

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

The Application of Competitive Carriers of the)	
South, Inc. for a Declaratory Order Affirming that)	
The Interconnection Regimes under KRS 278.530)	Case No. 2015-00283
and 47 U.S.C. § 251 are Technology Neutral)	

**RESPONSE OF CINCINNATI BELL TELEPHONE COMPANY LLC
TO APPLICATION OF COMPSOUTH FOR A DECLARATORY ORDER**

I. Introduction

a. Procedural Background

This proceeding was commenced by Competitive Carriers of the South, Inc. “CompSouth” by the filing of a petition for declaratory order. CompSouth purports to seek a determination of the interconnection rights of carriers that provide voice service using Internet Protocol (“IP”) format. CompSouth has requested that the Public Service Commission of Kentucky (“Commission”) declare that interconnection under the federal Telecommunications Act, 47 U.S.C. §§ 251-52, and under state law, specifically KRS 278.530, apply on a technology-neutral basis, and that these federal and state laws permit a carrier to file a petition with the Commission for an order prescribing the rates, terms and conditions of interconnection with an incumbent local exchange carrier (“ILEC”).

On August 2, 2015, the Commission entered an Order requiring CompSouth to serve its petition on all ILECs, CLECs and CMRS providers in Kentucky and afforded all such providers the opportunity to intervene and respond in this proceeding by October 5, 2012. The deadline for intervention and response was extended to October 12, 2015 in an Order entered on September 24, 2015. Cincinnati Bell Telephone Company LLC (“CBT”) is an ILEC operating in Kentucky

and has filed a Motion to Intervene. As an ILEC, CBT would be directly affected by any ruling making a general declaration of the rights of carriers using IP format to interconnect with its ILEC network. CBT opposes the issuance of the requested declaratory ruling for the reasons explained herein.

b. Staff Opinion 2013-015

On October 24, 2013, in response to a request from tw telecom of Kentucky, LLC,¹ Staff addressed the same issues that are being raised here: whether the federal and state statutes governing interconnection are “technology neutral” and whether any provider of voice communications may petition the Commission for an interconnection agreement. AT&T opposed the request for a legal opinion largely because these are issues of national significance that should be addressed by the FCC first. The FCC has an open proceeding where it is considering these issues among many others.²

Staff noted at the outset that tw telecom’s request for an opinion had asked for “a generic interpretation of law, and did not ask Commission Staff to opine on the outcome of a specific factual scenario or application of the law.”³ The Staff Opinion declined to conclude anything more than the general statement that the statutory interconnection regimes are “technology neutral.”⁴ But Staff also cautioned that, while the FCC has stated that interconnection is “technology neutral,” it has not determined if the regime under 47 U.S.C. § 251 is “service

¹ tw telecom is not identified as a member of CompSouth in the Petition.

² See Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011), at ¶¶ 1385-1395. Among the questions posed by the FCC are whether IP-to-IP interconnection would qualify as “the transmission and routing of telephone exchange service and exchange access,” the prerequisite to § 251 interconnection (¶ 1389), and the extent to which an ILEC must be using IP protocol in its own network before it could be required to exchange traffic in IP protocol (¶ 1392).

³ Opinion at p. 3.

⁴ Opinion at p. 5.

neutral,” meaning that the FCC has not determined whether it applies to IP services or interconnection. Staff cited the ongoing FCC proceeding⁵ in which the FCC is addressing how IP interconnection and services should be addressed.⁶ Staff concluded that the FCC could preempt any action by the Commission regarding IP-enabled services or provide that a different interconnection scheme applies to IP services other than 47 U.S.C. § 251.

