COMMONWEALTH OF KENTUCKY

BEFORE THE 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
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
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
Petition of West Kentucky 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. 2006-00220

Petition of North Central Telephone Cooperative Corporation, 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	Case No. 2006-00252
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 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. 2006-00255
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
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 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. 2006-00288

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
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
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
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

CONSOLIDATED RESPONSE OF CMRS PROVIDERS TO MOTIONS FOR REHEARING

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 joint response to the Motions for Rehearing filed by Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard"), Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky") Logan Telephone Cooperative, Inc. ("Logan"), North Central Telephone Cooperative Corporation ("North Central"), South Central Rural Telephone Cooperative Corporation, Inc. ("South Central"), Foothills Rural Telephone Cooperative Corporation, Inc. ("Foothills"), Brandenburg Telephone Company ("Brandenburg"), Gearheart Communications Inc. d/b/a Coalfields Telephone Company ("Gearheart"), Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"), Peoples Rural Telephone Cooperative Corporation, Inc. ("Peoples Rural"), and Thacker-Grigsby Telephone Company, Inc. ("Thacker-Grigsby") (collectively referred to as "RLECs").[1]

[1] To conserve both the Commission's and the parties' resources, the CMRS Providers submit this Consolidated Response to all the Motions for Rehearing filed by the RLECs in the above consolidated proceedings.

I. INTRODUCTION AND BACKGROUND

Between May 30 and June 9 the RLECs filed 49 arbitration petitions under 47 U.S.C. § 252. On June 19 the Commission issued an order that directed the CMRS Providers to file a consolidated response to the arbitration petitions, and established a briefing schedule that would address formal consolidation of these cases. The CMRS Providers filed their Motion for Consolidation on July 7, and the RLECs filed their opposition on July 14. Each of these filings addressed various procedural issues, including proposed dates and deadlines for litigating this complicated case efficiently before the end of the 2006 calendar year.

On July 25, the Commission issued an order ("*July 25 Order*") that consolidated these cases into 12 separate proceedings, and set a reasonable procedural schedule to ensure a timely decision. Immediately upon receiving the *July 25 Order* the RLECs began filing documents other than those called for in the procedural schedule – Motions to Approve Interconnection Agreements, Motions for Rehearing, and Petitions for Suspension. The CMRS Providers responded to the RLECs' Motions to Approve Interconnection Agreements on August 7, and now file their response to the Motions for Rehearing. The CMRS Providers intend to separately respond to the Petitions for Suspension.

The Commission should deny the Motions for Rehearing and maintain the procedural schedule it has adopted. The RLECs have anticipated these negotiations since 2004, filed the arbitration petitions, and knew they would be responsible to support their proposed rates with cost studies and testimony. 47 U.S.C. § 252(d)(2); 47 C.F.R. § 51.505(e). Now, two months after filing their arbitration petitions they are seeking relief from this basic obligation. Their request is not legally supported, is untimely, and does not support a modification of the scheduling order.

II. ANALYSIS

A. The Commission Has Nothing to Rehear

The RLECs bring their Motions for Rehearing under KRS 278.400 and 807 KAR 5:001. However, KRS 278.400 allows for the filing of a motion after a hearing, not after the issuance of a procedural order. At this point, there is nothing to "rehear," and the Motions can and should be dismissed on procedural grounds. In addition, a motion for rehearing is most appropriate where a party seeks to offer evidence that could not, with reasonable diligence, have been offered earlier, which clearly is not the case here. *See, e.g., In the Matter of Saeid Shafizadeh*, Case No. 2003-00400, Order (Apr. 26, 2005). The RLECs' Motions should be denied.

B. The RLECs Should Not Be Relieved of the Obligation to Support Their Petitions with Cost Studies and Testimony

The RLECs initiated these proceedings and claim to be concerned that they be concluded in a timely manner. To achieve this goal, the Commission set an appropriate schedule that called for the RLECs to file their cost studies and testimony on August 16. As required by the FCC's Rules, and consistent with other arbitration proceedings conducted by the Commission since 1996, the Commission ordered that the RLECs' proposed rates be based on total long run incremental cost ("TELRIC") studies. Now, the RLECs seek relief from this August 16 filing deadline as they are apparently unprepared or unwilling to provide support for their proposed rates. The Commission should not relieve the RLECs of their burden of proof of any rates they may propose and therefore, the August 16 filing deadline should remain as presently established. If the RLECs choose to file nothing they accept the risks associated with doing so.

