

STATEMENTS OF POLICY

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION Abbreviated Dispute Resolution Process

Joint Petition of Nextlink Pennsylvania, Inc., et al., for Adoption of Partial Settlement Resolving Pending Telecommunications Issues; Doc. No. P-00991648

Joint Petition of Bell Atlantic—Pennsylvania, Inc., et al., for Resolution of Global Telecommunications Proceedings; Doc. No. P-00991649

Commissioners Present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; Terrance J. Fitzpatrick

Public Meeting held
July 13, 2000

Order Establishing Revised Interim Guidelines for Abbreviated Dispute Resolution Process

By the Commission:

In Appendix E to our Global Order¹ entered September 30, 1999 at Docket Nos. P-00991648 and P-00991649, the Commission adopted interim guidelines for an Abbreviated Dispute Resolution Process (ADRP) to address certain disputes between competing telecommunications carriers. An ADRP mechanism was proposed by both sets of petitioners in the Global Order proceeding and, in particular, was intended to address, in an expedited fashion, disputes between interconnecting carriers that threatened to impede the development of local telephone competition in Pennsylvania.

In the Commission's judgment, the successful introduction of local telephone competition in Pennsylvania, in accordance with Chapter 30 of the Public Utility Code and the Federal Telecommunications Act of 1996, depends upon efficient and nondiscriminatory carrier interconnection, as well as the prompt resolution of disputes between competing carriers. The Commission believes that an effective ADRP mechanism that provides for the prompt resolution of carrier disputes will be of substantial benefit to all carriers, and will facilitate this Commission's State and Federal statutory mission to create a procompetitive market for the provision of local telephone services.

On April 1, 2000, the ADRP mechanism adopted in the September 30, 1999 Global Order was published at 30 Pa.B. 1764 for public comment in order to determine the effectiveness of the process to date. The deadline for comments was April 17, 2000, and, as of that date, two parties have filed comments with the Secretary's Bureau: Bell Atlantic-Pennsylvania, Inc. (Bell Atlantic or BA-PA) and the Association for Local Telecommunications Services (ALTS). No other comments were filed.²

Summary of Comments

Generally, the comments received from BA-PA urged a relatively narrow interpretation of the ADRP process

¹ *Joint Petition of Nextlink, et al. and Joint Petition of Bell Atlantic, et al.*, Docket Nos. P-00991648 and P-00991649 (September 30, 1999) (Global Order).

² On July 7, 2000, Bell Atlantic filed, pursuant to its Federal Communications Commission (FCC) merger commitments, an alternative dispute resolution mediation process to facilitate resolution of carrier-to-carrier disputes regarding the provision of local services, including disputes related to existing and effective interconnection agreements. However, it appears that this filing is separate from and not intended to supplant either (a) the carrier dispute resolution processes contained in existing interconnection agreements or (b) the Commission's ADRP which, unlike a mediation, results in an adjudication that can be appealed.

while ALTS has urged a more liberal approach. Specifically, with regard to Paragraph No. 1 (pertaining to types of disputes eligible for ADRP), BA-PA characterizes the list of issues eligible for ADRP as too "elastic and subject to liberal interpretation." BA-PA Comments at 9. BA-PA proposes language designed to narrow the scope of matters eligible for ADRP which BA-PA describes as "true carrier-to-carrier interconnection disputes that are susceptible to expedited resolution" and limited to allegations that either a carrier's conduct jeopardizes uninterrupted service or violates an existing interconnection agreement, and collocation space limitation disputes. BA-PA Comments at 11-12.

ALTS, conversely, suggests that the scope of disputes eligible for ADRP should be "liberally construed" and, further, proposes that the list of eligible disputes should continue to include allegations of "anti-competitive" conduct and "predatory pricing." ALTS also suggests that there is a discrepancy in the scope of issues listed in Paragraph 1 (general rule) and Paragraph 3 (pertaining to interim relief) of the existing ADRP. ALTS Comments at 2-3.