While Staff stated that a carrier could file for interconnection regardless of the underlying technology under either Kentucky or federal law, it also concluded that “each petition for arbitration stands on its own, and each case is ‘tied to factual circumstances or otherwise circumscribed in various ways’ and does not guarantee interconnection with an IP network.”⁷

c. The Petition

CompSouth requests that the Commission issue a declaratory ruling on the same issues that were the subject of Commission Staff Opinion 2013-015. CompSouth seeks a declaration that regardless of the underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic between two carriers’ networks, (a) the interconnection regimes under 47 U.S.C. §§ 251-52 apply, and (b) a requesting carrier may file a petition with the Commission requesting an Order prescribing the rates, terms and conditions of proposed interconnection with an ILEC. The Petition sought to formalize the October 24, 2013 advisory Staff Opinion 2013-015 as a binding decision of the Commission. For the same reasons that

⁵ *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) at ¶ 1381.

⁶ Opinion at p. 5.

⁷ Opinion at p. 5.

Commission Staff declined to provide more than a generalized opinion in that matter, the Commission should decline to issue a declaratory ruling.

CompSouth asserts that its members provide voice service to Kentucky end-users using IP format or in a format that can be converted to IP for purposes of transport.⁸ CompSouth asserts that it is more efficient to exchange traffic that is in IP format than to convert traffic to TDM format “solely for the purposes of handing off the traffic to another provider at an interconnection point.”⁹ CompSouth asserts uncertainty whether such a carrier may file an arbitration petition absent an advance declaration from the Commission.

The Petition alleges that KRS Chapter 278 affords two paths to seeking interconnection: one path by applying to the Commission for an interconnection order per KRS 278.530(1); the alternative to seek injunctive relief in Franklin Circuit Court per KRS 278.530(3).¹⁰ CompSouth goes on to generally describe the interconnection provisions of 47 U.S.C. § 251-52.¹¹ Among other things, § 252 provides that state utility commissions are to arbitrate the terms of interconnection when the parties cannot reach an agreement through negotiation.

CompSouth asserts that the state and federal statutory schemes are not limited to a particular technology, transmission media or protocol.¹² It further asserts that KRS Chapter 278

⁸ This description is so generic, it would even include networks that only use TDM protocol. The failure to provide specific verified facts as to the actual nature of any given network and how it seeks to interconnect with any other specific network makes any attempt at a meaningful declaratory ruling in this matter impossible. It is not clear what CompSouth is even seeking to accomplish in the way of interconnection. Does it seek to connect an IP protocol network with a TDM network? Two IP protocol networks? Two TDM networks using only an IP interface? Each of these scenarios presents different legal and technical issues, yet it is impossible to determine from the Petition which of these scenarios is proposed.

⁹ Petition at ¶ 3.

¹⁰ Petition at ¶ 4.

¹¹ Petition at ¶¶ 5-6.

¹² Petition at ¶ 7.

encompasses any type of technology.¹³ CompSouth contends that the Federal Communications Commission (“FCC”) has stated that 47 U.S.C. § 251 is “technology neutral” and is not limited to circuit-switched voice traffic.¹⁴ Finally, CompSouth claims that Commission Staff has agreed in its advisory opinion that the statutory provisions are “technology neutral.”¹⁵ Without providing any details as to the nature of any specific proposed interconnection arrangement in this proceeding, CompSouth requests the Commission to issue a binding declaratory order to the same effect.¹⁶

II. The Requirements For Issuance of a Declaratory Ruling Have Not Been Met.

The Commission Rule authorizing an application for a declaratory rule is 807 KAR 5:001, Section 19. The main substantive provision of the rule in part (1) states as follows:

The commission may, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.

The regulation also contains certain procedural requirements: it must “[c]ontain a complete, accurate, and concise statement of the facts upon which the application is based; . . .” 807 KAR 5:001, Section 19(2); and each allegation of fact in an application must be supported by affidavit or to be verified. 807 KAR 5:001, Section 19(6)(b). The Commission may dispose of an application for a declaratory order solely on the basis of the written submissions filed. 807 KAR 5:001, Section 19(6)(b). It should do so here by denying the application.

¹³ Petition at ¶ 8.

¹⁴ Petition at ¶ 9.

¹⁵ Petition at ¶ 10.

¹⁶ Petition at p. 5.

