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SOME ISSUES IN COMMISSION MEDIATION AND ARBITRATION OF INTERCONNECTION AGREEMENTS: DEFINING AND STAFFING THE ADMINISTRATIVE PROCESS

A PRELIMINARY REPORT

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This paper is one of a series of focused, timely NRRI analyses of issues in state policy that derive from passage of the Telecommunications Act of 1996. It was prepared by The National Regulatory Research Institute (NRRI) with funding provided by participating member commissions of the National Association of Regulatory Utility Commissioners (NARUC). The views and opinions of the authors do not necessarily state or reflect the views, opinions, or policies of the NRRI, the NARUC, or NARUC

member commissions.

The Telecommunications Act of 1996 (Section 252, (a)(2)) allows any party negotiating an interconnection agreement to ask a state public utility commission to participate in the negotiation and *mediate* any differences arising in negotiations. Between the 135th and the 160th day after the incumbent local exchange carrier receives a request for negotiation, under Section 252, (b)(1) any party to the negotiation may petition a state commission to *arbitrate* any open issues.

Many parties to interconnection agreements will likely not involve states in negotiation of their interconnection agreements. Many carriers will successfully negotiate agreements without state commission participation, and, since state commissions are required by the Act to subsequently review and approve interconnection agreements, the agreements negotiated between the carriers will likely be crafted with an eye toward commission concerns. As a result, states may be well served by investing most of their resources and efforts toward the more difficult task of developing guidelines for a detailed and probing evaluation of the negotiated agreements rather than developing contingency plans or processes for mediation and arbitration of disputed agreements. In some cases, however, carrier negotiations will break down and state commissions should expect to be drawn into mediation or arbitration under these sections of the act. Two of the important issues that must be dealt with when this happens are (1) the conceptual framework within which to set up the process and (2) who conducts the process.

Process Framework

When they are drawn into carrier negotiations, states have two choices: (1) they can apply existing state procedures for informal negotiations (or formal hearings) and hope that those procedures will be deemed to meet the requirements of the federal statute or (2) they can attempt to perform mediation and arbitration as they are more

commonly defined. If they perform standard mediation and arbitration, many state commissions will be operating to some extent in unfamiliar territory.

Though mediation and arbitration may, on the surface, appear to be similar to standard commission informal negotiations, they differ significantly. (Because arbitration is closer to standard commission processes, it is not described extensively in this short report.) It is also important to understand that a negotiated settlement that is the result of mediation is not the same as the typical settlements that occur during a settlement process as parts of prehearing conferences, or during a contested case. Typical commission settlements are actually by-products of a traditional legal process. The parties, sometimes at the urging of an administrative law judge, decide to reach a settlement. Often the settlement is forced upon the party which cannot withstand the financial burden of litigating (keep in mind that local exchange carriers recover their reasonable legal expenses, while the alternative local exchange carriers or competitive local exchange carriers would not). Or the settlement may be forced upon the party that lacks information necessary to carry on its case or upon a party that cannot bear the financial burden or lost opportunities that accompany delay in the administrative or adjudicatory process. A settlement often results in "splitting the baby," with the solution being the results of a zero-sum or negative-sum game.

In the case of a negotiated settlement that results from mediation as defined by the American Arbitration Association and other groups, the settlement goes beyond simply splitting the baby. The mediator helps the parties to look beyond their surface level positions and arguments to craft a win-win solution that provides the parties with a mutually beneficial solution based on their common interests. This requires the mediator, through various techniques, to determine the underlying values, interests, and needs of the parties. If possible, the mediator attempts to place the parties on a relatively even footing concerning information. Then, the mediator work with the parties, individually and/or together, to craft a mutually beneficial solution.

