BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application and Petition of Nova Telephone Company to Maintain its Rural Exemption Pursuant to 47 U.S.C. Section 251(f)(1) and Ohio Admin. Code 4901:1-7-04 and to Suspend or Modify the Application of the Requirement of 47 U.S.C. Section 251(b) and (c) Pursuant to 47 U.S.C. Section 251(f)(2) and Ohio Admin. Code 4901:1-7-05	:	Case No. 09-1899-TP-UNC

COMMENTS OF ARMSTRONG TELECOMMUNICATIONS, INC.
IN RESPONSE TO THE APPLICATION AND PETITION OF
NOVA TELEPHONE COMPANY

INTRODUCTION

Armstrong Telecommunications Company, Inc. ("Armstrong") files these comments in response to Nova Telephone Company's ("Nova") application seeking an extension of its exemption from the provisions of 47 U.S.C. Section 251(c) and from the Local Service Guidelines promulgated by the Public Utilities Commission of Ohio (the "Guidelines")[1] Armstrong respectfully urges the Public Utilities Commission of Ohio ("PUCO") to dismiss the Application and Petition (hereinafter "Application") filed by Nova and direct Nova to negotiate the terms of an interconnection agreement in accordance with Sections 251 and 252 of the Telecommunications Act of 1996, as amended (the "Act").

Basically, Armstrong seeks to bring local telephone competition to the area served by Nova and to offer consumers quality telephony service options. All Ohio residents deserve the same telecommunications options that are available to residents in urban

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[1] Case No. 95-845-TP-COI, In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues (845 Guidelines).

areas. Armstrong's business model supports a facilities-based voice telephony service that is provided without the use of incumbent facilities, so there should be no economic burden upon Nova to consent to interconnection upon reasonable terms.

Armstrong currently offers video and internet telecommunications services within Nova's service area, and Armstrong owns facilities and infrastructure in the area sufficient to serve prospective subscribers to Armstrong's voice telephony services offering. Since Armstrong expects that these facilities will be sufficient to carry calls from a subscriber's premises to the Armstrong switch, Armstrong will not rely upon any local exchange facilities from Nova. Among the services that Armstrong provides is interconnection with the public switched telephone network ("PSTN"), and as part of that service Armstrong interconnects with the local provider where it delivers local calls in traditional telephony protocol- time division multiplex ("TDM").

Nova filed its Application on December 3, 2009 in response to a letter Armstrong sent on November 17, 2009 requesting negotiation of an interconnection agreement; however, Nova took issue with Armstrong's request, questioning whether it served as a bona fide request within the meaning of 47 U.S.C. Section 251(f) and in accordance with the Guidelines.[2] Without conceding the validity of the claim regarding Armstrong's request, Armstrong's supplemental bona fide request to Nova submitted on December 21, 2009 is attached hereto as Exhibit 1, and incorporated herein by reference as if fully set forth.

Under Ohio Administrative Code ("OAC") Section 4901:1-7-04, the telephone company requesting interconnection (Armstrong) shall file a response within fifteen (15)

[2] Nova Petition at page 2, paragraph 6.

calendar days after the rural telephone company's application for exemption. These comments satisfy that requirement.

In its Application, Nova requests a rural telephone exemption as provided in 47 U.S.C. Section 251(f)(1), adopted in OAC 4901:1-7-04(B). In connection with this rural telephone exemption claim, Armstrong will demonstrate herein that the interconnection request by Armstrong is not unduly economically burdensome, is technically feasible, and is consistent with 47 U.S.C. 254, as effective in paragraph (A) of OAC 4901:1-7-02. Nova is not entitled to an exemption pursuant to Section 251(f)(1), as Armstrong will be using its own facilities to provide telephony service to Ohio residents, and therefore Armstrong is not requesting more burdensome Section 251(c) elements such as unbundled network elements or collocation elements that are normally required by non-facilities based providers of service, which might justify a 251(f)(1) exemption. Also, Armstrong seeks to interconnect with Nova by providing a "fiber mid span meet" at or near Nova's Central Office in order to exchange local traffic. There is nothing remotely technically infeasible about the request. Armstrong's request is consistent with the universal service objectives set forth in Section 254, which generally favor fostering a competitive environment among providers of telecommunications services.

Nova additionally requests a suspension or modification of its obligations to interconnect under the Act according to the procedures outlined in Section 251(f)(2). Armstrong's interconnection request does not warrant this extraordinary remedy. As noted above, and explained more fully below, Armstrong's request is simply to interconnect its network with Nova's for the exchange of local traffic. A suspension or modification of Nova's duty to interconnect is not necessary to avoid a significant

adverse economic impact on users of telecommunications services generally. To the contrary, users of telecommunications services will generally benefit from the availability of meaningful consumer choice. No modification or suspension is necessary to avoid imposing a requirement on Nova that is unduly economically burdensome. Armstrong seeks interconnection through a relatively straightforward "fiber mid- span meet," at or near Nova's central office. No undue economic burden will result from the interconnection. For much the same reason, no modification or suspension is necessary to avoid imposing a requirement that is technically infeasible. If any unforeseen technical difficulty should arise with the "fiber mid span meet," Armstrong will work with Nova to find a mutually agreeable technical solution. Further, such suspension or modification is not consistent with the public interest, convenience, and necessity, because a suspension of Nova's obligation to interconnect would tend to limit access to meaningful choice for consumers of telecommunications products and services in this area. Thus, Nova's request for suspension or modification of its obligations to interconnect under Section 251(f)(2) of the Act must also fail.