The Petition in this matter is deficient in several regards and there is no compelling reason to go forward with it beyond summary dismissal. Neither CompSouth nor any of its members is a “person substantially affected” as required by 807 KAR 5:001, Section 19(1). The Petition does not contain “a complete, accurate, and concise statement of facts upon which” the Commission could issue a declaratory ruling. 807 KAR 5:001, Section 19(2)(b). The Petition does not describe any of CompSouth’s members’ specific network configurations, does not describe any particular interconnection request, nor does it describe any particular interconnection arrangement that is sought or any proposed contractual interconnection terms. In short, the request is so generic as to be meaningless even if issued. Any actual IP interconnection controversy that might come before the Commission in the future would have to be decided on its specific facts, none of which are presented here.

In Opinion 2013-015, Staff noted that tw telecom’s request had asked for a “generic interpretation of a law” and not the “outcome of a specific factual scenario.” To ask the Commission to issue a binding declaratory ruling with no more specifics is a meaningless exercise. To simply rule that any telephone company, regardless of the technology employed, may invoke the Commission’s jurisdiction under either state law or the federal Telecom Act to seek an interconnection agreement accomplishes little. It is the details of a specific interconnection arrangement that will control and CompSouth offers no such detail here. The more appropriate procedure for CompSouth is for its individual members who seek interconnection agreements with ILECs to make a proper request for interconnection, engage in good faith negotiations, and IF the parties are unable to negotiate an agreement, THEN come to the Commission seeking to arbitrate an agreement. THEN, the Commission can make a determination whether the applicant is a party entitled to seek interconnection and, if so, to

determine the specific terms and conditions of interconnection based on the specific facts of that case.

III. The Commission May Not Issue a Declaratory Ruling With Respect to Federal Law

The regulation authorizing a declaratory ruling, 807 KAR 5:001, Section 19, only authorizes a declaratory ruling with regard to an “administrative regulation of the commission or provision of KRS Chapter 278.”¹⁷ Nowhere does the regulation authorize the Commission to issue a ruling on the meaning of federal law. The only proceeding by which the Commission may interpret federal interconnection rights is in the course of an arbitration proceeding conducted pursuant to 47 U.S.C. § 252. Nothing in the Telecommunications Act authorizes a state commission to issue a declaratory ruling on the meaning of the Act absent a pending arbitration case. By law, a state commission “shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).”¹⁸ And, the condition precedent to the filing of such a petition is a request to negotiate an interconnection agreement with an ILEC and the passage of at least 135, but no more than 160, days without the conclusion of an agreement.¹⁹ CompSouth does not allege that any of its members has any pending negotiation request or that there is any unresolved interconnection issue between its members and any other service provider. Thus, the Commission’s jurisdiction under the Telecommunications Act cannot be invoked and there is no basis for the Commission to render an abstract opinion on federal law under the Commission’s declaratory ruling regulation.

¹⁷ 807 KAR 5:001, Section 19(1).

¹⁸ 47 U.S.C. § 252(b)(4).

¹⁹ 47 U.S.C. § 252(b)(1).

Even if the Commission could issue a declaratory ruling on the meaning of federal law, which it cannot, it should not. CompSouth is asking the Commission to get out in front of the FCC, when it knows that the FCC is already considering numerous specific issues about IP services and how/whether interconnection of IP networks should be regulated. As Staff acknowledged in Opinion 2013-015, the FCC is actively engaged in a proceeding that will comprehensively address IP interconnection issues (one of the first of which is whether IP interconnection is even subject to the same rules as TDM interconnection). To date, the FCC has not formally declared interconnected VoIP service to be “telecommunications service,” a prerequisite to invoking many rights under the Telecommunications Act. The FCC has invoked other bases for its jurisdiction to regulate interconnected VoIP service, at the same time making clear that it may preempt state commissions’ ability to regulate the same.²⁰ Whatever the FCC decides with respect to IP protocol interconnection will also likely preempt any contrary ruling by a state commission. It is best to stay out of the field until the FCC has established the ground rules (absent a valid petition for arbitration, where the Commission would be called upon to decide a real case on real facts).

