

Public Service Commission

**Guidelines for Negotiations, Mediations, Arbitration, and Approval of Agreements
Between Local Exchange Telecommunications Carriers (Dockets 10 and 45)**

1.0 Purpose of Guidelines

Section 251(c) of the federal Communications Act, as added by the Telecommunications Act of 1996, Pub. L. No. 104-104, requires an incumbent local exchange carrier (such as Bell Atlantic-Delaware, Inc.) and a requesting telecommunications 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 U.S.C. § 251(c)(1). Another new section added by the 1996 Act charges this Commission with the responsibility, upon request, to mediate or arbitrate these negotiations between the potential competitors. 47 U.S.C. § 252(b)-(d). Finally, the Act now also commands the Commission, within abbreviated time periods, to review, approve, or reject any agreement which may emerge from the above negotiations, as well as any "statement of terms and conditions" which Bell Atlantic-Delaware, Inc., as the incumbent carrier, might unilaterally file. 47 U.S.C. § 252(e), (f).

The Commission understands that negotiations, as contemplated by the federal Act, are already underway and that more requests for bargaining may be on the horizon. Because the window for demanding arbitration now moves open,¹ the Commission hereby adopts the following guidelines to govern the arbitration and review processes under the federal Act.

Some may say that the 1996 Telecommunications Act directs that the negotiation and arbitration be essentially private bilateral mechanisms between the two carriers, with wider participation by other persons coming, if at all, only during the subsequent review of the delivered agreement. However, the Commission believes that the Act recognizes the public interest should be a factor throughout, considered both during the earlier arbitration endeavors, as well as any final review. See, e.g., 47 U.S.C. §§ 251(d)(3), 252(e)(3), 252(f)(2). Particularly given the short time frames for its review of interconnection agreements, the Commission believes that it should enact guidelines for arbitration, which will not only assist in the resolution of the carriers' disputes, but allow contemporaneous consideration of the public interest. Thus, while these guidelines do not make the arbitration process a fully-open proceeding, they do allow for consideration of the public interest in several linked ways.

First, the guidelines permit the Public Advocate to be part of the arbitration process. Two reasons support this early participation. Initially, under state law, the Public Advocate has a right to appear in any matter or proceeding over which the Commission has jurisdiction. 29 Del. C. §§ 8828(1), 8829(a)-(c). Moreover, the Advocate, as an active participant during arbitration, may be able to bring to the arbiter's attention any actual or potential violations of state laws, regulations, or standards. With the two competing carriers eyes most likely focused on each's business interests, the participation of the Advocate will ensure that, in particular, laws or rules aimed at protecting the end-using consumer will not be overlooked.

Second, although the guidelines envision Commission Staff primarily serving as arbiters and adjuncts, these roles should not be so narrowly viewed as to bar the arbitrator from also acting to protect the public interest and the rights of consumers. Thus, the arbiters remain free to raise, entertain, and resolve questions of the public interest during the arbitration process.

Third, the guidelines allow the Commission Staff, independent of those members appointed as arbiters or adjuncts, to become an active party in any particular arbitration if the Staff, upon review, believes that significant issues concerning the public interest may arise and might not be adequately explored. In particular, the Commission Staff may become an active player in an arbitration if the Public Advocate decides not to participate and Staff believes that, without "third-party" participation, the public interest might be undervalued.

1. A carrier to a negotiation must request State Commission intervention no sooner than 135 days after the request for negotiation was filed and no later than 160 days after the kick-off date. 47 U.S.C. § 252(b)(1).

The federal Act requires arbitration by the Commission but gives few clues about what procedures are required. So too, it compels review of agreements by the Commission but, again, sets few direct procedural benchmarks. However, neither the arbitration, nor the review process, dovetails easily with the procedural structure set forth in the Public Utility Act (26 Del.C. ch. 1) or the state's Administrative Procedures Act. 29 Del.C. ch. 101. For example, both the PUA and APA envision Superior Court review of Commission decision-making. In contrast, the federal Act specifically bars such state court review, granting judicial oversight to the federal courts instead. 47 U.S.C. § 252(e)(4), (6). Moreover, the time limitations imposed on the Commission under the federal Act do not, in some instances, provide sufficient leeway to allow for publication of public notice and the convening of formal public evidentiary hearings as envisioned by the APA for price-fixing and rate-making rulings. Consequently, the Commission, in these guidelines, has attempted to craft procedural rules consistent with the spirit of the APA, even though they may be inconsistent with some of the specifics of the PUA and APA. The Commission believes that the General Assembly granted it such authority to depart from the strictures of the APA when it authorized the Commission to undertake "deregulation" of telecommunications services. 26 Del.C. § 703(3).¹

These guidelines will apply to negotiations and mediations conducted after the effective date of the guidelines. In addition, these guidelines shall apply to any arbitrations and reviews instituted after the effective date of the guidelines. Finally, these guidelines may be applied, consistent with justice and fairness, to any arbitrations and reviews pending at the time the guidelines become effective. Experience using these guidelines in the near future will assist the Commission in developing final administrative rules.