ARGUMENT

I. Nova Is Not Entitled To A Rural Exemption as Set Forth in Section 251(f)(1).

47 U.S.C. Section 251 (f)(1) states in pertinent part:

> "*** ***f) Exemptions, suspensions, and modifications***
>
> (1) Exemption for certain rural telephone companies
>
> (A) Exemption
>
> Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not

> unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).
>
> (B) State termination of exemption and implementation schedule
>
> The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, ***the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title*** (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations." (Emphasis and insertions added.)

This rural telephone exemption, and the test set forth in 251(f)(1)(B), is applicable in Ohio in appropriate circumstances as set forth in OAC 4901:1-7-04.

Nova should not be permitted to invoke the rural exemption to avoid its obligations to interconnect with Armstrong in the present case. The exemption should be terminated as it applies to Armstrong's current interconnection request. Since Armstrong is merely seeking a simple interconnection under Sections 251(a) and (b) of the Act, the rural exemption should not be available as a shield to prevent interconnection. The rural exemption may make sense when applied to more burdensome interconnection requirements imposed by Section 251(c) of the Act upon incumbent local exchange carriers, such as unbundling, resale or collocation. However, the exemption does not serve any rational public purpose when a straightforward, technically simple interconnection, such as Armstrong has made here, is at issue.

Armstrong's interconnection request does not implicate any of the more burdensome interconnection, services or network element requirements of Section

251(c). Armstrong's interconnection request does not seek unbundled network elements, resale or collocation. Armstrong's interconnection request is made pursuant to Sections 251(a) and (b). Physical interconnection is mandated by Section 251(a), and the requirement to exchange traffic under the terms of reciprocal compensation is included in Section 252(b)(5).[3] Nothing in the Act or the OAC should exempt a rural carrier from providing a simple interconnection to a requesting telecommunications carrier when, as here, the competitor seeks interconnection to support the introduction of a wholly facilities-based service.

Admittedly Section 251(f)(1) may reasonably provide relief for small incumbent local exchange carriers ("ILECs") if the specific interconnection request would require that ILEC to incur extraordinary or substantial costs to support the request. For example, if a small ILEC were requested to interconnect in a way that would require the ILEC to expand its physical plant to accommodate collocation, the rural exemption may serve to protect that small ILEC from an unduly burdensome economic requirement related directly to an intrusive interconnection request. However, Section 251(f)(1) and OAC 4901:1-7-04 should not routinely and indiscriminately prohibit all interconnection requests of smaller ILECs.

All rural telephone companies, like all telecommunications carriers, have a duty to interconnect directly or indirectly with the facilities and equipment of other carriers.[4] Rural telephone companies, like other local exchange carriers ("LECs"), are also required to provide number portability, dialing parity, and access to directory listing, and to

[3] See, *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256, 1267 (10th Cir. 2005) (Rejecting rural telephone companies' assertion that FCC expected reciprocal compensation agreements under Section 251(c)).
[4] 47 U.S.C. Section 251(a).

"establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic."[5] As the Eighth Circuit Court of Appeals stated:

> "First, all else being equal, if a provision of the Act is vague we are inclined to interpret the provision in a manner that ***promotes competition***. It is undisputed that Congress passed the Act with the ***intention of eliminating monopolies and fostering competition***. We do not suggest that this general intent should be used to impose duties on incumbents beyond those created by Congress. We do, however, believe that this general intent should guide our consideration of competing interpretations of the Act. Such guidance suggests that ***we should be wary of interpretations that simultaneously expand costs for competitors (such as a requirement for direct connections) and limit burdens on incumbents (such as a limitation of dialing parity to local exchange boundaries). If a cost is imposed on a competitor, it becomes a barrier to entry and rewards the company who previously benefited from a monopoly protection***. Because Congress passed the Act with a ***clear intent to foster competition***, we are more inclined to interpret a vague provision in a manner that reduces barriers to entry."[6]

Nova does not dispute that Armstrong's request does not include burdensome network element or collocation obligations described in Section 251(c). Rather, Nova bases its request for the exemption by alleging that: "termination of the exemption will be economically burdensome beyond the burdens typically associated with efficient competitive entry, may prove to be technically infeasible, and may prove inconsistent with universal service principles."[7] Nova states no factual basis for any of these assertions, and does not attempt to explain how a simple request for a "fiber mid span meet" interconnection could possibly justify any of Nova's concerns. The only factual basis asserted in support of the exemption is that "Nova and its predecessors have served the Nova and Sullivan Exchanges for over 100 years, and have long provided quality

[5] 47 U.S.C. Section 251(b)(5).
[6] *WWC License LLC v. Pub.Serv.Comm'n*, 459 F.3d 880, 891 (8th Cir. 2006) (Emphasis added).
[7] Application at page 3, paragraph 11.

telecommunications services at affordable rates to its subscribers."[8] This assertion, even if proven, is simply not enough to support extension of the rural telephone carrier exemption as applied to Armstrong's current interconnection request.

The Commission has previously ruled that Ohio residents are entitled to the benefits of competition when it dismissed the application of four other ILECs that had asserted the rural exemption as a barrier to interconnection with a competitive carrier.[9] The rural exemption should be used only in the most extraordinary of circumstances and should not be used to prevent competitive carriers from interconnecting with all ILECs when the request does not implicate the more burdensome aspects of Section 251(c) of the Act.

Armstrong's request does not constitute an undue economic burden upon Nova. The overall goal of Sections 251 and 252 of the Act is to promote local competition and provide more meaningful choices for telecommunications consumers. The rural exemption to Section 251(c) cannot be construed so broadly as to completely negate the general requirements in Section 251 requiring interconnection.

