

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF WINDSTREAM)	
COMMUNICATIONS, INC. FOR)	
A DECLARATORY ORDER AFFIRMING)	CASE NO.
THAT THE INTERCONNECTION REGIMES)	2015-00283
UNDER KRS 278.530 AND 47 U.S.C. § 251)	
ARE TECHNOLOGY NEUTRAL)	

ORDER

On August 14, 2015, Competitive Carriers of the South, Inc. (CompSouth), filed with the Commission an application for a declaratory order. CompSouth requested an Order affirming that, regardless of the technology used to exchange voice traffic between carrier's networks, the interconnection regimes under 47 U.S.C §§ 251-252 and KRS 278.530 apply, and that a requesting carrier may file a petition with the Commission requesting an Order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier (ILEC). The Commission subsequently granted intervention to Cincinnati Bell Telephone Company LLC (Cincinnati Bell), BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky), and MCI Communication Services, Inc. d/b/a Verizon Business Services (Verizon).

At the time of the filing of the application, the members of CompSouth were: Birch Communications, Inc.; EarthLink Business, LLC; Level 3 Communications, LLC; Windstream Communications, Inc.; and XO Communications, LLC. On December 27, 2017, CompSouth filed a motion notifying the Commission that CompSouth would formally dissolve on December 31, 2017, and requested the Commission allow

Windstream Communications, Inc. (Windstream), to substitute for CompSouth as a party in this matter. The Commission granted CompSouth's request by Order on February 7, 2018.

At the request of the parties, the established procedural schedule was modified by Order entered August 9, 2016, to permit the parties to conduct discovery, file testimony and briefs, and to schedule a hearing for January 31, 2017. Due to ongoing procedural and discovery disputes, the parties requested that the procedural schedule be suspended. By Order entered January 25, 2017, the January 31, 2017 hearing was continued, and a procedural schedule was established for the parties to file rebuttal testimony and briefs. Parties filed briefs on March 24, 2017. In addition to the filing of briefs, AT&T Kentucky filed a motion for oral arguments, to which CompSouth filed a response in opposition. AT&T Kentucky also has an outstanding motion seeking to strike portions of one of CompSouth's witnesses. Through this Order, the Commission will: address the outstanding motions; require supplemental briefs; and establish a deadline by which the Commission will issue an Order.

BRIEFS

At the heart of the issue before the Commission is whether the regulatory interconnection scheme under 47 U.S.C. §§ 251-252 and KRS 278.530 governs all voice traffic, regardless of underlying technology, transmission media, or protocol. In other words, is the Commission's approach to intercarrier interconnection for the exchange of voice traffic "technology neutral"? In order to resolve the issue, the Commission must interpret both federal and state law. Although the intervenors argue that the Commission lacks the jurisdiction to issue a declaratory order with regard to federal law, the state of

federal law with regard to internet protocol (IP) interconnection is nonetheless relevant to this proceeding, regardless of whether the Commission's declaratory powers extend to the interpretation of federal law. The intervenors also argue that the Commission should not weigh in on federal law issues as the FCC has an open docket to investigate, *inter alia*, IP interconnection.¹

Due to the passing of time since the filing of initial briefs in this proceeding, the Commission finds that the parties should file supplemental briefs that: 1) provide an update on federal law regarding the issues presented in the petition for declaratory order; and 2) responding to the arguments raised in the initial briefs. Within 45 days of receipt of the briefs, the Commission will issue a final order in this matter.

OUTSTANDING MOTIONS

There are two outstanding motions that the Commission addresses below.

Motion for Oral Argument

AT&T Kentucky has requested oral argument, asserting that, because the case presents primarily legal issues it would be helpful to the Commission, and appropriate, to conduct oral arguments before the Commission. AT&T Kentucky asserts that because the Commission continued the hearing scheduled for January 31, 2017, oral argument is the only opportunity for the parties to present their position live to the Commission and address any questions from the Commission. AT&T Kentucky further argues that oral argument would be appropriate because the intervenors do not all have the same arguments, and that the parties have not had an ample opportunity to present its

¹ See, e.g., Initial Brief of Cincinnati Bell (filed Mar. 24, 2017) at 9; Verizon's Initial Brief In Opposition to CompSouth's Request for Declaratory Order (filed Mar. 24, 2017) at 5; and AT&T Kentucky's Initial Brief (filed Mar. 24, 2017) at unnumbered pagers 21–22.

arguments because they have only had the opportunity to file an initial brief. CompSouth opposes oral argument, asserting that the parties have had ample opportunity to state their arguments in briefs.

