Model Regulatory Procedures for the Enforcement of Interconnection Agreements

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Enforcement of Interconnection Agreements

Enforcement of Interconnection Agreements between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs) is the province of the state regulatory agencies according to the Eighth Circuit Court of Appeals.¹ State regulators must exercise this responsibility expeditiously to further the public interest in having a competitive choice among local telecommunications carriers. The critical need for speedy action was underscored earlier this year by the Iowa Utilities Board, the first state public utility commission (PUC) to impose civil penalties on a recalcitrant ILEC (U. S. West):

"The timely implementation of the interconnection agreement ... is a matter of highest public policy importance under Iowa code ..., and under the Federal Telecommunications Act of 1996. It is essential to the development of local service competition that U. S. West comply with the implementation schedule set by the board."²

Moreover, states may not erect or maintain barriers to entry in the local telecommunications market, and cumbersome regulatory processes that themselves delay implementation of Interconnection Agreements certainly constitute a barrier to entry, because they favor incumbents.³

With few exceptions, 100 percent of local exchange service customers still take ILEC service. Thus ILECs have a strong market incentive to delay implementation of Interconnection Agreements because delay may accomplish four ILEC objectives: it keeps customers from selecting a CLEC; it can limit CLEC revenues; it drives up CLEC regulatory costs; and it forces CLECs to divert

¹ Iowa Utilities Board v. FCC, 120 F. 3d 753 (July 18, 1997).
resources away from investment in competitive infrastructure in order to participate in dispute resolution processes.

ILECs may seek to evade their Interconnection Agreement obligations in different ways. One way is to “reinterpret” the terms of the agreement, for example, saying they did not “intend” a specific definition when they signed the agreement. Another way is to declare a dispute over facts, such as traffic volumes, to create a “billing dispute.” So long as a “billing dispute” remains unresolved, the ILEC can avoid paying a CLEC. A third way is to experience “technical difficulties” of various kinds to “excuse” performance that impairs CLECs’ reputations. A fourth way is to claim that CLECs have failed to provide needed information to enable ILECs to meet their obligation to provide interconnection, collocation, or access to unbundled network elements. Neither these nor any other attempts to delay interconnection and CLEC access to unbundled elements is lawful, but already, it is clear that some ILECs are more than willing to risk having their actions declared impermissible and even to risk financial penalties, in order to frustrate and delay local exchange competition for as long as possible.

Unfortunately, the requirement and opportunity to enforce Interconnection Agreements find state regulatory agencies totally unprepared. Understandably, many state regulatory agencies are not experienced in what is, in essence, quasi-judicial contract enforcement. State administrative procedures, established by state legislatures to enable state regulators to protect ratepayers from monopoly abuse, are not designed to adjudicate contract disputes between businesses who are interdependent rivals. Thus new, focussed, and streamlined state regulatory procedures are needed to permit swift enforcement of Interconnection Agreements as contracts.

Enforcement of Interconnection Agreements is very different from traditional regulatory processes. Regulatory proceedings, especially rate cases but also service quality enforcement and other types of proceedings, accustom Commissions to “cut the baby in half” solutions -- that is, to render a decision that balances the interests of two parties (usually telecommunications service providers and
consumers) more or less equally. Enforcement of Interconnection Agreements demands a completely different decision criterion. The Commission must decide what the Agreement said, how parties' actions pursuant to the disputed portions of the Agreement reflect the intent of the parties in meeting the requirements of the Act, and whether the actions taken by the parties give effect to that intent. Enforcement of Interconnection Agreements rarely should result in a "compromise" as in a traditional regulatory proceeding, but rather in most cases should result in a finding for or against the complainant, as in a traditional contract dispute. Because in approving the Agreement initially the Commission has already found its terms to be nondiscriminatory and in the public interest, the public interest can only be served by enforcing the agreement as written.

Of course it is self evident that the Commission must not during enforcement permit either party to re-litigate the Interconnection Agreement itself, by arguing that circumstances have changed or otherwise. Enforcement must proceed as in interpretation of a contract, with the added consideration that the Interconnection Agreement is a special type of contract that has already been found to serve a public purpose and must be enforced so as to actually accomplish the objectives of the Telecommunications Act of 1996.

Resolving a dispute between businesses about business practices pursuant to an Interconnection Agreement should not involve any parties other than those businesses. This would simply prolong the proceeding, give rise to attempted intervention by parties with no financial or operational interest in the outcome of the dispute, and create yet another incentive for the ILEC to delay resolution and to actually create sham disputes.

Just as many normal commercial contract disputes are resolved through binding arbitration, enforcing some Interconnection Agreements could be more akin to commercial arbitration than to regulatory functions. Thus it is also necessary for PUCs to consider whether particular personnel experienced in regulatory processes have the background and training to effectively conduct enforcement proceedings. If a hearing examiner's or administrative law judge's (or
Commissioner's) knowledge of relevant contract law is limited, and/or if the person has had no experience with arbitration, a Commission may decide to assign an enforcement proceeding to a commercial arbitrator. In the interest of time, too, it might be appropriate for a Commission to appoint an outside arbitrator to conduct enforcement proceedings. At the very least, Commissions should if needed provide the staffer or Commissioner acting as hearing examiner with special training as an arbitrator.^[4]

TCG offers the following Model Regulatory Procedures for the Enforcement of Interconnection Agreements. In some cases amendments to the state administrative procedures laws may be necessary to permit the regulatory agencies to adopt streamlined procedures. The Model, with appropriate rewording, could also serve as Model Legislation.^[5]

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^[4] TCG believes that ideally the parties should be free to agree to have their dispute resolved by a commercial arbitrator, rather than submit it to a PUC.

