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**

BRIEF OF
COMPETITIVE CARRIERS OF THE SOUTH, INC.

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 Friday, March 24, 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 Monday March 27, 2017.

Counsel for Competitive Carriers of the South, Inc.

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Comes now the Competitive Carriers of the South, Inc. ("CompSouth"), by counsel, and tenders its Brief, respectfully stating as follows:

II. INTRODUCTION

This case presents a simple question: Whether a technological shift in the underlying network architecture used to provide telecommunications services somehow deprives the Commission of jurisdiction over those same telecommunications services under KRS 278.530 and 47 U.S.C. §§ 251-252 that it has today.[1] The question is a straightforward legal question that can be addressed through a straightforward analysis. Under the universally-accepted canons of statutory construction, it is plainly evident that nothing within these state and federal statutes limits the Commission's jurisdiction to only one type of telecommunications technology. Even as technology evolves, the Commission's jurisdiction remains the same. It is the service to the customer – regardless of the underlying methods, means and machinations – that is subject to Commission jurisdiction. The fact is that the Public Switched Telecommunications Network ("PSTN") is moving from Time Division Multiplexing ("TDM") technology to packet-based technology using Internet Protocol ("IP"). The direct implication of this conclusion is that incumbent local exchange carriers ("ILECs") are just as subject to Commission jurisdiction for arbitration of the IP-based voice interconnection agreement disputes as they already are for TDM interconnection agreements; and that those agreements must be filed with the Commission upon their execution, thereby allowing competitive local exchange carriers ("CLECs") to opt-in to existing IP voice interconnection

[1] Copies of KRS 278.530 and 47 U.S.C. §§ 251-252 are attached hereto and incorporated herein by reference as Exhibit 1 and Exhibit 2 respectively.

agreements and facilitating the more rapid deployment and growth of advanced and more efficient telecommunications services.

This plain and literal construction of KRS 278.530 and 47 U.S.C. §§ 251 – 252 satisfies important public policies underlying the statutory schemes and is wholly consistent with the most recent decisions of state regulators and federal appellate courts. Commission Staff first articulated the position that KRS 278.530 and 47 U.S.C. §§ 251 – 252 are technologically neutral nearly four years ago in testimony before the Kentucky General Assembly. A letter confirming Staff's understanding of the statutes followed several months later in the form of Staff Opinion 2013-015.[2] CompSouth, on behalf of its members, now respectfully requests the Commission to:

1) Affirm Staff Opinion 2013-015; and

2) Hold that regardless of the 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) 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

[2] *See* Staff Opinion 2013-015 (Oct. 23, 2013). A copy of the Staff Opinion is attached hereto and incorporated herein as Exhibit 3.

those agreements or arrangements are subject to 47 U.S.C. §§ 251-252 and available for opt-in by other telecommunications carriers.

III. BACKGROUND

A. The Parties

CompSouth is an industry association of CLECs that provide voice services to end-use customers in Kentucky and elsewhere using IP format services or TDM services that are convertible to IP format for purposes of call transport. The members of CompSouth currently participating in this case are: Birch Communications, Inc.; Level 3 Communications, LLC; and Windstream Communications, Inc. Each of CompSouth's members is a "utility" as that term is defined in KRS 278.010(3)(e). Each of the participating CompSouth members is also a "telecommunications carrier", a "local exchange carrier" and a "competitive local exchange carrier" as those terms are used in 47 U.S.C. §§ 251 – 252.

BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky") and Cincinnati Bell Telephone Company, LLC ("CBT") are both ILECs operating within the Commonwealth of Kentucky. AT&T Kentucky and CBT are both a "utility" as that term is defined in KRS 278.010(3)(e). Both of them are also a "telecommunications carrier", a "local exchange carrier" and an "incumbent local exchange carrier" as those terms are used in 47 U.S.C. §§ 251- 252. AT&T Kentucky and CBT have interconnection agreements with CompSouth's members, but those agreements do not allow for the exchange of voice traffic in IP format.[3]

MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, LLC ("Verizon") is a CLEC authorized to provide service within and throughout the

[3] *See e.g.* AT&T Kentucky Amended Response, p. 3 (filed Oct. 14, 2015); CBT's Response No. 1a to CompSouth's Information Request (filed Nov. 18, 2016).

Commonwealth of Kentucky and interconnects with various ILECs in Kentucky. Verizon is also a corporate affiliate of several ILECs around the country that currently provide voice over internet ("VoIP") service in IP format.[4] According to Verizon, those affiliated ILECs have "an extensive record of negotiating and entering into nationwide commercial IP voice interconnection agreements"[5] (although the record made clear that the majority of its agreements have never been implemented).[6]

Each of CompSouth's members and the intervenors are, individually, a "telephone company" as that term is used in KRS 278.530.

B. The Value of IP Formatted Telecommunications Services

As technology evolves, the value of IP voice interconnection continues to be clear. As stated in CompSouth's Application, IP interconnection is a more efficient, higher quality, and cost-effective method for handling traffic.[7] Verizon, at least, agrees. Its own expert witness testified:

> Unlike the traditional telephone network, an IP network does not need a dedicated physical pathway to carry a call all the way from the caller to the called party. In contrast, Time Division Multiplexing, or TDM, is the traditional protocol in which telephone calls are transmitted between service providers in a circuit-switched network like the Public Switched Telephone Network ("PSTN"). In order to deliver a call to its destination, a circuit-switched network has to create a dedicated pathway that covers the entire distance from the calling party to the called party and must maintain that pathway for the duration of the call.[8]

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[4] Verizon Motion to Intervene, p. 2 (filed Oct. 12, 2015).

[5] *Id.*

[6] Testimony of Joseph Gillan, p. 8 (filed Aug, 4, 2016).

[7] CompSouth Application, p. 2.

[8] Testimony of Paul B. Vasington, p. 4 (file Oct. 26, 2016).

....

> It is more efficient for two VoIP providers to exchange traffic in IP format because it allows the providers to exchange traffic at a small number of mutually agreed upon points of interconnection for the entire country.[9]

It is undisputed that IP voice interconnection benefits not only the overall efficiency of telecommunications networks, but also the quality and experience of retail customers. One might assume then, that in the face of such obvious benefits and consistent federal and state statutes that encourage the development and investment in telecommunications networks, it would not be difficult to negotiate and implement interconnection agreements utilizing IP technology upon reasonable terms for the exchange of voice traffic. Sadly, however, such an assumption would be incorrect considering the years of regulatory uncertainty that has crippled and prevented the proliferation of IP technology in Kentucky and across the nation.

C. Procedural History

1. Federal Indecision

The ILECs – AT&T Kentucky and CBT – both take the position that their existing interconnection agreements with CompSouth's members do not allow the exchange of IP voice traffic in IP format.[10] Their position that such interconnections should be negotiated as commercial agreements takes IP voice interconnection out of the realm of agreements which are subject to regulatory review and opt-in rights. Instead IP voice interconnection becomes a function of whether an ILEC arbitrarily chooses to enter into an agreement without facing any accountability or backstop for the substantial bargaining power advantage the ILEC enjoys.

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[9] *Id.*, p. 10.

[10] *See* AT&T Kentucky Supplemental Response No. 20 to CompSouth's Information Request (filed Jan. 12, 2017); CBT Response 10 to CompSouth's Information Request (filed Nov. 18, 2016).

David must take on Goliath without a slingshot or stones – indeed, without even knowing if there is *already* a working slingshot that they can simply adopt.

Thus, it comes as no surprise that the issue of whether IP formatted voice traffic was subject to the mandatory arbitration and filing obligations of 47 U.S.C. §§ 251 – 252 first arose at the federal level when tw telecom, inc. filed a petition for a declaratory ruling before the Federal Communications Commission ("FCC") on July 14, 2011.[11] In its request, TW Telecom stated, "states currently lack the legal guidance from the FCC needed to confidently arbitrate disputes regarding IP-based interconnection agreements."[12] Further, in its Transformation Order addressing intercarrier compensation (and universal service) reform, the FCC unambiguously brought all VoIP traffic within section 251(b) of the federal Act, but requested further comment as to whether other sections of the statute should apply.[13] Although the FCC has received comments and made marginal progress on giving a ruling in the case, to date, no answer to tw telecom's petition has been ordered.

2. Informal Guidance in Kentucky (PSC Staff Opinion 2013-015)

On July 15, 2013, Commission Staff was called to testify before the Kentucky General Assembly's Interim Joint Committee on Economic Development. During the presentation, Staff described the Commission's jurisdiction over matters arising between various

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[11] *See In the Matter of tw telecom, inc.'s Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Dkt. No. 11-119 (filed June 30, 2011). tw telecom was acquired by Level 3 Communications on October 31, 2014.

[12] *Id.*, p. 6.

[13] *See In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (released Nov. 18, 2011) at ¶ 954:

> Although the Commission has not classified interconnected VoIP services or similar one-way services as "telecommunications services" or "information services," VoIP-PSTN traffic nevertheless can be encompassed by section 251(b)(5).

telecommunications providers as being "technology neutral."[14] Following-up on the testimony, tw telcom of Kentucky, LLC ("tw telecom") filed a request for a Staff Opinion on August 22, 2013. The request asked Staff to elaborate upon and confirm its statements from the prior month's legislative committee hearing. More specifically, tw telecom:

> [R]equested a Commission Staff opinion concerning whether or not the regulatory interconnection scheme under 47 U.S.C. §§ 251-252 and KRS 278.530 govern all voice traffic, regardless of underlying technology, transmission media, or protocol. [tw telecom] also requests Commission Staff to advise whether this interconnection scheme guarantees the right of any provider of voice communications to file a petition with the Commission requesting an Order prescribing the rates, terms, and conditions of proposed interconnection with another provider.[15]

Prior to the issuance of the Staff Opinion, AT&T Kentucky tendered a letter to Commission Staff asking the Staff to disregard tw telecom's request and decline to give a Staff Opinion.[16] AT&T Kentucky stated its general disagreement with Commission Staff and tw telecom's understanding of the law, but focused particularly on various reasons to avoid the issuance of any formal Staff Opinion. AT&T Kentucky argued that it would be improper to:

> (a) jump out in front of the Federal Communications Commission ("FCC") and federal courts in addressing a novel issue of profound national significance; (b) jump out in front of the Kentucky Commission and Kentucky courts in addressing a novel issue of profound national significance; and (c) effectively bypass input of other persons and entities who have an interest in, and would be affected by, any Staff opinion on those issues.[17]

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[14] *See* Minutes of the 2nd Meeting of the 2013 Joint Committee on Economic Development and Tourism, p. 5 (July 15, 2013).

[15] Staff Opinion 2013-015, p. 1.

[16] *Id.*, p. 2.

[17] *Id.*

In essence, AT&T Kentucky believed that since the FCC had opened a docket two years previously on the question raised by tw telecom, it would be improper for Commission Staff to "plow new ground" ahead of the FCC, federal courts, state courts and the Commission.[18] AT&T Kentucky concluded:

> If tw telecom's questions are to be addressed at all, they should be addressed by the Commission itself after receiving evidence presented by interested parties in a formal contested case proceeding or, at a minimum, in the context of a formal application for a declaratory order that has been served on all persons who may be affected by the application.... In no event should these novel questions, which have nationwide significance, be addressed in the informal manner requested by tw telecom.[19]

Despite AT&T Kentucky's objections, the Commission Staff issued Staff Opinion 2013-015 on October 23, 2013. The Staff Opinion addressed the concerns raised by AT&T Kentucky before coming to the substance of the request:

> Commission Staff disagrees with [AT&T Kentucky's] position that Commission Staff should decline to issue the opinion sought by tw telecom. As always, Commission Staff opinions have no legal precedential value and are advisory in nature. tw telecom's request for a legal opinion asks for a generic interpretation of a law, and does not ask Commission Staff to opine on the outcome of a specific factual scenario, or application of the law, that may come before the Commission. Moreover, while a party is entitled to request a declaratory order from the Commission pursuant to 807 KAR 5:001, Section 18, it is not required to file a petition with the Commission in lieu of requesting a Commission Staff opinion. [AT&T Kentucky's] position, if accepted and applied to other requests for Commission Staff opinions, would greatly reduce, if not eliminate, the number of Commission Staff opinions. Consequently, Commission Staff will not decline to address [tw telecom's] letter.[20]

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[18] *See id.*

[19] *Id.*

[20] *Id.*, p. 3.

