

**TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION,
IOWA[751]**

Notice of Intended Action

Proposing rule making related to waivers and providing an opportunity for public comment

The Iowa Telecommunications and Technology Commission hereby proposes to amend Chapter 9, “Requests for Waiver of Network Use by Certified Users,” and Chapter 16, “Uniform Waiver and Variance Rules,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 8D.3(3)“b.”

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code sections 8D.9(2) and 17A.9A.

Purpose and Summary

2020 Iowa Acts, House File 2389, amended the waivers and variances provision of the Administrative Procedures Act (Iowa Code chapter 17A) by striking references to “variances” and changing reporting requirements for waivers from semiannually to within 60 days of the granting or denying of a waiver request. 2020 Iowa Acts, Senate File 2284, amended Iowa Code section 8D.9 to strike Regents institutions from the definition of “certified users” of the Iowa Communications Network. This proposed rule making implements these changes.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Commission for a waiver of the discretionary provisions, if any, pursuant to 751—Chapter 9.

Public Comment

Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Commission no later than 4:30 p.m. on June 8, 2021. Comments should be directed to:

Mark Johnson
Iowa Telecommunications and Technology Commission
Grimes State Office Building
400 East 14th Street
Des Moines, Iowa 50319
Phone: 515.725.4608
Email: mark.johnson@iowa.gov

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend rule 751—9.1(8D), introductory paragraph, as follows:

751—9.1(8D) Request for waiver. A certified user is entitled to file a request for a waiver pursuant to Iowa Code section 8D.9(2). For the purposes of this chapter, “certified user” means an area education agency, or community college, ~~or regents institution,~~ that has certified with the commission that it is or will be a part of the network.

ITEM 2. Amend rule 751—9.6(8D) as follows:

751—9.6(8D) Hearing. At the commission meeting where the petition is considered, the petitioner and the commission staff will have an opportunity to present any relevant evidence to the commission bearing on the appropriateness of the petition. The hearing will be informal. The hearing will be mechanically recorded. The recording shall constitute the official record of the hearing. Either party may at its own expense have a certified court reporter present to record the hearing. In the event of an appeal, the appealing party shall, at its cost, be responsible for transcribing the record of the meeting for judicial review. ~~In the event the decision of the commission is subject to arbitration pursuant to Iowa Code section 679A.19, the commission shall have the record transcribed with the cost to be split evenly between the parties subject to the arbitration.~~

9.6(1) No change.

9.6(2) Decision. The commission members, the petitioner and the staff will be afforded an opportunity to ask questions regarding the information presented at the time of the meeting. At the close of the meeting, the commission will issue a decision that is dictated into the record or the matter will be taken under advisement to be discussed and decided at a subsequent public meeting. The commission’s decision shall be reduced to writing and shall constitute final agency action. ~~In the event the decision is appealed by a regents institution, the resolution of the dispute shall be subject to the provisions of Iowa Code section 679A.19.~~

ITEM 3. Amend **751—Chapter 16**, title, as follows:

UNIFORM WAIVER ~~AND VARIANCE~~ RULES

ITEM 4. Amend rules 751—16.1(17A,ExecOrd11) to 751—16.3(17A,ExecOrd11) as follows:

751—16.1(17A,ExecOrd11) Applicability. This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the commission. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the commission. This chapter shall not apply to rules that merely define the meaning of a statute or other provision of law or precedent if the commission does not possess delegated authority to bind the courts to any extent with its definition. To the extent another more specific provision of law governs the issuance of a waiver from a particular rule, the more specific provision shall supersede this chapter with respect to any waiver from that rule.

16.1(1) Definitions.

“Commission” or “Iowa telecommunications and technology commission” means the Iowa telecommunications and technology commission established by Iowa Code chapter 8D operating the Iowa Communications Network.

“Person” means an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any legal entity.

“Waiver ~~or variance~~” means an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

16.1(2) Authority.

a. A waiver ~~or variance~~ from rules adopted by the commission may be granted in accordance with this chapter if (1) the commission has authority to promulgate the rule from which waiver ~~or variance~~ is requested or has final decision-making authority over a contested case in which a waiver ~~or variance~~ is requested; and (2) no statute or rule otherwise controls the granting of a waiver ~~or variance~~ from the rule from which a waiver ~~or variance~~ is requested.

b. No waiver ~~or variance~~ may be granted from a requirement which is imposed by statute. Any waiver ~~or variance~~ must be consistent with statute.

