

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE ) ADMINISTRATIVE  
INTRASTATE SWITCHED ACCESS RATES ) CASE NO.  
OF ALL KENTUCKY INCUMBENT AND ) 2010-00398  
COMPETITIVE LOCAL EXCHANGE )  
CARRIERS )

**RLECS' COMMENTS IN RESPONSE TO THE COMMISSION'S MARCH 22, 2012  
ORDER**

In response to the March 22, 2012 Order (the "Order") of the Public Service Commission of the Commonwealth of Kentucky (the "Commission") in the above-captioned case (the "Intrastate Access Case"), the RLECs<sup>1</sup> hereby submit their comments on the Federal Communication Commission's (the "FCC") November 18, 2011 intercarrier compensation Order (the "ICC/USF Order").<sup>2</sup>

**I. INTRODUCTION**

The Commission initiated the current administrative case in 2010 "to investigate and address the basis and structure for intrastate access rates and how they are affecting Kentucky's telephone market." (Order, Nov. 5, 2010, p. 2.) This included efforts to "investigate access charge reform within Kentucky" and to serve "as a formal method of monitoring, analyzing, and

<sup>1</sup> Ballard Rural Telephone Cooperative Corporation, Inc.; Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative, Inc.; Gearhart Communications Co., Inc.; Highland Telephone Cooperative, Inc.; Logan Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative, Inc.; North Central Telephone Cooperative Corporation; Peoples Rural Telephone Cooperative, Inc.; South Central Rural Telephone Cooperative Corporation, Inc.; Thacker-Grigsby Telephone Company, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. (collectively, the "RLECs").

<sup>2</sup> See *In the Matter of Connect America Fund: A National Broadband Plan for Our Future: Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; *Universal Service Reform: Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("ICC/USF Order").

applying changes implemented by the FCC through the [National Broadband Plan] and the Connect America Fund.”( *Id.* at pp.5-6.)

Due to their size and the rural nature of their service territories, the RLECs are particularly vulnerable in any access rate reform. Rural build out is expensive due to low population densities, significant distances, difficult terrain, and minimal infrastructure. Moreover, the RLECs’ costs for providing service to such expensive and challenging territories are mandatory and continuing. The RLECs serve as carriers of last resort in their territories, and they have accepted a legal obligation to provide service to any customer in their rural service area that requests it (regardless of whether service to that particular customer is economically viable at prevailing rates). Despite these difficulties, the RLECs have led the way in making Kentucky a national model for broadband development, and they are eager to continue providing high quality service to the rural citizen of Kentucky.

The potentially devastating impact of any access reform on the RLECs cannot be overstated. Revenue variations that would leave other types of carriers unscathed could severely disrupt the RLECs’ abilities to serve rural Kentucky consumers. In particular, access reform that disregards the difficult economic realities of rural service will lead to lower quality services which fail to meet customers’ evolving demands, as well as higher service costs for rural Kentuckians. In his testimony on behalf of the RLECs, Gregory Hale, General Manager and Vice President of Logan Telephone Cooperative, Inc., stressed that “this proceeding is the most significant proceeding to occur in the telecommunications industry in Kentucky in nearly twenty years.... And, it is probably as significant as any proceeding in history involving the RLECs.” (Prefiled Direct Testimony of G. Hale, July 8, 2011, p. 7:8:16.)

The Commission's intrastate access reform efforts coincided with a nationwide reform effort that included a Notice of Proposed Rulemaking issued by the FCC. Although the FCC was aware of these reform efforts by the Commission and the public service commissions of other states, the FCC believed that "the challenges posed by a state-by-state process would likely result in significant variability and unpredictability of outcomes." (ICC/USF Order, ¶794.) On November 18, 2011, the FCC issued its ICC/USF Order establishing a reform plan with "a uniform national approach" encompassing both interstate and intrastate access traffic. (*Id.* at ¶796.) As a result of the FCC's ICC/USF Order, the Commission's central purpose for this proceeding has been eliminated, and the Commission should decline to take any further action on the question of access reform except as noted below.

## **II. RESPONSE AND COMMENTS**

The Commission's March 22, 2012 Order asked the parties to file comments addressing three topics: (1) "the Commission's finding that it has limited jurisdiction over intrastate terminating access rates and should contain suggestions for how this proceeding should progress"; (2) "the non-traffic sensitive rate element"; and (3) "any intention to implement the Access Recovery Charge." (Order, p.5.)

