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August 12, 2016

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: WC Docket No. 10-90 *et al.*  
West Kentucky and Tennessee Telecommunications Cooperative  
Notice of *Ex Parte***

Dear Ms. Dortch:

On August 10, 2016, John Kuykendall Steve Meltzer of JSI with Trevor Bonnstetter of West Kentucky & Tennessee Telecommunications Cooperative (“WK&T”) met in person with Travis Litman of Commissioner Rosenworcel’s office and Amy Bender of Commissioner O’Rielly’s office. On August 11, the West Kentucky Representatives also met in person with Nick Degani of Commission Pai’s office and Claude Aiken of Commission Clyburn’s office.

The purpose of these meetings was to discuss WK&T’s pending Petition for Limited Waiver of Federal Communications Commission rules Section 51.917(b)(7)(iii), 2011 Rate-of-Return Carrier Base Period Revenue. West Kentucky’s petition has been pending a decision for several years and the West Kentucky Representatives want to ensure that the FCC has all the information it needs to come to a favorable decision.

WK&T followed up on previous *ex parte* meetings held earlier this summer with Commissioner staff, and provided some new information and insight that the West Kentucky Representatives believed would be helpful for the Commissioner staff to decide favorably on WK&T’s petition. A summary of this information is contained in the attached Talking Points which were presented at the meetings.

Please direct any questions regarding the filing to the undersigned.

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Sincerely,

A handwritten signature in black ink that reads "John Kuykendall". The signature is written in a cursive style with a large initial "J" and "K".

John Kuykendall  
JSI Vice President  
301-459-7590  
[jkuykendall@jsitel.com](mailto:jkuykendall@jsitel.com)

Cc: Nick Degani  
Claude Aiken  
Travis Litman  
Amy Bender

Attachment

**West Kentucky and Tennessee Telecommunications Cooperative  
Petition for Limited Waiver of Section 51.917(b)(7)(ii)  
Ex Parte Discussions – August 10-11, 2016**

**Introduction:**

Throughout October 1, 2010 – September 30, 2011 (FY2011), WK&T’s intrastate access tariff contained two rate elements that applied to minutes-of-use for actual service provided during that timeframe. According to FCC rules, the revenues associated with those minutes-of-use were to have been included in WK&T’s Base Period Revenue if they were billed and collected prior to March 31, 2012. The fact that backbilling occurred to apply those rate elements to minutes-of-use that had already been billed should not prevent their inclusion into WK&T’s BPR.

As explained below, the FCC has stated that a carrier’s BPR should reflect “actual service provided during FY2011 to terminate actual calls bound for Petitioners’ customers.” Throughout FY2011, WK&T billed carriers minutes-of-use to terminate actual calls. After the cooperative discovered that two rate elements had been omitted, WK&T backbilled, on a per minute-of-use basis, the two rate elements for intrastate access rates which were in effect during FY2011 and had been approved by the Kentucky Public Service Commission. By December 2012, the carriers had promptly made full or partial payments, and WK&T filed its petition.

Waiving the March 31, 2012 deadline to allow WK&T to include these revenues in its BPR is consistent with how the FCC treats terminating intrastate access revenues for all other carriers. Accordingly, for this and other reasons enumerated below, the FCC should grant WK&T’s petition.

**1. The Revenues WK&T Seeks to Include in its BPR Were Billed Pursuant to Tariff**

- West Kentucky and Tennessee Telecommunications Cooperative (“WK&T”) is a concurring carrier in the Duo County Cooperative Corp., Inc.’s Intrastate Access Tariff which is in effect and on file at the Kentucky Public Service Commission.
- Among the rate elements in this tariff are the following:
  - Carrier Common Line/Non-Traffic Sensitive Revenue (“CCL/NTSR”) which is billed monthly to carriers on a per-terminating minute-of-use basis but also contains an annual adjustment mechanism. The tariff clearly defines how this adjustment should be made.
  - Transport Interconnection Charge (“TIC”).
- During a period of time that included FY2011, due to inadvertent errors, the adjustment specified in the tariff for the CCL/NTSR was not made and the TIC rate element was mistakenly omitted from the carrier access billing system.
- When WK&T discovered these billing oversights, the cooperative quickly acted to rectify the issue and sent invoices to carriers for the CCL/NTSR adjustment and TIC where billing records showed minutes-of-use for actual service provided to those carriers during that timeframe.
- Several of the carriers paid the entire amount invoiced while most of the remaining reached settlement agreements with WK&T. WK&T then determined the total terminating amount associated solely with FY2011 and submitted its petition to include this amount in its Base Period Revenue (“BPR”).

## 2. **WK&T's Backbilling Was Consistent with Section 201(b) and Within the Scope of its Section 203 Obligation to Collect its Lawful Tariffed Charges**

- The Act expressly contemplates that backbilling and collection actions may be required.
- Section 415 establishes a time frame of up to two years for recovery actions – Congress recognized that billing and collection can be complex, and may require time to resolve.
- In *Brooten*, the FCC considered a case in which AT&T had backbilled a customer, Kenneth E. Brooten, Jr., after the carrier discovered that billing had not occurred due to a computer programming error.<sup>1</sup> In determining that AT&T's practices were not unlawful under Section 201(b) of the Act, the FCC found that AT&T addressed the billing system error in a "reasonable period of time"; that the previously unbilled service was "rendered and subscribed to pursuant to tariff," and that the backbilled charges were reasonable in part "because it was within the scope of AT&T's Section 203 obligation to collect its lawful, tariffed charges."<sup>2</sup>
- Similar to AT&T, WK&T's backbilling is consistent with Section 201(b). WK&T addressed the billing omission within a reasonable period of time. The billing error was discovered in late April 2012 and the invoices were sent in May and August. Further, the previously unbilled service was "rendered and subscribed to" pursuant to WK&T's intrastate access tariff, and the backbilling was within the scope of its Section 203 obligation to collect its "lawful, tariff charges."
  - Unlike AT&T's situation in which billing did not occur until after the error was discovered, in WK&T's case, the minutes-of-use for actual services rendered were specified on the bills when they were sent to the carriers during FY2011. The backbilling merely applied to those minutes rates that had been inadvertently omitted when the bills were originally sent.

