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August 15, 2006

**RECEIVED**

AUG 15 2006

PUBLIC SERVICE  
COMMISSION

**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 Logan Telephone Cooperative, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular f/k/a ACC Kentucky License LLC, Partnership Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00218***

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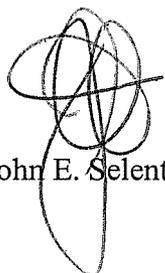
Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and ten (10) copies of Reply Memorandum in Support of Motion of Logan Telephone Cooperative, 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  
Enclosures  
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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

AUG 15 2006

Petition of Logan Telephone Cooperative, Inc. )  
for Arbitration of Certain Terms and )  
Conditions of Proposed Interconnection )  
Agreement with American Cellular Corporation )  
f/k/a ACC Kentucky License LLC, )  
Pursuant to the Communications Act of 1934, )  
as Amended by the Telecommunications )  
Act of 1996 )

PUBLIC SERVICE  
COMMISSION

Case No. 2006-00218

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

Logan Telephone Cooperative, Inc. ("Logan"), 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 Logan submitted to the Commission in this arbitration proceeding against American Cellular Corporation f/k/a ACC Kentucky License, LLC ("ACC"); 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"); and Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PSC (collectively "Sprint").<sup>1</sup> For its reply, Logan states as follows.

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<sup>1</sup> Logan had filed five individual motions to approve interconnection agreement against the individual CMRS providers ACC, Verizon, Alltel, T-Mobile, and Sprint. For its reply, Logan replies to these CMRS providers collectively in this case designated as the lead case pursuant to the Commission's June 25, 2006 Order.

## INTRODUCTION

Logan'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 Logan'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, Logan respectfully requests that the Commission approve its proposed interconnection agreements.

## ARGUMENT

Logan'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, Logan respectfully requests that the Commission approve Logan's interconnection agreements in full.

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

The CMRS providers claim they negotiated with Logan 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 Logan's negotiation overtures until a time when successful negotiation had become impossible. This delay forced Logan to commence arbitration proceedings before this Commission.

The CMRS providers waited until the very end of the arbitration window to provide redlined changes to Logan'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). Further, the CMRS providers know full well 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 apparently attempted to do), Congress would have written a two week negotiation period into the Act. 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.

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.

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 Logan had sent to the CMRS providers in late January and early February, (2) asked Logan 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 Logan's template interconnection agreement and to ask Logan to abandon its right to negotiate individually. The Bloomfield letter was not a meaningful response of any kind. As such, Logan implicitly rejected the Bloomfield letter in its March letters to the CMRS providers.<sup>2</sup>

The CMRS providers also claim that the Commission should excuse their failure to negotiate in good faith because they began to negotiate in mid-May, at the very end of the arbitration window. (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 Logan's motions. The affidavits provide strong support to what Logan 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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<sup>2</sup> The CMRS providers attempt to attack the fact that Logan did not describe the Bloomfield letter in its arbitration petitions or in its motions to approve. However, Logan 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 negotiate in good faith. Moreover, the Bloomfield letter never references Logan's initial letter either. The Bloomfield letter notes generally some "responses" from the RLECs but completely ignores the substance of Logan's letter and the template interconnection agreement attached thereto.

Finally, it is extremely disingenuous for the CMRS providers to blame Logan 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 Logan 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, Logan was working swiftly and diligently to file numerous arbitration petitions that the CMRS providers had rendered inevitable by their failure to negotiate. Logan 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 Logan'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.<sup>3</sup>

*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

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<sup>3</sup> 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).

failure to negotiate in good faith.<sup>4</sup> 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 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

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<sup>4</sup> 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).

requirement of the Act; and, finally, denying Logan's motions would "adversely affect" Logan 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 Logan'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, Logan respectfully requests that the Commission reject the CMRS providers' proposed interconnection agreements and approve Logan's proposed agreements in full.

Respectfully submitted,



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**COUNSEL TO LOGAN  
TELEPHONE COOPERATIVE, INC.**

**CERTIFICATE OF SERVICE**

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

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