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**

SUPPLEMENTAL BRIEF OF WINDSTREAM COMMUNICATIONS, INC.

Comes now Windstream Communications, Inc. ("Windstream"), by counsel, pursuant to the Commission's August 6, 2018 Order in the above-styled docket, and for its Supplemental Brief, respectfully states as follows:

I. INTRODUCTION

The Commission's August 6, 2018 Order directs the parties to file supplemental briefs that "update the Commission on the state of relevant federal law, and provide a response to the arguments raised in the initial briefs."[1] The brief filed by Windstream's predecessor, Competitive Carriers of the South, Inc. ("CompSouth"), anticipated each of the substantive arguments raised by the intervenors, BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky") and Cincinnati Bell Telephone Company, LLC ("CBT") and MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, LLC ("Verizon"). Accordingly, no response is necessary to the arguments raised in the initial briefs of these parties

[1] *See* Order, p. 4.

and Windstream will primarily devote its brief to providing an update on known and relevant federal law – all of which is favorable to Windstream.

II. ARGUMENT

1. Federal Statutes

The Application in this proceeding requests the Commission to: (1) affirm the substance of Staff Opinion 2013-015; (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 those agreements or arrangements are subject to 47 U.S.C. §§ 251-252 and available for opt-in by other telecommunications carriers. The two federal statutes in question have not been amended by Congress since the filing of the parties' original briefs in March 2017. As set forth in the CompSouth Brief, there is nothing in the federal statutes to disrupt the FCC's prior determination that § 251 is technologically neutral, focuses upon the requirement to interconnect,[2] and requires that such interconnection be on "just, reasonable and nondiscriminatory" terms,[3] rather than focusing upon the nature of the technology used to accomplish the interconnection.[4] Thus, there are no changes in law with respect to relevant federal statutes.

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[2] *See* 47 U.S.C. § 251(a)(1).

[3] 47 U.S.C. § 251(c)(2)(D).

[4] *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.").

2. Pre-Existing Federal Communications Commission Dockets

As the Commission is aware, a similar question to that posed herein was raised before the Federal Communications Commission ("FCC") in a 2011 request for declaratory relief.[5] The 2011 request for a federal declaratory order built upon a prior FCC decision which unmistakably held that Voice over Internet Protocol ("VoIP") service was governed by § 251 of the Federal Telecommunication Act ("Telecom Act").[6] There have been no new relevant orders entered by the FCC since the filing of the parties' initial briefs in this case in either Docket No. WC 11-119 or Docket No. 10-90.

3. Updates in Federal Court Cases

Two new federal Court of Appeals decisions have been entered since the original briefs were filed in this matter; both of these decisions are consistent with the case law previously cited by CompSouth and demonstrate the judiciary's consistent conclusion that state authority continues to apply to IP voice traffic under federal law. First, the United States Court of Appeals for the 8th Circuit issued a decision on June 23, 2017 affirming the principle that VoIP calls are subject to state authority under § 251, holding: "We conclude that § 251(g) preserved state authority to regulate that traffic and that federal law did not preempt the [Iowa] Board's authority to regulate the nonnomadic, intrastate long-distance VoIP calls at issue in this case." *Sprint Commc'ns Co., L.P. v. Lozier*, 860 F.3d 1052, 1058–59 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 669, 199 L. Ed. 2d

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[5] *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.

[6] *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).

534 (2018). Likewise, the 5th Circuit Court of Appeals' decision in *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., L.P.*, 861 F.3d 566, 574 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 669, 199 L. Ed. 2d 587 (2018), is instructive. In that case the Court stated:

> Sprint contends these authorities stand for the proposition that, when there is a "net protocol conversion" from Internet-protocol format (like VoIP) into another format (like traditional format), the service is an "information service". Sprint urges its proposed rule applies here, and states that, because the calls at issue originated in VoIP and terminated in traditional format, there was a net protocol conversion, making Sprint's transfer service an information service exempted from the tariff rate.[7]

Relying upon FCC precedent, the Court of Appeals rejected Sprint's argument, stating:

> ...[T]elephone calls originating in VoIP format can qualify as telecommunications services even if they terminate in a different format. Therefore, the net-protocol-conversion rule proposed by Sprint fails, and the telecommunications-services-versus-information-services distinction does not resolve the dispute.[8]

The only federal ruling which could yield a different outcome is a 2017 District Court decision from Minnesota,[9] however, that ruling obviously has less precedential value that two Court of Appeals decisions and is on appeal to the 8th Circuit Court of Appeals in any event. A ruling by the Commission that §§ 251 and 252 of the Telecom Act are technology neutral will plainly be consistent with the most recent federal case law.

4. The FCC's *Restoring Internet Freedom Order*

On January 4, 2018, the FCC released its *Restoring Internet Freedom Order* ("*RIF Order*"), which rolled back Obama Administration rules imposing public-utility style regulation

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[7] *Id.* Verizon made a similar argument earlier in this proceeding.

[8] *Id.*, p. 575.

