BEFORE THE KENTUCKY
PUBLIC SERVICE COMMISSION

In the matter of

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

AT&T KENTUCKY'S MOTION TO WITHDRAW AND SUBSTITUTE RESPONSE WITH AMENDED RESPONSE OR, ALTERNATIVELY, TO SUBSTITUTE WITH REDACTED RESPONSE

Comes AT&T Kentucky[1] and respectfully requests that the Public Service Commission (hereinafter "Commission") withdraw from the record its Response to the Application of CompSouth[2] for a Declaratory Order filed on October 12, 2015 (hereinafter referred to as "October 12, 2015 Response") and replace it with the Amended Response tendered with this Motion or, alternatively, with the Redacted Response tendered with this Motion.

AT&T Kentucky mistakenly filed an earlier version of this pleading and, among other things, page three (3) of the October 12, 2015 Response contains commercially sensitive information concerning interconnections with AT&T Kentucky that may be considered to be proprietary. The final version of AT&T's Response, which was to have been filed with the Commission, includes textual improvements to the Response, and it does not contain this commercially sensitive information. AT&T Kentucky respectfully asks the Commission to remove the mistakenly-filed, earlier version of its Response from its website and replace it with the Amended Response tendered with this Motion.

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1 BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky

2 Competitive Carriers of the South, Inc.

In the alternative, AT&T Kentucky respectfully requests that the Commission withdraw the mistakenly-filed, earlier version of its Response from its website and replace it with the Redacted October 12, 2015 Response tendered with this Motion, as the potentially-proprietary information has been redacted from the Redacted October 12, 2015 Response.

Granting this Motion will not result in prejudice to any parties to this action, and will not change the substance of the arguments made in said Response.

Respectfully submitted,

/s/ Robert C. Moore
Hazelrigg & Cox, LLP
415 West Main Street
P. O. Box 676
Frankfort, KY 40602
(502-227-2271)
rmoore@hazelcox.com

Dennis G. Friedman
J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
dfriedman@mayerbrown.com
jcovey@mayerbrown.com

FILING NOTICE AND CERTIFICATE

I hereby certify that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission (which includes a cover letter serving as the required Read 1st document) within two business days; that the electronic filing was transmitted to the Commission on October 14, 2015; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Robert C. Moore

BEFORE THE KENTUCKY
PUBLIC SERVICE COMMISSION

In the matter of

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

AT&T KENTUCKY'S AMENDED RESPONSE TO APPLICATION OF COMPSOUTH FOR A DECLARATORY ORDER

AT&T Kentucky[1] respectfully submits this Amended Response to the Application of CompSouth[2] for a Declaratory Order pursuant to 807 KAR 5:001. The Commission should deny the Application for the reasons set forth below.

INTRODUCTION

CompSouth seeks a declaration concerning interconnection under the federal Telecommunications Act of 1996 ("FTA") and under a Kentucky statute, KRS 278.530. The Commission should issue no declaration concerning the FTA, for several reasons. First and foremost, no Kentucky law or regulation authorizes the Commission to issue a declaration concerning federal law; 807 KAR 5:001 only authorizes declarations concerning Kentucky law. The only proceeding in which the Commission can lawfully address the interconnection provisions of the FTA is an arbitration of an interconnection agreement ("ICA") under the FTA, which provides for state commission resolution of issues arising under the federal statute. This is not an ICA arbitration, and there will be no ICA arbitration between AT&T Kentucky and any of

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1 BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky

2 Competitive Carriers of the South, Inc.

the carriers represented by CompSouth in the near future, because all of those carriers already have ICAs with AT&T Kentucky, and none of them has requested negotiation of a new ICA.

Even when 807 KAR 5:001 does permit the Commission to issue a declaration, it does not require the Commission to do so. As the Commission has noted, the rule "gives the Commission discretion to issue declaratory orders but does not mandate the issuance of such orders."[3] And even if the Commission could lawfully entertain the federal question presented by CompSouth in this proceeding (and it cannot), it would be ill-advised to do so. Such matters are far better addressed in arbitrations of competing contract language proposals. In addition, the question of IP interconnection under the FTA is currently before the Federal Communications Commission ("FCC"),[4] and it would be imprudent for the Commission to leapfrog the FCC on a federal question of nationwide significance, especially since there is no pressing reason for the Commission to do so.

Unlike the interconnection provisions of federal law, the interconnection provisions of KRS 278.530 are within the scope of the Commission's declaratory order authority under 807 KAR 5:001. As Staff has noted, however, relief is available under KRS 278.530 only when the carrier requesting interconnection has no existing contract or interconnection with the carrier with which interconnection is sought.[5] Here, all the carriers represented by CompSouth have existing ICAs with AT&T Kentucky, and most of them have established interconnections between their networks and AT&T Kentucky's pursuant to their ICAs. Indeed, CompSouth does not assert, and cannot assert, that AT&T Kentucky has denied any request for interconnection.

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[3] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

[4] See *infra* at 13.

[5] See *infra* at 15.

Consequently, none of the participating CompSouth carriers could possibly obtain relief under KRS 278.530, and none of them would be "substantially affected," as 807 KAR 5:001 requires, by any declaration the Commission might make concerning that statute. Accordingly, the Commission should deny CompSouth's request for a declaration with respect to the state interconnection statute as well as the FTA.[6]

PERTINENT FACTS

Five CompSouth members are participating in this proceeding: Birch Communications, Inc. ("Birch"); EarthLink Business, LLC ("EarthLink"); Level 3 Communications, LLC ("Level 3"); Windstream Communications, Inc. ("Windstream"); and XO Communications, LLC ("XO").[7] Each of those carriers has an existing ICA with AT&T Kentucky pursuant to which it is entitled to obtain interconnection with AT&T Kentucky's network. None of the ICAs provides for Internet Protocol ("IP") interconnection. By its terms, each of the ICAs will remain in effect until one party or the other terminates it. None of the ICAs has been terminated, and none of the participating CompSouth members has requested negotiation of a new ICA.

Three of the participating CompSouth members – Level 3, Windstream and Birch – have existing interconnections with AT&T Kentucky pursuant to their ICAs with AT&T Kentucky.

None of the participating CompSouth members has requested IP interconnection with AT&T Kentucky.

AT&T Kentucky has not refused the request of any participating CompSouth member to establish interconnection.

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[6] CompSouth's Application is defective because none of its assertions of fact is supported by affidavit or verification as required by section 19(6) of 807 KAR 5:001. Unless and until that defect is corrected, the Commission should disregard all facts asserted in the Application.

[7] Application at ¶ 1.

ARGUMENT

I. THE COMMISSION SHOULD MAKE NO DECLARATION CONCERNING THE INTERCONNECTION PROVISIONS OF THE FTA.

A. Kentucky Law Does Not Authorize The Commission To Issue A Declaratory Order Concerning the Federal Telecommunications Act.