2.0 Negotiations

- 2.1 A telecommunications carrier requesting negotiation with an incumbent local exchange carrier concerning any of the obligations imposed under 47 U.S.C. § 251 shall make such a request in writing. A telecommunications 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. If a telecommunications carrier has made a request for negotiation prior to the effective date of these guidelines, the requesting telecommunications 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 telecommunications carrier has a duty to negotiate in good faith. The duty to negotiate in good faith includes the obligation to meet and confer at reasonable times and places with minds open to persuasion and an eye towards reaching agreement over any of the terms and conditions set forth in 47 U.S.C. § 251 (b), (c).
- 2.3 As part of the duty to negotiate in good faith, each telecommunications carrier shall provide to the other telecommunications carrier, upon request, relevant information about its costs or any other pertinent data which the requesting carrier can use to substantiate the claims made by each telecommunications carrier during the negotiations. The producing carrier may require reasonable protections that the information provided will remain confidential.

Interpretation. *The guidelines require the requesting carrier to give notice to the Commission when it has made a request for negotiation to an incumbent local exchange provider under 47 U.S.C. § 251(c) and § 252(a). Such forewarning will allow the Commission to plan when it may be called upon to commence arbitration proceedings.*

With the exception of the duty to provide documents, the guidelines do not provide a checklist for the "good faith" obligation. However, 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 U.S.C. § 158.

1. The Commission promulgates these rules informally as part of its rules of practice. 26 Del.C. § 10113(b)(2).

The guidelines do specifically allow "discovery" 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 U.S. 149 (1956). In this negotiation data exchange, the carrier producing 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 carrier's business. The demand for such assurances should not, however, be so stringent or restrictive to become a device to forestall or impede bargaining.

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.

3.0 Mediation

- 3.1 At any point during a negotiation, a telecommunications carrier involved in a negotiation may request the Commission to participate as mediator under 47 U.S.C. § 252(a)(2). To do so, the carrier shall file with the Commission, and serve upon the other telecommunications carrier, a *Request for Mediation*. Such *Request* shall include:
 - 3.1.1 the name and address of the requesting carrier;
 - 3.1.2 the name and address of the other carriers in the negotiation;
 - 3.1.3 the name, address, and voice and facsimile telephone numbers for the representatives for each carrier in the negotiations;
 - 3.1.4 a history of the negotiations, including the times and locations of any prior meetings;
 - 3.1.5 a description of those issues which remain in dispute between the carriers; and
 - 3.1.6 a description of any agreements, actual or tentative, already reached on any issue.
 - 3.1.6.1 Such *Request for Mediation* shall not be deemed a public record.
- 3.2 Within ten days after the filing of a request for mediation, the Executive Director of the Commission shall appoint one or more persons to act as a mediator for the negotiation. The mediator may be a member of the Commission Staff or any other competent, disinterested person specifically retained for such position. Unless excused by the Commission or Executive Director, the mediator shall participate in the negotiations until such negotiations terminate.
- 3.3 The mediator shall have discretion to regulate the course of the mediation. In so doing, the mediator may: (1) meet individually with each carrier; (2) require the carriers to exchange and submit statements of position prior to any mediation session; (3) direct the carriers to attend mediation conferences; (4) require the carriers to provide supporting information to each other or the mediator; and (5) 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 costs of mediation.

Interpretation. *The federal Act empowers one or both negotiating carriers to invoke mediation by the Commission. The guideline requires a notice of such a request to include a description of the matters which have been resolved and those that remain in dispute between the carriers. This disclosure will help the Executive Director to choose an appropriate mediator - one with some background knowledge into the contentious areas. The Executive Director may also hire outside persons, skilled in either mediation techniques or in a particular area of telecommunications, to act as a mediator. The mediator will determine how mediation should precede and will continue such efforts, unless earlier relieved, until the time an agreement is reached or until the arbitration process is invoked and negotiations end. No representation made by a mediator is binding upon the Commission.*

Because the mediation seeks to assist the negotiation process, the mediator may not disclose, except with the consent of the parties, information regarding the status, course, or direction of the negotiations or mediation. However, the mediator may keep the Commission apprised, in general terms, of the

progress of the mediation efforts. In a similar vein, the mediator may not disclose, except upon consent, information learned, or documents received, during the mediation process.

