's distinction between agreements that are arrived at through negotiation and those arrived at through arbitration.

Participants Comments

As stated above, Qwest, Verizon, Sprint, McLeodUSA, and the Coalition filed comments to Staff's rulemaking proposals. The comments generally support Staff's efforts to streamline and improve the process for review and approval of carrier-to-carrier agreements. The rulemaking participants, however, raised a variety of issues relating to the rules governing review of adopted agreements. We group the comments by issue and address them as follows:

Pre-Filing Notice

In most "opt-in" or adoption dockets, the requesting and affected carriers file a jointly executed notice of adoption with the Commission. There is no requirement, however, that a requesting carrier contact the affected carrier prior to filing notice to adopt a previously approved agreement. Proposed OAR 860-016-0025 recognizes the right of a requesting carrier to unilaterally file such a notice to adopt. When filing a unilateral notice, the requesting carrier must simultaneously give notice to the affected carrier.

Qwest contends that requesting carriers should be required to first contact an affected carrier about its intent to file a notice to adopt a previously approved agreement. Qwest believes that this requirement would help avoid potential problems and speed up the review process. Qwest states that, for example, if an affected carrier knows in advance that a requesting carrier intends to adopt an expired, or soon to be expired contract, the two carriers can work together and identify a more appropriate contract for adoption. The Coalition contends that the proposed rules provide an incentive to encourage carriers to cooperate and believes that Qwest's pre-filing notice adds an unnecessary layer to the process. It is also concerned that the pre-filing requirement could cause additional delay if a requesting carrier has difficulty contacting the proper representative of the affected carrier.

We decline to adopt Qwest's recommendation. The 1996 Act allows a requesting carrier to adopt a previously approved agreement. Nothing requires these carriers to first contact or consult with the affected carrier prior to filing the notice to adopt with the Commission. We agree that such cooperation between carriers will help identify potential problems and possibly expedite the review process. For that reason, the rules will encourage, but not require, requesting carriers to file jointly executed notices of adoption.

Comment Period

As noted above, proposed rule OAR 860-016-0025 gives affected carriers 10 days to respond to a requesting carrier's unilateral notice to adopt a previously approved agreement. Qwest, Verizon, and Sprint contend that 10 days is an insufficient period of time to allow the affected carrier to review and respond to a notice of adoption. Verizon requests that affected carriers be given 20 calendar days to file objections. Sprint suggests a 12 business day period.

After consideration, we agree that the proposed 10-day period should be expanded to 21 days, the same time period allowed for comment on negotiated agreements submitted for approval. This additional time will allow an affected carrier the ability to determine the current status of the chosen interconnection agreement, whether provision of the requested term will be more expensive than provision to the original carrier, and whether the provision is technically feasible. This additional time will also provide further incentive for a requesting carrier to work cooperatively with the affected carrier to file a jointly executed notice of adoption.

We also adopt the recommendations made by all participants that proposed OAR 860-016-0025 be modified to clarify that, if no objections are filed, the adoption becomes effective immediately on the day following the final day for objection, without further action of the parties or the Commission. The rule should also be revised to explain that, if objections are filed, the Commission will adjudicate those objections in an expedited manner. Pending such adjudication, the non-objectionable portions of the agreement will take effect. Furthermore, the rule should be revised to state that a jointly submitted notice of adoption becomes effective when filed.

Grounds for Objection

All participants agreed that the proposed rules should set forth the limited grounds for objection to a notice of adoption. Sprint proposed that objections be limited to two: (1) the agreement proposed to be adopted has expired, been cancelled, or is scheduled to terminate within the next 60 days; and/or (2) there are new federal or state orders that require modification of the agreement proposed to be adopted. The Coalition cites procedures adopted by the California Public Utilities Commission that limits grounds for objection to: (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement; and/or (2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible. Verizon also refers to these grounds for objection in its proposal to extend the period of time for an affected carrier to file comments.

We will address below the issue whether a requesting carrier should be prohibited from adopting an agreement that is scheduled to soon expire. With that exception, and with some minor modifications, we agree with the suggestions submitted by Sprint and the Coalition and revised proposed rule OAR 860-016-0025 accordingly. The rule should limit the grounds for objection to the following:

(a) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement;

(b) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible;

(c) There is new federal or state law that requires modification of the agreement proposed to be adopted;

(d) The agreement proposed to be adopted has expired or been cancelled; or

(e) The proposed adoption is unlawful.

Adoption of Agreements Set to Expire

Sprint and Verizon contend that the proposed rules should be modified to prohibit a requesting carrier from adopting a previously approved agreement that is scheduled to terminate within 90 days. The Coalition opposes such a restriction, arguing that a requesting carrier should be allowed to adopt an existing agreement at any time prior to termination.

