**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held February 24, 2022

Commissioners Present:

 Gladys Brown Dutrieuille, Chairman

 John F. Coleman, Jr., Vice Chairman

Ralph V. Yanora

Proposed Modifications to the Review M-2022-3030709

of Voluntarily Negotiated Interconnection Agreements

Pursuant to 47 U.S.C. § 252(e)(2)

Implementation of the Telecommunications Act of 1996 M-00960799

**TENTATIVE OPINION AND ORDER**

**BY THE COMMISSION:**

Through this Tentative Opinion and Order, the Commission requests comments to our proposed action to modify the current practice to approve those interconnection agreements (ICAs) and ICA amendments that have been voluntarily negotiated between a requesting telecommunications carrier (typically, a competitive local exchange carrier or CLEC) and an incumbent local exchange carrier (ILEC) pursuant to the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 252(e)(1). Under current Commission practice, such voluntarily negotiated ICAs and amendments are approved through consideration of the item at a scheduled Public Meeting after the filing and publication in the *Pennsylvania Bulletin*, of a Joint Petition for approval filed by the ILEC.

The Commission proposes to modify its current practice of considering voluntarily negotiated ICAs and ICA amendments at Public Meeting by reviewing and approving these ICAs and amendments via a Secretarial Letter that will be issued through a Commission bureau with delegated authority. Comments to this Tentative Opinion and Order shall be requested thirty (30) days after publication in the *Pennsylvania Bulletin*. Parties may submit Reply Comments ten (10) days thereafter.

**I. Background**

On June 3, 1996, the Commission entered its initial Order implementing in Pennsylvania, provisions of TA-96 addressing, *inter alia*, the obligations of the state commission in complying with the far-reaching changes in the regulation of telecommunications companies resulting from the law and associated orders of the Federal Communications Commission (FCC). (*Implementation Order*, Docket No. M‑00960799).[[1]](#footnote-1) Included in the *Implementation Order* were specific procedures and requirements relating to the filing of ICAs for state commission approval. These state commission obligations regarding ICAs arise from Section 252 of TA-96, 47 U.S.C. § 252, specifically 47 U.S.C. § 252(e).

Pursuant to the *Implementation Order*, at 24-34, the Commission acknowledged that the process of obtaining an ICA proceeds in three phases: (1) negotiations phase; (2) arbitration phase; and (3) adjudication phase. *Id*. at 24.

The *Implementation Order* concluded, with regard to the “adjudication phase,” that “ . . . it is clear that the Act [TA-96] envisions that upon resolution of all terms and conditions of interconnection, whether through negotiation and mediation or arbitration, the contracting parties must reduce the agreement to writing and execute the agreement. Pursuant to Section 252(e), the executed agreement must then be filed with the state commission to conduct the adjudication phase of the proceeding.” *Id*. at 33; (emphasis added; note #17 omitted).

The *Implementation Order*, after discussing the relevant time periods for state commissions to act on ICAs which are submitted for approval under TA-96, stated the following:

Pursuant to Section 252(c)(4) of the Act [TA-96], the Commission must approve or reject the agreement, consistent with the standard set forth in Section 252(e) by no later than 90 days from filing for negotiated agreements and 30 days from filing for arbitrated agreements. . . . The Commission will issue an order approving or rejecting each agreement within the required timeframe established by the Act. Pursuant to Section 252(h), the Commission will make each approved agreement available for public inspection and copying within ten days of the entry date of the Commission's order finally approving the agreement.

*Id*., at 34; (emphasis added).

State commission approval of an ICA, evidenced by the filing of a final, executed ICA with the state commission, is mandatory. *See* TA-96 Section 252(e)(1): “Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.” *Id*.

### In the event a state commission does not act within the time frames set forth in TA-96, there are procedures to notify the FCC and the FCC would, thereafter, assume jurisdiction over the ICA under consideration by the parties. *See* TA-96 Section 252(e)(5)-(6), 47 U.S.C. § 252(e)(5)-(6).

Additionally, Section 252(h) of TA-96 requires that the state commission

“. . .  shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. . . .” *See* 47 U.S.C. § 252(h) (emphasis added). Emphasis on use of the word, “approved,” is noted for purposes of the discussion, below, that TA-96 is only concerned with the end-result, *i.e*., the final contract document, namely, the ICA.

**II. Discussion**

The Public Utility Code, 66 Pa. C.S. § 305(c) (Code), provides in pertinent part, “The commission may appoint, fix the compensation of, authorize and delegate such officers, consultants, experts, engineers, statisticians, accountants, inspectors, clerks and employees as may be appropriate for the proper conduct of the work of the commission. . . .”

