Dinsmore&Shohl LLP
ATTORNEYS

John E. Selent
502-540-2315
john.selent@dinslaw.com

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PUBLIC SERVICE COMMISSION

August 15, 2006

**via Hand Delivery**
Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

**Re:** ***In the Matter of: Petition of Duo County Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00217***

Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and ten (10) copies of Reply Memorandum in Support of Motion of Duo County Telephone Cooperative Corporation, Inc. to Approve Interconnection Agreement.

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

Very truly yours,

DINSMORE & SHOHL LLP

John E. Selent

JES/bmt
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**COMMONWEALTH OF KENTUCKY**
**BEFORE THE PUBLIC SERVICE COMMISSION**



In the Matter of:

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| Petition of Duo County Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996. | ) | Case No. 2006-00217 |

**REPLY MEMORANDUM IN SUPPORT OF MOTION OF DUO COUNTY TELEPHONE COOPERATIVE CORPORATION, INC. TO APPROVE INTERCONNECTION AGREEMENT**

Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), by counsel, pursuant to the Telecommunications Act of 1996 ("the Act"), KRS Chapter 278.040, and 807 KAR 5:001, hereby replies in support of its motions before the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to approve the interconnection agreements Duo County submitted to the Commission in this arbitration proceeding against Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless (collectively, "Verizon"); AllTel Communications, Inc. ("AllTel"); T-Mobile USA, Inc. ("T-Mobile"); New Cingular Wireless PSC, LLC and Cincinnati SMSA Limited Partnership (collectively, "Cingular"); and Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PSC (collectively "Sprint").[1] For its reply, Duo County states as follows.

[1] Duo County had filed five individual motions to approve interconnection agreement against the individual CMRS providers Verizon, Alltel, T-Mobile, Cingular and Sprint. For its reply, Duo County replies to these CMRS providers collectively in this case designated as the lead case pursuant to the Commission's June 25, 2006 Order.

## INTRODUCTION

Duo County's motions to approve should be granted. The response of the CMRS providers actually further demonstrates their failure to negotiate in good faith and, therefore, only supports Duo County's motions. The CMRS providers submit affidavits in which they attempt to cast favorable light, in hindsight, on their failure to negotiate in good faith. In fact, those affidavits undermine the CMRS providers' position. The facts in those affidavits speak for themselves and demonstrate conclusively that the CMRS providers made no meaningful effort to negotiate until approximately the final fifteen (15) days of the one hundred sixty (160) day statutory window. This inexplicable delay rendered negotiation impossible. The CMRS providers failed to meet any definition of the term "good faith."

Further, the CMRS providers understate -- and fail to appreciate -- this Commission's full power and discretion. The Commission has the power and the discretion to conclude that the CMRS providers failed to negotiate in good faith and that their proposed interconnection agreements must be rejected. As such, Duo County respectfully requests that the Commission approve its proposed interconnection agreements.

## ARGUMENT

Duo County's motions should be granted. The CMRS providers offer no factual or legal basis to the contrary. Even their own version of the "negotiation" process demonstrates that they failed to negotiate in good faith. Moreover, there is no doubt that the Commission has the power and the discretion to reject the CMRS providers' interconnection agreements because of their failure to negotiate in good faith. Accordingly, Duo County respectfully requests that the Commission approve Duo County's interconnection agreements in full.

## I. The CMRS Providers Failed to Negotiate in Good Faith.

The CMRS providers claim they negotiated with Duo County in good faith. They attach affidavits setting forth their respective versions, in hindsight, of the "negotiation" process. In fact, none of those affidavits evidence good faith negotiations. Each, on its face, only further demonstrates that the CMRS providers failed to respond meaningfully to Duo County's negotiation overtures until a time when successful negotiation had become impossible. This delay forced Duo County to commence arbitration proceedings before this Commission.