As discussed above, the Commission will allow for the filing of supplemental briefs that update the Commission on the state of relevant federal law, and provide a response to the arguments raised in the initial briefs. The Commission believes that this will provide a sufficient opportunity for the parties to convey their respective arguments before the Commission, and allow the Commission to reach a conclusion on this matter. Accordingly, the Commission finds that the motion for oral argument should be denied.

Motion to Strike

AT&T Kentucky, in its motion to strike, claims that several portions of the rebuttal testimony of Joseph Gillan (Gillan Rebuttal) are irrelevant and should be stricken. Specifically, AT&T Kentucky seeks to strike the following testimony.

Page 2, lines 7–8 and line 9–12²

Mr. Gillan testifies that, contrary to AT&T Kentucky's testimony, CompSouth members have discussed internet protocol (IP) interconnection with AT&T Corporation (AT&T), the parent company of AT&T Kentucky. Mr. Gillan also testifies to AT&T Kentucky's obligation to file IP interconnection agreements and an entity's right to review said agreements. AT&T Kentucky argues that this should be stricken as irrelevant because: 1) AT&T Kentucky's testimony did not say CompSouth members had not discussed IP interconnection with AT&T Kentucky, but instead said that no CompSouth member had requested IP interconnection; 2) CompSouth members' discussion was not

² AT&T Kentucky also moves to strike page 5, lines 13-18, and page 7, lines 1-9, for the same reasons put forth in this section.

with AT&T Kentucky but with a different AT&T entity; 3) the occurrence of generic discussion is not relevant to any issue presented in CompSouth's application; 4) the testimony addresses issues AT&T Kentucky did not raise in its testimony, and; 5) has no relevance to the issues raised in CompSouth's application.

In its response to the motion to strike, CompSouth argues that AT&T Kentucky is trying to distract from one of the key points of the Gillan Testimony, which is that AT&T Kentucky is allowing a non-jurisdictional affiliate to enter into IP interconnection agreements that involve service to AT&T Kentucky's customers. CompSouth argues that this is relevant to the proceeding because, if AT&T Kentucky were required to file IP interconnection agreements under the 1996 Telecommunications Act, it would make it much more difficult for AT&T Kentucky to use an affiliate to evade Commission jurisdiction. CompSouth also claims that the Gillan Testimony highlights the harm resulting from discriminatory practices of incumbent local exchange carriers as laid out in its application.

Page 2, line 14 – page 4, line 9

Mr. Gillan testifies to AT&T Kentucky's obligation to file agreements similar to those of Verizon, and an entity's right to review the agreements. AT&T Kentucky argues that this is irrelevant because: 1) the testimony addresses issues AT&T Kentucky did not raise in its testimony; 2) the testimony has no bearing on the issues raised in CompSouth's application, and; 3) the relief requested in the Gillan Testimony is inconsistent with the agreement between AT&T Kentucky and CompSouth to resolve previous discovery issues in which they agreed that AT&T Kentucky would not produce the IP interconnection agreements that AT&T Kentucky affiliates had made. AT&T Kentucky opines that

CompSouth would not have acquiesced in AT&T Kentucky's refusal to provide the agreements if the agreements were crucial to the resolution of this case.

In its response, CompSouth argues that it is up to AT&T Kentucky to determine what issues it wants to discuss, however, by intervening in this proceeding, AT&T Kentucky will be bound by the Commission's decision, even if that decision requires AT&T Kentucky to file the agreements with the Commission. CompSouth also argues that AT&T Kentucky misunderstood the Gillan Testimony. CompSouth claims that Mr. Gillan did not testify that IP interconnection agreements should be filed in this proceeding, but instead he described the reasons for the transparency provisions in the 1996 Telecommunications Act.

