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JAN 10 2013

PUBLIC SERVICE
COMMISSION

January 10, 2013

Via Hand Delivery

Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

In the Matter of: Petition of Cumberland Cellular, Inc. d/b/a Duo County Telecom for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2012-00529

Dear Mr. Derouen:

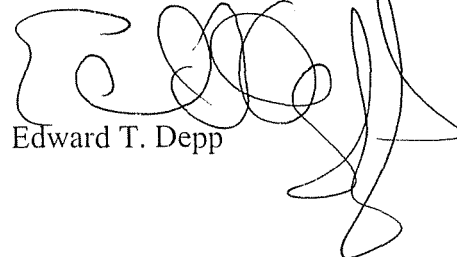
Enclosed for filing with the Public Service Commission of the Commonwealth of Kentucky (the "Commission") are one (1) original and ten (10) copies of the response of Duo County Telecom to AT&T's motion to dismiss.

Please return a file stamped copy to our courier.

Thank you and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/kwi
Enclosures

cc: John E. Selent, Esq.
Jerrad Howard, Esq.

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JAN 10 2013

PUBLIC SERVICE
COMMISSION

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Petition of Cumberland Cellular, Inc. d/b/a)
Duo County Telecom for Arbitration of)
Certain Terms and Conditions of Proposed)
Interconnection Agreement with BellSouth)
Telecommunications, Inc., d/b/a AT&T)
Kentucky, Pursuant to the Communications)
Act of 1934, as Amended by the)
Telecommunications Act of 1996)

Case No. 2012-00529

**DUO COUNTY TELECOM'S RESPONSE TO
AT&T KENTUCKY'S MOTION TO DISMISS
CLAIM FOR COMPENSATION FOR INTERIM SERVICES**

Cumberland Cellular, Inc., d/b/a Duo County Telecom ("Duo County Telecom"), by counsel, hereby responds to BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's ("AT&T Kentucky") motion to dismiss and respectfully asks the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to deny the same for the following reasons.

INTRODUCTION

Duo County Telecom submitted its arbitration petition to the Commission on November 30, 2012 pursuant to Section 252 of the 1996 federal Telecommunications Act (the "1996 Act") and applicable state law. That petition described five open issues that Duo County Telecom and AT&T Kentucky have been unable to resolve in their negotiation of an interconnection agreement. Among these open issues is a provision in the agreement requiring that AT&T Kentucky compensate Duo County Telecom for interim interconnection services that Duo County Telecom has provided and AT&T Kentucky accepted without payment. This provision in the draft interconnection agreement has been the subject of long-running negotiations between the parties prior to Duo County Telecom's submission of its arbitration petition.

AT&T Kentucky filed a motion to dismiss on December 21, 2012, claiming that Duo County Telecom had improperly joined its claim for compensation related to these interim interconnection services and alleging that the Commission does not have authority to arbitrate a matter that is outside the scope of an ILEC's Section 251(b) or (c) duties. AT&T Kentucky further contends that Duo County Telecom's claim for compensation does not establish a *prima facie* case.

AT&T Kentucky's motion to dismiss should be denied. The Commission has the authority, pursuant to Section 252 of the 1996 Act, to arbitrate any open issue that has been the subject of negotiations between the parties. State commissions also have the authority to review and refuse the approval of interconnection agreements based upon principles of state law. There is no requirement that Duo County Telecom must submit its claim for compensation in a separate formal complaint when the claim for compensation derives from an open issue in an interconnection agreement that has been the subject of long-running negotiations between the parties.

Duo County Telecom provided AT&T Kentucky with interim interconnection services immediately upon request. Duo County Telecom seeks to have AT&T Kentucky pay for those interim services at the rates provided in the agreement. This issue is central to the disputed terms of the interconnection agreement. Consequently, it was appropriate for Duo County Telecom to include that issue in its petition, and the Commission should deny AT&T Kentucky's motion to dismiss.

ARGUMENT

I. THE COMMISSION HAS AUTHORITY TO ARBITRATE ANY OPEN ISSUE, INCLUDING DUO COUNTY TELECOM'S CLAIM FOR COMPENSATION RELATED TO INTERIM INTERCONNECTION SERVICES.