CompSouth requests a declaratory ruling "[p]ursuant to 807 KAR 5:001, Section 19."[8] That rule, however, does not authorize the Commission to issue declarations concerning the FTA. Rather, it authorizes the Commission to

> 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 principal question CompSouth poses is whether the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic between two carriers' networks.[9] Plainly, that is not a question about the commission's jurisdiction, the applicability of an order or administrative regulation of the commission, or a provision of KRS Chapter 278. Nor is it a question about the meaning or scope of such an order, regulation or provision. Rather, it is a question about the meaning and effect of a provision in the FTA, namely, 47 U.S.C. § 251(c)(2).[10] By its plain terms, 807 KAR 5:001, Section 19, does not authorize the Commission to address that question.

Nor does CompSouth identify any statute that authorizes the relief it requests. The Commission is a creature of statute, and "has only such powers as granted by the General

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[8] Application at p.1.

[9] *Id.*

[10] Section 251(c)(2) is the FTA provision that requires incumbent local exchange carriers to provide interconnection to requesting carriers.

Assembly."[11] Kentucky "common law has long adhered to the doctrine that the powers of administrative agencies are limited to those conferred expressly by statute or which exist by necessary and fair implication. But these implications are never extended beyond fair and reasonable inferences. Powers not conferred are just as plainly prohibited as those which are expressly forbidden."[12] CompSouth cites no Kentucky statute that either expressly or by necessary and fair implication authorizes the Commission to issue declarations concerning the meaning or application of the interconnection provisions of the FTA. Absent such a statute, and with 807 KAR 5:001, Section 19, clearly inapplicable, the Commission cannot lawfully issue a declaration on the principal question posed by the Application

In addition to the principal question of federal law (*i.e.*, whether FTA § 251(c)(2) applies regardless of underlying technology, transmission media, or protocol), the Application also poses a subsidiary question: whether the FTA permits a requesting carrier to petition the Commission for an order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier.[13] That question, like the first, asks about the FTA and so is not within the scope of 807 KAR 5:001, Section 19, or of the jurisdiction the Legislature has conferred on the Commission.

Moreover, the Commission cannot properly take up CompSouth's subsidiary question about a potential petition under the FTA for an additional reason: There is no possible disagreement about the answer to that question. As the Supreme Court of Kentucky has explained, "The existence of an actual controversy . . . is a condition precedent to an action under

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[11] *Commonwealth, ex rel. Stumbo v. Kentucky Pub. Serv. Comm'n*, 243 S.W.3d 374, 378 (Ky. Ct. App. 2007); *see also Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001) (same).

[12] *Baker v. Commonwealth*, 2007 WL 3037718, at *34 (Ky. Ct. App. Oct. 19, 2007) (citations and quotations omitted).

[13] Application at p.1.

the [Kentucky Declaratory Judgment Act]. The court will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered."[14] This Commission appropriately applies the same principle.[15]

The Application does not state or imply that there is any disagreement about whether the FTA allows a requesting carrier to petition the KPSC for an order prescribing rates, terms and conditions of interconnection with an incumbent local exchange carrier.[16] Nor can there be any such disagreement; as we explain in the next section, the one and only procedure the FTA establishes for obtaining a state commission determination concerning terms and conditions for interconnection are the arbitration and ICA approval procedures spelled out in section 252 of the ICA. Accordingly, there would be no lawful basis for CompSouth's request for a declaration on that subject even if the Commission were authorized to issue declarations about the FTA, which it is not. If a member of CompSouth wants to assert rights under section 251(c)(2) for interconnection with an ILEC like AT&T Kentucky, it must do so under the negotiation and

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[14] *Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2010), quoting *Veith v. City of Louisville,* 355 S.W.2d 295, 297 (Ky. 1962) (quoting *Black v. Elkhorn Coal Corp*, 233 Ky. 588, 26 S.W.2d 481, 483 (1930)).

[15] *See, e.g., In the Matter of Joint Filing by Big Rivers Elec. Corp. and Kenergy Corp. of a Load Curtailment Agreement with Century Hawesville*, No. 2013-00413 (KPSC Jan. 30, 2014) (declining to determine whether the Commission had jurisdiction to resolve disputes under an approved agreement because "there is no there is no actual dispute presented to us for resolution" and the Commission was unable to render what would amount to an advisory opinion).

[16] This is not to say that there is no disagreement about whether such an order could lawfully require IP interconnection, but that takes us back to the principal question of federal law posed in the Application, which, as demonstrated above, is not within the scope of 807 KAR 5:001, Section 19.

arbitration provisions of the FTA, and the Commission would then determine whether and under what terms and conditions such interconnection would take place, if at all.[17]

B. Even If The Commission Could Lawfully Issue A Declaratory Order On The Federal Questions CompSouth Presents, The Commission Would Be Ill-Advised To Do So.

807 KAR 5:001, Section 19, begins with the words, "The commission ***may***, upon application by a person substantially affected, issue a declaratory order . . . ." (Emphasis added.) Thus, the rule merely allows for the issuance of a declaratory order in appropriate instances; as the Commission has noted, it "does not mandate the issuance of such orders."[18] As demonstrated above, no declaratory order may lawfully issue on the federal questions presented in the Application. Even if that were not the case, however, there are compelling reasons for the Commission to decline to issue such an order.

First, the appropriate forum for state commission resolution of federal interconnection issues is an arbitration of an ICA. That is the forum Congress created for dealing with such matters, and it is only in the context of the competing contract language proposals that are presented in an arbitration that a state commission can properly decide them. Indeed, a Commission declaration about interconnection under federal law in this proceeding would have little if any effect, as a practical matter, because, as we explain below, the ICA pathway mandated by the FTA is the only mechanism by which a requesting carrier can actually obtain interconnection under the FTA.

Second, the question whether the interconnection provisions of the FTA extend to IP interconnection is pending before the FCC. The Commission should not anticipate the FCC's

[17] AT&T Kentucky reserves the right to demonstrate why the FTA does not permit IP interconnection in the context of such a proceedings.

[18] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

decision on this federal question of nationwide importance, especially when, as here, there is no pressing need for it to do so. If a future ICA arbitration presents the question to the Commission in a form that the Commission must grapple with, then it may need to do so. But there is no reason for the Commission to do so now.

1. The Commission Should Not Address IP Interconnection Outside An ICA Arbitration Under The FTA.

As the Commission has stated, 807 KAR 5:001 provides a procedure for obtaining guidance "where no other available remedy or process is readily available to address the proposed act or conduct."[19] Here, an appropriate remedy or process will be readily available when and if Kentucky telecommunications carriers have a ripe disagreement about interconnection under the FTA: arbitration.

