



PUBLIC NOTICE

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PROCEDURES ESTABLISHED FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT BETWEEN INTRADO COMMUNICATIONS OF VIRGINIA AND EMBARQ

WC Docket No. 08-33

On June 4, 2008, the Wireline Competition Bureau (Bureau) released the *Intrado Preemption Order*,¹ which preempted, pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (Act),² the jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to the arbitration of an interconnection agreement between Intrado Communications of Virginia Inc. (Intrado) and Central Telephone Company of Virginia and United Telephone – Southeast, Inc. (collectively, Embarq).

In the *Intrado Preemption Order*, the Bureau directed Intrado to contact the Bureau to schedule a joint pre-filing conference.³ The order further directed the parties to refer to the procedures that had been established for the Commission's previous arbitrations.⁴ Finally, the Bureau indicated that it would issue a public notice establishing procedures and a pleading schedule specific to the arbitration proceeding once the pre-filing conference had been held.⁵ An initial joint pre-filing conference was held on July 14, 2008, wherein the parties indicated they were continuing to negotiate in an effort to resolve additional issues and thus limit the number of issues required to be arbitrated. The Bureau directed the parties to provide weekly updates on the status of their discussions. In this Public Notice, we establish procedures and a pleading schedule for this proceeding, pursuant to authority delegated to the Chief of the Bureau.⁶

¹ See *Petition of Intrado Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Central Telephone Company of Virginia and United Telephone – Southeast, Inc. (collectively, Embarq)*, WC Docket No. 08-33, Memorandum Opinion and Order, DA 08-1330 (WCB rel. June 4, 2008) (*Intrado Preemption Order*).

² 47 U.S.C. § 252(e)(5).

³ See *Intrado Preemption Order*, DA 08-1330, at para. 5.

⁴ See *id.* at n.15.

⁵ See *id.* at para. 5.

⁶ See *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, Order, 16 FCC Rcd 6231 (2001) (*Arbitration Procedures Order*); see also 47 C.F.R. §§ 51.805, 51.807. The Commission delegated to the Chief, Common Carrier Bureau (now the Wireline Competition Bureau), authority to serve as the Arbitrator in section 252(e)(5) arbitration proceedings, with the assistance of the staff of the Wireline

A. Commencement of the Arbitration

1. Petition for Arbitration. A Petition for Arbitration must be filed no more than 30 days after the pre-filing conference. For purposes of the Commission's resolution of the issues, the date on which a Petition for Arbitration is filed with the Commission shall be deemed to be the 135th day after which Embarq received the request to negotiate.⁷ The Petitioner must serve a copy of its Petition on the Respondent not later than the day on which the Commission receives the Petition. A Petition for Arbitration shall include a Request for Arbitration and a Statement of Relevant Authority, as described below. Failure to comply with these requirements may result in dismissal of the Petition for Arbitration.

1.1. The Request for Arbitration shall include:

- a) The name, address, telephone number, facsimile number, and e-mail address of each party to the negotiations and of each party's designated representative in the proceeding;
- b) A description of the parties' efforts to resolve their differences through negotiation;
- c) A list of every unresolved issue, categorized by subject matter, and the position of each of the parties on each issue (Statement of Unresolved Issues);
- d) A list of the issues that have been resolved by the parties;
- e) The most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed upon language and the disputed language each party proposes;
- f) A copy of the interconnection agreement, if any, under which the parties are currently operating;
- g) A copy of all pleadings in the arbitration proceeding before the state commission and of any letters, orders, or rulings of the state commission in that proceeding;
- h) A list identifying each person with knowledge upon whom Petitioner intends to rely to support its position on each of the unresolved issues; and
- i) Copies of all cost models, cost studies, and other studies on which Petitioner intends to rely to support its position and any documentation underlying those cost models, cost studies, and other studies. Computerized cost models must be submitted in a form that allows the Arbitrator and the parties to alter inputs and determine the effect on cost estimates.