Although the Eighth Circuit has held that it is the full economic burden on the ILEC of meeting the interconnection request that must be assessed by the relevant state commission,[10] a determination of what is meant by the term "undue economic burden" should be consistent with the overall purpose of the Act. The Preamble to the Act states that its purpose is "[t]o ***promote competition*** and ***reduce regulation*** in order to secure

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[8] Application at page 3, paragraph 10.

[9] Case No. 04-1494-TP-UNC, et al., *In the Matter of the Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines Filed by: The Champaign Telephone Company, Telephone Service Company, the Germantown Independent Telephone Company and Doylestown Telephone Company,* Order on Rehearing, at 10 (April 13, 2005).

[10] *Iowa Utils v. FCC*, 219 F.3d 744, 761 (8th Cir. 2000) (rev'd in part on other grounds, 535 U.S. 467 (2002)) ("Iowa Utils." or "Iowa II").

lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[11] The PUCO should conclude that given this clear legislative purpose, requests to be exempt from competition should not be granted lightly, let alone automatically extended without factual support.

Any competition may result in some negative economic impact upon an ILEC. But, this is not the "undue" economic "burden" required to justify maintaining a rural exemption. Possible access line loss and the resulting revenue impacts are insufficient to constitute an "undue" economic burden, beyond the burdens typically associated with efficient competitive entry. As the PUCO has noted in dismissing the applications of four ILECs asserting a rural exemption, the potential for a loss of customers is a possible outcome of competition, but it is not an undue economic burden directly associated with a competitive carrier's interconnection request.[12] Line loss may also result from other factors, unrelated to Armstrong's interconnection request, such as customers switching to wireless service. Armstrong's interconnection request cannot be viewed as an undue economic burden, when viewed in the context of all relevant surrounding facts and circumstances.

Also, as previously noted, Armstrong's request does not implicate unbundled network elements, collocation or resale of the ILEC's services- the burdens associated with a Section 251(c) request. If these elements were involved, the interconnection itself might be costly for Nova to provision, and might constitute a greater economic burden

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[11] Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat 56 (1996), cited in *Ronan Telephone Co. v. Montana DPS*, Cause No. DV 00-14, 2001 ML 803, 2001 Mont. Dist. LEXIS 2862 at **2 (March 2001) (attached).

[12] Case No. 04-1494-TP-UNC, Order on Rehearing at 10 (April 2005).

that would have to be considered. However, Armstrong's request does not involve these issues; therefore, the interconnection itself will not be unduly burdensome to Nova.

Further, Nova is not precluded from broadening its portfolio of services beyond simple telephony. Other local exchanges have ventured into providing services such as video and broadband. If Nova is not providing these services, it should not be rewarded for failing to provide Ohio consumers with up- to- date telecommunications options.

Nova is not entitled to assert its rural exemption status under 47 U.S.C. 251(f)(1) as applied in Ohio through 4901:1-7-04, as a way to avoid its clear interconnection obligations to Armstrong.

II. Nova's Request For Suspension or For Suspension or Modification of It's Obligations to Interconnect Pursuant to 47 U.S.C. Section 251(f)(2) Must Also Be Denied.

47 U.S.C. Section 251 (f)(2) states in part:

"*** ***(2) Suspensions and modifications for rural carriers***

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

> The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers." (Emphasis added.)

This Section of the Act is applied in Ohio through OAC 4901:1-7-05.

Nova states in its Application that, "In the time that has passed since receipt of the Armstrong Letter, Nova has not been able to complete a full evaluation of its merits in detail, or to determine with precision its current or prospective effect on Nova."[13] This is an admission that Nova does not know what the economic impact of interconnection on Nova, if any, would be.

Despite this admission, Nova goes on to assert that "suspension or modification will be consistent with the public interest, convenience and necessity, and are or may be necessary (a) to avoid significant adverse economic impact on users of telecommunication services generally, (b) to avoid imposing a requirement that is unduly economically burdensome and/or (c) to avoid imposing a requirement that is technically infeasible.[14]

First, it is difficult to conceive how providing telecommunications services customers with meaningful choices in a competitive environment could have an adverse economic impact on users of telecommunications services. In fact, it is highly likely, and this is recognized in the Act, that fostering competition will provide meaningful benefits to telecommunications consumers generally. If Nova fails to effectively compete,

[13] Application at page 2-3, paragraph 9.
[14] Application at page 3, paragraph 12.

competition may have adverse economic impacts on Nova- but not on users generally. Supporting Nova's operations is not a significant goal of the test set forth in 251(f)(2).

As Nova freely admits, Nova has no idea whether the interconnection request would prove unduly economically burdensome to Nova.[15] However, Armstrong may state with some certainty that the interconnection requested by Armstrong will not be unduly economically burdensome to Nova. As noted above, Armstrong is merely requesting physical interconnection through a "fiber mid span meet" at or near Nova's central office to exchange local traffic. There is nothing remotely burdensome or technically challenging about this interconnection request, or the method of the proposed interconnection itself. If technical difficulties arise, which is unlikely, Nova and Armstrong can work to develop a mutually acceptable technical solution. It may be difficult and time consuming to determine the effect of a competitive environment, or to determine the impact competition may have on Nova's net income. But, while these considerations may be critically important to Nova from a business perspective, they are not relevant under the Act. Nova may not modify or suspend its obligations to interconnect under 47 U.S.C. Section 251(b) and (c) solely on the basis of unfounded and unexamined fear that effectively competing with Armstrong may prove to be difficult.