The Commission has authority to arbitrate "any open issue" that is presented in Duo County Telecom's petition, whether that "open issue" is based upon state or federal law. *Petition of*

Comm'ns Venture Corp., Case No. 2009-00438, at *11 (Ky. P.S.C. 2009) (stating the Commission has “the authority to arbitrate ‘any open issues’ presented in the arbitration petition”); 47 U.S.C. 252(b)(1); *see also Coserv Ltd. Liab. Corp. v. Sw. Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003). The arbitration process outlined in Section 252 has generally been understood to apply to all open issues presented in all Section 251 agreements, and not just those issues involving Section 251(b) and (c) duties. In fact, Section 252(a)(1) clearly anticipates that the parties’ negotiations will go beyond Section 251(b) and (c) duties:

[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.

The state commission’s jurisdiction to arbitrate is only “limited by the actions of the parties in conducting voluntary negotiations,” *Coserv Ltd. Liab. Corp.*, 350 F.3d at 488, and where jurisdiction has been expressly limited to the Federal Communications Commission. *See Mich. Bell Tel. Co. v. Isiogu*, No. 09-12577, 2010 U.S. Dist. LEXIS 18182 (E.D. Mich. Mar. 2, 2010). If it wished to limit its negotiations to its Section 251(b) and (c) duties, AT&T Kentucky was required to do so affirmatively when negotiations commenced. *Id.* at *13 (declining to adopt AT&T Michigan’s narrow definition of “open issue”). AT&T did not do so. Instead, it argued that the terms of the eventual interconnection agreement should not govern the interim services provided by Duo County Telecom; Duo County Telecom took the opposite position. Thus, because the question of AT&T Kentucky’s obligation to compensate Duo County Telecom for interim interconnection services was a subject of disputed negotiation, it is appropriate for the Commission to address that issue in the arbitration proceeding.¹

¹ AT&T Kentucky makes repeated reference to the concept of “used computer parts” in its arguments on this point. Although Duo County Telecom has no idea how “used computer parts” are relevant to this arbitration, it bears

Moreover, “[t]here is nothing in § 252(b)(1) limiting open issues only to those [duties] listed in § 251(b) and (c).” *Coserv Ltd. Liab. Corp.*, 350 F.3d at 487. Likewise, nothing in Section 251 or applicable Kentucky law limits the subject matter of an interconnection agreement to prospective duties of the parties. *See, e.g.*, 47 CFR § 51.715(d) (allowing an ILEC to receive interim interconnection charges for services rendered); *see also* KRS 278.030(1) (“Every utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person.”).

Duo County Telecom and AT&T Kentucky have engaged in voluntary negotiations regarding AT&T Kentucky’s payment of compensation for interim interconnection services while negotiating their interconnection agreement. Despite the parties’ negotiations, Duo County Telecom and AT&T Kentucky have been unable to reach an agreement on the terms associated with this issue. Therefore, AT&T Kentucky’s payment of compensation for interim services and the related terms in the agreement remain an “open issue” that Duo County Telecom has properly submitted to the Commission for arbitration.

II. THE 1996 ACT PROVIDES STATE AGENCIES WITH AUTHORITY TO ENSURE INTERCONNECTION AGREEMENTS COMPLY WITH STATE LAW.

Despite AT&T Kentucky’s disregard for the applicability of state law, the 1996 Act affords the Commission concurrent jurisdiction over those matters arising out of Section 251 and state law. Section 252(e)(3) allows the Commission to consider relevant state law when reviewing an interconnection agreement:

[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.

noting that if “used computer parts” were a subject of disputed negotiation in this agreement, it would be appropriate to address that matter here, as well. Thankfully, “used computer parts” are not in issue.

In addition, at least one court within the Sixth Circuit has upheld a state commission's arbitration of issues outside the scope of Section 251(b) and (c). *Mich. Bell Tel. Co.*, 2010 U.S. Dist. LEXIS 18182 (holding that a state commission may arbitrate an open issue based upon an FCC order and not the 1996 Act).