The CMRS providers waited until the very end of the arbitration window to provide redlined changes to Duo County's proposed interconnection agreements. As the CMRS providers know very well, the statutory window for negotiation of an interconnection agreement and for filing an arbitration petition is **one hundred sixty days, not fifteen**. 47 U.S.C. 252(b)(1). Nonetheless, in every instance, and by their own admissions, the CMRS providers wasted most of the statutory time period and sat on their rights until well into the arbitration window.

Cingular waited **one hundred forty-five (145) days** to propose redlined changes to Duo County's proposed interconnection agreement. (Aff. Brown, ¶14.) ACC waited **one hundred forty-six (146) days** to propose its changes. (Aff. Bloomfield, ¶20.) Alltel **never proposed changes**. (Aff. Williams, ¶14-15.) Sprint waited **one hundred forty-three (143) days** to propose its changes. (Aff. Jones, ¶16.) T-Mobile waited **one hundred forty-three (143) days** to propose its changes. (Aff. Markel, ¶14.) Verizon **never proposed changes**. (Aff. Sterling, ¶10-15.) Apparently, the CMRS providers believed they were entitled to condense the Act's one hundred sixty (160) day period into approximately fifteen (15) days, in derogation of the intent of Congress and the FCC.

By Cingular's own admissions, the CMRS providers rendered negotiations impossible by failing to propose redlined changes until deep into the arbitration window, and therefore failed to negotiate in good faith. As Mr. Brown explains in his affidavit:

> [I]t is not unusual for two, three or even more weeks to pass between the exchange of a red-lined contract and the next negotiation session. . . . Schedules are busy, and it is very common for several weeks to pass before a date can be found that fits the schedule of every participant in the negotiation.

(Aff. Brown, ¶¶20-21.) This incredible admission conclusively demonstrates that Cingular, and the other CMRS providers alike, failed to negotiate in good faith. If it takes weeks to respond to a redlined agreement, then one cannot even imagine why a CMRS provider would wait one hundred forty-five (145) days out of one hundred sixty (160) to provide such a redlined agreement.

Mr. Brown further admits that he knew negotiations would be complex but that Cingular sat on its rights for essentially the entire negotiation window:

> Cingular, however, was not going to agree to the original interconnection agreement proposed by Mr. Selent and his clients. That document contained many provisions that Cingular found acceptable. I had anticipated serious negotiations that would not be quickly or easily concluded.

(Aff. Brown, ¶¶25-26.) In other words, Cingular knew it needed to propose redlined changes to Duo County's interconnection agreement **when it received the agreement in January**, yet failed to propose its changes until late May.

These incredible admissions apply to all the CMRS providers, each of which understands that the negotiation process takes time. The length of the statutory window created by Congress itself evidences that negotiations take substantial time. If Congress believed interconnection agreements could be negotiated in two weeks (as the CMRS providers attempted to do), Congress would have written a two week negotiation period into the Act.

The CMRS providers argue that the Commission should excuse their failure to negotiate in good faith because of Leon Bloomfield's letter of February 24, 2006. In that letter, Mr. Bloomfield, on behalf of the CMRS providers, (1) completely ignored the template interconnection agreements Duo County had sent to the CMRS providers in late January and early February, (2) asked Duo County to abandon its own individual interests in favor of collective negotiations, and (3) attached the CMRS providers' collective template interconnection agreement. The CMRS providers' heavy reliance on the Bloomfield letter only weakens their position. Apparently, they believe it constitutes good faith negotiations to ignore Duo County's template interconnection agreement and to ask Duo County to abandon its right to negotiate individually. The Bloomfield letter was not a meaningful response of any kind. As such, Duo County implicitly rejected the Bloomfield letter in its March letters to the CMRS providers.[2]

The CMRS providers also claim that the Commission should excuse their failure to negotiation in good faith because they **began** to negotiate in mid-May, at the very end of the arbitration window. (Aff. Brown, ¶¶12-16); (Aff. Bloomfield, ¶¶17-20); (Aff. Williams, ¶¶10-15); (Aff. Jones, ¶¶12-21); (Aff. Markel, ¶¶12-16); (Aff. Sterling, ¶¶11-15.) These delayed and meaningless efforts to negotiate at the end of the window cannot cure their failure to negotiate during the preceding entirety of the window. The descriptions contained in the affidavits only strengthen Duo County's motions. The affidavits provide strong support to what Duo County has argued all along: that the CMRS providers failed to engage in any meaningful negotiations until deep into the arbitration window.

