

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

MOTION TO COMPEL

AND

MOTION TO EXTEND PROCEDURAL SCHEDULE

Comes now the Competitive Carriers of the South, Inc., (“CompSouth”), by counsel, pursuant to 807 KAR 5:001 Section (4) and other applicable law, and for its Motion to Compel and Motion to Extend the Procedural Schedule, respectfully states as follows:

I. Background

CompSouth filed this action on August 14, 2015 for the purpose of seeking a declaratory order from the Kentucky Public Service Commission (“Commission”) affirming Staff Advisory Opinion 2013-015, which held that the interconnection and arbitration obligations variously imposed by KRS 278.530 and 47 U.S.C. §§ 251 and 252 were applicable to all telecommunication interconnections regardless of the underlying technological format, facilities or protocols involved (the “Staff Opinion”). The Staff Opinion was important because it concluded that incumbent exchange carriers could not act unfairly, unreasonably or in a discriminatory manner whenever a telecommunications provider sought to enter into an interconnection agreement using an internet

protocol (“IP”) service. In seeking a declaration affirming the Staff Opinion, CompSouth explained the importance of such a decision:

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.¹

Three incumbent local exchange carriers (“ILEC”) – MCImetro Access Transmission Services LLC, d/b/a Verizon Access Transmission Services (“Verizon”); BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T”); and Cincinnati Bell Telephone Company, LLC (“CBT”) – filed motions to intervene and opposed CompSouth’s request for a declaratory order. On June 23, 2016, the Commission issued a procedural order that allowed for the filing of testimony and one round of data requests. On August 9, 2016, the Commission issued an amended procedural order that allowed for briefs to be filed before the scheduled January 31, 2017 hearing.

CompSouth filed testimony to support its application on August 4, 2016. Verizon propounded three data requests to CompSouth, which were answered in responses filed on September 9, 2016. Neither AT&T nor CBT engaged in any effort at discovery. Verizon and AT&T filed testimony on October 26, 2016. CBT did not file any testimony. CompSouth tendered data requests to the intervening ILECs on November 9th. CBT filed responses containing

¹ Application, ¶ 3.

significant amounts of confidential information on November 18, 2016. Verizon and AT&T filed their respective responses on November 23, 2016.

II. Motion to Compel

A. Many of AT&T's Responses are Incomplete and Evasive

CompSouth propounded twenty-two data requests to AT&T. AT&T objected to most all of CompSouth's requests on the basis that the information being sought was "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence."² In each case, AT&T relied upon Kentucky Rule of Evidence 401. However, KRS 278.310 makes it clear that the technical rules of legal evidence are not binding upon the Commission. Thus, as a general matter, AT&T's objection as to relevancy is misplaced.

Yet even if KRE 401 did apply to this proceeding, the sought after information is plainly relevant to the claims asserted in CompSouth's application. While CompSouth agrees that this case presents predominately legal issues, the practical result of the ruling requested by the Intervenors would effectively be to bless terms, conditions and pricing arrangements in IP interconnection agreements that are unfair, unreasonable and discriminatory. To the extent that AT&T and any other intervenor today have IP interconnection agreements, seeking the disclosure and review of those agreements are fair game for discovery. To say otherwise would require the conclusion that the law cannot be construed without regard to the absurd consequence which any given interpretation would yield. Clearly, such a proposition is unsupported in Kentucky law. *See Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Company*, 963 S.W.2d 493, 500 (Ky. 1998). The intentions, actions and non-actions of the intervenors with regard to IP

² AT&T Responses to Data Requests No. 2-9 and 14-16 (Nov. 23, 2016).

interconnections are discoverable matters. This is demonstrated to be particularly true in the context of the specific requests and responses at issue in this motion.³

For instance, in Request No. 2 CompSouth asked AT&T to describe how it would respond to a generic request for IP interconnection under 47 U.S.C. §§ 251-252. AT&T's response is essentially, "it depends." While that answer may reflect AT&T's position, it is by no means informative or complete, which renders it insufficient as a matter of law.⁴ Surely AT&T knows how it would likely respond to a request for IP interconnection for it claims that it has such agreements today.⁵ But rather than help clarify what the factual and legal issues might be with regard to such interconnection, AT&T instead chooses to obfuscate. Such evasiveness directly contradicts the company's pledge to "assist the Commission in fully considering this matter...."⁶ It must not be forgotten that AT&T (as well as Verizon and CBT) voluntarily submitted themselves to the jurisdiction and authority of the Commission in this case. By doing so, AT&T likewise submits to reasonable and relevant inquiry from other parties and must exercise good faith in responding to such inquiry. It has not done so in this instance. AT&T should be compelled to

³ CompSouth could have moved to compel a complete response with regard to virtually every response tendered by AT&T. However, in the interests of judicial economy and in order to not lose sight of the main legal issues presented in this case, CompSouth has consciously chosen to limit the scope of this motion to the most egregious examples of AT&T's failure to be fully transparent.