The "Model Standards of Conduct for Mediators" identifies "self-determination"

as the fundamental principle of mediation.[1] That means that the goal of mediation of disputes is to allow the parties to reach a voluntary, uncoerced agreement.[2] The mediator does not make a decision or, importantly, bring any views to the table. The mediator may provide information about the mediation process, raise issues, and help parties explore their options.[3] But the mediator must remain impartial and must withdraw from the mediation if his or her impartiality is compromised.[4] Under the Model Standards, the interests of the parties, not the interests of the public or the interests of the commission, drive the mediated agreement. (The Telecommunications Act itself may create some confusion about the goals of mediation by allowing *any party,* implying any one party, to request mediation; mediation cannot take place without the active and willing participation of two or more of the parties to the dispute.)

However, it is important to underscore that traditional mediation involves a private dispute with little or no public interest aspect involved. The "Model Standards of Conduct for Mediators" appear to be written primarily for mediation of private disputes. No such generally acceptable standards have been written for mediation of public disputes, though several publications provide guidance on mediating or resolving public disputes in a public regulatory setting, including an earlier NRRI report.[5] That report is available from the NRRI.

The difficulties inherent in mediation may provide a rationale for the state commission to apply existing processes to the resolution of interconnection disputes. On the other hand, the law uses the term "mediation" quite specifically and, presumably with intent, though it is not clear how mediation should be defined. Commissions may

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[1] American Arbitration Association, American Bar Association, Society of Professionals in Dispute Resolution, "Model Standards of Conduct for Mediators," pamphlet, I.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] See, for example, Robert E. Burns, Esq., *Administrative Procedures for Proactive Regulation* (Columbus, Ohio: NRRI, 1988).

want to take this opportunity to apply this form of alternative dispute resolution.

Selection of the Mediator

If commission mediation of interconnection disputes were done according to the "Model Standards for Conduct of Mediators," the mediator (commission staff or hired, external mediator) could not manage the mediation to ensure that the goals of the commission are included in the interconnection agreement. Under the clear rules of mediation, the selection of the mediator becomes critical. If commission staff are used, the mediator must be isolated from subsequent action by the commission on the specific interconnection agreement at issue as a result of the confidentiality requirements of the mediation process. Effective mediation requires that "the reasonable expectations of the parties with regard to confidentiality shall be met by the mediator."[6] Under this guideline, the parties, not the commission, set the parameters of disclosure, and the mediator may not be at liberty to report to the commission on the behavior of the parties, the progress of the mediation, or the merits of settlement offers or agreements. The mediator (or the commission) cannot even solely determine who will be involved in the mediation in that the presence or absence of parties at the mediation depends on the agreement of the mediator and the parties.[7] Clearly, if this standard were enforced so that interested parties were excluded from the process, then such mediation would violate due process. However, a strong argument can be made that mediation by a state agency must fulfill the due process requirements of state procedure.[8] It seems unlikely that the general language of the Telecommunications Act would preempt state due process concerns.

Given the requirements for impartiality, some would argue that commission staff

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[6] American Arbitration Association, et al., "Model Standards of Conduct for Mediators," III.

[7] Ibid., V.

[8] Robert Burns, *Administrative Procedures for Proactive Regulation*, 93-106.

cannot, by definition, serve as mediators in these cases since they are charged to protect the public interest and are evaluated by commission managers who may expect an agreement that serves the public interest. If the mediated agreement is challenged in court, the impartiality of the mediator may be an issue even though, if commission staff are used, the parties to the mediation will know of the affiliation in advance of the mediation. In addition, it might be argued that the commission cannot participate in mediation because it must always function in a manner that enhances the public interest. Yet the Telecommunications Act clearly allows commissions to participate in the negotiation and mediation of differences between private parties.

Third-party (private) mediators are available. (Attachment 1 to this report identifies organizations that may link the commission with mediation resources.) Though there exist many competent mediators with experience in a wide variety of fields and many experts on utility issues, it appears that there are few individuals with both competencies. Though some might argue that substantive knowledge of the field might get in the way of effective mediation, it is our experience and belief that substantive knowledge of the public utility field would strongly benefit the mediator of an interconnection agreement. Competency requirements within the "Model Standards of Conduct for Mediators" simply require that the mediator "have the necessary qualifications to satisfy the reasonable expectations of the parties."[9]

Another model that might allow the merger of general mediation skills with knowledge of the utility field would be to team a skilled mediator (as the primary mediator) with a person knowledgeable in the utility field (as the co-mediator). Given the difficulty of the mediator's task and the likely complexity of the mediation of interconnection agreements, the assistance of a co-mediator might be useful even if the primary mediator is knowledgeable in utility issues.

