

CMRS PROVIDERS RESPONSE TO RLECS' MOTION TO BIFURCATE

Alltel Communications, Inc. (“Alltel”); American Cellular Corporation (“ACC”); New Cingular Wireless PCS, LLC, successor to BellSouth Mobility LLC, BellSouth Personal Communications LLC and Cincinnati SMSA Limited Partnership d/b/a Cingular Wireless (“Cingular”); Sprint Spectrum L.P., on behalf of itself and SprintCom, Inc., d/b/a Sprint PCS (“Sprint PCS”); T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC (“T-Mobile”); and Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated, and Kentucky RSA No. 1 Partnership (“Verizon Wireless”) (collectively referred to as the “CMRS Providers”), hereby file their consolidated Response to the Motion to Bifurcate filed herein by Ballard Rural Telephone Cooperation Corporation, Inc. (“Ballard”) and adopted by the other Rural Telephone Companies (“RLECs”) in these consolidated proceedings.¹

Analysis

1. The RLECs' Motion Is Nothing More Than Another Request For Rehearing Of The Procedural Schedule.

The Motion to Bifurcate is nothing more than another request for rehearing of the Commission's original order establishing the procedural schedule in these consolidated proceedings. The Commission has already denied the first request for rehearing, holding that the

¹ The companies adopting the Ballard motion are Duo County Telephone Cooperative Corporation, Inc. (“Duo County”), Logan Telephone Cooperative, Inc. (“Logan”), West Kentucky Rural Telephone Cooperative Corporation, Inc. (“West Kentucky”), North Central Telephone Cooperative Corporation (“North Central”), South Central Rural Telephone Cooperative Corporation, Inc. (“South Central”), Brandenburg Telephone Company (“Brandenburg”), Foothills Rural Telephone Cooperative Corporation, Inc. (“Foothills”), Gearheart Communications, Inc. d/b/a Coalfields Telephone Company (“Coalfields”), Mountain Rural Telephone Cooperative Corporation, Inc. (“Mountain”), Peoples Rural Telephone Cooperative Corporation, Inc. (“Peoples”) and Thacker-Grigsby Telephone Company, Inc. (“Thacker-Grigsby”).

original procedural schedule shall remain in place.² In fact, in recently scheduling an informal conference in these matters, the Commission has again affirmed that the original procedural schedule should remain in place.³ The Motion to Bifurcate contains no new information that the RLECs have not previously presented to the Commission and thus should be denied.

2. The RLECs Have Already Been Given Additional Time To Prepare TELRIC Studies.

The Commission's Order of August 18, 2006, has already provided the RLECs with "additional time, if needed, to file their TELRIC-based cost studies and written testimony."⁴ The original procedural schedule issued at the end of July required the TELRIC studies and supporting testimony to be filed and served by August 16, 2006.⁵ But, the August 18 Order entered in these consolidated proceedings provided that the TELRIC studies and supporting testimony would be filed and served "no later than 8/23/06." Thus, the RLECs were provided with up to an additional week to prepare the studies.

The RLECs however, chose not to use that additional time and instead argue – without any basis – that "[t]he Commission did not set forth a specific schedule by which Petitioner

² Order, August 18, 2006. It is important to note that although the RLECs have attempted to impose numerous restrictions on these consolidated proceedings, they did not suggest that these proceeding be bifurcated in either their opposition to the CMRS Motion to Consolidate or in their subsequent motions for rehearing. It would simply be inappropriate to allow them to try to impose additional restrictions on the proceedings at this stage.

³ Staff Notice of Informal Conference at 5: "Please note that the procedural Order dated August 18, 2006, remains in full force and effect."

⁴ Order, August 18, 2006 at 8.