In the FTA, Congress established a straightforward procedure for state commission resolution of disagreements about the interconnection and other provisions of section 251 of the FTA. The process begins with a request to negotiate.[20] If the parties do not arrive at a complete ICA via negotiation, either party may petition the state commission to arbitrate open issues,[21] and the State commission rules on the open issues by applying the federal statute (section 251 and pricing standards in section 252(d)) and the regulations established by the FCC to implement the statute.[22] After the State commission resolves the open issues, the parties submit a conforming ICA for the commission to review.[23] The State commission then approves or rejects the ICA in

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[19] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

[20] 47 U.S.C. § 252(a)(1).

[21] *Id.* § 252(b)(1).

[22] *Id.* § 252(c)(1).

[23] *Id.* § 252(e)(1).

accordance with criteria set forth in the statute.[24] After the State commission approves or rejects the ICA, the FTA provides for federal court review of the commission's application of federal law in the proceedings.[25]

This is the one and only process Congress established for state commission resolution of disagreements under the FTA, and the courts have rejected state commission attempts to use other procedures to implement FTA requirements. In *Verizon North, Inc. v. Strand*,[26] for example, the Michigan Public Service Commission ("MPSC") ordered an incumbent LEC to tariff its prices for unbundled network elements required by the FTA. The ILEC challenged the order, and the federal district court reversed the MPSC, stating

> Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring [the ILEC] to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase [the ILEC's] network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act . . . . Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.[27]

The Sixth Circuit affirmed, reasoning, "[T]he MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements

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[24] *Id.* § 252(e)(2).

[25] *Id.* § 252(e)(6).

[26] 309 F.3d 935 (6th Cir. 2002).

[27] *Id.* at 940.

that are then subject to state commission approval, FCC oversight, and federal judicial review. This is inconsistent with the provisions of [the FTA], and therefore preempted."[28] Similarly, in *Wisconsin Bell Inc. v. Bie*,[29] the Seventh Circuit affirmed the district court's reversal of a state commission order requiring tariffing of unbundled network elements, stating, "The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiation scales . . . ."

In *Verizon North* and *Wisconsin Bell*, the federal courts of appeals held that state commission actions that interfered with the FTA's negotiation and arbitration scheme were preempted. Here, AT&T Kentucky is not making a preemption argument. Rather, the point is that if Kentucky law did authorize the Commission to issue the declaration of federal law that CompSouth requests – which it plainly does not – the Commission should decline to do so because, as *Verizon North* and *Wisconsin Bell* make clear, arbitration is the only appropriate forum for state commission adjudication of the substantive requirements of the FTA.

If this Commission is presented with a question concerning IP interconnection in an arbitration, the question will be presented not in the abstract, as it is here, but in the context of proposed terms for an interconnection agreement. It is in that context, and only in that context, that Congress intended state commissions to interpret and apply the requirements of FTA section 251, and it is in that context that state commissions can most prudently do so. This is illustrated by a decision of the Illinois Commerce Commission in an arbitration in which Sprint asked the Illinois Commission to require the incumbent carrier, AT&T Illinois, to provide IP

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[28] *Id.* at 941.

[29] 340 F.3d 441, 444 (7th Cir. 2003).

interconnection, but with the details to be determined later. The Commission rejected Sprint's proposal, based in significant part on the recommendation of its Staff:

> Staff notes that Sprint proposes, with limited exceptions that the details of IP-to-IP Interconnection should be determined at a later date, but separately proposes the Commission determine that Sprint has a right to exchange traffic with AT&T in IP format. Staff explains, however, that in arbitrating disputes brought pursuant to Section 252(b) of the Act, the Commission is required by Section 252(c) to ensure that resolution and conditions of interconnection meet the requirements of Section 251 of the Act and the FCC's Part 51 rules implementing the requirements of Section 251. Staff recommends that the Commission make no such determinations because Sprint, with one exception, has not identified the terms and conditions under which it seeks IP interconnection and, therefore, the Commission does not have a proposal before it that would allow the Commission to assess whether the terms and conditions under which Sprint seeks IP interconnection meet the requirements of Section 251 of the Act and Part 51 of the FCC's rules implementing the requirements of Section 251.[30]

Consistent with its Staff's recommendation, the Illinois Commission rejected Sprint's proposal for IP interconnection, stating,

> The Commission notes that it has not determined that any provider has the right to exchange traffic with an incumbent local exchange carrier in IP format. Indeed, the legal question of whether IP Interconnection can be compelled pursuant to Section 251 has not been decided by the FCC. Also, the Commission has not determined any rates, terms, or conditions under which IP interconnection would occur, consistent with the requirements of Section 251 of the Act or the FCC and [Illinois Commission] rules and regulations implementing it. While the Commission might or might not have the authority to order IP interconnection, this decision cannot be made until it is presented with an IP-to-IP interconnection proposal of sufficient detail to allow it to assess whether such a plan is technically feasible or otherwise comports with the requirements of the 1996 Act.[31]

That reasoning applies with even greater force here. The Illinois Commission prudently declined to decide whether the FTA requires IP interconnection because the carrier that

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[30] Arbitration Decision, Docket 12-0550, *SprintCom, Inc. et al. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company* (Ill. Comm'n Comm. June 26, 2013), at 32.

[31] *Id.* at 34.

requested IP interconnection proposed contract language that left most of the detail for future discussion. All the more clearly, this Commission should decline to address that question unless and until it is presented with a concrete proposal in an arbitration rather than, as here, in the abstract.

Finally, the declaratory ruling that CompSouth seeks would have little effect, if any, even if the Commission could issue it. Assume the Commission were to issue an order stating yes, the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol.[32] Then, in the next ICA negotiation between AT&T Kentucky and a participating CompSouth member, that carrier would presumably propose terms for IP interconnection. If the parties did not reach agreement, the matter would become a subject for arbitration. For all practical purposes, that arbitration would look exactly the same as it would have looked in the absence of the prior declaratory ruling. In that arbitration, AT&T Kentucky – if only to preserve the federal court review the FTA provides[33] – would argue that the FTA does not require IP interconnection, and the Commission would have to decide again the same question CompSouth is asking it to decide here.

Simply put, Congress provided a specific role for state commissions in the adjudication of issues that arise under the FTA – arbitration and approval of interconnection agreements. Even if 807 KAR 5:001 allowed the Commission to issue a declaration concerning the meaning

[32] AT&T Kentucky maintains that FTA section 251(c)(2) in fact does not require IP interconnection, and will so demonstrate in later submissions in this proceeding if the Commission does not decline CompSouth's request for declaratory order outright.

[33] Under the regime Congress established in the FTA, a state commission's application of the federal law provisions of the FTA is expressly subject to direct review by federal courts. CompSouth's application seeks to evade this carefully-constructed regime by asking the Commission to make determinations about the FTA in a proceeding that does not expressly provide for direct review by federal courts.

or effect of the interconnection provisions of the FTA, it would be imprudent for the Commission to do so.