1. The RLECs are Not Exempt From the Requirement to Exchange Reciprocal Compensation Traffic Based On TELRIC Rates

The RLECs' initial premise – that they are exempt by 47 U.S.C. § 251(f)(1) from the obligation to exchange reciprocal compensation traffic at forward-looking TELRIC rates – is

simply wrong. Section 251(f)(1) provides rural telephone companies with an exemption from the obligations set forth in Section 251(c), *i.e.*, certain interconnection requirements, provision of unbundled network elements, provision of resold service at wholesale rates, and collocation. Here, the RLECs have asked the Commission to establish arbitrated rates to apply to a reciprocal compensation arrangement. The obligation to establish reciprocal compensation arrangements is imposed by Section 251(b)(5), not Section 251(c). Moreover, Section 252(d)(2) *requires* that "for the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)," rates must be set based on a "reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2). The FCC has established TELRIC as the appropriate methodology for determining compliance with this standard. As a result, there is no exemption in place that relieves the RLECs from the obligation to exchange traffic under Section 251(b)(5) at TELRIC rates.[2] Most of the RLECs' citations to the FCC's *First Report and Order* relate to the pricing of interconnection, unbundled network elements, and resale at forward-looking rates,

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[2] In fact, dozens of rural telephone companies in many states have prepared and filed TELRIC-based cost studies and testimony as a matter of course in cases arising under 47 U.S.C. § 252. *See, e.g.*, *Petition Of Hamilton County Telephone Co-Op et al. For Arbitration Under The Telecommunications Act To Establish Terms And Conditions For Reciprocal Compensation With Verizon Wireless and Its Constituent Companies*, Illinois Commerce Commission Docket Nos. 05-0644–05-0649, 05-0657 (rates proposed by rural telephone companies supported by cost study claimed to be consistent with TELRIC methodology); *In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with T-Mobile USA, Inc.*, Case No. TO-2006-0147 (consolidated with Case No. TO-2006-0151), Public Service Commission of Missouri (use of TELRIC cost studies); *Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp.2d 1299, 1311 (W.D. Okla. 2004), *aff'd*, 400 F.3d 1256 (10th Cir. 2005) (rural telephone companies acknowledged rates would be set at forward-looking costs); *In the Matter of the Petition by the Siskiyou Telephone Co. (U 1017-C) for Arbitration of a Compensation Agreement with Cingular Wireless Pursuant to 47 C.F.R. 20.11(e)*, Public Utilities Commission of California Docket No. A.06-02-028 (and consolidated cases). *See also* South Dakota Commission Docket Nos. TC06-036, TC06-037, TC06-038, TC06-039, TC06-040, TC06-041, TC06-042 (rural ILECs sponsoring forward looking cost studies); Michigan Commission U-14781 (generic docket to set forward-looking costs for rural telephone companies).

which are simply not applicable. The remaining citations are to blanket statements by the FCC that there are certain exemptions that may be available to rural telephone companies under Section 251(f). The RLECs cite to nothing that states they can establish reciprocal compensation arrangements under Section 251(b)(5) but avoid setting rates as required by Section 252(d)(2).

In addition, the Commission has put the RLECs on notice that they were required to assert any Section 251(f)(1) exemption claims at the start of negotiations:

> [T]he parties to this proceeding are hereby put on notice that the Commission has held, in Case Nos. 2000-027 and 2000-083, that even a negotiated agreement will not be found to be in the public interest pursuant to 47 U.S.C. § 252(e)(2) if the incumbent's wholesale rate to resellers is identical to its tariffed rates. Instead, the rates must be at a properly calculated avoided cost discount applicable to the incumbent in question. Moreover, any carrier wishing to assert the rural exemption to incumbent carriers' obligations under the Telecommunications Act of 1996 should assert its exemption at the outset of negotiations, so that proceedings may begin pursuant to 47 U.S.C. § 251(f)(1).