Competition and Enforcement Bureaus. As used in this Public Notice, the term "Arbitrator" refers to the Bureau and authorized staff of the Wireline Competition and Enforcement Bureaus assisting in the arbitration proceeding.

⁷ Although the Commission is not bound by the deadlines imposed by section 252 upon the state commissions, the Bureau will attempt to release the arbitration award not later than nine months after the date on which Embarq is deemed to have received the request to negotiate. See *Arbitration Procedures Order*, 16 FCC Rcd at 6233-34, paras. 11-13.

1.2. The Statement of Relevant Authority shall be organized on an issue-by-issue basis, in the same manner as the Statement of Unresolved Issues, and shall:

- a) Identify any proceeding pending before the state commission or this Commission relating to the disputed issues; and
- b) Discuss all federal and state statutory, judicial, and regulatory authority (including contrary authority) relating to the disputed issues.

2. Response. Within 25 days after service of the Petition for Arbitration, Respondent shall file with the Commission and serve on each party to the proceeding a Response, which shall include a Response to the Statement of Unresolved Issues, Respondent's Statement of Additional Unresolved Issues, and a Statement of Relevant Authority.

2.1. The Response to the Statement of Unresolved Issues shall include:

- a) The Respondent's position as to each unresolved issue identified by Petitioner;
- b) A list identifying each person with knowledge upon whom Respondent intends to rely to support its position on each of the unresolved issues; and
- c) Copies of all cost models, cost studies, and other studies on which Respondent intends to rely to support its position and any documentation underlying those cost models, cost studies, and other studies. Computerized cost models must be submitted in a form that allows the Arbitrator and the parties to alter inputs and determine the effect on cost estimates.

2.2. The Respondent's Statement of Additional Unresolved Issues shall list each unresolved issue between Petitioner and Respondent for which arbitration is sought that is not identified in Petitioner's Statement of Unresolved Issues and the position of each of the parties on each of these issues. This portion of the response shall be organized on an issue-by issue basis and shall contain the information specified in 1.1 and 1.2, above.

2.3. The Statement of Relevant Authority shall be organized on an issue-by-issue basis in the same manner as Respondent's Statement of Unresolved Issues and Statement of Additional Unresolved Issues and, to the extent not provided by Petitioner, shall:

- a) Identify any proceeding pending before the state commission or this Commission relating to the disputed issues; and
- b) Discuss all federal and state statutory, judicial, and regulatory authority (including contrary authority) relating to the disputed issues.

3. Reply. The Arbitrator may request that the Petitioner file a reply to any unresolved issues identified by Respondent and establish a deadline for its submission.

4. Consideration of Issues. The Commission shall limit its consideration to the issues set forth in the Petition and in the Response, if any.

B. Status Conferences

1. Initial Status Conference. The parties shall appear for an initial status conference on a date set by the Arbitrator. At this conference, the parties shall raise any challenges to the appropriateness for arbitration of any issue listed in the Petition for Arbitration or Response. If such challenges are not raised at this conference, they shall be deemed waived. The following matters also may be discussed:

- a) Simplifying or narrowing the issues;
- b) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- c) Settlement of some or all of the unresolved issues by agreement of the parties;
- d) Discovery procedures and schedule;
- e) The schedule for the remainder of the case and the dates for any further status conferences; and
- f) Such other matters that may aid in resolving the unresolved issues or issuing an arbitration award.

2. Subsequent Status Conferences. The Arbitrator may hold such other status conferences as deemed necessary.

C. Discovery

1. Admissions. Assertions made in the Petition and not specifically denied in the Response shall be deemed admitted for the purposes of this proceeding.

2. Discovery Methods. The parties may obtain discovery through document requests, interrogatories, oral depositions, and requests for admissions. Discovery disputes will be resolved based on the written pleadings, any sworn affidavits attached thereto, and materials, if any, provided for *in camera* inspection, unless a discovery conference is deemed necessary.

