

## CHAPTER 21. INTERCONNECTION AGREEMENTS FOR TELECOMMUNICATIONS SERVICE PROVIDERS

### Subchapter D. DISPUTE RESOLUTION.

#### §21.95. Compulsory Arbitration.

(a) **Request for arbitration.**

- (1) Any party to negotiations concerning a request for interconnection, services or network elements in accordance with the Federal Telecommunications Act of 1996 (FTA) §251 may request arbitration by the commission by filing with the commission a petition for arbitration. The petitioner must send a copy of the petition and any documentation to the negotiating party with whom agreement cannot be reached the date the petition is filed with the commission.
- (2) The petition must be received by the commission during the period from the 135th to the 160th day after the date the negotiating party received the request for negotiation. The commission will perform a sufficiency review of the petition. To the extent that a petition is determined to be insufficient, the commission will file a notice of insufficiency within five working days of receipt of the petition. In the absence of a notice of insufficiency, the petition will be presumed sufficient.
- (3) Where a petition for arbitration is found insufficient, the presiding officer may consider dismissal without prejudice in accordance with §21.67 of this title (relating to Dismissal of a Proceeding) and order the petitioner to refile.
- (4) A petition that is procedurally sufficient must be filed with the commission by the 160th day after the date on which petitioner requested negotiation.
- (5) In addition to the requirements of form specified in §21.33 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) the petition for arbitration must include:
  - (A) the name, address, telephone number, facsimile number, and email address of each party to the negotiations and the party's designated representative;
  - (B) a description of the parties' efforts to resolve their differences by negotiation, including the dates of the request for negotiation and the projected timeline for compliance under FTA deadlines;
  - (C) a Decision Point List (DPL) that includes a list of any unresolved issues and the position of each party on each issue;
  - (D) the proposed contract language from each party, as applicable, for each unresolved issue;
  - (E) all contract language agreed upon by the parties;
  - (F) if the arbitration request concerns a request for interconnection under §26.272 of this title (relating to Interconnection), the material required by §26.272(g) of this title;
  - (G) the current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed language and the disputed language of both parties; and
  - (H) a certificate of service that complies with the requirements of §21.35 of this title (relating to Service of Pleadings and Documents).

- (b) **Response.** Any non-petitioning party to the negotiation must respond to the request for arbitration by filing the response with the commission and serving a copy on each party to the negotiation. In accordance with to FTA §252(b)(3) the response must be filed within 25 days after the commission received the request for arbitration. The response must indicate any disagreement with the matters contained in the petition for arbitration, including a detailed response to the DPL and alternative proposed contract language, and may provide additional information the party wishes to present.

(c) **Selection and replacement of presiding officer.**

- (1) Upon receipt of a complete petition for arbitration, the commission may delegate authority to a presiding officer to hear the arbitration. The parties will be notified of the commission-designated presiding officer or whether the commission will hear the arbitration directly by electronic mail or in writing. The presiding officer and designated commission staff will act

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as an arbitration team. The presiding officer may be advised on legal and technical issues by members of the arbitration team. The commission staff members included in the arbitration team will be identified to the parties.

- (2) If at any time a presiding officer is unable to continue presiding over a case, a substitute presiding officer will be appointed who will perform any remaining functions without the necessity of repeating any previous proceedings. The substitute presiding officer will read the record of the proceedings that occurred prior to their appointment before issuing an arbitration award or other decision.
- (d) **Participation.** Only parties to the negotiation may participate as parties in the arbitration hearing. The presiding officer may allow interested persons to file a statement of position to be considered in the proceeding.
  - (e) **Prehearing conference; challenges.** As soon as is practicable after selection, the presiding officer will schedule a prehearing conference with the parties to the arbitration. At the prehearing conference, parties may raise any challenges to the appointment of the presiding officer or to the inclusion of any issue identified for arbitration in the petition and responses.
    - (1) The presiding officer may establish criteria for waiver of issues, including threshold issues, identified for arbitration. If a challenge to the appointment of the presiding officer is not raised at the first prehearing conference, such a challenge will be deemed waived by the parties.
    - (2) The presiding officer will serve parties with the orders ruling on challenges within ten working days of the first prehearing conference.
    - (3) The presiding officer may schedule additional prehearing conferences to consider discovery, procedural schedules, clarification of issues, amending pleadings, stipulations, evidentiary matters, requests for interim relief, and any other matters that assist the disposition of the proceedings in a fair and efficient manner.
  - (f) **Notice.** The presiding officer will establish a procedural schedule for the arbitration hearing, which may not be scheduled earlier than 35 days after the commission receives a complete request for arbitration. The presiding officer will notify the parties, not less than ten days before the hearing, of the date, time, and location of the hearing.
  - (g) **Record of hearing.** The arbitration hearing will be open to the public. If any party requests it, a stenographic record will be made of the hearing by an official court reporter appointed by the commission. It is the responsibility of the party ordering the stenographic record to request that the commission have an official reporter present. A party may purchase a copy of the transcript from the official reporter at rates set by the commission. The court reporter must provide the transcript and exhibits in a hearing to the presiding officer at the time the transcript is provided to the requesting party. If no court reporter is requested by a party, the presiding officer will record the proceedings and maintain the official record and exhibits. Each party to the arbitration hearing is responsible for its own costs of participation in the arbitration process.
  - (h) **Hearing procedures.**
    - (1) The parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing.
    - (2) Redirect examination may be allowed at the discretion of the presiding officer, provided that parties have reserved time for redirect.