⁵ Order, July 25, 2006 at Appendix A.

should proceed in conducting and filing TELRIC study and related testimony.”⁶ This is simply not the case as explicitly set forth by the Commission’s August 18 Order.⁷

3. There is no Justification for Bifurcating these Proceedings

Unsatisfied with their numerous attempts to derail these proceedings, the RLECs now argue that these consolidated proceedings should be bifurcated, with the non-cost issues proceeding first pursuant to the original procedural schedule, followed at some unspecified time in the future by the cost issues – pursuant to a second procedural schedule which has not been entered and which the RLECs do not even propose in their motion.⁸

In addition, the RLECs claim – without any legal authority – that the CMRS Providers should be required to pay 1.5 cents per minute to the RLECs for the termination of wireless-originated traffic (as they currently are doing under the May 4 Settlement Agreement in Case No. 03-00045) until such time as the second “cost phase” is concluded. Moreover, the RLECs make this claim without any discussion of when such a conclusion might be expected.⁹ In other words, the RLECs now want to preserve the rate charged under the Settlement Agreement even though that Agreement explicitly anticipated these proceedings and the development of appropriate reciprocal rates under the Act.¹⁰

⁶ Motion to Bifurcate at 2.

⁷ The CMRS Providers note that in the Motion to Bifurcate, the RLECs now affirm that they intend “to comply with the Commission’s order requiring the completion and filing of a TELRIC cost study” yet they have already failed to comply with two such orders. *See* Motion to Bifurcate at 2.

⁸ Motion to Bifurcate at 3.

⁹ *Id.* The RLECs do not even clearly state whether the interim rates they suggest would be reciprocal (*i.e.*, apply to intraMTA traffic originated by the RLECs and terminated by the CMRS Carriers) although their motions seems to imply they would be unilateral only. *See* Motion to Bifurcate at 3.

¹⁰ Moreover, to the extent any initial rates were to be adopted by this Commission in the absence of proper cost studies, the only appropriate rates are those provided by the Act itself. *See, e.g.*, 47 C.F.R. §§ 51.705 and 51.715.

In sum, there is no justification for bifurcating these proceedings. The CMRS Providers and RLECs have been anticipating the current negotiations/arbitrations since at least May 2004 when the Settlement in Case No. 03-00045 was approved by the Commission. Thus, the RLECs have known for an extended period that if arbitration were necessary, they would be required to file TELRIC studies in support of their proposed rates. Indeed, this Commission has long been clear that any request for exemption from the TELRIC obligation must be filed in advance of the beginning of formal negotiations.¹¹ Yet the RLECs chose neither to seek an exemption, nor to prepare TELRIC studies. Moreover, as this Commission has previously noted, the parties are operating under a deadline of January 1, 2007, by which to complete these proceedings.¹² The current procedural schedule allows for completion within that time. The Commission should move forward with these proceedings per its previous orders (which the RLECs have apparently chosen to disregard).

4. The Absence of Cost Studies Should Not Delay or Result in the Bifurcation of These Proceedings.

The RLECs have been provided the opportunity, and in fact have been ordered by this Commission on two occasions, to submit cost studies in these proceedings and have decided –

The CMRS Providers also note that the RLECs' objections to preparing cost studies based on the time and expense that would have been involved are unfounded. *See* Motion to Bifurcate at 2. The Commission must not be misled into thinking that each RLEC needed three months and one hundred thousand dollars to produce a cost study. Unlike RBOC UNE cost proceedings, which develop forward-looking loop costs for carriers with large and complex networks, these consolidated cases would not have needed to determine loop costs and do not involve carriers with complex networks. If the RLECs had simply begun to prepare cost studies when they filed these petitions, or even when the first procedural schedule was issued, there would be no issue. In fact, as discussed above, the RLECs now indicate that they are willing to produce cost studies which only further undermines their objections to producing them in the first place. The RLECs are not entitled to yet another bite at the proverbial apple.

¹¹ *In the Matter of Petition of Southeast Telephone, Inc. for Arbitration of Certain Terms and Conditions of the Proposed Agreement with Kentucky ALLTEL, Inc., Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2003-00115, Order, Dec. 19, 2003.

¹² Order, August 18, 2006 at 6.

for whatever strategic reasons – not to do so. With the hearing in these consolidated proceedings scheduled to begin October 16, 2006, no further extensions of time should be permitted. The Commission should continue with the proceeding as scheduled despite the RLECs’ refusal to timely file TELRIC cost studies and establish reciprocal compensation based on bill and keep principles, the FCC’s proxy rates or in any other manner which is consistent with the forward-looking costing principles set forth in the Act.

