

7812.1700 ARBITRATION OF INTERCARRIER NEGOTIATIONS.

Subpart 1. **Request to arbitrate.** During the period from the 135th day to the 160th day, inclusive, after the date on which an incumbent local exchange carrier (LEC) receives a request to negotiate under section 252, subsection (a), of the act, any party to the negotiation may petition the commission to arbitrate unresolved issues in the negotiation. The petition must include the following:

- A. the name, address, and telephone number of the petitioner and its counsel;
- B. the name, address, and telephone number of the other party to the negotiation and its counsel;
- C. a brief summary of the negotiation history since the request for negotiation was made, including meeting dates;
- D. the date of the initial request for negotiation and the dates 135 days, 160 days, and nine months after that date;
- E. a list of the issues resolved by the parties, including a copy of any proposed contract language that reflects the resolution of those issues;
- F. a list of the unresolved issues, if any, that are not being submitted for arbitration;
- G. a list of the unresolved issues submitted for arbitration and the position of each of the parties with respect to those issues;
- H. any proposed contract language reflecting the parties' positions;
- I. a written narrative that explains the petitioner's position on each disputed issue and indicates how the petitioner's and respondent's positions meet or fail to meet the requirements of the act, applicable FCC regulations, applicable state statutes, and applicable rules, orders, or policies of the commission;
- J. any terms and conditions the petitioner recommends imposing;
- K. a proposed schedule for implementing the terms and conditions imposed in the arbitration;
- L. a recommendation as to what information the other parties to the negotiation should provide, including a narrative explaining the relevance and importance of the information;
- M. a proposed agreement reflecting the petitioner's recommended resolution of the disputed issues;

N. all documentation in the petitioner's possession or control that is relevant to the dispute, including:

(1) the documents the petitioner intends to rely on to support its position on each issue, including exhibits the petitioner intends to introduce at the arbitration hearing;

(2) to the extent prices are in dispute, the petitioner's proposed rates or charges and relevant cost studies and other information supporting those rates or charges;

O. any procedural recommendations regarding the conduct of the arbitration;

P. any request for a protective order;

Q. a list of all the witnesses and exhibits the petitioner intends to present at the arbitration hearing under subpart 17; and

R. any request for consolidation under subpart 12.

Subp. 2. **Response to petition.** A nonpetitioning party or other interested person shall file with the commission any request to modify the procedures under this part or to consolidate the proceeding under subpart 11 within five days after the petition is filed. A nonpetitioning party shall file with the commission a complete response to the arbitration petition within 25 days after the petition is filed. The response must include the information required for petitions under subpart 1.

Subp. 3. **Service and verification of petition and response.** The petition and response must be served on the other party to the negotiations, the department, the Office of Attorney General-Residential Utilities Division (OAG-RUD), and all persons on the service list established pursuant to part 7812.1500, subpart 2. Petitions and responses under subparts 1 and 2, and their accompanying documentation, must be verified.

Subp. 4. **Assignment of arbitrator.** The commission shall meet and issue an order assigning an arbitrator within 25 days after the petition is filed. The commission may appoint a single arbitrator or a panel of arbitrators. The order may include procedural requirements or guidelines for the conduct of the arbitration in addition to those established in this part, and must include a decision on any request to consolidate proceedings under subpart 12. If the procedures set forth in the commission's order conflict with the procedures established in this part, the commission shall vary the requirements of this part as necessary under part 7829.3200.

Subp. 5. **Mediation-arbitration hybrid.** The arbitration shall proceed without a commission order under subpart 4 if the arbitrator was designated under part 7812.1600, subpart 15, unless a party files a petition with the commission to decide procedural disputes regarding the conduct of the arbitration.

Subp. 6. **Arbitrator qualifications.** The arbitrator must be, or the arbitration panel must include, an administrative law judge with the Office of Administrative Hearings

or a person with arbitration or adjudicative experience retained by the commission on contract for the purpose of arbitrating under this part. If an arbitration panel is used, the administrative law judge or other experienced arbitrator under contract with the commission shall chair the panel.

