

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

**APPLICATION OF COMPETITIVE CARRIERS OF)
THE SOUTH, INC. 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**

RESPONSE TO MOTION TO STRIKE

Comes now the Competitive Carriers of the South, Inc. (“CompSouth”), by counsel, and in response to the Motion to Strike Irrelevant Portions of Rebuttal Testimony of Joseph Gillan and Request to Expedited Ruling to Facilitate Scheduling Discussions filed by BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky (“AT&T Kentucky”) on February 24, 2017, respectfully states as follows.

I. INTRODUCTION

AT&T’s motion seeks to strike portions of CompSouth’s Rebuttal Testimony of Joseph Gillan, stating the issues discussed therein are irrelevant to this proceeding. In reality, each of the issues discussed in AT&T’s Motion to Strike are relevant to this proceeding because they demonstrate what CompSouth has suspected all along – AT&T Kentucky and other legacy carriers strongly prefer to keep their networks outside the legal framework of KRS 278.530 and 47 U.S.C. § 251 so that they may discriminate between carriers and offer IP-based interconnections on terms and conditions that are arbitrary and one-sided. The very nature of this proceeding is to seek a Declaratory Order stating that the technology used to interconnect under KRS 278.530 and 47 U.S.C. § 251 does not matter, which was precisely the conclusion of Staff Opinion 2013-015. The

Rebuttal Testimony sets forth just some of the reasons why the Commission should affirm its jurisdiction over IP Voice Interconnection, and in the natural course of that jurisdiction, why AT&T Kentucky should be required to file IP Interconnection Agreements with the Commission in order to insure that carriers are not discriminated against and that the terms and conditions of the agreements are substantially the same for each carrier. Because AT&T's motion is more in the nature of surreptitious sur-rebuttal and advocacy than it is a serious attempt to demonstrate that the Rebuttal Testimony is somehow irrelevant, the motion should be denied.

II. STANDARD OF REVIEW

Wholly absent from AT&T's motion is any legal authority to support its arguments. In fact, were it not for a lonesome footnote reciting a single Rule of Evidence that does not even strictly apply in Commission proceedings, there would not be *any* legal authority cited by AT&T Kentucky in its ten page motion. The lack of citation to controlling legal authority is particularly troubling in light of the plethora of persuasive legal authorities which directly speak to the use of testimony in official proceedings such as this.

Of utmost importance is the fact that AT&T Kentucky bears the burden of proof in demonstrating that the Rebuttal Testimony should be stricken. As stated in *Personnel Board v. Heck*, 752 S.W.2d 13, 17 (Ky. App. 1986), “[i]n administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof.” AT&T's motion improperly seeks to shift the burden of proof to CompSouth by implying that CompSouth must somehow justify the expert opinion which Mr. Gillan has provided. It likewise bears emphasis that AT&T's motion relies exclusively upon KRE 401, without acknowledging that the Kentucky Rules of Evidence are not formally binding upon the Commission according to KRS 278.310.

AT&T's efforts to shift the burden of proof and invoke a legal requirement that is itself non-controlling are clearly inconsistent with Kentucky law and should not go unnoticed.

Even if the Commission were to rely upon KRE 401, however, AT&T's motion is still devoid of the ample legal authorities interpreting that Rule and giving context to the Commission's application of standards of admissibility. For instance, AT&T Kentucky appears to be unaware that what is "relevant" is well-defined in Kentucky case law:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. According to Professor Lawson, "[t]he law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and unmistakable." We have recently said as much in *Springer v. Commonwealth*: "Relevancy is established by any showing of probativeness, however slight."

Tuttle v. Perry, 82 S.W.3d 920, 922 (Ky. 2002) (citations omitted).

The "inclusionary thrust in the law that is powerful and unmistakable," of which Professor Lawson speaks and the Supreme Court expressly affirms, is based upon the ample precedent of the courts for over a century. For instance, it has been said:

A fact, though not in issue, is relevant when it is or probably may have been the cause of a fact in issue or the effect of it. Evidence which conduces, though but slightly, to prove a fact in issue or to repel a presumption which might otherwise arise favorable to the opposite party, is admissible, and in case of doubt the evidence should not be excluded.