⁴ See 807 KAR 5:001 Section 4(12)(d)5; *In the Matter of an Investigation of the Gas Costs of B & H Gas Company Pursuant to KRS 278.2207 and the Wholesale Gas Price it is Charged by its Affiliate, B & S Oil and Gas Company, Pursuant to KRS 278.274*, Order, Case No. 2015-00367, p. 10 (Ky. P.S.C. Oct. 20, 2016) (granting the Attorney General's motion to compel supplemental responses to answers that did not constitute "an adequate and complete response"); *In the Matter of the Application of Big Rivers Electric Corporation for a Declaratory Order*, Order, Case No. 2016-00278, p. 5 (Ky. P.S.C. Nov. 21, 2016) (requiring party to clarify its answer that is "not fully clear").

⁵ See Presentation of Frank Simone, Vice President/Federal Regulatory, AT&T, before the South Carolina Public Service Commission, Ex Parte Briefing ND-2015-31-C, January 12, 2016 at Tr. 42 (quoted in the Direct Testimony of Joseph Gillan (filed Aug. 4, 2016)).

⁶ AT&T Motion to Intervene, p. 1 (Oct. 12, 2015).

supplement its response to Request No. 2 with additional detail as to how it might respond to a request for IP interconnection.

Most importantly, AT&T refused to identify or provide copies of IP interconnection agreements that were already in place. For instance, in Request No. 3, CompSouth asked AT&T to identify any agreement it or an affiliate had entered into that involved the exchange of voice traffic in IP format. Request No. 4 asked for identical information regarding IP interconnection agreements that are under negotiation by AT&T or its affiliates and Request No. 5 asked AT&T to provide copies of the IP interconnection agreements referred to by its witness in a similar proceeding before the South Carolina Public Service Commission. AT&T completely refused to answer all three of these requests. Instead, it raised the same “relevant evidence” objection discussed above and further sought to hide behind the distinction between it and its affiliates’ corporate identity.⁷ AT&T’s responses certainly imply that it is aware of IP interconnection agreements that were entered into by its affiliates or that are under negotiation, but such agreements are put off limits from discovery by virtue of the sweeping, unsubstantiated claim that such agreements are not within AT&T’s possession, custody or control. AT&T’s counsel is listed as the person solely responsible for that factual assertion and will therefore likely need to be called as a witness at the hearing unless a more detailed response is provided in a supplemental response. CompSouth is willing to clarify its request to be clear that it is only requesting agreements by an affiliate that address traffic originating or terminating to AT&T Kentucky’s customers. But AT&T’s answer is so non-responsive as to be certain whether or not its “affiliate’s objection” applies only to agreements (if any) that are completely unrelated to AT&T Kentucky’s obligations,

⁷ CompSouth could have hidden behind the same objection with regard to the Data Requests from Verizon, which were really directed to CompSouth’s Members. In good faith, CompSouth consulted and answered Verizon’s requests with substantive responses.

or whether they are intended to hide from the Commission arrangements that coexist across multiple AT&T companies.

In addition, AT&T claimed that any agreement that would be responsive to the requests would be shielded from production due solely to its confidential nature. This objection is simply not credible. The Commission's regulations (807 KAR 5:001 Section 13) plainly provide for the filing of confidential information. Indeed, CompSouth is negotiating such an arrangement with CBT. AT&T cannot unilaterally avoid making necessary disclosures on the basis that the disclosure is claimed to be confidential. AT&T should be compelled to produce any and all agreements to which it or an affiliate is a party that involves IP interconnection and which apply to traffic that originates or terminates to an AT&T Kentucky customer. To the extent that AT&T claims that it lacks possession, custody or control of any such affiliate agreements, it should provide the factual basis for such assertion or tender its counsel for cross-examination at the hearing in this matter.

Other questions which AT&T side-stepped involve the nature of its interactions with potential counterparties to IP interconnection agreements. As an example, Request No. 6 presented AT&T with a conditional question. If there was a difference between any of the terms, conditions or pricing provisions of the agreements that were responsive to Request No. 4, then AT&T was requested to state whether any of its counterparties were first offered the opportunity to sign an existing agreement before entering into an agreement with differing terms, conditions or pricing provisions. AT&T claims that it does not understand the question, which is difficult to believe. Yet even if that is accurate, it certainly did not seek a clarification from CompSouth prior to tendering its non-responsive answer. A similar question was asked of Verizon, which had no

difficulty understanding and responding.⁸ AT&T should be compelled to answer the question substantively.

