

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' MOTION FOR RECONSIDERATION OR REHEARING PURSUANT
TO KRS 278.400 AND 807 KAR 5:001 SECTION 4(10)**

In response to the May 30, 2012 Order (the "May 30 Order") of the Public Service Commission of the Commonwealth of Kentucky (the "Commission") in the above-captioned case (the "Intrastate Access Case"), the RLECs¹ hereby submit their Motion for Reconsideration or Rehearing Pursuant to KRS 278.400 and 807 KAR 5:001 Section 4(10). In support of this Motion, the RLECs--of which there are thirteen--state as follows.

I. FACTS

This motion arises in the context of the Federal Communications Commission's (the "FCC") November 18, 2011 intercarrier compensation order (the "ICC/USF Order").² In the ICC/USF Order, the FCC set forth "a uniform national approach" encompassing both interstate and intrastate access traffic, and required carriers to file revised intrastate tariffs with state public service commissions. (See ICC/USF Order, ¶¶ 760-781.) See also 47 CFR § 51.901

¹ 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").

² 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).

(establishing the transition). In a separate order, the FCC provided a number of Tariff Review Plan (“TRP”) spreadsheets for ILECs “to use to support the annual revision to the rates in their interstate access service tariffs.” (*In the Matter of Material to be Filed in Support of 2012 Annual Access Tariff* filings, WCB/Pricing File No. 12-08, Order, ¶1 (rel. April 19, 2012) (the “April 19 FCC Order”).) In AT&T’s³ unsolicited “supplemental” comments to the Commission, which were filed outside the scope of the Commission’s March 22 order requesting comments, AT&T mischaracterized the April 19 FCC Order as “adopt[ing] standardized spreadsheets for carriers to use in calculating their July 1, 2012 intrastate access reductions” (AT&T’s Supplemental Comments in Response to the Commission’s March 22, 2012, p. 1 (March 22, 2012) (“AT&T’s Supplemental Comments”).) To the contrary, the FCC expressly did not adopt a standardized TRP spreadsheet for intrastate use, nor did it adopt standardized TRP spreadsheets for the National Exchange Carrier Association (“NECA”), which includes the RLECs.⁴ (April 19 FCC Order, ¶¶1, 28.) Instead, the FCC encouraged those carriers to simply “refer to the rate-of-return TRP for guidance on the level of support materials to provide in [their] annual filing[s].” (*Id.* at ¶28.)

In response to the FCC’s ICC/USF Order, the RLECs prepared a revision to the Duocounty Telephone Cooperative Intrastate Access tariff, filed contemporaneously with this motion. The RLECs have gathered, organized, and submitted to the Commission all data required by the FCC’s ICC/USF Order. The RLECs have also gathered, organized, and submitted to the Commission all information required by subparagraphs a, b, c, e, and f of the first ordering paragraph of the Commission’s May 30 Order (subparagraph is not applicable to

³ AT&T Kentucky, AT&T Communications of the South Central States, LLC, AT&T Long Distance Services, and TCG Ohio (collectively, “AT&T”).

⁴ Of the RLECs, only South Central Rural Telephone Cooperative is not an issuing carrier through NECA.

the RLECs). In light of the significant work associated with compiling, organizing, and presenting the cost support data in a coherent manner, the RLECs formatted and organized this data while working closely with the Commission over the past several weeks. This work included the sharing of drafts and participation in at least one informal conference, all to ensure that the Commission would have a consistent methodology whereby they could evaluate that the RLECs' filings comply with the FCC's requirements.

On May 30, 2012, less than two days before the tariff revision filing deadline and apparently in response to AT&T's unsolicited "supplemental" comments, the Commission issued its May 30 Order setting forth burdensome new formatting requirements. (*See* May 30 Order.) Specifically, the Commission ordered all carriers to submit data on the FCC's TRP spreadsheets based on AT&T's misrepresentation that the April 19 FCC Order "adopted standardized spreadsheets for carriers to use in calculating their July 1, 2012 intrastate access reductions." (*Id.*, p. 5.) Furthermore, the May 30 Order states that that carrier's "intrastate access rates shall be null and void as of July 3, 2012, pending a full investigation of the rates and supporting data." (*Id.*, p. 8.)

The FCC expressly stated that the TRP spreadsheets were merely "guidance" and not mandatory for NECA carriers. (April 19 FCC Order, ¶28.) The TRP spreadsheets were also never previously identified as a requirement despite the RLECs working closely with the Commission for several weeks to collect and organize the required data.