Subp. 7. **Arbitrator neutrality.** The person assigned to conduct the arbitration proceedings must have no personal or financial interest in the outcome of the proceeding. The arbitrator must not have participated or assisted materially in the negotiations leading up to the arbitration unless the arbitrator served as a mediator and was assigned under part 7812.1600, subpart 15, or the negotiating parties otherwise agree expressly in writing to waive the limitation in this subpart.

Subp. 8. **Arbitrator role and authority.** The arbitrator shall conduct the arbitration proceedings and submit a recommended decision to the commission. The commission is the final arbiter and shall issue the final binding decision under section 252, subsection (b), paragraph (4), of the act. The arbitrator has those duties and powers necessary to conduct the arbitration, including the authority to:

- A. conduct hearings and prehearing conferences;
- B. direct parties to serve verified statements and exhibits;
- C. supervise discovery procedure;
- D. administer oaths and affirmations;
- E. examine witnesses and allow parties to examine an adverse party or agent;
- F. rule upon matters that do not result in the final determination of the proceeding;
- G. direct any person to produce witnesses or information relevant to issues in the arbitration;
- H. waive any of the requirements in this part upon agreement of the parties or for good cause;
- I. issue protective orders as provided in subpart 9; and
- J. issue proposed arbitration decisions as provided in subpart 19.

Subp. 9. **Proprietary information.** Trade secret and proprietary information must be treated as provided under the commission's rules of practice and procedure, part 7829.0500. At any time during the proceeding, the arbitrator or commission may enter an order to protect the confidential, proprietary, or trade secret nature of data, information, or studies.

Subp. 10. **Intervenors and participants.** The department and OAG-RUD may intervene in an arbitration proceeding by filing comments or a request to intervene within 25 days after the arbitration petition is filed. The comments or intervention request must be served on the negotiating parties and the persons on the service list established under part

7812.1500, subpart 2. No other intervention is permitted. Others wishing to participate may attend hearings as observers, file written comments and request the opportunity for oral argument to the arbitrator or the commission as provided in part 7829.0900.

Subp. 11. **Staff involvement.** Commission staff may attend all prehearing conferences and hearings. Staff may question witnesses to the extent the arbitrator considers the questions relevant and helpful in developing a record for decision.

Subp. 12. **Consolidation.** A party or other interested person may petition the commission to consolidate an arbitration with another arbitration or related proceeding. The petition must identify the issues common to the proceedings for which consolidation is sought, indicate the appropriate deadline for completing the consolidated proceeding, and explain why the request should be granted based on the criteria in items A to D. The commission may also take up the issue of consolidation on its own motion. The commission may consolidate an arbitration with another proceeding if the rights of the parties or the public interest will not be materially prejudiced by consolidation. The commission shall decide whether to consolidate based on:

- A. the commonality of issues and interests in the proceedings;
- B. the degree to which consolidation would reduce administrative burdens on the commission and the parties in the proceedings for which consolidation is being considered;
- C. the administrative burdens and delay that may result from consolidation; and
- D. the rights and preferences of the parties.

Subp. 13. **Discovery request and response.** A party may serve requests for discovery on other parties at any time after the arbitration petition is filed, and may seek discovery by any means available under the Rules of Civil Procedure for the District Courts of Minnesota, subject to the discretion of the arbitrator under subpart 14. Initial requests for discovery must be served no later than 35 days after the arbitration petition is filed. The response to the request must explain any refusal to provide the information requested. The request and response must be served on the parties and filed with the arbitrator and the commission.

Subp. 14. **Arbitrator discretion.** The arbitrator may establish a schedule for discovery and set any reasonable limits on the type, scope, or extent of discovery as needed to avoid delay or undue hardship on a party. The arbitrator's authority includes, but is not limited to, authority to set deadlines for responses to discovery requests and to limit the number of questions permitted in any written depositions or interrogatories.

