

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF:**

<b>APPLICATION OF COMPETITIVE CARRIERS OF )</b>	
<b>THE SOUTH, INC. FOR A DECLARATORY ORDER )</b>	<b>CASE NO.</b>
<b>AFFIRMING THAT THE INTERCONNECTION )</b>	<b>2015-00283</b>
<b>REGIMES UNDER KRS 278.530 AND 47 U.S.C. § 251 )</b>	
<b>ARE TECHNOLOGICALLY NEUTRAL )</b>	

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**COMPETITIVE CARRIERS OF THE SOUTH, INC.’S NOTICE OF  
PENDING DISSOLUTION AND REQUEST FOR A DECLARATORY ORDER**

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Comes now the Competitive Carriers of the South, Inc. (“CompSouth”), by counsel, and hereby gives notice of its pending dissolution and requests that the Commission enter a Declaratory Order prior to said dissolution, respectfully stating as follows:

CompSouth filed its Application for a Declaratory Order on August 14, 2015, over two years ago. The Application asked the Commission to affirm Staff Opinion 2013-015, which was issued on October 23, 2013. The Commission immediately noted the significance of the issues raised by CompSouth and acknowledged the direct and material impact its ruling would have on “any telecommunications provider that interconnects or can interconnect with the ILECs in Kentucky.”<sup>1</sup> Indeed, BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”), MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, LLC (“Verizon”) and Cincinnati Bell Telephone Company, LLC (“CBT”) intervened and have participated vigorously throughout the proceeding.

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<sup>1</sup> Order, Case No. 2015-0283, p. 1 (Ky. P.S.C. Aug. 26, 2015).

The Commission waited over ten months before issuing a procedural schedule on June 23, 2016. Once it became clear that CompSouth's Application would be considered on the merits, AT&T Kentucky implemented a strategy of delay. As an example, AT&T Kentucky filed a motion on July 7, 2016 that sought to add an additional three months to the Commission's procedural schedule.<sup>2</sup> AT&T Kentucky's motion was granted in part and denied in part in an Order entered on August 9, 2016. AT&T Kentucky's strategy was rewarded when CompSouth was forced to give notice on August 29, 2016 that XO Communications, LLC was forced to withdraw as a participating member due to "the costs of its participation in this proceeding."<sup>3</sup> EarthLink Business, LLC also ceased to be a participating member.<sup>4</sup>

Further delay occurred during discovery. CompSouth filed testimony and responses to information requests from Verizon without issue. Ironically, the ILECs (AT&T Kentucky and CBT) chose not to send any information requests to CompSouth despite a formal declaration previously that such due process would be necessary to achieve a proper resolution.<sup>5</sup> AT&T Kentucky filed brief testimony which primarily consisted of blanket legal assertions.<sup>6</sup> CBT did not file testimony. When AT&T Kentucky and Verizon responded to information requests from CompSouth, however, a discovery dispute followed and CompSouth was forced to file a motion to compel. For its part, Verizon's failure to adequately respond to CompSouth's

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<sup>2</sup> See AT&T Kentucky Motion to Modify Procedural Schedule (filed July 7, 2016).

<sup>3</sup> CompSouth's Notice of Withdrawal of Participating Members (filed Aug. 29, 2016).

<sup>4</sup> See *id.* Windstream Holdings, Inc. announced completion of its acquisition of EarthLink Holdings, Inc. on February 27, 2017.

<sup>5</sup> See Staff Opinion 2013-015, p. 2 (quoting a letter previously received from AT&T Kentucky).