2. This Commission Should Not Get Out In Front Of The FCC.

In WC Dkt. No. 11-119, *In the Matter of TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, the FCC is considering the question whether section 251(c)(2) of the FTA requires ILECs to provide IP interconnection to requesting carriers. In its Petition initiating that proceeding, TW Telecom Inc. stated, "[S]tates currently lack the legal guidance from the FCC needed to confidently arbitrate disputes regarding IP-based interconnection agreements."[34] Subsequently, the FCC sought comment on whether section 251(c)(2) requires IP interconnection.[35]

The FCC has received hundreds of pages of pleadings on IP interconnection from incumbent LECs, competing LECs, wireless carriers, state commissions and other interested parties across the country.[36] The question is one of national importance, and the FCC will decide

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[34] Petition for Declaratory Ruling of TW Telecom, Inc., WC Dkt. No. 11-119, *In the Matter of TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act* (July 14, 2011), at 6.

[35] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011), ¶¶ 1385-1395. The FCC stated, for example (at ¶ 1389), "Section 251(c)(2)(A) requires that interconnection obtained under 251(c) be 'for the transmission and routing of telephone exchange service and exchange access.' We seek comment on whether traffic exchanged via IP-to-IP interconnection would meet those criteria." If the answer to that question is "no," it would necessarily follow that section 251(c)(2) does not require IP interconnection. Similarly, the FCC asked (at ¶ 1392), "[T]o what extent must an incumbent LEC be using IP transmission in its own network before it could be required to provide IP-to-IP interconnection pursuant to [section 251(c)(2)], and to what extent is that occurring today?" The answers to those questions, too, could lead to a conclusion that section 251(c)(2) does not require IP interconnection – or does not require certain ILECs to provide IP interconnection. For present purposes, the point is that the IP interconnection question is open and pending at the FCC.

[36] In addition to ILECs, CLECs and wireless carriers, participants in the FCC docket include the National Association of Regulatory Utility Commissions, the United States Telecom Association, the National Association of State Utility Advocates, the Pennsylvania Public Utility Commission, The Competitive Carriers Association, the National Telecommunications Cooperative Association, the Public Utilities Commission of Ohio, Google and CompSouth participating members Earthlink and XO.

it on a nationwide basis. Even if this Commission could lawfully entertain the federal question under 807 KAR 5:001, it would not be prudent to do so when the question is pending at the FCC, particularly, where, as here, there is no immediate controversy that requires an answer. *If* a carrier seeks to negotiate a new interconnection agreement with AT&T Kentucky, and *if* that carrier asks for IP interconnection with AT&T Kentucky, and *if* the parties are unable to resolve the matter between themselves, and *if* the question is then raised as an open issue in an arbitration, then the Commission *may* conclude that it needs to answer the question (or, like the Illinois Commission, it may not). But it would be imprudent for the Commission to address this issue now.

II. THE COMMISSION SHOULD MAKE NO DECLARATION CONCERNING KRS 278.530 BECAUSE NO COMPSOUTH PARTICIPANT WOULD BE SUBSTANTIALLY AFFECTED BY THE DECLARATION.

The Commission has discretion to issue a declaratory order concerning its own jurisdiction, the application of its own orders or regulations, or the application of a provision in KRS Chapter 278, but only "upon application ***by a person substantially affected.***"[37] None of the participating CompSouth members would be substantially affected by a declaratory ruling on KRS 278.530 as it might apply to AT&T Kentucky, because all of them are either interconnected with AT&T Kentucky or have ICAs pursuant to which they can readily obtain interconnection with AT&T Kentucky. Accordingly, the Commission should decline to issue a declaratory order concerning KRS 278.530.

KRS 278.530(1) provides,

> 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

[37] 807 KAR 5:001(19)(1) (emphasis added)

> conditions, the company desiring the connection may proceed as provided in subsection (2) or as provided in subsection (3) of this section.

By its plain terms, that statute comes into play only when one telephone company refuses the request of another telephone company to permit interconnection upon reasonable terms, rates and conditions. Moreover, as the KPSC Staff stated in an advisory opinion that CompSouth cites, "The Commission . . . has interpreted KRS 278.530 to apply to situations where interconnection does not already exist. . . . Therefore, Commission Staff concludes that . . . ***KRS 278.530 . . . only applies in the absence of an existing contract or interconnection.***"[38]

Here, all five of the participating CompSouth members have contracts with AT&T Kentucky that entitle them to interconnection, and three of them have interconnected their networks with AT&T Kentucky's network.[39] Furthermore, none of the CompSouth members has any possible grievance with AT&T Kentucky under KRS 278.530, because AT&T Kentucky has not refused a request by any of them for interconnection on reasonable rates, terms and conditions.

Thus, any declaration by the Commission concerning KRS 278.530 would have no effect whatsoever on any of the participating CompSouth members, so none of them has the required "substantial interest" in the requested declaration. Consequently, CompSouth not only is not entitled to the declaration it requests under the express terms of 807 KAR 5:001, but also cannot meet the threshold requirement of standing to pursue the declaration it requests. Even with

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[38] KPSC Staff Opinion 2013-015, p. 4 (cited in Application at 4, ¶ 10) (emphasis added). Analogous cases have found that the absence of an agreement is a "jurisdictional requirement" for proceeding under such statutes. *See, e.g., Ind. Tel. Corp. v. Ind. Bell Tel. Co.*, 171 Ind. App. 616, 623 (Ind. Ct. App. 1976), *modified by* 360 N.E.2d 610 (Ind. Ct. App. 1977), and as described by *Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219, 1222 (7th Cir. 1980) (noting that the Indiana Utility Regulatory Commission has the power to set charges between competing phone services in the absence of agreement, that since the parties had voluntarily entered into a written agreement the Commission had no statutory authority over the dispute, and that therefore the Commission was ousted of jurisdiction).

[39] *See supra* at _.

regard to declaratory rulings, a party must show a legally "recognizable interest in the subject matter of the suit." Not only that, but the party's interest must be determined to be "present and substantial as opposed to a mere expectancy." *Gen. Drivers, Warehouseman & Helpers Local Union No. 89 v. Chandler*, 968 S.W.2d 680, 683 (Ky. Ct. App. 1998). CompSouth fails this test.

This conclusion is bolstered by CompSouth's Application, which fails to sufficiently allege that the participating members will be "substantially affected" by the requested declaratory order. To be sure, the Application parrots the language of 807 KAR 5:001 by reciting that the members will be "substantially affected," but all it offers in support of the recitation is purported uncertainty that "*could have* the effect of slowing the transition" from TDM to IP based voice services at some uncertain time in the future.[40]

CONCLUSION

The Commission is not authorized by 807 KAR 5:001 or any other provision of Kentucky law to issue a declaration concerning the meaning or effect of the interconnection provisions of the federal Telecommunications Act of 1996, and even if it were, it would not be prudent for the Commission to do so. The Commission should also deny CompSouth's request for a declaration concerning KRS 278.530, because all the participating CompSouth members are already interconnected with AT&T Kentucky or have ICAs pursuant to which they can readily interconnect with AT&T Kentucky; no CompSouth member has requested IP interconnection with AT&T Kentucky; and no CompSouth member has made any request for interconnection that AT&T Kentucky has denied.