4.0 Arbitration

4.1 Trigger

4.1.1 A telecommunications carrier involved in a negotiation may request arbitration under 47 U.S.C. § 252(b)(1) by timely filing with the Commission and serving upon the other telecommunications carrier and the Public Advocate, on the same day, the following documents:

4.1.1.1 a *Petition for Arbitration*, which shall include:

- 4.1.1.1.1 the name and address of the petitioning carrier;
- 4.1.1.1.2 the name and address of the other carriers in the negotiation;
- 4.1.1.1.3 the name, address, and voice and facsimile telephone numbers for the attorney or other representatives for the petitioning carrier;
- 4.1.1.1.4 the name, address, and voice and facsimile telephone numbers for the attorney or other representative for the other carrier involved in the negotiations; and
- 4.1.1.1.5 the date when the request for negotiation was made and the date for completion of the arbitration.

4.1.1.2 a *Statement of Unresolved Issues*, which shall include:

- 4.1.1.2.1 a listing of all issues between the carriers which have not been resolved in the negotiations;
- 4.1.1.2.2 a citation of each state or federal statute, rule, order, or docket which may govern, or be related to, each of the unresolved issues;
- 4.1.1.2.3 a detailed statement of each carrier's position with respect to each unresolved issue;
- 4.1.1.2.4 a statement of the last offer made by each carrier on each of the unresolved issues;
- 4.1.1.2.5 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;
- 4.1.1.2.6 a statement of any conditions which the petitioning carrier requests be imposed;
- 4.1.1.2.7 a proposed schedule for the implementation of the terms and conditions of each arbitrated issue; and
- 4.1.1.2.8 a statement indicating the petitioning carrier's position of what type of proceeding is necessary to resolve each of the unresolved issues.

4.1.1.3 All relevant material and documentation, appropriately referenced, which the petitioning carrier wishes the arbitrator to consider in resolving each of the unresolved issues.

4.1.1.4 Material and documentation relevant to any other issue discussed and resolved during the negotiations.

4.1.2 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 and the Public Advocate the following documents:

4.1.2.1 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;

4.1.2.2 a *Counter-Statement of Unresolved Issues* which shall include that carrier's responses to the listings and statements required to be set out in the *Statement of Unresolved Issues*; and

4.1.2.3 all relevant material and documentation, appropriately referenced, which the non-requesting carrier wishes the arbitrator to consider in resolving each of the unresolved issues.

4.1.3 Within thirty-two days after the filing of the *Petition for Arbitration*, the Public Advocate may file with the Commission, and serve upon the carriers, a notice indicating whether the Advocate will

participate in the arbitration. If the notice indicates an intent to participate, the Public Advocate shall, with such notice, file and serve a document setting forth the Public Advocate's position on all the unresolved issues and the Public Advocate's position on the appropriate proceedings necessary to resolve each disputed issue.

4.1.4 Within forty days after the filing of the *Petition for Arbitration*, the Commission Staff may file with the Commission, and serve upon the carriers and the Office of the Public Advocate, a notice indicating that Staff desires to participate in the arbitration and setting forth the Staff's position on all the unresolved issues and the Staff's position on the appropriate proceedings necessary to resolve each disputed issue.

4.1.5 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.

4.1.6 Trade secrets and commercial or financial information submitted during the arbitration which is of a privileged and confidential nature shall not be considered public records and will be held and treated as confidential by the Commission, the arbitrator and adjuncts, the carriers, the Public Advocate, and the Commission Staff.

Interpretation. These provisions provide a pleading and document submission cycle for the carriers once the negotiation window opens under 47 U.S.C. § 252(b)(1). The *Petition* and *Response* provide the Commission with the identify of contact persons and the deadline for completing arbitration. The *Statement of Unresolved Issues* and the corresponding *Counter-Statement* seek to narrow the issues and positions and assist the Commission and the arbitrator to determine the nature of the disputes. This will aid in the task of selecting adjuncts (see below) and in determining the type of further proceedings which might be required.

4.1.8 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.

