

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: June 3, 2003

BY THE COMMISSION:

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

Background:

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 certain proposed revisions and requested comments be filed by interested parties.

In the Commission's first comment cycle, 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. In the Commission's February 11, 2003, order, the Commission agreed with WorldCom that the financial hardship provision should be clarified. However, the Commission found that when a staff member is appointed as an arbitrator, the Commission should not absorb the costs of the arbitration. Therefore, we made further amendments to clarify that the negotiating parties should be accountable for incidental costs associated with arbitrations performed by Commission staff members. We also proposed to place additional

language in the policy to address situations where parties could not mutually agree upon an arbitrator. Finally, we deleted one section associated with technical assistance, as we believed that any assistance given to the arbitrator may necessarily have some effect on assisting the arbitrator in the decision-making process.

Positions of the Parties:

Comments to the proposed changes in the second comment cycle were filed by Qwest, the Rural Independent Companies and AT&T.

The Rural Independent Companies recommended that the Commission use an alternative striking method in the selection process. They also stated that the Commission should provide that its policy is held in abeyance pending the deliberation of a financial hardship motion. The Rural Independent Companies further stated that the Commission should not allow more than one staff arbitrator at one time. They proposed that technical questions asked to staff be committed to writing and noticed to all the parties, to establish a time frame for the filing of the interconnection agreement after the decision and to exclude other parties from being involved in the arbitration. Finally, the Rural Independent Companies recommended that the Commission's policy include a provision requiring the arbitrator use the Nebraska Rules of Discovery.

AT&T recommended that the Commission amend the language pertaining to the arbitrator's involvement in situations after the arbitrator has made his or her decision and when the parties are still negotiating.¹ AT&T stated that it is inappropriate for the arbitrator to be involved in that stage of the process.

Qwest did not support the Commission's proposal to unilaterally select an arbitrator in cases where the parties were deadlocked. Qwest commented that it was inappropriate in some cases to use staff arbitrators. Qwest further stated that financial hardship was not relevant to arbitrations as arbitrating interconnection agreements are a cost of doing business those telecommunications carriers should be able to absorb. Qwest did not believe that arbitrators should be given any technical assistance from the Commission or Commission staff. Finally, Qwest recommended including a safeguard against the discovery of privileged information.

¹ Previously found in para. 8.

Discussion:

A. Selection of the Arbitrator

With respect to the comments filed by the Rural Independent Companies, the Commission finds that the alternative striking method proposed would be a neutral and streamlined method for the parties to select an arbitrator within the 15-day time period. Therefore, the Commission will amend its proposed policy to include this as a selection method. In the alternative, the Commission finds that when financial hardship is found, the Commission itself should serve as the arbitrator rather than having parties or the Commission select amongst Commission staff members.² By this change, the Commission is not agreeing with Qwest's arguments claiming that the Commission staff would be biased and inexperienced arbitrators. Rather, the Commission finds that arbitrating cases may be a more efficient and simplified process. The Commission therefore adds this change to its proposed policy for comment.

B. Financial Hardship

The Commission also disagrees with Qwest's arguments that financial hardship is an irrelevant factor in arbitration. The Commission finds that financial restraints are highly relevant and may be a huge barrier for new entrants and struggling competitors to arbitrate a fair agreement with a well-positioned carrier.

C. Discovery

The Commission also finds that it should not add a provision requiring the arbitrator to use the Nebraska Rules of Discovery as proposed by the Rural Independent Companies. Because of the limited time frame in which to complete an arbitration provided by the Act, the Commission finds it would be detrimental to the arbitration process to add rigid timelines for discovery. The Commission finds that the better policy is to permit the arbitrator to establish a procedural schedule on a case-by-case basis with mutual agreement and understanding of the negotiating parties. Accordingly, the Commission declines to add such a provision to its policy.

² Because of its findings detailed herein, the Commission will not consider the suggestions made by the parties pertaining to how staff members are to be selected and whether more than one staff member should arbitrate a single case.

The Commission likewise, declines to give further consideration to Qwest's suggestion to place a provision in its policy that limits discovery of supposed confidential information. The Commission again finds that such decisions are best left up to the arbitrator on a case-by-case basis and should not be placed in the Commission's policy.