As expected, Commission Staff's opinion of the law had not changed since its original presentation to the Kentucky General Assembly. As to the merits of the request for an advisory opinion, Commission Staff stated:

> ...[tw telecom] states that, "KRS 278.530(1) describes the right of a 'telephone company' to petition the Commission if it has been unable to negotiate reasonable terms to connect its exchange or lines with another provider..." and that "KRS 278.530...uses the term 'telephone company,' which is otherwise undefined in KRS Chapter 278. However, Kentucky case law supports the common sense proposition that any statute related to a 'telephone company' is to be applied in a technology neutral manner.... "
>
> [tw telecom] also states that:
>
> > Similarly, 47 U.S.C § 251 requires all telecommunication carriers "...to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers..." but like KRS 278.530, it does not reference particular technology, transmission media, or protocols. And the FCC has noted that Section 251 of the Act does not limit the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic, describing the statutory language as "technology neutral." ...The FCC has also explained that "[t]he duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, [or] otherwise. (Citations omitted.)
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> [tw telecom] concludes that "[u]nless the FCC expressly orders otherwise, the Kentucky Commission appears to have authority to apply Section 251's requirements to any telecommunications carrier... " and that "KRS 278.530 and 47 U.S.C. § 251 appear to be technologically neutral and to continue to provide a route by which the Commission may compel interconnection and specify reasonable terms for the interconnection parties." (Citations omitted.)
>
> [tw telecom] is asking Commission Staff for an opinion on a matter that neither the Commission nor Commission Staff has

addressed formally or informally. [tw telecom] is requesting an interpretation of KRS 278.530(1) which provides that:

> 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.

[tw telecom] is also requesting an interpretation of 47 U.S.C. § 251, which provides the statutory framework of interconnection between telecommunication providers. This interpretation also implicates 47 U.S.C. § 252, which provides for the procedure for seeking interconnection under the 47 U.S.C. §251 interconnection regime.

[tw telecom] is correct that KRS 278.530 does not specifically define the types of technology that may be utilized for the connecting of lines or the routing and switching of calls. In fact, KRS Chapter 278 neither specifies nor exempts types of interconnection dependent upon the underlying technology used. Therefore it follows that if a petition for the connecting of lines is filed pursuant to KRS 278.530, the Commission may entertain the petition regardless of the technology involved.

The Commission, however, has interpreted KRS 278.530 to apply to situations where interconnection does not already exist. The Commission has also noted that KRS 278.530 establishes a "procedure to be followed by aggrieved utilities, but does not prescribe the means by which the Commission must investigate and determine fair, just and reasonable rates." Therefore, Commission Staff concludes that while KRS 278.530 is "technology neutral," it only applies in the absence of an existing contract or interconnection and does not guarantee what procedure or standard the Commission should apply to reach a determination regarding the terms of interconnection. In short, even if a telephone company files a petition under KRS 278.530 (which has not occurred since 1983), interconnection is not guaranteed.

With regard to the interconnection regime under 47 U.S.C. § 251, Commission Staff agrees with [tw telecom's] characterization that the FCC has declared the interconnection regime under that statute to be "technology neutral." However,

> the FCC has not determined if the regime under 47 U.S.C. § 251 is also service neutral or if it varies with the type of service offered or what portions of the interconnection regime should apply to IP services or interconnection. As [AT&T Kentucky] states in [its] letter, the FCC has established an ongoing proceeding to address how IP interconnection and services should be addressed in an interconnection framework.
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> Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law. However, each petition for arbitration stands on its own, and each case is "tied to factual circumstances or otherwise circumscribed in various ways" and does not guarantee interconnection with an IP network.
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> Commission Staff notes that the FCC, by its actions, could preempt the Commission from acting on IP-enabled services, or provide that a different interconnection regime applies other than the traditional regime found in 47 U.S.C.§ 251. Therefore, while a carrier can currently file under 47 U.S.C. § 252 for interconnection to an IP network, FCC action could affect this right.
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> Based on the foregoing, and with the limitations discussed, *supra,* Commission Staff concludes that the interconnection regimes under KRS 278.530 and 47 U.S.C § 251 are technology neutral.[21]

Despite the straightforward legal analysis in the Staff Opinion, the ILECs continued to deny that IP interconnection agreements were subject to 47 U.S.C. §§ 251 – 252 or KRS 278.300.

3. The Necessity of a Formal Declaration of Law (Case No. 2015-00283)

CompSouth filed its Application for a Declaratory Order on August 14, 2015, seeking affirmation of the Staff Opinion. More specifically, CompSouth requested confirmation that

[21] Staff Opinion 2013-015, pp. 3-5.

"regardless of underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic between two carriers' networks...the interconnection regimes under 47 U.S.C. §§ 251-252 and KRS 278.530 apply...."[22] CompSouth also sought confirmation that these two statutory authorities "permit (among other things) 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."[23]

As it did in the course of requesting the Staff Opinion, CompSouth explained the importance of the declaratory relief which it was seeking:

> Without a declaration by the [Commission] that the interconnection regimes of the above-cited statutes are technology neutral and that a carrier may file a petition for arbitration with the [Commission] per said statutes, carriers are uncertain of their interconnection rights and obligations under the law as the Commonwealth of Kentucky and the nation undergo a transition from TDM to IP based voice services. That uncertainty, in turn, could have the effect of slowing the transition, as carriers will be faced with the choice of either a "take-it-or-leave-it," possibly discriminatory offer to interconnect in IP or continuing to interconnect in TDM with the added expense of converting their IP traffic to TDM solely for the purpose of interconnection, even though IP interconnection would be the more efficient, quality, and cost-effective method.[24]

Shortly thereafter, the Commission issued an Order noting the significance of the issues raised by CompSouth and acknowledging the direct and material impact its ruling would have on "any telecommunications provider that interconnects or can interconnect with the ILECs in Kentucky."[25] The Commission directed CompSouth to serve every ILEC, CLEC and

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[22] CompSouth Application, p. 1.

[23] *Id.*

[24] *Id.*, p. 2.

[25] Order, Case No. 2015-0283, p. 1 (Ky. P.S.C. Aug. 26, 2015).

commercial mobile radio service ("CMRS") provider operating in Kentucky.[26] Of the 295 providers that were served by CompSouth, only AT&T Kentucky, Verizon and CBT requested to intervene. Each of their motions for leave to intervene was granted.

In their responses to the Application, AT&T Kentucky and CBT did not offer any substantive response to the issues raised by CompSouth. Instead, these two ILEC intervenors requested the Commission to decline to provide a formal declaration regarding applicable law. Verizon's response echoes the other intervenors' responses, but did offer some substantive comment. CompSouth filed its reply, which addressed the issues raised by all the intervenors, on November 2, 2015.

Following the entry of significant orders by the California Public Utilities Commission and the U.S. Third Circuit Court of Appeals which directly supported CompSouth's interpretation of existing law, CompSouth filed a notice of supplemental authorities on January 20, 2016. AT&T Kentucky and Verizon filed brief, non-responsive pleadings a couple of weeks later.

The Commission entered a procedural Order on June 23, 2016, which called for the filing of formal testimony by each party, reciprocal requests for information and an opportunity to request an evidentiary hearing. Once it became clear that CompSouth's Application would be considered on the merits, AT&T Kentucky shifted tactics and 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.[27] AT&T Kentucky's motion was granted in part and denied in part in an Order entered on August 9, 2016. AT&T

[26] *See id.*, p. 2.

[27] *See* AT&T Kentucky Motion to Modify Procedural Schedule (filed July 7, 2016).

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."[28] EarthLink Business, LLC also ceased to be a participating member.[29]

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.[30] AT&T Kentucky filed brief testimony which primarily consisted of blanket legal assertions.[31] 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 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.[32]

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[28] CompSouth's Notice of Withdrawal of Participating Members (filed Aug. 29, 2016).

[29] *See id.* Windstream Holdings, Inc. announced completion of its acquisition of EarthLink Holdings, Inc. on February 27, 2017.

[30] *See* Staff Opinion 2013-015, p. 2 (quoting a letter previously received from AT&T Kentucky).

[31] *See* Testimony of Scott McPhee, pp. 4-5 (filed Oct. 26, 2016).

[32] *See* AT&T Kentucky's Supplemental Responses Nos. 3, 4, 5, 8 and 9 to CompSouth's Information Requests (filed Jan 12, 2017).

The significance of AT&T Kentucky's admission was detailed at length in CompSouth's rebuttal testimony filed on February 17, 2017. First, Mr. Gillan explained the significance of the fact that neither AT&T Kentucky nor Verizon disputed his 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.[33]

Based upon this undisputed analysis, Mr. Gillan 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."[34] Mr. Gillan further explained, "AT&T has prevented the Commission from performing this [FCC prescribed] role by refusing to provide the agreements (even if under confidentiality protection while the Commission determines whether to require their filing)."[35] 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

[33] Rebuttal Testimony of Joseph Gillan, p. 3 (filed Feb. 17, 2017).

[34] *Id.*, p. 4

[35] *Id.*

> arms-length basis - or on *any-length* basis - that can be explained.[36]

Mr. Gillan 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.[37]

Mr. Gillan' concluded his testimony 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 nondiscrimination protections of section 252 will cease to exist.[38]

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. In its reply in support of the motion to strike, AT&T Kentucky neither denied nor apologized for editing CompSouth's rebuttal testimony and

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[36] *Id.*, pp. 5-6 (emphasis in original).

[37] *Id.*, p. 6. The unredacted portion of Mr. Gillan's testimony was filed under seal on February 17, 2017. It is also the subject of a pending motion for confidential treatment.

[38] *Id.*, p. 7.

changing its meaning. Having filed the motion to strike, AT&T Kentucky then filed a motion to delay the filing of briefs. Following a telephonic informal conference on March 3, 2017, the parties agreed that briefs should be filed on March 24, 2017. The case is now ripe for a decision and should be decided in favor of CompSouth for the reasons set forth below.

IV. ARGUMENT

A. Principles of Statutory Construction

This case presents a simple question of statutory construction. There is an abundance of authority describing both the process and the principles that apply to any statutory interpretation undertaking. A leading authority on this task states:

> As we have previously indicated, our goal in construing a statute is to give effect to the intent of the General Assembly. To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning. The statute must be read as a whole and in context with other parts of the law. Where a statute is unambiguous, we need not consider extrinsic evidence of legislative intent and public policy. We presume, of course, that the General Assembly did not intend an absurd or manifestly unjust result. As a matter of application, all statutes are to be liberally construed to promote the objects and carry out the intent of the General Assembly.[39]

Neither KRS 278.530 nor 47 U.S.C. §§ 251-252 are ambiguous and, therefore, both of these statutes may be construed by giving the words used therein their plain and ordinary meaning. To aid in this process, the Kentucky Supreme Court has opined, "[w]e are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used."[40] Elsewhere it has stated, "a court must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole and

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[39] *Richardson v. Louisville/Jefferson County Metro Govt.*, 260 S.W.3d 777, 779 (Ky. 2008) (citations omitted); *see also Com., ex rel. Stumbo v. Kentucky Public Service Comm'n*, 243 S.W.3d 374, 381 (Ky. App. 2007).

[40] *Commonwealth v. Harrelson,* 14 S.W.3d 541, 546 (Ky.2000).

to its object and policy."[41] In other words, "courts should look to the letter and spirit of the statute, viewing it as a whole."[42] Likewise, "a reviewing court must not construe a statute in a manner which would effectively abolish it,"[43] nor shall a court "amend it by means of a so-called interpretation contrary to the plain meaning."[44] Equally important, a statute should not be interpreted "in a way that would render other parts of the same statute or the larger statutory scheme meaningless."[45] Federal courts construe federal laws with the same guiding principles in mind.[46] With these authorities in mind, the construction of KRS 278.530 and 47 U.S.C. §§ 251 – 252 is simple.