[9] *See Charter Advanced Servs. (MN), LLC v. Lange*, 259 F. Supp. 3d 980, 987 (D. Minn. 2017) ("In this specific factual context, the touchstone of the information services inquiry is whether Spectrum Voice acts on the customer's information—here a phone call—in such a way as to "transform" that information. By altering the protocol in which that information is transmitted, Charter Advanced's service clearly does so.") (citations omitted).

of the internet.[10] So that there could be no ambiguity as to the scope of the *RIF Order*, the FCC made clear that traditional telecommunications service remained fully regulated under Title II (§ 251, *et seq.*) of the Telecom Act, even if such service relied in part upon the use of internet infrastructure. The FCC noted, "[f]urther, we observe that to the extent [internet service providers] 'use their broadband infrastructure to provide video and voice services, those services are regulated in their own right.'"[11] Thus, the FCC's most recent precedent also supports the conclusion that Staff Opinion 2013-015 should be affirmed and adopted.

5. Public Policy Supporting Competitive Markets Remains Unchanged

The very purpose of the Telecom Act is to encourage a competitive market for telecommunications services.[12] However, the policy advocated by AT&T, Verizon and CBT, as discussed in the original CompSouth Brief, is anti-competitive and ruinous for competitive local exchange carriers.[13] Conversely, the application of §§ 251 and 252 of the Telecom Act to IP voice message interconnection agreements levels the playing field. This conclusion is not just hypothetically correct, but rather has been validated in fact. In the recent case of *Michigan Bell Tel. Co. v. Eubanks, et al.*, Slip. Op., Case No. 1:14-CV-416 (W.D. Mich., July 10, 2017),[14] the federal court overturned the decision of the Michigan Public Service Commission ("MPSC") when it rejected certain language negotiated into an interconnection agreement that was inconsistent with the MSPC's arbitration ruling on the disputed issue. In *Michigan Bell*, the MPSC rejected an interconnection agreement that did not include language to mandate IP to IP interconnection under

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[10] *See In the Matter of Restoring Internet Freedom*, Declaratory Ruling Report and Order, WC Docket No. 17-108, FCC 17-166 (Jan. 4, 2018).

[11] *Id.*, ¶ 23 (citation omitted).

[12] *See generally* 47 U.S.C. Subchapter II – Common Carriers, Part II, "Development of Competitive Markets".

[13] *See* CompSouth Brief, Sec. IV, D.

[14] As it is an unpublished opinion, a copy of the Slip Opinion in *Michigan Bell* is attached hereto as a convenience to the Commission and parties.

§ 251, which certainly leaves no doubt as to whether the MPSC views §§ 251 and 252 as being technology neutral. The federal court struck down the MPSC's decision, but not on substantive grounds; instead, the court overruled the MPSC because it had not honored the arbitrating parties' post-arbitration, negotiated compromise on the disputed interconnection requirement, as required by § 252(e). In other words, while the MPSC did not violate the law in holding that IP voice interconnections are subject to § 251 in a § 252 proceeding, it could not lawfully ignore the fact that this determination had in causing the parties to subsequently enter into a negotiated compromise on the issue. The case is significant because it demonstrates the power that § 251 has on negotiations when employed as contemplated under law. An incumbent local exchange carrier, when under a state commission mandate to allow IP voice interconnections and to file such agreements publicly, became much more willing to negotiate with the smaller carrier who otherwise lacked bargaining power. The *Michigan Bell* case simply accepts that §§ 251 and 252 are technology neutral and offers a vivid example of how following the letter of the law will actually fulfill the purpose of the law.

III. CONCLUSION

As William Gladstone, the four-time Prime Minister of the United Kingdom and Ireland, once famously remarked, "justice delayed is justice denied."[15] AT&T, Verizon and CBT have eagerly sought to impede and avoid a final declaration of the law in this case for over three years, despite a Staff Opinion that plainly, simply and correctly addresses the essential issue of the case. Both KRS 278.530 and §§ 251 and 252 of the Telecom Act are technology neutral and should be

[15] The quote is first attributed to Mr. Gladstone by Lord Edward Henry Stanley, the 15th Earl of Derby, in a debate occurring in the House of Commons on March 30, 1868. *See* https://hansard.parliament.uk/Commons/1868-03-30/debates/20754f63-3212-4606-9972-5062eeeaa16e/MotionForACommittee?highlight=gladstone#contribution-345f381a-a992-4184-85f1-b4a9f7960e91 (last accessed Aug. 30, 2018).

applied in a manner that encourages a competitive marketplace and eschews ruinous, one-sided concentrations of market power.

WHEREFORE, on the basis of the foregoing, CompSouth respectfully requests the Commission enter 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) In 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 5th day of September, 2018.

Respectfully submitted,

David S. Samford
L. Allyson Honaker
GOSS SAMFORD, PLLC
2365 Harrodsburg Road, Suite B-325
Lexington, KY 40504
(859) 368-7740
david@gosssamfordlaw.com
allyson@gosssamfordlaw.com
Counsel for Windstream Communications, 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 Wednesday, September 5, 2018; 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 within two (2) business days.

Counsel for Windstream Communications, Inc.