BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application and Petition of Nova Telephone Company, Filed Pursuant to Rules 4901:1-7-04, and 4901:1-7-05, Ohio Administrative Code.	))))	Case No. 09-1899-TP-UNC

FINDING AND ORDER

The Commission finds:

(1) On December 3, 2009, Nova Telephone Company (Nova) filed an application and petition (application) in this case for two purposes: (a) to maintain its rural exemption pursuant to 47 U.S.C. §251(f)(1) and Rule 4901:1-7-04, Ohio Administrative Code (O.A.C.);[1] and (b) to suspend or modify the application of the requirements of 47 U.S.C. §251(b) and (c), pursuant to 47 U.S.C. §251(f)(2) and Rule 4901:1-7-05, O.A.C.[2]

(2) On November 19, 2009, Nova received from Armstrong Telecommunications, Inc. (Armstrong), a letter requesting negotiation of an interconnection agreement. In its application, Nova questions whether Armstrong's November 19, 2009, letter meets the requirements for a bona fide request for interconnection (BFR) under the Commission's rules. On December 21, 2009, Armstrong served on Nova a supplemental BFR which, on its face, purports to supersede Armstrong's November 19, 2009, letter. By attorney examiner entry issued on January 22, 2010, the

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1 Under 47 U.S.C. §251(f)(1), a rural telephone company remains exempt from the obligations of 47 U.S.C. §251(c) until: (a) that company has received a bona fide request for interconnection, services, or network elements; and (b) the State commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with the universal service principles of U.S.C. §254. Pursuant to Rule 4901:1-7-04(B), O.A.C., and settled law, the party making the request for interconnection must prove that the request meets these three prerequisites to justify the termination of the exemption, otherwise it will not terminate but continue. See: *Iowa Util. Bd. v. FCC*, 219F3d744, 762 (8th Cir. 2000)("*Iowa II*"), reversed in part on other grounds by *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

2 Under 47 U.S.C. §251(f)(2), a local exchange carrier having fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide is eligible for suspension or modification obligations if the State commission determines that such suspension or modification is both consistent with the public interest, convenience, and necessity and also is necessary to avoid: (a) a significant adverse economic impact on users of telecommunications services generally; (b) imposing a requirement that is unduly economically burdensome; or (c) imposing a requirement that is technically infeasible.

Commission found Armstrong's December 21, 2009, letter to be a BFR under the Commission's rules and further found that Nova's December 3, 2009, application in this case shall be considered as a timely filed response to Armstrong's BFR dated December 21, 2009.

(3) Nova seeks to prevent the Commission from terminating the company's rural exemption under 47 U.S.C. §251(f)(1), a provision of federal law that exempts qualifying a rural telephone company from the incumbent local exchange carrier (ILEC) obligations set forth in 47 U.S.C. §251(c). Nova states that such relief is needed because terminating the exemption will be (a) economically burdensome beyond the burdens typically associated with efficient competitive entry, and (b) inconsistent with universal service principles (Nova Application at 3). Nova notes that it has not offered local exchange service in areas outside of its traditional local exchange area, either as a competitive local exchange carrier (CLEC) or under "edge out" authority. Nova adds that as a "cost company" it would not be able to include costs associated with "edge out" or out-of-territory operations for purposes of NECA settlements, which could impact Nova's ability to provide the highest level of service to its customers (Nova Supplement to Application, at 2). Instead, Nova has concentrated on offering its customers advanced services and enhancing their current services. Broadband service is available to 100 percent of Nova's customers (*Id.*).

(4) Additionally, Nova, as a rural carrier, seeks to modify or suspend, pursuant to 47 U.S.C. §251(f)(2) and Rule 4901:1-7-05, O.A.C., all requirements of 47 U.S.C. §251(b) and (c). Nova states that such relief is or may be necessary to avoid (a) a significant adverse economic impact upon customers or (b) imposing a requirement that is unduly economically burdensome or technically infeasible (Nova Application at 3).

(5) On December 21, 2009, Armstrong filed both a motion for leave to intervene in this case as well as comments on Nova's application (Initial Comments). Referring to Section 4903.221, Revised Code, and Rule 4901-1-11(B), O.A.C., Armstrong argues in support of its motion to intervene that it has direct, real, and substantial interests in this proceeding, that its participation in the case will ensure full, equitable, and expeditious resolution of the case, and that no other party can adequately represent its interests.

The Commission finds that Armstrong has shown cause to grant Armstrong its desired intervention under Section 4903.221, Revised Code, and Rule 4901-1-11, O.A.C.