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[41] *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) citing *Democratic Party of Kentucky v. Graham,* 976 S.W.2d 423 (Ky.1998); *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transp. Cabinet,* 983 S.W.2d 488 (Ky.1998); *see also Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998) ("The policy and purpose of the statute must be considered in determining the meaning of the words used.").

[42] *Jackson Energy Co-op. Corp.*, p. 93 citing *Combs v. Hubb Coal Corp.,* 934 S.W.2d 250 (Ky.1996).

[43] *Id.*, citing *Commonwealth v. Wirth,* 936 S.W.2d 78 (Ky.1996).

[44] *Id.*, p. 94 citing *City of Louisville v. Fidelity & Columbia Trust Co.,* 54 S.W.2d 40 (1932).

[45] *Pub. Serv. Comm'n of Kentucky v. Com.*, 320 S.W.3d 660, 668 (Ky. 2010).

[46] *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976, 195 L. Ed. 2d 334 (2016) ("In statutory construction, we begin 'with the language of the statute.' If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent…[t]he inquiry ceases.'") (citations omitted); *Ford Motor Co. v. United States*, 768 F.3d 580, 587 (6th Cir. 2014) ("We 'must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'") (citation omitted); *United States v. Bazel*, 80 F.3d 1140, 1145 (6th Cir. 1996) (citations omitted) ("The cardinal principle of statutory construction is to save and not destroy."); *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982), aff'd, 464 U.S. 165, 104 S. Ct. 575, 78 L. Ed. 2d 388 (1984) ("A statute should be read and construed as a whole and, if possible, given a harmonious, comprehensive meaning."); *Kentucky Employees Ret. Sys. v. Seven Ctys. Servs., Inc.*, 550 B.R. 741, 756 (W.D. Ky. 2016) ("When construing a term in a statute, the Court first looks to the word's plain meaning.").

B. Staff Opinion 2013-015 Correctly Construes KRS 278 .530 and 47 U.S.C. §§ 251-252

1. KRS 278.530

a. KRS 278.530 is Technology Neutral

The protections afforded to telephone companies in KRS 278.530(1) have existed within the Kentucky Revised Statues for over a century,[47] and are rooted in Section 199 of the 1891 Kentucky Constitution.[48] The latest iteration that is currently set forth in KRS 278.530

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[47] *See Railroad Comm'n v. Northern Ky. Tel. Co.*, 33 S.W.2d 676, 677 (Ky. 1930), which states:

> This appeal requires no more than the construction of section 199 of the Constitution of Kentucky and chapter 143 of the Acts of 1912, now sections 4679f-1 to 4679f-4, Ky. St. There is no room for doubting that section 199 of the Constitution of Kentucky requires telephone companies operating exchanges in different towns, or cities, or other public stations, to receive and transmit each other's messages without unreasonable delay or discrimination. It was the intention of that section that telephone companies falling within the provisions should make such physical connection as might be required so that a message originating on the lines of one company might be transmitted over the lines of the other company through such mechanical arrangements as might be found necessary to enable the carrying of the message.

The latest iteration of this basic commercial protection was key to facilitating the transition from analog telecommunications services to digital TDM telecommunications services in the late 1970s and early 1980s. That shift in technology was just as revolutionary at the time as the current shift from TDM to IP telecommunications services. Seeing KRS 278.530 in its historical context gives further credence that the statutory text is technology neutral.

[48] *See* KY. CONST. § 199 (1891):

> Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and said companies shall receive and transmit each other's messages without unreasonable delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control. *Telephone companies operating exchanges in different towns or cities, or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination.* The General Assembly shall, by general laws of uniform operation, provide reasonable regulations to give full effect to this section. Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys, and to designate the places at which, and the manner in which, the wires of such companies shall be erected or laid within the limits of such city or town. (Emphasis added).

was enacted in 1978 with one obvious purpose – to facilitate growth of the telecommunications network and eliminate unreasonable obstacles that would slow or derail the desired investment. In light of the tendency of large ILECs to use their disparate size and inherent negotiating advantage against smaller telecommunications providers, the General Assembly was compelled to grant the Commission and the courts the express authority to require interconnections to be made upon "terms, rates and conditions" that were "reasonable."

> 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.[49]

Importantly, KRS 278.530(1) bestows a statutory right primarily upon a telephone company seeking to interconnect with another telephone company.[50] The Commission's role is to assure that the resisting telephone company is properly served and to promptly set a hearing. The timeframe envisioned for the hearing is measured in days;[51] not weeks, months or years as AT&T Kentucky and other ILECs have thus far achieved at the FCC and before the Commission. If the Commission found that an interconnection should be made, the telephone company seeking to connect enjoyed a statutory right of self-help whereby it could

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[49] KRS 278.530(1).

[50] "Telephone company" is not defined in KRS Chapter 278. However, the definition of a telephone "utility" in KRS 278.010(3)(e) includes "the transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public for compensation." Similarly, Chapter 279 defines a "telephone company" as individuals or entities owning or operating *"any* line, *facility, or system* used in the furnishing of telephone service within this state." KRS 279.310(12) (emphasis added). None of the intervenors have denied that they are a "telephone company" under KRS 278.530.

[51] *See* KRS 278.530(2).

interconnect its network and bill the resisting telephone company for one-half of the interconnection costs.[52]

The policy of encouraging interconnection was so great that even the significant rights afforded to a telephone company under KRS 278.530(1) and (2) were not enough. The General Assembly granted additional rights and remedies to telephone companies in paragraph (3) of the statute by expressly allowing a requesting telephone company to seek and obtain a circuit court injunction to require interconnection. Under penalty of contempt of court, a telephone company could be made to interconnect with a requesting telephone company upon reasonable terms, rates and conditions.[53] KRS 278.530 is a unique statute within KRS Chapter 278 in that the Commission and circuit courts share jurisdiction in order to facilitate the interconnection of telecommunications networks across the Commonwealth. Both the Commission *and the courts* have statutory authority to determine in the first instance what constitutes a reasonable interconnection.

While the technology by which telecommunications services has changed since the era of the party line, operator assisted call and rotary phone, the law has remained the same. There is nothing in KRS 278.530 that limits or exempts certain types of technology from the statute's ambit.[54] This is exactly what Staff Opinion 2013-015 concludes:

> [tw telecom] is correct that KRS 278.530 does not specifically define the types of technology that may be utilized for the connecting of lines or the routing and switching of calls. In fact,

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[52] *See* KRS 278.530(2).

[53] *See* KRS 278.530(3).

[54] The Kentucky Court of Appeals also observed that even while communications technology has changed since statutes regulating telephone companies had been enacted, that technical evolution did not mean that telephone companies become something else simply because they use improved communication techniques. *See Central Ky. Cellular Tel. Co. v. Revenue Cabinet,* 897 S.W.2d 601, 603 (Ky. App. 1995) (upholding treatment of wireless carrier as a "telephone company" under state tax statute).

> KRS Chapter 278 neither specifies nor exempts types of interconnection dependent upon the underlying technology used. Therefore it follows that if a petition for the connecting of lines is filed pursuant to KRS 278.530, the Commission may entertain the petition regardless of the technology involved.[55]

The Staff Opinion correctly construes and interprets KRS 278.530 and should be affirmed by the Commission.

b. To Date, the Intervenors Have Made No Substantive Argument to the Contrary

The intervenors have paid no attention to the interpretation of KRS 278.530 because its import and meaning are quite obvious and incompatible with their preferred outcome. After all of its protestations about the need for formal process in a declaratory action, AT&T Kentucky initially took the position that it had no position on the meaning of KRS 278.530.[56] When pressed, AT&T Kentucky took a position on KRS 278.530 that – as applied to its own circumstance – drips with double speak and borders upon the absurd:

> Subject to those objections, AT&T Kentucky states that it is not AT&T Kentucky's position that the existence of a TDM interconnection agreement forecloses a carrier from requesting IP interconnection under KRS 278.530. In the event of such a request, however, AT&T Kentucky reserves its right to deny the request on any and all lawful grounds, including but not limited to the facts that (1) the requesting carrier has an existing interconnection agreement with AT&T Kentucky and/or has established interconnections with AT&T Kentucky pursuant to that agreement; and (2) KRS 278.530 only requires the carrier with which interconnection is sought to permit the other carrier to connect its exchange or lines with the exchange or lines of the

[55] Staff Opinion, p. 4.

[56] *See* Testimony of Scott McPhee on behalf of AT&T Kentucky, p. 5 ("In this proceeding, however, AT&T Kentucky does not advocate a position one way or the other on the questions CompSouth has raised. AT&T Kentucky believes the law is very clear that the Commission cannot and should not answer those questions in this proceeding, and therefore asserts no position on those questions here."). AT&T Kentucky's objections to a formal declaration regarding the meaning and effect of KRS 278.530 are addressed subsequently in Section IV, E, *infra.*, and accompanying text.

> carrier with which interconnection is sought upon reasonable terms and conditions.[57]

In other words, a CompSouth member could request an IP voice interconnection with AT&T Kentucky, but AT&T Kentucky could deny it based upon the fact that a TDM voice interconnection already exists. The fact that a less efficient interconnection exists therefore becomes an absolute, non-appealable, incontrovertible legal bar to the deployment of a more efficient and higher quality interconnection *unless* the CLEC agrees to an ILEC's "take it or leave it" terms and conditions is a miscarriage of justice and a misapplication of law. The only authority supporting AT&T Kentucky's archaic position is AT&T Kentucky itself. Clearly, the ILEC's policies and positions are irreconcilable with the evident purpose of KRS 278.530 to facilitate interconnections between carriers. The Staff Opinion's construction of KRS 278.530 should be affirmed.

2. 47 U.S.C. §§ 251-252

a. Interconnection Obligations Under § 251 Are Technology Neutral

It is sometimes conveniently forgotten that 47 U.S.C. Subchapter II – Common Carriers, Part II is entitled, "Development of Competitive Markets". While the name of a statutory scheme is not actually law, courts have held that the name legislators have given to a statutory scheme "embodies a sort of epitome of the meaning of the section."[58] Federal law imposes a general duty upon each telecommunications carrier to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[59] ILECs

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[57] AT&T Kentucky Response No. 10 to CompSouth's Information Requests (filed Nov. 23, 2016).

[58] *Peoples Gas Co. of Kentucky v. City of Barbourville*, 165 S.W.2d 567, 570 (Ky. 1942).

[59] 47 U.S.C. § 251(a)(1).

are also unilaterally charged with additional duties in relation to their facilitation of network interconnections:

> **(c) Additional obligations of incumbent local exchange carriers** In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> ....
>
> **(2) Interconnection** The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> **(A)** for the transmission and routing of telephone exchange service and exchange access;
>
> **(B)** at any technically feasible point within the carrier's network;
>
> **(C)** that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> **(D)** on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.[60]

Clearly, there is nothing in 47 U.S.C. § 251(a)(1) or (c) that limits the duty of a telecommunications carrier or an ILEC to interconnect based upon the method, means or protocols involved in the exchange of voice telecommunications traffic. Section 251 is technologically neutral, focusing upon the requirement to interconnect,[61] and the fact that such interconnection should be on "just, reasonable and nondiscriminatory" terms,[62] rather than

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[60] 47 U.S.C. § 251(c)(2) (bold text in original).

[61] *See* 47 U.S.C. § 251(a)(1)

[62] 47 U.S.C. § 251(c)(2)(D).

focusing upon the nature of the technology used to accomplish the interconnection.[63] The only inherent limitation on interconnection that relates to the underlying technology is this: 1) the interconnection must be "technically feasible";[64] and 2) it must be "at least equal in quality" to the service provided by the carrier "to itself, or to any subsidiary, affiliate or any other party to which the carrier provides interconnection."[65] There is nothing in these two provisions that applies to a specific technology, however. These substantive provisions refer to technology in relative terms by balancing the ILEC's obligation to interconnect against the protection of not having to upgrade its network to accommodate the interconnection. That distinction is irrelevant in the context of CompSouth's Application, which only seeks a declaratory ruling that IP formatted voice interconnections are not exempt from Section 251 as a matter of law.[66] The Staff Opinion's conclusion that, "[w]ith regard to the interconnection regime under 47 U.S.C. § 251, Commission Staff agrees with [tw telecom's] characterization that the FCC has declared the interconnection regime under that statute to be 'technology neutral,'" is correct and should be affirmed.[67]

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[63] *See, e.g., Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking , 26 FCC Red 17663, ¶¶ 1011, 1342, 1381 (2011) ("The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection , whether TDM, IP, or otherwise.").