Louisville Ry. Co. v. Ellerhorst, 110 S.W. 823, 826 (Ky. 1908) (citations omitted).

Elsewhere, Kentucky's highest court has opined, "[t]he test as to remoteness is that if the offered evidence is so remote as to have no probative value it should be excluded but if it is relevant and has some degree of probative value, however small, it is admissible, and its weight is for the jury." *Caton v. McGill*, 488 S.W.2d 345, 346 (Ky. 1972). More recently, the Kentucky Court of

Appeals reaffirmed the well-known principle, that “[i]n presiding over an administrative proceeding, the hearing officer is permitted to accept hearsay evidence which is reliable, but which would not be admissible in court.” *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 321 (Ky. Ct. App. 2011). *Drummond* involved an administrative proceeding under KRS Chapter 13B which is even more rigid than that described in KRS Chapter 278. Finally, it is worth noting that much of the evidence offered in the Rebuttal Testimony falls within the category of business custom, which has also been held to be expressly admissible. *See Texaco, Inc. v. John Martin, Distributor, Inc.*, 472 S.W.2d 674 (Ky. 1971).

As shall be demonstrated, CompSouth’s Rebuttal Testimony clearly satisfies the standard of relevance and admissibility articulated by Kentucky’s bench over the last 100 years. What is therefore most stunning about AT&T’s motion is its ignorance, or disregard, of Kentucky law.

III. ARGUMENT

A. Evidence that AT&T Kentucky’s Affiliates are Discussing IP Interconnection Agreements that would Involve AT&T Kentucky’s Customers is Highly Relevant

The first two portions of testimony that AT&T Kentucky moves to strike are actually separate clauses of the same sentence, which reads as follows:

Contrary to AT&T’s testimony, CompSouth members *have* discussed IP interconnection with AT&T; but even if they had not, they should have the right to review any agreement AT&T has reached, both to determine whether it is suitable for themselves and/or to ensure that it does not discriminate against them.¹

AT&T Kentucky moves to strike the first clause of the sentence on the basis that it allegedly: (1) rebuts a point not actually asserted by AT&T Kentucky in its testimony;² (2)

¹ Rebuttal Testimony, p. 2 (emphasis in original).

² AT&T’s Motion further underscores the fact that even if AT&T’s testimony is 100% accurate in so much as it says, it nonetheless fails to be complete. Consider this passage: “AT&T Kentucky’s testimony does not say that CompSouth members *have not discussed IP interconnection* with AT&T. Instead, it says that no CompSouth member has requested

confuses AT&T Corporation for AT&T Kentucky; and (3) relates to irrelevant “generic discussions” concerning IP Interconnection.³ AT&T Kentucky moves to strike the second clause of the sentence because it allegedly urges relief which is beyond the scope of CompSouth’s application.⁴

AT&T’s assertions as to both clauses are merely efforts to distract from one of the key points of the Rebuttal Testimony, which is the now established fact that AT&T Kentucky is allowing a non-jurisdictional affiliate to enter into IP Interconnection Agreements that involve service to AT&T Kentucky’s customers.⁵ The only apparent purpose behind this corporate shell game is to intentionally evade Commission oversight and review of the IP Interconnection Agreements in question, precisely because AT&T Kentucky knows that the applicable law – as confirmed by Staff Opinion 2013-015 – would otherwise require it to file any IP Interconnection Agreements it might enter into in the course of serving its Kentucky customers. If the Staff’s interpretation of the law is affirmed, the mandatory filing obligations of the Federal Telecommunications Act of 1996 would apply and it would be much more difficult for AT&T Kentucky or any other incumbent local exchange carrier to discriminate in the provision of IP Interconnection service. Mr. Gillan’s Rebuttal Testimony exposes the manner in which AT&T’s delicate parsing of words in its testimony and discovery responses leads to an incomplete picture of what is at stake. Moreover, it amplifies and directly relates to the harm that would result from

IP interconnection with AT&T Kentucky and – most important – that AT&T Kentucky has not refused any CompSouth member’s request for interconnection.” AT&T Motion to Strike, p. 2 (emphasis in original).

³ See Motion to Strike, pp. 1-2 (seeking to strike Page 2, Lines 7-8).