For similar reasons Armstrong's request for interconnection is not technically infeasible. Armstrong requests interconnection through a "fiber mid span meet" at or near Nova's central offices to exchange local traffic. As noted above, in the unlikely event that unforeseen technical problems arise with the specific interconnection method, Armstrong and Nova should be able to negotiate to arrive at a mutually agreeable technical solution.

[15] Application at page 2, paragraph 9.

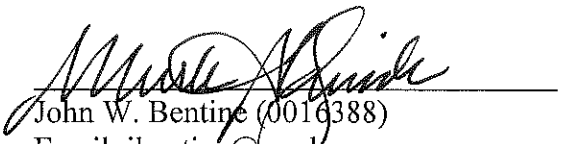
Finally, suspension or modification of Nova's interconnection obligations imposed by 47 U.S.C. Section 251(b) and (c) will not further the public interest, convenience or necessity. The public interest, convenience and necessity is best served by fostering a robust competitive environment where consumers of telecommunications services have access to meaningful choices among service providers. Protecting an incumbent from the rigors of competition may assist that incumbent in surviving, but it does nothing to assist the public at large. Nova has failed to carry its burden of showing that a suspension or modification of its interconnection responsibilities is warranted. Nova has admittedly not yet even properly evaluated the request or the possible current or prospective effects on Nova, let alone the public at large. Nova simply assumes that competition will have an adverse financial impact on Nova and requests a suspension or modification on that basis. Nova has no proof that the interconnection request will have any adverse economic impact on users of telecommunications services generally, would impose a requirement that is unduly economically burdensome and/or is technically infeasible. Nova's request for modification or suspension is therefore not consistent with the public interest, convenience or necessity.

CONCLUSION

Since Armstrong has shown that the interconnection request will not unduly economically burden Nova, is technically feasible and is consistent with the Act, the PUCO should deny Nova's Application for an extension of its rural telephone company exemption under 251(f)(1). Further, since Nova has failed to show that a suspension or modification of Nova's obligation to interconnect is consistent with the public interest, convenience and necessity, nor is such suspension or modification necessary to (a) avoid

significant adverse economic impact on users of telecommunications services generally, (b) to avoid imposing a requirement that is unduly economically burdensome, and/or (c) to avoid imposing a requirement that is technically infeasible, Nova's request for suspension or modification of its obligation to interconnect must be similarly denied.

Respectfully submitted,



John W. Bentine (0016388)
Email: jbentine@cwslaw.com
Direct Dial: (614) 334-6121
Mark S. Yurick (0039176)
Email: myurick@cwslaw.com
Direct Dial: (614) 334-7197
Matthew S. White (0082859)
Email: mwhite@cwslaw.com
Direct Dial: (614) 334-6172
CHESTER WILLCOX & SAXBE LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
Telephone: (614) 221-4000
Facsimile: (614) 221-4012

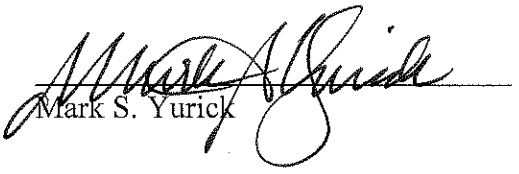
Attorneys for Armstrong Telecommunications, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Comments of Armstrong Telecommunications, Inc. In Response To The Application And Petition of Nova Telephone Company* have been served by electronic mail, this 21st day of December 2009, upon the parties listed below:

Carolyn S. Flahive, Esq.
Thomas E. Lodge, Esq.
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101
Carolyn.Flahive@ThompsonHine.com
Tom.Lodge@ThompsonHine.com

Attorneys for Nova Telephone Company



Mark S. Yurick

ND: 4818-2332-2117, v. 6

ARMSTRONG®

December 21, 2009

Via Overnight Delivery

Mr. Rick Ringler, President
Nova Telephone Company, Inc.
255 Township Road 791
P.O. Box 27
Nova, Ohio 44859-0027

Re: Request for Interconnection with Nova Telephone Company

Dear Mr. Ringler:

This letter serves as a request to negotiate an interconnection agreement for the State of Ohio pursuant to Sections 251 and 252 of the Telecommunications Act of 1934 as amended (the "Act") and Ohio Administrative Code ("OAC") 4901:1-7-06(B) between Armstrong Telecommunications Company, Inc. ("Armstrong"), a competitive local exchange carrier ("CLEC") and Nova Telephone Company, an incumbent local exchange carrier ("ILEC"). This request supersedes and supplements Armstrong's request for interconnection dated November 17, 2009. Armstrong requests an interconnection agreement which encompasses the carrier duties of Sections 251(a) direct and indirect interconnection, including N11, 251(b)(5) Reciprocal Compensation; 251(b)(2) Number Portability; and, 251(b)(3) Dialing Parity. Armstrong's request for interconnection can be accomplished under Sections 251(a) and (b) and Armstrong does not intend for this request to implicate Section 251(c).

Armstrong also requests negotiations as provided for in 47 U.S.C. Section 252(b)(1) which establishes the statutory timelines as defined in the Act. Should negotiations not be completed between the 135th and 160th day after the receipt of this letter, May 3, 2010 and May 28, 2010, respectively, either party may petition the Ohio Public Utilities Commission ("PUCO") to arbitrate any unresolved issues.

ARMSTRONG TELECOMMUNICATIONS, INC.
ONE ARMSTRONG PLACE • BUTLER, PA 16001
724-283-0925 • FAX 724-283-9655

EXHIBIT
tabbies
1

In compliance with the PUCO's Local Service Guidelines, Section III Interconnection, Sub-section (c) Bona Fide Request For Interconnection," Armstrong provides the following:

1. The technical description of the requested meet points or, in the alternative, the requested points of collocation (e.g., the end office, tandem, act..);

   Armstrong requests direct or indirect interconnection pursuant to Section 251(a) and OAC 4901:1-7-06. Armstrong intends to provide a fiber mid span meet at or nearby Nova's Central Office to exchange local traffic.