IV. The Commission Should Decline to Issue a Declaratory Ruling Under Kentucky Law Because CompSouth Has Not Demonstrated That KRS 278.530(1) Applies to Any of its Members

The Kentucky statute at issue states as follows:

Whenever any telephone company desires to connect its exchange or lines with the exchange or lines of another telephone company and the latter refuses to permit this to be done upon reasonable terms, rates and conditions, the company desiring the connection may proceed as provided in subsection (2) or as provided in subsection (3) of this section.

²⁰ See *Petition of Vonage Holdings Corporation for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 04-267, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *aff’d sub nom. Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

KRS 278.530(1). CompSouth seeks a declaration whether the procedures in subsections (2) and (3) are available to its members.

The Commission should decline to issue a declaratory ruling with regard to KRS 278.530 because the prerequisite to invoke subsections (2) or (3) has not been established. Subsection (1) only provides the right to proceed under subsection (2), by way of application to the Commission, or under subsection (3), to the Franklin Circuit Court, to a “telephone company” when “another telephone company . . . refuses to permit” it to connect its lines. There is no allegation that any of the members of CompSouth has been refused interconnection by any telephone company in Kentucky, or that any of them has even sought interconnection for that matter.²¹ Therefore, the Petition is premature and quite academic. No member of CompSouth is “a person substantially affected” within the meaning of 807 KAR 5:001, Section 19, so there is no basis for issuing a declaratory ruling with respect to their rights under KRS 278.530. No member of CompSouth is in a position to invoke KRS 278.530 because none of them alleges that it has either requested interconnection or been refused interconnection by any other Kentucky telephone company.

With respect to Kentucky law, of course the Commission is empowered to render a declaratory ruling. However, there is no actual pending case or controversy upon which the Commission may rule. CompSouth has not alleged any unsuccessful attempt to reach an interconnection agreement with any telephone company. The Commission has in the past, and should here, decline to issue an advisory opinion where there is no pending dispute. Even if the Commission were to issue the opinion sought, it would do nothing to resolve any future

²¹ CBT has an existing interconnection with at least one member of CompSouth. CBT has no knowledge of that member having sought any modification to the existing agreement or of any of the other members having requested an interconnection agreement with CBT. There is certainly no allegation in the Petition to that effect.

controversy that might appropriately come before the Commission because there are no details offered of any proposed type of interconnection that could present any concrete basis for making a ruling. Such a decision should await the time when two parties with an actual live controversy needing resolution by the Commission come before it. Until then, all the Commission could do is engage in speculation, which would be a waste of its valuable time and resources.

V. Conclusion

The Commission should decline the request for a declaratory ruling. There is no legal basis for the Commission to issue a declaratory ruling on the meaning of the federal Telecommunications Act. The only proper procedural basis for the Commission to determine federal interconnection requirements is in the course of a petition to arbitrate the terms of a specific contested interconnection agreement pursuant to 47 U.S.C. § 252. Until and unless such a petition is before the Commission, there is no basis for interpreting federal law. It would be futile to do so at this time anyway, as numerous IP-protocol interconnection issues are being considered by the FCC at this time and its decision on such matters will preempt the Commission.

With respect to Kentucky law, CompSouth has not established the necessary groundwork for the requested declaratory ruling. The statute at issue, KRS 278.530, requires that a telephone company first seek and be refused interconnection by another telephone company. No CompSouth members even asserts that that is the case. There are certainly no verified facts or affidavits before the Commission in this proceeding to that effect, as required by 807 KAR 5:001(19)(2)(b). And, even if CompSouth could get by the standing threshold required to invoke KRS 278.530, it presents no specifics to the Commission that could yield a meaningful declaratory ruling on any issue. Regardless of whether the Commission might say that the

applicable statutes are “technology neutral,” that is meaningless until a specific situation requiring resolution by the Commission is presented to it. It would be impossible to prejudge an unknown situation through an abstract and generic ruling.

The Commission should deny the request for declaratory ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

Counsel certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days, that the electronic filing was transmitted to the Commission on October 12, 2015, and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 12th day of October, 2015

/s/ Douglas E. Hart _____
Douglas E. Hart
Attorney for Cincinnati Bell
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