COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)))))	Case No. 2004-00427

COMPSOUTH'S RESPONSE TO AT&T KENTUCKY'S MOTION FOR RECONSIDERATION AND CLARIFICATION

Competitive Carriers of the South, Inc. ("CompSouth"), a party to the above-referenced proceeding, submits the following Response to the Motion for Reconsideration and Clarification (the "AT&T Motion") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky.

I. INTRODUCTION

CompSouth urges the Commission to reject two of BellSouth's three requests for reconsideration or clarification. [1] First, as CompSouth discusses below, the Commission's decision on commingling (Issue 14) is legally correct and comports with, as BellSouth admits, a recent federal court precedent on the issue. Second, BellSouth's request for "clarification" on the identification of unimpaired wire centers (Issue 5) is unnecessary and, worse, urges the Commission to opine about an issue not litigated in this proceeding – the impact of specific provisions of the AT&T/BellSouth Merger Commitments. AT&T Kentucky's Motion does not tell the whole story concerning its request for clarification, and the issue has not been raised

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[1] CompSouth takes no position on AT&T's third request, in which AT&T requests reconsideration of its decision regarding the "deadline for submitting true-up disputes." *See* AT&T Motion at 5.

previously. CompSouth urges the Commission to either reject AT&T Kentucky's Motion or give affected parties the opportunity to debate the issue in a more appropriate forum.

II. COMMINGLING

The Commission's decision on commingling comports with federal law, the FCC's *Triennial Review Order* ("*TRO*"), *Triennial Review Remand Order* ("*TRRO*"), and with federal court precedent that is directly on point. *See NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007). In *NuVox*, a Florida federal district court reversed a decision of the Florida Public Service Commission that reached the same conclusion regarding commingling that AT&T urges the Commission to adopt here. The court, after reviewing the relevant paragraphs of the *TRO* and *TRO Errata*, held that "the common element of all the above paragraphs is the requirement that commingling applies to wholesale facilities and services. <u>If § 271 checklist elements are wholesale facilities and services, then the commingling requirement does in fact apply to those elements as well</u>."[2]

The *NuVox* court rejected the argument that the *TRO Errata* deletions change the FCC's fundamental ruling that Section 251 and Section 271 elements must be commingled:

> Reading the relevant paragraphs of the *TRO* in context, it becomes apparent that the *Errata* deletions were made in order to avoid conflating distinct concepts. For example, paragraph 584 addresses BellSouth's resale obligations. The modification to paragraph 584 simply eliminated the irrelevant UNE clause. *Errata* at 3, ¶ 27. Similarly, the last sentence of footnote 1990 was deleted in order to avoid contradicting the paragraph which contained it. *Errata* at 3, ¶ 31. That paragraph, in pertinent part, noted that "BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis." *TRO* ¶ 655. Maintaining consistency required the removal of a footnote declining to apply the commingling rule to "services that must be offered pursuant to these checklist items," i.e., Section 271 elements. … Thus, the Court finds that the FPSC misinterpreted the *TRO* to prohibit commingling of 251 elements with 271 checklist elements.[3]

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[2] *NuVox*, 511 F. Supp.2d at 1203 (emphasis supplied).

[3] *Id.* at 1204.

AT&T Kentucky urges the Commission to repeat the error struck down in *NuVox*, and bases its position on the incorrect premise that the Commission's decision "re-creates UNE-P."[4] This concern is misplaced for three reasons. First, a commingled arrangement that permits a CLEC to offer a service using BellSouth loops and switching is not "the equivalent of UNE-P." Switching unbundled pursuant to Section 271 is not subject to TELRIC pricing, but rather to the "just and reasonable" standard applicable to Section 271 checklist items. Therefore, AT&T Kentucky need no longer make available the TELRIC-priced combination formerly known as UNE-P.