(6) By entry issued January 22, 2010, the attorney examiner directed Nova to file additional information supplementing its application by no later than February 12, 2010. Nova supplemented its application on a timely basis on February 12, 2010. In the January 22, 2010, entry, the attorney examiner directed that any response to Nova's supplemented application be filed by no later than February 26, 2010. On February 26, 2010, Armstrong filed comments in response to Nova's application as supplemented on February 12, 2010 (Supplemental Comments).

(7) According to Nova, Armstrong's BFR seeks: (a) direct or indirect interconnection pursuant to 47 U.S.C. §251(a) and Rule 4901:1-7-6, O.A.C., and, to exchange local traffic, Armstrong intends to provide a fiber mid-span meet at or nearby Nova's central office; (b) DS1s or DS3s as necessary; (c) to exchange traffic on a bill-and-keep compensation arrangement; (d) directory listing services; (e) access to the selective router; and (f) number portability (Nova Supplement to Application, at 3). Nova adds that while Armstrong does not intend its BFR to implicate 47 U.S.C. §251(c), the fact that Armstrong seeks to obligate Nova to negotiate an interconnection agreement does indeed implicate a 47 U.S.C. §251(c) duty to negotiate. Thus, says the applicant, Nova is entitled to exercise its right for a rural exemption, as well as suspension or modification of 47 U.S.C. §251(b) and (c) obligations (*Id.* at 4).

(8) Nova argues that terminating the rural exemption under 47 U.S.C. §251(f)(1) would allow an unregulated service provider to enter Nova's service territory, causing a "dramatic and conceivably ruinous" loss of customers and revenues. In explanation, the applicant asserts that, "within Nova's service territory, Armstrong's interface with the retail end user will be Voice over Internet protocol (VoIP), an unregulated telecommunications service" (*Id.* at 2). While conceding that Armstrong's BFR is technically feasible, Nova projects that the anticipated loss of customers and revenues would impose an undue economic burden and be inconsistent with universal service principles –

circumstances which support a finding that, under 47 U.S.C. §251(f)(1), the rural exemption should not be terminated (*Id.* at 3).

(9) Under *Iowa II*, observes Nova, the Commission cannot simply focus on the economic burden of only discrete parts of the BFR, but rather must consider the total economic burden that will result from Armstrong's entry into Nova's territory – specifically the loss of customers and revenues that Nova would experience as a result of interconnection with Armstrong and the entry of Armstrong into Nova's territory (*Id.* at 5).

According to Nova, with limited exceptions, Armstrong appears to have built its cable network over Nova's entire service territory. Nova claims that Armstrong's potential market represents the entirety of Nova's current access lines. Nova asserts that if Armstrong succeeds in migrating access lines away from Nova's network, significant revenue will be lost, and the first customers who would migrate from Nova to Armstrong would be Nova's largest users (*Id.* at 6). For example, Nova contends that for it, as for most small telephone companies, the largest 20 percent of customers supply about 60 percent of usage. With this in mind, Nova adds, if only one-half of Armstrong's estimated current Internet and/or television service subscriber base within Nova's service territory were to migrate to Armstrong's digital telephone service, Nova would lose 50 percent of its customer base and 89.7 percent of its total intrastate annual revenues. If this loss were to occur, Nova states that it would require a local rate increase of $89.33 per month as compared to its existing average local monthly rate of $17.08. Nova expects that a much higher percentage of current Armstrong customers would take advantage of a "triple play" and disconnect from Nova to subscribe to Armstrong's digital telephone service, bundled with Armstrong's ZOOM Internet and Armstrong Television Plus services (*Id.* at 6).

Nova points out that its only two exchanges are extremely small with a limited number of customers and that every loss has significant impact. Nova contends that, even as customer migration occurs, the cost of serving customers continues because Nova's network will still require maintenance and replacement. In sum, says Nova, when static costs combine with declining revenues, the only option is to increase prices – a move which provides reason for remaining customers to leave (*Id.* at 7). Nova

projects that the customers that will ultimately remain on its network will be those that Armstrong is unwilling to serve, and that such customers will be saddled with the entire cost of the Nova network, even though they may be the ones least able to afford it (*Id.*).

