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JAN 28 2013

PUBLIC SERVICE  
COMMISSION

January 25, 2013

Via FedEx

Jeff Derouen, Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

*In the Matter of: Petition of Cumberland Cellular, Inc. d/b/a Duo County Telecom for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2012-00529*

Dear Mr. Derouen:

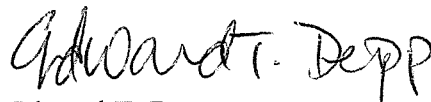
Enclosed for filing with the Public Service Commission of the Commonwealth of Kentucky (the "Commission") are one (1) original and ten (10) copies of the motion to strike of Duo County Telecom to AT&T Kentucky's reply in support of its motion to dismiss.

Please return a file stamped copy in the enclosed, self-addressed postage paid envelope.

Thank you and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/kwi  
Enclosures

cc: John E. Selent, Esq.  
Jerrad Howard, Esq.

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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JAN 28 2013

In the Matter of:

PUBLIC SERVICE  
COMMISSION

Petition of Cumberland Cellular, Inc. d/b/a )  
Duo County Telecom for Arbitration of )  
Certain Terms and Conditions of Proposed )  
Interconnection Agreement with BellSouth )  
Telecommunications, Inc., d/b/a AT&T )  
Kentucky, Pursuant to the Communications )  
Act of 1934, as Amended by the )  
Telecommunications Act of 1996 )

Case No. 2012-00529

**DUO COUNTY TELECOM'S MOTION TO STRIKE AT&T KENTUCKY'S REPLY IN  
SUPPORT OF ITS MOTION TO DISMISS**

Cumberland Cellular, Inc., d/b/a Duo County Telecom ("Duo County Telecom"), by counsel, respectfully requests that the Public Service Commission of the Commonwealth of Kentucky (the "Commission") strike BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's ("AT&T Kentucky") reply in support of AT&T Kentucky's motion to dismiss ("AT&T Kentucky's Reply"). AT&T Kentucky's Reply should be stricken because it does not comply with 807 KAR 5:001 Section 5. AT&T Kentucky's Reply was not filed timely, and it simply reiterates the same arguments it presented in its motion to dismiss.

**INTRODUCTION**

Duo County Telecom submitted its arbitration petition to the Commission on November 30, 2012 pursuant to Section 252 of the 1996 federal Telecommunications Act (the "1996 Act") and applicable state law. That petition described five open issues that Duo County Telecom and AT&T Kentucky have been unable to resolve in their negotiation of an interconnection agreement. Among these open issues is a provision in the agreement requiring that AT&T Kentucky compensate Duo County Telecom for interim interconnection services that Duo County Telecom has provided and AT&T Kentucky accepted without payment. This provision in the draft interconnection agreement

has been the subject of long-running negotiations between the parties prior to Duo County Telecom's submission of its arbitration petition.

AT&T Kentucky filed a motion to dismiss on December 21, 2012, claiming that Duo County Telecom had improperly joined its claim for compensation related to these interim interconnection services and alleging that the Commission does not have authority to arbitrate a matter that is outside the scope of an ILEC's Section 251(b) or (c) duties. AT&T Kentucky further contended that Duo County Telecom's claim for compensation does not establish a *prima facie* case.

Duo County Telecom filed its response to AT&T Kentucky's motion to dismiss on January 10, 2013, a deadline that was mutually agreed-upon in December 2012 before the Commission's amended Rules of Procedure had become effective. Simultaneous with that filing, Duo County Telecom served a copy of its response by email upon counsel of record to AT&T Kentucky.

The amended Rules of Procedure became effective on January 4, 2013. AT&T Kentucky filed its reply to Duo County Telecom's response on January 18, 2013, eight days after Duo County Telecom's response was filed. AT&T Kentucky did not seek any extension of this filing deadline from either the Commission or Duo County Telecom, and Duo County Telecom did not grant any extension.

Not only did AT&T Kentucky fail to file its reply timely, but its reply also simply reiterated AT&T Kentucky's original arguments from its motion to dismiss. These repetitious arguments include the allegation that the Commission's ability to arbitrate open issues is limited under the 1996 Act. AT&T Kentucky also repeats its allegation that Duo County Telecom is somehow trying to avoid establishing a *prima facie* case for the compensation AT&T Kentucky owes Duo County Telecom for interim services.

Because AT&T Kentucky did not comply with the Commission's Rules of Procedure as set out in 807 KAR 5:001 Section 5, the Commission should strike AT&T Kentucky's Reply.

