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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION FOR APPROVAL OF )	
THE TRANSFER OF CONTROL OF )	CASE NO. 2005-00534
ALLTEL KENTUCKY, INC. AND )	
KENTUCKY ALLTEL, INC. AND FOR )	
AUTHORIZATION TO GUARANTEE )	
INDEBTEDNESS )	

RESPONSE TO MOTION TO DISMISS

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Kentucky Alltel, Inc., Alltel Kentucky, Inc., Alltel Communications, Inc., Alltel Holding Corp., Valor Communications Group and Alltel Holding Corporate Services, Inc. (“Applicants”) file as follows in support of their Response to the Attorney General’s Motion to Dismiss the Amended and Restated Application or, in the Alternative, Attorney General’s Reply to Applicants’ Response to the Motion for Full Intervention by International Brotherhood of Electrical Workers (“IBEW”):

INTRODUCTION

1. On March 23, 2006, IBEW filed a Motion for Full Intervention in this proceeding. On March 24, 2006, Applicants filed a response to IBEW’s Motion and requested that IBEW’s Motion for Full Intervention be denied as the motion is untimely and would unduly complicate and disrupt the proceedings and existing schedule established by the Commission’s March 2, 2006 Order. Applicants’ desire is that this already protracted proceeding continue without further procedural interruptions so that the parties can concentrate on bringing closure to the requested transactions pending before the Commission. While full intervention by IBEW or any other

entity is inappropriate and unfounded at this late stage in the proceeding, informal intervention is available. Applicants would not oppose a motion by IBEW for informal intervention.

2. On March 31, 2006, the Attorney General filed a Motion to Dismiss the Amended and Restated Application requesting relief in the form of either dismissal of this proceeding or approval of IBEW's full intervention. While Applicants do not desire to continue expending resources on such procedural matters, they have no choice but to respond to the Attorney General's Motion to Dismiss in order to defend their rights with respect to the pending transactions. For the reasons set forth below, the Commission should deny the Attorney General's Motion to Dismiss and allow the parties to proceed with the substantive issues at hand.

### **ATTORNEY GENERAL'S MOTION TO DISMISS**

3. The Attorney General's Motion proposes to dismiss the Amended and Restated Application claiming that it does not comply with filing requirements and that Applicants are "attempting to thwart due process". (Attorney General's Motion at pages 4 and 6.) As an alternative to its request to dismiss the Amended and Restated Application, the Attorney General requests that IBEW be allowed full intervention. As discussed below, these arguments are without merit and would result in undue prejudice to Applicants, and the Commission should dismiss the Attorney General's Motion.

#### **A. Attorney General's Statement of Facts**

4. Applicants deny all allegations in the Attorney General's Motion unless specifically admitted herein.

5. The Attorney General acknowledges that an application may be deemed sufficient regardless of submission of prefiled testimony. For instance, Applicants' initial Application on

December 22, 2005 was deemed “not deficient” by the Commission without the submission of any prefiled testimony.

6. To clarify the Attorney General’s statement on page 3 of its Motion that Applicants represented in the initial Application that the transaction “would involve a simple name change,” the initial Application set forth a detailed description of the transfer of control transaction. Applicants represent that, from an end user customer perspective, both the transfer of control and debt financing transactions will appear essentially as a name change. Most importantly and in response to footnote 3 of the Attorney General’s Motion alleging impacts to Kentucky ratepayers, Applicants have demonstrated that the transactions will not result in a change in end user rates or local operations.

7. At the informal conference and during other discussions with the parties, Applicants consistently made clear their position that the maximum time period allowed by law (120 days) was initiated on January 23, 2006, the date their Amended and Restated Application was filed and that a final order, therefore, should be issued on or before May 23, 2006. Contrary to the Attorney General’s representations, Applicants’ response to IBEW’s Motion did not assert or request relief with respect to whether “any decision tendered after 23 May 2006 is null and void” (Attorney General’s Motion at page 6), nor did Applicants request a finding as to whether there was in fact good cause to extend the statutory time period from 60 to 120 days.<sup>1</sup>

#### **B. Attorney General’s Argument I**

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<sup>1</sup> The findings in the March 2, 2006 Order for the extension are one party’s desire for two rounds of data requests and “the number of intervenor...[and] the number of issues addressed at the informal conferences....” The Order contains no finding as to why these concerns necessitate the schedule being extended by the maximum 60 days. The only other reason advanced by any of the parties was the Attorney General’s request for additional time due to his involvement in the legislative session. With respect to Applicants’ request for debt financing, North Carolina law permits approval of the debt financing upon findings almost identical to those required under KRS 278.300, and the North Carolina Commission approved the financing 31 days after the application was filed.

8. The Attorney General asserts that the Amended and Restated Application should be dismissed as it does not comply with filing requirements (“Argument I”). Argument I is unsubstantiated and should be dismissed.

9. After serving over 275 data requests on Applicants and waiting more than two months after the Amended and Restated Application was filed (during which other parties, including Commission Staff, collectively have served over 200 data requests on Applicants), the Attorney General now for the first time alleges that the Amended and Restated Application and the testimony are deficient. The Commission has not issued a “deficiency notice”, and it is unreasonable for a party to suggest that the Commission would have allowed this matter to proceed for months and the parties to expend countless hours and resources on what the Attorney General contends is a patently deficient application.