751—16.2(17A,ExecOrd11) Commission discretion. The decision on whether the circumstances justify the granting of a waiver ~~or variance~~ shall be made at the discretion of the commission upon consideration of all relevant factors.

16.2(1) Criteria for waiver ~~or variance~~. The commission may, in response to a completed petition ~~or on its own motion~~, grant a waiver ~~or variance~~ from a rule, in whole or in part, as applied to the circumstances of a specified situation if the commission finds each of the following:

a. Application of the rule to the person at issue would result in hardship or injustice to that person; and

b. Waiver ~~or variance~~ on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and

c. Waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and

d. Where applicable, substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

In determining whether a waiver should be granted, the commission shall consider the public interest, policies and legislative intent of the statute on which the rule is based. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the commission shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all affected persons.

16.2(2) Special waiver ~~or variance~~ rules not precluded. These uniform waiver ~~and variance~~ rules shall not preclude the commission from granting waivers ~~or variances~~ in other contexts including those described in Iowa Code section 8D.9 or on the basis of other standards if a statute or other commission rule authorizes the commission to do so and the commission deems it appropriate to do so.

751—16.3(17A,ExecOrd11) Requester’s responsibilities in filing a waiver ~~or variance~~ petition.

16.3(1) Application. All petitions for waiver ~~or variance~~ must be submitted in writing to the ICN main office location as listed in 751—subrule 1.6(1). If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

16.3(2) Content of petition. A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester (for an example of a petition for waiver ~~or variance~~, see Exhibit A at the end of this chapter):

a. A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.

- b. The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.
- c. The relevant facts that the petitioner believes would justify a waiver ~~or variance~~.
- d. A signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.
- e. A history of any prior contacts between the commission and the petitioner relating to the use of the network, other regulated activity, license, grant, loan or other financial assistance affected by the proposed waiver ~~or variance~~, including a description of each use of the network, license, grant, loan or other financial assistance held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the affected use of the network, regulated activity, license, grant or loan within the last five years.
- f. Any information known to the requester regarding the commission's treatment of similar cases.
- g. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.
- h. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of a petition.
- i. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver ~~or variance~~.
- j. Signed releases of information authorizing persons with knowledge regarding the request to furnish the commission with information relevant to the waiver ~~or variance~~.

16.3(3) *Burden of persuasion.* When a petition is filed for a waiver ~~or variance~~ from a commission rule, the burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the commission should exercise its discretion to grant the petitioner a waiver ~~or variance~~.

ITEM 5. Amend rules 751—16.5(17A,ExecOrd11) to 751—16.11(17A,ExecOrd11) as follows:

751—16.5(17A,ExecOrd11) Commission responsibilities regarding petition for waiver ~~or variance~~.

16.5(1) *Additional information.* Prior to issuing an order granting or denying a waiver ~~or variance~~, the commission may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the commission may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting or a meeting over the network operated by the commission, between the petitioner and the commission's designee, a committee of the commission, or a quorum of the commission.

16.5(2) *Hearing procedures.* The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (a) to any petition for a waiver ~~or variance~~ of rule filed within a contested case; (b) when the commission so provides by rule or order; or (c) when a statute so requires.

16.5(3) *Ruling.* An order granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

16.5(4) *Conditions.* The commission may condition the granting of the waiver ~~or variance~~ on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

16.5(5) and 16.5(6) No change.

16.5(7) *Time for ruling.* The commission shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the commission shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

16.5(8) and 16.5(9) No change.

751—16.6(17A,ExecOrd11) Public availability. Subject to the provisions of Iowa Code section 17A.3(1) "e," the commission shall maintain a record of all orders granting or denying waivers ~~and~~

variances under this chapter. All final rulings in response to requests for waivers or variances shall be indexed and available to members of the public at the ICN main office location as listed in 751—subrule 1.6(1).