2. For each collocation point: a forecast of DS-1 and DS-3 cross-connects required during the term of the agreement; the requested interface format (electrical vs. optical); the type of collocation (physical or virtual) requested; and, if physical collocation is required, the amount of partitioned space required, as well as DC power and environmental conditioning requirements;

   Not applicable.

3. For each meet point, a detailed technical description of the requested interface equipment will be provided;

   Armstrong will provision DS-1s or DS3s as necessary to exchange local traffic with the ILEC.

4. The requested reciprocal compensation arrangement for transport and termination of local traffic;

   Armstrong suggests that traffic be exchanged on a bill and keep compensation arrangement.

5. A technical description of any required unbundled network elements;

   Not applicable.

6. Any requested access to poles, ducts, conduits and rights of way owned or controlled by the providing carrier;

   Not applicable.

7. Any requested white pages directory listings for the customer of the requesting carrier's telephone exchange service;

   Armstrong requests Directory listing service.

8. Any requested access to 911, E911, directory assistance, operator call completion service and any required dialing party capability;

   Armstrong will require access to the selective router, as needed.

9. Any requested telephone numbers for the assignment to the requesting LEC's local exchange service customers;

   Armstrong will obtain its own telephone numbers in the appropriate rate centers. Additionally, the agreement will establish number porting arrangements.

10. The required method of interim number portability, until long-term number portability is available;

    Armstrong requests number portability as provided for in 47 U.S.C. Section 251(b)(2) and under the provisions and timelines established in 47 CFR Sections 52.23(b) and (c).

11. An itemized list of the required telecommunications services to be offered for resale by the providing carrier, and required operational support systems associated with the resale of these telecommunications services;

    Not applicable.

12. If transit traffic functionality is required, the requested method(s) of providing that functionality at each requested point of interconnection pursuant to Section IV of these guidelines;

    Not applicable.

13. The requested completion date;

    Armstrong requests the agreement be completed sixty (60) days from the receipt of this request, if possible.

14. A list including names, phone numbers and areas of responsibility of the requesting carrier's contact persons for negotiation purposes;

James D. Mitchell
Vice President
Armstrong Telecommunications, Inc.
One Armstrong Place
Butler, Pennsylvania 16001

Thomas S. Wilson
Director Telecom Traffic Management
Armstrong Telecommunications, Inc.
One Armstrong Place
Butler, Pennsylvania 16001

Armstrong reserves any and all applicable rights under Sections 251(a) and 251(B) not specifically addressed herein. Armstrong would like to begin discussions using the enclosed interconnection agreement containing Armstrong's proposed terms and conditions for the ILEC's duties, directory listings and directory distribution.

Please provide me with an interconnection agreement form and proposed terms acceptable to Nova Telephone and Nova Telephone's point of contact for negotiations. I look forward to hearing from you at your earliest convenience.

Very Truly Yours,

Thomas S. Wilson
Director, Telecom Traffic Management
Armstrong Telecommunications, Inc.
One Armstrong Place
Butler, Pennsylvania 16001

RONAN TELEPHONE COMPANY, a Montana corporation, Petitioner, v. MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, PUBLIC SERVICE COMMISSION, and DAVE FISHER, NANCY McCAFFREE, BOB ANDERSON, GARY FELAND and BOB ROWE, ITS COMMISSIONERS, Respondents, and MONTANA WIRELESS, INC., a Montana corporation, Intervenor.

CAUSE NO. DV 00-14

TWENTIETH JUDICIAL DISTRICT COURT OF MONTANA, LAKE COUNTY

2001 ML 803; 2001 Mont. Dist. LEXIS 2862

March 14, 2001, Decided

CORE TERMS: telecommunications, suspension, carrier, rural, exemption, technically, telephone, discovery, competitive, users, public interest, interconnection, reciprocal, legal conclusions, infeasible, feasible, service area, discriminatory, modification, prediction, consumers, customer, economic burden, economic impact, convenience and necessity, interconnect, economically, burdensome, persuasive, territory

JUDGES: **[**1]** C. B. McNeil, District Judge.

OPINION BY: C. B. McNeil

OPINION

FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT

[*1] This matter came before the Court on the Petition of Ronan Telephone Company, (hereinafter "RTC"), for Judicial Review of the Final Order (Order No. 6174e) of the Montana Public Service Commission (hereinafter "Commission" issued December 27, 1999, in commission Docket No. D 99.4.111, along with various interim orders and evidentiary rulings issued in that proceeding. Following submission of briefs, the Court heard oral argument of the parties on January 25, 2001. Petitioner was represented by Ivan C. Evilsizer. Respondent Commission was represented by Robin A. McHugh, Special Assistant Attorney General. Intervenor Montana Wireless, Inc. (hereinafter "MWI") was represented by William A. Squires.

[*2] The Court makes the following:

FINDINGS OF FACT

[*3] 1. In 1996 Congress passed and the President signed the Telecommunications Act of 1996 (hereafter Act). (The Act is codified at scattered sections of 47 U.S.C..) A fundamental objective of the Act is the creation of competition in the provision of telecommunications services. The preamble to the Act reads: **[**2]** "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American

telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

[*4] 2. In order to create competition the Act requires telecommunications carriers to interconnect with each other. In that regard the Act reads:
(a) General Duty of Telecommunications Carriers. - Each telecommunications carrier has the duty -

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; ...

(2) ...

