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AUG 25 2006

COMMONWEALTH OF KENTUCKY

FINANCIAL ANA

BEFORE THE PUBLIC SERVICE COMMISSION

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AUG 25 2006

PUBLIC SERVICE COMMISSION

In the Matter of:

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

Case No. 2006-00215

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 )  
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

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, Pursuant to the Communications Act of )  
1934, as Amended by the Telecommunications )  
Act of 1996 )

Case No. 2006-00218

In the Matter of:

Petition of West Kentucky Rural Telephone )  
Cooperative Corporation, Inc. for Arbitration of )  
Certain Terms and Conditions of Proposed )  
Interconnection Agreement with American ) Case No. 2006-00220  
Cellular f/k/a ACC Kentucky License, LLC, )  
Pursuant to the Communications Act of 1934, as )  
Amended by the Telecommunications Act of 1996 )

In the Matter of:

Petition of North Central Telephone Cooperative )  
Corporation for Arbitration of Certain Terms and )  
Conditions of Proposed Interconnection )  
Agreement with American Cellular Corporation ) Case No. 2006-00252  
f/k/a ACC Kentucky License, LLC, Pursuant to the )  
Communications Act of 1934, as Amended by the )  
Telecommunications Act of 1996 )

In the Matter of:

Petition of South Central Rural 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 ) Case No. 2006-00255  
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 )

In the Matter of:

Petition of Brandenburg Telephone Company 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 ) Case No. 2006-00288  
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 )

In the Matter of:

Petition of Foothills Rural 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. 2006-00292

In the Matter of:

Petition of Gearheart Communications, Inc. d/b/a )  
Coalfields Telephone Company 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. 2006-00294

In the Matter of:

Petition of Mountain Rural 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. 2006-00296

In the Matter of:

Petition of Peoples Rural 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. 2006-00298

In the Matter of:

Petition of Thacker-Grigsby Telephone Company, )  
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. 2006-00300

**CMRS PROVIDERS' CONSOLIDATED MOTION TO DISMISS THE RLECS'  
PETITIONS FOR SUSPENSION OF, OR MODIFICATION TO, ANY  
REQUIREMENT TO CONDUCT TELRIC STUDIES**

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 Motion to Dismiss the Petitions for Suspension of, or Modification to, Any Requirement to Conduct TELRIC Studies (the "Petitions") filed by Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard"), 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")(collectively referred to as "RLECs").<sup>1</sup>

The Petitions for a suspension or modification of the RLECs' requirement to prepare and file TELRIC studies are unnecessary and therefore should be dismissed. In these consolidated dockets, the RLECs can prepare and file such studies at their discretion. If they choose not to file, the RLECs simply will have not met their burden of proving their costs as required by the Act, and the RLECs' rates will then be set by other means; for example, bill and keep or FCC proxy rates.

The Petitions should also be dismissed because they are not in compliance with either federal law or previous decisions of this Commission. In fact, this Commission has already determined that a Section 251(f)(2) petition is inappropriate and cannot be considered in the context of a pending arbitration proceeding under the Act.<sup>2</sup> Moreover, in a recent order filed in these same consolidated proceedings, this Commission has already held that the RLECs are not relieved of the requirement to produce and file TELRIC studies.<sup>3</sup>

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<sup>1</sup> To conserve both the Commission's and the parties' resources, the CMRS Providers submit this Consolidated Motion to Dismiss to all the Petitions filed by various RLECs in various consolidated proceedings.

<sup>2</sup> *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 ("AllTel Order").

<sup>3</sup> Order, August 18, 2006, p. 6.

### Procedural Summary

Between May 30, 2006, and June 9, 2006, the RLECs filed forty-one (41) petitions for arbitration against the CMRS Providers. The issues raised in the 41 petitions were essentially identical.

On July 7, 2006, the CMRS Providers filed a Consolidated Response to the Arbitration Petitions, raising 28 separate issues for arbitration.

On July 25, 2006, the Commission consolidated the Petitions for Arbitration into 12 proceedings, each centered upon an individual RLEC. The Commission also established a procedural schedule to apply to the 12 consolidated proceedings. The procedural schedule included a requirement for the RLECs to “file and serve TELRIC-based cost studies and written testimony in support of those cost studies.”<sup>4</sup>

On August 3, 2006, the RLECs filed motions (which they styled “motions for rehearing”), asking the Commission to, among other things, reconsider its previous order requiring them to file TELRIC studies and related testimony.<sup>5</sup>

On August 4, 2006, the RLECs filed the Petitions, asking the Commission to “suspend the TELRIC studies requirement pending resolution of this petition, and grant [RLEC’s] petition for suspension of, or modification to, the requirement to conduct TELRIC studies.”<sup>6</sup>

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<sup>4</sup> Order, July 25, 2006, Appendix C.