In light of these comments, the description of disputes eligible for ADRP, as adopted by this order, will be revised and clarified to eliminate the discrepancy cited by ALTS. However, we will eliminate allegations of "anti-competitive" conduct from the scope of appropriate issues since, in our view, this category of issues is too open ended for an limited ADRP process. In the Commission's judgement, the net scope of issues delineated by this order will encompass those disputes that can and should be resolved on an expedited basis.

With regard to Paragraph No. 3 (pertaining to interim relief), ALTS suggests that the section be reworded to permit relief for any issue fairly raised by an ADRP petition. ALTS Comments at 4. With regard to the standard of proof for interim relief, ALTS suggests that a simple "likely to prevail in the dispute" standard is appropriate rather than limiting relief to emergency situations or requiring the moving party to carry a heavier burden of proof. ALTS Comments at 5. BA-PA, however, urges adoption of a more stringent standard. BA-PA urges a requirement of "clear and convincing evidence" of a likelihood of success on the merits, a demonstration of a threat of substantial harm, and a demonstration that balance of the hardships weighs in favor of granting the interim relief. BA-PA Comments at 12-13.

In view of these comments and in the interest of a truly expeditious ADRP, the ADRP adopted by this order makes no special provision for interim relief. We expect that the expedited schedule for ADRP adopted in this order will, in and of itself, provide a prompt resolution of the disputed issues. If, however, a party nevertheless desires interim relief, the request can be made and evaluated by the presiding ALJ using the existing provisions and standards at 52 Pa. Code §§ 3.6—3.11 of the Commission's regulations.

With regard to Paragraph Nos. 4 through 10 (pertaining to ADRP parties and proceedings), the comments focused on the availability of discovery for ADRP, the qualifications of arbitrators to hear technical and legal matters, and finally, the nature of an appeal from the informal decision of the arbitrator. ALTS advocates the use of limited discovery, and BA-PA entirely opposes the

availability of discovery as impracticable under the limited time frame afforded ADRP. ALTS Comments at 7; BA-PA Comments at 15-17. ALTS also suggests that the guidelines for assigning an arbitrator, other than an ALJ, should be flexible so as to allow a nonattorney with technical expertise to preside where appropriate, and to require an assignment to ALJ in other cases. ALTS Comments at 7-8. Finally, ALTS suggests that the appeal from an informal decision should be clarified to be a "notice" appeal, which preserves all questions raised in the original ADRP petition. ALTS Comments at 8.

In order to resolve these issues and promote the speedy resolution of disputes, the ADRP adopted by this order provides for initial assignment to an ALJ within four (4) calendar days, and authorizes the presiding ALJ to reject a petition for dispute resolution that does not qualify for the process. Also, as to discovery, we will continue to encourage informal exchanges of information; however, if the parties fail to cooperate, the presiding ALJ will be authorized to permit limited formal discovery if deemed reasonable and necessary to resolve the contested issues.

Finally, BA-PA also comments on the provision in Paragraph No. 15 (pertaining to the effect of appeals from informal decisions), suggesting that informal arbitrator decisions should not be binding if an appeal is taken to an ALJ; BA-PA also comments that permitting interested parties to intervene at the adjudicatory phase would inhibit the ability of the parties to complete discovery and present their cases before the ALJ. BA-PA Comments at 14, 17-18. With regard to the mandatory time frames for action by the arbitrator/ALJ, particularly in Paragraph No. 3 (pertaining to interim relief) and Paragraph No. 17 (pertaining to de novo review), ALTS suggests that any time frame should be discretionary so as to allow flexibility for the number and nature of the issues which may be presented for ADRP. ALTS Comments at 8.

In the interest of administrative efficiency, the ADRP adopted by this order eliminates both the informal non-ALJ and interim relief procedural steps that prompted some of these comments by BA-PA and ALTS. Upon further review, we do not view these interim steps as consistent with our goal of a prompt resolution of the dispute. The scope of parties permitted to intervene will remain a matter within the discretion of the presiding ALJ. As to the time frame for hearing and decision by the presiding ALJ, the ADRP process adopted by this order will permit extension of the 30-day time frame for good cause shown.