(b) Obligations of All Local Exchange Carriers. - Each local exchange carrier has the following duties:

(1) Resale. - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number Portability. - The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing Parity. - The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to **[**3]** permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to Rights-of-Way. - The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal Compensation. - The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

[*5] 47 U.S.C. § 251(a) and (b). RTC is a telecommunications carrier and a local exchange carrier and, absent an exemption, is subject to the duties imposed by these sections of the Act.

[*6] 3. The Act contains a process by which a rural telecommunications carrier can petition a state regulatory commission like the PSC for a suspension of the duties imposed by 47 U.S.C. § 251(b). (47 U.S.C. § 251(f)(2).) RTC is a rural telecommunications carrier, and in April of 1999 RTC filed a petition with the PSC, pursuant to 47 U.S.C. § 251 **[**4]** (f)(2), for a suspension of the provisions of 47 U.S.C. § 251(b) with respect to the RTC telephone exchange facilities.

[*7] 4. RTC filed a petition requesting a "rural suspension" with the Montana PSC, pursuant to 47 U.S.C. § 251(f)(2) (iPSC Docket No. D99. 4.111).

[*8] 5. After RTC filed the petition the PSC opened a docket and conducted a contested case proceeding that included a hearing and the issuance of Order No. 6174c in November of 1999, in which the PSC conditionally denied the petition. After RTC declined an opportunity to supplement the administrative record the PSC issued Order No. 6174e, in

late December 1999, in which it considered and denied motions for reconsideration of Order No. 6174c and closed the docket. Following that, RTC filed for judicial review in this Court of PSC Order Nos. 6174c and 6174e.

[*9] 6. During the administrative process that led to the hearing, the PSC sustained objections to a number of discovery requests issued by RTC. At the hearing, in response to a motion in limine filed by MWI, the PSC prohibited RTC from introducing certain evidence into the administrative record. The PSC's **[**5]** rationale for these intermediate rulings was that the discovery and evidence was beyond the scope of the proceeding. RTC also seeks in this case review of these intermediate rulings.

[*10] 7. RTC makes two claims of PSC error. First, RTC asserts the PSC misinterpreted 47 U.S.C. § 251(f)(2) - referred to as the "rural suspension statute" -and, as a result, excluded evidence and improperly narrowed the scope of discovery. Second, RTC contends the PSC was required to grant the petition based on the record evidence.

[*11] 8. The rural suspension statute reads as follows:

SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS. - A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -
(A) is necessary -

(i) to avoid a significant **[**6]** adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers. 47 U.S.C. § 251(f)(2).

[*12] 9. The PSC interpreted the rural suspension statute at pp. 15-17 of its Order No. 6174c.

In the absence of controlling case law, and a scarcity of written opinions generally, the Commission is left to apply this section nearly from scratch, using ordinary English usage and principles of statutory construction. We note first that § 251(f)(2) allows us to approve an exemption from the primary purpose of the Act. The preamble to the Act states its purpose as, "To promote competition and reduce regulation in order to secure **[**7]** lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Thus, it was the fundamental objective of Congress in passing the Act to create competition in all

telecommunications markets, for the benefit of all telecommunications consumers, urban and rural. Given this over arching legislative purpose, we find that requests to be exempt from competition should not be granted lightly. Indeed, the language of § 251(f)(2) creates a heavy burden for those who petition under it.

Section 251(f)(2) begins by giving us considerable latitude when addressing a petition. We can suspend or modify one or all of the requirements of § 251(b) and (c), but we can do so only "to the extent that, and for such duration as" it is necessary "to avoid" certain specified conditions. The word "duration" is important, because it implies that any exemption granted from the requirements of § 251(b) and (c) should be finite and limited, not indefinite. A petitioner asking for an unlimited exemption from the requirements of the Act would have an extremely difficult, if not impossible, burden before this Commission.

[8]** A petitioner under § 251(f)(2) is entitled to an exemption if it can show that the absence of an exemption will 1) create "a significant adverse economic impact on users of telecommunications services generally" (§ 251(f)(2)(A)(i); 2) will impose "a requirement that is unduly economically burdensome (§ 251(f)(2)(A)(ii); or 3) will impose "a requirement that is technically infeasible." (§ 251(f)(2)(A)(iii). If a petitioner can show one of these elements, it must also demonstrate that exemption "is consistent with the public interest, convenience, and necessity." § 251(f)(2)(B).

With respect to § 251(f)(2)(A)(i) we interpret "users of telecommunications services generally" as all users of telecommunications services, from whatever source, who reside in the service area of the petitioner. It would make little sense to us to interpret "generally" as implying a geographic dimension beyond the service territory of the petitioner; and, if Congress intended to consider impacts on only the telecommunications customers of the petitioner, it would have said so. Also, we ascribe to "significant" the usual meaning of "important" or "considerable." Demonstrating only "some" impact would **[**9]** not, in our view, meet this standard.

Regarding § 251(f)(2)(A)(ii) we conclude that Congress meant to describe a burden on the rural carrier seeking the exemption. Therefore, in this case the evidence would have to show that an exemption is necessary to avoid an unduly economically burdensome requirement on RTC. Additionally, the FCC has stated:

In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

47 C.F.R. §51.405(d) (emphasis added). This language is not directed specifically at § 251(f)(2)(A)(ii), but we think it is apparent that it is most applicable to that section. Therefore, we must ask whether the evidence demonstrates an economic burden on RTC beyond that which is normal when competitors enter a market.

