



**South Dakota Telecommunications Association**  
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*Rural roots, global connections*

January 26, 2007

Ms. Patty Van Gerpen, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Ave.  
State Capitol Building  
Pierre, SD 57501

RE: Docket TC06-176, Petition for Arbitration of Sprint Communications  
Company, L.P.

Dear Ms. Van Gerpen:

Enclosed you will find for filing in the above referenced proceeding a "SDTA Petition for Reconsideration and Clarification."

As is evidenced by the Certificate of Service attached to the Petition, service has been made to those parties identified in the case.

Thank you for your assistance in filing these documents.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard D. Coit", written over a large, stylized circular flourish.

Richard D. Coit  
SDTA Executive Director and General Counsel

RDC/ms

CC: Ben Dickens  
Mary Sisak  
Talbot J. Wiczorek  
Diane C. Browning  
Monica M. Barone

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**TC06-176 - In the Matter of the Petition  
of Sprint Communications Company L.P.  
for Arbitration Pursuant to the  
Telecommunications Act of 1996 to  
Resolve Issues Relating to an  
Interconnection Agreement with  
Brookings Municipal Utilities d/b/a  
Swiftel Communications**

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**Petition for Reconsideration and Clarification**

The South Dakota Telecommunications Association ("SDTA") hereby petitions the Commission pursuant to ARSD §§ 20:10:01:29 and 20:10:01:30.01 for reconsideration and/or clarification of its Order Denying Intervention issued on December 28, 2006, in the above captioned proceeding. Specifically, SDTA seeks a clarification from the Commission as to the extent of its rights to appear as a non-party in the proceeding pursuant to ARSD § 20:10:01:15.06. In support of this Petition, SDTA states as follows:

1. At its meeting on December 6, 2006, this Commission addressed a Petition to Intervene filed by SDTA with the Commission on November 3, 2006. The Commission voted to deny the intervention request, and subsequently issued a written "Order Denying Intervention" on December 28<sup>th</sup>, 2006. The reason for the denial is set forth on page 2 of that Order as follows:

The Commission finds that allowing an intervenor into the proceeding is inconsistent with the federal statutory scheme which sets forth the processes to be followed by state commissions in arbitration proceedings. An arbitration proceeding is clearly contemplated as a proceeding between the party petitioning for arbitration and the non-petitioning party. See 47 U.S.C. § 252. This makes sense as the result of the arbitration is a binding interconnection agreement between the two parties. The Commission would further note that its rules allow for the input of non-parties to the Interconnection Agreement. Pursuant to ARSD § 20:10:32:34, a person may file comments on the arbitrated agreement with the Commission.

2. SDTA does not agree that permitting it intervening party status in this arbitration proceeding is inconsistent with or contrary to the Federal Act. There is no language in the Act expressly addressing whether or not other parties should be involved in the arbitration proceedings to be conducted by State Commissions. Furthermore, it cannot fairly be denied that numerous issues presented as a result of the Sprint Communications Company (“Sprint”) Petition for Arbitration filed herein are issues of interest to other rural LECs in the State of South Dakota, particularly those rural LECs utilizing the SDN Communications tandem switch facilities in Sioux Falls. And, because this Commission will conduct the arbitration proceedings and render, directly, the arbitration decision, there is a reasonable likelihood that the arbitration proceedings and decision will have some affect “either favorably or adversely with respect to an interest” of other rural telephone companies doing business in the State. See ARSD § 20:10:01:15.05. This being the case, SDTA continues to believe that it should have been granted intervention in this proceeding pursuant to the state statutes and administrative rules. It is not sufficient from SDTA’s perspective to simply rely on the opportunity to participate in the subsequent interconnection agreement approval process provided for under 47 U.S.C. § 252(e) and ARSD §§ 20:10:32:33 through 20:10:32:35. Merely having the ability to present written comment after this Commission has already completed the arbitration proceeding and rendered its decision on the substantive issues fails to adequately address the legitimate due process concerns.

3. At this time, however, rather than posing a direct challenge to the Commission’s denial of the SDTA intervention, SDTA would seek from this Commission clarification concerning the extent of its rights to participate in the arbitration proceeding under the provisions of ARSD § 20:10:01:15.06 which generally references an “[i]ndividual’s right to appear” in PUC proceedings. At the Commission meeting on December 6, 2006, during the course of oral argument regarding SDTA’s Petition to Intervene there was reference to these provisions, but nothing is included in the Commission’s Order Denying Intervention indicating what may be an acceptable level of participation pursuant to the rule.