MODEL REGULATORY PROCEDURES FOR SWIFT ENFORCEMENT
OF INTERCONNECTION AGREEMENTS

Purpose

The federal Telecommunications Act of 1996 established the national goal of opening all telecommunications service markets to competition and accords to the states the responsibility to establish and enforce policies necessary to attain that goal.

It is in the immediate interest of the People of the [state] for the State to exercise its responsibilities and rights within the new federal statutory framework to ensure that all the benefits of competition in all telecommunications service markets are realized as effectively as possible.

Protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications service markets.

It is necessary and appropriate to establish rules to encourage and ensure orderly transition in the development of markets for all telecommunications services and to promote effective and sustained competition in all telecommunications markets.

For the purpose of the adoption of such rules, "telecommunications service" means [existing definition] and also includes interconnection arrangements and services and access to unbundled network elements of incumbent local exchange carriers pursuant to the Telecommunications Act of 1996.
Adoption and Authority

The [PUC] herewith adopts enforcement rules and procedures that ensure that interconnection arrangements entered into by carriers and approved by the [PUC] are implemented and enforced. The Commission has general rulemaking authority to make rules necessary to enforce these rules and procedures consistent with the Telecommunications Act of 1996 and [applicable state statute].

Rules

1. **PROHIBITED ACTIONS OF TELECOMMUNICATIONS CARRIERS.** A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered *per se* impediments to the development of competition:

   a. Refusing or delaying interconnections or providing inferior connection to another telecommunications carrier;

   b. impairing the speed, quality or efficiency of services used by another telecommunications carrier;

   c. denying a request of another provider of telecommunications for information regarding the technical design and features, geographic coverage, information necessary for the design of equipment, and traffic capabilities of the local exchange network, except in the case of proprietary information, in which case the disclosure of such propriety information may be required, subject to proprietary agreement or protective order;
d. delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;

e. refusing or delaying access by any person to another telecommunications carrier, including but not limited to preventing the access by a tenant or occupant of a building to a carrier of his or her choice, or acquiescing to such prevention;

f. acting, or failing to act, in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

g. violating the terms of or unreasonably delaying implementation of an Interconnection Agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers;

h. other actions that impede competition.

2. ENFORCEMENT. The Commission shall enforce the rules set forth in Section 1. Unless the Commission and the parties otherwise mutually agree, the Commission shall use the procedures set forth in this Section for the review of complaints relating to violations of Section 1 or Interconnection Agreements.

3. COMPLAINT RESOLUTION BY CARRIERS. A carrier having a complaint regarding an action prohibited by Section 1 or an Interconnection Agreement with another carrier must notify the respondent of the alleged violation in writing. A complainant must either (a) exhaust the specific dispute resolution process provided for in its Interconnection Agreement with the respondent, or (b) offer the respondent 48 hours to correct the situation prior to
filing any complaint under this Section. Provision of notice or the opportunity to correct the situation creates a rebuttable presumption of knowledge under either action.

4. COMPLAINT PROCESS. If no resolution is reached under 3(a) or 3(b), the complainant may file with the Commission and initiate the complaint process.

   a. The complaint shall be filed with the [appropriate officer] of the Commission and shall be served in hand upon the respondents;

   b. at any time following the filing of the complaint, parties may commence reasonable discovery. Parties must respond to the discovery request within fourteen days after the date the request is made;

   c. responsive pleading to the complaint must be filed with the Commission within seven days after the date the complaint is filed;

   d. a determination of grounds for the complaint and, if necessary, a directive for legal notice will be made within three days after the date the response is filed;

   e. a pre-hearing conference before the Commission’s designated hearing examiner or arbitrator will be held within fourteen days after the date the complaint is filed;

   f. the hearing shall commence within thirty days after the date the complaint is filed;

   g. the hearing examiner [arbitrator] shall issue its decision within sixty days after the date the complaint is filed;
h. the hearing examiner's [arbitrator's] decision shall be considered a final order ten days after the date the decision is issued, unless the Commission issues its own final order within ten days after the date the hearing examiner or arbiter issued its decision.

5. REQUEST FOR EMERGENCY RELIEF. If the alleged violation has substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for emergency relief. The Commission shall address the request in accordance with the following:

a. The Commission, acting through its designated hearing examiner [arbitrator], shall issue a decision regarding the request within two business days of the date the complaint is filed;

b. the decision of the hearing examiner [arbitrator] shall be considered an order unless the Commission itself issues its own order within two calendar days of the date the hearing examiner's [arbitrator's] order.

6. INJUNCTIVE RELIEF. If the Commission believes that there is an imminent threat to competition or to other aspects of the public interest, the Commission may, notwithstanding
any other provision of this rule, seek temporary, preliminary, or permanent injunctive relief from a court of relevant jurisdiction either prior to or after the hearing.

7. PENALTIES. Upon completion of the hearing and a determination that all or any portion of Section 1 of the Commission's rules have been violated, the Commission shall impose penalties on the telecommunications carrier(s) that has (have) violated the rules.

a. The party or parties responsible for the violation shall each pay the complainant an amount equal to three times the complainant's lost revenue and added costs resulting from the violation(s), or $30,000 per violation, whichever is greater;

b. each day that the violator was in violation of the rule shall be considered a separate violation;

c. such penalties shall be in addition to any liquidated damages provided for in the interconnection agreement which is the subject of the complaint.

8. RECOVERY OF THE COMMISSION'S COSTS. The Commission shall assess the losing party or parties for the Commission's costs of investigating and conducting the complaint proceeding. If parties settle before a final decision, commission costs are divided equally, unless parties agree otherwise in settlement.

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