In addition, the Commission's May 30 Order remains ambiguous as to what "standardized spreadsheets" are purportedly required. The April 19 FCC Order attached numerous TRP spreadsheets, none of which are "standardized" for NECA carriers like the RLECs and many of which are inapplicable to intrastate rates. (*See generally* April 19 FCC

Order.) Indeed, the completion of most of the TRP spreadsheets would require the RLECs to collect significant amounts of additional data unrelated to the intrastate access rates that are before the Commission. (*Id.*) As a result, the May 30 Order does not provide enough information for the RLECs to comply.

Moreover, due to the extremely short notice of these burdensome new formatting requirements (and the possibility of new data collection requirements if the TRP spreadsheets are mandated), the RLECs are unable to comply with the May 30 Order. The RLECs have spent multiple weeks collecting and organizing the data required by the FCC's ICC/USF Order and have submitted to the Commission all data required by the ICC/USF Order. Although the RLECs always endeavor to promptly comply with Commission orders, two days is simply not enough time to gather the new data that may be necessitated by certain TRP spreadsheets and redo weeks of work organizing and compiling data.

In effect, the May 30 Order requires the RLECs to perform a logistically impossible task and subjects the RLECs to nullification of their intrastate access rates when they fail to do the impossible. This is an untenable situation, and the RLECs believe the Commission did not intend this result. Rather, it appears that the Commission believed AT&T's misrepresentation that the FCC had prescribed "standardized spreadsheets" and simply intended to confirm those purported formatting requirements.

For these reasons and the reasons set forth below, the RLECs respectfully request that the Commission retract ordering paragraph 2 (requiring use of the TRP spreadsheets) and ordering paragraph 3 (declaring certain rates "null and void" in advance of filing) of its May 30 Order, at least as to the RLECs. In the alternative, the RLECs respectfully request that, at a minimum, the Commission: (i) clarify which TRP spreadsheets it considers to be "standardized" for the

RLECs; (ii) permit the RLECs sufficient time (approximately two weeks) to reorganize data to populate those spreadsheets; and (iii) clarify that, in the course of revising intra-state rates, the RLECs are not required to provide information that is only relevant to inter-state rates.

II. ARGUMENT

Due to the extremely limited notice of the requirements set forth in the May 30 Order and the continued ambiguity as to the formatting requirements established by the May 30 Order, the RLECs cannot comply. Consequently, the May 30 Order, if left unchanged, appears to have already declared the RLECs' intrastate access rates "null and void" even before those rates are filed. This result seems particularly draconian in light of the fact that the RLECs have provided all data required by the ICC/USF Order in a format that already provides uniformity and allows for ready review of the data of 13 RLECs.

A preemptive nullification of the RLECs' intrastate access rates in these circumstances would violate the most fundamental rights of due process guaranteed by the Kentucky Constitution, as well as statutory requirements governing ratemaking and Commission procedure. Therefore, the RLECs respectfully request that the Commission retract ordering paragraphs 2 and 3 of its May 30 Order or, at a minimum, provide the RLECs with sufficient time and guidance to comply.

A. The May 30 Order Goes Above and Beyond the FCC's Requirements.

The Commission's May 30 Order, as it currently stands, effectively guarantees the nullification of the RLECs' intrastate access rates despite the fact that the RLECs have complied with all of the FCC's substantive and procedural requirements.

The FCC set forth substantive tariff revision requirements in the ICC/USF Order. (*See* ICC/USF Order.) The RLECs have met those substantive requirements. (*See generally* , June 1,

2012 Revision to the Duo County Telephone Cooperative Intrastate Access Tariff.) The RLECs have also met the FCC's procedural requirements for the filing of their tariff revision. Although the April 19 FCC Order includes sample spreadsheets for carriers to use for data reporting, it did not require NECA carriers like the RLECs to use the TRP spreadsheets and instead described those spreadsheets as "guidance." (April 19 FCC Order, ¶28.) Because the Commission's May 30 Order sets forth formatting requirements above and beyond those required by the FCC, the Commission retains the authority to retract those formatting requirements.

Confusion regarding purportedly "standardized" spreadsheets appears to have originated with AT&T's unsolicited "supplemental" comments, in which AT&T misrepresented the April 19 FCC Order. (AT&T's Supplemental Comments, p. 1.) AT&T's mischaracterizes the April 19 FCC Order as adopting "standardized spreadsheets for carriers to use in calculating their July 1, 2012 intra-state access reductions." (*Id.*) This is expressly contradicted by the plain language of the April 19 FCC Order, which provided spreadsheets "to use to support the annual revisions to the rates in their inter-state access service tariffs" and in which the FCC clarified that it "ha[s] not adopted a TRP for the National Exchange Carrier Association (NECA)..." (April 19 FCC Order, ¶¶1, 28.)