4.1.9 As noted before, the guidelines allow the Public Advocate to participate in the arbitration process. To do so, the Public Advocate must file a document revealing whether the office will participate. If participation is indicated, the Advocate must also submit a summary of that office's position on the disputed issues and the level of process desired for each. This will allow the arbitrator to determine what proceedings to hold. Similarly, the Commission Staff has the power, but not the obligation, to become a participant in the arbitration. To do so, Staff must file a notice of its intent along with a position paper. Because the decision of Staff to participate may, in many instances, depend on the Public Advocate's participation, the Staff may file its pleading last.

4.1.10 If Staff does elect to participate, the members of Staff assigned to present Staff's position shall remain separate from those members acting as arbitrators or adjuncts. No other entity or person may participate in the particular arbitration process.

4.1.11 Each carrier, the Public Advocate, and the participating Commission Staff must also indicate the level of process it feels is necessary to resolve adequately and appropriately the disputed issues. Thus, each carrier, the Advocate, and Staff, should indicate whether the issue can be resolved on the written documents or whether it might require a trial-type hearing, involving oral testimony, cross-examination, etc.

4.1.12 Consistent with 47 U.S.C. § 252(b)(2)(A)(iii), the guidelines require the petitioning carrier to also provide documentation pertaining to the issues on which the carriers have already resolved during the negotiations. By having this information about the resolved issues provided early on, the Commission can then begin the review process of the entire agreement.

4.2 Appointment of Arbitrator and Adjuncts

- 4.2.1 Within ten days after the receipt of a Petition for Arbitration, the Executive Director of the Commission shall appoint a neutral arbitrator to resolve the disputed issues. Generally, the arbitrator shall be a Hearing Examiner employed by the Commission; however, the Executive Director may, in his discretion, appoint another disinterested, qualified person to act as arbitrator. Unless the carriers agree, the Executive Director shall not appoint as arbitrator a person who previously served as mediator in the same negotiation. The Executive Director shall promptly notify the carriers and the Public Advocate of the person appointed as arbitrator.
- 4.2.2 At any time during the arbitration, the Executive Director of the Commission, at the request of the arbitrator or otherwise, may appoint one or more adjuncts to assist the arbitrator. Such adjuncts may be persons who possess particular or specialized knowledge, skill, or expertise which may be helpful to the arbitrator. Such adjuncts shall act under the direction and supervision of the arbitrator and provide guidance to the arbitrator concerning any relevant issue. With the express approval of the arbitrator, such adjuncts may participate in any hearings conducted and may request the carriers to submit any additional documents, information, or data.
- 4.2.3 The arbitrator shall fairly and efficiently resolve any unresolved issues in accord with 47 U.S.C. § 252(c). In so doing, the arbitrator shall insure that such resolution is consistent with any governing state law, regulation, and standard.
- 4.2.4 Neither a carrier involved in arbitration, the Public Advocate, nor any member of the Commission Staff involved as a participant in the arbitration shall have any *ex parte* contacts with the arbitrator or any appointed adjunct concerning any substantive matter related to the arbitration.
- 4.2.5 Interpretation. Under these guidelines, the Executive Director is specifically authorized to designate the arbitrator and any adjuncts. In most situations, the arbitrator and adjuncts will come from the pool of members of the Commission Staff, outside rate counsel, and consultants. The function of the adjunct is to assist the arbitrator in understanding complicated technical, financial, or economic issues. The arbitrator remains the ultimate decision-maker. However, the arbitrator may delegate to the adjunct the authority to make inquiries during any hearing and to request further documentation from the carriers. While the adjunct may provide additional insight, the arbitrator's decision still must be based on materials submitted in accord with these guidelines.
- 4.2.6 Given the number and nature of unresolved issues in an arbitration, the Executive Director may assign more than one adjunct to any arbitration. As noted in the introduction, the arbitrator has dual responsibilities. The arbitrator must umpire the dispute between the carriers. However, the arbitrator must also insure that any final resolution is compatible with any governing state statutes, rules, orders, and policy.
- 4.2.7 The arbitrator and the adjuncts should be insulated from contacts with any participant except when all the participants will have the opportunity to be heard. This bar on closed door communications extends to the members of the Commission Staff involved in representing Staff when Staff has given notice that it wishes to participate in the arbitration.
- 4.3 Paper Resolution or Formal Oral Evidentiary Hearing
- 4.3.1 At any time after the filing of the Response, the arbitrator, or the adjunct upon direction, may direct the carriers to submit additional information, data, documents, or memoranda to assist in the determination of any unresolved issue.
- 4.3.2 Within forty-five days after the filing for a Petition for Arbitration, the appointed arbitrator shall notify the carriers, the Public Advocate, and Commission Staff of:
- 4.3.2.1 the arbitrator's identification of the unresolved issues which will be subject to arbitration;
 - 4.3.2.2 the opportunity, if any, for the carriers to submit written responses and additional materials in response to the initial pleadings and the date for submission of such responses;
 - 4.3.2.3 the scope of discovery, if any, to be permitted and a schedule for the filing of discovery requests and responses; and
 - 4.3.2.4 the type of resolution process which the arbitrator has tentatively concluded will be used for each of the unresolved issues.