Conclusion

After due consideration of the parties' comments, as well as our own internal review of these procedures and our existing rules and regulations, we have determined that certain revisions to the current ADRP mechanism are appropriate to make the process more efficient and to better fulfill its purpose. In addition, we have also reviewed the accelerated docket procedures adopted by the Federal Communications Commission (FCC) in developing these further refinements to the ADRP mechanism that will be used in Pennsylvania.³

The significant changes to the existing ADRP mechanism previously established in the Global Order may be summarized as follows:

Scope of Issues—In order to eliminate some ambiguity in the prior version of the ADRP, the Commission has

redefined and clarified the limited scope of issues to be addressed by the ADRP, and has defined the term "scheduled service." The scope of disputes that qualify for the ADRP process are actions or inactions that (1) allegedly compromise the ability of a party to provide uninterrupted service, (2) unreasonably preclude the provisioning of scheduled service, (3) allegedly violate a provision of an existing interconnection agreement, (4) allegedly constitutes predatory pricing, or (5) involve collocation space limitation disputes. We have also modified the preamble to make clear that the ADRP is designed to prevent an adverse impact on "telecommunications carriers' ability to serve customers." Thus, for example, a petition for dispute resolution may be filed by a telecommunications carrier if the action or inaction compromises its ability to provide uninterrupted service or precludes the provisioning of scheduled service.

Elimination of Unnecessary Steps—The prior version of the ADRP contained several intermediate steps that, upon further review, are not consistent with our goal of achieving a prompt resolution of these disputes. Therefore, the ADRP has been streamlined in that there is no longer an informal process before the case is assigned to an Administrative Law Judge for an evidentiary hearing. The interim relief procedure has also been eliminated, thus shortening the deadline for an Initial Decision to 30 calendar days from the date the Dispute Resolution Petition is filed.

Contents of a Dispute Resolution Petition—The ADRP has been clarified and modified to reduce the evidentiary burden on a petitioner to show prior good faith negotiations and, at the same time, to ensure that all relevant information is presented as early as possible in the process. In lieu of "detailed evidence" that the petitioner has engaged in good faith negotiations for at least 30 days, the requirement has been modified to only a "demonstration" that good faith negotiations have occurred. We also recognize that good faith negotiations may nevertheless reach an impasse in less than 30 days and, therefore, will permit the filing of a dispute resolution upon a demonstration that such an impasse has occurred. At the same time, each dispute resolution petition will be required to include, in addition to the specifics of the action and/or inaction alleged to have occurred, "copies of all documents within the petitioner's possession that are likely to bear significantly on the issues raised in the petition." This requirement, as well as a similar requirement on the respondent, is intended to place all relevant documents before the presiding ALJ at the earliest possible point in the process.

Authority of Presiding ALJ—In order to qualify for the ADRP mechanism, the petitioner must demonstrate either that at least 30 days of good faith negotiations have occurred, or that the parties have reached an impasse in negotiations, and that the dispute falls within the scope of disputes delineated as qualifying for ADRP. The revised ADRP makes clear that the presiding ALJ is authorized to reject any petition for dispute resolution that does not so qualify. If the petition qualifies for ADRP, the presiding ALJ will conduct such hearings, including reasonable examination and cross-examination of witnesses, as deemed necessary to resolve the dispute. The parties will also be permitted to file briefs before the ALJ issues an adjudication.

Collocation Disputes—Additionally, the new ADRP provides special procedures for addressing currently-existing collocation disputes. However, it should be noted that the proceeding pending before ALJ Chestnut at Docket No.

³ In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, Second Report and Order (Released July 14, 1998).

R-00994697 will provide further guidance for the resolution of all future collocation disputes. The ADRP also provides that collocation space limitation disputes must first be addressed by appropriate Commission technical staff prior to any request for ADRP. The rationale for this requirement is that it is more efficient for a technical expert from the PUC staff to evaluate and attempt to resolve the dispute informally before calling upon the adjudicative resources and procedures of the OALJ. Thereafter, if the staff determination does not resolve the dispute, a party may file a Dispute Resolution Petition. However, the staff report regarding the collocation dispute may be introduced as evidence by either party to the dispute if properly introduced and authenticated.