The RLECs agree with the Commission's finding that it has limited jurisdiction over intrastate terminating access rates and believe this jurisdictional change makes it appropriate for the Commission to forego any action in this proceeding. Furthermore, the RLECs believe the Commission should not address the non-traffic sensitive rate element in this proceeding because it is included in the FCC's reform path. Finally, the RLECs anticipate implementing the new federal ARC pursuant to 47 CFR § 51.917(e), but note that this process requires no action by the Commission.

## A. Jurisdiction

The Commission correctly explains the FCC's change to the jurisdiction for intrastate terminating switched access rates as one that "preempts states' jurisdiction over intrastate access rates." ( *See* Order, p. 1.) Accordingly, except for its critical role in the implementation of the FCC's reform plan, the Commission has neither the responsibility nor the authority to implement any reform efforts related to intrastate access traffic, and it should decline to take any further action in this proceeding. ( *See* ICC/USF Order, ¶¶ 788-797 (establishing the states' roles as partners in implementing, but not directing, reform efforts).)

In its March 22, 2012 Order, the Commission accurately summarized the change in jurisdiction for intrastate terminating switched access rates. ( *See* Order, p. 1.) The FCC found that it has the authority to reform intrastate access rates. ( *See* ICC/USF Order, ¶¶ 760-781.) In doing so, the FCC preempted the Commission's authority over such traffic and its role in the reform of intrastate access rates. ( *Id.*)

Specifically, the FCC outlined a reform path for "Transitional Intrastate Access Service"<sup>3</sup> in which the Commission's primary role will be to "regulate the rates that the carriers charge their end users" and aid in the "implementation of a bill-and-keep framework." ( *See* ICC/USF Order, ¶ 776, Figure 9.) *See* also 47 CFR § 51.901 (establishing the transition).

The FCC's preemption of state authority over intrastate access services is currently subject to appeal at the U.S. Tenth Circuit Court of Appeals. *See In re: FCC 11-161*, Case No. 11-9900 (10th Cir., opened Dec. 16, 2011) (consolidated with *NARUC v. FCC*, Case No. 12-

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<sup>3</sup>Transitional Intrastate Access Service is defined to include three categories of traffic that were subject to intrastate access rates as of December 31, 2011: (1) End Office Access Service; (2) terminating Tandem-Switched Transport Access Service; and (3) originating and terminating Dedicated Transport Access Service that was subject to intrastate access rates. 47 CFR § 51.903(j).

9531, on March 8, 2012). Although the outcome of this appeal may materially affect the Commission's jurisdictional authority over the intrastate access traffic at issue, no party to the appeal has requested a stay of the FCC's ICC/USF Order and the Tenth Circuit has not issued such a stay. Consequently, the FCC will continue the implementation of its reform plan, and its decision to preempt state jurisdiction will remain valid unless and until it is overturned by the appellate court.

As a result, the Commission does not have jurisdiction to address the reform of intrastate access traffic rates, and it has limited authority to address the components affected by the FCC's reform path. Because this proceeding was opened specifically to address intrastate access reform, it should be treated as inactive, pending resolution of the appeal before the Tenth Circuit. We recommend that the Commission monitor the appeals process but decline to take any further action in this proceeding.

### **B. Non-Traffic Sensitive Rate Element**

Due to the jurisdictional limitations described above, there is no present need for the Commission to address the non-traffic sensitive rate ("NTSR") element. The Commission is well aware that the RLECs are particularly sensitive to reforms that affect the NTSR because it constitutes a significant source of their revenue.

The FCC preempted state control of terminating intrastate switched access service, which includes End Office Access Service, 47 CFR § 51.903(j). End Office Access Service is defined to include "[t]he switching of access traffic at the carrier's end offices switch and the delivery to or from of such traffic to the called party's premises." 47 CFR § 51.903(d)(1),(j). The NTSR is a recovery mechanism of Carrier Common Line Service which "provide[s] for the use of end

users' Telephone Company provided common lines by [access] customers for access to such end users to furnish Intrastate Communications.” (Duo County Tele. Coop. Corp., Inc. Tariff, P.S.C. Ky. No. 2A, § 3.1.) Thus, revenues derived from the Kentucky NTSR are included in the Transitional Intrastate Access Service reform path, and recovery of these costs should flow from the new rules imposed by the FCC.

Like the other intrastate access rate elements, the NTSR element is incorporated in the FCC’s reform plan. As a result, the Commission does not have jurisdiction to address the reform of the NTSR, and it should decline to take any further action in this proceeding.