- a) **Discovery Period.** The Arbitrator shall establish a time frame for the commencement and completion of all discovery. All written discovery responses shall be served and all oral depositions shall be completed by the discovery cut-off date established by the Arbitrator. All discovery disputes shall also be resolved by the discovery cut-off date.
- b) **Written Responses.** Responses to all written discovery requests shall be submitted to the requesting party no later than fifteen days after the date on which the request was received.
- c) **Document Requests.** The Arbitrator shall establish a deadline for production of documents requested in the course of discovery.
- d) **Depositions.** The parties shall coordinate the scheduling of oral depositions in advance of taking such depositions. No party shall seek to depose a witness without first providing written notice at least five days in advance. Depositions shall be taken at a time and place agreed upon by the parties.

- e) **Objections.** Objections to discovery requests shall be filed within three days of receipt of the request. The parties shall negotiate diligently and in good faith concerning any discovery dispute prior to the filing of any objection. The objections shall include a statement that negotiations were conducted diligently and in good faith. If necessary, the Arbitrator will convene a discovery conference to resolve discovery disputes.

D. Decision Point List

1. Submission of Joint DPL. Prior to the arbitration hearing, the parties shall jointly file a Decision Point List (“DPL”) in a format approved by the Arbitrator, at the time set by the Arbitrator. An electronic copy of the DPL shall be provided to the Arbitrator. The DPL shall set forth, as to each unresolved issue:

- a) A summary of each party’s position;
- b) A listing of all disputed issues of fact;
- c) Relevant admissions or stipulations of fact; and
- d) Each party’s proposed contract language.

2. Revision of Joint DPL. The parties shall file an updated DPL at a time established by the Arbitrator, which shall include specific citation to the parties’ testimony and other evidentiary submissions relevant to each unresolved issue.

E. Evidentiary Submissions

1. Submissions. Unless the Arbitrator orders to the contrary, the Petitioner and Respondent are required to file and serve the following on the dates established by the Arbitrator:

- a) **Direct Testimony.** Each party shall file and serve on each other party all of the evidence it intends to offer as part of its direct case, in the form of affidavits, with supporting documentation, expert reports and exhibits. The evidence shall be organized on an issue-by-issue basis, in accordance with the DPL. Each expert report shall include a complete statement of all opinions to be expressed by the expert, the basis and reasons for each opinion, and all data or other information considered by the witness in forming those opinions.
- b) **Rebuttal Testimony.** Each party shall file and serve on each other party all of the evidence it intends to offer as rebuttal to the other party’s direct testimony, in the form of affidavits, with supporting documentation, expert reports and exhibits. Each expert report shall include a complete statement of all opinions to be expressed by the expert, the basis and reasons for each opinion, and all data or other information considered by the witness in forming those opinions.
- c) **Witness and Exhibit Lists.** Each party shall file and serve on each other party a list of all witnesses the party intends to call and exhibits the party intends to introduce during the hearing. Expert witnesses shall be identified as such.
- d) **Objections.** Each party shall file and serve objections to any affidavits, exhibits, expert reports, or witnesses proposed by the other party, or file and serve a statement that it has no such objections.

F. Arbitration Hearing

1. Notice Regarding Arbitration Hearing. Any arbitration hearing conducted in these proceedings shall not constitute a hearing within the meaning of section 554 of the Administrative Procedure Act.⁸ If the Arbitrator determines that an arbitration hearing is required as to some or all of the issues, the Arbitrator will notify the parties, in writing, regarding: (a) the date, time and place of the hearing; (b) the length of the hearing; (c) the matters as to which the hearing is to relate; (d) the date of any pre-hearing conference; (e) the dates any pre-hearing submissions are to be filed and served; and (f) any other appropriate matters.