Review of ICAs and current Commission practice for approval of ICAs that have been voluntarily negotiated indicates that final Commission review and approval at the adjudication phase has become routine, ministerial, and non-policy making. Prior to Commission consideration of the Joint Petition seeking approval, the ILEC and CLEC have negotiated and resolved all outstanding issues for purposes of inclusion into a final document. A Joint Petition for approval of the ICA is then filed, noting that the ICA has memorialized the consensus reached on all outstanding issues and represents the entire agreement of the parties. Thereafter, the Joint Petition (including the ICA) has been published in the *Pennsylvania Bulletin* with an opportunity for comment by non-signatories but interested parties. After this period of time has elapsed, the ICA is scheduled for consideration by the Commission at a Public Meeting. The afore-mentioned procedure is identically followed for amendments to voluntarily negotiated ICAs.

When presented for Commission review, the standard of review of the state commission of a voluntarily negotiated ICA is narrowly defined by TA-96. The standard for review of a negotiated interconnection agreement is set out in Section 252(e)(2) of TA-96, 47 U.S.C. § 252(e)(2). Section 252(e)(2) provides in pertinent part, that:

(2) Grounds for rejection. The state commission may only reject—

 (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that –

 (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement

or portion is not consistent with the public interest, convenience, and necessity . . . .[[2]](#footnote-2)

The Commission’s initial *Implementation Order* used the word “order” to describe Commission final “approval” of an ICA in its discussion of state commission compliance with TA-96. *See Implementation Order* at 34 (emphasis added): “The Commission will issue an order approving or rejecting each agreement within the required timeframe established by the Act [TA-96].”

On review of the pertinent orders involving ICAs that we have issued since the *Implementation Order*, in conjunction with Commission orders which have delegated authority to bureaus for purposes of, *inter alia*,administrative efficiency, the Commission concludes that the use of the word, “order” in the original *Implementation Order* was a generic reference to Commission “approval,” that would be consistent with the obligations of state commissions under TA-96. In the context in which we used the word, “order” and on review of Commission delegation order precedent, the word “order” is ambiguous and did not express a definitive Commission intent that all ICAs should be the subject of a Public Meeting item for approval.[[3]](#footnote-3)

Based on the foregoing, our use of the word “order” in the *Implementation Order* does not preclude or foreclose delegation of authority to a Commission bureau to “approve” a voluntarily negotiated ICA through a Secretarial Letter under the conditions and circumstances we address in this Tentative Opinion and Order. [[4]](#footnote-4)

Consistent with the Commission’s prior delegations of authority to bureaus, items which are clearly policymaking, rulemaking or adjudicative in nature are not appropriate for delegation to Commission staff and are, accordingly, reviewed by the Commission and resolved at Public Meeting. *See Delegation of Additional Authority Regarding Motor Carrier Abandonment and Discontinuance of Service Applications*, Docket No. M-2013-2389253 (Order entered November 14, 2013) (*2013 Delegation Order*). Policymaking, rulemaking and adjudication decisions determine the direction of the agency on key issues and determine the rights and obligations of persons subject to the Commission’s jurisdiction. These represent the core functions of the Commission as an administrative agency, and they remain with the Commission. *Id*.

Conversely, matters which are routine, ministerial and non-policymaking in nature are candidates for delegation to Commission staff. *2013 Delegation Order*.

Because the approval of voluntarily negotiated ICAs and amendments thereto pursuant to TA-96, 47 U.S.C. § 252(e)(2), has become routine, ministerial and non-policy making, we propose to delegate authority to a designated Commission bureau to approve the filing.[[5]](#footnote-5) The bureau designated with this authority will prepare a Secretarial Letter determining whether the Joint Petition for approval of the ICA should be approved or rejected under the standards of TA-96 and whether the final ICA should be submitted to the Commission pursuant to 47 U.S.C. § 252(h). That Secretarial Letter will then be forwarded to the Commission’s Secretary’s Bureau for formal issuance in lieu of Public Meeting action. The Secretarial Letter will have the same authority as a Commission order. *See 2013 Delegation Order*, citing *West Penn Power Co. v. Pa. PUC*, 174 Pa.Super. 123, 100 A.2d 110 (1954).