- 4.3.3 The arbitrator may conduct a preliminary conference in person or by telephone in order to clarify the issues, to obtain evidentiary resolutions, to set scheduling, and to consider any other matter designed to expedite the arbitration.
- 4.3.4 If the arbitrator shall determine that a formal oral evidentiary hearing is needed to resolve disputed material facts or would be helpful, the arbitrator shall notify the carriers, the Public Advocate, and Commission Staff, in writing of:
- 4.3.4.1 the date, time, and place for the oral evidentiary hearing;
 - 4.3.4.2 the date for filing and service of any pre-filed direct testimony, if any;
 - 4.3.4.3 the date for each participant to file and serve a list of its proposed witnesses and exhibits;
 - 4.3.4.4 the date for filing and service of any legal memoranda, if any; and
 - 4.3.4.5 the format for the conduct of the oral evidentiary hearing.
 - 4.3.4.5.1 Within five days after the conclusion of an oral evidentiary hearing, each carrier shall submit to the arbitrator and serve upon the other carrier, the Public Advocate, and Commission Staff, a proposed award setting forth a resolution on each unresolved issue. Such proposed award shall set forth the rationale for each resolution.
- 4.3.5 If the arbitrator determines that a formal evidentiary hearing with oral testimony is not necessary to resolve a disputed issue, the arbitrator shall notify the carriers, the Public Advocate, and Commission Staff, in writing of:
- 4.3.5.1 the date, time, and place for consideration of the issue;
 - 4.3.5.2 the date, if any, by which participants can file and serve additional material not already included with the *Petition* and *Response*, or not previously requested by the arbitrator;
 - 4.3.5.3 the date, if any, for filing and service of any legal memoranda, if any; and
 - 4.3.5.4 the format for the conduct of the consideration.
 - 4.3.5.4.1 Within five days after the conclusion of the consideration, each carrier shall submit to the arbitrator and serve upon the other carrier, the Public Advocate, and Commission Staff, a proposed award setting forth a resolution on each unresolved issue. Such proposed award shall set forth the rationale for each resolution.
- 4.3.6 The proceedings at any formal oral evidentiary hearing or at an informal consideration shall be recorded, either by audio tape recording or stenography, for use by the Commission. Either carrier may arrange, at its own expense, to have an additional form of recording performed.
- 4.3.7 The arbitrator may close arbitration proceedings to the public in order to protect against disclosure of trade secrets and commercial or financial information which is of a privileged or confidential nature.
- 4.3.8 Within nine months after the date on which negotiation was requested, the arbitrator shall file with the Commission and serve on the carriers, the Public Advocate, and Commission Staff, a written award which shall resolve all unresolved issues, set a schedule for implementation, and comply with 47 U.S.C. § 252(c).
- 4.3.9 If the carriers reach voluntary agreement after the initiation of arbitration, the carriers shall promptly notify the arbitrator and file with the Commission and serve on the Public Advocate a dismissal of the arbitration.
- 4.3.10 The Commission shall charge each carrier to the arbitration equally for the costs of conducting the arbitration.

Interpretation. *These guidelines commit to the arbitrator the decision concerning the type of process which should be undertaken to adequately resolve each of the disputed issues. Soon after the close of the pleading cycle, the arbitrator is given the power to allow the carriers an opportunity to file rebuttal responses and to undertake discovery on a set schedule. Then, or at some later date, the arbitrator will make such a decision on how to hear the issues. Such a decision will be based upon the carriers' earlier submissions, including their statements about the needed process. For legal questions, the arbitrator may determine to proceed on the "paper record" and only hear legal arguments. For issues which involve disputed factual questions, such as costs, or which may require an appreciation of complex technology, the arbitrator may desire to conduct a full evidentiary hearing to provide clarity on*

the issue. In either case, the arbitrator must notify the participants of the hearing date, the type of evidence or exhibits which will be permitted, and the procedures to be utilized at the scheduled proceeding. For oral evidentiary hearings, the participants must exchange witness and exhibit lists. The arbitrator can employ both types of hearings concurrently, choosing to resolve several issues via the paper record and make others subject to oral evidentiary hearings.