### **C. Federal Access Recovery Charge Implementation**

The RLECs anticipate implementing the new federal Access Recovery Charge (“ARC”) in July of 2012.

The ARC is a newly-minted, federally authorized charge intended to help offset the rate-of-return revenues eliminated through the Transitional Intrastate Access Service reform path. *See* 47 CFR § 51.917(e)(1) (describing ARC as a charge “to allow the Rate-of-Return Carrier to recover some or all of its Eligible Recovery”). The ARC is permitted if a rate-of-return carrier’s baseline revenue as established by 47 CFR § 51.917(d) is not recovered through carrier access revenues. *Id.* If the carrier access revenues and ARC revenues are still less than the adjusted baseline revenue amount, the carrier is eligible for additional federal universal service support. 47 CFR § 51.917(f).

Based on the current language of the ICC/USF Order, the RLECs will implement the federal ARC on July 1, 2012. Because the ARC is a federally tariffed rate, carriers will file

according to the rules for their federal tariffs. Consequently, the Commission does not need to—and should not—take any actions with respect to the ARC.

#### **D. Additional Issues**

The ICC/USF Order will impact the Transitional Intrastate Access Service reform path for rate-of-return carriers in two ways that affect this Commission.

First, the ICC/USF Order provides for an initial, limited recovery of a portion of intrastate access traffic revenue shortfall from a national-level fund. Consequently, the RLECs anticipate that the Commission's future involvement will be necessary to ensure that the RLECs are able to both take advantage of those federal funds and attain their prescribed rates-of-return.

On July 1, 2012, carriers must make a one-time election to be eligible for CAF-ICC support. 47 CFR § 51.917(f)(1). All carriers that elect to become CAF-ICC support recipients will be committed to certain voice telephony and broadband obligations. (See ICC/USF Order, ¶¶ 917-920.) However, the FCC's support for carriers to meet these obligations is limited and capped. (Id. at ¶¶ 917-932.) As a result, additional state support may be necessary.

Moreover, nothing in the ICC/USF Order usurps existing Commission authority under 47 U.S.C. § 254(f) to adopt regulations to preserve and advance universal service, including, if necessary, the establishment of a state-level universal service fund. The Commission should be actively involved in ensuring that rate-of-return carriers have the financial capacity to meet their federal obligations to receive the limited CAF-ICC support. Indeed, the ongoing need for a Kentucky universal service fund seems to be widely recognized among the parties in this investigation. The continued existence of the Kentucky universal service fund was a key part of AT&T's Plan for Kentucky Switched Access Reform. (See, e.g., Proposed AT&T Plan, Section

6(setting forth KUSF contribution guidelines). The RLECs have also consistently advocated for the continuation of the service fund, arguing that “[a] state-level universal service fund is absolutely essential to any effort at reform.” (RLECs’ Preliminary Comments on AT&T’s Proposed Plan, April 15, 2011.) In the event federal support and the carrier’s revenues are insufficient to be able to attain a prescribed rate-of-return, the Commission may ultimately need to establish a state universal service fund for these carriers.

Second, the Commission will also be responsible for certifying eligible telecommunications carriers (ETCs). This responsibility is time-sensitive and will include all federal high-cost universal service support mechanisms. Thus, the Commission should devote time to address this process jointly with the RLECs.

### **III. CONCLUSION**

With respect to the primary inquiry in the Commission’s March 22, 2012 Order, the RLECs agree with the Commission’s summary of the FCC’s jurisdictional challenge. As a result of the FCC’s ICC/USF Order preempting state authority over intrastate access rate reform, the Commission should decline to take any action in this proceeding related to reforming intrastate access traffic rates, including the NTSR and the ARC.

The FCC ICC/USF Order has the further effect of relegating to the Commission the following roles: (1) implementation of a state universal fund to ensure that rate-of-return carriers are able to meet their prescribed rate-of-return and take advantage of the CAF-ICC support; and (2) arrangement for the certification of eligible telecommunications carriers. Although the RLECs do not believe the Commission must take immediate action to address these issues, they



anticipate that the Commission's future involvement will be critical to the successful implementation of the access reform.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

In accordance with Ordering Paragraph No. 5 of the Commission's March 10, 2011 Order, this is to certify that the RLECs' April 23, 2012 electronic filing is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing has been transmitted to the Commission on April 23, 2012; that an original and one copy of the filing will be delivered to the Commission on April 23, 2012; and that, on April 23, 2012, electronic mail notification of the electronic filing will be provided through the Commission's electronic filing system.

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