**ARGUMENT**

**I. AT&T KENTUCKY FAILED TO FILE ITS REPLY WITHIN FIVE DAYS OF THE FILING OF DUO COUNTY TELECOM'S RESPONSE.**

Under the Commission's Rules of Procedure, AT&T Kentucky is required to file its reply within five days of the filing of Duo County Telecom's response to AT&T Kentucky's motion to dismiss. AT&T Kentucky failed to meet this filing deadline, and, therefore, the Commission should strike AT&T Kentucky's Reply.

The Commission's amended Rules of Procedure took effect on January 4, 2013. Section 5 of the amended Rules of Procedure requires that:

[u]nless the [C]ommission orders otherwise, a party shall file a reply no later than five (5) days of the filing of the most recent response to the party's motion.

807 KAR 5:001(5)(3) (2013). This rule plainly requires that a party's reply be filed within five days of the filing of the opposing party's response unless the party seeks and receives the Commission's approval. No such approval was sought.

Section 4 describes the method by which the filing deadline is to be computed for any pleading:

(a) In computing a period of time prescribed . . . by 807 KAR Chapter 5 . . . the day of the act . . . after which the designated period of time begins to run shall not be included.

(b) The last day of the period so computed shall be included . . . .

807 KAR 5:001(4)(7).

Duo County Telecom's response was filed on January 10, 2013. Pursuant to Sections 4(7) and 5(3) of 807 KAR 5:001, if AT&T Kentucky intended to file a reply, it was required to do so

within five days of the filing of Duo County Telecom's response, which would have been January 16, 2013. AT&T Kentucky did not file its reply until January 18, 2013. Therefore, AT&T Kentucky's Reply was not filed timely and should be stricken from the record.<sup>1</sup>

**II. AT&T KENTUCKY'S REPLY ONLY REITERATES THE ARGUMENTS PRESENTED IN ITS MOTION TO DISMISS.**

Even if AT&T Kentucky's Reply had been filed timely, the Commission should still strike AT&T Kentucky's Reply because the reply is not confined to points raised in Duo County Telecom's response, but instead reiterates the same arguments presented by AT&T Kentucky in its Motion to Dismiss, a practice that is prohibited by the Commission's Rules of Procedure.

807 KAR 5:001(5)(3) states that

The reply shall be confined to points raised in the responses to which they are addressed, and *shall not reiterate an argument already presented.*

Therefore, a reply must be in response to specific issues addressed in the opposing party's response and cannot recite the same arguments contained in the party's original motion.

AT&T Kentucky's Reply reiterates the same arguments already presented in its motion to dismiss. For instance, the substance of Section 1 of AT&T Kentucky's Reply is the same as that addressed in Section 1 of AT&T Kentucky's motion to dismiss, both of which allege that the Commission's ability to arbitrate "open issues" is limited under the 1996 Act (including an unnecessary continuing and irrelevant argument related to computer parts).<sup>2</sup> (AT&T Kentucky Reply 1-11.) Section 3 of AT&T Kentucky's Reply is the same as that presented in Section 3 of

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<sup>1</sup> Duo County Telecom further notes that, in addition to AT&T Kentucky's in-house counsel, AT&T Kentucky's Reply and AT&T Kentucky's motion to dismiss list two Chicago counsel of record, Dennis G. Friedman and J. Tyson Covey. Neither of these attorneys appear to be licensed to practice law in Kentucky, and neither appear to have filed a motion for *pro hac vice* admission or received an Out-of-State Certification Form from the Kentucky Bar Association to practice law before the Commission in this matter.

<sup>2</sup> Section 1 of AT&T Kentucky's Reply is entitled "Duo's Claim for Compensation for Interim Services is Not Subject to Arbitration Under the 1996 Act," which is the same exact heading of Section 1 of AT&T Kentucky's motion to dismiss *verbatim*. (AT&T Kentucky Reply 3.)

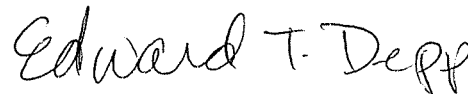
AT&T Kentucky's motion to dismiss, both of which mistakenly allege that Duo County Telecom is trying to "evade" the requirement that it establish a *prima facie* case entitling it to such compensation. (AT&T Kentucky Reply 8-10.)

807 KAR 5:001(5)(3) requires that a reply be confined to points raised in the opposing party's response and not reiterate arguments already presented by that same party in its original motion. Because AT&T Kentucky's Reply reiterates arguments already presented, the Commission should strike AT&T Kentucky's Reply.

**CONCLUSION**

For the foregoing reasons, Duo County Telecom respectfully requests that the Commission strike AT&T Kentucky's Reply.

Respectfully submitted,



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*Counsel to Duo County Telecom*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served this 25<sup>th</sup>, day of January, 2013, on the following individuals:

***Via U.S. mail and email:***

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