[64] 47 U.S.C. § 251(c)(2)(B).

[65] 47 U.S.C. § 251(c)(2)(C). The importance of the reference to a carrier's "subsidiary" and "affiliate" to the case *sub judice* was highlighted in CompSouth's rebuttal testimony, which AT&T Kentucky was desperate to strike.

[66] CompSouth agrees that its members could not require an IP interconnection agreement with an ILEC for which IP interconnection is not technically feasible due to the ILEC's antiquated network or would be superior to the quality of service provided by the ILEC to itself or its subsidiaries, affiliates or others. Fortunately, that is not the case here.

[67] Staff Opinion, p. 5.

b. Negotiation and Arbitration Procedures in § 252 are Technology Neutral

Having established that 47 U.S.C. § 251 is technologically neutral, the final relevant requirement set forth in that statute is Section 251(c)(1) which requires both ILECs and other telecommunications carriers seeking to interconnect to negotiate the terms of an interconnection agreement in good faith and in accordance with § 252 of the Act, which includes the opportunity for a carrier to review and adopt a previously negotiated agreement.[68] This component of the statute provides an appropriate segue for further analysis of whether the procedural portion of the interconnection statute is also technology neutral.

Among other things related to the duties imposed on incumbent local exchange carriers, 47 U.S.C. § 252(b) provides for interconnection agreements to be arrived at through compulsory arbitration before the Commission. In the event of an arbitration, the Commission is required to determine "the just and reasonable rate for the interconnection of facilities and equipment for purposes of [Section 251(c)(2)]."[69] All interconnection agreements must be submitted to the Commission regardless of whether an interconnection agreement is arrived at through negotiation or arbitration.[70] Once an interconnection agreement has been approved, it must remain filed at the Commission and be available for public inspection and copying within ten days.[71] As noted, any other telecommunications carrier may adopt and implement the agreement.[72] Again, there is nothing about any of these statutory provisions which somehow

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[68] *See* 47 U.S.C. § 251(c)(1).

[69] 47 U.S.C. § 252(d)(1).

[70] 47 U.S.C. § 252(e)(1).

[71] 47 U.S.C. § 252(h).

[72] 47 U.S.C. § 252(i).

discriminates between interconnection technologies. The plain and ordinary meaning of Section 252 is simply unconcerned with the nature of the technology that is the subject of an interconnection agreement. Thus, the Staff Opinion correctly finds:

> Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law.[73]

c. The Intervenors' Substantive Arguments are Inconsistent with §§ 251 – 252 Under the Canons of Statutory Construction

i. Arguments Based Upon Administrative Inaction are Unpersuasive

It is abundantly clear that both KRS 278.530 and 47 U.S.C. §§ 251 – 252 are unconcerned with the nature of the technology underlying the interconnection of telecommunication networks. The canons of statutory construction lead to this inescapable conclusion. Thus, it is not surprising that the few substantive arguments offered by the intervenors rely upon legal gimmickry in their effort to distract from what should be obvious.

For instance, the primary argument advanced by all three intervenors is that the FCC has not unambiguously held that IP formatted voice interconnection is subject to 47 U.S.C. §§ 251 – 252.[74] When this proposition is examined, however, it quickly falls apart. First, the notion that § 251 or § 252 may have meaning and legal effect in any given legal context *only* upon the FCC's interpretation of the statutes in that particular context forgets the hierarchy of authority at work. Section 251 and § 252 are the law, as enacted by the United States Congress.

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[73] Staff Opinion, p. 5.

[74] *See* AT&T Amended Response, pp. 7-8; CBT Response, p. 8; Verizon Response, p. 5. With regard to the applicability of this same argument to KRS 278.530, the intervenors would love nothing more than the Commission to similarly take six years or more to interpret the scope and effect of Kentucky law. Such an invitation only invites more regulatory uncertainty and should be rejected.

Any FCC order construing them is an administrative interpretation of that law and is entitled to appropriate deference, but any FCC order is only persuasive and binding to the extent that it correctly interprets the statutes. The absence of an FCC order does not lessen the meaning or legal effect of the statutes. They are inherently persuasive and legally-binding standing alone and the Commission and courts have the right and duty to construe them in accordance with the canons of statutory construction, especially in the absence of a final and non-appealable FCC order.

Second, the argument that the FCC's silence on the issue of whether Section 251 and Section 252 are technology neutral somehow gives rise to an inference that the FCC believes IP formats are excluded from the statutory scheme is based purely upon rhetoric, not logic. Standing alone, the FCC's silence could just as easily mean that it believes the federal statutes are technology neutral. Administrative inaction is a poor basis for interpreting unambiguous statutes.[75] This is especially so in this instance, because the FCC has *not* been entirely silent on the regulatory regime that applies to IP formatted voice traffic. The FCC has explicitly concluded that all VoIP-to-PSTN, PSTN-to-VoIP, and VoIP-to-VoIP calls are subject to Section 251 (which unambiguously implicates § 252) when the traffic is exchanged in TDM, and none of the intervenors have offered a theory as to why the format of these calls at the point of exchange could possibly alter this conclusion.

[75] *See, e.g., Ohio Valley Trail Riders v. Worthington*, 111 F. Supp. 2d 878, 888 (E.D. Ky. 2000) ("A plaintiff may invoke a 'failure-to-act' exception to the requirement of final agency action where 'administrative inaction has precisely the same impact on the rights of the parties as denial of relief.' q*uoting Sierra Club v. Thomas,* 828 F.2d 783, 793 (D.C.Cir.1987)).

ii. Verizon's Effort to Distinguish IP Formatted Interconnection is Ineffectual

AT&T Kentucky and CBT offer no real analysis concerning whether §§ 251 – 252 are technologically neutral. Only Verizon attempts to make a substantive argument, but each of its arguments may be quickly cast aside.

(A) Whether VoIP Services are "Information Services" is a Distinction Without a Difference

First, Verizon claims that VoIP services are in fact "information services," and therefore exempt from the federal interconnection regime.[76] However, in the ICC Transformation Order, the FCC specifically rejected the argument that VoIP calls are exempt from § 251 and clearly found that such services are covered by § 251(b)(5):

> Although the Commission has not classified interconnected VoIP services or similar one-way services as "telecommunications services" or "information services," VoIP-PSTN traffic nevertheless can be encompassed by section 251(b)(5).[77]

The FCC's treatment of VoIP-PSTN traffic in the ICC Transformation Order and elsewhere[78] make clear that §251(b)(5) applies to every combination of TDM or IP formats at the end-point of a call. Thus, the VoIP services themselves are subject to § 251, whether or not they are information or telecommunication services. Verizon's rationale that the claimed "net protocol conversion" changes the nature of the call is equally at odds with the FCC's approach. As noted, even though a VoIP-to-PSTN and PSTN-to-VoIP call each arguably involves a "net protocol conversion" (at least according to Verizon), the FCC has already confirmed that both

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[76] *See* Verizon Response, p. 7.

[77] *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 954 (Nov. 18, 2011) (footnotes omitted).

[78] *See, e.g.,* 47 C.F.R. § 51.913(a)(1) (The VoIP-PSTN category encompasses traffic exchanged in TDM format that "originates and/or terminates in IP format.").

are subject to § 251(b)(5). The distinction Verizon is attempting to make is obviously one without a difference.

Although it was unnecessary for the FCC to make a finding in the ICC Transformation Order as to whether voice traffic exchanged in IP format would also fall under § 252, it is readily apparent that the answer would be "yes." If the end-points of the call have no bearing on the analysis, which the FCC confirmed, then the only possible source of a transformative change that would exempt a voice call from §§251 – 252 must occur somewhere between the end points. Yet in the IP-in-the-Middle Order, the FCC has previously made clear that exchanging traffic in IP format is not a defining event when the FCC concluded that IP transport could be provided by one or more providers (which would require an exchange of traffic), but that did not change the classification of the call.[79]

It bears further emphasis that Verizon's argument has been asserted by Verizon in another jurisdiction – and summarily rejected. In a decision issued by the California Public Utilities Commission ("California PUC") on March 23, 2017, we have this finding:

> Further, we reject carriers' claims that the CPUC has no jurisdiction to approve the Multistate Agreements because VoIP service is an "information" service, not a telecommunications service, and therefore, beyond the reach of a state commission. None of the proponents of this view cited to any authority for the proposition that VoIP is an information service, and indeed, could not cite to such an authority....The carriers' insistence that VoIP is an information service is nothing more than hyperbole.[80]

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[79] *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, ¶ 1, WC Docket No. 02-361, FCC 04-97 (Apr. 21, 2004).

[80] *In the Matter of the Approval of Executed Internet Protocol Multistate Agreements Submitted by Verizon California, Inc. in Advice Letter No. 12725 as Interconnection Agreements Pursuant to § 252 of the Federal Telecommunications Act*, Resolution T-17546 (CD/GVC), Agenda No. 15356 (Rev. 2), pp. 11, 12 (Cal. P.U.C. Mar. 23, 2017). A signed version of the California PUC's Resolution was not yet available due to the fact that it was adopted the day prior to CompSouth's filing of this Brief. The California PUC's Resolution can be found at: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M182/K325/182325357.PDF. However, the minutes of the California PUC's March 23, 2017 Agenda meeting confirm that the Resolution was in fact adopted. The Agenda meeting minutes are available at: https://ia.cpuc.ca.gov/agendadocs/3394_results.pdf.

Verizon's argument that VoIP is an information service has been thoroughly discredited and should be rejected.

(B) Verizon's Reliance Upon an Alleged Omission in One Paragraph of the ICC Transformation Order is Unsupported by any Fair Reading of the Order as a Whole

Verizon's second argument alleges that while § 251(a) is technology neutral, § 252(c)(2) is not.[81] Verizon acknowledges, however, the FCC's observation in the ICC Transformation Order that, "section 251 of the Act is one of the key provisions specifying interconnection requirements, and that its interconnection requirements are technology neutral — they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks."[82] Verizon even admits that the reference is to § 251 as a whole,[83] but then ignores the express reference to interconnection requirements (plural) by constructing an argument that tries to limit the technology neutrality discussion to one subsection of § 251. Verizon claims that, even though the FCC repeated the conclusion about neutrality for § 251(a), the FCC failed to repeat the conclusion specifically with regard to § 251(c)(2). Thus, according to Verizon, the Commission should ignore the FCC's observation that the interconnection requirements of § 251 "are technology neutral" and conclude somehow that the observation cannot apply to § 251(c)(2) or any part of § 251 other than subsection (a). Again, the omission of a detail from one paragraph of a voluminous order construing a non-critical point in an ancillary proceeding is hardly a firm foundation from which to argue that the plain and ordinary language of § 251 is somehow vague or ambiguous.

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[81] *See* Verizon Response, pp. 7-8.

[82] *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 1342 (Nov. 18, 2011).

[83] *See* Verizon Response, p. 7.

The omission of this argument from the responses of AT&T Kentucky and CBT is reason enough to conclude that Verizon's argument is facially deficient.