Other responses demonstrate AT&T's unwillingness to disclose its current practices with regard to IP interconnection agreement negotiations. In Request No. 7, AT&T was asked to state simply whether AT&T provided copies of pre-existing agreements with each of the carriers that have requested IP interconnection. Request No. 8 asked AT&T to confirm whether or not it or an affiliate required a counterparty to disclaim the applicability of 47 U.S.C. §§ 251-252 as a precondition to signing the agreement. Request No. 9 asked AT&T to confirm whether or not it mandates the signing of a non-disclosure agreement as a prerequisite to engaging in negotiations of an IP to IP agreement for the exchange of voice traffic. Each of these requests could be answered with simple "yes"/"no" answers. All of these requests seek factual, not legal, responses. AT&T should be compelled to answer whether or not it conditions or limits its negotiation of IP interconnection agreements.

In Request No. 14, AT&T was asked to "[p]lease provide for year-end 2012, 2013, 2014, 2015 (and update when 2016 data becomes available), the number of switched access lines and facilities-based VoIP lines in Kentucky, separately for residential and business customers." Request No. 15 asked AT&T to "provide AT&T's Form 477 response to the FCC for 2012, 2013, 2014 and 2015 for Kentucky identifying the number of voice lines and VoIP subscriptions, aggregated for the state of Kentucky." CBT answered the question by providing the information to the Commission under seal, but AT&T objected and alternatively claimed the information responsive to Request No. 14 was information available from the Federal Communications Commission and the information responsive to Request No. 15 would only be provided when

⁸ See Verizon Response No. 4 (filed Nov. 23, 2016).

required by the Commission. These objections are not appropriate. CompSouth seeks the information responsive to Request 14 directly from AT&T so that it is verified by AT&T and carries with it the appropriate evidentiary value that is contemplated by the Commission's discovery order. The Commission has previously dismissed the notion that a party has no obligation to produce information when it has filed that information with another public agency.⁹ Likewise, refusing to produce a document exclusively upon the basis that it is confidential ignores the requirements for filing confidential information on a confidential basis as set forth in 807 KAR 5:001, Section 13. AT&T should be compelled to file the information which its non-responsive answers confirm is within its possession.

In Request No. 20, AT&T was asked to confirm its own understanding as to whether the interconnection agreements that it has already entered into with CompSouth's participating members (Birch Communications, Inc., Level 3 Communications, LLC and Windstream Communications, LLC) allowed for the exchange of IP voice traffic in IP format. AT&T responded by saying that it had not had time to adequately examine the interconnection agreements in question and "cannot properly be required to do so...." The claim that relevant discovery should not be produced because of the time involved in inquiring has no merit.¹⁰ If AT&T needed more time in which to properly respond to this data request, CompSouth would have willingly agreed to an extension of time in which to respond. No such additional time was requested. The contention

⁹ See *In the Matter of the 2012 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Order, Case No. 2012-00149, p. 3 (Ky. P.S.C. Sep. 7, 2012) ("We also find that, rather than search for information via the various governmental environmental agencies, a party should be able to expect that information developed and/or maintained by a utility jurisdictional to the Commission will be provided when the party makes a legitimate request for such information.").

¹⁰ See *In the Matter of an Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From November 1, 2013 Through April 30, 2014*, Order, Case No. 2014-00230, pp. 3-4 (Ky. P.S.C. Apr. 7, 2015) (rejecting the contention that a request requiring "approximately 40 to 60 hours" to prepare was not unduly burdensome).

that AT&T cannot be properly required to respond is additional proof that AT&T's desire to intervene did not arise from an altruistic desire to help the Commission fully consider the issues. What appears more likely is that AT&T sought intervention in order to secure a license to use its legacy infrastructure advantages as a means to force competitive carriers to agree to terms, conditions and pricing arrangements that are unfair, unjust or discriminatory in order to enjoy IP interconnection privileges. As a matter of business, AT&T should be able to articulate what it thinks its existing interconnection agreements with CompSouth's participating members allow and do not allow – and it should be compelled to put that understanding in writing.

B. Certain of Verizon's Responses are Incomplete and Evasive

CompSouth also respectfully requests the Commission to compel responses from Verizon. For instance, Request No. 2 asked Verizon to confirm whether or not it or an affiliate required a counterparty to disclaim the applicability of 47 U.S.C. §§ 251-252 as a precondition to signing an agreement involving IP interconnection. Verizon responds by alluding to the universally-known requirement of mutuality of agreement for contract formation when it answers, “one party cannot require the other party to agree to any particular term.”¹¹ This response does not answer the question, however, of whether Verizon has ever refused to enter into such an agreement unless the cited disclaimer was included. Verizon's evasive response suggest that it regularly (if not uniformly) refuses to enter into IP interconnection agreements unless its counterparty agrees to sacrifice all rights and remedies available under 47 U.S.C. §§ 251-252. Verizon should be compelled to provide a complete response.