The entire premise of the Commission's May 30 Order – its belief that the TRP spreadsheets were mandated by the FCC – is based on AT&T's misrepresentation of the April 19 FCC Order and is inconsistent with the plain language of the April 19 FCC Order. Consequently, the RLECs respectfully request that the Commission grant this motion and retract ordering paragraphs 2 and 3 of the May 30 Order.

B. The May 30 Order Violates the Kentucky Constitution's Guarantees of Due Process As Well As Provisions of the Kentucky Revised Statutes.

The RLECs have filed all data required by the FCC's ICC/US F Order to reform their intrastate access tariff. Nevertheless, the May 30 Order imposes new formatting requirements (and possibly new data gathering requirements) that the RLECs cannot meet when given only two days' notice. Consequently, the May 30 Order effectively already declared the RLECs' intrastate rates "null and void" even before those rates are filed. This lack of notice and prospectively nullification of intrastate rates are unconstitutional and constitute unlawful violations of the RLECs' due process rights.

Kentucky law has long established that "a party to be affected by an administrative order is entitled to procedural due process." *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). The requirements of due process have been met "when a party has sufficient notice and opportunity to make his defense." *Soms v. Sanitation Dist. No. 1 of Jefferson County*, 303 Ky. 284, 286 (Ky. 1946). Administrative decisions that affect a party's rights without affording "an opportunity to be heard could... be classified as arbitrary." *Am. Beauty Homes*, 379 S.W.2d at 456.

In addition to these fundamental principles of due process that extend to administrative proceedings, Kentucky's legislature has statutorily mandated certain procedures for the filing and suspension of utility rates. Specifically, the Commission may not invalidate a rate on its own motion without complying with the procedures set forth in KRS 278.190. The Commission is first required to provide "reasonable notice" of a hearing to the affected utility and then to "hold a hearing concerning the reasonableness of the new rates." KRS 278.190(1). While the hearing

is pending, the Commission may suspend the new rates for up to five months, but a final decision on rate approval may not be made in the absence of such a hearing. KRS 278.190(2).

The May 30 Order violates both the general constitutional due process requirements and the specific statutory procedural requirements for rate approval. After weeks of diligent work, the RLECs provided all data required by the FCC's ICC/USF Order and organized it in collaboration with the Commission. Despite this, the May 30 Order gave the RLECs less than two days notice of new and burdensome formatting requirements (that may also include additional data gathering requirements). Two days does not provide enough time for the RLECs to comply with the May 30 Order even if their staffs worked around the clock until the filing deadline. Because the RLECs were not provided "sufficient notice" to have any hope of complying with the May 30 Order, they were not given "sufficient notice" to meet the requirements of due process under Kentucky law. This lack of notice violates the RLECs' rights to due process, rendering the May 30 Order unconstitutionally arbitrary. *Am. Beauty Homes*, 379 S.W.2d at 456; *Somsen*, 303 Ky. at 286.

Furthermore, because the RLECs cannot comply with the May 30 Order due to the insufficient notice, the May 30 Order appears to have already declared the RLECs' intrastate access rates "null and void" before they are even filed. Again, less than two days notice of this decision does not constitute "sufficient notice" for due process purposes. *Am. Beauty Homes*, 379 S.W.2d at 456; *Somsen*, 303 Ky. at 286. Even more troubling, the May 30 Order apparently declares that the RLECs' rates will be "null and void" without providing the RLECs a clear "opportunity to be heard" or an "opportunity to make [their] defense" as required for due process purposes. *Am. Beauty Homes*, 379 S.W.2d at 456; *Somsen*, 303 Ky. at 286. Because the RLECs' rights were affected by the May 30 Order without sufficient notice or any opportunity to

meaningfully respond, the May 30 Order violates Kentucky law's guarantees of due process and should be retracted.

Similarly, the May 30 Order's declaration that the RLECs' rates will be "null and void" does not comply with the statutory procedural requirements set forth in KRS 278.190. The Commission is only empowered to invalidate a filed rate after specific procedural steps have been taken, including a hearing. KRS 278.190. Because the RLECs were provided effectively no notice of this adverse decision and have not been afforded a hearing as to the appropriateness of their filed intrastate access rate, the May 30 Order violates the procedural requirements of KRS 278.190 and should be retracted.