4. SDTA would urge the Commission to clarify such matters and to consider the attached procedures that have been adopted by the Minnesota Public Utilities Commission. The Minnesota rules appropriately recognize the due process concerns and rights of other interested parties to participate in arbitration proceedings on interconnection issues, allowing other interested parties to take part in the proceedings as “non-party participants.” See Minnesota

Rules §§ 7811.1700(Subp. 10) and 7812.1700(Subp.10), and Order Granting Petition, and Establishing Procedures for Arbitration, dated October 30, 1996, Docket No. P-407, 466/M-96-1111, In the Matter of Sprint Communciations Company L.P.'s Petition for Arbitration of with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 (pertinent provisions from these documents are attached as Exhibit 1). Generally, these provisions provide other interested parties or "participants" with the following rights: (1) to file written comments and request and opportunity for oral presentations; and (2) to attend all hearings and prehearing conferences as observers, subject to the same confidentiality constraints as the parties.

5. SDTA believes that, in the absence of granting full party status to SDTA, allowing it participation in these proceedings to the extent permitted in Minnesota would be appropriate in this State pursuant to ARSD § 20:10:01:15.06. It is also necessary to address in some way the due process concerns of SDTA and its membership.

Dated this 26<sup>th</sup> day of January, 2007.

Respectfully submitted:

SDTA

By: 

Richard D. Coit  
General Counsel

## CERTIFICATE OF SERVICE

I hereby certify that a copy of SDTA's Petition for Reconsideration and Clarification in Docket TC06-176 was filed electronically with the South Dakota PUC on January 26, 2007, directed to the attention of:

Patty Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

A copy was sent by US Postal Service First Class mail to each of the following individuals:

Ben H. Dickens, Jr.  
Blooston, Mordkofsky, Dickens, Duffy &  
Predergast  
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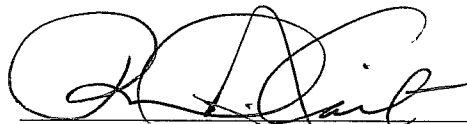
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Washington, DC 20037

Dated this 26th day of January, 2007.



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Richard D. Coit, General Counsel  
South Dakota Telecommunications Association  
PO Box 57 – 320 East Capitol Avenue  
Pierre, SD 57501-0057

DOCKET TC06-176

EXHIBIT 1

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs	Chair
Marshall Johnson	Commissioner
Dee Knaak	Commissioner
Mac McCollar	Commissioner
Don Storm	Commissioner

In the Matter of Sprint Communications  
Company L.P.'s (Sprint's) Petition for  
Arbitration of with Contel of Minnesota, Inc.  
d/b/a/ GTE Minnesota (GTE) Pursuant to  
Section 252(b) of the Federal  
Telecommunications Act of 1996

ISSUE DATE: October 30, 1996

DOCKET NO. P-407, 466/M-96-1111

ORDER GRANTING PETITION, AND  
ESTABLISHING PROCEDURES FOR  
ARBITRATION

**PROCEDURAL HISTORY**

**I. Factual Background**

On February 8, 1996, the President signed into law the Telecommunications Act of 1996, Public Law 104-104, *to be codified at 47 U.S.C. § 151 et seq.* (Act or Federal Act), which establishes requirements and procedures intended to open existing telecommunications markets to competition.

The Act allows a telecommunications carrier to request an incumbent local exchange carrier (LEC) to negotiate an agreement for interconnection, services and network elements to facilitate entry into the incumbent LEC's service area. Such a request gives rise to a corresponding duty on both carriers to negotiate in good faith. The Act also allows either negotiating party to petition the relevant State commission to arbitrate any issues the parties have not resolved through negotiations. The request for arbitration must be made between 135 and 160 days after the incumbent LEC receives the request for negotiation.

On April 19, 1996, Sprint Communications Company L.P. (Sprint) served US West Communications, Inc. (US West) with a written request to negotiate under the Act. On September 25, 1996, Sprint filed a petition with the Commission to arbitrate the unresolved issues in the negotiations.

On October 3, 1996, the Commission met to consider whether to accept Sprint's petition and establish procedures for the requested arbitration.