Availability of Discovery—The Commission recognizes that formal discovery is tedious, burdensome and, too often, a litigation tactic to delay resolution of the controversy. At the same time, we believe that in some instances under the ADRP formal discovery requests and prompt responses thereto will be essential to a fair and informed resolution of the dispute. Therefore, the revised ADRP specifies that informal discovery is encouraged, but that the parties will also be permitted to conduct “such limited formal discovery as is deemed reasonable and necessary by the presiding ALJ to resolve the contested issues.” Thus, if the documents provided through informal discovery and those provided with the petitions and responses are deemed to be inadequate, the nature, timing and scope of any formal discovery to be permitted will be a matter within the discretion of the presiding ALJ.

Availability of Mediation—Finally, the revised ADRP also recognizes and provides for the availability of Commission-sponsored mediation as a dispute resolution technique. In addition, Bell Atlantic has in place a voluntary mediation process to address local service and interconnection disputes. Mediation leading to settlement continues to be the preferred approach at this agency. Therefore, the revised ADRP provides that the parties may, at any time during the ADRP proceeding, request the services of a Commission mediator to assist them in reaching a settlement. The request will act as a 30-day stay of proceedings pending mediation. The parties may, by mutual agreement, further extend this period for an additional 30 days.

We believe that this revised ADRP represents an effective mechanism for addressing, on an expedited basis, disputes of an operational nature that require prompt resolution to insure, facilitate and nurture the development of local telephone competition. Also, by providing for notice of the process and deadlines, hearings before an ALJ, reasonable examination and cross-examination of witnesses, and an opportunity to file briefs, the revised ADRP will satisfy the requirements of the Administrative Agency Law, 2 Pa.C.S. §§ 101—754, for achieving a valid adjudication.

At the same time, however, this remains an experimental process at the Commission to deal with a limited set of disputes between telecommunications carriers during the transition to a fully competitive market. As such, we will continue to monitor the need and effectiveness of the ADRP mechanism outlined in herein.

Finally, in terms of procedure, we recognize that implementation of the ADRP mechanism will require the Commission and the presiding ALJ to waive, in certain respects, the existing rules and regulations that otherwise apply to the formal complaint process, particularly those dealing with the response times for answers to com-

plaints, to content of petitions and responses thereto, and the discovery process. We note that under our existing regulations at 52 Pa. Code § 1.2(c) the Commission or presiding ALJ may waive any procedural deadline or requirement, at any stage of a proceeding, so long as the waiver does not adversely affect the substantive rights of a party to the proceeding. Because the procedural modifications needed to implement ADRP are largely those of timing, we conclude that no substantive rights would be affected. Accordingly, there is ample authority in the existing Commission regulations to allow for the procedural modifications necessary to implement the ADRP for each disputes that so qualifies;

Therefore, It Is Ordered:

1. That the interim guidelines for an Abbreviated Dispute Resolution Process (ADRP) adopted and established in the September 30, 1999 Global Order are hereby revised, as set forth in Annex A to this Order, effective as of the entry date of this Order.
2. That the ADRP shall be implemented and managed by the Office of Administrative Law Judge (OALJ).
3. That, pursuant 52 Pa. Code § 1.2(c), the presiding ALJ is authorized to waive appropriate sections of the Commission's rules of practice and procedure, as necessary, to implement the ADRP and resolve the disputed issues within the time frames set forth in Annex A to this Order.
4. That these interim guidelines for the ADRP process shall be reviewed within one (1) year or less from the entry date of this order to evaluate their effectiveness in addressing and resolving inter-carrier disputes.
5. That this Order, together with Annex A, be published in the *Pennsylvania Bulletin* and that a copy be served upon all jurisdictional telecommunications utilities.