10. In particular, the Attorney General states that information with respect to the “amount of notes, bonds or other evidence of indebtedness with the terms and rate of interest” and the “filing of the amount to be used for the acquisition” were not provided. (Attorney General’s Motion at page 5.) This is incorrect. To begin, the rules cited by the Attorney General in support of Argument I require the identified information to be provided with respect to the Kentucky utilities. The transactions set forth in the Amended and Restated Application do not impact in any material way either Kentucky-based ILEC. As a result of the transactions, their respective financial statements will not change in any material way from the statements already on file with the Commission.

11. Further, attached as Exhibits 6 and 7 to the Amended and Restated Application were a Schedule of Proposed Debt of New Holding Company and Commitment Letter setting forth the applicable terms and ranges of interest rates with respect to the debt financing. As the Kentucky

ILEC Applicants are not acquiring any property, the requirement with respect to “filing of the amount to be used for the acquisition” is inapplicable to these facts. Similarly, the Attorney General suggests that certain stock information was not provided and that the Kentucky ILECs have supplied no company-specific data. Neither Kentucky ILEC is issuing any stock such that the requirement is inapplicable and, as set forth in the Amended and Restated Application, there is no material change to the financial statements of either Kentucky ILEC. The annual financial statements for Kentucky Alltel, Inc. and Alltel Kentucky, Inc. are already on file with the Commission.

12. The Attorney General claims that it “pursued this information” in one out of its more than 275 data requests. (Attorney General’s Motion at footnote 6.) However, the referenced Initial Data Request 34 merely requested a “detailed breakdown of the amount for each and every Kentucky company that will guarantee and grant liens.” Applicants provided this information in Exhibit 6 to the Amended and Restated Application. Additionally, Attorney General Supplemental Data Request 46 requested where on Exhibit 6 “one can determine the amount for each Kentucky company’s...allocation/assignment/apportionment of the guarantees/liens.” Applicants responded that under the Senior Secured Credit Facilities, Column 3 (“Comments”) Note A, the entire debt will be guaranteed and secured by personal property and other necessary assets of the New Holding Company and all of its subsidiaries, including each of the Kentucky companies. This amount is limited only by the provisions set forth in the Commitment Letter. Despite the purported difficulties “discerning” this information as suggested on page 5 of the Attorney General’s Motion and contentions that the transactions are complex (Attorney General’s Motion at page 2), Applicants’ repeated offers to discuss and explain the transactions

were declined by the Attorney General. No other data request (out of 475 served) implies that any of the referenced items were missing, nor did any data request seek production of same.

13. In Argument I, the Attorney General contends that “all of the change of control cases in which the undersigned has been involved have included pre-filed testimony, an essential part of the filing necessary to fully state the facts on which the application is based.” (Attorney General’s Motion at page 4.) Such statement appears to suggest that in change of control cases, the statutory timeframes begin necessarily after a party files its application and testimony. However, this is not the case. The Attorney General was a party to the Kentucky Alltel Inc./Verizon acquisition, which was far more complicated than the instant transfer of control and involved a change in the management of the local operating company. In the Verizon transfer of control case, the Commission considered the statutory timeframes from the date the application was filed, not the filing date of the parties’ testimony.

14. In any event, Kentucky law does not permit the imposition of a requirement as substantial as the pre-filing of testimony other than through a regulation promulgated in accordance with Chapter 13A of the Kentucky Revised Statutes. (KRS 13A.100; KRS 13A.130(1), (2).) Nor is it sufficient to argue, as the Attorney General attempts, that the requirement is encompassed in the provisions requiring an application “to be in a form and contain the information the Commission requires” or within the rubric “such other facts as may be pertinent to the application.” (*See, Motor Vehicle Commission v. Hertz Corp.*, 767 S.W.2d 1, 3-4 (Ky. App. 1989) (administrative bodies lack unfettered discretion in applying regulations.)) Indeed, when the Commission intends to require testimony, it is fully capable of plainly setting out the requirement in a regulation. (*See*, 807 KAR 5:001, Section 10(6)(b) (requiring the pre-filing of testimony with applications in the rate cases of certain utilities.))

15. With respect to Argument I, Applicants provided all applicable and required information by January 23, 2006. (See, Application on December 22, 2005; Supplemental Filing on January 5, 2006; and Amended and Restated Application (including Exhibit 6 and Commitment Letter) on January 23, 2006.) While further discussions, discovery, and Applicants' pre-filed testimony all may serve to assist the parties in better understanding the transactions, they do not indicate that an application is deficient, as the Attorney General appears to suggest. Applicants' testimony on February 16, 2006 did not correct any "deficiencies" in the Amended and Restated Application, and testimony is not required by the Commission's rules with respect to cases requesting a change of control or issuance of a debt guaranty. (*See e.g.*, 807 KAR 5:001, Sections 6, 8, 9, and 11.) In fact, Commission Staff inquired about when Applicants planned to file testimony, and Applicants proceeded with the filing. As acknowledged by the Attorney General, Applicants' initial Application for approval of transfer of control was deemed "not deficient" by Commission Order without any testimony being filed.