Yet, when the premise of Verizon's argument is further explored, the conclusion which it has offered is found to be even more unpersuasive. Verizon's theory that only § 251(a)(1) is technology neutral is based on a later remark, in ¶ 1352 of the ICC Transformation Order, that § 251(a) is technology neutral when addressing whether the FCC "should utilize section 251(a)(1) as the basis for the requirement that all carriers must negotiate in good faith in response to a request for IP-to-IP interconnection." There is simply nothing about the FCC repeating its "technology neutral" conclusion in this paragraph that suggests in any way that its earlier finding concerning section 251 applies only to § 251(a). Indeed, Verizon concedes that the finding in ¶ 1342 referred to "§ 251 as a whole, and § 251 contains two interconnection duties."[84] Moreover, the FCC did not limit its conclusion that the interconnection obligations of § 251 are technology neutral to a single reference in the ICC Transformation Order. To the extent that Verizon's theory is worth considering, it is debunked by ¶ 1381 and the accompanying footnotes:

> We agree with commenters that "nothing in the language of [s]ection 251 limits the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic"[2507] and that the language is in fact technology neutral.[2508]
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> [2507] *COMPTEL USF/ICC Transformation NPRM* Comments at 5. "The Commission has already determined that Section 251 entitles telecommunications carriers to interconnect for the purpose of exchanging VoIP traffic with incumbent LECs and that a contrary decision would impede the development of VoIP competition and broadband deployment." *Id.* at 6 (citing *Time-Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain*

[84] *Id.*, pp. 7-8.

Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517, 3519-20, paras. 8, 13 (2007) (*Time Warner Cable Order*)).

[2508] *See, e.g., XO USF/ICC Transformation NPRM* Reply at 5-6 ("Despite protestations of the ILECs, the interconnection obligations of sections 251 and 252 are technology neutral and not targeted to apply only to legacy TDM networks that existed at the time the Telecommunications Act was passed.").

As CompSouth's expert testified:

> The critical importance of this finding is that the retail service is covered by the Act, irrespective as to whether the call is VoIP or TDM. Because the format used at the point of exchange between the networks (be it IP or TDM) is transparent to the customer, how can a call exchanged in IP be legally different than a call exchanged in TDM? To state the obvious, there is simply no rational basis to distinguish between the use of technologies at the point of traffic exchange when the FCC has already found that the retail services are indistinguishable under section 251(b)(5). If nothing material happens at the point of exchange - again, the format used should be transparent to the customer - it is impossible to conclude anything other than *both* IP and TDM traffic exchange are covered by the Act.[85]

(C) Verizon's "Commercial Agreement" Argument is Also Contradicted by FCC Precedent

Verizon's third and final substantive claim is that § 251(a) is somehow only implemented through a "commercial agreement" and not a formal interconnection

[85] Testimony of Joseph Gillan, pp. 5-6 (filed Aug. 4, 2016) (emphasis in original).

agreement.[86] This position is directly contradicted by the Time Warner Cable Order,[87] which was referenced above in ICC Transformation Order footnote 2507:

> We also clarify that the rural incumbent LECs' obligations under sections 251(a) and (b) can be implemented through the state commission arbitration and mediation provisions in section 252 of the Act. Finally, we reaffirm that providers of wholesale telecommunications services enjoy the same rights as any other telecommunications carrier under sections 251(a) and (b) of the Act. We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the scope of sections 251 and 252 in state commission proceedings.

Verizon's position is not even consistent with its own experience before the California Public Utilities Commission (summarized *infra*.) which found that its IP voice interconnection agreements must be submitted to the California commission for review and approval.[88]

iii. Summary of Intervenors' Arguments

The bottom line is that, even though the FCC has not issued an Order directly answering whether §§ 251 – 252 apply to IP voice interconnection, decisions such as the IP-in-the Middle, ICC Transformation, and Time Warner Cable Orders clarify that the obligations of §§ 251 – 252 are technology neutral. Verizon's substantive arguments are vigorous, but unsupportable. AT&T Kentucky and CBT rely not upon substance, but simply upon the FCC's inaction. None

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[86] *See* Verizon Response, p. 8.

[87] *In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption pursuant to Section 253 of the Communications Act, as amended*, Order, WC Docket No. 10-143, 26 FCC Rcd 8259, ¶ 2 (May 26, 2011) (footnotes omitted).

[88] *See Joint Application of Frontier Communications Corporation, et al. for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, Order, Cal. PUC Decision, Application 15-03-005, pp. 55-56, 73, 76, 80 and Ordering Paragraph ¶ 6 (Cal. P.U.C. Dec. 9, 2015).; Testimony of Joseph Gillan, p. 7.

of these arguments are consistent with the principles of interpreting and applying statutes and should therefore be ignored and forgotten.

C. Staff Opinion 2013-015 is Consistent With the Decisions of Other Jurisdictions

Although the canons of statutory construction independently lead to a conclusion that is well-supported by the plain and ordinary meaning of both KRS 278.530 and 47 U.S.C. §§ 251 – 252, the recent decisions of other jurisdictions offer further confidence that Staff Opinion 2013-015 is correct, accurate and complete. It is important to note that CBT concedes, as it must, that the FCC has not overtly or even implicitly pre-empted the authority of state regulators with regard to IP voice interconnection. CBT's admits: "The FCC has invoked other bases for its jurisdiction to regulate interconnected VoIP service, at the same time making clear that it *may* preempt state commissions' ability to regulate the same."[89] "May" is synonymous with "might", "can" or "could". It is the opposite of "did". The admitted lack of explicit pre-emption is itself confirmation that the Commission may (and should) issue a Declaratory Order in this case.

In so doing, notice should be taken of the 2015 decision of the California PUC, which held that: (a) Verizon's ILEC affiliate must request state commission "approval in accordance with § 252 of each of its executed Internet Protocol agreements for the exchange of voice traffic to which Frontier Communications Corporation will succeed" and, if approved, "shall make them available for opt-in by other carriers;" and (b) a Verizon ILEC affiliate's IT template would meet the § 252 standard and must be filed for Commission review "to determine whether or not it is an interconnection agreement subject to the filing, approval and opt-in requirements

[89] CBT Response, p. 8.

of § 252 of the federal Telecommunications Act."[90] Both points are squarely consistent with Staff Opinion 2013-015.

The California PUC affirmed its prior ruling in a Resolution adopted on March 23, 2017. The California PUC echoed the Kentucky Staff Opinion and issued one of the clearest interpretations of §§ 251 – 252 yet, holding:

> We find the carriers' other arguments about the applicability of §§ 251/252 to be equally unavailing. The FCC gave no indication that it intended to remove the exchange of voice traffic, regardless of the underlying technology, from the realm of §§ 251/252 interconnection.... *Moreover, the interconnection obligations of §§ 251 and 252 are technology neutral; nothing in the language of §§ 251 or 252 limits the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic.*[91]

The California PUC also noted, "the 11 agreements Verizon California, Inc. submitted...conform to the § 251 definition of interconnection agreements insofar as the agreements concern the exchange of voice traffic and an ongoing obligation to provide resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation."[92] The California PUC's actions are entirely consistent with Staff Opinion 2013-0015 and offer further evidence that §§ 251 – 252 are technology neutral.

In addition, the U.S. Court of Appeals for the Third Circuit also recently issued an Opinion directly relevant to the Commission's analysis, when it held: "the FCC's jurisdiction

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[90] *Joint Application of Frontier Communications Corporation, et al. for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, Order, Cal. PUC Decision, Application 15-03-005, pp. 55-56, 73, 76, 80 and Ordering Paragraph ¶ 6 (Cal. P.U.C. Dec. 9, 2015).

[91] *In the Matter of the Approval of Executed Internet Protocol Multistate Agreements Submitted by Verizon California, Inc. in Advice Letter No. 12725 as Interconnection Agreements Pursuant to § 252 of the Federal Telecommunications Act*, Resolution T-17546 (CD/GVC), Agenda No. 15356 (Rev. 2), p. 11 (Cal. P.U.C. Mar. 23, 2017).

[92] *Id.*, p. 6.

over local ISP-bound traffic is not exclusive and the PPUC orders [requiring AT&T payments to Core Communications for terminating traffic] did not conflict with federal law...."[93] The Third Circuit's ruling is important because it confirms that FCC jurisdiction is primary, but not exclusive, and specifically rejects preemptive readings of FCC orders and the position that "state commissions may only act pursuant to their role in mediating and arbitrating interconnection agreements under § 252 of the TCA".[94] The Third Circuit's opinion demonstrates that the Commission: 1) may make decisions on "federalized" matters that best conform to its state's conditions and specific regulatory history; and 2) has authority to act outside of an arbitration or other consideration of a specific agreement or negotiation and without an explicit FCC determination on an issue.

Verizon sought to distinguish these recent authorities in a supplemental filing consisting of two feeble paragraphs.[95] AT&T Kentucky's response was even weaker, devoting three pages to reiterating its prior arguments regarding why the Commission should not issue a declaratory order while wholly failing to even address the substance of CompSouth's supplemental citations. AT&T Kentucky's only allusion to the supplemental citations was set forth in the first paragraph of its response, which claimed without any support that, "[n]either of the decisions submitted by CompSouth has any bearing on the question presented at this *initial* stage of the proceedings. That question is whether the Commission should deny CompSouth's Application outright or should set a schedule for further proceedings on the merits of the declarations CompSouth has requested."[96] The Commission obviously saw

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[93] *See AT&T Corp. v. Core Comm'ns, Inc.*, 806 F.3d 715, 718 (3rd Cir. Nov. 25, 2015).

[94] *Id.*, p. 729.

[95] *See* Verizon Response to CompSouth's Supplemental Citations (filed Feb. 5, 2016).

[96] *See* AT&T Kentucky's Response to CompSouth's Submission of Supplemental Citations, p. 1.

through AT&T Kentucky's bluster and issued a procedural schedule as AT&T Kentucky originally requested. Even AT&T Kentucky must now concede the decisions of the California Public Utilities Commission and the U.S. Court of Appeals for the Third Circuit are highly relevant. The clear trend in the law is to recognize that §§ 251 – 252 fully encompass voice interconnections in IP format.

D. Staff Opinion 2013-015 Fulfills an Important Public Policy

The value of IP voice interconnection has previously been established,[97] and it is beyond disputation that any reasonable effort to pursue economic development in the Commonwealth is a valid public purpose.[98] Telecommunications networks are the backbone of a sound economy, the pursuit of which is a legitimate government interest.[99] And yet, all of the publicly-filed voice interconnection agreements between AT&T Kentucky and CBT and CompSouth's members are for TDM interconnection and all are in evergreen status.[100] None of these existing agreements provide rates, terms, and conditions for IP voice interconnection (or for the exchange of voice traffic between managed packet networks). When AT&T Kentucky gives notice to terminate existing voice interconnection agreements that are in evergreen status, all the CLECs without an IP voice interconnection agreements in place will be unable to deliver the traffic of their customers to the customers on AT&T Kentucky's

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[97] *See* Section III, B, *supra*., and accompanying text.

[98] *See Dannheiser v. City of Henderson*, 4 S.W.3d 542, 546 (Ky. 1999) citing *Norman, State Auditor, v. Kentucky Bd. of Managers of World's Columbian Exposition,* 20 S.W. 901 (Ky. 1892); *Hager v. Kentucky Children's Home Society,* 83 S.W. 605 (1904); *Butler v. United Cerebral Palsy of Northern Ky., Inc.,* 352 S.W.2d 203 (Ky. 1961).

[99] *See Kentucky Harlan Coal Co. v. Holmes,* 872 S.W.2d 446 (Ky. 1994); *Hayes v. State Property and Buildings Commission,* 731 S.W.2d 797 (Ky. 1987); *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky. 1998).

[100] *See, e.g.*, AT&T Kentucky's Amended Response, p. 3.

networks – virtually shutting down the CLECs' business. Any effort to negotiate an IP interconnection agreement without an available regulatory backstop will be akin to negotiating a contract with no leverage with a party that has every economic interest to see the negotiation fail and benefits mightily if it does. That is ***NOT*** the outcome anticipated or intended by the General Assembly when it enacted KRS 278.530 or its predecessor statutes or the U.S. Congress when it enacted 47 U.S.C. §§ 251 – 252.