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.; Ballard Rural Telephone Cooperative Corporation, Inc.; Brandenburg Telephone Company, Inc.; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative Corporation, Inc.; Logan Telephone Cooperative, Inc.; Gearhart Communications Company, Inc. F/K/A Harold Telephone Company D/B/A Coalfield's Telephone Company; Mountain Rural Telephone Cooperative, Inc.; Peoples Rural Telephone Cooperative Corporation, Inc.; South Central Rural Telephone Cooperative Corporation, Inc.; Thacker-Grigsby Telephone Company, Inc.; and West Kentucky Rural Telephone Cooperative

Corporation, Inc., Case No. 2000-00354 (Nov. 2, 2000) (emphasis added). The RLECs have not complied with this requirement.[3]

The RLECs recognize the weakness of their claim under Section 251(f)(1), as they have filed separate Petitions seeking a suspension under Section 251(f)(2).[4] However, the Commission has previously recognized that an arbitration proceeding does not provide the time for a suspension request to be considered, and thus is not the place for such a suspension request to be made. *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, p. 9 (Dec. 19, 2003). In Case No. 2003-00115, when the ILEC sought to assert a Section 252(f)(2) exemption during the course of an arbitration, the Commission determined that the ILEC:

> 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.

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[3] Indeed, the RLECs have essentially waived any application that Section 251(f)(1) may have had to this case. Section 251(f)(1) potentially provides an RLEC an exemption to the 251(c)(2)(B) duty to interconnect "at any technically feasible point within the carrier's network" – commonly referred to as "direct interconnection." Rather than attempting to avoid direct interconnection, the RLECs are affirmatively seeking to *require* the CMRS Providers to directly interconnect at RLEC network interconnection points. *See, e.g.*, Ballard Petition (Lead Case No. 2006-00215), Exhibit 6 Agreement for Facilities-Based Network Interconnection For Transport and Termination of Telecommunications Traffic § 4.1 Method of Interconnection, 4.11. ("The Parties agree to interconnect their respective networks within the incumbent LEC service area of Ballard Rural at one or more interconnection Points ("IPs") as established by Ballard Rural.") and 4.1.2 (Indirect Interconnection. ... In such case, on behalf of ACC, the third party will connect dedicated facilities with Ballard Rural at the IP(s).").

[4] The CMRS Providers will separately respond to these Petitions, which do not belong in these proceedings and are not properly supported. The Commission need not rule on the Petitions for Suspension in order to deny the RLECs' Motions for Rehearing at this juncture.

Id. As the Commission noted, because Section 251(f)(2) provides the Commission with 180 days to reach a decision, an exemption request during the midst of an arbitration proceeding leaves the Commission with insufficient time to consider the important issues raised and "forecloses participation of all other parties who may wish to interconnect" with the RLECs. *Id.*

The RLECs in this case have not met the standards previously imposed by the Commission for asserting exemptions. The RLECs and the CMRS Providers signed a settlement agreement in 2004 in Case No. 2003-00045 ("2004 Agreement") that contemplated formal interconnection requests being made by the CMRS Providers on or about January 1, 2006.[5] The RLECs waited over two years, until a hearing date was set on the arbitration petitions, to seek exemptions. The Commission's decisions in Case Nos. 2000-00354 and 2003-00115, and the policy supporting those decisions, make clear that the Commission should deny the RLECs' request to throw the Commission's scheduling order into flux at this point in the proceedings.

2. The RLECs Should File Any Affirmative Cost Case on August 16

In light of the fact that the hearing in this case is two months away, it is imperative that the RLECs file their cost testimony on August 16 unless they simply choose to not meet their burden of proof. Setting aside questions regarding methodology, it is abundantly clear that the RLECs have the burden of proof as to reciprocal compensation rates to be established by the Commission. 47 C.F.R. § 51.505(e). The FCC imposed the burden of proof on ILECs because they have greater access to the kind of information that would allow a commission to set rates in accordance with the FCC's rules. *In the Matter of Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 FCCR 15499, FCC 96-325,

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[5] A copy of the 2004 Agreement was attached as Exhibit 1 to each arbitration petition.

First Report and Order, ¶ 680 (1996). *See also Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp.2d 1299, 1311 (W.D. Okla. 2004) (recognizing the burden of proof is on the ILEC), *aff'd*, 400 F.3d 1256 (10th Cir. 2005).

Whatever evidence and testimony the ILECs intend to rely on needs to be served and filed, needs to be vetted through the discovery process, and the CMRS Providers must have the ability to properly respond. *MCI Telecommunications Corp. v. BellSouth Telecommunications*, 9 F. Supp.2d 766, 772 (E.D. Ky. 1998) (competitor has a due process right in setting appropriate telecommunications rates in an arbitration proceeding). Presumably the RLECs contemplated filing something in support of their proposed rate when they initiated these arbitration petitions. If the RLECs choose to file something other than TELRIC cost studies, and instead rely on a legally deficient claim that rates need not be cost-based, they do so at their risk. *See Atlas*, 309 F. Supp.2d 1299 (commission properly ordered the parties to exchange traffic at bill-and-keep until rural LECs demonstrated costs using an appropriate methodology). For these reasons the Commission should deny the RLECs' Motions for Rehearing.