After either type of proceedings, each carrier must submit to the arbiter a proposed award, which must detail why it should prevail on each issue in the arbitration. Such submissions will serve in the stead of briefing and will assist the arbiter to promptly file his decision. The arbitrator may require the carriers to accompany such written submissions with an electronic word-processing file containing the proposed award.

References in the above guidelines requiring service upon, and action by the Public Advocate and the Commission Staff, are applicable only if the Advocate and Commission Staff have indicated a desire to participate in the arbitration. If the Advocate and Staff have not given the required notification, the references in the above guidelines are not applicable.

As required by the federal Act, the arbitrator must file his award within nine months after the filing of the negotiation request. The Commission will not approve the arbitration award at this juncture. Under 47 U.S.C. § 252(e), the Commission will have before it the arbitrator's award when it is called upon to review the agreement. At that time, it will determine whether the award complied with prerequisites in the federal Act and is consistent with state law, state regulations, and state standards.

5.0 Review of Agreements and “Statement of Terms and Conditions”

5.1 An agreement (including any attachments and appendices) between carriers concerning the terms and conditions set out in 47 U.S.C. § 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 U.S.C. § 252(a), or within thirty days after the filing of an arbitrator's award in cases of an agreement subject to arbitration under 47 U.S.C. § 252(b). The Commission may extend the time for good cause. On the same day of filing, a copy of the agreement (including any attachments and appendices) shall be served upon the Public Advocate. The filing obligation shall be the requirement of all carriers and parties to the agreement.

5.1.1 Negotiated Agreements under 47 U.S.C. § 252(a)

5.1.1.1 If carriers have adopted an agreement by negotiation under 47 U.S.C. § 251(a), the carriers shall, at the time of filing of the agreement, file and serve on the Public Advocate statements setting forth the reasons why the Commission should not reject the agreement under the standards in 47 U.S.C. § 252(e)(2)(A) and the reasons why the agreement is consistent with applicable state laws and regulations. Such statements shall be accompanied by any relevant supporting documents and materials.

5.1.1.2 Within ten days after the filing of the agreement, the Commission shall provide notice of the filing of the agreement. Such notice 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 to be accessed through a home page heading entitled “Public Notices of Telecommunications Interconnection Agreements Submitted for Approval.” The notice to the submitted agreement shall be maintained on the Commission's website for thirty days. The Commission Staff, at its discretion, may direct the submitted carriers to disseminate such notice by other, additional means, such as by newspaper publication or by direct transmission, by facsimile, courier, or mail, to particular entities or persons.

5.1.1.3 During the comment period, any person, the Public Advocate, and the Commission Staff 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.

- 5.1.1.4 After the date for the submission of comments and responses, the Executive Director shall determine whether the review process should be conducted by the Commission directly or after initial proceedings by a designee. The Commission, or its designee, shall, at least fifteen days in advance, notify the submitting carriers, the Public Advocate, and all persons who have submitted written comments of the date, time, and place for a proceeding to consider approval or rejection of the agreement. At such proceeding, the Commission, or its designee, may hear argument from the carriers, the Public Advocate, the Commission Staff, and any person who submitted written comments. The Commission or its designee may, in its discretion, also hear evidence from any of such participants at such proceeding if the Commission, or its designee, has given at least seven days notice of its intent to do so.
- 5.1.1.5 If the proceeding is initially held by a designee, that designee 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.
- 5.1.1.6 Within ninety 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 a 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.
- 5.1.1.7 If the Commission approves an agreement, such agreement shall be made available for public inspection and copying ten days after approval.