Page 4, line 11 – page 5, line 5

Mr. Gillan testifies to CompSouth's members' attempts to negotiate an IP voice interconnection agreement with AT&T Kentucky. Mr. Gillan testified that AT&T Kentucky was able to claim that it had not received requests for IP interconnection from CompSouth's members because any such requests were made to an affiliate. AT&T Kentucky argues that the testimony is premature because no CompSouth member has made a request for IP interconnection to AT&T Kentucky. AT&T Kentucky also argues that the Gillan Testimony is misleading because it conflates discussions with AT&T Corporation with discussions with AT&T Kentucky.

In its response, CompSouth argues that the testimony is relevant because it reveals that AT&T Kentucky customers are served in part through IP Interconnection Agreements entered into by a non-jurisdictional affiliate. CompSouth also argues that AT&T Kentucky is seeking to misconstrue the Gillan Testimony so that it would appear

that the parties to the case (CompSouth and AT&T Kentucky) had discussed IP interconnection.

Page 5, line 20 – page 6, line 6

Mr. Gillan testifies that AT&T claims that AT&T Kentucky has no agreement to exchange voice traffic in IP format with any other carriers and that an AT&T affiliate exchanges the traffic. Mr. Gillan also testifies that AT&T never explains how the IP voice traffic is then exchanged with AT&T Kentucky. AT&T Kentucky objects to this testimony, arguing that the existence of such agreements (which AT&T Kentucky disputes the existence of) is irrelevant because it has no bearing on the issues concerning the meaning of 47 U.S.C. §§ 251-252 and KRS 278.530 that CompSouth raised in its petition. AT&T Kentucky also disputes the inferences to be drawn from the testimony, arguing that because it and CompSouth negotiated the content of AT&T Kentucky's discovery responses, and anything not answered was because CompSouth agreed that it did not need to be explained.

In its response, CompSouth states that the Gillan Testimony is based upon AT&T Kentucky's Supplemental Responses to CompSouth's discovery requests. CompSouth argues that it is a well-established principle that an expert witness may opine upon the significance and meaning of a fact admitted by an opposing party.

Page 6, lines 8–16

Mr. Gillan testifies that some of AT&T Kentucky's customers are being served over lines using IP technology. AT&T Kentucky claims that this is irrelevant to any issues raised in this proceeding.

With regard to the Motion to Strike, AT&T Kentucky seeks to strike several portions of the Gillan Testimony because it is, according to AT&T Kentucky, irrelevant to the proceeding. AT&T Kentucky relies upon Kentucky Rule of Evidence 401, which defines “relevant evidence” as “evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” AT&T Kentucky argues that none of the testimony it seeks to strike has any tendency to make the existence of any fact that is of consequence to any determination that the Commission will make more probable or less probable without the testimony.

The Commission finds that, while the Kentucky Rules of Civil Procedure, including the accompanying Rules of Evidence, are at times cited in our proceedings, the applicability of those rules is limited to actions in the Courts of Justice. KRS 278.310 states that the Commission is not bound by the technical rules of legal evidence in hearings and investigations. The Rules of Civil Procedure and the Rules of Evidence are advisory in nature to the proceedings of the Commission. The Commission retains discretion in determining the level of the application of the Rules, if at all. *Inter-County Rural Elec. Co-op Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (1966).

In this proceeding, the Commission finds that AT&T Kentucky has provided insufficient grounds to sustain its Motion to Strike. The Commission is the final arbiter of the relevancy of information in the record and will afford the evidence whatever weight to which it is entitled. Accordingly, the Commission finds that AT&T Kentucky’s motion to strike should be denied.

Based upon the foregoing IT IS THEREFORE ORDERED that:

1. AT&T Kentucky's motion for oral argument is denied.
2. AT&T Kentucky's motion to strike is denied.
3. Within 30 days of the date of this Order, the parties shall file supplemental briefs that: 1) respond to the issues raised in the initial briefs, and; 2) provide updates on relevant, federal law.

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By the Commission



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