

BEFORE THE COMMONWEALTH PUBLIC UTILITIES COMMISSION

DOCKET 09-3

GUIDELINES FOR NEGOTIATIONS, MEDIATIONS, ARBITRATION AND APPROVAL
OF AGREEMENTS BETWEEN LOCAL EXCHANGE CARRIERS

1. Purpose

- 1.1 Section 251[c] of the federal Communications Act, as added by the Telecommunications Act of 1996, Pub. L. No. 104-104 [Act] requires an incumbent local exchange carrier and a requesting telecommunications carrier [carrier] to negotiate about the terms for interconnecting their networks and the prices and conditions governing the purchase and use of the incumbent's network elements and services. 47 USC § 251[c][1]. The Act charges this Commission with the responsibility, upon request, to mediate or arbitrate these negotiations between the potential competitors. 47 USC § 252[b]-[d]. Finally, the Act also commands the Commission, within abbreviated time periods, to review and approve or reject any agreement which may emerge from the above negotiations or arbitrations.
- 1.2 The Commission hereby adopts the following guidelines to govern the negotiation, arbitration and review processes under the Act. Experience using these guidelines will assist the Commission in due course in developing final administrative rules. These guidelines have been adopted pursuant to the Commission's authority under 4 CMC § 8409[m] to promulgate orders necessary to govern proceedings before it.

2. Negotiation

- 2.1 A carrier requesting negotiation with an incumbent local exchange carrier concerning any of the obligations imposed under 47 USC § 251 shall make a request in writing. A carrier requesting negotiation shall, on the same day that such request is delivered to the other carrier, also file a copy of such request with the Commission. Either the requesting telecommunications carrier or the incumbent local exchange carrier may ask the Commission to treat the request filed as confidential and privileged information under the Commission's April 2, 2009 *Confidentiality Rules*. If a carrier has made a request for negotiation prior to the effective date of these guidelines, the requesting carrier shall file a copy of the request with the Commission within fifteen days after the effective date of these guidelines.
- 2.2 After a request for negotiation has been made, each carrier has the duty to negotiate in good faith. The Commission anticipates that the duty to negotiate in "good faith" may be given meaning by looking to a similar obligation imposed in the collective bargaining context under federal labor laws. 29 USC § 158.

- 2.3 As part of the duty to negotiate in good faith, each carrier shall provide to the other carrier, upon request, relevant information about its costs or any such other pertinent data, which the requesting carrier can use to substantiate the claims made by each carrier during the negotiations. The producing carrier may require reasonable assurance that the information provided will remain confidential.
- 2.4 Discovery shall be allowed during the negotiation process so that each carrier may verify the other's claims. Such discovery is generally perceived to be part of the good faith negotiation process. *See NLRB v. Truitt Manufacturing Co. 351 US 149 (1956)*. In this negotiation data exchange, the carrier producing the data or other documents can require that the other carrier undertake reasonable protections to ensure that the information, documents and data produced remain confidential and shall not be used to further the other's business. The demand for such assurances, should not, however, be so stringent or restrictive to become a device to forestall or impede bargaining.
- 2.5 Except in extraordinary circumstances, the Commission will not police the negotiations or entertain complaints of "bad faith" including the duty to disclose information. Instead the Commission may use remedial measures during the arbitration process to rectify prior breaches or recalcitrance.

3. Mediation

- 3.1 At any point during the negotiation, a carrier involved in a negotiation may request the Commission to participate as mediator under 47 USC § 252[a][2]. To do so, the carrier shall file with the Commission, and serve on the other carrier, a *Request for Mediation*. Such request shall include: a) the name and address of the requesting carrier; b) the name and address of the other carriers in the negotiation; c) the name, address and telephone numbers for the representatives for each carrier in the negotiations; d) a history of the negotiations, including the times and locations of any prior meetings; e) a description of those issues which remain in dispute between the carriers; and f) a description of any agreements, actual or tentative, already reached on any issue. A Request shall not be deemed a public record.
- 3.2 The Commission's hearing examiner shall act as mediator and shall participate in the negotiations until they terminate.
- 3.3 The mediator shall have discretion to regulate the course of the mediation. In so doing, the mediator may: a) meet individually with each carrier; b) require the carriers to exchange and submit statements of position prior to any mediation session; c) direct the carriers to attend mediation conferences; d) require the carriers to provide supporting information to each other or to the mediator; and e) assist in the preparation of any written agreement.