This is the same approach the Commission has taken in all four arbitrations initiated previously (MFS/US West, AT&T/US West, MCImetro/US West and AT&T/GTE).<sup>3</sup> In this case, the arbitration decision will be issued by January 21, 1997. The Commission will then require Sprint and US West to file their final agreement, containing all the arbitrated and negotiated terms. The Commission will approve or reject the agreement consistent with the requirements of § 252(e) of the Act.

#### **D. Intervention**

##### **1. Scope of Intervention and Participation Permitted**

Sprint and GTE are the negotiating parties in this consolidated proceeding. The Commission will allow the Department of Public Service (Department) and the Residential and Small Business Utilities Division of the Attorney General's Office (AG-RUD) to intervene as parties, based on their specific statutory rights to intervene in Commission proceedings. See Minn. Stat. § 216A.07, subd. 3 and § 8.33, subd. 3. These intervenors will have all the procedural rights and privileges of the two negotiating parties.

The Commission will also allow others to take part in the arbitration as "non-party participants" under Minn. Rules, part 7829.0900. Participants shall have the right, after the hearing has closed, to file written comments and request an opportunity for oral presentations to the ALJ, the Commission or both. Participants may attend all hearings and prehearing conferences as observers, subject to the same confidentiality constraints as the parties. Participants shall also have access to all written information admitted as evidence in the arbitration, subject to the same

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<sup>3</sup> In the Matter of MFS Communication Company's Petition for Arbitration of Rates, Terms and Conditions for Interconnection and Related Arrangements with U S West, ORDER GRANTING PETITION AND ESTABLISHING PROCEDURES FOR ARBITRATION, Docket No. P-3167, 421/M-96-729 (July 19, 1996). In the Matter of AT&T's Petition for Arbitration of Rates, Terms and Conditions for Interconnection and Related Arrangements with U S West Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, ORDER GRANTING PETITION AND ESTABLISHING PROCEDURES FOR ARBITRATION, Docket No. P-442, 421/M-96-855 (August 9, 1996). In the Matter of MCImetro Access Transmission Services, Inc.'s Petition for Arbitration with US West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, and Request for Consolidation, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION, AND GRANTING REQUEST FOR CONSOLIDATION (August 26, 1996). In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with GTE Communications, Inc. Pursuant to the Federal Telecommunications Act of 1996, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION, AND ESTABLISHING COMMENT PERIOD TO ADDRESS GTE'S CLAIM TO A RURAL COMPANY EXEMPTION (September 10, 1996).



requirements as the parties with respect to confidential or proprietary data. The Commission expects the parties to serve participants with any written briefs or exceptions filed with the ALJ or Commission. The ALJ should ensure that participants receive all hearing notices and a copy of the recommended decision.

## **2. Limit on Further Intervention**

Minnesota Statutes, section 216A.07, subd. 3 gives the Department the right to intervene in all Commission proceedings. Section 8.33, subd. 3 gives the AG-RUD a similar right of intervention. The Commission finds nothing in the Federal Act that would preempt these rights in this proceeding. State law, however, does not extend a similar right of intervention to any others. Although the Commission's current rule, part 7829.0800, subd. 2, provides for broader intervention, the Commission will vary the rule here to facilitate the timely completion of this arbitration.

Applied to this arbitration, the current intervention rule could open up the proceeding to other carriers and a variety of organizations. The addition of just a few such parties would jeopardize the Commission's ability to complete the arbitration within the limited time frame imposed by the Federal Act. Even if no such parties were allowed to intervene, deciding individual requests under the rule would likely lengthen the proceeding and detract from the ALJ's ability to move forward expeditiously on the merits of the petition. Therefore, the Commission will vary its intervention rule pursuant to Minn. Rules, part 7829.3200 and limit intervention to the two statutory intervenors.

The Commission imposed the same limit on intervention in all the arbitrations it has considered to date. Other potential new entrants argued there that they needed to intervene in the MFS proceeding because of the possible precedential impact of the Commission's MFS decision on their subsequent arbitrations. This concern was addressed by providing that the substantive decisions in the MFS proceeding would not be given any precedential weight in subsequent arbitrations. Others expressed concern that the public interest might not be adequately represented by the statutory intervenors. This concern was addressed by allowing all interested persons to take part in the proceeding as non-party participants, with full access to proprietary data admitted into evidence. The Commission will address these concerns in the same manner in this case, giving no precedential weight to the substantive decisions in this arbitration and allowing participants access to proprietary information as provided above.