⁴ See *id.*, p. 3 (seeking to strike Page 2, Lines 9-12). Without additional argument, AT&T also seeks to strike similar testimony on Page 7, Lines 1-9 of the Rebuttal Testimony. See Motion to Strike, p. 10.

⁵ Again without any support, AT&T Kentucky blindly claims that the fact that some of its customers are served using IP technology should also be stricken. See Motion to Strike, p. 10 (seeking to strike Page, 6, Lines 8-16).

discriminatory practices on the part of incumbent local exchange carriers as set forth in CompSouth's application.⁶ The sentence that is the subject of the first two points in AT&T's motion to strike is relevant and should not be stricken.

B. AT&T Kentucky's Motion to Strike Testimony Concerning Policy and Industry Custom is Based Upon a Mistaken Understanding of the Nature of the Case and the Rebuttal Testimony Itself

AT&T Kentucky's next argument is that the following three pages of Rebuttal Testimony should be similarly struck because: (1) they allegedly address issues upon which AT&T Kentucky does not intend to opine in a declaratory case; and (2) the relief requested in the Rebuttal Testimony is inconsistent with the agreement of AT&T Kentucky and CompSouth to resolve a discovery dispute whereby the parties agreed AT&T Kentucky would not produce the IP Interconnection Agreement that AT&T Kentucky's affiliate has made.⁷ Both of these arguments are quickly dispatched.

First, CompSouth respects and defers to AT&T Kentucky with regard to which issues it may take a position upon and which issues it may choose to be silent upon. AT&T Kentucky has been afforded over eighteen months in which to opine or not opine. AT&T Kentucky's exercise of discretion in that regard, however, will not in any way limit the legal effect or significance of the Commission's decision herein. By seeking intervention and participating in this proceeding, AT&T Kentucky will be bound by the Commission's decision and that decision could very well determine whether AT&T Kentucky is required to file copies of IP Interconnection Agreements involving its Kentucky customers.

⁶ See Application, p. 3.

⁷ See Motion to Strike, pp. 4-7 (seeking to strike Page 2, Line 14 through Page 4, Line 9). Without providing any additional arguments, AT&T Kentucky also seeks to strike similar testimony on Page 5, Lines 13-18 of the Rebuttal Testimony. See Motion to Strike, p. 9.

Second, AT&T Kentucky has egregiously misunderstood the Rebuttal Testimony. Mr. Gillan has not testified that the IP Interconnection Agreements which formed the genesis of the discovery dispute should be filed in this proceeding. He has instead described the very plain and obvious reason why the transparency provisions of the Federal Telecommunications Act of 1996 would mitigate the dangers that naturally flow from a situation where IP Interconnection Agreements are negotiated blindly and one party has “take it or leave it” bargaining power.

Again, the pages of Rebuttal Testimony which AT&T Kentucky seeks to strike are relevant to CompSouth’s application because they help describe the significance of the legal question that has been brought before the Commission. AT&T Kentucky’s preference that this legal issue be examined without regard to the context in which it is decided is anathema to notions of fair dealing and due process. AT&T Kentucky’s motion to strike should be denied on this point as well.

C. AT&T’s Efforts to Strike Testimony Pointing out the Dissembling Nature of AT&T Kentucky’s Testimony and Discovery Responses are in the Nature of Sur-Rebuttal Testimony Rather than Legal Argument and AT&T Kentucky’s Editing of the Rebuttal Testimony is Highly Improper

AT&T Kentucky next moves to strike a question regarding whether any of CompSouth’s members have attempted to negotiate an IP Interconnection Agreement with AT&T, as well as the response to the question.⁸ In support of its motion, AT&T Kentucky argues that the subject of the testimony is premature as no member of CompSouth has requested an IP Interconnection Agreement from AT&T Kentucky. This is the same defense raised by AT&T Kentucky in its original response to CompSouth’s application. Again, the point of the Rebuttal Testimony is that the sophistry within AT&T Kentucky’s prior testimony and data requests are what has finally led AT&T Kentucky to the point where it must concede that its customers are being served in part

⁸ See Motion to Strike, pp. 7-9 (seeking to strike Page 4, Line 11 through Page 5, Line 5).

through IP Interconnection Agreements entered into by a non-jurisdictional affiliate. The Rebuttal Testimony simply points this out: “It is unclear why AT&T did not simply acknowledge that parties have, in fact requested IP interconnection and state so clearly at the outset (rather than making this an issue).”