For these reasons, the RLECs respectfully request that the Commission grant this motion and retract ordering paragraphs 2 and 3 of the May 30 Order.

C. At a Minimum, the RLECs Seek Clarification of Ordering Paragraphs 2 and 3 of the May 30 Order.

At a minimum, the RLECs respectfully ask the Commission to clarify ordering paragraphs 2 and 3 of the May 30 Order. Specifically, the RLECs ask the Commission to clarify the formatting the Commission desires and to confirm that the RLECs are not required to collect and file interstate information.

The May 30 Order does not specify which of the many TRP spreadsheets attached to the April 19 FCC Order should be completed by the RLECs and similarly-situated carriers. (See May 30 Order, ordering ¶ 2; April 19 FCC Order.) At minimum, the RLECs respectfully request clarification of what TRP spreadsheets the Commission considers to be "standard" in order to have an opportunity to comply with the new requirements.

In addition, many of the TRP spreadsheets appear to require information relevant only to interstate access rates, whereas the only issue relevant to and within the potential jurisdiction of the Commission is the revision to intra-state access rates. To the extent the Commission's clarification indicates that it considers any such spreadsheet to be "standard" and required, the RLECs respectfully request that the Commission confirm that the RLECs do not need to gather and file information related to interstate access rates.

These requested clarifications, along with a modestly extended deadline to comply with the requirements of the May 30 Order, would at least afford the RLECs an opportunity to try to comply with the Commission's new requirements. Nevertheless, such clarifications would not resolve the central problems. Because the Commission's requirements go above and beyond the FCC's requirements (see Section I.A above) and because of the numerous procedural defects with the May 30 Order (see Section I.B above), the RLECs believe that retraction of ordering paragraphs 2 and 3 is the only appropriate solution. For these reasons, the RLECs respectfully request that the Commission grant this motion and retract ordering paragraphs 2 and 3 of the May 30 Order.

D. AT&T's Unsolicited "Supplemental" Comments Set a Dangerous Precedent and Should Be Disregarded.

As set forth above, the Commission's May 30 Order appears to have followed AT&T's Supplemental Comments, which misrepresented the April 19 FCC Order. However, AT&T's Supplemental Comments were filed outside the scope of the Commission's March 22 request for comments and without Commission authority and should have been disregarded. (See March 22 Order (requesting one set of comments from each party).) Even in the absence of AT&T's misrepresentations, deferring to such a "supplemental" filing sets a dangerous precedent that

may encourage parties in future cases to pepper the Commission with unscheduled, unwanted, and unhelpful “supplemental” pleadings with the hopes of having the last word or impacting the Commission’s decisions at the very last second. Although it is a strategic ploy that AT&T apparently endorses, this is not a practice that the Commission should encourage. Retraction of those elements of the May 30 Order that relied on AT&T’s Supplemental Comments will make it clear that such “supplemental” filings are disfavored and given little to no weight absent clear indications that the substance of late filings could not have been included in the filings contemplated by the Commission’s procedural order.

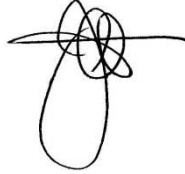
For these reasons, the RLECs respectfully request that the Commission grant this motion and retract ordering paragraphs 2 and 3 of the May 30 Order.

III. CONCLUSION

The RLECs have already submitted all required information to the Commission in connection with the revision of the Duo County Telephone Cooperative Intra-state Access tariff. Specifically, the RLECs have gathered, organized, and submitted to the Commission all data required by the FCC’s ICC/USF Order. The RLECs have also gathered, organized, and submitted to the Commission all information required by subparagraphs a, b, c, e, and f of the first ordering paragraph of the Commission’s May 30 Order (subparagraph is not applicable to the RLECs).

Because the May 30 Order goes beyond the FCC’s substantive and procedural requirements for intrastate access rate reform and violates the RLECs’ constitutional due process rights as well as statutory procedural protections, the RLECs respectfully request that the Commission grant this motion and retract ordering paragraphs 2 and 3 of the May 30 Order.

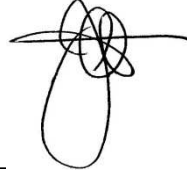
Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line extending to the right.

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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' June 1, 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 June 1, 2012; that an original and one copy of the filing will be delivered to the Commission on June 1, 2012; and that, on June 1, 2012, electronic mail notification of the electronic filing will be provided through the Commission's electronic filing system.



Counsel to the RLECs