Pursuant to Kentucky law, Duo County Telecom has the right to demand and collect fair and reasonable rates for interconnection services provided. KRS 278.030. Furthermore, AT&T Kentucky is required to compensate Duo County Telecom for interconnection services at rates consistent with the terms of the interconnection agreement (which in this case references Duo County Telecom's filed and approved tariffs). KRS 278.160. Because the parties have engaged in long-running negotiations regarding this matter, the Commission may properly arbitrate this open issue despite the fact that the claim is based in part upon Kentucky law.

III. DUO COUNTY TELECOM'S CLAIM FOR COMPENSATION FOR INTERIM INTERCONNECTION SERVICES SHOULD BE ADDRESSED IN THIS ARBITRATION.

AT&T Kentucky contends that Duo County Telecom must file a formal complaint to request compensation for interim services. Again, AT&T Kentucky provides no support for its position that the Commission cannot arbitrate an open issue related to an interconnection agreement. Nothing in the 1996 Act, Kentucky state law, or 807 KAR 5:001 requires any open issue that has been the subject of Section 251 negotiations to be filed as a separate formal complaint. Moreover, public policy favors the consolidation of the same or similar matters into one proceeding for adjudication by a decision-maker to preserve government resources. Furthermore, the 1996 Acts prohibits barriers to entry, including the imposition of inefficient costs on a competitive local exchange carrier as ATT would seem to demand in its motion to dismiss.

AT&T Kentucky also contends that Duo County Telecom has failed to establish a *prima facie* case for its claim regarding compensation for interim services. AT&T Kentucky is “bootstrapping” that claim on the incorrect assumption that there must be a separate complaint. Duo County Telecom’s arbitration petition clearly states that the interim interconnection services billed are the same services, and are billed at the same rates, as contained in the draft interconnection agreement now before the Commission. The issue is part and parcel of the terms the Commission has been petitioned to arbitrate. Consequently, it is not necessary for Duo County Telecom to set out duplicative information or file a duplicative complaint that might otherwise be necessary were the Commission *not* examining the relevant interconnection agreement.

AT&T Kentucky’s obligation to pay for interim interconnection services has been the subject of long-running negotiations between the parties, and AT&T Kentucky was well aware that the effective date of the interconnection agreement and terms related to the payment of previously billed and unpaid access charges were integral issues regarding the interconnection agreement. Duo County Telecom’s inclusion of this issue as part of the arbitration petition should come as no surprise to AT&T Kentucky. Tellingly, AT&T Kentucky does not deny that this issue has been the subject of continued negotiations between the parties. (AT&T Kentucky’s Motion to Dismiss 9-10.) In addition, AT&T Kentucky all but acknowledges that, if Duo County Telecom were required to file a separate formal complaint, it could easily establish a *prima facie* case for such compensation. Duo County Telecom has billed AT&T Kentucky for these interim services, and AT&T Kentucky has received those bills and refused to pay for those interim services. Pursuing this issue through a separate complaint, however, is inefficient for everyone involved.

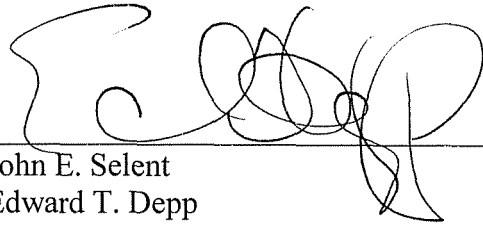
Because the Commission has been petitioned to arbitrate the interconnection agreement and because AT&T Kentucky is obligated to compensate Duo County Telecom for the interim services

that it requested and received, this open issue is subject to arbitration by the Commission. AT&T Kentucky's demand for a separate formal complaint is unnecessary, unwarranted, and baseless. It is a transparent attempt to forestall AT&T Kentucky's yet undisputed obligation to compensate Duo County Telecom for the interim services it requested and received. Therefore, AT&T Kentucky's motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, Duo County Telecom respectfully requests that the Commission deny AT&T Kentucky's motion to dismiss.

Respectfully submitted,



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Jerrad T. Howard

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Counsel to Duo County Telecom

CERTIFICATE OF SERVICE

Pursuant to 47 U.S.C. § 252(b)(2)(B), I hereby certify that a copy of the foregoing was served this 10th day of January, 2013, to the following individuals:


Via U.S. mail and email:

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