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- (3) The presiding officer may temporarily close the arbitration hearing to the public to hear evidence containing information filed as confidential under §21.77 of this title (relating to Confidential Material). The presiding officer will close the hearing only if there is no other practical means of protecting the confidentiality of the information.
  - (4) Each party, as applicable, must provide a copy of all exhibits or must pay the court reporter costs associated with the production of any copies the party asks the court reporter to provide.
- (i) **Applicable rules.** The rules of privilege and exemption recognized by Texas law apply to arbitration proceedings under this subchapter. The Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, Texas Administrative Procedure Act §2001.081, and Chapter 22 of this title (relating to Procedural Rules) may be used as guidance in proceedings under this chapter.
- (j) **Authority of presiding officer.**
- (1) **Generally.** The presiding officer has broad discretion in conducting the arbitration hearing, including the authority given to a presiding officer under §22.202 of this title (relating to Presiding Officer). In addition, the presiding officer has broad discretion to ask clarifying questions and to direct a party or a witness to provide information at any time during the proceeding, as provided by subsection (q) of this section.
  - (2) **Subpoenas.**
    - (A) **Issuance of Subpoenas.** In accordance with Texas Government Code §2001.089, the presiding officer may issue a subpoena for the attendance of a witness or for the production of books, records, papers, or other objects. Motions for subpoenas to compel the production of books, records, papers, or other objects must describe with reasonable particularity the objects desired and the material and relevant facts sought to be proved by them.
    - (B) **Service and return.** A subpoena may be addressed to the sheriff or any constable, who may serve the subpoena in any manner authorized by the Texas Rules of Civil Procedure; and service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena, or by any other method authorized by the Texas Rules of Civil Procedure.
    - (C) **Fees.** Subpoenas must be issued by the presiding officer only after sums have been deposited to ensure payment of expense fees incident to the subpoenas. Payment of any such fees or expenses must be made in the manner prescribed by Texas Government Code §2001.089 and §2001.103.
    - (D) **Motions to quash.** Motions to quash subpoenas must be filed within five working days after the issuance of the subpoena, unless the party ordered to respond to the subpoena shows that it was justifiably unable to file objections at that time.
- (k) **Discovery.** In accordance with subsection (j) of this section, the presiding officer has broad discretion regarding discovery. Except as modified in paragraphs (1) - (3) of this subsection, Chapter 22, Subchapter H of this title (relating to Discovery Procedures) must serve as guidance for all discovery conducted under this chapter.
- (1) **Scope.** The presiding officer will permit only such discovery as the presiding officer determines is essential, considering public policy, the needs of the parties and the commission, the commission's deadlines under FTA §252(b)(4)(C), and considering the desirability of making discovery effective, expeditious and cost effective. The presiding officer will be the judge of the relevance and materiality of the discovery sought.
  - (2) **Limits.** Parties may obtain discovery relevant to the arbitration by submitting requests for information (RFIs), requests for inspection and production of documents (RFPs), requests for admissions (RFAs), and depositions by oral or written examination. RFIs, RFPs and RFAs must contain no more than 40 requests (subparts are counted as separate requests). The presiding officer, upon a motion filed by a party, may permit a party to propound more than

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40 requests provided that the moving party has made a clear demonstration of the relevance of and the need for the additional requests. Factors to be considered by the presiding officer in determining whether to allow additional requests include: the number of unresolved issues, the complexity of the unresolved issues, and whether the proceeding addresses costs or cost studies.