<sup>5</sup> See e.g., Motion for Rehearing of Ballard Rural Telephone Cooperative Corporation, Inc. These motions also sought to modify the procedural schedule so that the decisions in the underlying arbitrations would be issued by October 2, 2006.

<sup>6</sup> See, e.g., Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Suspension of, or Modification To, any Requirement to Conduct TELRIC Studies, p. 5.

On August 18, 2006, the Commission denied the RLECs' August 3, 2006 motions to the extent the RLECs sought to be relieved of their obligations to file TELRIC studies or related testimony.<sup>7</sup>

### Analysis

The RLECs' Petitions for suspension or modification under Section 251(f)(2) are untimely and completely at odds with the Commission's prior rulings on this issue. As noted above, this Commission has previously held that an RLEC cannot wait until interconnection is requested, much less until after the filing of arbitration petitions and the entry of a procedural schedule, to seek relief under Section 251(f)(2):

As a final matter, we note the process in which ALLTEL has requested a rural exemption is not in compliance with statute. 47 U.S.C. Section 252(f) requires that a carrier requesting the exemption petition for it; it further gives a state commission 180 days to reach its decision. ALLTEL erred in waiting until a carrier requested interconnection to request an exemption. An arbitration proceeding is not only too brief to conduct the required analysis; it forecloses the participation of all other parties who may wish to interconnect with ALLTEL and who have the right to be notified and to be heard.<sup>8</sup>

This Commission has made a similar ruling with regard to requests for suspension or modification filed pursuant to Section 251(f)(1). The Petitions in these consolidated proceedings were not filed pursuant to that section, but the principle stated by the Commission certainly applies:

"[A]ny carrier wishing to assert the rural exemption to incumbent carriers' obligations under the Telecommunications Act of 1996 should assert its

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<sup>7</sup> See Order, August 18, 2006, p. 6. The Order also denied the request to modify the procedural schedule so that the Commission could issue a decision by October 2, 2006.

<sup>8</sup> *AllTel Order*.



exemption *at the outset of negotiations*, so that proceedings may begin pursuant to 47 U.S.C. § 251(f)(1).<sup>9</sup>

In these proceedings, the principle enunciated in the *Alltel* and *JTC* Orders is even more compelling, because the RLECs themselves filed the consolidated arbitration petitions – in response to requests for interconnection made by the CMRS Providers on or about January 1, 2006. The RLECs and CMRS Providers had anticipated these negotiations, contemplated by the 2004 Settlement Agreement with BellSouth, for over a year. If the RLECs believed they were entitled to a suspension or modification of the obligation to produce TELRIC studies, they should have spoken a long time ago. The RLECs’ decision first to file petitions for arbitration that seek to establish reciprocal compensation rates, and then to seek suspension or modification of the mandatory rate methodology for reciprocal compensation, is inconsistent with federal law and the prior rulings of this Commission.

For example, section 251(f)(2) gives the Commission 180 days (from the date of filing the request for suspension or modification) to make a decision. Section 252(b)(4)(C), on the other hand, gives the Commission “not later than nine months” from the initial request for interconnection to conclude an arbitration. Thus, as noted in the *AllTel* Order, an arbitration proceeding “is too brief to conduct the required analysis” necessitated by a section 251(f)(2) petition.

Moreover, a request for suspension or modification under Section 251(f)(2) requires a substantial evidentiary showing on the part of the Applicant, significantly different in kind from that required in an arbitration proceeding. Specifically, the

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<sup>9</sup> *In the Matter of the Inquiry of Bona Fide Request of JTC Communications, Inc. Pursuant to the Telecommunications Act of 1996, For Negotiation of an Interconnection Agreement with Alltel Kentucky, Inc., et al.*, Case No. 2000-354, Order, Nov. 2, 2000, (“*JTC Order*”)(emphasis added).