Interpretation. *These guidelines require all agreements to be filed within thirty days after they are finalized, either by execution or by entry of an arbitration order. The carriers who have reached a negotiated agreement must also file a memorandum supporting its approval. The subsequent notice will simply inform the public that such an agreement has been tendered, may be inspected, and may be commented upon. Because an approved agreement is required to be made public under 47 U.S.C. §252(h), the Commission believes that an agreement offered for approval is also available to the public. Interested persons can then file comments with the Commission. Moreover, because under 47 U.S.C. § 252(a), this type of agreement need not meet the particular standards set forth in 47 U.S.C. §251, the comment period is short and there will generally be no need for complex technical hearings. If an evidentiary hearing is needed, the carriers, Commission Staff, the Public Advocate, and other commenting persons must be alerted to that fact and given time to prepare for the hearing. However, the Commission retains the authority to approve or reject the agreement based solely on the paper record which may be established.*

The guidelines also recognize that the Commission may wish to have the review process, in some instances, to be initially undertaken by a Hearing Examiner. The determination whether to proceed initially before a Hearing Examiner is delegated to the Executive Director. If that Hearing Examiner procedure is chosen, the guidelines provide for a hearing and exception procedure modeled after present practice, but with shortened time periods.

If the Commission rejects an agreement, the carriers will have thirty days to submit a corrected agreement. In this second round, only those persons who participated in the original proceeding need be notified and given an opportunity to comment. After receiving those comments, the Commission may then act without further protracted proceedings.

In all cases, the participants must be aware that the Commission must enter an order approving or rejecting the agreement within ninety days after its submission. All hearings, whether conducted by a designee or the Commission itself, must be scheduled to accommodate that deadline.

5.1.2 Agreements Arbitrated Under 47 U.S.C. § 252(b)

- 5.1.2.1 If an agreement has been adopted by arbitration under 47 U.S.C. § 252(b), one, or both, of the carriers shall, at the time of filing of the agreement, file a statement setting forth: (1)

the carrier's position as to whether the agreement should be adopted, rejected, or modified; (2) the reasons why the agreement should not be rejected under the standards in 47 U.S.C. § 252(e)(2); and (3) the reasons why the agreement is consistent with applicable state laws and regulations. Such statements shall be accompanied by any relevant supporting documents and materials.

- 5.1.2.2 On the same day of the filing of the agreement, the carriers shall give notice of the filing of the agreement. Such notice shall inform interested parties that they may file with the Commission written comments accompanied with supporting documentation concerning the agreement within ten days after the date of the public notice. The notice shall also include the date, time, and place, when the Commission will conduct a public proceeding to approve or reject the tendered agreement. Such notice shall be: (1) published in a newspaper of state-wide circulation; and (2) sent by facsimile and United States mail to each other entity that then holds a Certificate of Public Convenience and Necessity to provide local exchange telecommunications service in Delaware. In addition, on the same date, the Commission shall post the notice on the Commission's Internet website to be accessed through a heading on the home page entitled "Public Notices of Telecommunications Interconnection Agreements Submitted for Approval." The notice for the agreement shall be maintained on the Commission's website for twenty days.
- 5.1.2.3 During the comment period, any person, the Public Advocate, and the Commission Staff may serve and file written comments, accompanied with supporting documentation. The submitting carriers may file and serve responses to any written comments within five days after the close of the comment period.
- 5.1.2.4 At any proceeding held to approve or reject the agreement, the Commission may hear argument and, in its discretion, receive evidence concerning approval or rejection of the agreement. The Commission Staff may participate in such proceeding as to all portions of the agreement. The Commission, in making its determination, may also rely upon any information, data, documents, or material submitted during arbitration.
- 5.1.2.5 Within thirty days after the submission of the agreement, the Commission shall issue an order approving or rejecting the agreement or portions thereof. If the order rejects the agreement or portions thereof, the order shall set forth the deficiencies found. The carriers may, within thirty days after a 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.
- 5.1.2.6 If the Commission approves an agreement, such agreement shall be made available for public inspection and copying ten days after the approval.

Interpretation. *Again, these guidelines contemplate notice to be given when two carriers submit for approval an agreement which has been subject to arbitration. However, given the short time frame, the notice will also give notice of the date the Commission will consider the matter. Thus, the submitting carrier must, prior to filing the agreement, give notice to the Commission and obtain a date for a scheduled proceeding. This date will then be reflected in the notice. The comment period is also shortened. With the limited time frames and given the history of arbitration by the Commission presumably on the most difficult issues, the Commission will most likely proceed simply on the written record. In this process, the Commission Staff may present its views on any portion of the agreement including the issues which were not arbitrated. In reviewing the arbitrated issues, the Commission may rely upon those materials in reviewing the agreement. Again, if the agreement is rejected, the parties will have thirty days to submit a "corrected" agreement which then may be approved with a round of comments from the prior parties but without further protracted proceedings.*