2. Allotment of Time for Presentation of Case. Before the arbitration hearing, the Arbitrator may allot to each party a specific time within which the party may present evidence and make argument during the hearing. The parties will be required to present all of their evidence and argument within the time allotted.

3. Conduct of Arbitration Hearing. The arbitration hearing will be conducted by the Arbitrator. The arbitration hearing shall be open to the public, except that all or a portion of the arbitration hearing may be closed to protect a party's confidential information. The parties shall arrange for the stenographic transcription of the arbitration hearing by a court reporter authorized to swear in witnesses. The court reporter shall provide the transcript and exhibits of the hearing to the Arbitrator at the same time the transcript is provided to the parties. Absent an agreement to the contrary, the cost of the transcript shall be shared equally between the parties to the arbitration hearing.

4. Presentation of Oral Testimony; Availability of Witnesses. The parties to the arbitration hearing are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the arbitration hearing. No party may introduce an exhibit (including expert reports) or call a witness unless the exhibit or witness was identified in that party's pre-hearing submission, except for good cause shown. Each witness presenting direct testimony by affidavit, and all authors of expert reports included in the pre-hearing submissions shall be available for cross-examination by the other parties to the arbitration hearing. The Arbitrator may order that certain witnesses not attend the arbitration hearing before having testified.

5. Clarifying Questions. The Arbitrator may ask clarifying questions at any point during the arbitration hearing and may direct a party or witness to provide additional information as needed to fully develop the record.

6. Evidence. The Arbitrator may exclude evidence considered to be inadmissible, irrelevant, immaterial or cumulative. The Arbitrator may be guided by the Federal Rules of Evidence in making such determinations; strict conformity to such rules, however, is not required.

G. Post-Hearing Materials

1. Post-Hearing Briefs. On a date determined by the Arbitrator, each party shall file and serve a post-hearing brief, which shall explain, as to each issue set forth in the DPL, and with appropriate citations to the record, why the Commission should adopt the position advocated by that party. The Arbitrator may impose page limits with respect to such briefs.

⁸ 5 U.S.C. § 554.

H. General Provisions

1. Amendment of Procedures. The Arbitrator may change these procedures by written notice in order to expedite the proceeding, preserve the resources of the Commission or the parties, promote settlement, or for good cause shown.

2. Format of Pleadings.

- a) The parties' Statements of Unresolved Issues, Statements of Relevant Authority, and all briefs shall contain a Table of Contents and, if applicable, a Table of Authorities.
- b) Assertions in affidavits based upon information and belief are prohibited unless made in good faith and the affiant explains the basis for the belief and why the facts could not reasonably be ascertained.

3. Filing Procedures. By 7:00 p.m. on the day established as the deadline for the filing of any submission pertaining to this proceeding, four copies shall be filed with the Secretary of the Commission, eight copies shall be hand-delivered to the Arbitrator, and one copy shall be served on all other parties to the proceeding (i) by hand, where such parties are located in Washington, D.C., or (ii) by overnight delivery, where such parties are located outside Washington, D.C. The Arbitrator also may require that copies of submissions be served by e-mail to the service list.

4. Resolution of Unresolved Issues. Petitioner is obligated to inform the Arbitrator in writing as soon as possible of the resolution by the parties of any unresolved issue identified in either party's Statement of Unresolved Issues or the DPL.

5. Failure to Respond. The Arbitrator may require the parties to provide such information as may be necessary to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request, then the Commission may proceed on the basis of the best information available to it from whatever source derived.

6. Ex Parte Status; Confidentiality of Information. These proceedings are restricted for *ex parte* purposes. Therefore, *ex parte* presentations are prohibited. Parties seeking to protect the confidentiality of information produced or exchanged shall follow the procedures set forth in Commission rule 1.731, substituting the phrase "this proceeding" for "formal complaint proceeding."⁹

By the Chief, Wireline Competition Bureau.

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⁹ 47 C.F.R. § 1.731.