[40] Application ¶ 3 (emphasis added). As noted above, the factual assertions in the Application, skimpy as they are, are unsupported by affidavit or verification as required by section 19(6) of 807 KAR 5:001. This is a fatal defect, because section 19(2)(b) requires the application for declaratory order to include "a complete, accurate, and concise statement of the facts upon which the application is based."

Alternatively, if the Commission does not deny the Application outright, it should set a schedule for further proceedings, in the course of which AT&T Kentucky will demonstrate that the FTA does not require IP interconnection and that CompSouth is not entitled to any aspect of the declaration it requests.

Respectfully submitted,

/s/ Robert C. Moore
Hazelrigg & Cox, LLP
415 West Main Street
P. O. Box 676
Frankfort, KY 40602
(502-227-2271)
rmoore@hazelcox.com

Dennis G. Friedman
J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
dfriedman@mayerbrown.com
jcovey@mayerbrown.com

FILING NOTICE AND CERTIFICATE

I hereby certify that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission (which includes a cover letter serving as the required Read 1st document) within two business days; that the electronic filing was transmitted to the Commission on October 14, 2015; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Robert C. Moore

VERIFICATION

I, Tony Taylor, Executive Director – External Affairs, BellSouth Telecommunications LLC d/b/a AT&T Kentucky, after being duly sworn, state that based upon my personal knowledge, my review of the records of AT&T Kentucky, and my communications with appropriate personnel of AT&T Kentucky and its affiliates, the facts contained in the "Pertinent Facts" section of "AT&T Kentucky's Response to Application of CompSouth for a Declaratory Order" are true and accurate to the best of my knowledge.

Tony Taylor

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Tony Taylor on this the 9 day of October, 2015.

Notary Public State at Large

My Commission Expires:

7-25-2016

BEFORE THE KENTUCKY
PUBLIC SERVICE COMMISSION

In the matter of

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

REDACTED RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, LLC, TO APPLICATION OF COMPETITIVE CARRIERS OF THE SOUTH, INC., FOR A DECLARATORY ORDER

BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky ("AT&T Kentucky") respectfully submits this Redacted Response to the Application of Competitive Carriers of the South, Inc. ("CompSouth") for a Declaratory Order pursuant to 807 KAR 5:001. The Commission should deny the Application for the reasons set forth below.

INTRODUCTION

CompSouth seeks a declaration concerning interconnection under the federal Telecommunications Act of 1996 ("FTA") and under a Kentucky statute, KRS 278.530. The Commission should issue no declaration concerning the FTA, for several reasons. First and foremost, no Kentucky law or regulation authorizes the Commission to issue a declaration concerning federal law; 807 KAR 5:001 only authorizes declarations concerning Kentucky law. The only proceeding in which the Commission can lawfully address the interconnection requirement in the FTA is an arbitration of an interconnection agreement ("ICA") under the FTA, which provides for state commission resolution of issues arising under the federal statute. This is not an ICA arbitration, and there will be no ICA arbitration between AT&T Kentucky and any of the carriers represented by CompSouth in the near future, because all of those carriers

already have ICAs with AT&T Kentucky, and none of them has requested negotiation of a new ICA.

Even in a case – unlike this one – where 807 KAR 5:001 permits the Commission to issue a declaration, the Commission is never required to do so. As the Commission has noted, the rule "gives the Commission discretion to issue declaratory orders but does not mandate the issuance of such orders."[1] Even if the Commission could lawfully entertain the federal question presented by CompSouth in this proceeding, it would be ill-advised to do so. Such matters are far better addressed in arbitrations of competing contract language proposals. In addition, the question of IP interconnection under the FTA is currently pending before the Federal Communications Commission ("FCC"), and it would be imprudent for the Commission to get out in front of the FCC on a federal question of nationwide significance, especially since there is no pressing reason for the Commission to do so.

Unlike the federal interconnection requirement, the interconnection requirement in KRS 278.530 is within the scope of the Commission's declaratory order authority under 807 KAR 5:001. As Staff has noted, however, relief is available under KRS 278.530 only when the carrier requesting interconnection has no existing contract or interconnection with the carrier with which interconnection is sought. Here, all the carriers represented by CompSouth have existing ICAs with AT&T Kentucky, and most of them have working interconnections. Indeed, CompSouth does not assert, and cannot, that AT&T Kentucky has denied any request for interconnection. Consequently, none of the participating CompSouth carriers could possibly obtain relief under KRS 278.530, and none of them would be "substantially affected," as 807 KAR 5:001 requires, by any declaration the Commission might make concerning that statute. Accordingly, the

[1] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

Commission should deny CompSouth's request for a declaration with respect to the state interconnection statute as well as the FTA.[2]

PERTINENT FACTS

Five CompSouth members are participating in this proceeding: Birch Communications, Inc. ("Birch"); EarthLink Business, LLC ("EarthLink"); Level 3 Communications, LLC ("Level 3"); Windstream Communications, Inc. ("Windstream"); and XO Communications, LLC ("XO").[3] Each of those carriers has an existing contract with AT&T Kentucky pursuant to which it is entitled to obtain interconnection with AT&T Kentucky's network. None of the ICAs provides for Internet Protocol ("IP") interconnection. By their terms, all of the ICAs will remain in effect until one party or the other terminates it. None of the ICAs has been terminated, and none of the participating CompSouth members has requested negotiation of a new ICA.

Three of the participating CompSouth members have existing interconnections with AT&T Kentucky pursuant to their ICAs with AT&T Kentucky. Level 3 is interconnected with **[REDACTED]** AT&T Kentucky wire centers via **[REDACTED]** interconnection trunks; Windstream is interconnected with **[REDACTED]** AT&T Kentucky wire centers via **[REDACTED]** interconnection trunks; and Birch is interconnected with **[REDACTED]** AT&T Kentucky wire centers via **[REDACTED]** interconnection trunks.

None of the participating CompSouth members has requested IP interconnection with AT&T Kentucky.

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[2] CompSouth's Application is defective because none of its assertions of fact is supported by affidavit or verification as required by section 19(6) of 807 KAR 5:001. Unless and until that defect is corrected, the Commission should disregard all facts asserted in the Application.

[3] Application at ¶ 1.

AT&T Kentucky has not refused the request of any participating CompSouth member to establish interconnection. **ARGUMENT**

I. THE COMMISSION SHOULD MAKE NO DECLARATION CONCERNING THE INTERCONNECTION REQUIREMENT IN THE FTA.

A. Kentucky Law Does Not Authorize The Commission To Issue A Declaratory Order Concerning the Federal Telecommunications Act.