We interpret "technically infeasible," as used in § 251(f)(2)(A)(iii), as meaning basically unworkable at the present time as a matter of telecommunications engineering. We also **[**10]** interpret the term as applying specifically to a petitioner under § .251(f)(2). We believe Congress intended to recognize that what might be technically feasible for an RBOC, might not at the same time be "workable" or "practical" for a small rural carrier. But while a petitioner might be able to demonstrate technical infeasibility, we believe the intent was to allow such a carrier a period to catch up technically. We don't believe "technically infeasible" could support more than a temporary exemption.

We find that each of these elements, § 251(f)(2)(i), (ii) and (iii), imposes on a petitioner a requirement of presenting evidence to support a plausible prediction of the future. We cannot read the verb "to avoid," as used in these sections, as other than a reference to a future occurrence. RTC is entitled to a suspension if it can make a convincing showing that interconnection and competition will cause certain harms. We have said that making such a case is difficult, but it cannot be impossible, or else § 251(f)(2) is meaningless; a conclusion we are generally not entitled to reach.

Further, we cannot interpret § 251(f)(2) to require that a successful petitioner must present **[**11]** evidence of actual harm. It may be that evidence of actual harm from competition or interconnection could result in certain remedies being imposed by this Commission. But such remedies, in our view, would have to be based on other sections of the law, not § 251(f)(2).

Finally, even if a petitioner successfully carries the burden of one of the elements under § 251(f)(2)(A), it still needs to demonstrate that an exemption "is consistent with the public interest, convenience, and necessity." § 251(f)(2)(B). Thus, even if a petitioner meets its burden under § 251(f)(2)(A), a state commission may nonetheless deny exemption if it finds such is not in the public interest.

[*13] 10. RTC contends this interpretation is not correct and precluded RTC from conducting discovery relevant to the impact on users of telecommunications services outside RTC's service area. RTC also argues that the statute requires the PSC to consider broad questions of the public interest, even if a petitioner does not meet its burden under 47 U.S.C. § 251(f)(2)(A).

[*14] 11. Based on its interpretation of the rural suspension statute the PSC found that the record before it **[**12]** did not support granting RTC's petition. The PSC wrote as follows:

RTC's petition asks us to exempt it from all requirements of § 251 (b) and (c) for an unlimited period. The evidence and argument on this record does not support a grant of such a sweeping exemption. In fact, almost all of RTC's evidence and argument is directed at being relieved of the obligation under § 251(b)(5) of having to enter into reciprocal obligation arrangements with MWI and Blackfoot. Even so narrowed, RTC does not carry its burden under § 251(f)(2).

Regarding § 251(f)(2)(A)(i) and (ii), RTC estimates the impacts of losing customers as a result of a reciprocal compensation arrangement. MCC properly characterizes the RTC analysis as a worst case scenario. The analysis excludes the actual reciprocal compensation rate(s) that will result from an arbitration proceeding or a negotiation; obviously, if the rate(s) exceed the worst case scenario that RTC assumes, the impacts will differ. Also, the RTC impact analysis fails to model the likely flow of local traffic between RTC and either Blackfoot or MWI. Further, the "death spiral" prediction that flows from RTC's impact analysis is unconvincing; it lacks **[**13]** any cause and effect relation that could link the loss of a customer to the ultimate loss of the 100 largest customers. We presume, along with MCC, that RTC will compete in response to competitive pressures. RTC will not accept competitive pressure docilely, but will apply competitive pressure of its own. (Note: It is not our job to advise RTC on how to compete. But we note that there are a variety of lawful ways that RTC can use to counter competitive thrusts into its service territory.) The net result will likely be far different from the scenario that RTC predicts. Finally, RTC makes little attempt to distinguish the consequences of efficient competitive entry from the entry of

MWI and Blackfoot. The bases for RTC's predictions that economic harm will occur are not persuasive, and fall far short of meeting the statutory requirements.

With respect to RTC's contention that unlawful discriminatory rates will result if the petition is denied, we note that avoiding discriminatory rates is not a basis for granting a § 251(f)(2) petition. We are uncertain of the rates that will emerge from competition in RTC's service territory. We are certain that discriminatory rates are necessarily **[**14]** treated differently in a competitive environment than in a regulated environment.

Regarding § 251(f)(2)(A)(iii), we find ample evidence that interconnection between RTC and MWI or Blackfoot is technically feasible. MWI indicates it has reciprocal compensation arrangements with U S West that segregate wireless and wireline traffic. It could be that what is technically feasible for U S West is not feasible for RTC, but RTC did not convincingly make this case. Moreover, the record indicates that RTC is willing to interconnect and account for the traffic if the price is right. This leads us to the conclusion that RTC is using the "technically infeasible" argument as a shield to fend off competition, not as a vehicle to temporarily delay interconnection in order to make technical improvements.

Since RTC has failed to convince us that we should grant the petition based on either § 251(f)(2)(A)(i), (ii) or (iii), it is not necessary that we consider whether a grant would be consistent with the pubic interest pursuant to § 251(f)(2)(B). We note only that if RTC had met one of the standards, it would nonetheless have to demonstrate that the harm that would be inflicted by competition would **[**15]** outweigh the benefits created. PSC Docket No. D 99.4.111, Order No. 6174c.

[*15] 12. RTC did not request that this Court receive additional evidence as allowed by Mont. Code Ann. § 2-4-703.

[*16] Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

[*17] 1. This Court has jurisdiction in this matter pursuant to Mont. Code Ann. § 2-4-701, *et seq.*

[*18] 2. The standard of review for this Court to follow in deciding this case is set forth at § 24-704, MCA:
Standards of review.

(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial **[**16]** rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(vii) findings of fact, upon issues essential to the decision, were not made although requested.