- (3) **Timing.** Discovery may commence upon the filing of the petition for arbitration. Parties must file a proposed discovery schedule that accommodates the commission's deadlines under FTA §252(b)(4)(C), taking into consideration relevant commission regulatory timeframes. The presiding officer may impose a discovery schedule that accommodates the commission's deadlines under FTA §252(b)(4)(C). If any party requests an extension that will affect the ability to complete the proceeding within the commission's deadlines under FTA §252(b)(4)(C), all parties must agree to the extension and file a joint waiver to extend such deadlines.
- (l) **Time for hearing.** The arbitration hearing will be conducted expeditiously and in an informal manner. The presiding officer is authorized to impose reasonable time limits on the arbitration hearing. The presiding officer may continue an arbitration hearing from time to time and place to place. Unless additional time is allowed by the commission or additional information is requested by the presiding officer, the hearing may not exceed five working days.
- (m) **Evidence.**
  - (1) **Relevance.** The parties may only offer such evidence as is relevant and material to a proceeding and must provide such evidence as the presiding officer deems necessary. The presiding officer will be the judge of the relevance and materiality of the evidence offered.
  - (2) **Conformity to rules.** The presiding officer will have the authority to decide whether to apply strict rules of evidence or any other rules as to the admissibility, relevance, or weight of any material tendered by a party on any matter of fact or expert opinion. The presiding officer will provide notice of this decision prior to the deadline for filing direct testimony.
  - (3) **Exhibits.** The offering of exhibits is governed by §22.226 of this title (relating to Exhibits).
  - (4) **Offers of proof.** Offers of proof are governed by §22.227 of this title (relating to Offers of Proof).
  - (5) **Stipulation of facts.** Stipulation of facts are governed by §22.228 of this title (relating to Stipulation of Facts).
  - (6) **Prefiled evidence.**
    - (A) Parties to the hearing must file their direct case at least 15 working days prior to the hearing unless the presiding officer establishes a different deadline. A copy of the direct case and notice of filing must be provided to each of the other parties to the hearing the same day the direct case is filed with the commission.
    - (B) The prepared direct case must include all of the party's direct evidence on all DPL issues in the proceeding, including written direct testimony of all of its witnesses and all exhibits that the party intends to offer as part of its direct case. The prepared case must present the entirety of the party's direct evidence on each of the issues in controversy and must serve as the party's complete direct case.
    - (C) Prefiled evidence must include, to the extent allowed or requested by the presiding officer, prefiled rebuttal testimony and exhibits and must be filed not less than eight working days prior to the hearing unless the presiding officer establishes a different deadline.
  - (7) **Public Information.** Except as provided in §21.77 of this title (relating to Confidential Information), all materials filed with the commission or provided to the presiding officer will be considered public information under the Texas Public Information Act (TPIA), Texas Government Code, §552.001, *et. seq.*

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- (n) **Sanctions.** Whenever a party fails to comply with a presiding officer's order or commission rules in a manner deemed material by the presiding officer, the presiding officer will establish a reasonable period of time for compliance. If the party does not comply within that time period, then after notice and opportunity for a hearing, the presiding officer may impose a remedy as set forth in §21.71 of this title (relating to Sanctions).
- (o) **Decision Point List (DPL) and witness list.**
- (1) Ten days after the filing of the response to the petition, the parties must file a revised DPL that is jointly populated to the extent practicable, taking into consideration the status of discovery.
  - (2) Parties must file a jointly populated DPL in a format approved by the presiding officer, no later than five working days before the commencement of the hearing. An electronic copy of the DPL must also be provided. The DPL must identify all issues to be addressed, the witnesses who will address each issue, and a short synopsis of each witness's position on each issue, with specific citation to the parties' testimony relevant to that issue. The DPL must also provide the parties' competing contract language. Except as provided in §21.77 of this title (relating to Confidential Material), all materials filed with the commission or provided to the presiding officer will be considered public information under the TPIA, Texas Government Code, §552.001, *et. seq.*
- (p) **Cross-examination.** Each witness presenting written prefiled testimony must be available for cross-examination by the other parties to the arbitration. The presiding officer will judge the credibility of each witness and the weight to be given their testimony based upon their response to cross-examination. If the presiding officer determines that the witness's responses are evasive or non-responsive to the questions asked, the presiding officer may disregard the witness's testimony on the basis of a lack of credibility.
- (q) **Clarifying questions.** The presiding officer or an arbitration team member, at any point during the proceeding, may ask clarifying questions and may direct a party or a witness to provide additional information as needed to fully develop the record of the proceeding. This has no effect on a party's responsibility to meet its burden of proof. If a party fails to present information requested by the presiding officer, the presiding officer will render a decision based on the best information available. Moreover, failure to provide requested information may subject a party to sanctions, as set forth in §21.71 of this title.
- (r) **Briefs.** The presiding officer may require the parties to submit post-hearing briefs or written summaries of their positions. The presiding officer will determine the filing deadline and any limitations on the length of such submissions. Reply briefs are not permitted unless the presiding officer determines that they would aid in the resolution of the proceeding, after consideration of applicable deadlines.
- (s) **Time for decision.** The presiding officer will endeavor to issue a proposal for award on the arbitration within 30 days after the filing of any post-hearing briefs.
- (1) If post-hearing briefs are not filed, the presiding officer will endeavor to issue the proposal for award within 30 days after the conclusion of the hearing.
  - (2) The arbitration team must issue an arbitration award not later than nine months after the date on which a party receives a request for negotiation under FTA, unless the parties have waived the nine-month deadline in writing or orally on the record.