CompSouth requests a declaratory ruling "[p]ursuant to 807 KAR 5:001, Section 19."[4] That rule, however, does not authorize the Commission to issue declarations concerning the FTA. Rather, it authorizes the Commission to

> 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 principal question CompSouth poses is whether the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic between two carriers' networks.[5] Plainly, that is not a question about the commission's jurisdiction. Or about the applicability of an order or administrative regulation of the commission or a provision of KRS Chapter 278. Or about the meaning or scope of such an order, regulation or provision. Rather, it is a question about the meaning and effect of a provision in the FTA, namely, 47 U.S.C. § 251(c)(2).[6] By its plain terms, 807 KAR 5:001, Section 19, does not authorize the Commission to address that question.

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[4] Application at p. 1.

[5] *Id.*

[6] Section 251(c)(2) is the FTA provision that requires incumbent local exchange carriers to provide interconnection to requesting carriers.

Nor does CompSouth identify any statute that authorizes the relief it requests. The Commission is a creature of statute, and "has only such powers as granted by the General Assembly."[7] Kentucky "common law has long adhered to the doctrine that the powers of administrative agencies are limited to those conferred expressly by statute or which exist by necessary and fair implication. But these implications are never extended beyond fair and reasonable inferences. Powers not conferred are just as plainly prohibited as those which are expressly forbidden."[8] CompSouth cites no Kentucky statute that either expressly or by necessary and fair implication authorizes the Commission to issue declarations concerning the meaning or application of the interconnection requirement in the FTA. Absent such a statute, and with 807 KAR 5:001, Section 19, clearly inapplicable, the Commission cannot lawfully issue a declaration on the principal question posed by the Application

In addition to that the principal question of federal law (*i.e.*, whether the interconnection requirement in FTA § 251(c)(2) applies regardless of underlying technology, transmission media, or protocol), the Application also poses a subsidiary question: whether the FTA permits a requesting carrier to petition the commission for an order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier.[9] That question, like the first, asks about the FTA and so is not within the scope of 807 KAR 5:001, Section 19, or of the jurisdiction the Legislature has conferred on the Commission.

Moreover, the Commission cannot properly take up CompSouth's subsidiary question about a possible petition under the FTA because there is no possible disagreement about the

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[7] *Commonwealth, ex rel. Stumbo v. Kentucky Pub. Serv. Comm'n*, 243 S.W.3d 374, 378 (Ky. Ct. App. 2007); *see also Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001) (same).

[8] *Baker v. Commonwealth*, 2007 WL 3037718, at *34 (Ky. Ct. App. Oct. 19, 2007) (citations and quotations omitted).

[9] Application at p. 1.

answer to that question. As the Supreme Court of Kentucky has explained, "The existence of an actual controversy . . . is a condition precedent to an action under the [Kentucky Declaratory Judgment Act]. The court will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered."[10] While those are court cases, this Commission appropriately applies the same principle.[11]

The Application does not state or imply that there is any disagreement about whether the FTA allows a requesting carrier to petition the KPSC for an order prescribing rates, terms and conditions of interconnection with an incumbent local exchange carrier. Nor can there be one; as we explain in the next section, the one and only procedure the FTA establishes for obtaining a state commission determination concerning terms and conditions for interconnection are the arbitration and ICA approval procedures spelled out in section 252 of the ICA. Accordingly, there would be no lawful basis for CompSouth's request for a declaration on that subject even if the Commission were authorized to issue declarations about the FTA, which it is not.

B. Even If The Commission Could Lawfully Issue A Declaratory Order On The Federal Questions CompSouth Presents, The Commission Would Be Ill-Advised To Do So.

807 KAR 5:001, Section 19, begins with the words, "The commission ***may***, upon application by a person substantially affected, issue a declaratory order . . . ." (Emphasis added.)

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[10] *Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2010), quoting *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962) (quoting *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S.W.2d 481, 483 (1930)).

[11] *See, e.g., In the Matter of Joint Filing by Big Rivers Elec. Corp. and Kenergy Corp. of a Load Curtailment Agreement with Century Hawesville*, No. 2013-00413 (KPSC Jan. 30, 2014) (declining to determine whether the Commission had jurisdiction to resolve disputes under an approved agreement because "there is no there is no actual dispute presented to us for resolution" and the Commission was unable to render what would amount to an advisory opinion).

Thus, the rule merely allows for the issuance of declaratory order in appropriate instances; as the Commission has noted, it "does not mandate the issuance of such orders."[12] As demonstrated above, no declaratory order may lawfully issue on the federal questions presented in the Application. Even if that were not the case, however, there are powerful reasons for declining to issue such an order.

First, the appropriate forum for state commission resolution of federal interconnection issues is an arbitration of an ICA. That is the forum Congress created for dealing with such matters, and it is only in the context of the competing contract language proposals that are presented in an arbitration that a state commission can properly decide them. Indeed, a Commission declaration about interconnection under federal law in this proceeding would have little if any effect, as a practical matter, because, as we explain below, the ICA pathway mandated by the FTA is the only mechanism by which a requesting carrier can actually obtain interconnection under the FTA.

Second, the question whether the interconnection requirement in the FTA extends to IP interconnection is pending before the FCC. The Commission should not anticipate the FCC on this federal question of nationwide importance, especially when, as here, there is no pressing need for it to do so. If a future ICA arbitration presents the question to the Commission in a form that the Commission must grapple with, then it may need to do so. But there is no reason for the Commission to do so now.

1. The Commission Should Not Address IP Interconnection Outside An ICA Arbitration Under The FTA.

[12] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

As the Commission has stated, 807 KAR 5:001 provides a procedure for obtaining guidance "where no other available remedy or process is readily available to address the proposed act or conduct."[13] Here, an appropriate remedy or process will be readily available when and if Kentucky telecommunications carriers have a ripe disagreement about interconnection under the FTA: arbitration.

In the FTA, Congress established a straightforward procedure for state commission resolution of disagreements about the interconnection and other requirements in section 251 of the FTA. The process begins with a request to negotiate.[14] If the parties do not arrive at a complete ICA via negotiation, either party may petition the state utility commission to arbitrate open issues,[15] and the State commission rules on the open issues by applying the federal statute (section 251 and pricing standards in section 252(d)) and the regulations established by the FCC to implement the statute.[16] After the State commission resolves the open issues, the parties submit a conforming ICA for the commission to review.[17] The State commission then approves or rejects the ICA in accordance with criteria set forth in section 252(e)(2). After the State commission approves or rejects the ICA, the FTA provides for federal court review of the commission's determinations.[18]

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[13] Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, *6 (KPSC Jan. 3, 2014).

[14] 47 U.S.C. § 252(a)(1).

[15] *Id.* § 252(b)(1).