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[2] The CMRS providers attempt to attack the fact that Duo County did not describe the Bloomfield letter in its arbitration petitions or in its motions to approve. However, Duo County set forth only **meaningful** communications in its arbitration petitions and motions to approve. It did not set forth communications that ignored its own attempts to negotiation in good faith. Moreover, the Bloomfield letter never references Duo County's initial letter either. The Bloomfield letter notes generally some "responses" from the RLECs but completely ignores the substance of Duo County's letter and the template interconnection agreement attached thereto.

Finally, it is extremely disingenuous for the CMRS providers to blame Duo County for failing to negotiate a completed interconnection agreement during the end of May -- within the final days of the statutory window. (See the same portions of the affidavits cited immediately above, in which the CMRS providers attempt to characterize Duo County as nonresponsive at the end of May.) The Commission should reject this attempt by the CMRS providers to turn the facts upside down. By the time the arbitration window had nearly expired, Duo County was working swiftly and diligently to file numerous arbitration petitions that the CMRS providers had rendered inevitable by their failure to negotiate. Duo County was in no position to negotiate in the final days of the arbitration window.

For all of the foregoing reasons, the CMRS providers failed to negotiate in good faith.

## II. The Commission Has the Power and Discretion to Reject the CMRS Providers' Agreements and Approve Duo County's Agreements in Full.

The CMRS providers understate this Commission's power and discretion. The CMRS providers believe they have an absolute right to have the Commission consider their proposed agreement regardless of their failure to comply with express provisions of the Act such as the duty to negotiate in good faith. The plain language of the Act provides otherwise.

It is clear that the Commission may conclude that a CMRS provider failed to negotiate in good faith and may, therefore, reject that CMRS provider's interconnection agreement.

> We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations. In light of these considerations, we set forth some minimum standards that will offer parties guidance in determining whether they are acting in good faith, but **leave specific determinations of whether a party has acted in good faith to be decided by a state commission**, court, or the FCC on a case-by-case basis.

*See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, at ¶150 ("First Report and Order") (emphasis added); 47 U.S.C. 252(c)(1) (State commission must "ensure that [resolution of the arbitration proceeding] meet[s] the requirement of section 251 . . . ," including the duty to negotiate in good faith); 47 U.S.C. 252(e)(2)(B) (State commission may reject an agreement that does not meet the requirements of the Act, including the duty to negotiate in good faith.); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218, 224 (D. Del. 2000) ("The Act provides a disincentive to state commission mediation by **allowing the commission to reject agreements that do not 'meet the requirements of section 251'** of the Act. This grants a state commission broader discretion to reject agreements (in whole or in part) that do not comport with the duties imposed in 251.") (emphasis added.)

In response, the CMRS providers selectively quote the Act for the proposition that "The State commission shall resolve each issue set forth in the petition and the response, if any . . . ." 47 U.S.C. 252(b)(4)(C). Apparently, the CMRS providers believe this means that the Commission lacks the power to remedy a party's violation of the Act by rejecting that party's proposed interconnection agreement. However, the CMRS providers conveniently fail to quote the remaining portion of that provision, which states,

> The State commission shall resolve each issue set forth in the petition and the response, if any, **by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement**, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.[3]

[3] Subsection (c), to which this provision refers, requires that the Commission ensure that its resolution of the arbitration proceeding comports with the requirements of the Act, including the duty to negotiate in good faith. 47 U.S.C. 252(c)(1).

*Id.* By its plain language, this provision gives the Commission the discretion to remedy a violation of the Act as "appropriate." It is completely "appropriate" for the Commission to reject the proposed interconnection agreements of the CMRS providers because they violated the Act through their failure to negotiate in good faith.[4] 47 U.S.C. 252(b)(4)(C). Otherwise, the CMRS providers will succeed in cutting the good faith requirement out of the Act. Their failure to negotiate in good faith – a clear violation of one of the Act's bedrock foundations -- will go completely unaddressed.

