

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of )  
 )  
 Procedures for Arbitrations Conducted )  
 Pursuant to Section 252(e)(5) of the )  
 Communications Act of 1934, as amended. )

**ORDER**

**Adopted: January 17, 2001**

**Released: January 19, 2001**

By the Commission:

1. In this Order, we amend on our own motion section 51.807 of our rules, 47 C.F.R. § 51.807, to grant additional discretion to the FCC arbitrator when arbitrating interconnection disputes pursuant to section 252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 252(e)(5) (“Act”). We also address a number of other generic procedural issues concerning section 252(e)(5) arbitrations conducted by the Commission.

**I. BACKGROUND**

2. Section 252 of the Act provides for the compulsory arbitration by state commissions of interconnection agreements between incumbent local exchange carriers (“LECs”) and other carriers in certain circumstances. Section 252(e)(5) provides that, if a state commission fails to act to carry out its responsibility under section 252 in any proceeding, then the Commission is to issue an order preempting the state commission’s jurisdiction of that proceeding, and assume the responsibility of the state commission under section 252 with respect to the proceeding.

3. In the *Local Competition Order*,<sup>1</sup> the Commission adopted interim rules governing the arbitration of interconnection agreements when it preempts state commission jurisdiction pursuant to section 252(e)(5). See 47 C.F.R. §§ 51.805, 51.807 (1999). Those rules provide, among other things: (1) that the Commission is not bound by state laws or standards that would have applied to the state commission absent preemption, 47 C.F.R. § 51.807(b) (1999); (2) that in resolving any open issues and in imposing conditions upon the parties to the agreement, the Commission will ensure that such resolution and conditions meet the requirements of section 251 of the Act, establish any rates for interconnection, services, or network elements according to

---

<sup>1</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16122-32, ¶¶ 1269-95 (1996), *subsequent history omitted (Local Competition Order)*.

section 252(d) of the Act, and provide a schedule for implementation of the terms and conditions by the parties to the agreement, 47 C.F.R. § 51.807(c) (1999); and (3) that, absent mutual consent of the parties, the decision of the arbitrator is binding on the parties. 47 C.F.R. § 51.807(h) (1999).

## II. DISCUSSION

### A. Amendment to Section 51.807

4. We adopted an interim rule in the *Local Competition Order* establishing a hybrid scheme of “final offer” arbitration for section 252(e)(5) proceedings. See 47 C.F.R. § 51.807(d), (e), (f) (1999). This rule provides that, in issuing an arbitration award, the arbitrator “shall use final offer arbitration,” which “may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.” 47 C.F.R. § 51.807(d)(1). If the parties’ offers do not meet the standards of section 251, the arbitrator may require the parties to submit additional final offers or may adopt a result offered by neither party. 47 C.F.R. § 51.807(f)(3) (1999).

5. Experience gained by states in arbitrating scores of interconnection disputes over the past five years suggests that “final offer” arbitration may not always afford the arbitrator sufficient flexibility to resolve complex interconnection issues. Accordingly, we now amend section 51.807(f)(3) to provide the arbitrator additional flexibility in certain circumstances. The arbitrator shall have discretion to require the parties to submit new final offers, or adopt a result not submitted by any party, in circumstances where a final offer submitted by one or more of the parties fails to comply with the Act or the Commission’s rules. There may be some unique circumstances where, even though the parties submit a final offer that complies with the Act and the Commission’s rules, the arbitrator will have a basis for concluding that another result is more consistent with the requirements of section 252(c) of the Act, and the Commission’s rules, although we do not identify those circumstances here.

