

CASEY, GENTZ & MAGNESS, L.L.P.

ATTORNEYS AT LAW

98 San Jacinto Blvd., Ste. 1400
Austin, Texas 78701-4286
Phone 512-480-9900
Fax 512-480-9200

Writer's Direct Dial: 225-0019

Robin A. Casey
Susan C. Gentz
Diane M. Barlow
Valerie P. Kirk
Bill Magness
Bradford W. Bayliff

February 21, 2006

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Re: Case No. 2004-00427, CompSouth Responses To Recent
BellSouth Filings Regarding Change of Law Issues

Dear Ms. O'Donnell:

In recent weeks, BellSouth Telecommunications, Inc. ("BellSouth") has made various filings in the pending "Change of Law" docket regarding developments in the Florida and Georgia proceedings. CompSouth believes that each state commission should, as contemplated by the FCC in its *TRO* and *TRRO* orders, resolve disputes based on the record before it. The decisions reached in other states may be instructive, but they are only that; each commission must, as it always does, review the evidence and arguments itself.

When the Commission reviews information from other state proceedings, however, CompSouth believes it important for the Commission to have the full picture of what has transpired in those cases. Therefore, CompSouth files the following information from related proceedings in Georgia, North Carolina, and Florida.

1. Georgia. In January, the Georgia Public Service Commission ("GPSC") voted to commence a proceeding to set rates for unbundled loops, transport, and switching that must be made available by BellSouth pursuant to Section 271 of the federal Telecommunications Act of 1996 (the "Act"). CompSouth previously filed an informational copy of that GPSC Order. BellSouth appealed the GPSC's decision in federal court (BellSouth filed a copy of its Complaint with the Commission). Both CompSouth and the GPSC filed their Answers to BellSouth's Complaint in the federal court case on February 17, 2006. CompSouth's Answer is attached at Exhibit A to this letter. Both the GPSC and CompSouth pleadings evidence an intention to vigorously defend the actions of

the Georgia Commission on the Section 271/252 issue. There is no procedural schedule set in the federal court proceeding as of the date of this letter.

In addition, on February 7, 2006, the GPSC voted to approve a Staff Recommendation on the remaining issues in the COL proceeding. The GPSC is expected to issue its final order shortly. While there were several decisions that were disappointing to CompSouth, the GPSC determination generally was well-balanced. Among the highlights of the GPSC's decision:

- The GPSC held that Section 271 checklist network elements are subject to the FCC's commingling rules;
- The GPSC rejected BellSouth's argument that when AT&T and SBC are both "fiber-based collocators" in a wire center that they must be counted twice, in spite of the recent merger that joined AT&T and SBC.
- The GPSC found that line sharing is a Section 271 checklist element, and that BellSouth's line sharing obligations were not affected by the FCC's Broadband Forbearance Order.
- The GPSC ordered that Section 271 checklist elements must be included in BellSouth's SQM/PMAP/SEEM performance plans.

CompSouth has attached the Staff Recommendation approved by the GPSC as Exhibit B to this letter.

2. North Carolina. On February 9, 2006, the North Carolina Utilities Commission ("NCUC") issued an important decision affirming that BellSouth is required to commingle Section 251 and Section 271 network elements.¹ The NCUC decision is attached as Exhibit C.

In an arbitration proceeding brought by CompSouth members NuVox Communications, Inc. and Xspedius Management Co., LLC, the NCUC had previously issued a determination that BellSouth is not required to commingle wholesale services made available under the Section 271 checklist with Section 251 UNEs. The NCUC reconsidered that decision, and strongly endorsed the position taken by CompSouth in this proceeding, holding that Section 271 checklist items constitute "wholesale services" that must be commingled with Section 251 UNEs.

Notably, the NCUC's decision relied in part on a key FCC decision issued in December 2005, *after* the hearings and briefs were completed in this proceeding. The NCUC noted that the FCC, in a forbearance order regarding Qwest services in Omaha, Nebraska,² included several references to "section 271 wholesale obligations" and referred to Section 271 requirements as

¹ North Carolina Public Utilities Commission Docket No. P-772, Sub. 8, *et al.*, In the Matter of Joint Petition of NewSouth Communications, *et al.*, for Arbitration with BellSouth Telecommunications, Inc., *Order Ruling On Objections and Requiring the Filing of The Composite Agreement*, at 15-30 (Feb. 8, 2006) ("NCUC Order").

² WC Docket No. 04-223, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order* ¶¶ 67-68, 103-05 (Dec. 2, 2005) ("*Qwest Forbearance Order*").

“wholesale access obligations.” The NCUC concluded:

The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to tariff, the FCC would have specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.³

CompSouth urges the Commission to review both the NCUC Order and the FCC’s December 2005 Qwest Forbearance Order as it considers the commingling issues before it in this docket.

3. Florida. On February 9, 2006 counsel for BellSouth wrote to the Commission, praising a January 26 staff recommendation to the Florida Public Service Commission which rejected various CLEC positions advanced in the Florida change of law proceeding. BellSouth also noted that on February 7, 2006 the Florida Commission voted to adopt the staff recommendation on all issues except for one. However, an official investigation by the Inspector General in Florida has now revealed that the misconduct of one person may have tainted the Florida staffs’ recommendation. On February 17, 2006 the Florida staff recommended that due to improper communications the Florida Commission should vacate portions of its yet to be released change of law order. The FPSC staff person involved in the controversy, a former BellSouth employee, has since been terminated from the FPSC. The issues are currently subject to review by the FPSC Staff and Commissioners.⁴ The FPSC Staff recommendation, which includes discussion of the improper conduct, is attached as Exhibit D to this letter. While the final outcome of the Florida proceeding remains uncertain, CompSouth urges this Commission not to rely on the results of the FPSC decision touted by BellSouth in its previous filing.

CompSouth appreciates the Commission’s ongoing attention to the important issues that are the subject of this proceeding.

I certify that this filing was uploaded electronically today to the Commission’s web filing portal, and that the electronic version is a true copy of the document filed in paper form. Please indicate receipt of this filing by returning an electronic receipt to Douglas F. Brent, local counsel to CompSouth.

Respectfully submitted,

/s/ Bill Magness

Bill Magness (admitted *pro hac vice*)
Counsel for CompSouth

³ NCUC Order at 30.

⁴ The February 17 Florida staff recommendation that the Commission vacate parts of its decision is attached as Exhibit D.

Attachments:

Exhibit A: CompSouth Answer to BellSouth federal court complaint

Exhibit B: GPSC Staff Recommendation approved by GPSC on Change of Law Issues

Exhibit C: NCUC Order

Exhibit D: FPSC Staff Recommendation