[16] *Id.* § 252(c)(1).

[17] *Id.* § 252(e)(1).

[18] *Id.* § 252(e)(6).

This is the one and only process that Congress established for state commission resolution of disagreements under the FTA, and the courts have rejected state commission attempts to use other procedures to implement FTA requirements. In *Verizon North, Inc. v. Strand*,[19] for example, the Michigan Public Service Commission ("MPSC") ordered an incumbent LEC to tariff its prices for unbundled network elements required by the FTA. The ILEC challenged the order, and the federal district court reversed the MPSC, stating

> Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring [the ILEC] to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase [the ILEC's] network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act . . . . Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.[20]

The Sixth Circuit affirmed, reasoning, "[T]he MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is inconsistent with the provisions of [the FTA], and therefore preempted."[21] Similarly, in *Wisconsin Bell Inc. v. Bie*,[22] the Seventh Circuit affirmed a district court reversal of state

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[19] 309 F.3d 935 (6th Cir. 2002).

[20] *Id.* at 940.

[21] *Id.* at 941.

[22] 340 F.3d 441, 444 (7th Cir. 2003).

commission order requiring tariffing of unbundled network elements, stating, "The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiation scales . . . ."

In *Verizon North* and *Wisconsin Bell*, the federal courts of appeals held that state commission actions that interfered with the FTA's negotiation and arbitration scheme were preempted. Here, AT&T Kentucky is not making a preemption argument. Rather, the point is that if Kentucky law did authorize the Commission to issue the declaration of federal law that CompSouth requests – which it plainly does not – the Commission should decline to do so because, as *Verizon North* and *Wisconsin Bell* make clear, arbitration is the only appropriate forum for the adjudication of disagreements about the substantive requirements of the FTA.

If this Commission is presented with a question concerning IP interconnection in an arbitration, the question will be presented not in the abstract, as it is here, but in the context of proposed terms for an interconnection agreement. It is in that context, and only in that context, that Congress intended state commissions to interpret and apply the requirements of FTA section 251, and it is in that context that state commissions can most prudently do so. This is illustrated by a decision of the Illinois Commerce Commission ("ICC") in an arbitration in which Sprint asked the ICC to require the incumbent carrier, AT&T Illinois, to provide IP interconnection, but with the details to be determined later. The Commission rejected Sprint's proposal, based in significant part on the recommendation of its Staff:

> Staff notes that Sprint proposes, with limited exceptions that the details of IP-to-IP Interconnection should be determined at a later date, but separately proposes the Commission determine that Sprint has a right to exchange traffic with AT&T in IP format. Staff explains, however, that in arbitrating disputes brought pursuant to Section 252(b) of the Act, the Commission is required by Section 252(c) to ensure that resolution and conditions of interconnection meet the requirements of Section 251 of the Act and the FCC's Part 51 rules implementing the requirements of Section 251. Staff

> recommends that the Commission make no such determinations because Sprint, with one exception, has not identified the terms and conditions under which it seeks IP interconnection and, therefore, the Commission does not have a proposal before it that would allow the Commission to assess whether the terms and conditions under which Sprint seeks IP interconnection meet the requirements of Section 251 of the Act and Part 51 of the FCC's rules implementing the requirements of Section 251.[23]

Consistent with its Staff's recommendation, the ICC rejected Sprint's proposal for IP interconnection, stating,

> The Commission notes that it has not determined that any provider has the right to exchange traffic with an incumbent local exchange carrier in IP format. Indeed, the legal question of whether IP Interconnection can be compelled pursuant to Section 251 has not been decided by the FCC. Also, the Commission has not determined any rates, terms, or conditions under which IP interconnection would occur, consistent with the requirements of Section 251 of the Act or the FCC and ICC rules and regulations implementing it. While the Commission might or might not have the authority to order IP interconnection, this decision cannot be made until it is presented with an IP-to-IP interconnection proposal of sufficient detail to allow it to assess whether such a plan is technically feasible or otherwise comports with the requirements of the 1996 Act.[24]

That reasoning applies with even greater force here. The ICC prudently declined to decide whether the FTA requires IP interconnection because the carrier that requested IP interconnection proposed contract language that left most of the detail for future discussion. All the more clearly, this Commission should decline to address that question until and unless it is presented with a concrete proposal in an arbitration rather than, as here, in the abstract.

Finally, the declaratory ruling that CompSouth seeks would have little effect, if any, even if the Commission could issue it. Assume the Commission were to issue an order stating yes, the interconnection regime under the FTA applies regardless of underlying technology, transmission

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[23] Arbitration Decision, Docket 12-0550, *SprintCom, Inc et al. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company* (Ill. Comm'n Comm. June 26, 2013), at 32.

[24] *Id.* at 34.

media, or protocol.[25] Then, in the next ICA negotiation between AT&T Kentucky and a participating CompSouth member, that carrier would presumably propose terms for IP interconnection. Almost certainly, the parties would not reach agreement, and the matter would become a subject for arbitration. For all practical purposes, that arbitration would look exactly the same as it would have looked in the absence of the prior declaratory ruling. In that arbitration, AT&T Kentucky – if only to preserve the federal court review the FTA provides – would argue that the FTA does not require IP interconnection, and the Commission would have to decide again the same question CompSouth is asking it to decide here.

Simply put, Congress provided a specific role for state commissions in the adjudication of issues that arise under the FTA – arbitration and approval of interconnection agreements. Even if 807 KAR 5:001 allowed the Commission to issue a declaration concerning the meaning or effect of the interconnection requirement in the FTA, it would be imprudent for the Commission to do so.

2. This Commission Should Not Get Out In Front Of The FCC.

In WC Dkt. No. 11-119, *In the Matter of TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, the FCC is considering the question whether section 251(c)(2) of the FTA requires ILECs to provide IP interconnection to requesting carriers. That proceeding was initiated by a Petition filed by TW Telecom Inc. In its Petition, TW Telecom stated, "[S]tates

[25] AT&T Kentucky maintains that FTA section 251(c)(2) in fact does not require IP interconnection, and will so demonstrate in later submissions in this proceeding if the Commission does not decline CompSouth's request for declaratory order outright.

currently lack the legal guidance from the FCC needed to confidently arbitrate disputes regarding IP-based interconnection agreements."[26]

The FCC has received hundreds of pages of pleadings on IP interconnection from incumbent LECs, competing LECs, wireless carriers, state commissions and other interested parties across the country.[27] The question presented in WC Dkt. No. 11-11-119 is of national importance, and the FCC will decide it on a nationwide basis. Even if it could lawfully entertain the federal question under 807 KAR 5:001, it would not be prudent for the Commission to do so when the question is pending at the FCC, particularly, where, as here, there is no immediate controversy that requires an answer. *If* a carrier represented by CompSouth seeks to negotiate a new interconnection agreement with AT&T Kentucky, and *if* that carrier asks for IP interconnection with AT&T Kentucky, and if the parties are unable to resolve the matter between themselves, and *if* the question is then raised as an open issue in an arbitration, then the Commission *may* conclude that it needs to answer the question (or, like the ICC, it may not). But not now.