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(t) **Decision.**

- (1) **Proposal for award.** The proposal for award will be based upon the record of the arbitration hearing. The presiding officer may agree with the positions of one or more of the parties on any or all issues or may offer an independent resolution of the issues. The presiding officer is the judge of whether a party has met its burden of proof. The proposal for award will include:
  - (A) a ruling on each of the issues presented for arbitration by the parties, including specific contract language;
  - (B) a statement of any conditions imposed on the parties to the agreement in order to comply with the provisions of FTA §252(c);
  - (C) a statement of how the final decision meets the requirements of FTA §251, including any regulations adopted by the Federal Communications Commission (FCC) in accordance with FTA §251;
  - (D) the rates for interconnection, services, or network elements established in accordance with FTA §252(d);
  - (E) a schedule for implementation of the terms and conditions by the parties to the agreement;
  - (F) a narrative report explaining the rulings included in the proposal for award, unless the arbitration is conducted by two or more of the commissioners acting as the presiding officers; and
  - (G) to the extent that a ruling establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a statement requiring that all certificated carriers be notified of such price either through web posting, mass mailing, or electronic mail within ten days of the date the ruling becomes final.
- (2) **Exceptions to the proposal for award.** Within ten working days of the issuance of the proposal for award the parties must file any exceptions to the proposal for award specifying any alleged ambiguities or errors. To the extent that a party objects to contract language within the proposal for award, the party's exceptions to the proposal for award must include alternative contract language along with an explanation of why the alternative language is appropriate, with citation to the record.
- (3) **Arbitration award.** The arbitration award will be based upon the record of the arbitration hearing. The presiding officer will endeavor to issue the arbitration award within ten working days of the receipt of parties' exceptions to the proposal for award. The presiding officer may agree with the positions of one or more of the parties on any or all issues or may offer an independent resolution of the issues. The presiding officer is the judge of whether a party has met its burden of proof. The arbitration award will include:
  - (A) a ruling on each of the issues presented for arbitration by the parties, including specific contract language;
  - (B) a statement of any conditions imposed on the parties to the agreement in order to comply with the provisions of FTA §252(c), if any;
  - (C) a statement of how the final decision meets the requirements of FTA §251, including any regulations adopted by the FCC in accordance with FTA §251;
  - (D) the rates for interconnection, services, or network elements established according to FTA §252(d), as appropriate;
  - (E) a schedule for implementation of the terms and conditions by the parties to the agreement;
  - (F) a narrative report explaining the presiding officer's rationale for each of the rulings included in the final decision, unless the arbitration is conducted by a majority of the commissioners acting as the presiding officers; and

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- (G) to the extent that a ruling establishes a new or different price for an unbundled network element; combination of unbundled network elements; or resold service, a statement requiring that all certificated carriers be notified of such price either through a web posting, mass mailing, or electronic mail within ten days of the date the ruling becomes final.
  
- (u) **Distribution.** The proposal for award and arbitration award will be filed with the commission as a public record and will be mailed by first class mail, or transmitted via facsimile to all parties of record in the arbitration. On the same day that a decision is issued, the presiding officer will notify the parties by facsimile or electronic mail that a decision has been issued. If a decision involves 9-1-1 issues, the presiding officer will also notify the Commission on State Emergency Communications by facsimile or electronic mail on the same day.
  
- (v) **Implementation.** Unless modified, implementation of the terms and conditions of the arbitration award must comply with §21.99 of this title (relating to Approval of Arbitrated Agreements).
  
- (w) **Motions for reconsideration.** No motions for reconsideration of the proposal for award are permitted. Motions for reconsideration of the arbitration award must be filed in accordance with §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).