The Federal Communications Commission (FCC) has determined that individual interconnection, service, or network elements arrangements shall remain available for use by requesting carriers for a reasonable period of time. *See* 47 CFR Section 51.809(c). While it is questionable whether the adoption of terms that will only be in effect for a matter of days or weeks meets that standard and will benefit any party, we decline to adopt a bright-line rule. An affected carrier will be allowed to object to an adoption based on the FCC's rule. If such an objection is filed, the Commission will make its determination based on the circumstances presented in that particular case.

GTE-Bell Atlantic Merger

The Coalition notes that, in approving the Bell Atlantic-GTE merger, the FCC imposed several conditions to promote competition. One of these conditions, according to the Coalition, is that requesting carriers are allowed to adopt the terms and conditions of Verizon interconnection agreements that have been approved by other state commissions. The Coalition contends that the rules should be modified to reference these special circumstances. Verizon opposes the placement of the merger conditions in the rules. Verizon notes that these conditions are temporary and that the obligation exists regardless of whether it is placed in the rules.

We agree with Verizon and conclude that the rules should not be revised to include the relevant merger conditions. As Verizon notes, the condition will expire in less than two years—June 2003. If the merger conditions are placed in the rules now, the Commission would be required to initiate another rulemaking at that future date to remove them. Moreover, the placement of the conditions in our rules would be redundant of Verizon's federal obligations.

Pick and Choose

McLeodUSA and the Coalition request that the rules be further revised to address how the Commission will review a requesting carrier's notice to adopt multiple provisions from different carrier-to-carrier agreements. Both contend that such a revision is necessary to ensure that requesting carriers are provided with timely and expedited approval of agreements involving this so-called "pick and choose" process. Qwest, Sprint, and Verizon acknowledge a requesting carrier's substantive right to "pick and chose" among agreements. They caution, however, that much controversy exists as to the exact nature of this right. Because there is uncertainty, Qwest, Sprint, and Verizon contend that the Commission should not establish substantive "pick and choose" rules in this proceeding. Verizon does propose, however, that the rule be modified to procedurally bring "pick and choose" adoptions within the scope of the rule.

Section 252(i) of the Act contemplates both "pick and choose" adoptions and adoptions of entire agreements. Accordingly, we adopt Verizon's suggestion to make minor wording changes to expand the scope of the proposed rule to include "pick and choose" agreements. Adding a reference to Section 252(i) and its FCC Rule counterpart, 47 CFR Section 51.809, along with minor wording changes, will track federal law regarding the extent of requesting carrier's rights to adopt other agreements. We further conclude that the addition of more substantive rules addressing "pick and choose" agreements is beyond the scope of this rulemaking. As these carriers note, there are numerous substantive issues regarding what a carrier's "pick and choose" rights entail and when and to what degree a carrier may assert them. The Commission will need to resolve these and other substantive issues on a case-by-case basis.

Expiration Date

Qwest contends that, when adopting a carrier-to-carrier agreement, a requesting carrier adopts all terms and conditions of the original agreement—or portions thereof—including the original expiration date. We agree and believe that the proposed rule, as written, reflects that understanding. The proposed rule allows a requesting carrier to change only two terms when adopting an agreement—the adopting party's name and the new effective date, *i.e.*, the date the agreement becomes effective. The rule does not allow a requesting carrier to modify the expiration date and unilaterally extend the terms and conditions of a particular agreement.

ORDER

IT IS ORDERED that:

1. The rules set out in Appendix A, attached to and made part of this order, are adopted.

2. The rules shall become effective upon filing with the Secretary of State.

Made, entered and effective _____.

_____ _____

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

_____

Joan H. Smith
Commissioner

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-016-0000
Definitions

As used in Division 016 of the rules:

(1) "The Act" means the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996.

(2) "Arbitration" means the submission of a dispute for resolution by a neutral third party appointed by the Commission **pursuant to Section 252(b) of the Act**.

(3) "Commission" means the Public Utility Commission **of Oregon**.

(4) "Mediation" means a process in which a neutral third party assists negotiating parties to reach their own solution **pursuant to Section 252(a)(2) of the Act**.

(5) "Petitioner" means a person who has filed a petition for arbitration under the Act.

(6) "Respondent" means the party to a negotiation, which did not make the request for arbitration.