5.1.3 Statement of Terms and Conditions Under 47 U.S.C. § 252(f)

- 5.1.3.1 If Bell Atlantic-Delaware, Inc. ("BA-Del"), chooses to file with the Commission a statement of the terms and conditions under 47 U.S.C. § 252(f)(1), it shall, on the same day of filing, serve a copy of the statement on the Public Advocate. With the filing, BA-Del shall also

- file with the Commission and serve on the Public Advocate a memorandum setting forth the reasons why the Commission should approve the statement, why the terms and conditions comply with 47 U.S.C. §§ 251, 252(d), and implementing federal regulations, and why the terms and conditions are consistent with applicable state laws and regulations. BA-Del may also support any relevant supporting documentation.
- 5.1.3.2 On the date of filing of its statement, BA-Del shall give notice of its filing. Such notice shall indicate that any person may file comments concerning the tendered statement with the Commission no later than twenty days after publication of the notice. Such notice shall be: (1) published in a newspaper of state-wide circulation; (2) sent by facsimile and United States mail to each participant on the service list in Regulation Docket No. 45; and (3) sent by facsimile and United States mail to each other entity that then holds a Certificate of Public Convenience and Necessity to provide local exchange telecommunications service.
- 5.1.3.3. During the comment period, any person, the Public Advocate, and the Commission Staff may serve and file written comments, accompanied with supporting documentation. BA-Del may file and serve responses to any written comments within seven days after the close of the comment period.
- 5.1.3.4 After the date for the submission of comments and responses, the Executive Director of the Commission shall determine whether the review process should be conducted by the Commission directly or after initial proceedings by a designee. The Commission, or its designee, shall give notice, at least ten days in advance, to BA-Del, the Public Advocate, and all persons who have submitted written comments of the date, time, and place for a proceeding to consider approval or rejection of such statement. At such proceeding, the Commission, or its designee, may receive argument and may, in its discretion, receive evidence concerning approval or rejection of the statement.
- 5.1.3.5 If the proceeding is held by a designee, that designee 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.
- 5.1.3.6 Within sixty days after the submission of the statement (unless the time is extended by the Commission), the Commission shall issue an order approving or disapproving the statement of terms and conditions, or any portion thereof. If the order disapproves the statement or any portion thereof, the order shall set forth the deficiencies found. Within 30 days after a rejection of the agreement, BA-Del may submit a revised statement for approval which purportedly corrects the cited deficiencies. After giving notice and an opportunity to comment to the prior participants, the Commission may then approve or reject the re-submitted statement.
- 5.1.3.7 If the Commission approves a statement, such statement shall be made available for public inspection and copying 10 days after the approval.

Interpretation. *Under 47 U.S.C. § 252(f), Bell Atlantic-Delaware may submit a statement of generally available terms and conditions to comply with the conditions imposed by section 251. The guidelines require Bell Atlantic-Delaware to give notice of such submission, and allow interested persons to comment. Afterwards, the Executive Director shall determine whether the matter should be heard directly by the Commission or initially by a Hearing Examiner. The Commission, or the Examiner, may then determine what type of proceeding is necessary before acting to approve or disapprove the terms and conditions set forth in the statement. Since the statement has attributes of a tariff, and will be submitted without any prior review by any competing carrier, the Commission, or the examiner, may believe that the filing should be subject to more traditional fact-finding proceedings, including discovery, and cross-examination. However, given the shortened time frames, the Commission will expect expedited participation by any party. In addition, the guideline recognizes that, absent Bell Atlantic-Delaware's concurrence, the statement will go into effect at the end of sixty days but that the Commission may still reject the agreement afterwards. 47 U.S.C. § 252(f)(3), (4). Thus, the guidelines allow the Commission to extend the time for its decision even if the Commission cannot unilaterally extend its effective date.*

The Commission shall assess the carriers to an agreement, equally, for the costs of reviewing such negotiated agreements, whether arbitrated or not. For statements of terms and conditions, the Commission shall assess BA-Del for the costs of the reviewing its statement.

For purposes of these guidelines, notices and documents may be filed and served by facsimile transmission. A certificate reflecting how service was made shall be filed with the Commission within a reasonable time after service.

When documents are required to be filed or submitted during arbitration, five copies shall be filed or submitted and at least one copy served on each participant. For all other materials required to be filed with the Commission, twelve copies shall be filed or submitted, and at least one copy served on each other participant.

The Commission reserves the right to waive or modify, for good cause, the application of any of the above guidelines, including any time deadline not imposed by law.