A commission might find it useful to prepare itself for a mediation process that involves: (1) a commission staff member with telecommunications expertise who is

[9] American Arbitration Association, et al., "Model Standards for Conduct of Mediators," III.

trained in mediation, (2) hiring the now rare private mediator with telecommunications expertise, or (3) hiring a private mediator and having that person co-mediate with a staff member experienced in telecommunications interconnection issues. The first option probably is only available to a few fortunate state commissions. Where it is available, the staff mediator must be isolated from subsequent commission evaluation of that negotiated agreement. (An example of effective isolation that would meet this requirement for mediators is the New York Public Service Commission's separation of settlement judges from judges hearing contested cases.) Hiring a private mediator with the appropriate expertise is likely to be expensive, although nothing in the Telecommunications Act specifically prohibits the state commission from charging the parties for its mediation service. Further, relying exclusively on a private mediator might violate due process in many states because it might violate the non-delegation doctrine.[10]

The final option is probably the most feasible. Mediators have become increasingly commonplace, and co-mediation would have the side benefit of training staff in mediation while at the same time providing telecommunications-specific expertise to the private mediator. This option is less likely to violate the non-delegation doctrine and thus is less likely to cause the same due-process problems as the second option.

Commissioners might recall that a major result of the PUC 2000 Summit was a recommendation that state commissions should rely more on alternative dispute resolution.[11] In furtherance of that finding, the Telecommunications Act provides a major opportunity for commissions to engage in mediation and arbitration. Commissioners might well view this as an opportunity to train their staff in alternative dispute resolution techniques, particularly if the cost of the mediation and/or arbitration

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[10] Robert Burns, *Administrative Procedures for Proactive Regulation*, 22, 27, 104-109.

[11] The Staff of the National Regulatory Research Institute, *Missions, Strategies, and Implementation Steps for State Public Utility Commissions in the Year 2000: Proceedings of the NARUC/NRRI Commissioners Summit* (Columbus, Ohio: NRRI, 1995).

is borne by the parties of the dispute, and to pursue the use of alternative dispute resolution in lieu of traditional, adjudicatory processes.

Conclusion

Deciding on the conceptual framework that will guide the administrative process for carrying out commission responsibilities for mediation and arbitration under the Telecommunications Act of 1996 is crucial to the implementation and eventually the effectiveness of interconnection agreements that take this administrative path. If state commissions are drawn into interconnection disputes, they can attempt to meet the intent of the federal legislation by using existing commission procedures. Or they can see this as an opportunity to apply alternative techniques of dispute resolution, techniques that may become more prevalent in the future.

The skills of the mediator are also an issue that commissions must be prepared to deal with. Co-mediation by an expert mediator and a commission staff expert may be the most potent approach to assure that disputes are resolved in the best interests of all parties and that state statutory responsibilities are met.

This short report was prepared in order to address these very time-sensitive issues. Other issues regarding interconnection agreements will be dealt with in a more extensive NRRI report that will be available in the early summer.

Attachment 1
Mediation and Arbitration Resources

American Arbitration Association
140 West 51st Street
New York, NY 10020-1203
Telephone: (212) 484-4000
Fax: (212) 307-4387

American Bar Association
Section of Dispute Resolution
740 Fifteenth Street, N.W.
Washington, D.C. 20005-1009
Telephone: (202) 662-1681
Fax: (202) 662-1032

Society of Professionals in Dispute Resolution
815 Fifteenth Street, N.W.
Suite 530
Washington, D.C. 20005
Telephone: (202) 783-7277
Fax: (202) 783-7281

National Institute on Dispute Resolution
1726 M Street, N.W.
Suite 500
Washington, D.C. 20036-4502
Telephone: (202) 466-4764