Subp. 15. **Inadequate response to discovery requests.** If a party believes another party has failed to respond adequately to a discovery request, the party shall file a written statement to that effect with the arbitrator before the hearing has closed. The statement must identify specifically the alleged inadequacies and provide the reasons for concluding that the discovery responses were inadequate. The party against whom the allegation is

made may file a written statement responding to the allegation according to the timetable established by the arbitrator. The arbitrator or commission may do any of the following based on a party's failure to respond adequately to discovery requests or cooperate in the discovery process:

- A. issue an order to compel discovery;
- B. resolve the issue to which the discovery pertains in favor of the party making the discovery request; or
- C. treat the failure as a failure to negotiate in good faith under the act.

Subp. 16. **Prehearing conference.** The arbitrator shall hold at least one prehearing conference no later than ten days after the response to the arbitration petition is filed under subpart 2. The arbitrator shall ensure the parties receive notice of the prehearing conference at least 48 hours in advance. The notice may be provided in writing by mail, hand-delivery or facsimile, or orally by telephone. The arbitrator may hold as many prehearing conferences as necessary to ensure the fair and expeditious conduct of the arbitration. The prehearing conferences may be used to set the hearing schedule and guidelines, and to consider all other relevant procedural matters, including:

- A. identification and narrowing of issues;
- B. amendments to documents;
- C. limitations on the number of witnesses; and
- D. discovery.

Subp. 17. **Hearing.** If material issues of fact are in dispute, the arbitrator must conduct a hearing with the opportunity for cross-examination. The arbitrator shall schedule the hearing to ensure the proceeding can be completed by the deadline under the act. The arbitrator shall conduct the hearing according to the following procedures:

- A. The arbitrator shall serve notice of the hearing on all parties and participants at least five days before the hearing begins.
- B. Oral testimony must be given under oath and witnesses are subject to cross-examination.
- C. The arbitrator may, with or without timely objection, exclude evidence or limit testimony that is irrelevant or unduly repetitious.
- D. The arbitrator shall ensure that a written transcript of the hearing is prepared.

Subp. 18. **Posthearing argument and comment.** Parties shall file briefs and reply briefs as directed by the arbitrator. Participants may file comments and reply comments during the briefing period.

Subp. 19. **Arbitrator's recommended decision.** The arbitrator shall issue a recommended decision on the issues submitted for arbitration no later than 35 days before the date nine months after the request for negotiation that gave rise to the arbitration. The decision must be in writing, setting forth the recommended resolution of each issue submitted for arbitration that has not been resolved through subsequent negotiations. The decision must also include a recommended schedule for implementation by the parties. The decision must be accompanied by a written memorandum that provides the rationale for each recommended resolution, including any necessary findings and relevant citations to law or the record.

Subp. 20. **Exceptions.** The parties and participants may file exceptions to the recommended decision and requests for oral argument with the commission no later than ten days after the arbitrator issues the recommended decision under subpart 19.

Subp. 21. **Commission decision.** The commission shall issue a final arbitration decision no later than 35 days after the arbitrator issues the recommended decision. The decision must include a resolution of each issue submitted for arbitration that has not been resolved through subsequent negotiations. The decision must also include a schedule for implementation by the parties and a deadline for submitting a final agreement to the commission for approval under part 7812.1800.

Subp. 22. **Decision criteria.** Issues submitted for arbitration must be resolved consistent with the public interest, to ensure compliance with the requirements of sections 251 and 252(d) of the act, applicable FCC regulations, and applicable state law, including rules and orders of the commission.

Subp. 23. **Burden of proof.** The burden of production and persuasion with respect to issues of material fact are on the incumbent LEC. The facts at issue must be proven by a preponderance of the evidence. The arbitrator may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrator may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof.

Statutory Authority: *MS s 216A.05; 237.10; 237.16*

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