Second, when the FCC adopted commingling rules that permitted commingling of Section 251 UNE loops with unbundled switching "obtained at wholesale form an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act,"[5] it expressly authorized service packages that provided an end-user services using the same network elements that supported UNE-P services. As noted above, the critical difference is that the FCC held that TELRIC-priced switching could not be included in the package – thus barring the re-creation of UNE-P as it existed previously. The FCC would not have written the commingling rules the way it did if it intended to prevent CLECs from obtaining switching not provided pursuant to Section 251(c)(3) (whether via Section 271 or "commercial" agreements with BellSouth) with UNE loops. The Commission will not be authorizing a return to TELRIC-priced UNE-P if it confirms its determination regarding commingling.

Third, AT&T Kentucky's argument ignores that commingling is important for carriers who never served customers using UNE-P. Facilities-based carriers using UNE high-capacity loops and transport to serve business customers need commingling when one of the loop or

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4 AT&T Motion at 2.

5 *TRO* ¶ 579.

transport UNEs is no longer offered pursuant to § 251. The commingling of § 251 UNEs with § 271 checklist elements is crucial to the CLECs serving the small business market in Kentucky who did not even utilize UNE-P when it was available.

AT&T Kentucky urges the Commission to follow the lead of the Tennessee Regulatory Authority's recent decision on commingling, which, not surprisingly, went BellSouth's way. CompSouth notes that the Tennessee Regulatory Authority has accepted the issue for arguments on reconsideration, and that the decision was a result of a split decision by the commissioners in that state. Notably, one Tennessee commissioner, Director Ron Jones, issued a separate opinion on the commingling issue that is entirely consistent with this Commission's determination on the commingling issue. CompSouth has attached Director Jones' opinion for the Commission's convenience as Attachment A to this response.[6] CompSouth does not suggest that this Commission should base its decisions on the views of other commissions, but if the Commission is inclined to consider the Tennessee decision, CompSouth urges the Commission to consider Director Jones' views as well.

III. UNIMPAIRED WIRE CENTERS

The Commission's Order properly defines the unimpaired wire centers in Kentucky. That determination required the Commission to apply the methodology for identifying "Fiber-Based Collocators" ("FBC") that AT&T agreed to abide by in the AT&T/BellSouth merger. In the Merger Order, AT&T committed that the "merged entity shall exclude [from FBC counts]

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[6] Attachment A: Separate Opinion of Director Ron Jones, Tennessee Regulatory Authority Docket No. 04-00046, *In Re: Joint Petition For Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC of an Interconnection Agreement with BellSouth* (Dec. 5, 2007).

the following … fiber-based collocations established by AT&T or its affiliates."[7] Based on this merger condition, if AT&T Kentucky had included in its count of FBC in a wire center a collocation owned by pre-merger AT&T, the merged AT&T/BellSouth entity agreed not to count such an affiliated collocation arrangement in its FBC counts.

In Kentucky, as the AT&T Motion correctly notes, that change made a real difference: the removal of a pre-merger AT&T FBC meant that a Kentucky wire center remains impaired under the FCC's standards for DS-3 UNE loops.[8] Prior to the removal of the pre-merger AT&T FBC, the FBC count was high enough to justify pre-merger BellSouth's refusal to provide DS-3 UNE loops in that wire center.

In the AT&T Kentucky Motion, however, AT&T Kentucky asks the Commission to reverse the effect of the FCC Merger Order. AT&T Kentucky does not explain this in its Motion, but when it asks the Commission to endorse its 2005 pre-merger list of unimpaired wire centers "for the period from March 11, 2005, to December 29, 2006," AT&T Kentucky is asking the Commission to adopt an interpretation of its merger commitment that drains it of any meaning. AT&T Kentucky would have the Commission permit it to count a pre-merger AT&T collocation as a FBC – even though the collocation is now owned by AT&T Kentucky. This would permit AT&T Kentucky to treat DS-3 UNE loops provisioned from the Louisville wire center in question between March 2005 and December 2006 not as UNEs but as special access circuits – and perhaps attempt to backbill CLECs much higher rates for that period. In addition, if the Commission goes along with AT&T Kentucky's request that the Commission endorse its outdated unimpaired wire center list, as requested in the AT&T Motion, AT&T Kentucky is in a

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[7] *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, FCC 06-189, 22 FCC Rcd 5662, 5809 (*rel.* March 26, 2007).