<sup>6</sup> See Testimony of Scott McPhee, pp. 4-5 (filed Oct. 26, 2016).

information requests were quickly resolved and remedied by the filing of a supplemental response. AT&T Kentucky also filed a carefully worded supplemental response on January 12, 2017. Those responses revealed for the first time that AT&T Corporation (an affiliate of AT&T Kentucky that does not consider itself to be subject to PSC jurisdiction) has entered into contracts that allow for the provision of IP format voice traffic that originates with, or is terminated to, end users in Kentucky, including some customers of AT&T Kentucky.<sup>7</sup>

The significance of AT&T Kentucky's admission was detailed at length in CompSouth's rebuttal testimony filed on February 17, 2017. First, CompSouth explained the significance of the fact that neither AT&T Kentucky nor Verizon disputed the assertions that FCC precedent:

[P]rovided the Commission with (a) a clear instruction that the state commission role is to review agreements to determine whether they must be filed in accordance with section 252 of the federal Act, and (b) that the only agreements (those of Verizon) that have been made public clearly satisfy the standards that the FCC directed state commissions to use in their review. As a result, any agreement similar to those of Verizon should be filed for approval in accordance with section 252 of the federal Act.<sup>8</sup>

Based upon this undisputed analysis, CompSouth noted that AT&T Kentucky "admits that voice traffic is completed to AT&T-KY customers in IP format, but will not provide copies of the agreements."<sup>9</sup> CompSouth further explained, "AT&T has prevented the Commission from performing this [FCC prescribed] role by refusing to provide the agreements (even if

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<sup>7</sup> See AT&T Kentucky's Supplemental Responses Nos. 3, 4, 5, 8 and 9 to CompSouth's Information Requests (filed Jan 12, 2017).

<sup>8</sup> Rebuttal Testimony of Joseph Gillan, p. 3 (filed Feb. 17, 2017).

<sup>9</sup> *Id.*, p. 4

under confidentiality protection while the Commission determines whether to require their filing).”<sup>10</sup> The implications of this evasiveness was described as follows:

AT&T acknowledges that AT&T-KY has voice customers served using IP technology, and that the traffic to/from these customers is exchanged in IP format. Nevertheless, AT&T claims that AT&T-KY has no agreement to exchange voice traffic in IP format with any other carriers. Rather, an AT&T affiliate exchanges the traffic, but AT&T never explains how the IP voice traffic is then exchanged with AT&T-KY, where the traffic originates and terminates. This would seem to suggest that AT&T-KY does not deal with AT&T on an arms-length basis - or on *any-length* basis - that can be explained.<sup>11</sup>

CompSouth further explained:

These are not theoretical concerns. As of June 2016, over a [REDACTED] of AT&T's consumer lines are served using IP technology. The ability of other companies to efficiently exchange voice traffic with AT&T-KY under nondiscriminatory terms and conditions requires that the Commission oversee the Act's interconnection provisions for both the base of customers served by IP technology in addition to the obsolescing TDM technology in AT&T-KY's network.<sup>12</sup>

CompSouth's rebuttal testimony concluded by describing the discriminatory nature of the ILEC's current practices:

Both AT&T and Verizon acknowledge that parties must negotiate IP interconnection agreements blind, with only AT&T and Verizon knowing the terms of all the agreements. Unless state commissions affirm their jurisdiction over all voice interconnection matters regardless of the underlying technology and bring these contracts into the light, as required by section 252, the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, pp. 5-6 (emphasis in original).

<sup>12</sup> *Id.*, p. 6. The unredacted portion of Mr. Gillan's testimony was filed under seal on February 17, 2017.

nondiscrimination protections of section 252 will cease to exist.<sup>13</sup>

AT&T Kentucky sought to strike most of the rebuttal testimony filed by CompSouth in a motion filed on February 24, 2017. It quickly came to light, however, that AT&T Kentucky had edited the very testimony which it sought to strike in such a way as to completely change the meaning of the testimony.<sup>14</sup> In its reply in support of the motion to strike, AT&T Kentucky neither denied nor apologized for editing CompSouth's rebuttal testimony and changing its meaning. Having filed the motion to strike, AT&T Kentucky then filed a motion to successfully delay the filing of briefs. The case has laid dormant upon the Commission's docket for over six additional months.