- 3.4 Because mediation is part of the negotiation between the carriers, the mediator shall not disclose information relating to the mediation, except upon the agreement of the participating carriers. The mediator may, however, inform the Commission of the progress of the mediation efforts.
- 3.5 The Commission shall assess the carriers in the negotiation equally for the regulatory costs of mediation.

4. Arbitration

- 4.1 A carrier involved in a negotiation may request arbitration under 47 USC § 252[b][1] by timely filing with the Commission and serving upon the other carrier on the same day, the following documents: a] a *Petition for Arbitration* which shall include the name and address of the petitioning carrier and the other carriers in the negotiation; the name, address, telephone numbers and email address for the attorney or other representatives for the petitioning carrier and for the other carriers in the negotiation; the date when the request for negotiation was made and the date for completion of the arbitration. b] a *Statement of Unresolved Issues*, which shall include a listing of all issues between the carriers which have not been resolved in the negotiations; a citation of each Commonwealth or federal statute, rule, order or docket which may govern or be related to each of the unresolved issues; a detailed statement of each carrier's position with respect to each unresolved issue; a statement of the last offer made by each carrier on each of the unresolved issues; a statement describing any information which the petitioning carrier believes the arbitrator should request from the other carrier, with reasons why such information would be beneficial; a statement of any conditions which the petitioning carrier requests be imposed; and a proposed schedule for the implementation of the terms and conditions of each arbitrated issue; c] all relevant material and documentation, appropriately referenced, which the petitioning carrier wishes the arbitrator to consider in resolving each of the unresolved issues; and d] material and documentation relevant to any other issue discussed and resolved during the negotiations.
- 4.2 Within twenty-five days after service of the documents set out above, each other carrier to the negotiations may file with the Commission and serve upon the requesting carrier: a] a *Response* which shall include a counter-statement of any information set out in the *Petition for Arbitration* which the carrier believes is incorrect, incomplete or inadequate; b] a *Counter-Statement of Unresolved Issues*, which shall include the carrier's responses to the listings and statements required to be set out in the *Statement of Unresolved Issues*; and c] all relevant material and documentation, appropriately referenced, which the non-requesting carrier wishes the arbitrator to consider in resolving each of the unresolved issues.
- 4.3 Disputes over whether the request for arbitration was timely or whether any issue is properly subject to arbitration shall be decided by the arbitrator. The arbitrator shall presume that all unresolved issues are subject to arbitration

unless a carrier provides notice of such an objection in its *Statement* or *Counter-Statement of Unresolved Issues*. If such claim has been made, the objecting carrier shall be required to demonstrate, clearly and convincingly, that the issue is not subject to arbitration.

- 4.4 Trade secrets and commercial and financial information submitted during the arbitration, which is of a privileged and confidential nature shall not be considered public records and shall be treated as confidential pursuant to the Commission's *Confidentiality Rules*.
- 4.5 Each carrier's summary of its position and the accompanying documentation submitted should be sufficiently detailed and comprehensive to allow the arbitrator to resolve the disputed issues. A carrier should assume that it may not be allowed to submit any further argument or documentation and that the unresolved issues will be decided on the materials submitted in this pleading cycle.
- 4.6 The Commission's hearing examiner shall serve as the arbitrator. The arbitrator shall preside over the arbitration process and is empowered to issue communications to the parties, to rule on all procedural matters, to conduct prehearing and settlement conferences and to decide how best to conduct the arbitration proceeding. The arbitrator may order the parties to participate in further negotiations in his presence or with his assistance. The arbitrator may, with the concurrence of the parties, make reasonable modifications to this arbitration process.
- 4.7 The arbitration process will not be patterned after a contested case proceeding, but will be designed to inform the arbitrator. Accordingly, the parties to the negotiation will be the only parties to the arbitration, although the arbitrator may direct the Commission's regulatory consultant to file comments on any issue in dispute and to participate in settlement negotiations. The parties will not have the right to conduct discovery, although either may request that the arbitrator order the production of additional information from the other party. Questioning will be done by the arbitrator rather than by the parties. The arbitrator will meet with the parties as necessary to enable him to prepare his report and recommended decision for the Commission's consideration, including a proposed schedule for implementation in accordance with the requirements of 47 USC § 252[c] and within the time required by the Act. The arbitrator will serve his report and recommended decision on the parties, who will have ten days to file objections thereto.
- 4.8 The Commission, after reviewing the arbitrator's report and recommended decision and the objections of the parties, will issue a decision on the merits of the parties' position on each issue raised by the request for arbitration. Unless the result would be clearly unreasonable or contrary to the public interest, the

