

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-1128
of the Commission, on its own) Progression Order No. 3
motion, to set guidelines for)
mediation, arbitration, and) ORDER SEEKING FURTHER
reviews of negotiated agreements) COMMENT ON PROPOSED
under the Telecommunications Act) AMENDMENTS TO THE MEDIATION
of 1996.) AND ARBITRATION POLICY
)
) Entered: February 11, 2003

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

On July 16, 1996, the Commission entered Progression Order No. 3 in Application No. C-1128, offering a proposed mediation/arbitration policy statement. On August 20, 1996, the Commission entered a mediation and arbitration policy to carry out the mandates of Section 252. The Commission's mediation and arbitration policy was subsequently amended in 1997 and in 2000.

In light of the costs associated with hiring an outside arbitrator, the Commission voiced its concerns that new entrants and carriers facing financial difficulties would be unable to arbitrate terms and conditions for interconnection agreements in compliance with the Commission's current mediation and arbitration policy. On September 18, 2002, the Commission released some proposed revisions and requested comments be filed by any interested party.

WorldCom, Inc., filed written comments in support of the amendments to the arbitration and mediation policy. WorldCom recommended that the Commission clarify what carriers must do in order to demonstrate financial hardship and recommended that the Commission insert the word "outside" in the second sentence in paragraph eight with respect to fee splitting. We agree with WorldCom that the financial hardship provision should be clarified. However, we further find that when a Commission staff member is appointed as an arbitrator, the Commission should not absorb the costs of the arbitration. Therefore, we make further amendments to clarify that the negotiating parties should be accountable for incidental costs associated with arbitrations performed by Commission staff members. However, we expect that the costs of such would be less than using an outside arbitrator. We also propose to place additional language in the policy to address situations where parties cannot mutually agree upon an arbitrator. Finally, we delete the section associated with technical assistance, as we believe that any assistance given to

the arbitrator may necessarily have some effect on assisting the arbitrator in the decision-making process.

The Commission enters this order seeking further comments on proposed amendments to its mediation and arbitration policy. The proposed amendments are attached hereto and incorporated as though fully set forth herein as ATTACHMENT "A".

The Commission will permit any interested party to file comments in support or in opposition to the proposed amendments. Comments should include meaningful discussion as to the reasons for or against amending the Commission's mediation and arbitration policy as proposed. The Commission will also accept further proposed amendments to its mediation and arbitration policy. Parties wishing to file written comments in this proceeding must do so on or before **March 17, 2003**. Commenters must file one (1) original and five (5) paper copies along with one (1) electronic copy in Word or WordPerfect Format.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the attached proposed amendments to its mediation and arbitration policy be, and they are hereby open for public comment.

IT IS FURTHER ORDERED that interested parties file comments within the time frame and in the manner prescribed herein.

MADE AND ENTERED at Lincoln, Nebraska, this 11th day of February, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

ATTACHMENT A

MEDIATION AND ARBITRATION POLICY

(Established in Application No. C-1128, Progression Order No. 3)

Mediation

1. The parties may seek the assistance of an outside mediator to help them reach an agreement. However, either negotiating party may ask the Commission to assist in mediation. If the Commission receives a request for mediation, the Commission will use an outside mediator. Provided, however, if there is a showing of financial hardship by one or both of the parties, the Commission may appoint one of its ~~attorneys~~ staff to act as the mediator.
2. Upon receipt of a request to select an outside mediator to facilitate negotiations, notice will be sent by certified mail to each negotiating party. The parties will have fifteen (15) days to select a mediator and inform the Commission of their selection. The notice will provide the date when the fifteen (15) day period expires and a list of potential mediators. Parties are not bound to select a mediator from the Commission's list.
3. Upon the mediator's request, technical questions may be answered by staff members or outside individuals. Technical questions shall be answered either in written form or at a mediation session attended by both parties.
4. Only the negotiating parties and the mediator will participate in the mediation.
5. After an agreement has been reached, the agreement will be filed with the Commission, and notice will be served by publication in The Daily Record. The public will have thirty (30) days from the date of publication to file written comments on the agreement.
6. The Commission has ninety (90) days to approve or reject the mediated agreement or the agreement shall be deemed approved. The grounds for rejection (Section 252(e)(2)) are that the agreement discriminates against a carrier not a party to the agreement, or that the implementation of the agreement is not consistent with the public interest, convenience and necessity.

7. Although mediation is generally a voluntary process, the Commission interprets 47 USC § 252(a)(2) to require all parties to participate in a Commission mediation, once requested, on a good faith basis. The mediator may terminate the mediation if it appears that the likelihood of agreement is remote or if a party is not participating in good faith, or for other good cause. A mediation should not be terminated prior to the completion of at least one mediation session.
8. Each party will pay for its own fees and costs. In addition, the mediator's expenses will be split equally by both mediating parties. If all negotiating parties agree, separate mediations may be consolidated.