C. The Commission Need Not Modify its Scheduling Order for These Dockets to Be Concluded in a Timely Manner

The RLECs ask the Commission to reconsider its procedural schedule based on their hypothetical concern that interconnection agreements may not be completely finalized by the end of the year. The Commission should deny this request. The RLECs first state that the Commission must resolve all issues by October 2, 2006 under Section 252(b)(4)(C). *See, e.g., Ballard Motion for Rehearing*, p. 7. This is simply not realistic, and the Commission's schedule does the best job possible of ensuring that these issues will be resolved by the Commission

before the expiration of the 2004 Agreement at the end of the year. This Commission action is reasonable and should not be modified.[6]

The RLECs' concern about what may or may not happen before December 31 is not something the Commission should act on at this time. The Commission's decision resolving open issues will include a "schedule for implementation" of arbitrated terms and conditions. 47 U.S.C. § 252(c)(3). If any "gap" period issues do arise the Commission will be best suited to address those concerns at that time. The RLECs' speculation about problems that may or may not occur is not "good cause" to deviate from the schedule at this time. *July 25 Order*, p. 3.

Finally, the RLECs' stated willingness to "discuss an appropriate timeline" other than that set by the Commission is of little help. *See, e.g.*, Ballard Motion for Rehearing, fn.2. The RLECs have not proposed an alternative schedule, and do not suggest a mechanism or time frame for such discussions. The Commission should maintain its current schedule, and the parties should start litigating substantive arbitration issues rather than procedural motions.

D. The Commission Should Not Act on the RLECs' Proposed "Procedural Restrictions"

In their opposition to consolidation, the RLECs asked the Commission to impose a series of "procedural restrictions" on these cases. The Commission declined to do so, but instead stated that it expected "the parties to minimize unnecessary duplication of efforts and resources" and reserved the right to enter a separate order later setting forth the process and procedures to be

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[6] Moreover, in their opposition to consolidation the RLECs addressed the CMRS Providers' procedural schedule but did not insist on strict compliance with the 9 month time frame in Section 252(b)(4)(C). Their argument should not be considered for the first time on a motion for rehearing. In addition, it is ironic that this claim comes in a pleading in which they claim they are not able to meet the deadlines in the current schedule.

followed. *July 25 Order*, p. 4. The RLECs now ask the Commission to revisit this decision and impose their requested conditions.

The Commission should deny rehearing on this point. Not only do the RLECs simply repeat their previous arguments, but the Commission properly deferred this issue for the time being, and can address these or similar issues as the hearing nears. For the record, the Commission should note that *every* filing made by the CMRS Providers in these dockets has been a consolidated filing designed to minimize unnecessary efforts by the Commission, Staff, and the RLECs. The CMRS Providers have every intention of continuing to do so through discovery, the hearing, and post hearing submissions. There is no need for the Commission to impose unnecessary conditions at this time.

Finally, several of the "procedural restrictions" suggested by the RLECs raise significant legal concerns. The RLECs would have the Commission order one lawyer to serve as counsel for all CMRS Providers in each proceeding. *See, e.g.*, Ballard Motion for Rehearing, p. 9. The Commission cannot order a party to be represented by another party's lawyer. Under the Kentucky Rules of Professional Conduct, specifically SCR 3.130(1.2), a lawyer must abide by the directives of his or her own client, and is not allowed to take direction from another party to a case. An order preventing a party's own lawyer from participating in the hearing at all would raise due process and ethical concerns. The better approach is that already chosen by the Commission – to anticipate that all parties will work to achieve efficiency and prevent duplication, but to reserve the right to impose appropriate protections if necessary when circumstances may require such during these proceedings.

III. CONCLUSION

For the above reasons, the Commission should deny the RLECs' Motions for Rehearing.

Dated: August 11, 2006

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Consolidated Response Of CMRS Providers To Motions To Approve Interconnection Agreements was on this 11th day of August, 2006 served via United States mail, postage prepaid to the following:

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