751—16.7(17A,ExecOrd11) Voiding or cancellation. A waiver or variance issued by the commission pursuant to this chapter may be withdrawn, canceled, modified, declared void or revoked if, after appropriate notice and hearing, the commission issues an order finding any of the following:

1. The petitioner or the person who was the subject of the waiver or variance order withheld or misrepresented material facts relevant to the propriety or desirability of granting the waiver or variance; or
2. The alternative means for ensuring that the public health, safety and welfare will be adequately protected after issuance of the waiver order have been demonstrated to be insufficient; or
3. The subject of the waiver order has failed to comply with all conditions contained in the order; or
4. The waiver or variance is contrary to the public health, safety and welfare in light of newly discovered evidence or changed circumstances.

751—16.8(17A,ExecOrd11) Violations. Violation of conditions in the waiver or variance approval is the equivalent of violation of the particular rule for which the waiver or variance is granted and is subject to the same remedies or penalties.

751—16.9(17A,ExecOrd11) Defense. After the commission issues an order granting a waiver or variance, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

751—16.10(17A,ExecOrd11) Appeals. Granting or denying a request for waiver or variance is final agency action under Iowa Code chapter 17A. An appeal to district court shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

751—16.11(17A,ExecOrd11) Summary reports Submission of waiver information. ~~Semiannually, the commission shall prepare a summary report identifying~~ Within 60 days of granting or denying a waiver, the commission shall make a submission on the Internet site established pursuant to Iowa Code section 17A.9A for the submission of waiver information. The submission shall identify the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by these rules, and a general summary of the reasons justifying the commission’s actions on waiver requests. If practicable, the report shall detail the extent to which granting a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself. Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.

Exhibit A

Sample Petition (Request) for Waiver/~~Variance~~

BEFORE THE IOWA TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION

Petition by (insert name of petitioner)
for the waiver of (insert rule citation)
relating to (insert the subject matter).

}

PETITION FOR
WAIVER

Requests for waiver or variance from a commission rule shall include the following information in the petition for waiver or variance where applicable and known to the petitioner:

- a. Provide the petitioner’s (person asking for a waiver or variance) name, address, and telephone number.

- b.* Describe and cite the specific rule from which a waiver ~~or variance~~ is requested.
- c.* Describe the specific waiver ~~or variance~~ requested; include the exact scope and time period that the waiver ~~or variance~~ will extend.
- d.* Explain the important facts that the petitioner believes justify a waiver ~~or variance~~. Include in your answer why (1) applying the rule will result in hardship or injustice to the petitioner; and (2) granting the waiver ~~or variance~~ to the petitioner is consistent with the public interest; and (3) granting the waiver ~~or variance~~ will not prejudice the substantial legal rights of any person; and (4) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.
- e.* Provide a history of prior contacts between the commission and petitioner relating to the use of the network, regulated activity, license, grant, loan or other financial assistance that would be affected by the waiver ~~or variance~~; include a description of each affected use of the network, license, grant, loan or other financial assistance held by the petitioner, any notices of violation, contested case hearings, or investigative reports relating to the affected use, regulated activity, license, grant or loan within the past five years.
- f.* Provide information known to the petitioner regarding the commission's treatment of similar cases.
- g.* Provide the name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.
- h.* Provide the name, address, and telephone number of any person or entity that would be adversely affected or disadvantaged by the granting of the waiver ~~or variance~~.
- i.* Provide the name, address, and telephone number of any person with knowledge of the relevant or important facts relating to the requested waiver ~~or variance~~.
- j.* Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the commission with information relevant to the waiver ~~or variance~~.

I hereby attest to the accuracy and truthfulness of the above information.

Petitioner's signature

Date

Petitioner should note the following when requesting or petitioning for a waiver ~~or variance~~:

1. The petitioner has the burden of proving to the commission, by clear and convincing evidence, the following: (a) application of the rule to the petitioner would result in hardship or injustice to the petitioner; and (b) waiver ~~or variance~~ on the basis of the particular circumstances relative to the petitioner would be consistent with the public interest; and (c) waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and (d) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

2. The commission may request additional information from or request an informal meeting with the petitioner prior to issuing a ruling granting or denying a request for waiver ~~or variance~~.

3. All petitions for waiver ~~or variance~~ must be submitted in writing to the ICN main office location as listed in 751—subrule 1.6(1). If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.