D. Post-Decision Negotiations

In response to AT&T's comment regarding the arbitrator's role after a decision has been reached, the Commission finds that this recommendation as amended herein should be solicited for comment. Although to its knowledge, this provision has not posed a problem in recent years, the Commission finds there may be certain situations where it would be inappropriate for the arbitrator to mediate a dispute after a decision has been made. However, in certain cases, it may be helpful to the parties to have the arbitrator facilitate negotiations. The Commission proposes to strike certain language found in paragraph 7 of the arbitration policy to address AT&T's concerns. Interested parties should comment as to whether the change is warranted and whether the proposed deletion addresses this concern.

E. Time Period to File Arbitrated Agreement

The Commission also tentatively agrees with the Rural Independent Companies' suggestion that a timeline be added for parties to file the arbitrated interconnection agreement after the arbitrator's final decision has been released. We therefore include for comment a 30-day timeline, which should serve as a maximum time limit. The arbitrator should be allowed to designate a shorter amount of time if the arbitrator believes it is necessary.

F. Technical Assistance

Outside technical assistance was a subject of disagreement amongst the commenters. Qwest believed that it was inappropriate for the arbitrator to request and receive outside technical assistance from the Commission staff. The Rural Independent Companies, on the other hand, believed that the policy should be modified to require written notice to the parties when an arbitrator seeks outside technical assistance. The Commission's initial mediation and arbitration policy included a means for the arbitrator to receive outside technical assistance, however, such assistance was not supposed to go to the ultimate issue or affect the decision-making process.

However, the Commission found, as a practical matter, any technical assistance given has a tendency to persuade the arbitrator on one or more ultimate issue. Therefore, we modified this provision to remove this caveat entirely and permit the arbitrator to receive any type of outside "technical" assistance. Upon review of the comments filed, we find that the arbitrator should be permitted to receive outside technical assistance with the requirement that the parties be given notice of the question being asked and the answers being given. We therefore propose to modify our policy accordingly and release this modification for comment.

G. Method of Arbitration

Finally, although no party commented on this issue, the Commission finds that it may be appropriate to modify its policy with respect to the type of arbitration that is performed. The Commission's policy has always been limited to two types of final offer arbitration. One type was complete package final offer and the other type was issue-by-issue final offer. In both cases, the arbitrator has been bound to select amongst the limited alternatives given to him or her by the arbitrating policies. The goal in final offer arbitration is to encourage the parties to advance more realistic positions to the arbitrator. However, final offer arbitration may not produce the best results when neither party is willing to budge from its initial position or when the arbitrator believes that both positions would be contrary to state law, federal regulations or the Act. The Commission therefore invites comments on its proposal to modify its policy to give the arbitrator the option of engaging in traditional arbitration or requesting final offers from the parties.

Solicitation of Further Comments:

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

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 **July 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 3rd day of June, 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, both mediating parties will split the mediator's expenses equally. 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. Each negotiating party may add only three names to the list of arbitrators. After a final list has been created, the parties will use an alternative striking method to select the arbitrator. Each negotiating party must use good faith in the arbitration selection process.
- ~~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.~~
- ~~3.2.~~ 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. The time frame for selecting an arbitrator will be held in abeyance pending resolution of a motion of financial hardship.

- 3.4- Upon the arbitrator's request and upon notice to all negotiating parties, 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 provided to the arbitrator and all negotiating by both parties.
- 4.5- 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.
- 5.6- 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.
- 6.7- Either traditional or Final final offer arbitration shall may be used by the arbitrator. The arbitrator will instruct the parties which method of arbitration he or she intends to use prior to the first conference. In traditional arbitration, the arbitrator is free to select among the alternatives given to the arbitrator by the parties or to modify the alternatives based on factual evidence and conclusions of law. If traditional arbitration is used, the arbitrator shall discuss the findings of fact and conclusions of law in the final decision. 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 dis-

cretion 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.

~~7.8-~~ After the oral hearing, conference and other sessions, each party will submit either it's final offer and proposed agreement or post hearing brief to the arbitrator. 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 throughout the arbitration process.~~ Upon express agreement of all negotiating parties and explicit invitation, the arbitrator may assist in the negotiation process. Parties may submit the subsequent final offers following such negotiations if final offer arbitration is being used. 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 or final briefs by the parties. Final offers submitted by the parties to the arbitrator shall be consistent with Section 251 of the Act.

~~8.9-~~ 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.

~~9.10-~~ 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.

10. Once the decision of the arbitrator has been issued, the parties will have 30 days in which to file the conforming arbitrated interconnection agreement with the Commission,

unless the arbitrator explicitly mandates a shorter time frame in the decision.

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) appli-

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cations shall be effective ten days following the
publication of said notice.