The importance of §§ 251 – 252 to competition in the market was summarized by CompSouth's expert as follows:

> There is nothing more fundamental to the Act than the provisions of Section 252 that require the filing of interconnection agreements for the exchange of voice traffic be filed for approval. The public filing of interconnection agreements is absolutely essential to achieving the Act's core requirement that such agreements be non-discriminatory and in the public interest. Moreover, most competitors use the opt-in provisions of Section 252 to both fully *review* all available contracts and then *choose* which best meets their needs. This system does not work if some agreements are secret and competitors cannot get (or, just as importantly, cannot be assured they have received) the same terms, conditions and prices as other competitors.[101]

Kentucky was one of the first states to go on record, via Staff Opinion 2013-015, as to what the interconnection obligations of ILECs will be with regard to IP voice services. Yet, nearly three years later, the ILECs have still successfully managed to avoid any serious negotiations on IP interconnections. As long as their existing voice interconnection agreements are in jeopardy, it is unlikely that any CompSouth member would force an ILEC to negotiate. What is even more troubling is the discovery – made for the first time in this proceeding – that AT&T Kentucky in particular is allowing its Kentucky customers to be

[101] Testimony of Joseph Gillan, p. 6.

served by an affiliate under IP voice interconnection agreements or arrangements that it has purposefully chosen not to join.[102] There is no other logical explanation for AT&T Kentucky's evasive use of corporate affiliates to provide what is in fact a service subject to the Commission's scrutiny. In other words, the entire time that AT&T Kentucky has been imploring the Commission to not step into the IP voice interconnection arena despite the clear and unambiguous statutory mandate to do so, it has been knowledgeable of the fact that its own affiliate(s) have been engaged in the very conduct which should be subject to the Commission's oversight.

As the telecommunications industry adopts IP technology, CLECs like CompSouth's members need to be able to interconnect their networks for the exchange of voice traffic regardless of the underlying technology. Uncertainty bred by the menacing actions and insinuations of legacy ILECs as to whether long-standing regulatory protections will continue to apply to IP voice interconnection agreements substantially affects the members of CompSouth and most other carriers. Further inaction by the Commission will force CompSouth's members to delay their deployment of IP voice networks or to accrue unnecessary costs and inefficiencies to convert IP voice traffic to the TDM technology just to deliver the voice traffic of their customers. As the United States Supreme Court has stated, "it is well settled that in reading regulatory and taxation statutes, form should be disregarded for substance and the emphasis should be on economic reality."[103] After nearly two years of formal proceedings, the Commission should adopt and affirm Staff Opinion 2013-015.

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[102] *See* AT&T Kentucky's Supplemental Responses Nos. 3, 4, 5, 8 and 9 to CompSouth's Information Requests (filed Jan 12, 2017).

[103] *United States v. Eurodif S. A.*, 555 U.S. 305, 317–18, 129 S. Ct. 878, 887, 172 L. Ed. 2d 679 (2009).

E. The Intervenors' Arguments that a Declaratory Order Should Not be Issued are Unpersuasive and Contrary to Kentucky Law

The Intervenors collectively asserted four arguments as to why the Commission should "do nothing" and allow the regulatory uncertainty as to the authority of the Commission with regard to IP voice interconnection to fester. Each argument, when dissected, is nonsense; however, it bears pointing out that each of these arguments is actually moot in light of the context in which the intervenors' objections were raised and the subsequent course of this proceeding. To demonstrate the point, consider AT&T Kentucky's original reaction to tw telecom's request for the Staff Opinion in 2013:

> [AT&T Kentucky] concludes that:
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> > [I]f tw telecom's questions are to be addressed at all, they should be addressed by the Commission itself after receiving evidence presented by interested parties in a formal contested case proceeding or, at a minimum, in the context of a formal application for a declaratory order that has been served on all persons who may be affected by the application.... In no event should these novel questions, which have nationwide significance, be addressed in the informal manner requested by tw telecom.[104]

Ironically, AT&T Kentucky has already received the very relief it requested three years ago. Although the Commission Staff did in fact issue the Staff Opinion, that in and of itself has proved insufficient to overcome the ILEC's unwillingness to submit to Commission jurisdiction under either KRS 278.530 or 47 U.S.C. §§ 251 – 252 in the context of negotiating IP voice interconnection agreements. Based upon AT&T Kentucky's own admission that a "formal application for a declaratory order that has been served on all persons who may be affected by the application" would be minimally sufficient to fully and finally resolve the

[104] Staff Opinion 2013-015, p. 2.

issues first raised by tw telecom and now asserted by CompSouth, AT&T Kentucky should be estopped from re-asserting the same objections in this formal proceeding.

1. The Commission has Jurisdiction to Issue a Declaratory Order in this Case

AT&T Kentucky and CBT both argue that the Commission has no authority to issue a Declaratory Order in this case because it is allegedly not empowered by 807 KAR 5:001, Section 19 to issue a declaration concerning federal law.[105] AT&T Kentucky's argument misconstrues both CompSouth's argument and the Commission's regulatory authority. Plainly, 47 U.S.C. § 252 confers jurisdiction upon state regulatory agencies to implement and enforce the interconnection agreement negotiation, arbitration and filing portions of the Act. Thus, the subject matter of this dispute is squarely within the jurisdiction of the Commission as set forth in federal law – at least until such time as a final, non-appealable order of the FCC may pre-empt such jurisdiction. Moreover, 807 KAR 5:001, Section 19(1) specifically states that the Commission shall have the authority to "issue a declaratory order with respect to the jurisdiction of the commission...." Clearly, the Commission's own regulation is not an impediment to moving forward towards a permanent resolution of these important issues.

Even in the absence of the regulation, however, KRS Chapter 278 and Kentucky common law conclusively affirm that the Commission has sufficient jurisdiction to decide this case. For instance, the intervenors do not dispute that the definition of a telecommunications "utility" in KRS 278.010(3)(e) encompasses providers and their facilities for the transmission and conveyance of voice traffic using IP format. Likewise, none of them argue that the Commission's exclusive and sweeping authority to regulate the rates, terms, and conditions of interconnection service for circuit-switched voice traffic somehow ends if the interconnection

[105] *See* AT&T Kentucky's Amended Response, pp. 1, 4-7; CBT Response, p. 7.

exchange is instead accomplished by IP protocol.[106] It is thus undisputed that IP voice interconnection is within the scope of the statutory grant of jurisdiction to the PSC. Looking even more broadly, it is well-established that an administrative agency always has the authority to examine and determine the scope of its jurisdiction.[107]

Another inconsistency in the ILEC's argument is that the Commission may have the express authority to interpret federal law when it is deciding a matter under a § 252(b) arbitration proceeding, but it lacks authority to consider the scope and effect of federal law in any other context. This attempt to limit Commission jurisdiction to construe federal statutes affecting its own jurisdiction is not only wrong, but is deeply ironic. The ILECs are effectively arguing that that the Commission should declare that it is without jurisdiction to issue a declaratory ruling involving interpretation of federal statutes based on an obviously inaccurate interpretation of those very federal statutes that is itself inconsistent with Commission precedent.[108] It is also inconsistent with FCC precedent which has encouraged "state commissions to take actions to provide clarity to [ILECs] and requesting carriers concerning which agreements should be filed for their approval" and to take the lead in determining "which

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[106] Even Kentucky statutes that have deregulated aspects of telecommunications regulation have expressly specified that they "do not limit or modify the duties of a local exchange carrier...to provide unbundled access to network elements or the commission's authority to arbitrate and enforce interconnection agreements...to the extent required under 47 U.S.C. Secs. 251 and 252...." KRS 278.5462(2) (broadband service); *see also* KRS 278.54611(2) pertaining to cellular and other mobile service ("The provisions of this section do not limit or modify the commission's authority to arbitrate and enforce interconnection agreements.").

[107] *See City of Greenup v. Public Service Commission*, 182 S.W.3d 535, 538 (Ky. App. 2005) ("[A] quasi-judicial agency such as the PSC, like a Court, has authority, by implication, to determine its own jurisdiction.").

[108] *See In the Matter of the Petition of Communications Venture Corporation d/b/a INdigital Telecom for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Order, Case No. 2009-00438, p.2 (Ky. P.S.C. Apr. 9, 2010) (determining as a threshold issue that "competitive access to 911/E911 services and facilities qualifies for interconnection under Section 251(c) and can be included within a Section 252(b) interconnection agreement").

sorts of agreements fall within the scope of the statutory standard...."[109] Such a categorical analysis is, by definition, unrelated to a particular arbitration proceeding.

AT&T Kentucky and CBT shamelessly ignore the jurisdictional nature of the very statutes that are the subject of this proceeding. In requesting what would amount to a dismissal of the case without prejudice, the ILECs have essentially argued that the Commission somehow loses jurisdiction over telecommunication service if the technology underlying that service improves. Such an argument is anathema to the legislative intent expressed in the legislature's chosen wording. The intervenors have utterly failed to identify any provision of the Federal Telecommunications Act of 1996, FCC regulations, or case law that preempts the Commission from deciding issues about its own jurisdiction.

2. A Declaratory Action is an Appropriate Method to Ascertain the Effect of Applicable Law

AT&T Kentucky's next argument is that the issues raised herein are unripe and can only be decided within the confines of an arbitration proceeding.[110] CBT makes a similar argument where it claims, "[t]o simply rule that any telephone company, regardless of the technology employed, may invoke the Commission's jurisdiction under either state law or the federal Telecom Act to seek an interconnection agreement accomplishes little."[111] Again, it bears emphasis that a proceeding for a Declaratory Order is one of the exact methods which

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[109] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, at ¶¶ 10, 11 (Oct. 4, 2002) (emphasis added).

[110] *See* AT&T Kentucky's Amended Response, pp. 1-2, 7-13.

[111] CBT Response, p. 6.

AT&T Kentucky suggested in 2013 would be an appropriate method for resolving this question.[112]

In essence, the ILECs attempt to set up a "the Chicken or the Egg" dilemma by arguing that the members of CompSouth should comply with the Telecommunications Act of 1996 by formally requesting negotiations for an interconnection agreement with the rates, terms and conditions for IP voice interconnection. If the negotiations fail, then the CLEC could request arbitration. The ILECs state it is only then that the Commission should rule on whether it has jurisdiction pursuant to federal and state law to adjudicate the arbitration. However, once the CLEC has filed for arbitration, the ILECs will likely argue that the Commission does not have jurisdiction to adjudicate an interconnection agreement for the IP exchange of voice traffic.[113] Spending the time and money to try to negotiate interconnection agreements only to go to arbitration and have the ILECs argue that the Commission does not have jurisdiction is not

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[112] Staff Opinion 2013-015, p. 2 (citing AT&T Kentucky's letter previously received). Consistency is apparently not a strong suit for AT&T. In a California proceeding involving AT&T California, the AT&T ILEC argued that it would be a violation of due process to *not* decide whether IP voice interconnection is subject to §§ 251 – 252 in the context of broader administrative proceeding. Seeing through AT&T California's delay tactic, the California PUC found:

> Contrary to carriers' assertions, the Commission does not need to hold a generic rulemaking proceeding on whether these interconnection agreements are subject to §§ 251/252 approval. Moreover, we find that affected parties have had more than adequate notice and opportunity to be heard....Not only did interested parties have the opportunity to submit a protest to the Advice Letter, they also had the opportunity to submit comments on the Draft Resolution.

In the Matter of the Approval of Executed Internet Protocol Multistate Agreements Submitted by Verizon California, Inc. in Advice Letter No. 12725 as Interconnection Agreements Pursuant to § 252 of the Federal Telecommunications Act, Resolution T-17546 (CD/GVC), Agenda No. 15356 (Rev. 2), pp. 9, 12 and 13 (Cal. P.U.C. Mar. 23, 2017).

When it comes to considering the nature of the proceeding in which this important statutory construction issue will be addressed – whether it is an arbitration proceeding or a formal request for a Declaratory Order – AT&T's ILECs seem to always say the road not chosen was the necessary path forward.

[113] *See* AT&T Kentucky's Amended Response, p. 12.

only a waste of resources, but causes a delay of the transition to IP technology. Furthermore, having this question answered now is more efficient than addressing multiple challenges to the PSC's jurisdiction in future arbitration requests. If the ILECs are insisting that the CLECs should request negotiations for IP voice interconnection pursuant to §§ 251 – 252, then they should admit that the Commission has jurisdiction over IP voice interconnection. In the absence of such a clear and unqualified admission it is quite evident that the ILECs are relying upon smoke and mirrors to evade their statutory obligations. Moreover, such a process ignores the fundamental right to adopt a preexisting arrangement. Here, AT&T Corporation has apparently never reduced its agreement with AT&T Kentucky to writing, which would at least reveal the IP arrangement that others should have the opportunity to adopt or use as a basis for further negotiations.