Under this new procedure, due process controls will be maintained. Each Secretarial Letter will note that an affected party may appeal the staff action (approval or rejection of the ICA under TA-96 standards) to the full Commission by filing a Petition for Appeal from actions of staff pursuant to 52 Pa. Code § 5.44 within 20 days after service of notice of the action. Additionally, no other changes to the current practice will be affected. The Joint Petition for approval of the voluntarily negotiated ICA will continue to be published in the *Pennsylvania Bulletin* to allow interested parties to comment as necessary prior to Commission staff action via a Secretarial Letter.

Furthermore, in the event of changes in telecommunications policy, primarily emanating from the FCC, the assigned Commission bureau will exercise discretion and good judgment in determining whether a voluntarily negotiated ICA reflecting such change in federal policy, should nevertheless be placed on a Public Meeting agenda.[[6]](#footnote-6)

**III. Conclusion**

Based on the foregoing, consistent with the authority of the Commission pursuant to 66 Pa. C.S. § 305(c), we issue this Tentative Opinion and Order soliciting comments on whether the approval of voluntarily negotiated ICAs and ICA amendments under TA-96, 47 U.S.C. § 252(e)(2), has become routine, ministerial, and non-policy making, such that the delegation to a Commission bureau to approve or reject such filing via a Secretarial Letter is advisable; **THEREFORE**,

**IT IS ORDERED**:

1. That a Tentative Opinion and Order at Docket No. M-2022-3030709 is, hereby, issued under which we request comments on whether the approval of voluntarily negotiated interconnection agreements under 47 U.S.C. § 252(e)(2), including amendments thereto, has become routine, ministerial, and non-policy making, such that the delegation to a Commission bureau to approve or reject such filing via issuance of a Secretarial Letter in lieu of consideration of the matter at a Public Meeting is advisable.

2. That this Tentative Opinion and Order shall be published for comment in the *Pennsylvania Bulletin* and copies served upon all parties having filed pleadings at the above-captioned docket.

3. That interested parties shall file with the Commission’s Secretary Bureau, Comments to this Tentative Opinion and Order withing thirty (30) days of publication in the *Pennsylvania Bulletin*. Reply Comments may be filed ten (10) days after the date for submission of Comments.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 24, 2022

ORDER ENTERED: February 24, 2022

1. *See In Re: Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799 (Order entered June 3, 1996);1996 WL 482990 (Pa.P.U.C.) (*Implementation Order*); *also In Re: Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799 (Order on reconsideration entered

September 9, 1996); *Proposed Modifications to the Review of Interconnection Agreements* (Order entered May 3, 2004). [↑](#footnote-ref-1)
2. The standard of review for voluntarily negotiated ICAs is more restrictive than for ICAs subject to arbitration. *See* 47 U.S.C. § 252(e)(b)(4)(C) regarding agreements arrived at through compulsory arbitration. Therefore, parties are incentivized to voluntarily negotiate and resolve outstanding issues in reaching an ICA. *See* *MCI Communication Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 500-501 (3d Cir. 2001); *cert denied*, 537 U.S. 941, 123 S.Ct. 340 (2002) (*MCI v. Bell*). [↑](#footnote-ref-2)
3. Notwithstanding that the end-result envisioned by TA-96 of the state commission approval of a voluntarily negotiated ICA and an ICA obtained after compulsory arbitrary is indistinguishable, this Tentative Opinion and Order solely concerns voluntarily negotiated ICAs and voluntarily negotiated ICA amendments. An arbitrated ICA will have an Initial or Recommended Decision resolving disputed issues. Such Initial or Recommended Decision is subject to the filing of Exceptions. Therefore, this process creates a layer of policy-making for the particular ICA that would not be proper for Secretarial Letter delegation authority to a Bureau. [↑](#footnote-ref-3)
4. We would ask interested parties to comment on the conclusion reached herein. If one disagrees with the conclusion that use of the word “order” in the context in which it was used in the *Implementation Order* is not ambiguous, the Code provision of Section 703(g), 66 Pa. C.S. § 703(g), provides, in pertinent part, that “the commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it.” *West Penn Power Company v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995).  [↑](#footnote-ref-4)
5. Under current Commission practice, the Commission’s Office of Special Assistants (OSA) is the bureau that has been assigned to prepare draft Opinion and Orders of voluntarily negotiated ICAs for disposition at Public Meeting. [↑](#footnote-ref-5)
6. In certain situations, even a routine matter may be significant and require a Commissioner-level determination on review. When this occurs, the Bureau Director of the designated bureau should place the item on the Public Meeting agenda for full Commission review. *See 2013 Delegation Order*. The calendar sheet of the Public Meeting agenda item will explain the circumstances regarding the matter. *Id*. [↑](#footnote-ref-6)