

## **CHAPTER 69-02-10 ARBITRATION**

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### **69-02-10-01. Definitions.**

As used in this chapter:

1. "Act" means the federal Telecommunications Act of 1996 [Pub. L. No. 104-104].
2. "Arbitration" is a dispute resolution process by which a neutral third party renders a decision on disputed issues which is binding on the parties, subject to commission approval.
3. "Arbitrator" is the term used to identify the arbitration decisionmaker.
4. "Commission" means the North Dakota public service commission.
5. "Entire package final offer arbitration" is a procedure under which the arbitrator must select, without modification, the entire proposal of one of the parties.

6. "Final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration, or portions of both such offers.
7. "Issue-by-issue final offer arbitration" is a procedure under which the arbitrator must select, without modification, on an issue-by-issue process, one of the proposals of either party on each issue.
8. "Modified final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator may select and modify one of the final offers by the parties to the arbitration, or portions of both such offers.

**History:** Effective July 1, 1997; amended effective January 1, 2001.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-02. Scope of rules.**

These rules govern arbitrations of open or unresolved issues which arise under sections 251 and 252 of the Act, where one or more of the parties to a particular negotiation petition for arbitration.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-03. Representation.**

The parties may be represented by counsel. The attorney for a party may act on the party's behalf.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-04. Commencement of arbitration.**

The arbitration process is commenced with the filing of a petition with the commission pursuant to section 252(b)(1) of the Act by any party to the negotiation process within the time period designated in the Act. The arbitration process is deemed to begin on the date the petition is filed with the commission. The petitioning party must deliver a copy of the petition with proof of service on all parties to the negotiation on the day the petition is filed with the commission.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-05. Contents of petition.**

The petition must be filed in accordance with the commission's rules of practice and procedure. The petition must include the following information:

1. The name, address, telephone number, e-mail address, and fax number of the party making the request.
2. The name, address, telephone number, e-mail address, and fax number of the other party to the negotiation.
3. The name, address, telephone number, e-mail address, and fax number of each representative of the parties who are participating in the negotiation.

4. A summary of the negotiation history including mediation proceedings.
5. A comprehensive statement identifying all unresolved issues including all relevant documentation concerning those unresolved issues.
6. A statement of the position of each of the parties concerning the unresolved issues including all relevant documentation pertaining to those issues.
7. A statement identifying the issues that have been resolved through voluntary negotiation.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-06. Relevant documentation.**

Relevant documentation, for purposes of an arbitration proceeding, includes:

1. A brief or other written statement addressing the disputed issues, applicable state or federal law, and applicable state or federal regulations.
2. In the case of price disputes, the incumbent local exchange company's proposed rates or charges, and all relevant cost studies and supporting documentation.
3. Conditions that the parties request be imposed together with justification for the requested conditions.
4. A proposed schedule for implementation of the terms and conditions of the agreement.
5. Proposed interconnection agreements submitted by both the petitioner and the respondent.
6. All other documents relevant to the dispute, including copies of all documents intended to be introduced as evidence in the proceeding.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-07. Response to petition.**

Under section 252(b)(3) of the Act, a nonpetitioning party to a negotiation may respond to a petition for arbitration within twenty-five days after the commission receives the petition, and may present additional issues and provide additional relevant documentation it wishes to have considered pertaining to any of the issues. The party that files a response to a petition for arbitration with the commission must deliver a copy of the response with proof of service on all parties to the negotiation at the time the response is filed with the commission.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-08. Parties to provide list of arbitrators.**

The party or parties that request arbitration shall provide the commission, within no less than fifteen days from when the petition for arbitration is filed, names and qualifications of at least two qualified neutral arbitrators that are acceptable to all parties to the negotiation. In the event the parties are unable to agree on the acceptability of arbitrators, each party shall submit names and qualifications of at least two arbitrators that would be acceptable to that party.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-09. Selection of the arbitrator.**

The commission shall select and appoint a qualified arbitrator from the list provided by the parties. If the parties are unable to comply with the requirements of section 69-02-10-08, the commission shall appoint an arbitrator it determines to be qualified who may be a person from the commission's staff. The commission may designate one or more commission staff personnel or an outside consultant to serve as technical adviser to the arbitrator.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-10. Appointment of an arbitrator.**

The commission shall appoint the arbitrator within twenty days after a petition has been filed.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-11. Ex parte communications.**

A party may not have any ex parte communication with the arbitrator or technical advisor regarding any issue related to the arbitration except for scheduling purposes.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-37, 49-01-07

