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October 24, 2013

**PSC STAFF OPINION 2013-015**

Carolyn Ridley  
Vice-President, Public Policy  
tw telecom of Kentucky, LLC  
2078 Quail Run Drive  
Bowling Green, KY 42104

Hood Harris, President  
AT&T Kentucky  
601 W. Chestnut Street, Suite 408  
Louisville, KY 40203

RE: Request for Legal Staff Opinion  
Commission Jurisdiction Over the Technology Used for Interconnection Pursuant  
to 47 USC §§ 251-252 and KRS 278.530

and

AT&T Kentucky's Request That Commission Staff Decline to Address tw telecom  
of Kentucky's Request for Legal Staff Opinion

Dear Ms. Ridley and Mr. Harris:

Commission Staff acknowledges receipt of Ms. Ridley's letter dated August 22, 2013, filed on behalf of tw telecom of Kentucky, LLC ("tw telecom"), requesting a staff advisory opinion to clarify comments that were made at the July 15, 2013 hearing conducted before the Interim Joint Committee on Economic Development where the Commission's jurisdiction over intercarrier matters was described as "technology neutral." Ms. Ridley has requested a Commission Staff opinion concerning whether or not the regulatory interconnection scheme under 47 U.S.C. §§ 251-252 and KRS 278.530 govern all voice traffic, regardless of underlying technology, transmission media, or protocol. Ms. Ridley also requests Commission Staff to advise whether this interconnection scheme guarantees the right of any provider of voice communications to file a petition with the Commission requesting an Order prescribing the rates, terms, and conditions of proposed interconnection with another provider. Ms. Ridley states that the answer to both of these issues is in the affirmative.

Commission Staff also acknowledges receipt of Mr. Harris' letter dated October 8, 2013, filed on behalf of AT&T Kentucky, requesting that Commission Staff decline to respond to tw telecom's August 12, 2013 request for a legal opinion. Mr. Harris states that although AT&T Kentucky disagrees with tw telecom's interpretation of applicable law, AT&T Kentucky is most concerned that tw telecom has asked Commission Staff to:

(a) jump out in front of the Federal Communications Commission ("FCC") and federal courts in addressing a novel issue of profound national significance; (b) jump out in front of the Kentucky Commission and Kentucky courts in addressing a novel issue of profound national significance; and (c) effectively bypass input of other persons and entities who have an interest in, and would be affected by, any Staff opinion on those issues. In light of these concerns, we respectfully request that the Staff decline to address tw telecom's questions.

(Footnote omitted).

Mr. Harris states that interconnection with internet protocol ("IP") networks is nothing new or novel, but what is new or novel is tw telecom seeking to impose legacy interconnection regulations on "heretofore unregulated modern IP networks." Mr. Harris states that the FCC has an open proceeding to address these issues, that tw telecom is asking Commission Staff to "plow new ground ahead of the FCC and federal courts," and that tw telecom is asking Commission Staff to "plow new ground ahead of the Commission and the state courts."

Mr. Harris concludes that:

[I]f tw telecom's questions are to be addressed at all, they should be addressed by the Commission itself after receiving evidence presented by interested parties in a formal contested case proceeding or, at a minimum, in the context of a formal application for a declaratory order that has been served on all persons who may be affected by the application . . . . In no event should these novel questions, which have nationwide significance, be addressed in the informal manner requested by tw telecom.

This Opinion letter responds to both letters. It represents Commission Staff's interpretation of the law as applied to the facts presented. This Opinion is advisory in nature and not binding upon the Commission should the issues presented herein be formally presented for Commission resolution.

Commission Staff disagrees with Mr. Harris' position that Commission Staff should decline to issue the opinion sought by tw telecom. As always, Commission Staff opinions have no legal precedential value and are advisory in nature. tw telecom's request for a legal opinion asks for a generic interpretation of a law, and does not ask Commission Staff to opine on the outcome of a specific factual scenario, or application of the law, that may come before the Commission. Moreover, while a party is entitled to request a declaratory order from the Commission pursuant to 807 KAR 5:001, Section 18, it is not required to file a petition with the Commission in lieu of requesting a Commission Staff opinion. Mr. Harris' position, if accepted and applied to other requests for Commission Staff opinions, would greatly reduce, if not eliminate, the number of Commission Staff opinions. Consequently, Commission Staff will not decline to address Ms. Ridley's letter.

Concerning Ms. Ridley's letter: Ms. Ridley states that, "KRS 278.530(1) describes the right of a "telephone company" to petition the Commission if it has been unable to negotiate reasonable terms to connect its exchange or lines with another provider . . ." and that "KRS 278.530 . . . uses the term 'telephone company,' which is otherwise undefined in KRS Chapter 278. However, Kentucky case law supports the common sense proposition that any statute related to a 'telephone company' is to be applied in a technology neutral manner . . ."

