

CHAPTER 9
REQUESTS FOR WAIVER
OF NETWORK USE BY
CERTIFIED USERS

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, community college, regents institution, or private college that has certified with the commission that it is or will be a part of the network.

9.1(1) Conditions.

a. One of the following conditions shall be satisfied in the request:

(1) The costs to the certified user for services provided by the network are not competitive with the same services available from another provider.

(2) The certified user is under contract with another provider for such services, provided the contract was entered into prior to April 1, 1994. The certified user shall use the network for video, data, and voice requirements that are not provided pursuant to such contract.

b. A certified user shall have the burden of proof regarding the question of whether the services provided by the network are not competitive with the same services available from another provider.

9.1(2) Waiver submission. A request for waiver must be received at the ICN main office location as listed in 751—subrule 1.6(1) not less than 15 days prior to the next regularly scheduled commission meeting. A request for waiver renewal must be submitted not less than 15 days prior to the next scheduled commission meeting preceding the expiration of the current waiver. A listing of certified users not meeting this submission requirement shall be included in the commission’s annual report related to the network.

751—9.2(8D) Request for proposal, direct negotiation. A certified user may issue a request for proposals (RFP) or a request for information (RFI) or negotiate directly with public and private vendors for the provision of telecommunication services.

If a certified user seeks a waiver and is unable to supply the information necessary for the commission to make a determination as to the competitiveness of its services and the services provided by the certified user’s proposed vendor, for whatever reason, including but not limited to restrictions imposed by a nondisclosure agreement, the commission may deny the request for a waiver. An affidavit from the certified user indicating that the commission’s services are not competitive will not be sufficient to support a grant of waiver under these rules or Iowa Code section 8D.9.

751—9.3(8D) Contents for waiver petition. Upon receipt of a request for a waiver pursuant to Iowa Code section 8D.9(2), commission staff members will forward a copy of the request to the commission members along with any supplemental information filed by the petitioner. The petitioner shall specifically address each reason for which it is seeking a waiver, and recite any facts supporting its response. The petitioner shall enclose copies of all related letters, records, or other documents in support of its request. Filing a request for a waiver shall not commence a contested case proceeding.

751—9.4(8D) Waiver investigation, limited discovery. The commission staff shall commence a waiver investigation upon receipt of the petition for a waiver. The commission staff may make requests for supporting data from the petitioner or propound interrogatories to the petitioner or conduct depositions of relevant persons regarding information possessed by the petitioner relative to the waiver petition. Data requests or interrogatories served by commission staff shall either be responded to or objected to, with a concisely stated ground for relief, within seven days of receipt. The commission chair shall rule on all objections. Depositions of relevant persons must be conducted within 30 days after the petition for waiver is filed unless the parties agree otherwise.

751—9.5(8D) Notice of hearing and discovery. Within 20 days after the petition for a waiver has been filed with the commission, the staff will notify the petitioner of the time and place for a hearing before

the commission. Any information the staff has assembled for the commission to consider shall be made available to the petitioner at least 30 days before a meeting of the commission where the petitioner's request for waiver will be considered. The petitioner shall have the right to pose interrogatories or depose staff members involved in the development of any information for the commission to consider. The hearing to consider the waiver shall be held within 90 days after receipt of the request for the waiver unless the parties agree otherwise.

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) Official record and in camera requests. All of the information received by the commission from the staff and the petitioner including the petition and attachments will be included in the record of the hearing. The petitioner may ask the commission to examine any proprietary information in camera and in conformance with Iowa Code chapter 22. The tape recording for the hearing and the evidence presented to the commission will constitute the record of the proceeding.

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.

751—9.7(8D) Evaluation criteria. In considering the evidence regarding competitive service, the commission may consider any of the following:

9.7(1) The type of third-party service being offered to the petitioner versus the type of service the commission can offer.

9.7(2) The direct costs of service being offered to the petitioner versus the direct cost of the service offered by the commission, including but not limited to the following:

- a. The unit cost of individual services;
- b. The cost for bundled services;
- c. The costs of leased lines to access an individual service;
- d. The cost of installation charges;
- e. The cost of coordination fees;
- f. The costs of equipment necessary to access a service;
- g. The costs of setup fees;
- h. Any other direct cost related to the service sought by the certified user and identified in the evidence presented to the commission.

9.7(3) The indirect costs of service being offered to the petitioner versus the indirect cost of service offered by the commission, including but not limited to the following:

- a. Service availability;
- b. Protection from fraudulent use of the service;
- c. Availability of advanced billing services;
- d. Response time to service outages;
- e. Redundancy to ensure continuous service;
- f. Disaster recovery plan;

g. Any other indirect cost related to the service sought by the certified user and identified in the evidence presented to the commission.

9.7(4) Any discounts the petitioner has been offered versus the discounts the commission can offer.

9.7(5) Any other enhanced value items included in the offer of service by a service provider selected by the petitioner versus the enhanced value items the commission can offer including but not limited to the entire range of services the commission offers to an authorized user.

9.7(6) Any other relevant information included in the evidence before the commission regarding the petition for waiver.

751—9.8(8D) Voluntary decertification. A certified user may voluntarily withdraw its certification to use the services of the commission. The certified user must give the commission 60 days' prior written notice before the withdrawal will take effect. In the event the commission has property located on the property of the certified user, the commission and the certified user may enter into an agreement allowing the property to remain in place to serve the network. In the event the certified user decides to apply for certification after a voluntary withdrawal, the certified user will have to seek permission of the general assembly to recertify or as otherwise provided by law.

This chapter is intended to implement Iowa Code sections 8D.3(3) "b" and 8D.9(2) "b."

[Filed 3/21/97, Notice 1/15/97—published 4/9/97, effective 5/14/97]

[Filed 9/21/07, Notice 6/20/07—published 10/10/07, effective 11/14/07]