JAMES J. MCNULTY,
Secretary

Annex A

Interim Guidelines for Abbreviated Dispute Resolution Process

Preamble

The success of local competition in Pennsylvania is dependent on the efficiency and effectiveness of carrier interconnection. Given the fact that in addition to interconnecting with each other, carriers are also competing with each other, disputes will arise which require expedited resolution by the Commission to prevent an adverse impact on telecommunications carriers' ability to serve their customers and to provide customers with uninterrupted service in a competitive environment. Recognizing that our current mediation, arbitration, and emergency relief regulations may not address the need for prompt resolution of disputes between competing telecommunications carriers, competitive, incumbent or otherwise, we are persuaded by the request of both sets of petitioners in the Global proceedings to implement an Abbreviated Dispute Resolution Process (ADRP). The ADRP is expected to be beneficial to both carriers and the public in that it addresses the need for telecommunications carriers to be heard promptly with regard to certain issues that impact on the development of local telephone competition.

1. *Scope of ADRP.* The ADRP is limited to disputes between telecommunications carriers which involve action or inaction of a telecommunications entity that: (1) allegedly compromises the ability of a party to provide uninterrupted service, (2) unreasonably precludes the provi-

sioning of scheduled service, (3) allegedly violates a provision of an existing interconnection agreement, (4) contains allegations of predatory pricing, or (5) involves collocation space limitation disputes.

For purposes of the ADRP process, scheduled service includes scheduled appointment intervals for coordinated cut-over loop orders ("hot cuts"); scheduled connections, disconnections, and repairs of lines which one carrier sells, leases, or provides to another carrier, and the scheduled provisioning of products. A carrier unreasonably precludes the provisioning of a scheduled service when the carrier misses commitment dates for the provisioning of products (special access services, trunks, enhanced extended links, unbundled network elements platforms, etc.) or of scheduled service (hot cuts, maintenance and repair, etc.) without good cause.

ADRP is not designed to be a substitute for any dispute resolution procedures that may be specified in the parties' interconnection agreements; nor is the process designed to handle disputes that involve generic policy issues, consumer complaints against the carriers, or requests for damages.

2. *Good faith negotiations.* Before a petition is referred to ADRP, the petitioning party must engage in good faith negotiations with the answering party with respect to the dispute in question for at least 30 calendar days. However, if good faith negotiations nevertheless reach an impasse in less than 30 days, the party may demonstrate that such an impasse has occurred to qualify for ADRP. The parties may also stipulate that at least 30 days of good faith negotiations have occurred to qualify for ADRP.

3. *Collocation disputes.* Collocation space limitation disputes must first be analyzed by appropriate Commission technical staff prior to any request for ADRP. The aggrieved party in the collocation dispute shall first submit written notice to the Bureau of Fixed Utility Services (FUS) explaining the collocation dispute. The aggrieved party shall have had a tour of the carrier facility involved in the dispute prior to filing the notice with the Commission. The Commission technical staff will then tour the facility, with representatives of the parties, and listen to the arguments while viewing the evidence. Staff will then submit written findings of fact and conclusions to the parties. If the staff determination does not resolve the collocation dispute, the aggrieved party may then bring the collocation dispute before the OALJ by filing a Dispute Resolution Petition. The staff report may be introduced as evidence by either party if properly introduced and authenticated.

4. *Petition for Resolution of Disputed Issues.* A party directly involved in a dispute subject to ADRP that cannot be resolved through good faith negotiations may file a Dispute Resolution Petition with the Commission. If possible, such petitions should be submitted jointly by both parties.

Each petition shall include specifics of the action and/or inaction alleged to have violated one or more of the five standards identified in Section 1, above. The petition shall also include copies of all documents within the petitioner's possession that are likely to bear significantly on the issues raised in the petition. The petition shall be served upon the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff (the "Public Advocates"), and, if it is not a joint petition, upon the opposing party. As part of the Dispute Resolution Petition, the petitioning party must demonstrate either that it has engaged in good faith negotia-

tions with the other entity for at least 30 days, or that the parties have reached an impasse in negotiations in less than 30 days. Petitions specifying collocation disputes must state that the PUC technical staff has previously rendered a determination pursuant to Section 3, above.