6. Because this rule is a rule of agency procedure and practice, it may be adopted without affording prior notice and opportunity for comment. See 5 U.S.C. § 553(b)(3)(A).<sup>2</sup> In addition, we find good cause to make this change effective upon publication in the Federal Register. See 5 U.S.C. § 553(d)(3). In an order released contemporaneously herewith,<sup>3</sup> the Commission has preempted the jurisdiction of the Commonwealth of Virginia State Corporation Commission and therefore may soon need to begin the process of arbitrating complex interconnection agreement issues among carriers in Virginia. This rule change is necessary to facilitate the efficient and expeditious discharge of the Commission’s statutory responsibility in the Virginia arbitration

---

<sup>2</sup> See *JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994). See also *James V. Hurson Assoc. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000); *American Hospital Assoc. v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

<sup>3</sup> *In the Matter of Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, FCC 01-20 (rel. Jan. 19, 2001).

proceeding pursuant to section 252 of the Communications Act.

## B. Other Procedural Issues

7. Ex Parte Classification. Arbitrations conducted pursuant to section 252(e)(5) are restricted for *ex parte* purposes, consistent with the Commission's *ex parte* rules. See 47 CFR §§ 1.1208, 1.1204(b), 1.1206(a) (1999). Therefore, *ex parte* presentations are prohibited.

8. Delegated Authority. The Commission's existing arbitration rules contemplate that someone other than the full Commission may serve as arbitrator on behalf of the Commission. See 47 C.F.R. § 51.807(d) (1999). Consistent with that rule, we authorize the Chief, Common Carrier Bureau, to serve as the arbitrator in section 252(e)(5) proceedings, with the assistance of the staff of the Common Carrier and Enforcement Bureaus.<sup>4</sup> The arbitrator shall conduct such proceedings as he or she deems necessary and appropriate, issue the arbitration award, direct parties to submit an interconnection agreement conforming to the arbitration award, and issue an order approving or rejecting the agreement.

9. The Bureau's decisions issuing the arbitration award and approving or rejecting the agreement (like other orders issued pursuant to delegated authority) will be effective and binding upon release. See 47 U.S.C. § 155(c)(3); 47 C.F.R. § 1.102(b). See also 47 U.S.C. §§ 405(a), 408. Parties may file applications for review of both staff-level decisions. See 47 U.S.C. § 5(c)(4); 47 C.F.R. § 1.115 (1999). See also 47 C.F.R. § 1.102(b)(3) (1999). We anticipate the Commission's addressing any applications for review of both decisions on a consolidated basis.

10. We also instruct the Chief of the Common Carrier Bureau to include within any arbitration award establishing rates for interconnection, services, or network elements, a requirement that the interconnection agreement provide for a "true-up" of charges between the parties should the Commission ultimately modify any rates set by the Bureau.<sup>5</sup> A "true-up" mechanism will ensure that no carrier is disadvantaged by rates established by the Bureau's orders that differ from any rates set by the full Commission on review. Finally, we reserve the option of retaining an outside arbitrator should circumstances so require.

11. Timing Issues. Section 252 provides that the parties may petition the state commission to arbitrate "[d]uring the period from the 135<sup>th</sup> to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent [LEC] receives a request for negotiation ... ." 47 U.S.C. § 252(b)(1). The state commission must then issue an arbitration award "not later than 9 months after the date on which the local exchange carrier received the request [to negotiate]." 47 U.S.C.

---

<sup>4</sup> The Chief, Common Carrier Bureau, will issue a Public Notice setting forth certain procedures and a pleading schedule specific to the upcoming section 252(e)(5) arbitration proceeding involving Bell Atlantic-Virginia, Inc., MCI WORLDCOM Communications of Virginia, Inc., and MCImetro Access Transmission Services of Virginia, Inc.

<sup>5</sup> See 47 U.S.C. § 154(i); *Local Competition Order*, 11 FCC Rcd at 16030-31, ¶¶ 1066-67 (noting that the Commission has authority under section 4(i) of the Act to set interim rates subject to later "true-up" charges when final rates are established). See also *Lincoln Telephone and Telegraph Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

§ 252(b)(4)(C). In addition, section 252 provides that the state commission must approve or reject the interconnection agreement within 30 days after submission by the parties of an agreement adopted by arbitration under section 252(b), or the agreement is deemed approved. 47 U.S.C. § 252(e)(4).