Further, Nova contends that Armstrong, as a VoIP provider, need not: (a) adhere to the Commission's Minimum Telephone Service Standards (MTSS), Competitive Retail Service Rules, and Lifeline obligations or (b) compensate ILECs, like Nova, for interconnection, unbundled network elements (UNEs), or services other than special access (*Id.* at 8-10). Nova asserts that the only compensation from Armstrong would be for any DS1 or DS3 trunks that may be requested, and for ancillary services pertaining to number porting and directory listings, thus providing insufficient revenue to compensate for the loss of customers (*Id.* at 8). Finally, Nova argues that Armstrong can engage in pricing below cost and choose whether to provide service within its market (*Id.* at 10). In contrast, Nova contends that it bears carrier-of-last-resort obligations, must comply with MTSS, price services in accordance with the law, and adhere to all other applicable Commission rules and regulations (*Id.*). In sum, argues Nova, Armstrong's ability to operate without the hindrance and cost of regulation, in comparison with Nova's regulatory obligations, constitutes an undue economic burden (*Id.* at 9).

(10) Armstrong asserts that its request for interconnection does not implicate 47 U.S.C. §251(c) and that, therefore, Nova is not entitled to a 47 U.S.C. §251(f)(1) rural exemption (Initial Comments at 3, 5, Supplemental Comments at 6). In explanation, Armstrong points out that it seeks only physical interconnection under 47 U.S.C. §251(a), and the exchange of traffic under terms of reciprocal compensation under 47 U.S.C. §251(b), not Unbundled Network Elements (UNEs), resale, or collocation as specified under 47 U.S.C. §251(c) (Initial Comments at 6, Supplemental Comments at 6). In Armstrong's opinion, Nova is, in effect, asserting that all interconnection requests are subject to a rural exemption (*Id.*).

Further, says Armstrong, all rural telephone companies, like all telecommunications carriers have a duty to interconnect with the facilities and equipment of other carriers, and Armstrong's request

does not impose any greater obligation on Nova than does any other BFR (Supplemental Comments at 3).

(11) Even if Nova's rural exemption is terminated, contends Armstrong, its BFR does not constitute an undue economic burden. In Armstrong's opinion, the definition of "undue economic burden" must be consistent with the overall purpose of the Telecommunications Act of 1996 (the Act), i.e., the promotion of competition and reduction of regulation to secure lower prices and higher quality services for American telecommunications consumers (Initial Comments at 8, 9). Armstrong argues that the potential loss of customers is a possible outcome of competition, but not the economic burden directly associated with its interconnection request (*Id.* at 9).

Armstrong contends that its BFR does not create a competitive pressure for Nova different than would any other interconnection request (Supplemental Comments at 7). Nova, notes Armstrong, should have been aware that competition has been a major purpose of the Act. Yet, in Armstrong's view, Nova has done little or nothing to address its inadequacies in the current market where it must compete with a wide range of possible competitors and where local number portability is mandated. In fact, in this case, notes Armstrong, Nova has not even claimed that it will ever be in a position to compete against other LECs, but instead claims that the only one way it can continue to exist in a competitive environment is to drastically increase customer rates. Armstrong avers that its approach to competition is in contrast to Nova because competition has mandated that it provide a wide array of telephone, video, and broadband services to its customers. Since beginning to offer video and high-speed internet in Nova's territory, Armstrong claims that it has received over 100 customers' requests to provide telephone service as well (Supplement Comments at 7, 8).

Armstrong's own examination of the financial information presented by Nova leads it to conclude that its BFR will not create an undue economic burden. Armstrong points out that Nova focuses only upon the competitive impact of the BFR and fails to address: (a) the absence of requests for collocation space and facilities, resale, or UNEs; and (b) the fact that Armstrong may be required to compensate Nova for any direct cost Nova may incur as a result of the interconnection (Initial Comments at 5-7,

Supplemental Comments at 6, 9). In Armstrong's opinion, negative revenue projections are unsupported by any fact (Supplemental Comments at 6).

Finally, notes Armstrong, although Nova raises the issue of VoIP, the Commission has already addressed the use of such technology by the end user and determined that the use of VoIP does warrant different treatment under the Act. Armstrong claims that, to the extent that the Commission has taken a "hands-off" approach to VoIP providers, it has done so to encourage competition (Supplemental Comments at 9).

(12) Nova posits that if the Commission does not allow it to retain its rural exemption, as requested under 47 U.S.C. §251(f)(1), Nova further seeks modification or suspension of the application of the requirements of 47 U.S.C. §251(b) and (c) pursuant to 47 U.S.C. §251(f)(2). Nova states that under that statute it must prove that such suspensions or modifications 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 telecommunications services generally and/or (b) to avoid imposing a requirement that is unduly economically burdensome. Nova claims that its arguments regarding these criteria are the same under 47 U.S.C. §251(f)(2), as it extensively argued under 47 U.S.C. §251(f)(1) (Supplemental Comments at 16-17).

