

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CUMBERLAND CELLULAR, INC.)	
DBA DUO COUNTY TELECOM FOR)	
ARBITRATION OF CERTAIN TERMS AND)	
CONDITIONS OF PROPOSED INTER-)	CASE NO.
CONNECTION AGREEMENT WITH)	2012-00529
BELLSOUTH TELECOMMUNICATIONS, INC.)	
DBA AT&T KENTUCKY PURSUANT TO THE)	
PSC ACT OF 1934 AS AMENDED BY THE)	
TELECOMMUNICATIONS ACT OF 1996)	

ORDER

On November 30, 2012, Cumberland Cellular, Inc. d/b/a Duo County Telecom (“Duo County”) filed with the Commission, pursuant to 47 U.S.C. § 252(b) and KRS Chapter 278, a Petition¹ requesting that the Commission arbitrate certain terms and conditions of a proposed interconnection agreement between Duo County and BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”). Among the issues for which Duo County sought arbitration was compensation for interim services that Duo County claims it has been providing AT&T Kentucky since January 24, 2008.²

On December 26, 2012, AT&T Kentucky filed with the Commission its response to the Arbitration Petition, along with a motion to dismiss Duo County's claims for

¹ Arbitration Petition of Cumberland Cellular, Inc. d/b/a Duo County Telecom, filed November 30, 2012 (“Arbitration Petition”).

² Arbitration Petition at 6.

compensation for interim services (“Motion to Dismiss”).³ As grounds for its motion, AT&T Kentucky argues that: (1) The federal Telecommunications Act of 1996 (“1996 Act”) does not allow the Commission to arbitrate claims for services performed and billed in the past; and (2) AT&T Kentucky asserts that the claim for interim services should have been brought as a complaint under 807 KAR 5:001.⁴

AT&T Kentucky claims that 47 U.S.C § 252(b)⁵ allows the arbitration of “any open issue,” but that there are limits to what the open issues can be. AT&T Kentucky argues that the open issues are limited to the duties imposed on an incumbent local exchange carrier (“ILEC”) by 47 U.S.C. §§ 251(b) and (c). The duties imposed pursuant to 47 U.S.C. §§ 251(b) relate to: (1) resale, (2) number portability, (3) dialing parity, (4) access to rights of way, and (5) reciprocal compensation. The duties imposed pursuant to 47 U.S.C. § 251(c) relate to: (1) interconnection, (2) unbundled access to network elements, (3) resale, (4) notice of changes, and (5) collocation.

AT&T Kentucky argues that 47 U.S.C. § 251(c)(1) imposes upon ILECs the duty to negotiate in good faith, but that there is no duty to negotiate anything other than terms and conditions of the duties that are imposed in 47 U.S.C. § 251(b) and (c). AT&T Kentucky claims that an open issue is “a disagreement arising out of the parties’

³ AT&T Kentucky’s Motion to Dismiss Improperly Joined Claim for Compensation for Interim Services filed December 26, 2012 (“Motion to Dismiss”).

⁴ Motion to Dismiss at 1.

⁵ 47 U.S.C. § 252(b)(1) provides:

During the period from the 135th day to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issue*. (Emphasis added).

negotiations of the 'particular terms and conditions of' an agreement to 'fulfill the duties described in' Sections 251(b) and (c)."⁶

AT&T Kentucky also argues that the claim for interim services cannot be included in an arbitration because the claim is not governed by 47 U.S.C. § 251(b) and 47 U.S.C § 251(c). AT&T Kentucky bases this argument on two grounds: (1) that retroactive compensation for the period before an interconnection agreement goes into effect is not a duty imposed by the 1996 Act; and (2) that the interim services were billed under a valid tariff that is created and governed by state law and not a duty imposed by the 1996 Act.

Duo County argues that compensation for interim services is an "open issue" that can be arbitrated because it has been "the subject of long-running negotiations between the parties prior to . . ." ⁷ the filing of the petition. Duo County asserts that the issue is "central to the disputed terms of the interconnection agreement" and is therefore appropriate to include in the Petition for Arbitration.⁸ Duo County argues that if AT&T Kentucky had wanted to limit the negotiations to duties arising under 47 U.S.C. §251(b) and (c), AT&T Kentucky was affirmatively required to do so when negotiations commenced.⁹

Duo County also argues that the 1996 Act provides that the Commission has the authority to ensure that interconnection agreements comply with state laws. Duo

⁶ Motion to Dismiss at 4.

