

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application )	Application No. C-1128
of the Nebraska Public Service )	Progression Order #3
Commission on its own motion )	
to set guidelines for mediation, )	GRANTED
arbitration, and reviews of nego- )	
tiated agreements under the tele- )	
communications Act of 1996. )	Entered: August 27, 1996

PRELIMINARY MATTERS

The Telecommunications Act of 1996 ("the Act"), provides in Section 252, any party participating in negotiations may petition a state commission to mediate or arbitrate differences arising in the course of negotiation. The Act provides parties may petition a state commission for arbitration between the 135th and 160th day after negotiations begin.

The Nebraska Public Service Commission's responsibilities under Section 252 begin immediately and the time necessary to promulgate rules may take several months. Therefore, on July 16, 1996, the Commission entered a progression order in Application C-1128, offering a proposed mediation/arbitration policy statement. Interested parties were encouraged to provide their comments on the policy on or before July 30, 1996. The Commission received comments from ten (10) parties.

After taking into consideration the comments, the Nebraska Public Service Commission entered a mediation and arbitration policy on August 20, 1996 to carry out the mandates of Section 252 of the Telecommunications Act of 1996.

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

We find that a change under the arbitration section, Number Seven (#7) is warranted. The policy adopted August 20, 1996 stated only the two parties may participate in the arbitration; however, at the arbitrator's discretion, interested parties may submit written or oral statements. We still find that only the negotiating parties have full-party status to the arbitration; however we find it appropriate to permit interested parties to inform the arbitrator of their desire to offer written or oral statements. All other items in the policy remain the same. Therefore, the policy is modified to read in its entirety as follows:

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### 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.
2. Upon receipt of a request to appoint a mediator to facilitate negotiations, notice will be sent by certified mail to each negotiating party. The parties will have five (5) working days to select a mediator and inform the Commission of their selection. The notice will provide the date when the five (5) 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 Omaha 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.

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### Arbitration

1. Upon receipt of a petition for arbitration, notice will be sent by certified mail to each negotiating party. The parties will have five (5) working days to select an arbitrator and advise the Commission of their selection. The notice will provide the date when the five (5) day period expires and a list of potential arbitrators. Parties are not bound to select an arbitrator from the Commission's list.
2. 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. Any individual who answers any technical questions is not to assist in the arbitrator's decision making process.
3. 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.
4. 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.
5. 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.

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6. After the oral hearing, conference and other sessions, each party will submit its "final offer" 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 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 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.
7. 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 informational session, scheduled by the arbitrator and attended by the negotiating parties.
8. 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.
9. 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)).
10. After the arbitrated agreement is final, it will be filed with the Commission, and notice will be provided in the Omaha Daily Record. The public will be given fifteen (15) days from the date of publication to file written comments on the agreement.
11. After written comments have been received, the Commission 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.
12. 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. The Commission will have thirty (30) days to reject or approve any arbitrated agreement or the agreement will be deemed approved.

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13. 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. Separate arbitrations may be consolidated, only if agreed upon by all negotiating parties.


O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the mediation/arbitration policy statement described herein is adopted.

MADE AND ENTERED at Lincoln, Nebraska this 27th day of August, 1996.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

  
//s//Rod Johnson  
//s//Frank E. Landis  
//s//James F. Munnelly  
//s//Daniel G. Urwiller

Chairman

ATTEST:

  
Executive Director

10. 11. 2000

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