16. Consistent with the above, the filing of the Amended and Restated Application on January 23, 2006, initiates the statutory time periods, not because Applicants "say so" as the Attorney General indicates, but rather because the filings were sufficient as of January 23, 2006 to initiate and did initiate the Commission's investigation of these matters. Accordingly, Argument I should be dismissed.

### **C. Attorney General's Argument II**

17. The Attorney General further suggests that the Amended and Restated Application should be dismissed on the ground that "Applicants are attempting to thwart due process" ("Argument II"). (Attorney General's Motion at page 6.) By requesting that the Commission deny full intervention on the basis that it is untimely, Applicants are not attempting to deny any

party's due process. Indeed, it is Applicants' right to due process that has been placed in jeopardy by the Attorney General's Motion to Dismiss and the procedural schedule in this proceeding. Argument II is unsubstantiated in law and in fact and should be dismissed. If procedural deadlines for intervention deny due process in this instance, then they will be illegal in all instances; however, that is not the case. IBEW simply failed to make a case that justifies its failure to make a timely filing for full intervention.

18. In support of Argument II, the Attorney General states that "Applicants have unequivocally stated that they believe the Commission will have approved the amended and restated application on May 24 if the Commission takes no action on it as filed, regardless of whether the Commission denies it or approves it, and regardless of whether it contains conditions, if that action is taken on or after May 24" (Emphasis supplied). (Attorney General's Motion at page 7.) Applicants' response to IBEW's Motion contains no such statement.

19. Similarly, the Attorney General states that Applicants negotiated with the Attorney General and arrived at the current procedural schedule. (Attorney General's Motion at page 7.) Applicants did not establish the schedule, but rather it was established by the Commission and its Staff in the Commission's March 2, 2006 Order. Applicants consistently advocated a schedule providing for issuance of a final order within 60 days of January 23, 2006, or at a maximum, on or before May 23, 2006.

20. Argument II is misplaced because even if the Commission tendered a final order in this matter on or before May 23, 2006, there is no harm to any other party, including the Attorney General. The schedule established by the Commission provides for a final hearing on April 25 and for final briefs to be submitted by May 12. Therefore, May 23 is well after the final hearing and parties' final briefs. To the contrary, the dismissal sought in Argument II, which is



unsubstantiated and without merit, clearly results in obvious harm to Applicants as well as other parties who have expended a great amount of time and resources in this proceeding.

**D. Attorney General's Argument III**

21. The Attorney General suggests that this matter is so deficient that it must be dismissed, yet Argument III suggests alternative relief in the form of allowing the proceeding to continue with full intervention by IBEW ("Argument III"). (Attorney General's Motion at page 8.) Applicants already have responded to IBEW's Motion for Full Intervention. Argument III should be dismissed.

**CONCLUSION**

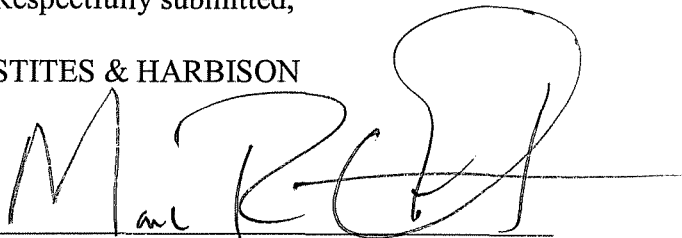
22. The Amended and Restated Application is sufficient and should not be dismissed. Arguments I, II, and III of the Attorney General's Motion to Dismiss are unsubstantiated and without merit and should be denied. Additionally, while IBEW has not set forth grounds sufficient to justify full intervention in this proceeding, IBEW may consider and Applicants would not oppose informal intervention.

Wherefore, Kentucky Alltel, Inc., Alltel Kentucky, Inc., Alltel Communications, Inc., Alltel Holding Corp., Valor Communications Group and Alltel Holding Corporate Services, Inc. respectfully request that the Commission deny the Attorney General's Motion to Dismiss and grant all other proper relief to which Applicants may be entitled.

Dated: April 11, 2006.

Respectfully submitted,

STITES & HARBISON

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', is written over a horizontal line. The signature is stylized and cursive.

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**CERTIFICATE OF SERVICE**

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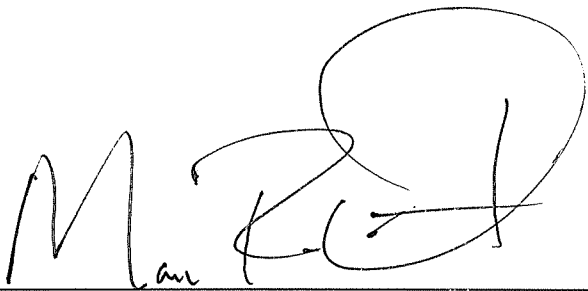
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on this the 11<sup>th</sup> day of April, 2006.

  
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