⁷ Duo County Telecom's Response to AT&T Kentucky's Motion to Dismiss Claim for Compensation for Interim Services, filed January 10, 2013 ("Response to Motion to Dismiss") at 1.

⁸ *Id.*

⁹ *Id.* at 3.

County asserts that 47 U.S.C. § 252(e)(3)¹⁰ allows the Commission to consider relevant state law when reviewing an interconnection agreement. Duo County claims that it is owed compensation under KRS 278.160 for services provided under its filed tariff, and therefore, is an issue that should be included in the arbitration.¹¹

DISCUSSION

Duo County is seeking payment for services that it claims it has been providing since January 24, 2008.¹² It is undisputed that Duo County provided these services to AT&T Kentucky; what is disputed is whether the issue of compensation should be included in the arbitration proceeding. The Commission must determine whether the request for compensation for interim services is an “open issue” and subject to arbitration.

The 1996 Act is lenient in what it allows to be included in agreements voluntarily negotiated under 47 U.S.C § 252(a). Agreements reached under this section can include terms and conditions that are not required under 47 U.S.C. § 251(b) and (c). What must be included in an arbitrated agreement under 47 U.S.C. §252(b) is more limited.

47 U.S.C. § 252(b) requires only that the Commission arbitrate any “open issues” between the petitioning carriers. AT&T Kentucky claims that the issues are limited to those duties found in 47 U.S.C. § 251(b) and (c). Duo County claims that “open issues”

¹⁰ 47 U.S.C. § 252(e)(3) provides, in pertinent part, that:

[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

¹¹ Response to Motion to Dismiss at 5.

¹² Arbitration Petition at 6.

include any issue that the parties were negotiating prior to filing for arbitration with the Commission.

In this case, Duo County is seeking payment for services it has been rendering to AT&T Kentucky for more than five years. By admission, these services were provided under Duo County's state tariff on file with the Commission. If there was a dispute over compensation for these services, it is puzzling why Duo County did not bring a complaint against AT&T Kentucky under the Commission's statutes, rather than to wait five years and then seek enforcement of the tariff in an arbitration petition.

By its nature an interconnection agreement is a forward-looking document, governing the relationship of carriers in the future upon approval of the agreement. A request to be compensated for services that have already been provided, especially for a period exceeding five years, deals with the past business dealings of the carriers and does not address the future relationship of the carriers. Accordingly, Duo County's claim for compensation for interim services is not a proper issue to be included in this arbitration. Should Duo County wish to seek compensation for the provision of interim services as provided under its tariff, it may file a complaint with the Commission.

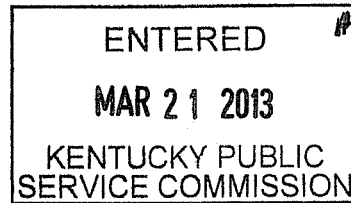
Although an interconnection agreement is a forward-looking document, compensation for services rendered can be a proper subject for arbitration if the parties both agree that it should be included in the list of issues to arbitrate. Had AT&T Kentucky agreed to include compensation for interim services in the open issues to be decided, we could have resolved that issue as well. We also do not agree with AT&T Kentucky's reading of 47 U.S.C. § 252(b) that restricts "open issues" solely to the duties

imposed by 47 U.S.C. §251(b) and (c). Should the parties so desire and agree, they may submit any issue to the Commission to arbitrate.

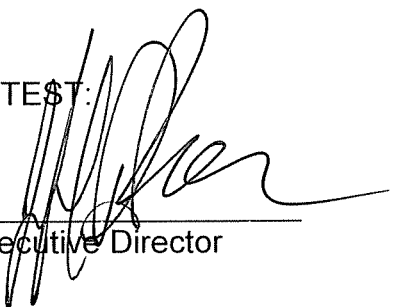
IT IS THEREFORE ORDERD that:

1. AT&T Kentucky's Motion to Dismiss is granted.
2. All other motions are denied as moot.

By the Commission



ATTEST:



Executive Director

Edward T Depp
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KENTUCKY 40202

Honorable Mary K Keyer
General Counsel/Kentucky
BellSouth Telecommunications, LLC dba AT&T
601 W Chestnut Street
4th Floor East
Louisville, KY 40203