II. THE COMMISSION SHOULD MAKE NO DECLARATION CONCERNING KRS 278.530 BECAUSE NO COMPSOUTH PARTICIPANT WOULD BE SUBSTANTIALLY AFFECTED BY THE DECLARATION.

The Commission has discretion to issue a declaratory order concerning its own jurisdiction, the application of its own orders or regulations, or the application of a provision in

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[26] Petition for Declaratory Ruling of TW Telecom, Inc., WC Dkt. No. 11-119, *In the Matter of TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act* (July 14, 2011), at 6.

[27] In addition to ILECs, CLECs and wireless carriers, participants in the FCC docket include the National Association of Regulatory Utility Commissions, the United States Telecom Association, the National Association of State Utility Advocates, the Pennsylvania Public Utility Commission, The Competitive Carriers Association, the National Telecommunications Cooperative Association, the Public Utilities Commission of Ohio, Google and CompSouth participating members Earthlink and XO.

KRS Chapter 278, but only "upon application ***by a person substantially affected.***"[28] None of the participating CompSouth members would be substantially affected by a declaratory ruling on KRS 278.530 as it might apply to AT&T Kentucky, because all of them are either interconnected with AT&T Kentucky or have ICAs pursuant to which they can readily obtain interconnection with AT&T Kentucky. Accordingly the Commission should decline to issue a declaratory order concerning KRS 278.530.

KRS 278.530(1) provides,

> 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.

By its plain terms, that statute comes into play only when one telephone company refuses the request of another telephone company to permit interconnection upon reasonable terms, rates and conditions. Moreover, as the KPSC Staff stated in an advisory opinion that CompSouth cites, "The Commission . . . has interpreted KRS 278.530 to apply to situations where interconnection does not already exist. . . . Therefore, Commission Staff concludes that . . . ***KRS 278.530 . . . only applies in the absence of an existing contract or interconnection.***"[29]

Here, all five of the participating CompSouth members have contracts with AT&T Kentucky that entitle them to interconnection, and three of them have working interconnections

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[28] 807 KAR 5:001(19)(1) (emphasis added).

[29] KPSC Staff Opinion 2013-015, p. 4 (cited in Application at 4, ¶ 10) (emphasis added). Analogous cases have found that the absence of an agreement is a "jurisdictional requirement" for proceeding under such statutes. *See, e.g., Ind. Tel. Corp. v. Ind. Bell Tel. Co.*, 171 Ind. App. 616, 623 (Ind. Ct. App. 1976), *modified by* 360 N.E.2d 610 (Ind. Ct. App. 1977), and as described by *Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219, 1222 (7th Cir. 1980) (noting that the Indiana Public Service Commission has the power to set charges between competing phone services in the absence of agreement, that since the parties had voluntarily entered into a written agreement the Commission had no statutory authority over the dispute, and that therefore the Commission was ousted of jurisdiction).

with AT&T Kentucky.[30] Furthermore, none of the CompSouth members has any possible grievance with AT&T Kentucky under KRS 278.530, because AT&T Kentucky has not refused a request by any of them for interconnection on reasonable rates, terms and conditions.

Thus, any declaration by the Commission concerning KRS 278.530 would have no effect whatsoever on any of the participating CompSouth members, so none of them has the required "substantial interest" in the requested declaration. Consequently, CompSouth not only is not entitled to the declaration it requests under the express terms of 807 KAR 5:001, but also cannot meet the threshold requirement of standing to pursue the declaration it requests. Even with regard to declaratory rulings, a party must show a legally "recognizable interest in the subject matter of the suit." Not only that, but the party's interest must be determined to be "present and substantial as opposed to a mere expectancy." *Gen. Drivers, Warehouseman & Helpers Local Union No. 89 v. Chandler*, 968 S.W.2d 680, 683 (Ky. Ct. App. 1998). CompSouth fails this test.

This conclusion is bolstered by CompSouth's Application, which fails to sufficiently allege that the participating members will be "substantially affected" by the requested declaratory order. To be sure, the Application parrots the language of 807 KAR 5:001 by reciting that the members will be "substantially affected," but all it offers in support of the recitation is purported uncertainty that "*could have* the effect of slowing the transition" from TDM to IP based voice services at some uncertain time.[31]

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[30] *See supra* at _.

[31] Application ¶ 3 (emphasis added). As noted above, the factual assertions in the Application, skimpy as they are, are unsupported by affidavit or verification as required by section 19(6) of 807 KAR 5:001. This is a fatal defect, because section 19(2)(b) requires the application for declaratory order to include "a complete, accurate, and concise statement of the facts upon which the application is based."

CONCLUSION

The Commission is not authorized by 807 KAR 5:001 or any other provision of Kentucky law to issue a declaration concerning the meaning or effect of the interconnection requirement in the federal Telecommunications Act of 1996, and if it were, it would not be prudent for the Commission to do so. The Commission should also deny CompSouth's request for a declaration concerning KRS 278.530, because all the participating CompSouth members have existing interconnections with AT&T Kentucky or ICAs pursuant to which they can readily obtain interconnections; no CompSouth member has requested IP interconnection with AT&T Kentucky; and no CompSouth member has made any request for interconnection that AT&T Kentucky has denied.

If the Commission does not deny the Application outright, it should set a schedule for further proceedings, in the course of which AT&T Kentucky will demonstrate that the FTA does not require IP interconnection and that CompSouth is not entitled to any aspect of the declaration it requests.

Respectfully submitted,

/s/ Robert C. Moore
Hazelrigg & Cox, LLP
415 West Main Street
P. O. Box 676
Frankfort, KY 40602
(502-227-2271)
rmoore@hazelcox.com

Dennis G. Friedman
J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
dfriedman@mayerbrown.com
jcovey@mayerbrown.com

FILING NOTICE AND CERTIFICATE

I hereby certify that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission (which includes a cover letter serving as the required Read 1st document) within two business days; that the electronic filing was transmitted to the Commission on October 14, 2015; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Robert C. Moore

VERIFICATION

I, Tony Taylor, Executive Director – External Affairs, BellSouth Telecommunications LLC d/b/a AT&T Kentucky, after being duly sworn, state that based upon my personal knowledge, my review of the records of AT&T Kentucky, and my communications with appropriate personnel of AT&T Kentucky and its affiliates, the facts contained in the "Pertinent Facts" section of "AT&T Kentucky's Response to Application of CompSouth for a Declaratory Order" are true and accurate to the best of my knowledge.

Tony Taylor

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Tony Taylor on this the 9 day of October, 2015.

Notary Public State at Large

My Commission Expires:

7-25-2016