AT&T Kentucky’s other assertion is nothing more than a blatant attempt to misconstrue the Rebuttal Testimony for its own purposes. AT&T Kentucky alleges that the Rebuttal Testimony confuses which of the AT&T entities is the subject of the testimony and hinges its argument upon the clause, “AT&T’s discovery responses make clear that *the parties* have discussed IP interconnection...”⁹ When the full sentence is considered, however, it is patently clear that the Rebuttal Testimony correctly identifies which AT&T entity is intended. Compare AT&T’s selective quotation of the Rebuttal Testimony with the full sentence, “I believe that AT&T’s discovery responses make clear that parties have discussed IP interconnection, including interconnection for voice traffic that originates and terminates with AT&T-KY customers, but that because the discussions have been with AT&T (albeit on behalf of its affiliates), AT&T claims that AT&T-KY has not received requests.”

The comparison yields two important conclusions. First, the Rebuttal Testimony clearly differentiates between AT&T Corporation (denoted as “AT&T”) and AT&T Kentucky (denoted as “AT&T-KY”). Second, AT&T Kentucky inserted the word “the” into its quotation of the Rebuttal Testimony, thereby changing “that parties” to “that the parties”. The obvious effect of this editing is to completely change the meaning of the Rebuttal Testimony. The Rebuttal Testimony clearly describes the parties negotiating an IP Interconnection Agreement (Level 3 and AT&T Corporation), but AT&T Kentucky edited the Rebuttal Testimony so that it would appear

⁹ Motion to Strike, p. 9 (emphasis in original).

to describe the parties to this case (CompSouth and AT&T Kentucky). Ironically, when AT&T Kentucky is caught dissembling the existence and nature of IP Interconnection Agreements effecting its customers, its response is not to own up to its ruse, but rather to move to strike the Rebuttal Testimony that points out its actions by editing the Rebuttal Testimony itself to further deceive the Commission. AT&T's disingenuous actions should not be rewarded.

D. AT&T Kentucky's Request to Strike the Rebuttal Testimony Characterizing AT&T Kentucky's Admission in Supplemental Discovery Responses Further Highlights the Odd Implications of AT&T Kentucky's Admission

AT&T Kentucky's final argument is that the fact that it does not have any IP Interconnection Agreements is not relevant to the proceeding and that the Rebuttal Testimony construing this fact should be stricken.¹⁰ However, footnote 7 to the Rebuttal Testimony clearly establishes that the expert opinion which AT&T Kentucky seeks to strike is based upon AT&T Kentucky's Supplemental Responses to CompSouth's discovery requests. The notion that an expert witness may opine upon the significance and meaning of a fact admitted by an opposing party is so well-established that CompSouth hardly takes AT&T Kentucky's request seriously. The fact that AT&T Kentucky is unable (or unwilling) to explain how its customers in Kentucky are being provided with IP technology service through a non-jurisdictional affiliate is so self-evidently significant that no expert testimony underscoring this oddity should even be necessary.

IV. CONCLUSION

AT&T Kentucky's motion to strike should be summarily denied. AT&T Kentucky fails to cite any relevant law and fails to demonstrate how any of the subject Rebuttal Testimony is irrelevant. AT&T Kentucky does manage to further highlight the bizarre positions it has taken throughout this proceeding and it does mislead the Commission by asking the Commission to

¹⁰ See Motion to Strike, pp. 9-10 (seeking to strike Page 5, Line 20 through Page 6, Line 6).

strike testimony that has been edited to better suit AT&T Kentucky's argument. In the final analysis, this appears to be the latest chapter in AT&T Kentucky's efforts to delay a final judgment in this case and to unnecessarily increase the costs of resolving a simple legal question.

WHEREFORE, on the basis of the foregoing, CompSouth respectfully requests that the Commission deny AT&T's Motion to Strike in its entirety.

This 3rd day of March, 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 March 3, 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 the 6th day of March, 2017.



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