Additionally, it is not entirely certain that deferring the legal issues raised herein within the context of a § 252(b) arbitration proceeding would actually resolve the issues. An arbitration decision about whether there must be voice interconnection in IP format between two carriers could be a function of numerous factors in addition to the Commission's construction of KRS 278.530 (if even implicated in an arbitration case) and 47 U.S.C. §§ 251 – 252. Furthermore, the decision would be binding only on the two participants in the proceeding. In contrast, a declaratory proceeding permits the Commission to singularly focus on the legal effect of one factor (voice interconnection in IP *versus* TDM format)[114] and —

[114] The contract-approval case decision that AT&T Kentucky's Response cites as supporting its unripeness argument actually supports issuance of declaratory rulings on narrow legal questions. In its January 30, 2014 Order in Case No. 2013-00413, *In the Matter of the Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, at 19, the Commission denied the request for a broad declaration whether any (unspecified) dispute that might arise under the contracts was within its jurisdiction or "rightly belongs before the FERC or any other appropriate forum." The Commission then declared more narrowly that "any dispute relating to rates or service that may arise under the agreements approved in this Order should be filed here for our review and resolution" and that if the new contracts did not become effective the next day, "Kenergy will have no choice but to terminate service" *Id.* at 20, 21 (Ordering Paragraphs 3-4).

like an administrative case — throws open the opportunity to participate to every utility in affected categories so that the Declaratory Order's binding effect is well-understood and industry-wide. There is no alternative proceeding that the CompSouth participating members could initiate that would be as efficient and effective as this declaratory proceeding.

The Commission should further take notice of the United States Supreme Court's decision in *Sprint Commc'ns v. Jacobs*, wherein the Iowa Utilities Board ("IUB") decided a question implicating the interpretation of law relating to VoIP access charges. The procedural posture of IUB's decision is extremely relevant to this proceeding:

> Sprint filed a complaint against Windstream with the IUB asking the Board to enjoin Windstream from discontinuing service to Sprint. In Sprint's view, Iowa law entitled it to withhold payment while it contested the access charges and prohibited Windstream from carrying out its disconnection threat. In answer to Sprint's complaint, Windstream retracted its threat to discontinue serving Sprint, and Sprint moved, successfully, to withdraw its complaint. *Because the conflict between Sprint and Windstream over VoIP calls was "likely to recur," however, the IUB decided to continue the proceedings to resolve the underlying legal question, i.e., whether VoIP calls are subject to intrastate regulation.* The question retained by the IUB, Sprint argued, was governed by federal law, and was not within the IUB's adjudicative jurisdiction. The IUB disagreed, ruling that the intrastate fees applied to VoIP calls.[115]

Though the substantive legal question was different from the issues raised herein, the procedural and jurisdictional point in *Jacobs* is directly on-point here. Neither the Supreme Court of the United States, the U.S. Court of Appeals for the 8th Circuit, nor the U.S. District Court for the Southern District of Iowa expressed any concern with the fact that a state utility

[115] *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 589, 187 L. Ed. 2d 505 (2013) (citation omitted) (emphasis in original).

commission was deciding an issue arising under 47 U.S.C. § 251 outside the context of an interconnection agreement arbitration.

AT&T Kentucky's argument that *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) require the Commission to abstain from issuing an interpretation of law except in the context of an arbitration context is nonsense.[116] *Verizon North* and *Wisconsin Bell* stand for a proposition entirely different than the issues of concern in this proceeding. In both *Verizon North* and *Wisconsin Bell*, state action was pre-empted because the state sought to enforce 47 U.S.C. §§ 251 – 252 via a tariff rather than through interconnection agreement arbitration proceedings. That is not what is occurring here. As in *Jacobs*, the Commission is being asked to render an interpretation of law that is "likely to recur" in multiple disputes. The weakness of AT&T Kentucky's pre-emption argument is underscored by AT&T Kentucky's own admission that – despite relying heavily upon *Verizon North* and *Wisconsin Bell* – "[h]ere, AT&T Kentucky is not making a preemption argument."[117] It cannot make the argument because the facts of this case are very different from the cases AT&T Kentucky relies upon. If preemption was a good argument, AT&T Kentucky would certainly have invoked it herein.

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[116] *See* AT&T Kentucky's Amended Response, pp. 10-11. AT&T Kentucky also cites a decision from the Illinois Commerce Commission to support the claim that an interpretation of federal law is impossible outside the context of a § 252 arbitration proceeding. *See In the Matter of Sprint Com, 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*, Arbitration Decision, Docket 12-0550 (Ill. Comm'n Comm. June 26, 2013). What is important to point out, however, is that the Illinois decision appears to be based in part upon the "technical feasibility" of the interconnection, which it not an issue in this proceeding. In other words, if the Commission grants the declaratory relief sought herein, the *factual defense* put forth by Illinois Bell in the ICC proceeding would not be foreclosed as a *matter of law* in any future arbitration proceeding involving AT&T Kentucky.

[117] *Id.*

Affirming the Staff Opinion does no prejudice to either ILEC. As the Staff already wisely foresaw, a ruling on the jurisdictional questions asserted herein will have significant value outside the context of an arbitration proceeding and will assist the entire industry in negotiating and implementing IP voice interconnection agreements. Moreover, providing the requested declaratory relief will not lead to any preordained result in a future arbitration proceeding, as AT&T Kentucky posits. Each future arbitration will still have to be decided within the factual context of that particular proceeding, undertaken pursuant to the larger legal framework of the Telecommunications Act of 1996:

> Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law. However, each petition for arbitration stands on its own, and each case is "tied to factual circumstances or otherwise circumscribed in various ways" and does not guarantee interconnection with an IP network.[118]

In other words, the Commission can rule in this case on a critical *legal* issue of importance to the entire industry without prejudicing the rights or liabilities of any party to assert a *factual* issue in any future interconnection agreement arbitration proceeding. All 295 telecommunications carriers in the state have been informed of this proceeding and given an opportunity to participate. As it turns out, the parties most interested in participating were the ILECs who have the most to commercially gain from delaying or preventing any final Commission action on CompSouth's application. This situation is the very essence of a legal controversy that is ripe for review. The ILEC's objection on this point should also be summarily dismissed.

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[118] Staff Opinion, p. 5.

3. "Wait" Has Proven to be a Dubious Regulatory Strategy

AT&T Kentucky's and CBT's next argument is that the Commission should simply wait for the FCC to act before making its own declaration as to the meaning and effect of §§ 251 – 252.[119] Verizon parroted the argument in its own response.[120] The FCC has been deliberating upon the issue for nearly six years, which is four years longer than this case has been on the docket and two years prior to the date when Commission Staff first opined upon the question in testimony before the Kentucky General Assembly. In the intervening 18 months since the intervenors urged the Commission to show some patience, the FCC has *still* failed to act. Six years is a long time to wait for a federal agency to make a simple determination on one of the most crucial, unresolved points of law in the industry.

What is patently clear is that the status quo of uncertainty benefits the ILECs, and AT&T Kentucky in particular in light of its ability to evade Commission scrutiny by allowing an affiliate to serve its Kentucky customers. Once again, the Staff Opinion got it exactly right. While stating that §§ 251 – 252 are technology neutral, it allowed for the fact that the FCC may one day issue a contrary decision. In the meantime, however, the Staff saw the wisdom of issuing a Staff Opinion that was consistent with the plain language of the statutes, fulfilled Congress' intent by promoting competition and allowed for future developments in the law to answer the jurisdictional question conclusively:

> However, the FCC has not determined if the regime under 47 U.S.C. § 251 is also service neutral or if it varies with the type of service offered or what portions of the interconnection regime should apply to IP services or interconnection. As [AT&T Kentucky] states in [its] letter, the FCC has established an

[119] *See* AT&T Kentucky's Amended Response, pp. 13-14; CBT Response, p. 8. This dubious argument, even if accepted, would not preclude the Commission from moving forward with a decision regarding KRS 278.530.

[120] Verizon Response, p. 5.

> ongoing proceeding to address how IP interconnection and services should be addressed in an interconnection framework.
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> Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law. However, each petition for arbitration stands on its own, and each case is "tied to factual circumstances or otherwise circumscribed in various ways" and does not guarantee interconnection with an IP network.[121]

The Commission should not abdicate its jurisdiction under either KRS 278.530 or 47 U.S.C. 251 – 252 by waiting for an FCC Order that is long-overdue and nowhere in sight.

4. The ILEC's Argument Regarding the Significance of Existing Interconnection Agreements is Inconsistent with Their Own Representations

The ILEC's final argument is that relief is not available under KRS 278.530 because they currently have interconnection agreements in place with CompSouth's members.[122] AT&T Kentucky in particular relies upon a statement in the Staff Opinion,[123] which finds that KRS 278.530 only applies in the situation where an interconnection already exists:

> The Commission, however, has interpreted KRS 278.530 to apply to situations where interconnection does not already exist. The Commission has also noted that KRS 278.530 establishes a "procedure to be followed by aggrieved utilities, but does not prescribe the means by which the Commission must investigate and determine fair, just and reasonable rates." Therefore, Commission Staff concludes that while KRS 278.530 is "technology neutral," it only applies in the absence of an existing contract or interconnection and does not guarantee what procedure or standard the Commission should apply to reach a determination regarding the terms of interconnection. In short, even if a telephone company files a petition under KRS 278.530

[121] Staff Opinion, p. 5.

[122] *See* AT&T Kentucky's Amended Response, pp. 2-3, 13-16; CBT Response, p. 9.

[123] *See* AT&T Kentucky's Amended Response, pp. 15-16.

(which has not occurred since 1983), interconnection is not guaranteed.[124]

While CompSouth's members and the ILECs have *TDM* voice interconnection agreements; the most salient point, however, is the fact that the ILECs expressly deny having any *IP* voice interconnection agreements with CompSouth's members.[125] By their own admission, *there are no IP voice interconnection agreements with CompSouth's members.* Thus, for purposes of connecting an IP voice exchange with the exchange of one of the ILEC's, no such connection currently exists and the Commission's historic interpretation of the statute would be no obstacle to invoking the jurisdiction of the Commission or a circuit court to direct an IP voice interconnection on reasonable terms, rates and conditions. Ironically, by insisting that IP voice interconnection is different, the ILECs have put themselves in a position that is impossible to reconcile with their stated objection that KRS 278.530 is inapplicable due to their existing TDM voice interconnections.

V. CONCLUSION

This case is ripe for a decision and 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

[124] Staff Opinion, p. 4.

[125] *See, e.g.,* Testimony of Scott McPhee on behalf of AT&T Kentucky, p. 6 (asserting that every CompSouth member has an interconnection agreement with AT&T Kentucky); *but see* AT&T Kentucky's Supplemental Response No. 20 to CompSouth's Information Requests; CBT's Response Nos. 1a and 10 to CompSouth's Information Request (indicating that none of its interconnection agreements provide for or govern the exchange in IP format of voice traffic).

resolution on this issue in Kentucky. 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 the very evil that the enactment of §§ 251 – 252 was intended to prevent. CompSouth appreciates the time that Commission Staff and the Commission have dedicated to this case and this issue and respectfully ask that a Declaratory Order be issued forthwith.

WHEREFORE, on the basis of the foregoing, CompSouth respectfully requests the Commission to 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 24th day of March, 2017.

Respectfully submitted,

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Counsel for Competitive Carriers of the South, Inc.