Likewise, Request No. 5 asked Verizon to explain how the exchange of traffic in IP format at the point of interconnection would provide enhanced functionality for calls that both originated

¹¹ Verizon Response to Data Request No. 2 (Nov. 23, 2016).

and terminated in TDM, while Request No. 7 asked the same question for a call that originates in TDM and terminates in IP. Verizon's objection repeats its claim that such calls are "information services," but that is not even arguable for TDM calls. The question was specifically intended to try and understand how the format of the traffic at the point of interconnection affected the claimed classification of the call. Verizon should be compelled to answer how the IP-formatted interconnection improves functionality for calls that are TDM in their origination, as well as the requests that address calls that originate in IP. While Verizon may claim such calls are "information services;" that is a claim, not a fact, and it does not change the question asked – *i.e.*, what is it about the format of the traffic at the point of interconnection that affects its functionality? It cannot change CompSouth's questions so as to provide a preferred response. Verizon should be compelled to provide substantive and complete answers that are responsive to CompSouth's data requests.

III. Motion to Extend Procedural Schedule

The non-responsive nature of AT&T's and Verizon's responses have made it impossible for CompSouth to timely prepare rebuttal testimony. Developing a full and complete administrative record is practically impossible when parties refuse to respond substantively and fully to legitimate requests for information. The fact that CompSouth's participating members were willing to provide information responsive to Verizon's data requests when they were under no technical obligation to do so stands in stark contrast to the unwillingness of AT&T and Verizon to provide full and complete responses after voluntarily submitting themselves to the Commission's jurisdiction.

CompSouth's ability to prepare rebuttal testimony is further compromised by CBT's disagreement regarding the terms of a confidentiality agreement. CompSouth propounded seven

data requests to CBT. Request No. 4 asked CBT to “[p]lease provide for year-end 2012, 2013, 2014, 2015 (and update when 2016 data becomes available), the number of switched access lines and facilities-based VoIP lines in Kentucky, separately for residential and business customers.” Request No. 5 asked CBT to “provide CBT’s Form 477 response to the FCC for 2012, 2013, 2014 and 2015 for Kentucky identifying the number of voice lines and VoIP subscriptions, aggregated for the state of Kentucky.” CBT responded to both data requests by objecting that the FCC filing was confidential and proprietary, but nevertheless filed the information under seal.¹² CompSouth did not object to CBT’s motion for confidential treatment in part because CBT’s objection was premised upon the company’s stated willingness to provide the confidential information with CompSouth upon the entry of a suitable protective order or execution of a confidentiality agreement.¹³

The same day that CompSouth received CBT’s responses, the undersigned contacted CBT’s counsel and began to discuss a confidentiality agreement. Unfortunately, the negotiations that have taken place over the past nineteen days have not yet resulted in a confidentiality agreement that is acceptable to CBT. The delay in gaining access to the confidential information has effectively prevented CompSouth from preparing its rebuttal testimony.

Accordingly, CompSouth respectfully requests that the current procedural schedule should be extended such that it will have an adequate opportunity to prepare and submit rebuttal testimony after AT&T and Verizon have tendered responsive answers and CBT has agreed to a confidentiality agreement that affords CompSouth an opportunity to review its confidential filing.

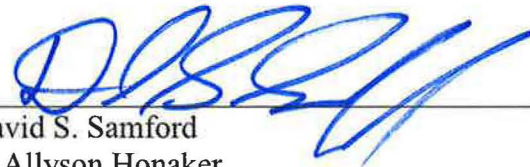
¹² See CBT Responses to Data Request No. 4 and No. 5 (Nov. 18, 2016).

¹³ See CBT Motion for Confidential Treatment, ¶ 5 (Nov. 18, 2016); CBT Response to Data Request No. 5 (Nov. 18, 2016).

WHEREFORE, on the basis of the foregoing, CompSouth respectfully requests that the Commission grant the motion to compel as set forth herein and grant the motion to extend the procedural schedule as necessary to afford CompSouth an adequate opportunity to prepare and tender rebuttal testimony after receiving responsive answers from AT&T and Verizon and being granted access to the confidential information already filed by CBT.

This 7^h day of December, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on December 7, 2016; 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 this the 7th day of December.



Counsel for Competitive Carriers of the South, Inc.