251(f)(2) applicant must demonstrate, *inter alia*, that the requirement sought to be suspended or modified is “unduly economically burdensome.”<sup>10</sup> Such a showing would entail a detailed analysis of an applicant’s financial status, which is well beyond the scope of a Section 252 arbitration.<sup>11</sup>

For example, each RLEC alleges, without any support, that without the requested suspension or modification, each RLEC “will expend such time and money as will jeopardize its ability to continue to provide telecommunications service to Kentucky customers at the same quality and rates as it presently provides.”<sup>12</sup> Petitioners have provided no evidence that their overall rate of return is so deficient that they will have to raise rates or reduce quality of service if they are required to prepare and file cost studies, yet that is what they allege. They, therefore, acknowledge that such is the test for whether a petition for suspension or modification should be granted. Again, the requirements of a full rate of return analysis and examination of all costs, revenues and expenses of the RLECs demonstrate that it is too late for Petitioners to make this request in the context of this arbitration, which they initiated.

On their face, the Petitions are premised upon nothing more than the conclusory allegations that i) cost studies are “expensive and time-consuming”, ii) the costs to perform such studies would cause “a significant economic impact” and be “unduly

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<sup>10</sup> 47 U.S.C. § 251(f)(2)(A)(ii).

<sup>11</sup> Even if the Petitions were appropriate – which they are not for the reasons discussed above – it is unclear how the RLECs expect the Commission to undergo the necessary analysis to make a 252(f)(2) determination while at the same time reach a decision in the underlying consolidated arbitrations by October 2, 2006 as they requested in their motions for rehearing. As noted in the *AllTel* Order, “[a]n arbitration proceeding is ...too brief to conduct the required analysis...”

<sup>12</sup> Petitions, p. 4.

economically burdensome” to an RLEC, and iii) it is “technically infeasible” to prepare cost studies in the time ordered by the Commission (notwithstanding the indisputable fact that the RLECs have sat idle for the past year aware that they would ultimately need to establish appropriate reciprocal compensation rates if they desired continued compensation after the interim Settlement Agreement expired). To the extent such generalized and unsupported allegations even necessitate a response, the CMRS Providers deny all such assertions.

In addition, section 251(f)(2) petitions, even where they are appropriate, explicitly relate to the potential suspension or modification of obligations under sections 251(b) or (c), e.g., the duty to establish reciprocal compensation arrangements in the first place. They do not, however, under any circumstances, allow an RLEC to avoid its statutory obligation to prepare and submit a TELRIC study in support of proposed reciprocal compensation rates.<sup>13</sup>

In any event, a request for suspension or modification of the obligation to establish reciprocal compensation rates using the FCC’s mandatory TELRIC methodology would affect all parties desiring interconnection with the RLECs, not simply the CMRS Providers. Yet only the CMRS Providers are parties to the consolidated arbitrations. Any decision on the Petitions handed down in the consolidated arbitrations would thus affect parties not given an opportunity to be heard, offending basic principles of due process.<sup>14</sup>

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<sup>13</sup> The CMRS Providers note that this is not an issue which needs to be decided in this proceeding.

<sup>14</sup> See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950); see also *AllTel Order* (A 251(f)(2) petition is inappropriate in the context of an arbitration proceeding since, among other things, “it forecloses the participation of all other parties who may wish to interconnect with ALLTEL and who have the right to be notified and heard.”)

Finally, in its Order of August 18, 2006, in these consolidated proceedings, this Commission has already stated, in overruling the RLECs' motions for rehearing:

The RLECs must prove that the rates for each element do not exceed the forward-looking economic cost per unit of providing the element. 47 C.F.R. 51.505(e). The RLECS have not demonstrated that they are relieved from this requirement.<sup>15</sup>

Thus, this Commission has already ruled that a suspension or modification of the requirement to produce and file TELRIC studies is not appropriate in these consolidated cases.

The Petitions should therefore be dismissed.

#### Conclusion

For the reasons discussed above, the Commission should dismiss the RLECs' Petitions and proceed to hear and decide the consolidated arbitration petitions pursuant to the procedural schedule previously entered.

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<sup>15</sup> Order, August 18, 2006, p. 6.

Dated: August 25, 2006

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Dated: August 25, 2006

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Dated: August 25, 2006

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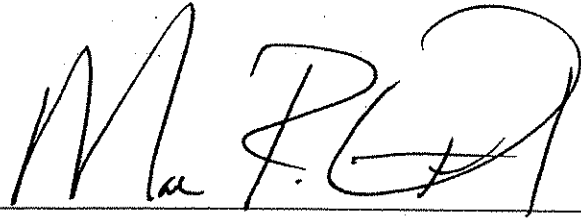
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Consolidated Motion of CMRS to Dismiss the RLECS' Petitions for Suspension of, or Modification to, any Requirement to Conduct Telric Studies was served via United States First Class Mail, postage prepaid, upon:

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