

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 ADOPTING PROPOSED  
reviews of negotiated agreements ) AMENDMENTS TO THE MEDIATION  
under the Telecommunications Act ) AND ARBITRATION POLICY  
of 1996. )  
 ) Entered: August 19, 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.

Last year, in consideration 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 was 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.

In response to those proposals released for the second comment cycle, comments 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.<sup>1</sup> 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.

The Commission then released several proposed findings in its order of June 3, 2003, and sought additional comments on the newly proposed changes. The Commission broke the issues down

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<sup>1</sup> Previously found in para. 8.

into several categories: Selection of the Arbitrator, Financial Hardship, Discovery, Post-Decision Negotiations, Time Period to file an Arbitrated Agreement, Technical Assistance and Method of Arbitration, labeled A through G respectively.

With respect to the comments filed by the Rural Independent Companies, the Commission found 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 proposed to amend its policy to include this as a selection method. In the alternative, the Commission found that when financial hardship is proven, the Commission itself should serve as the arbitrator rather than having parties or the Commission select amongst Commission staff members.

The Commission also disagreed with Qwest's argument that financial hardship was an irrelevant factor in arbitration. The Commission found that financial restraints were highly relevant and may be a huge barrier for new entrants and struggling competitors to arbitrate a fair agreement with a well-positioned carrier.

The Commission further found 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 and that such restraints would tie the hands of the arbitrator. The Commission found 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.

The Commission likewise, declined to give further consideration to Qwest's suggestion to place a provision in its policy that limited discovery of supposed confidential information. The Commission again found that such decisions were best left up to the arbitrator on a case-by-case basis, not placed in the Commission's policy.

In response to AT&T's comment regarding the arbitrator's role after a decision has been reached, the Commission found that an amended recommendation should be solicited for comment. The Commission found there could 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, the Commission found, it could be helpful to the parties to have the

arbitrator facilitate negotiations. The Commission proposed to strike certain language found in paragraph seven of the arbitration policy to address AT&T's concerns.

The Commission also tentatively agreed 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 included for comment a 30-day timeline, to serve as a maximum time limit. The Commission found that the arbitrator should be allowed to designate a shorter amount of time if necessary.

With respect to the technical assistance provision, the Commission had proposed a modification of this provision to permit the arbitrator to receive outside technical assistance with the requirement that the parties be given notice of the question being asked and the answers being given.

Lastly, the Commission found that it would be appropriate to modify its policy with respect to the type of arbitration that is performed. The Commission's policy had 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. The Commission therefore invited 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.

In this third comment cycle, in response to our June 3, 2003 order, comments were filed by the Rural Independent Companies, AT&T and WorldCom, Inc. The positions of these parties are set forth below.

#### **Positions of the Parties:**

AT&T commented that the Commission's proposed changes to paragraph seven of the arbitration party were still not sufficient. AT&T believes that the role of an arbitrator and mediator are completely different. In that respect, the arbitrator should never act as a mediator, even after a decision by the arbitrator has been formally reached and the parties request to continue negotiating. AT&T is fearful that where the arbitrator becomes a "last minute mediator" the opportunity for further arguments persist and there is a potential for confusion as to which "hat" the arbitrator is wearing at any given time.

AT&T further believed that an arbitrator should not be allowed to seek or obtain technical assistance from any source outside the parties, unless that source is subject to full disclosure and to cross-examination by the parties. AT&T requested that the Commission amend this section of its arbitration policy to preclude the ability of the arbitrator to receive technical assistance from outside parties.

Finally, AT&T recommended that the rules of any arbitration must be spelled out in detail in advance of any proceedings. AT&T was uncertain as to what "traditional arbitration" as defined by the Commission would be. However, as long as the rules associated with the decision were laid out in detail, AT&T expressed no preference between the various types of arbitration.

WorldCom, Inc., stated that the Commission's proposed policy fails to take into account financial hardship when allocating the costs of the arbitration. The Commission's policy provides that costs must be split equally between the parties. WorldCom, Inc., suggests that the Commission should allow itself some discretion in assigning costs by stating that such costs will be divided in an equitable manner. WorldCom, Inc., also suggested that the Commission place the burden upon the incumbent local exchange carrier to file the arbitrated interconnection agreement with the Commission along with contemporaneous notice to all parties to the mediation and arbitration. Finally, WorldCom, Inc., recommended that the Commission do away with entire package final offer arbitration, unless the parties agree otherwise from the outset of the arbitration.

The Rural Independent Companies supported many of the changes proposed by the Commission. The Companies hope that the arbitrator will solicit input from the parties to the arbitration prior to making a decision as to the procedure to be employed in the arbitration. The Rural Independent Companies also suggested an amendment to paragraph six of the revised policy which added the following: "In its review of the arbitrated agreement pursuant to paragraph 13 of this Policy, the Commission shall not be bound by the method of arbitration selected by the arbitrator in making its determination whether the agreement meets the requirements set forth in Section 252(e)."