(13) Armstrong argues that Nova fails to satisfy the requirement of 47 U.S.C. §251(f)(2) and the Commission rules in that Nova makes no attempt to specifically identify the requirements from which it seeks suspension or modification. Armstrong argues that providing telecommunication service customers with a choice will not have an adverse economic impact on users of telecommunication services. Armstrong also reiterates that its interconnection request is not unduly burdensome, beyond those burdens typically associated with efficient competitive entry. Further, Armstrong claims that the public interest, convenience, and necessity is best served by competition by providing customers with a choice for their telecommunication needs. Finally, Armstrong states that, because Nova offers no practical plan to respond to competition within a reasonable period of time, suspension or modification of Nova's obligations would serve no rational regulatory purpose (Supplemental Comments at 10-11).

(14) When considering whether to extend the rural exemption for Nova, the Commission first takes notice of Armstrong's and Nova's opposing viewpoints on whether the nature of Armstrong's BFR implicates 47 U.S.C. §251(c), thus allowing Nova to petition for a continuation of its rural exemption. Armstrong's position is that because its BFR does not seek unbundled network elements, resale, or collocation, it is made pursuant to Sections 251(a) and (b) and does not implicate any of the more burdensome interconnection, services, or network element requirements of Section 251(c) (Supplemental Comments at 6). However, we make the same holding, here, as we did in a set of earlier rural exemption cases that 47 U.S.C. §251(c) places a duty on all ILECs to negotiate "the duties described in paragraphs (1) through (5) of subsection (b) [47 U.S.C. §251(b)] and this subsection." As Armstrong agrees that it is seeking Section 251(b) duties from Nova, the Commission believes that Nova is correct in asserting that Armstrong's BFR implicates 47 U.S.C. §251(c) and that Nova has appropriately petitioned the Commission to continue its rural exemption.[3] With this in mind, the Commission will examine other factors in determining whether to grant Nova's application.

(15) The Commission notes that one purpose of the Act is the promotion of competition, and we reassert our opinion that providing customers with additional choice in telecommunications service does not, generally, conflict with universal service principles. The Act recognizes, however, that smaller rural companies may be uniquely impacted by competition, and thus, it empowers the states to continue a rural exemption, if policy considerations justify such. Upon review of the record as a whole, the Commission concludes, as discussed in further detail below, that we will grant Nova's request for a continuation of its rural telephone company exemption, but only for a two-year period effective from the date of this Finding and Order. In doing so, the commission seeks to balance the policy of the state to promote choice in the supply of telecommunications options against the important policy objective of assuring all of Nova's customers the availability of basic local exchange service at reasonable and affordable rates.

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3 Case No. 06-884-TP-UNC, et al.

(16) Under 47 U.S.C. §251(f)(1), the Commission shall terminate the rural telephone company exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act. In this case, neither Nova nor Armstrong dispute that the BFR is technically feasible. It is also a given that Armstrong's entry into Nova's market would necessarily place an economic burden on Nova. Thus, a determination as to whether to terminate Nova's rural exemption turns on whether that economic burden is undue, particularly in light of the fact that Nova, as the provider of last resort, is required to make available to all Nova customers stand-alone basic local exchange service at affordable rates, comparable to those charged for similar services in urban areas.

(17) As noted above, under *Iowa II*, the Commission must consider the total economic burden that will result from Armstrong's interconnection. Nova has projected customer losses and decreased revenue under Armstrong's BFR. Armstrong counters these numbers with its contention that it would be providing some limited revenue under terms of a yet-to-be negotiated interconnection agreement for trunk servicing, local number portability, and directory listings. When viewing the projected losses in combination with potential revenues from the interconnection, the Commission believes that the size of Nova is an important factor in Nova's ability to absorb any loss of customers. Nova has 1050 access lines in only two exchanges. Armstrong has the ability to serve the entirety of Nova's service territory. Based on financial information provided in this case, it would not take a significant loss of customers to result in a significant impact on Nova's financial health.

