

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 pursuant to the Federal Telecommunications Act of 1996 (FTA) §251 may request arbitration by the commission by filing with the commission's filing clerk a petition for arbitration. The petitioner shall send a copy of the petition and any documentation to the negotiating party with whom agreement cannot be reached not later than the day on which the commission receives the petition.
- (2) The petition must be received by the commission during the period from the 135th to the 160th day (inclusive) after the date the negotiating party received the request for negotiation. The commission shall perform a sufficiency review of the petition. To the extent that a petition is determined to be insufficient, the commission shall file a notice of insufficiency within five working days of receipt of the petition. In the absence of a notice of insufficiency, the petition shall be presumed sufficient.
- (3) Where a petition for arbitration is found insufficient, the presiding officer may consider dismissal without prejudice pursuant to §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 on file 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 shall 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 but not limited to 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 of the parties on each of those issues;
 - (D) proposed contract language for each unresolved issue;
 - (E) all agreed contract language;
 - (F) if the 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 most 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.

- (b) **Response.** Any non-petitioning party to the negotiation shall respond to the request for arbitration by filing the response with the commission's filing clerk and serving a copy on each party to the negotiation. Pursuant to FTA §252(b)(3) the response must be filed within 25 days after the commission received the request for arbitration. The response shall 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 such additional information as the party wishes to present.

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- (c) **Selection and replacement of presiding officer.**
- (1) Upon receipt of a complete petition for arbitration, a presiding officer shall be selected to act for the commission, unless two or more of the Commissioners choose to hear the arbitration en banc. The parties shall be notified of the commission-designated presiding officer, or of the Commissioners' decision to act as presiding officer themselves. The presiding officer along with designated commission staff will act 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 selected to be part of the team shall 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 shall be appointed who shall perform any remaining functions without the necessity of repeating any previous proceedings. The substitute presiding officer shall 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 practical after selection, the presiding officer shall schedule a prehearing conference with the parties to the arbitration. At the prehearing conference, parties should be prepared to 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. If such challenges are not raised at the first prehearing conference, they shall be deemed waived by the parties. The presiding officer shall serve parties with the orders ruling on challenges within ten working days of the first prehearing conference. The presiding officer has the authority to 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 as may assist the disposition of the proceedings in a fair and efficient manner.
- (f) **Notice.** The presiding officer shall make arrangements 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 shall 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 shall be open to the public. If any party requests it, a stenographic record shall 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 shall 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 shall record the proceedings and maintain the official record and exhibits. Each party to the arbitration hearing shall be 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 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 shall close the hearing only if there is no other practical means of protecting the confidentiality of the information.
 - (4) In addition to providing sufficient copies for all parties, the presiding officer, and, if appropriate, the court reporter, parties shall provide three copies of all exhibits for purposes of appeal at the hearing.
- (i) **Applicable rules.** The rules of privilege and exemption recognized by Texas law shall 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 Practice and Procedure) 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 pursuant to §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 set out in subsection (q) of this section.
 - (2) **Subpoenas.**
 - (A) **Issuance of Subpoenas.** Pursuant to APA, §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 shall 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 shall 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 shall be made in the manner prescribed in APA, §2001.089 and §2001.103.
 - (D) **Motions to quash.** Motions to quash subpoenas shall 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.** Pursuant to 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) shall serve as guidance for all discovery conducted under this chapter.
- (1) **Scope.** The presiding officer shall 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 shall be the judge of the relevance and materiality of the discovery sought.

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- (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 shall 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 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 shall include, but are not limited to: the number of unresolved issues, the complexity of the unresolved issues, and whether the proceeding addresses costs and/or cost studies.
 - (3) **Timing.** Discovery may commence upon the filing of the petition for arbitration. Parties shall 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 shall be conducted expeditiously and in an informal manner. The presiding officer is empowered to impose reasonable time limits. The presiding officer may continue a 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 shall provide such evidence as the presiding officer may deem necessary to determination of the proceeding. The presiding officer shall be the judge of the relevance and materiality of the evidence offered.
 - (2) **Conformity to rules.** The presiding officer shall have the authority to decide whether or not 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 shall provide notice of this decision prior to the deadline for filing direct testimony.
 - (3) **Exhibits.** The offering of exhibits shall be governed by §22.226 of this title (relating to Exhibits).
 - (4) **Offers of proof.** Offers of proof shall be governed by §22.227 of this title (relating to Offers of Proof).
 - (5) **Stipulation of facts.** Stipulation of facts shall be governed by §22.228 of this title (relating to Stipulation of Facts).
 - (6) **Prefiled evidence.**
 - (A) Parties to the hearing shall provide their direct cases to the presiding officer at least 15 working days prior to the hearing unless the presiding officer establishes a different deadline. Ten copies of the direct case shall be filed with the commission filing clerk and a copy shall be provided to each of the other parties to the hearing at the same time it is provided to the presiding officer.

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- (B) The prepared direct case shall 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 shall present the entirety of the party's direct evidence on each of the issues in controversy and shall serve as the party's complete direct case.
 - (C) Prefiled evidence shall include, to the extent allowed or requested by the presiding officer, prefiled rebuttal testimony and exhibits and shall 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 shall be considered public information under the Texas Public Information Act (TPIA), Texas Government Code, §552.001, *et. seq.*
- (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 shall fix 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 shall file a revised DPL that is jointly populated to the extent practicable, taking into consideration the status of discovery.
 - (2) Parties shall 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 shall also be provided. The DPL shall 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 shall 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 shall be considered public information under the TPIA, Texas Government Code, §552.001, *et. seq.*
- (p) **Cross-examination.** Each witness presenting written prefiled testimony shall be available for cross-examination by the other parties to the arbitration. The presiding officer shall 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 shall render a decision on the basis of the best information available from whatever source derived. Moreover, failure to provide requested information may subject a party to sanctions, as set forth in §21.71 of this title.

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- (r) **Briefs.** The presiding officer may require the parties to submit post-hearing briefs or written summaries of their positions. The presiding officer shall determine the filing deadline and any limitations on the length of such submissions. Reply briefs shall not be 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 shall endeavor to issue a Proposal for Award on the arbitration within 30 days after the filing of any post-hearing briefs. If post-hearing briefs are not filed, the presiding officer shall endeavor to issue the Proposal for Award within 30 days after the conclusion of the hearing. The arbitration team shall 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.
- (t) **Decision.**
- (1) **Proposal for Award.** The Proposal for Award shall 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 shall 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) pursuant to FTA §251;
 - (D) the rates for interconnection, services, and/or network elements established according to 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 shall 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 shall be based upon the record of the arbitration hearing. The presiding officer shall 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 shall include:

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- (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 pursuant to §251;
 - (D) the rates for interconnection, services, and/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 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.
- (u) **Distribution.** The Proposal for Award and Arbitration Award shall be filed with the commission as a public record and shall 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 shall 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 shall also notify the Commission on State Emergency Communications (CSEC) by facsimile or electronic mail on the same day.
- (v) **Implementation.** Unless modified, implementation of the terms and conditions of the Arbitration Award shall 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 shall be filed pursuant to §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).