VI. EXHIBITS

Documents	Tab
KRS 278.530	1
47 U.S.C. §§ 251 – 252	2
Staff Opinion 2013-015 (Oct. 23, 2013)	3

Steven L. Beshear
Governor

Leonard K. Peters
Secretary
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David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Linda Breathitt
Commissioner

October 24, 2013

PSC STAFF OPINION 2013-015

Carolyn Ridley
Vice-President, Public Policy
tw telecom of Kentucky, LLC
2078 Quail Run Drive
Bowling Green, KY 42104

Hood Harris, President
AT&T Kentucky
601 W. Chestnut Street, Suite 408
Louisville, KY 40203

RE: Request for Legal Staff Opinion
Commission Jurisdiction Over the Technology Used for Interconnection Pursuant to 47 USC §§ 251-252 and KRS 278.530

and

AT&T Kentucky's Request That Commission Staff Decline to Address tw telecom of Kentucky's Request for Legal Staff Opinion

Dear Ms. Ridley and Mr. Harris:

Commission Staff acknowledges receipt of Ms. Ridley's letter dated August 22, 2013, filed on behalf of tw telecom of Kentucky, LLC ("tw telecom"), requesting a staff advisory opinion to clarify comments that were made at the July 15, 2013 hearing conducted before the Interim Joint Committee on Economic Development where the Commission's jurisdiction over intercarrier matters was described as "technology neutral." Ms. Ridley has requested a Commission Staff opinion concerning whether or not the regulatory interconnection scheme under 47 U.S.C. §§ 251-252 and KRS 278.530 govern all voice traffic, regardless of underlying technology, transmission media, or protocol. Ms. Ridley also requests Commission Staff to advise whether this interconnection scheme guarantees the right of any provider of voice communications to file a petition with the Commission requesting an Order prescribing the rates, terms, and conditions of proposed interconnection with another provider. Ms. Ridley states that the answer to both of these issues is in the affirmative.

Commission Staff also acknowledges receipt of Mr. Harris' letter dated October 8, 2013, filed on behalf of AT&T Kentucky, requesting that Commission Staff decline to respond to tw telecom's August 12, 2013 request for a legal opinion. Mr. Harris states that although AT&T Kentucky disagrees with tw telecom's interpretation of applicable law, AT&T Kentucky is most concerned that tw telecom has asked Commission Staff to:

> (a) jump out in front of the Federal Communications Commission ("FCC") and federal courts in addressing a novel issue of profound national significance; (b) jump out in front of the Kentucky Commission and Kentucky courts in addressing a novel issue of profound national significance; and (c) effectively bypass input of other persons and entities who have an interest in, and would be affected by, any Staff opinion on those issues. In light of these concerns, we respectfully request that the Staff decline to address tw telecom's questions.

(Footnote omitted).

Mr. Harris states that interconnection with internet protocol ("IP) networks is nothing new or novel, but what is new or novel is tw telecom seeking to impose legacy interconnection regulations on "heretofore unregulated modern IP networks." Mr. Harris states that the FCC has an open proceeding to address these issues, that tw telecom is asking Commission Staff to "plow new ground ahead of the FCC and federal courts," and that tw telecom is asking Commission Staff to "plow new ground ahead of the Commission and the state courts."

Mr. Harris concludes that:

> [I]f tw telecom's questions are to be addressed at all, they should be addressed by the Commission itself after receiving evidence presented by interested parties in a formal contested case proceeding or, at a minimum, in the context of a formal application for a declaratory order that has been served on all persons who may be affected by the application . . . . In no event should these novel questions, which have nationwide significance, be addressed in the informal manner requested by tw telecom.

This Opinion letter responds to both letters. It represents Commission Staff's interpretation of the law as applied to the facts presented. This Opinion is advisory in nature and not binding upon the Commission should the issues presented herein be formally presented for Commission resolution.

Commission Staff disagrees with Mr. Harris' position that Commission Staff should decline to issue the opinion sought by tw telecom. As always, Commission Staff opinions have no legal precedential value and are advisory in nature. tw telecom's request for a legal opinion asks for a generic interpretation of a law, and does not ask Commission Staff to opine on the outcome of a specific factual scenario, or application of the law, that may come before the Commission. Moreover, while a party is entitled to request a declaratory order from the Commission pursuant to 807 KAR 5:001, Section 18, it is not required to file a petition with the Commission in lieu of requesting a Commission Staff opinion. Mr. Harris' position, if accepted and applied to other requests for Commission Staff opinions, would greatly reduce, if not eliminate, the number of Commission Staff opinions. Consequently, Commission Staff will not decline to address Ms. Ridley's letter.

Concerning Ms. Ridley's letter: Ms. Ridley states that, "KRS 278.530(1) describes the right of a "telephone company" to petition the Commission if it has been unable to negotiate reasonable terms to connect its exchange or lines with another provider . . ." and that "KRS 278.530 . . . uses the term 'telephone company,' which is otherwise undefined in KRS Chapter 278. However, Kentucky case law supports the common sense proposition that any statute related to a 'telephone company' is to be applied in a technology neutral manner . . . ."

Ms. Ridley also states that:

> Similarly, 47 U.S.C § 251 requires all telecommunication carriers ". . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." but like KRS 278.530, it does not reference particular technology, transmission media, or protocols. And the FCC has noted that Section 251 of the Act does not limit the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic, describing the statutory language as "technology neutral." . . . The FCC has also explained that "[t]he duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, otherwise. (Citations omitted.)

Ms. Ridley concludes that "[u]nless the FCC expressly orders otherwise, the Kentucky Commission appears to have authority to apply Section 251's requirements to any telecommunications carrier . . ." and, that "KRS 278.530 and 47 U.S.C. § 251 appear to be technologically neutral and to continue to provide a route by which the Commission may compel interconnection and specify reasonable terms for the interconnection parties." (Citations omitted.)

Ms. Ridley is asking Commission Staff for an opinion on a matter that neither the Commission nor Commission Staff has addressed formally or informally. Ms. Ridley is requesting an interpretation of KRS 278.530(1) which provides that:

> 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.

Ms. Ridley is also requesting an interpretation of 47 U.S.C. § 251, which provides the statutory framework of interconnection between telecommunication providers. This interpretation also implicates 47 U.S.C. § 252, which provides for the procedure for seeking interconnection under the 47 U.S.C. §251 interconnection regime.

Ms. Ridley is correct that KRS 278.530 does not specifically define the types of technology that may be utilized for the connecting of lines or the routing and switching of calls. In fact, KRS Chapter 278 neither specifies nor exempts types of interconnection dependent upon the underlying technology used. Therefore it follows that if a petition for the connecting of lines is filed pursuant to KRS 278.530, the Commission may entertain the petition regardless of the technology involved.

The Commission, however, has interpreted KRS 278.530 to apply to situations where interconnection does not already exist.[1] The Commission has also noted that KRS 278.530 establishes a "procedure to be followed by aggrieved utilities, but does not prescribe the means by which the Commission must investigate and determine fair, just and reasonable rates."[2] Therefore, Commission Staff concludes that while KRS 278.530 is "technology neutral," it only applies in the absence of an existing contract or interconnection and does not guarantee what procedure or standard the Commission should apply to reach a determination regarding the terms of interconnection. In short, even if a telephone company files a petition under KRS 278.530 (which has not occurred since 1983), interconnection is not guaranteed.[3]

---

[1] Case No. 8727, *General Telephone Company of Kentucky v. South Central Bell Telephone Company* (KY PSC May 12, 1983) at 5.

[2] *Id.*

[3] Commission Staff also notes that KRS 278.530 allows a telephone company to bring suit in Franklin Circuit Court, or the Circuit Court of the county in which the telephone company making the demand resides, and request interconnection with another telephone company.

With regard to the interconnection regime under 47 U.S.C. § 251, Commission Staff agrees with Ms. Ridley's characterization that the FCC has declared the interconnection regime under that statute to be "technology neutral." However, the FCC has not determined if the regime under 47 U.S.C. § 251 is also service neutral or if it varies with the type of service offered or what portions of the interconnection regime should apply to IP services or interconnection.[4] As Mr. Harris states in his letter, the FCC has established an ongoing proceeding to address how IP interconnection and services should be addressed in an interconnection framework.[5]

Commission Staff concludes that the current interpretation of 47 U.S.C. § 251 allows a carrier to file a petition for arbitration under 47 U.S.C. § 252 and seek interconnection regardless of the underlying technology. Kentucky law does not prohibit this result, nor does the current state of the FCC or federal law. However, each petition for arbitration stands on its own, and each case is "tied to factual circumstances or otherwise circumscribed in various ways" and does not guarantee interconnection with an IP network.

Commission Staff notes that the FCC, by its actions, could preempt the Commission from acting on IP-enabled services, or provide that a different interconnection regime applies other than the traditional regime found in 47 U.S.C.§ 251. Therefore, while a carrier can currently file under 47 U.S.C. § 252 for interconnection to an IP network, FCC action could affect this right.

Based on the foregoing, and with the limitations discussed, *supra*, Commission Staff concludes that the interconnection regimes under KRS 278.530 and 47 U.S.C § 251 are technology neutral.

Thank you both for your letters pertaining to the matters discussed above. Should you have any questions or concerns, please contact Staff Attorney J.E.B. Pinney at 502-782-2587 or at jeb.pinney@ky.gov.

Sincerely,

Jeff Derouen
Executive Director

[4] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform: Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) at ¶ 1381.

[5] *Id.* at ¶s 1335 to 1403.

Baldwin's Kentucky Revised Statutes Annotated
Title XXIV. Public Utilities
Chapter 278. Public Service Commission (Refs & Annos)
Telephone and Telegraph Companies

KRS § 278.530

278.530 Procedure to compel connection with telephone exchange or line

Currentness

(1) 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.

(2) The company desiring the connection may file a written statement with the Public Service Commission setting out the reasons why the connection is desired and the points at which the connection should be made, and giving the name and address of the owner or chief officer residing in this state of each company with which the connection is desired. The executive director of the commission shall thereupon cause a copy of the written statement to be served upon the companies owning or operating such lines or exchanges, by mailing a copy to the owner or chief officer residing in this state, and shall fix a date, not earlier than ten (10) days from the date of mailing the notice, for the hearing of the application. Upon the day so fixed for the hearing, the companies may respond in writing to the application, and either side may introduce such testimony as it desires and be heard by attorneys. After the hearing is completed the commission shall make its finding and enter it in a book to be kept for that purpose, and shall mail a copy thereof to each side; and if the commission directs the connection to be made it shall indicate the points where the connection is to be made, the number of wires to be connected, the terms and conditions and the rates to be charged, and the division of the rates charged between the companies handling the messages. The cost of making the connection shall be borne equally by the parties. If any company refuses to make a connection for a period of thirty (30) days after the finding of the commission directing the connection to be made, the company desiring the connection may make the connection and may recover one-half (1/2) of the cost thereof from the company so refusing.

(3) In lieu of the procedure provided in subsection (2) of this section, the company desiring the connection may compel the connection upon reasonable terms by suit in equity in the Franklin Circuit Court or in the Circuit Court of the county in which the company making the demand resides or has its chief office in this state, and the court shall, by mandatory injunction, compel the physical connection of the wires and interchange of messages, and enforce the same by contempt proceedings and in the same manner that other mandatory injunctions are enforced.

Credits

HISTORY: 1994 c 166, § 4, eff. 7-15-94; 1982 c 82, § 49, eff. 7-15-82; 1978 c 379, § 53; 1942 c 208, § 1; KS 4679f-2, 4679f-3

Notes of Decisions (8)

KRS § 278.530, KY ST § 278.530
Current through Ch. 7 of the 2017 Reg. Sess.

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)

47 U.S.C.A. § 251

§ 251. Interconnection

Effective: October 26, 1999
Currentness

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 251, as added Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 61; Pub.L. 106-81, § 3(a), Oct. 26, 1999, 113 Stat. 1287.)

Notes of Decisions (254)

47 U.S.C.A. § 251, 47 USCA § 251
Current through P.L. 114-327. Also includes P.L. 114-329 and 115-1 to 115-8. Title 26 current through 115-8.

End of Document

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)

47 U.S.C.A. § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

Effective: February 8, 1996
Currentness

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 252, as added Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 66.)

Notes of Decisions (157)

47 U.S.C.A. § 252, 47 USCA § 252
Current through P.L. 114-327. Also includes P.L. 114-329 and 115-1 to 115-8. Title 26 current through 115-8.

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