Finally, in order to ensure proper handling by Commission staff and to provide notice to the opposing party of the expedited schedule for processing these disputes, each ADRP petition should be clearly so identified by bold typeface above the normal caption on the first page as follows:

"Dispute Resolution Petition: Answer Due Within 7 Days."

5. *Serving copies and docketing.* An original and two copies of the Dispute Resolution Petition shall be filed with the Secretary of the Commission. Each Dispute Resolution Petition will be assigned a separate docket number. Copies must also be served on the Respondent, Chief Administrative Law Judge of the Commission and upon the Public Advocates on the same date.

6. *Assignment of an ALJ.* Within four (4) calendar days of the filing and service of a Dispute Resolution Petition, an Administrative Law Judge shall be assigned to the matter. The Administrative Law Judge shall schedule a prehearing conference at the earliest possible date to determine whether the petition qualifies for ADRP and, if so, to determine the schedule for the proceeding and other matters relevant to management and resolution of the dispute. The presiding ALJ is authorized to reject any petition for dispute resolution that does not fall within the scope of these interim guidelines.

7. *Answer.* Within seven (7) calendar days of the filing of the Dispute Resolution Petition, the respondent shall file an answer with the Secretary. The answer shall include copies of all documents in the respondent's possession that are likely to bear significantly on the issues raised in the petition. Copies must also be served on the Petitioner, the Chief Administrative Law Judge and Public Advocates on the same date.

8. *Public Advocates.* The parties will be the primary participants in the Abbreviated Dispute Resolution Process. The Public Advocates may participate in the proceeding but may not conduct formal discovery and are precluded from opposing the voluntary withdrawal of a Dispute Resolution Petition due to consummation of a settlement between the parties.

9. *Evidentiary Hearing.* The presiding ALJ will conduct an evidentiary hearing including sworn witnesses, reasonable cross examination and a transcription of the record. The parties will also have the opportunity to file briefs prior to the adjudication. The ALJ shall issue an Initial Decision resolving the dispute within 30 calendar days of the filing of the Dispute Resolution Petition, unless the ALJ extends the time frame for good cause shown recognizing that an expeditious result is in the public interest.

10. *Discovery.* The parties are encouraged to exchange information informally. The parties will also be permitted to seek leave to conduct such limited formal discovery as deemed reasonable and necessary by the presiding ALJ to resolve the contested issues. Whether and the extent to which leave to conduct limited formal discovery should be granted is a matter within the discretion of the presiding ALJ.

11. *Exceptions.* Participating parties may file exceptions to the Initial Decision of the ALJ within seven (7)

calendar days of issuance. Reply exceptions must be filed within five (5) calendar days after exceptions are filed. If no exceptions are filed and if two Commissioners do not request review within 15 days of issuance, the Initial Decision of the ALJ will become a final order by operation of law. If exceptions are filed or if Commission review is requested, the matter will be assigned to the Office of Special Assistants for preparation of a recommendation for Commission consideration at the earliest possible Public Meeting.

12. *Mediation.* The parties may, at any time during the ADRP proceeding, request the services of a Commission mediator consistent with the Commission's mediation policy statement at 52 Pa.Code §§ 69.391—69.394. The request shall act as a 30-day stay of the proceedings pending mediation. The parties may, by mutual agreement, further extend this period for an additional 30 days. No further extensions shall be permitted. If no

settlement is reached, the stay will be terminated and the case referred back to the assigned Administrative Law Judge. Any time lost to unsuccessful mediation shall not count against the ALJ's time to issue an Initial Decision. If a settlement is reached, the assigned mediator will immediately issue a mediation report with the attached proposed settlement agreement to the assigned Administrative Law Judge for review and disposition by Initial Decision.

13. *Other remedies.* The ADRP is not intended to replace or preclude any other procedures or remedies otherwise available to any of the parties under law, and a party's participation in this dispute resolution process shall not be considered a waiver of any available substantive or procedural rights.

[Pa.B. Doc. No. 00-1282. Filed for public inspection July 28, 2000, 9:00 a.m.]