## **3. Variance**

Part 7829.3200 of the Commission's rules permits the Commission to vary its rules when it determines that the following requirements are met:

1. Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;

2. Granting the variance would not adversely affect the public interest; and
3. Granting the variance would not conflict with the standards imposed by law.

Varying the Commission's intervention rule, part 7829.0900, here meets the variance requirements set out in part 7829.3200. First, as discussed above, enforcement of the Commission's intervention rule would unduly burden all those affected by the rule to the extent it delayed the proceeding beyond the federally mandated deadline. Second, the public interest will be protected in the absence of broad intervention by (1) limiting the precedential impact of this arbitration; (2) permitting intervention by the two statutory intervenors, who represent the general public or some portion thereof; and (3) allowing all others to take part in the proceedings as participants with full access to confidential and proprietary data in the record. Finally, granting the variance will not conflict with any standards imposed by law. To the contrary, limiting intervention will be consistent with the arbitration process contemplated by the Federal Act.

#### **E. Proprietary Information**

The Commission and ALJ shall treat trade secret and proprietary information as provided in the Commission's rules of practice and procedure, part 7829.0500. The ALJ may, at any time during the proceeding, enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies. The ALJ may consider using the protective order proposed by AT&T in its petition.

#### **F. Discovery**

The ALJ may permit any means of discovery available under the Rules of Civil Procedure for the District Courts of Minnesota. The parties, including intervenors, may serve discovery requests directly on other parties at any time. The parties shall serve discovery requests and responses on all parties. Discovery requests shall be filed simultaneously with the ALJ and the Commission, although parties need not file 15 copies of these requests.

The Commission urges and expects the parties to cooperate in good faith by promptly and informally exchanging all documents and other information relevant to the disputed issues, subject to claims of privilege or confidentiality. As discussed above, close cooperation among the parties will be particularly important in this consolidated proceeding to avoid duplicative discovery. The Commission or ALJ may decline to consider documents or information not disclosed during discovery.

The ALJ may establish the schedule for discovery and set any reasonable limits intended to avoid delay or undue hardship on any party. 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 ALJ with explanation. The party against whom the allegation is made may file a written response.

The ALJ and Commission may do any of the following based on a party's failure to comply with a discovery request:

Minnesota Rules, Table of ChaptersTable of contents for Chapter 7811**7811.1700 ARBITRATION OF INTERCARRIER NEGOTIATIONS.**

Subpart 1. **Request to arbitrate.** During the period from the 135th day to the 160th day, inclusive, after the later of (1) the date on which an incumbent local exchange carrier (LEC) receives a bona fide request to negotiate pursuant to part 7811.2000, subpart 1, or (2) the date upon which the LEC's rural exemption was terminated pursuant to part 7811.2000, 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 bona fide request for negotiation or the date upon which the LEC's rural exemption was terminated, whichever is later, 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;

R. any request for consolidation under subpart 12;  
and

S. a statement of how those who are not parties may participate, pursuant to subpart 10.

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 7811.1500, 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 7811.1600, 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 7811.1600, 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 7811.1500, 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, including setting deadlines for responses to discovery requests and limiting the number of questions permitted in any written depositions or interrogatories, and may set any reasonable limits on the type, scope, or extent of discovery as needed to avoid delay or undue hardship on a party.

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 later of (1) the request for negotiation that gave rise to the arbitration, or (2) the termination of the LEC's rural exemption, pursuant to part 7811.2000. 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.

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 nine months after the later of (1) the request for negotiation that gave rise to the arbitration, or (2) the termination of the LEC's rural exemption pursuant to part 7811.2000. 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 7811.1800.

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 burdens 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.

STAT AUTH: MS s 237.10; 237.16; 237.71

HIST: 22 SR 2079

*Current as of 10/24/05*

Minnesota Rules, Table of ChaptersTable of contents for Chapter 7812**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.



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.

STAT AUTH: MS s 216A.05; 237.10; 237.16

HIST: 22 SR 46

Current as of 10/24/05



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**7829.0900 PARTICIPANT.**

A person may file comments in a proceeding before the commission without requesting or obtaining party status. A participant may also be granted an opportunity for oral presentations.

STAT AUTH: MS s 216A.05

HIST: 19 SR 116

*Current as of 01/20/05*