Commission will limit its decision on each issue to selecting the position of one of the parties on that issue.

4.9 If the carriers reach voluntary agreement after the initiation of arbitration, the carriers shall promptly notify the arbitrator and file with the Commission a dismissal of the arbitration.

4.10 The Commission shall charge each carrier to the arbitration for the costs of conducting the arbitration.

5. Review of Agreements

5.1 An agreement [including any attachments and appendices] between carriers concerning the terms and conditions set out in 47 USC § 251 shall be filed with the Commission for review, within thirty days after the consummation of such agreement in cases of a negotiated agreement under 47 USC § 252[a] or within thirty days after the issuance of the Commission's decision under Rule 4.8 above in cases of an agreement subject to arbitration under 47 USC § 252[b]. The Commission may extend the time for good cause.

5.2 If an agreement has been established by negotiation under 47 USC § 252[a], the carriers shall, at the time of filing the agreement, file statements setting forth the reasons why the Commission should not reject the agreement under the standards in 47 USC § 252[e][2][A] and the reasons why the agreement is consistent with applicable Commonwealth laws and regulations. Such statements shall be accompanied by any relevant supporting documents and materials.

5.3 If an agreement has been established by arbitration under 47 USC § 252[b], one, or both, of the carriers shall, at the time of filing of the agreement, file a statement setting forth the carrier's position as to whether the agreement should be adopted, rejected or modified; the reasons why the agreement should not be rejected under the standards in 47 USC § 252[e][2]; and the reasons why the agreement is consistent with applicable Commonwealth laws and regulations. Such statements shall be accompanied by any relevant supporting documents and materials.

5.4 Within ten days after the filing of an agreement pursuant to section 5.1 above, the Commission shall provide notice thereof, which shall indicate that any person may file with the Commission and serve upon the submitting carriers by a date certain, twenty days after publication of the notice, comments [with supporting documentation] concerning approval or rejection of the agreement. Such notice shall be posted on the Commission's Internet website and shall be published in a newspaper of general circulation in the Commonwealth.

- 5.5 During the comment period, any person may serve and file written comments, accompanied with supporting documentation. The submitting carriers may file and serve responses to any written comments within seven days after the close of the comment period.
- 5.6 The review process shall be conducted by the hearing examiner, with such assistance from the Commission's regulatory consultant, as he may require. Hearing examiner shall file and serve upon the participants recommended findings and decision. Within seven days after the filing of such recommended findings and decision, any participant at the proceeding may file comments in opposition or in support of the recommendation.
- 5.7 Within forty-five days after the submission of the agreement, the Commission shall issue an order approving or rejecting the agreement or portions of the agreement. If the order rejects the agreement or portions thereof, the order shall set forth the deficiencies found. The carriers to the agreement may, within thirty days after the rejection of the agreement, submit a revised agreement for approval which purportedly corrects the cited deficiencies. After giving notice and an opportunity to comment to all the prior participants, the Commission may approve or reject the re-submitted agreement.
- 5.8 If the Commission approves an agreement, such agreement shall be made available for public inspection and copying ten days after approval.
- 5.9 The Commission shall assess the carriers to an agreement, equally, for the regulatory costs and expenses of reviewing negotiated and arbitrated agreements.