Arbitration

1. Upon receipt of a petition for arbitration, notice will be sent by certified mail to each negotiating party. The parties will have fifteen (15) days to select an arbitrator and advise the Commission of their selection. The notice will provide the date when the fifteen (15) day period expires and a list of potential arbitrators. Parties are not bound to select an arbitrator from the Commission's list. Each negotiating party wishing to select an outside arbitrator whose name does not appear on the Commission's list must provide the Commission and all other parties to the arbitration with the name, telephone number and curriculum vitae of such arbitrator(s) within seven (7) days from the date the petition for arbitration is filed with the Commission.
2. If the parties cannot mutually agree upon an arbitrator within the fifteen (15) day period, the Commission shall select an arbitrator for the parties.
3. Upon a showing of financial hardship, through a motion filed with the Commission, by one or both parties, the Commission may appoint one ~~of its attorneys~~ or more of its staff to act as the arbitrator. A motion specifying the reasons for and the degree of financial hardship must be filed with the Commission within seven (7) days from the date the petition for arbitration is filed with the Commission. The Commission may grant oral argument on such motion.

4. Upon the arbitrator's request, technical questions may be answered by staff members or outside individuals. Technical questions shall be answered either in written form or at an arbitration session attended by both parties.
5. Since the parties will have been negotiating for some time, and the time for arbitration is limited, extensive formal discovery procedures will be allowed only to the extent deemed necessary by the arbitrator. Parties will be required to cooperate in good faith in voluntary, prompt and informal exchanges of information relevant to the matter. Unresolved discovery disputes will be resolved by the arbitrator upon request of a party. The arbitrator will order a party to provide information if he/she determines the requesting party has a reasonable need for the requested information and that the request is not overly burdensome.
6. An early conference will be held to discuss procedure, and to receive the initial proposal put forth by each party. The arbitrator will establish the schedule, and determine whether an oral hearing would be helpful.
7. Final offer arbitration shall be used by the arbitrator. Final offer arbitration is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration or portions of both such offers. At the discretion of the arbitrator, final offer arbitration can take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration. Entire package final offer arbitration is the procedure under which the arbitrator must select, without modification, the entire proposal submitted by one of the parties to the arbitration. Issue-by-issue final offer arbitration is a procedure under which the arbitrator must select, without modification, on an issue-by-issue basis, one of the proposals submitted by the parties to the arbitration.
8. After the oral hearing, conference and other sessions, each party will submit its final offer and proposed agreement. Both parties shall act in good faith in presenting its final offers to the arbitrator. Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit the subsequent final offers following such negotiations. In order to provide an opportunity for

final post-offer negotiations, the arbitrator will not issue a decision for at least fifteen (15) days after submission to the arbitrator of the final offers by the parties. Final offers submitted by the parties to the arbitrator shall be consistent with Section 251 of the Act.

9. Only the two negotiating parties and the arbitrator will participate in the arbitration. However, upon the request of an interested party and the approval of the arbitrator, written arguments or oral statements may be taken at an information session, scheduled by the arbitrator and attended by the negotiating parties.
10. Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out here, however, the arbitrator's procedures must be fair, treat the parties equitably and substantially comply with procedures listed herein.
11. Each arbitrated agreement must: 1) ensure that the requirements of Section 251 of the Act and any applicable FCC regulations under that section are met; 2) establish interconnection and network element prices consistent with the Act; and 3) establish a schedule for implementation of the agreement (pursuant to Section 252(c)).
12. After the arbitrated agreement is final, it will be filed with the Commission, and notice will be provided in The Daily Record. The public will be given ten (10) days from the date the arbitrated agreement is filed with the Commission to file written comments on the agreement.
13. After written comments have been received, the Commission may ~~shall~~ hold an oral hearing to address whether the agreement meets the requirements set forth in Section 252(e). The Commission may limit the testimony of any witness to the extent it is irrelevant or repetitive.
14. The Commission does not interpret the nine (9) month time line for arbitration under Section 252(b)(4)(C) to include the Commission's approval process. Therefore, the Commission will have thirty (30) days from the date of filing to reject or approve any arbitrated agreement or the agreement will be deemed appropriate.
15. Each party will pay for its own fees and costs. In addition, the outside arbitrator's expenses will be split

equally by both negotiating parties. Incidental costs associated with the arbitration process performed by the Commission staff in the arbitration proceeding will be split equally by the arbitrating parties. Separate arbitrations may be consolidated only if agreed upon by all negotiating parties.

Section 252(i)

1. Section 252(i) requests shall be filed in accordance with the attached Appendix A, B and C forms.
2. Upon receipt of a Section 252(i) request for adoption of an approved interconnection agreement from a certified local exchange carrier, the Commission will publish notice of the application in The Daily Record. Section 252(i) applications shall be effective ten days following the publication of said notice.