Stat. Auth.: ORS Ch. 756
Stat. Implemented: 47 USC 252
Hist.: PUC 8-1998, f. & cert. ef. 4-8-98 (Order No. 98-132)

860-016-0020
~~Negotiation and Mediation of Interconnection~~ Agreements **Arrived at Through Negotiation**

(1) **Upon receiving a request for interconnection, services, or network elements pursuant to Section 251 of the Act, the affected telecommunications carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier.**

(2) The negotiating parties may ask a mediator outside the Commission to help them reach agreement. If they request the Commission to mediate, the Commission will use an Administrative Law Judge (ALJ) or a member of the utility Staff to mediate. Only the negotiating parties and the mediator will participate in mediation sessions.

(3) After the parties reach agreement **under Section 252(a) of the Act**, they shall file **an application with the Commission seeking approval of the agreement, or for approval of an amendment to an approved agreement on file with the Commission. The application shall include an original plus three copies of the negotiated agreement and a completed Carrier-to-Carrier Agreement Checklist. A copy of the checklist is available on the Commission's Internet website. The parties may also include any other supporting information with their application.** ~~**the negotiated interconnection agreement with the Commission. Unless the agreement merely adopts an agreement previously approved by the Commission, the Commission will serve notice of the negotiated agreement on those who have indicated a desire to receive notice of mediated and arbitrated agreements. The public may then file comments within 21 days of service of the notice, unless the Commission establishes a different time limit in an individual case. If the agreement merely adopts an agreement previously approved by the Commission, the Commission will process the agreement on an expedited basis, without serving notice of it.**~~

(4) The negotiating parties shall also submit a copy of the negotiated agreement and a copy of the checklist in electronic format compatible with Adobe Acrobat Reader or Rich Text Format. The electronic copy may be an unsigned version of the negotiated agreement. The Commission will provide notice of the application by posting the checklist and the agreement on its Internet website.

(5) The public may file written comments within 21 days of the filing date of the application, unless the Commission establishes a different time limit in an individual case.

~~(4)~~(6) The Commission will accept or reject the agreement within 90 days**, with written findings as to any deficiencies**. The grounds for rejection are that the agreement:

(a) Discriminates against a carrier not a party to the agreement; or

(b) Is not consistent with the public interest, convenience, and necessity.

Applicable Commission policies will be a factor in public interest, convenience, and necessity **determinations**.

Stat. Auth.: ORS Ch. 756
Stat. Implemented: 47 USC 252
Hist.: PUC 8-1998, f. & cert. ef. 4-8-98 (Order No. 98-132)

860-016-0025
Adoption of Previously Approved Agreement or Statement of Generally Available Terms

(1) If a requesting telecommunications carrier decides to adopt an identical agreement or an identical individual arrangement contained in an agreement, pursuant to Section 252(i) of the Act and 47 CFR Section 51.809, with the exception of the adopting party's name and new effective date, previously approved by and on file with the Commission, or a Statement of Generally Available Terms approved by the Commission under OAR 860-016-0040, it shall file notice of the adoption with the Commission. The notice shall include a completed Carrier-to-Carrier Agreement Checklist.

(2) The requesting carrier shall also submit a copy of the checklist in electronic format compatible with Adobe Acrobat Reader or Rich Text Format. The Commission may provide notice of the adoption by posting the checklist on its Internet website.

(3) If the notice is filed jointly with the affected telecommunications carrier, the adoption shall become effective on the date filed.

(4) If the notice is filed unilaterally by the requesting telecommunications carrier, the requesting telecommunications carrier shall simultaneously provide notice of the adoption to the affected carrier. The affected carrier may then file objections to the adoption within 21 calendar days of such notice. If no objections are filed, the adoption shall become effective on the 22nd day after filing.

(5) An affected carrier may object to an adoption on the following grounds:

(a) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement;

(b) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible;

(c) There is new federal or state law that requires modification of the agreement proposed to be adopted;

(d) The agreement proposed to be adopted has expired or been cancelled; or

(e) The proposed adoption is unlawful.

(6) If the affected carrier files objections, the requesting carrier may file a reply within 14 calendar days after the objections are filed. An assigned Administrative Law Judge (ALJ) shall schedule a conference within five business days after the reply is filed, to be held as soon thereafter as practicable. At the conference, the ALJ shall determine whether the issues raised by the affected carrier's objection can resolved based on the pleadings and all supporting documentation, or whether further proceedings are necessary. If further proceedings are necessary, the ALJ shall establish a schedule for resolving the dispute on an expedited basis. Pending resolution of the dispute, other provisions of the proposed adoption not contested by the affected carrier will become effective.

Stat. Auth.: ORS Ch. 756
Stat. Implemented: 47 USC 252
Hist.: NEW