The CMRS Providers note that at every stage of this proceeding prior to the filing of their motion to bifurcate, the RLECs have demanded that these dockets be litigated quickly so that parties’ contractual obligations were set prior to the expiration of the settlement agreement at the end of this year. The Commission should not grant their request now to do the opposite and allow this proceeding to extend well into 2007 to address an issue the RLECs now wish they had litigated differently.

Conclusion

Neither the Commission’s original procedural order, nor its grant of additional time, have produced cost studies. Instead, the Commission has received only further unfounded requests for continued delays filed even in light of the operating deadline of January 1, 2007. The Commission may lawfully, and in fact must, establish rates in this proceeding under the Act even if the RLECs have not met the burden of demonstrating their costs. Accordingly, the Motion to Bifurcate should be denied and the Commission should move forward with these proceedings as contemplated by the procedural schedule it has already established.

Respectfully submitted by:



Jeffrey J. Yost
Mary Elisabeth Naumann
JACKSON KELLY PLLC
P. O. Box 2150
Lexington, KY 40588-9945
(859) 255-9500

John Paul Walters, Jr.
15 East 1st Street
Edmond, OK 73034
(405) 359-1718

Counsel for New Cingular Wireless PSC, LLC,
Successor to BellSouth Mobility LLC, BellSouth
Personal Communications LLC and Cincinnati
SMSA Limited Partnership d/b/a
Cingular Wireless

Dated: September 8, 2006

By: s/Kendrick R. Riggs

Kendrick R. Riggs
Douglas F. Brent
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
and
Philip R. Schenkenberg
Briggs and Morgan, P.A.
2200 IDS Center
Minneapolis, Minnesota 55402

Counsel for: T-Mobile USA, Inc.,
PowerTel/Memphis, Inc. and T-Mobile Central
LLC ("T-Mobile") and Cellco Partnership d/b/a
Verizon Wireless, GTE Wireless of the Midwest
Incorporated and Kentucky RSA No. Partnership
("Verizon Wireless")

Dated: September 8, 2006

By: s/Quint McTyeire
Quint McTyeire, V
Greenebaum Doll & McDonald PLLC
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202
and
Leon M. Bloomfield
Wilson & Bloomfield LLP
1901 Harrison Street
Suite 1620
Oakland, California 94612

Counsel for: American Cellular Corporation

Dated: September 8, 2006

By: s/John N. Hughes
John N. Hughes
124 West Todd Street
Frankfort, KY 40601
and
William R. Atkinson
Sprint Nextel
3065 Cumberland Circle, SE
Mailstop GAATLD0602
Atlanta, GA 30339

Counsel for: Sprint Spectrum L.P., on behalf of
itself and Sprintcom, Inc. d/b/a Sprint PCS

Dated: September 8, 2006

By: s/Mark R. Overstreet
Mark R. Overstreet
Stites & Harbison PLLC
421 West Main Street
P. O. Box 634
Frankfort, KY 40602-0634
and
Stephen B. Rowell
Alltel Communications, Inc.
One Allied Drive
Little Rock, Arkansas 72202-2099

Counsel for: Alltel Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the parties listed below by electronic mail, or first class mail, postage prepaid, the 8th day of September, 2006.

John E. Selent
Holly C. Wallace
Edward T. Depp
Linda Bandy
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
john.selent@dinslaw.com
**Counsel for West Kentucky, Ballard Rural,
South Central,
Duo County, Brandenburg Telephone,
Foothills Rural,
Gearheart Communications, Logan
Telephone, Mountain Rural,
North Central, Peoples Rural, Thacker-
Grigsby**

NTCH-West, Inc.
Suite E
1970 North Highland Avenue
Jackson, TN 38305

James Dean Liebman
Liebman & Liebman
403 West Main Street
P. O. Box 478
Frankfort, KY 40602-0478

Thomas Sams
NTCH, Inc.
1600 Ute Avenue, Suite 10
Grand Junction, Colorado 81501

William G. Francis
Francis, Kendrick and Francis
504 First Commonwealth Bank Building
311 North Arnold Avenue
Prestonsburg, KY 41653-0268

Bhogin M. Modi
Vice President
ComScape Communications, Inc.
1926 10th Avenue, North
Suite 305
West Palm Beach, FL 33461


Counsel for Cingular Wireless