No specific comments were filed in the third comment cycle in support or against the Commission's proposals concerning the

selection of the arbitrator, financial hardship, or the proposed time period to file an arbitrated agreement.

**Discussion:**

Upon consideration of all of the comments filed, the Commission finds as follows:

A. Selection of the Arbitrator

The Commission's proposed changes with respect to the selection of the arbitrator should be adopted. The attachment contains the proposed changes as adopted by this order.

B. Financial Hardship

The Commission's proposed changes with respect to the financial hardship provisions should be adopted. The attachment contains the proposed changes as adopted by this order.

C. Discovery

The Nebraska Supreme Court rules of discovery will not be added into the policy at this time. The arbitrator will be free to establish the procedural timeline for, and the appropriate parameters in the use of, discovery on a case-by-case basis.

D. Post-Decision Negotiations

The Commission finds that AT&T has a valid concern and therefore changes its policy accordingly. The arbitrator should not act as a mediator for the parties even after a decision has been reached. If the parties wish to continue negotiating after a ruling has been made, they should be free to do so; however, the arbitrator should not be included in the negotiation process. The attachment contains AT&T's proposed deletion, which is adopted by this order.

E. Time Period to File Arbitrated Agreement

The Commission's proposed addition with respect to the time period to file an arbitrated interconnection agreement should be adopted. The attachment contains the proposed addition as adopted by this order.

F. Technical Assistance

Although two parties opposed the idea of allowing the arbitrator to seek and receive technical assistance from outside parties, the Commission finds that this provision should remain in its policy. The Commission sees no disadvantage to allowing the arbitrator to receive technical assistance so long as notice is given to the parties on the specific questions asked and the responses to those questions. Therefore, the Commission's earlier proposed changes to the technical assistance portion of the policy should be adopted. The attachment contains the proposed amendments as adopted by this order.

G. Method of Arbitration

The Commission finds that the proposed amendments with respect to the method of arbitration used should be adopted. The Commission finds that the arbitrator should make it clear to the parties from the outset of the proceeding which type of arbitration he or she is selecting. Traditional arbitration, i.e., where the arbitrator makes a written decision, issue-by-issue, on the matter of the dispute without any obligation on the part of the arbitrator to stay within the boundaries of either accepting or rejecting the individual final offer position of the parties, can be used by the arbitrator if he or she decides such a method would produce a better result. The arbitrator should solicit the opinions of the parties as to the type of arbitration preferred, but should have sole discretion to choose the method. The arbitrator should notify the parties in detail, of the method of arbitration used prior to the early conference on procedure provided for in the policy.

The Commission also agrees with the Rural Independent Companies that it is not bound to review an arbitrated decision using the method of arbitration used by the arbitrator. The Commission has in the past, modified and added to a decision of the arbitrator on review of an arbitrated agreement without using either final offer submitted by the parties. To be clear on its authority to overrule or modify the decision of an arbitrator in its review process, the Commission will add the proposed amendment suggested by the Rural Independent Companies.

Therefore, the proposed amendments set forth by the Commission in its June 3, 2003 order and the addition of language recommended by the Rural Independent Companies in its

July 17, 2003 comments, supra, is adopted and set forth in the attachment.

#### H. Other Issues Raised

The Commission has considered the other issues raised by WorldCom, Inc., in its comments filed July 17, 2003. At this time, the Commission does not see how, if the financial hardship test is met, new entrants and smaller carriers would be unable to afford their arbitration costs or how the equal division of costs would be inequitable. The costs split equally in the Commission's policy would then be the cost of having the Commission perform the arbitration. Such costs would foreseeably include the Commission hearing fees, transcription costs, filing fees, costs of copies and other such administrative costs incurred by the Commission in addition to the costs incurred by each party to put forth its case. The Commission believes that the fair approach is to have the costs be split equally by the parties to the arbitration. Should there be an issue of affordability or fairness in the future for a party to a negotiation, the Commission may revisit this concern; however for the present time, the Commission finds that the policy containing the requirement that parties equally split the costs of an arbitration should not be changed.

We also decline to adopt the recommendation of WorldCom, Inc., to require the incumbent local exchange carrier to file the arbitrated interconnection agreement. Rather, the Commission finds that the mediator or arbitrator should decide how the parties should coordinate the filing of the interconnection agreement.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the attached amended mediation/arbitration policy be, and it is, hereby adopted.



MADE AND ENTERED at Lincoln, Nebraska, this 19th day of August, 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 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. Upon a showing of financial hardship, through a motion filed with the Commission, by one or both parties, the Commission may 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. 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 in written form provided to the arbitrator and all negotiating parties.
4. 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. 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. Either traditional or final offer arbitration 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 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. In its review of the arbitrated agreement pursuant to paragraph 13 of this Policy, the Commission shall not be bound by the method of arbitration selected by the arbitrator in making its determination whether the agreement meets the requirements set forth in Section 252(e).

7. After the oral hearing, conference and other sessions, each party will submit either its 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 throughout the arbitration 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. 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. 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 thirty (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 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 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.