**69-02-10-12. Payment of costs and fees.**

The parties to the arbitration proceeding shall contract directly with the arbitrator for the arbitration services and shall pay all costs and fees of the arbitrator and outside consultants retained to assist the arbitrator. Costs associated with the arbitration process which are incurred by the commission or commission staff in the arbitration proceeding must be paid by the telecommunications companies involved in the proceeding under subsection 6 of North Dakota Century Code section 49-21-01.7.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07, 49-21-01.7

**69-02-10-13. Procedural officer.**

The arbitrator appointed by the commission, in addition to having the authority to arbitrate the disputed issues, has the authority of a hearing officer and will conduct the procedural aspects of the arbitration proceeding.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-08.1, 28-32-08.5, 49-01-07

#### **69-02-10-14. Prehearing conference.**

The arbitrator shall schedule a prehearing conference to be held no later than two hundred days from the date of making the request for negotiation. The purpose of the prehearing conference is to discuss a procedural schedule that conforms to the requirements of the Act, North Dakota laws and rules, and commission issued procedural order and preliminarily discuss areas of testimony, discuss the scope and timing of discovery, determine the timeline for filing testimony, and identify, simplify, and limit issues. The arbitrator shall issue an order following the prehearing conference setting forth a procedural order for the proceeding and identifying the issues in dispute.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-08.3, 49-01-07

#### **69-02-10-15. Notice of arbitration hearing.**

Within fifteen days after the prehearing conference, the commission shall issue a notice of hearing specifying the disputed issues that are the subject of the arbitration proceeding. The notice of arbitration hearing must be issued as required under North Dakota Century Code Chapter 28-32. Arbitration proceedings must be open to the public.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05, 28-32-05.1, 49-01-07

#### **69-02-10-16. Participation in the arbitration process.**

Participation in the arbitration process must be limited to the petitioning party, the responding party, and the commission staff. Commission staff personnel may participate in both advocacy or advisory roles. In the event staff participates in an advocacy role, the commission will employ its split staff procedures to designate advocacy and advisory staff members. An individual staff person may not be permitted to serve in both an advocacy and advisory role.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-17. Confidentiality.**

The petition, response, accompanying materials, and all other documentation provided to the commission are subject to the North Dakota open records laws. A party may request trade secret protection for information by filing an application with the commission under the provisions of chapter 69-02-09.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-06, 47-25.1

#### **69-02-10-18. Exchange of information.**

The parties shall cooperate in good faith in the voluntary, prompt, and informal exchange of all documents and other information relevant to the disputed issues, subject to claims of privilege or confidentiality.

1. The parties shall exchange copies of all documents in their possession or control on which they rely in support of their positions or which they may introduce as exhibits at the arbitration hearing. The parties shall serve the documents within twenty days after the response to the

petition is filed with the commission, unless otherwise agreed or such other time is ordered by the arbitrator.

2. The parties may offer other evidence that is relevant and material to the issues in dispute. The parties must be required to produce such additional evidence as the arbitrator deems necessary to understand and determine the issues in dispute.
3. The parties shall exchange a preliminary list of witnesses they expect to call at the arbitration hearing within twenty days after the response to the petition is filed, unless otherwise ordered by the arbitrator or agreed to by the parties. The preliminary list must identify expert witnesses and the subject matter of their testimony. Within seven calendar days prior to the hearing, the parties shall provide to each other and to the arbitrator a final list of witnesses they intend to call, including experts, together with a brief description of the testimony of each witness and the estimated time for the witness's direct testimony. In addition, within seven calendar days prior to the hearing, the parties shall provide to each other and to the arbitrator a list of exhibits intended to be used at the hearing together with copies of all exhibits not previously provided.
4. Within seven calendar days prior to the hearing, each party shall submit concise written statements of the party's position, including summaries of the facts and evidence a party intends to present, discussion of the applicable law, and the basis for the requested decision or denial of relief sought.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-19. Formal discovery.**

The provisions of North Dakota Century Code chapter 28-32 control discovery in arbitration proceedings. In the event any party fails or refuses to informally exchange requested information and documents, the other parties may:

1. Submit a request to conduct discovery in accordance with North Dakota Century Code section 28-32-09.
2. Submit a request to the arbitrator to compel responses to reasonable discovery requests.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-09, 49-01-07

#### **69-02-10-20. Filing of direct testimony.**

The parties to the arbitration proceeding shall file prepared written testimony relating to all of the disputed issues in the proceeding within the time frame established in the prehearing conference order.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-21. Production of documents and other discovery materials.**