The Commission has indicated that it simply will not reward the kind of needless and harmful delay caused by the CMRS providers here. *See In the Matter of: Adjustment of the Rates of Kentucky – American Water Company*, Case No. 2004-00103, 2004 Ky. PUC LEXIS 872 (Ky. P.S.C. November 15, 2004). There, the Commission flatly rejected a party's last-minute motions and reprimanded its dilatory behavior:

> FLOW offers **no reason for its delay** in seeking modifications to the procedural schedule. At this late date when **more than 6 months of the 10-month statutory review period has elapsed**, the Commission cannot accommodate FLOW's request and ensure an adequate review of Kentucky-American's rate adjustment proposal.
>
> **Dismissal of this proceeding, moreover, would only reward FLOW for its failure to assert its rights and encourage intervenors in future proceedings to engage in last-minute delaying tactics rather than the timely assertion of their rights. Such a result would wreak havoc and prevent the orderly administration of utility rate adjustment proceedings. Dismissal would also adversely affect the other parties to this proceeding that have diligently sought to comply with the established procedural schedule. These parties have a right to a timely and final adjudication of this application.**

*Id.* Although in a different context than the present arbitration proceeding, the exact same principles are at stake here. The CMRS providers offer "no reason for [their] delay"; they have wasted much

[4] The case cited by the CMRS providers for the same proposition does not stand for such a proposition any more than the statute, since the case simply quotes the statute. *MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001).

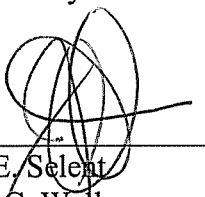
of the statutory timeline; they ask the Commission to "reward" and "encourage" their "last-minute delaying tactics"; rewarding their conduct would "wreak havoc" by diluting the good faith requirement of the Act; and, finally, denying Duo County's motions would "adversely affect" Duo County when it "diligently sought to comply" with the Act.

The Commission has the power and the discretion to conclude that the CMRS providers failed to negotiate in good faith and, therefore, that their proposed interconnection agreements should be rejected and Duo County's agreements adopted in full.

## CONCLUSION

The CMRS providers failed to negotiate in good faith. Their response and supporting affidavits only confirm this. They acknowledge that they did not begin meaningful negotiations until the very end of the negotiation window. As such, Duo County respectfully requests that the Commission reject the CMRS providers' proposed interconnection agreements and approve Duo County's proposed agreements in full.

Respectfully submitted,



John E. Selent
Holly C. Wallace
Edward T. Depp
**DINSMORE & SHOHL LLP**
1400 PNC Plaza
500 W. Jefferson Street
Louisville, Kentucky 40202
(502) 540-2300 (telephone)
(502) 585-2207 (fax)

**COUNSEL TO DUO COUNTY TELEPHONE COOPERATIVE CORPORATION, INC.**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by Federal Express and electronic mail on this 15th day of August, 2006, to the following individual(s):

Jeff Yost, Esq.
Mary Beth Naumann, Esq.
Jackson Kelly PLLC
175 East Main Street
Lexington, KY 40507
jyost@jacksonkelly.com
mnaumann@jacksonkelly.com
*Counsel to Cingular*

Kendrick R. Riggs, Esq.
Douglas F. Brent, Esq.
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
kendrick.riggs@skofirm.com
douglas.brent@skofirm.com
*Counsel to T-Mobile and Counsel to Verizon*

Mark R. Overstreet
Stites & Harbison PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
moverstreet@stites.com
*Counsel to AllTel*

John N. Hughes, Esq.
Attorney at Law
124 West Todd Street
Frankfort, Kentucky 40601
jnhughes@fewpb.net
*Counsel to Sprint PCS*

**COUNSEL TO DUO COUNTY TELEPHONE COOPERATIVE CORPORATION, INC.**

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