[*19] 3. Regarding the standard for reviewing an agency's legal conclusions the Montana Supreme Court has held that the standard is simply whether the conclusions are correct. Grouse Mountain Association v. Public Service Regulation, 284 Mont. 65, 68, 943 P.2d 971, 973 (1997), Steer v. Department of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). This does not mean, however, that there is a de novo standard for review of agency legal conclusions in Montana. Numerous other cases clarify the Supreme **[**17]** Court's holdings in Grouse Mountain and Steer by indicating that substantial judicial deference should be paid to an agency's interpretation of law that it administers. Lewis v. B&B Pawnbrokers, 292 Mont. 82, 95, 968 P.2d 1145, ___ (1998); Waste Management Partners v. Public Service Commission, 284 Mont. 245, 249, 944 P.2d 210, 213 (1997); Norfolk Holdings v. Department of Revenue, 249 Mont. 40, 44, 813 P.2d 460, 462 (1991); D'Ewart v. Neibauer, 228 Mont. 335, 340, 742 P.2d 1015, 1018 (1987); Department of Revenue v. Puget Sound Power and Light Co., 179 Mont. 255, 262, 587 P.2d 1282, 1286 (1978). Considering all these cases, this Court must review the challenged PSC legal conclusions to decide whether they are correct; if this Court finds that those conclusions are correct, it must affirm them, even if the Court would have reached a different conclusion. In other words, in cases where more than one reasonable or correct legal conclusion can be reached, on review this Court must defer to the reasonable or correct legal conclusion of the PSC on laws the PSC administers.

[*20] 4. The standard **[**18]** of review for agency findings of fact is "whether the findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." Cited at Lewis v. B&B Pawnbrokers, 292 Mont. 82, 87, 968 P.2d 1145, ___ (1998).

[*21] 5. The rural suspension statute, 47 U.S.C. § 251(f)(2), like most statutes, is subject to more than one interpretation. The Court, however, finds the PSC's interpretation reasonable and correct, and thus the Court is required to affirm it. The phrase "users of telecommunications services generally[,]" § 251(f)(2)(A)(i), can, as RTC argues, be interpreted to include a universe of telecommunications carriers larger than the RTC service area. But the Court concludes, along with the PSC, that such an interpretation creates an untenable and nearly absurd situation where the PSC, in 180 days, must consider economic impact on a potentially huge and undefined area of telecommunications users. Moreover, the Court agrees with the iPSC that the overall import of the rural suspension statute is to focus on the rural carrier filing the petition. This is especially apparent by looking at § 251(f)(2)(A)(iii), **[**19]** wherein the question of technical feasibility could not possibly relate to any other entity than the petitioning rural carrier. Finally, RTC's argument that § 251(f)(2)(B) creates an obligation in the PSC to consider the public interest, regardless of

whether a petitioner satisfies § 251(f)(2)(A), is simply wrong as a matter of statutory construction. The PSC was correct in its Order No. 6174c, p. 17, that a successful petitioner under the rural suspension statute must meet either § 251(f)(2)(A)(i), (ii) or (iii), and (B); so that if a petition fails to satisfy a part of (A), a state commission need not consider (B).

[*22] 6. The PSC's discovery and evidentiary rulings, challenged here, were consistent with its interpretation of the rural suspension statute. The discovery and evidence at issue in those rulings was clearly beyond the scope of the proceeding, as determined by the reasonable and correct interpretation by the PSC of the rural suspension statute. Given that the PSC's interpretation of the statute was correct, and the intermediate rulings were in accord with that interpretation, those rulings are also correct.

[*23] 7. Regarding findings of fact, this **[**20]** case presents this Court with a somewhat unusual task in that the rural suspension statute requires an evaluation of whether predictions of the future are plausible and persuasive. The fact question here at issue under the rural suspension statute is whether suspension is necessary "to avoid" certain harms. The "facts" on the record purporting to answer this question are expert opinions with different views of the consequences of interconnection on RTC and its service area. Despite that the "facts" in this case are opinion testimony, the question on review is the same: whether there is substantial, credible evidence to support the PSC decision. The Court finds that there is. The Montana Consumer Counsel presented an expert witness, whose credentials were not challenged, who testified that RTC's vision of its future, if forced to honor MWI's interconnection request, is not persuasive and should not support a rural suspension. This testimony alone satisfies the substantial and credible evidence standard and supports the PSC's decision. This Court need find nothing more.

[*24] 8. RTC sought discovery from Blackfoot Telephone Cooperative, which was not a party in the Commission proceeding **[**21]** and is not a party in this action. Since Blackfoot Telephone Cooperative was not a party below, and therefore not subject to the Commission's jurisdiction or the Procedural Order it issued, RTC improperly sought to compel Blackfoot's response to various "data requests" (informal interrogatories commonly used in Commission proceedings). Since it was not a party, Blackfoot Telephone Cooperative was under no obligation to respond to such data requests, and the Commission properly so held.

[*25] 9. To the extent not specifically discussed above, the Commission's underlying Orders and discovery rulings were correct.

JUDGMENT

[*26] Based on the foregoing Findings of Fact and Conclusions of Law, the Commission Orders in Docket No. D 99.4.111, specifically Order No. 6174c and Order No. 6174e, and the Commission's evidentiary rulings in such Docket, are AFFIRMED. Petitioner's Petition for Judicial Review is hereby DISMISSED.

Dated this 14th day of March, 2001.

C. B. McNeil,

District Judge

Summary: Comments Of Armstrong Telecommunications, Inc. In Response To The Application And Petition Of Nova Telephone Company electronically filed by Mark S Yurick on behalf of Armstrong Telecommunications, Inc.