Any party to the arbitration proceeding that receives a discovery request from another party or from the arbitrator shall produce all discoverable information within the time period established in these rules or the procedural order. If any party refuses or fails unreasonably to respond on a timely basis to any

reasonable request, the arbitrator may proceed on the basis of the best information available to the arbitrator from whatever source derived under section 252(b)(4)(B) of the Act.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-22. Testimony of witnesses.**

All witnesses shall present their testimony at the hearing under oath. The witnesses shall authenticate their prefiled testimony and be subjected to direct examination and cross-examination.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-11, 49-01-07

**69-02-10-23. Evidence.**

The arbitrator will consider evidence relevant and material to the dispute, giving the evidence such weight as the arbitrator determines is appropriate. Exhibits to the record may be offered by either party and may be received into evidence by the arbitrator. The admissibility of evidence shall be guided by the applicable provisions of North Dakota Century Code chapter 28-32.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 28-32-06, 49-01-07

**69-02-10-24. Continuation of mediation.**

The parties may at any time return to mediation to attempt to resolve disputed issues and the parties may involve the arbitrator in such mediation efforts. The participation of the arbitrator in such mediation efforts does not disqualify the arbitrator from continuing in the arbitration process.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-25. Transcript of the hearing.**

A stenographic record of each arbitration hearing must be made. The arbitrator may require an expedited copy of each hearing to be filed with the commission. The commission shall designate the court reporter for the proceeding. The parties shall pay the fees and costs of the reporter including the costs for preparing all transcripts directly to the court reporter.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-26. Commission to determine final offer arbitration process.**

The arbitrator shall use final offer arbitration or modified final offer arbitration as directed by the commission, except as otherwise provided in this section:

1. At the discretion of the arbitrator, the final offer arbitration process may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.
2. Negotiations between the parties may continue after final arbitration offers are submitted and the parties may submit subsequent final offers following such negotiations.

3. The arbitrator may allow up to fifteen days after submission of the initial final offers before making a decision in order to provide the opportunity for parties to conduct postoffer negotiations.
4. The arbitrator may request the commission to change the final arbitration process at any time prior to issuance of the arbitrator's decision.

**History:** Effective July 1, 1997; amended effective January 1, 2001.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-27. Filing of briefs and final offer arbitration agreements.**

The petitioner and the respondent shall each file a posthearing brief and a final offer arbitration agreement no later than ten days after the filing of the hearing transcript. The hearing officer has the discretion to shorten the time for filing. The posthearing briefs of each party must summarize all relevant portions of its final offer arbitrated agreement and cite legal authority and evidence to support the adoption of its agreement.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-28. Contents of final offers.**

Final offers submitted by the parties must:

1. Meet the requirements of section 251 of the Act and all rules prescribed by the federal communications commission pursuant to that section.
2. Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including all rules prescribed by the federal communications commission pursuant to that section.
3. Provide a schedule for implementation of the terms and conditions by the parties to the agreement. In the event a final offer of one or more of the parties fails to comply with the requirements of this section, the arbitrator may take the action necessary to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring the parties to submit new final offers or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act and rules prescribed by the federal communications commission pursuant to that section.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

#### **69-02-10-29. Arbitrator's decision.**

The arbitrator shall issue an arbitrator's decision which shall constitute resolution of the issues submitted for arbitration, subject to final commission approval. The arbitrator's decision shall include:

1. A summary of the material evidence presented;
2. A discussion of the issues incorporating the respective positions of each of the parties;
3. A proposed agreement of the arbitrated issues; and
4. The final recommendation of the arbitrator.

The arbitrator's decision shall be issued no later than nine months from the date of the request for negotiation.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-30. Submission of an interconnection agreement.**

The parties shall jointly file with the commission an agreement incorporating the provisions adopted through negotiation and arbitration within thirty days after the filing of the arbitrator's decision. The combined agreement will be referred to as the interconnection agreement.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-31. Public comments.**

Any person may file written comments on the interconnection agreement within fifteen days of the date of filing of the agreement with the commission. Each of the arbitrating parties may also file comments within the same time frame.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-32. Commission review.**

Within thirty days following the filing of the interconnection agreement, the commission shall issue a decision approving or rejecting the agreement.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07

**69-02-10-33. Applicable laws and rules.**

The arbitration procedure must be governed by the provisions of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996); the North Dakota Administrative Practices Act; North Dakota Century Code chapter 28-32; the commission's rules of practice and procedure; North Dakota Administrative Code article 69-02; and the commission issued guidelines and procedural orders.

**History:** Effective July 1, 1997.

**General Authority:** NDCC 28-32-02, 49-02-11

**Law Implemented:** NDCC 28-32-05.1, 49-01-07