CompSouth's members have determined that it will be necessary to dissolve the corporation on or about December 31, 2017. The dissolution is the result of various acquisitions in the industry and the cost of litigating cases such as this in the face of ruinous, anticompetitive behavior by ILECs.<sup>15</sup> CompSouth has invested considerable time and resources to obtain a Declaratory Order in this proceeding, but has, as of yet, been unable to obtain a Declaratory Order. In short, AT&T's strategy of delaying the case – as it has done in proceedings before the Federal Communications Commission – appears to be working splendidly. However, such an outcome – where the result is dictated by silence rather than an affirmative declaration of the law – is anathema to the law and fundamental notions of due process. Indeed, the Courts have observed that, “the manifest purpose of the Public Service

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<sup>13</sup> *Id.*, p. 7.

<sup>14</sup> *See* CompSouth's Response to AT&T Kentucky's Motion to Strike, pp. 7-9 (filed March 3, 2017).

<sup>15</sup> It is possible that one of the remaining members of CompSouth will file a motion to substitute itself as a party to the case in CompSouth's stead, if necessary.

Commission is to require and insure fair and uniform rates, prevent unjust discrimination, and *prevent ruinous competition.*<sup>16</sup> The lack of a Declaratory Order in this case deprives CompSouth of due process by preventing it from having “a meaningful opportunity to be heard.”<sup>17</sup> The Kentucky Supreme Court has held, “[e]ven a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process.”<sup>18</sup>

It is well-established that the Commission speaks only through its Orders.<sup>19</sup> This case is ripe for a decision – even the intervenors agree that this case presents questions of law,<sup>20</sup> making an evidentiary hearing unnecessary. Thus, for the reasons set forth in CompSouth’s brief, the Commission’s employment of the canons of statutory construction will lead to a conclusion that KRS 278.530 and 47 U.S.C. §§ 251 – 252 are technology neutral. This conclusion will be consistent with the most recent decisions of other state commissions and the federal courts and fulfills the statutory intent as evidenced by the plain and ordinary meaning of the statutes themselves. The intervenors’ arguments to the contrary should be recognized for what they are – self-interested efforts to derail a final resolution on this issue in Kentucky. They may yet succeed. AT&T Kentucky in particular has gone out of its way to evade the Commission’s jurisdiction precisely because it knows that its behavior brings about

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<sup>16</sup> *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460, 464 (Ky. 1994) (emphasis added) citing *City of Olive Hill v. Public Service Comm’n*, 305 Ky. 249, 203 S.W.2d 68 (1947).

<sup>17</sup> *Utility Regulatory Comm’n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982) citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

<sup>18</sup> *Kentucky Power Co. v. Energy Regulatory Comm’n*, 623 S.W.2d 904, 908 (Ky. 1981).

<sup>19</sup> See *Inter-County Rural Elec. Co-op. Corp. v. Public Service Comm’n*, 407 S.W.2d 127, 129 (Ky. 1966) citing KRS 278.360.

<sup>20</sup> See AT&T Brief, p. 1, n. 2 (filed March 24, 2017) (“Given that the issues in this case are predominately legal, the parties agreed to forego an evidentiary hearing.” [sic]). For their part, Verizon and CBT only raised legal and policy issues in their briefs. None of them have requested an evidentiary hearing.

the very evil that the enactment of §§ 251 – 252 was intended to prevent. CompSouth respectfully asks that a Declaratory Order be issued on or before November 22, 2017 so that it might become final prior to the dissolution of Compsouth.

WHEREFORE, on the basis of the foregoing, CompSouth respectfully requests the Commission to enter, on or before November 22, 2017, a Declaratory Order:

- 1) Affirming Staff Opinion 2013-015; and
- 2) Holding that, regardless of underlying technology, transmission media, or protocol,
  - (a) the interconnection regimes under 47 U.S.C. §§ 251-252 and KRS 278.530 apply, and
  - (b) these statutes permit a requesting carrier to file a petition with the Commission requesting an Order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier; and
- 3) And, in so affirming such jurisdiction, mandate the filing of any existing agreements, including any arrangements between affiliates, for the exchange of IP voice traffic so the Commission may determine if those agreements or arrangements are subject to 47 U.S.C. §§ 251-252 and available for opt-in by other telecommunications carriers.

This 31<sup>st</sup> day of October, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on Tuesday, October 31, 2017; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a copy of the filing in paper medium is being hand delivered to the Commission on Wednesday, November 1, 2017.



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