Ms. Ridley also states that:

Similarly, 47 U.S.C § 251 requires all telecommunication carriers ". . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." but like KRS 278.530, it does not reference particular technology, transmission media, or protocols. And the FCC has noted that Section 251 of the Act does not limit the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic, describing the statutory language as "technology neutral." . . . The FCC has also explained that "[t]he duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, otherwise. (Citations omitted.)

Ms. Ridley concludes that "[u]nless the FCC expressly orders otherwise, the Kentucky Commission appears to have authority to apply Section 251's requirements to any telecommunications carrier . . ." and, that "KRS 278.530 and 47 U.S.C. § 251 appear to be technologically neutral and to continue to provide a route by which the Commission may compel interconnection and specify reasonable terms for the interconnection parties." (Citations omitted.)

Ms. Ridley is asking Commission Staff for an opinion on a matter that neither the Commission nor Commission Staff has addressed formally or informally. Ms. Ridley is requesting an interpretation of KRS 278.530(1) which provides that:

Whenever any telephone company desires to connect its exchange or lines with the exchange or lines of another telephone company and the latter refuses to permit this to be done upon reasonable terms, rates and conditions, the company desiring the connection may proceed as provided in subsection (2) or as provided in subsection (3) of this section.

Ms. Ridley is also requesting an interpretation of 47 U.S.C. § 251, which provides the statutory framework of interconnection between telecommunication providers. This interpretation also implicates 47 U.S.C. § 252, which provides for the procedure for seeking interconnection under the 47 U.S.C. §251 interconnection regime.

Ms. Ridley is correct that KRS 278.530 does not specifically define the types of technology that may be utilized for the connecting of lines or the routing and switching of calls. In fact, KRS Chapter 278 neither specifies nor exempts types of interconnection dependent upon the underlying technology used. Therefore it follows that if a petition for the connecting of lines is filed pursuant to KRS 278.530, the Commission may entertain the petition regardless of the technology involved.

The Commission, however, has interpreted KRS 278.530 to apply to situations where interconnection does not already exist.<sup>1</sup> The Commission has also noted that KRS 278.530 establishes a "procedure to be followed by aggrieved utilities, but does not prescribe the means by which the Commission must investigate and determine fair, just and reasonable rates."<sup>2</sup> Therefore, Commission Staff concludes that while KRS 278.530 is "technology neutral," it only applies in the absence of an existing contract or interconnection and does not guarantee what procedure or standard the Commission should apply to reach a determination regarding the terms of interconnection. In short, even if a telephone company files a petition under KRS 278.530 (which has not occurred since 1983), interconnection is not guaranteed.<sup>3</sup>

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<sup>1</sup> Case No. 8727, *General Telephone Company of Kentucky v. South Central Bell Telephone Company* (KY PSC May 12, 1983) at 5.

<sup>2</sup> *Id.*

<sup>3</sup> Commission Staff also notes that KRS 278.530 allows a telephone company to bring suit in Franklin Circuit Court, or the Circuit Court of the county in which the telephone company making the demand resides, and request interconnection with another telephone company.

With regard to the interconnection regime under 47 U.S.C. § 251, Commission Staff agrees with Ms. Ridley's characterization that the FCC has declared the interconnection regime under that statute to be "technology neutral." However, the FCC has not determined if the regime under 47 U.S.C. § 251 is also service neutral or if it varies with the type of service offered or what portions of the interconnection regime should apply to IP services or interconnection.<sup>4</sup> As Mr. Harris states in his letter, the FCC has established an ongoing proceeding to address how IP interconnection and services should be addressed in an interconnection framework.<sup>5</sup>

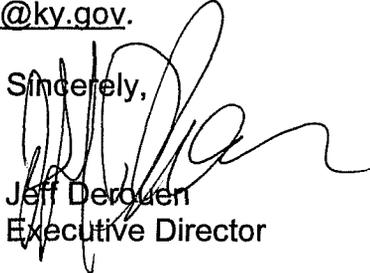
Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law. However, each petition for arbitration stands on its own, and each case is "tied to factual circumstances or otherwise circumscribed in various ways" and does not guarantee interconnection with an IP network.

Commission Staff notes that the FCC, by its actions, could preempt the Commission from acting on IP-enabled services, or provide that a different interconnection regime applies other than the traditional regime found in 47 U.S.C. § 251. Therefore, while a carrier can currently file under 47 U.S.C. § 252 for interconnection to an IP network, FCC action could affect this right.

Based on the foregoing, and with the limitations discussed, *supra*, Commission Staff concludes that the interconnection regimes under KRS 278.530 and 47 U.S.C. § 251 are technology neutral.

Thank you both for your letters pertaining to the matters discussed above. Should you have any questions or concerns, please contact Staff Attorney J.E.B. Pinney at 502-782-2587 or at [jeb.pinney@ky.gov](mailto:jeb.pinney@ky.gov).

Sincerely,



Jeff Derouen  
Executive Director

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<sup>4</sup> *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform: Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) at ¶ 1381.

<sup>5</sup> *Id.* at ¶¶ 1335 to 1403.