[8] The affected wire center is known as Louisville Armory Place. Its Common Language Location Identifier ("CLLI") code name is LSVLKYAP.

position to claim that when its merger commitments expire, AT&T Kentucky can go back and re-instate its pre-merger list of unimpaired wire centers.

To understand what AT&T Kentucky is asking the Commission to do via this "clarification" request, it is important to note that for any carrier to count as a FBC under the FCC's rules, the carrier must be "unaffiliated with the incumbent LEC."[9] For example, the merger of BellSouth and AT&T was completed in December 2006. Once that merger was complete, any fiber-based collocations operated by the pre-merger AT&T would no longer count for *TRRO* purposes, because pre-merger AT&T had become "affiliated with" (in this case, via merger) the ILEC formerly known as BellSouth. If the Commission was counting FBCs today – or any day after the BellSouth merger with AT&T became effective – pre-merger AT&T collocations could not be included because they are owned by an ILEC, *i.e.,* AT&T Kentucky.

The AT&T Motion incorrectly assumes that the merger condition removing affiliated collocations from FBC lists was prospective only. The only way pre-merger AT&T collocations could ever be counted as FBC (as AT&T requests for the March 2005-December 2006 period) is if the condition operated prospectively only. However, the wording of the merger condition is not prospective and, moreover, such an interpretation would render the merger condition totally meaningless. Once the BellSouth/AT&T merger closed, all pre-merger AT&T collocations became owned by the post-merger BellSouth/AT&T ILEC. If there had been no merger condition, "new" AT&T Kentucky could not count "old" AT&T collocations as FBC because the merger resulted in those collocations being owned by an ILEC. As noted above, for a carrier to count as a FBC under the FCC's rules, the carrier must be "unaffiliated with the incumbent

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[9] 47 C.F.R. § 51.5 (definition of "Fiber-Based Collocator").

LEC."[10] The post-merger BellSouth/AT&T could never have counted old AT&T collocations as FBC "prospectively."

If the merger condition is to have any meaning, it must apply to exclude collocation arrangements that BellSouth had identified as FBC *before the merger*, when AT&T was not affiliated with BellSouth. Moreover, even if the merger condition permitted what AT&T requests here, the Commission should not endorse an outdated FBC list that does not reflect reality. The upshot of AT&T's "clarification" request is that AT&T could, in 2008, seek to charge CLECs higher rates for a period in 2005-06 based on the existence of old AT&T collocations that now belong to the new AT&T, the incumbent LEC.

The new AT&T asks the Commission to willfully miscount FBC – and in the process to affirm the notion that competition is vibrant enough to justify non-impairment findings based on the existence in 2005 of collocations owned by a former competitor that became a merger partner. In ruling on a similar issue regarding how to count old AT&T and SBC collocations, the Georgia Pubic Service Commission held:

> It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.[11]

The Commission's Order appropriately reflects marketplace reality. It also reflects, as this Commission's Order states, "the definition of 'fiber-based collocators' set forth in the *TRRO* and

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[10] 47 C.F.R. § 51.5 (definition of "Fiber-Based Collocator").

[11] Georgia Public Service Commission, Docket No. 19341-U, *Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements*, Order on Remaining Issues, at 21 (Feb. 7, 2006).

federal rules and the AT&T/BellSouth Merger order."[12] AT&T's request to "clarify" the Order should be rejected.

IV. CONCLUSION

For all the reasons stated, CompSouth respectfully requests that the Commission deny AT&T Kentucky's Motion for Reconsideration and Clarification.

Respectfully submitted,

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[12] Order at 31.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the a copy of the foregoing Response of CompSouth to AT&T Kentucky's Motion For Reconsideration and Clarification, which is identical to any paper copy filed with the Commission, has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 11th day of January 2008.

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Douglas F. Brent