## 3. **No Court or Regulatory Body Intervention Was Required as Three Carriers Paid the Entire Amount and WK&T Accepted Partial Payments for the Others**

- In June 2012 after sending the initial invoices, WK&T contemplated seeking court or state commission action because of the specific language in the Transformation Order's waiver standard for BPR waivers. However, the cooperative determined that it would be a waste of court/state commission resources at that point given that the carriers may pay of their own accord and given that the units for which payment was due were already clearly stated on the bill.
- By December 1, 2012, Sprint, Quest and Level 3 had paid 100 percent of the invoiced amount.
  - The total terminating amount associated solely with FY 2011 for these three carriers is approximately 18.7 percent of the amount requested to be included in WK&T's BPR.
- By December 13, 2012, partial payments had been made by the remaining carriers – AT&T and its affiliated carrier BellSouth and Verizon/MCI (which has 2 CICs) so the cooperative determined that court or state commission involvement was not required. WK&T accepted the partial payments in full satisfaction of the amount invoiced as it had decided that obtaining the funds so that it could proceed with filing

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<sup>1</sup> *Brooten v. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13350 at para. 14 (Com. Car. Bur. 1997) ("*Brooten*").

<sup>2</sup> *Id.* at 13350-01 at paras. 14-15.

the waiver petition prior to the end of the year was the most prudent course of action for the cooperative.

- Part of the reason why AT&T/BellSouth's payment was lower is that during the correspondence with those companies, it was determined that the period of time covered by the invoices exceeded twenty-four months which is the "statute of limitations" that carriers follow for backbilling.<sup>3</sup>

#### **4. WK&T Followed Commission Policy by Settling**

- In *Brooten*, the FCC found that AT&T did not violate Section 203 of the Act when it attempted to settle with Brooten over the amount that he claimed as damages for inconvenience associated with the backbilling.
  - The Commission cited the "filed rate doctrine" and noted that it "generally bars damage awards and thus settlement offers that are based on common law theories that a rate, term, or condition contrary to the filed tariff should govern in place of the filed tariff."
  - The agency then found that "Section 203 did not, however, bar AT&T from attempting in good faith to settle Brooten's bonafide grievance, which does not arise under a legal theory contrary to the filed tariff."
- The FCC then stated that its "policy, moreover, is to encourage carriers and their customers to settle disputes over rates and practices outside of the often costly and time consuming complaint process."
- Similar to AT&T, WK&T followed Commission "policy" by accepting partial payment as settlement for the outstanding invoices rather than pursuing costly and time consuming court or state commission action which was unnecessary under these circumstances.

#### **5. WK&T's Decision Not to Pursue Court or State Commission Involvement Should Not Preclude the Commission From Granting its Waiver**

- The FCC is not precluded from granting WK&T's petition simply because the facts associated with the Petition do not fall squarely within the bounds of footnote 1745 in the *Transformation Order*.<sup>4</sup>
  - As the Commission has recognized, this footnote exists to provide "guidance" to petitioners where certain circumstances could justify adjustments to BPR amounts, that the situations set forth in the guidance are only "some situations" where adjustments may be appropriate and that petitions seeking such adjustments do not have to fall "within the four corners" of that guidance.<sup>5</sup>
  - Accordingly, the lack of involvement from a court or regulatory body does not preclude grant of BPR waiver petitions.
- Indeed, as demonstrated above, the actions taken by WK&T of accepting partial payments in settlement for those carriers that did not pay the entire invoiced amounts is preferred by the Commission over seeking the involvement of a court or regulatory body.

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<sup>3</sup> *Id.* at 13350 at para. 14 (FCC noting that AT&T told Brooten that "it was authorized to bill these charges for up to two years under the 'statute of limitations' it follows for backbilling, Section 415(a)").

<sup>4</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Transformation Order*") at n.1745, *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

<sup>5</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Order, FCC 14-121 (rel. Aug. 7, 2014) at para. 16.

**6. Good Cause Exists and the Public Interest Would be Served by Grant of WK&T's Petition**

- The public interest would be served by granting the petition based on the fact that WK&T's actions were:
  - consistent with Section 201(b) in that the previously unbilled service was rendered and subscribed to pursuant to tariff and the cooperative addressed the billing system error promptly;
  - within the scope of its Section 203 obligation to collect its lawful tariffed charges;
  - consistent with Commission policy of settling disputes over rates and practices outside of the often costly and time consuming complaint process.
- Further, grant of the petition would:
  - follow Commission precedent and “allow Petitioners’ BPRs to reflect actual service provided during FY 2011 to terminate actual calls bound for Petitioners’ customers;”<sup>6</sup>
  - allow for recovery in its BPR of revenues that were billed and collected which were associated with FY2011 for units of billing stated on FY2011 bills.
- Grant of the petition would not open the door to “me too” petitions given that the twenty-four month window for backbilling for FY2011 long ago closed, and if any carrier faced similar facts, they should have filed their petition several years ago.

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<sup>6</sup> *Id.* at para. 22.