12. Section 252 does not impose any time limits upon the Commission when it acts pursuant to section 252(e)(5). In this regard, the Commission stated in the *Local Competition Order* that “it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(c) [regarding issuing the arbitration award] imposes on state commissions,” because the Commission might not assume jurisdiction until nine or more months after a party requested negotiations.<sup>6</sup>

13. Nevertheless, we believe it is important to complete section 252(e)(5) arbitrations expeditiously. Although the Commission is not bound by the deadlines imposed by section 252 upon the state commissions, we encourage the Chief of the Common Carrier Bureau to endeavor to comply with those deadlines in most circumstances. Accordingly, we will deem the date an arbitration petition is filed with the Commission to be the 135<sup>th</sup> day after the incumbent LEC received the request to negotiate.<sup>7</sup> We encourage the Chief of the Common Carrier Bureau to attempt to release the arbitration award not later than 9 months after the date on which the incumbent LEC is deemed to have received the request to negotiate. We also encourage the Chief of the Common Carrier Bureau to attempt to release an order approving or rejecting any interconnection agreement adopted by arbitration pursuant to section 252(e)(5) within 30 days after its submission by the parties.

14. Judicial Review. While it is ultimately for the federal courts, not the FCC, to determine the appropriate forum for judicial review of Commission arbitration decisions, we think it will prove useful for us to set out our interpretation of the relevant statutory provisions at the outset. As noted above, the Act envisions that state commissions typically will arbitrate disputed interconnection issues and approve or reject interconnection agreements. Pursuant to state statutes, state commission actions ordinarily are subject to judicial review in state courts. The Act, however, expressly denies state courts jurisdiction to review the action of a state commission in approving or rejecting an interconnection agreement. 47 U.S.C. § 252(e)(4). The statute instead assigns judicial review of state arbitration decisions made pursuant to section 252 to the federal judiciary. Section 252(e)(6), captioned “Review of State Commission Actions,” provides for federal district court review of state commission “determinations” under section 252. 47 U.S.C. § 252(e)(6). By expressly shifting judicial review of state determinations involving the Act to the federal judiciary, Congress presumably intended to facilitate more uniform interpretation of the federal statutory scheme.

15. Final orders of the Commission, in contrast, are subject to judicial review in any federal circuit court of appeals where venue is proper. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

---

<sup>6</sup> *Local Competition Order*, 11 FCC Rcd at 16130, ¶ 1291.

<sup>7</sup> A party may file an arbitration petition with the FCC subsequent to the Commission’s decision preempting a state commission’s jurisdiction pursuant to section 252(e)(5).

We do not believe Congress intended for judicial review of final Commission orders issued pursuant to section 252(e)(5) to deviate from this course. Nothing in subsections 252(e)(5) and 252(e)(6) expressly overrides other provisions of the Communications Act and Title 28 governing judicial review of final Commission orders. Moreover, circuit court review of final Commission orders issued pursuant to section 252(e)(5) is consistent with the Act's goal of uniform interpretation of federal law. Accordingly, we believe that judicial review of any final Commission order approving or rejecting an interconnection agreement submitted after arbitration properly lies in the federal circuit courts of appeals.

16. Consolidation. Section 252(g) of the Act authorizes state commissions to consolidate arbitration proceedings. We now authorize the arbitrator, upon motion of the parties or his or her own motion, to consolidate section 252(e)(5) proceedings in order to reduce administrative burdens on the parties and the Commission in carrying out its responsibilities under the Act.

### III. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, that this Order is effective upon release.

18. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 303(r), 251, and 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 303(r), 251, and 252, that the amendment to Section 51.807 IS ADOPTED as set forth in the appendix to this Order, to be effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX**

Part 51 of Title 47 of the Code of Federal Regulations is amended as follows:

**§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.**

To be inserted and substituted for subsection (f)(3)

- (3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Communications Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.