In addition, given the Applicant's concern that Armstrong would offer its local and long distance voice offerings using VoIP, a cable television offering, and a broadband connection to the internet service, the Commission examined the ability of Nova to offset potential revenue losses with similar bundles of offerings. While Nova provides long distance service to its customers, it does not provide its own long distance offering. Nova does provide a digital subscriber line (DSL) connection to the internet, but does not engage in CLEC or out-of-territory/edge-out activities. Nor does Nova offer a cable television service offering. The Commission is concerned about the ability of Nova to grow revenues at this time,

as it is not positioned to provide a "triple play" offering similar to that of Armstrong. Given these circumstances, and in the face of lost revenues and static costs, the financial impact on Nova of allowing Armstrong to compete would ultimately fall on the remaining customers either who could not afford Armstrong's triple play offering or who simply wanted plain old telephone service. This result is inconsistent with the Commission's goal of ensuring that the largest number of residents possible has access to high quality basic local exchange telephone service, regardless of income or geographic location.

In sum, upon examining the total economic impact of Armstrong's interconnection, in conjunction with Nova's ability to continue to offer basic local exchange service at affordable rates, we determine that to terminate immediately Nova's rural exemption would cause undue economic burden on Nova and its ability to meet its provider of last resort obligations and universal service requirements. Therefore, after applying the criteria specified in 47 U.S.C. §251(f)(1) and examining the circumstances under which Nova operates at this time, the Commission finds a limited two-year extension of the rural exemption to be appropriate.

The Commission also notes that during this two-year period of time, the Federal Communications Commission (FCC) is expected to act upon its National Broadband Plan which includes recommendations for reforming the Universal Service Fund (USF) from a voice-only support mechanism to a broadband support fund (voice, data, and video). Furthermore, the FCC also anticipates reform of the Inter-Carrier Compensation (ICC) system to eliminate implicit subsidies between carriers. These actions will impact Nova's and, possibly, Armstrong's ability to provide a variety of telecommunication services to customers in rural areas and to be the "broadband provider of last resort" (Connecting America: The National Broadband Plan, FCC, March 16, 2010, at 144-146).

(18) In light of the Commission's approval of Nova's application and petition to maintain its rural exemption under 47 U.S.C. §251(f)(1), it is not necessary to also examine the requirements of 47 U.S.C. §251(f)(2). However, turning to the parties' discussion of 47 U.S.C. §251(f)(2), the applicable provisions provide that the Commission can grant Nova's petition for suspension or modification of a requirement of 47 U.S.C. §251(b) or (c) if the Commission

determines that the suspension or modification "(A)(i) is necessary to avoid a significant adverse economic impact on users of telecommunications service 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" (emphasis added). The Commission finds consistent with 47 U.S.C. §251(f)(2)(A)(ii) that Armstrong's BFR would impose an undue economic burden on Nova and its ability to meet its provider of last resort obligations. The presence of the word "or" does not require the Commission to apply the additional factors set forth in 47 U.S.C. §251(f)(2)(A)(i) and (iii). Next, by balancing the interest of Nova and Armstrong when making its decision, the Commission is taking into account the 47 U.S.C. §251(f)(2)(B) reference to the public interest, convenience, and necessity. In sum, the Commission believes it appropriate to allow Nova two additional years to prepare for competition, regardless of whether the two-year period is an extension of a rural exemption under 47 U.S.C. §251(f)(1) or a suspension under 47 U.S.C. §251(f)(2). The Commission adds that during this period, which ends two years from the date of the Commission order, Nova can entertain BFRs but is not required to do so.

(19) During this two-year time, the Commission emphasizes that it is imperative that Nova makes significant progress in order to prepare for imminent competition in its service area. Nova is instructed to submit, on a semi-annual basis during the two-year extension of the rural exemption, reports to the Commission staff outlining the steps it is taking to prepare for any potential introduction of competition in its traditional service territory. After two years, Nova's rural exemption will be terminated.

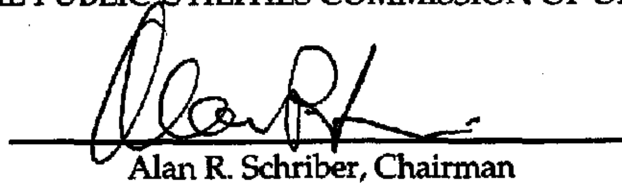
It is, therefore,

ORDERED, That the motion to intervene filed by Armstrong is granted. It is, further,

ORDERED, That the application and petition filed by Nova is approved for two years from the effective date of this finding and order. During this two-year time, the Commission emphasizes that it is imperative that Nova make progress in preparation for competition in its traditional service territories, as discussed in finding (19). It is, further,

ORDERED, That a copy of this finding and order be served upon counsel for Nova, counsel for Armstrong, and all other interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



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