

**BEFORE THE KENTUCKY
PUBLIC SERVICE COMMISSION**

In the matter of

Application of Competitive Carriers of the)	
South, Inc. for a Declaratory Order)	
Affirming that the Interconnection Regimes)	Case No. 2015-00283
Under KRS 278.530 and 47 U.S.C. § 251 are)	
Technologically Neutral)	

**AT&T KENTUCKY’S MOTION TO STRIKE IRRELEVANT
PORTIONS OF REBUTTAL TESTIMONY OF JOSEPH GILLAN AND REQUEST
FOR EXPEDITED RULING TO FACILITATE SCHEDULING DISCUSSIONS**

AT&T Kentucky¹ respectfully moves the Commission to strike the passages identified below from the Rebuttal Testimony of Joseph Gillan on behalf of CompSouth (“Rebuttal”). The ground for the motion is that the identified testimony has no bearing on the issues CompSouth asked the Commission to address in its Application for Declaratory Ruling or that any Intervenor has raised, and is therefore irrelevant.²

AT&T Kentucky requests that the Commission expedite its ruling on this motion. The parties have been discussing the schedule for this case in the hope of filing a joint scheduling motion. However, the next step in the proceeding – whether it be an evidentiary hearing or a brief in anticipation of oral argument – cannot properly occur until after the Commission has ruled on this motion so that the parties know the parameters of the hearing or brief. Once the Commission rules on this motion, the parties will be in a position to propose a schedule (or competing schedules, if the parties are unable to agree).

1. Page 2, lines 7-8

¹ BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky

² Kentucky Rule of Evidence 401 provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” As we demonstrate below, none of the testimony AT&T Kentucky moves to strike has any tendency to make the existence of any fact that is of consequence to any determination the Commission will make in this proceeding more probable or less probable than it would be without that information.

This passage states, “Contrary to AT&T’s testimony, CompSouth members *have* discussed IP interconnection with AT&T.” The basis for this statement appears later in the Rebuttal, in the passage discussed in item 4 below. As shown in detail there, the statement is irrelevant for three reasons: *First*, AT&T Kentucky’s testimony does not say that CompSouth members *have not discussed IP interconnection* with AT&T. Instead, it says that no CompSouth member has requested IP interconnection with AT&T Kentucky and – most important – that AT&T Kentucky has not refused any CompSouth member’s request for interconnection.³ CompSouth does not dispute that testimony. Thus, its purported Rebuttal does not actually rebut anything AT&T Kentucky has said.

Second, the discussion “with AT&T” to which the Rebuttal refers was not with AT&T Kentucky (the party to this proceeding), but with a different AT&T entity that is neither a party to this proceeding nor an incumbent local exchange carrier that is subject to the interconnection requirements of the federal Telecommunications Act of 1996 (“FTA”).⁴

Third, the mere occurrence of generic “discussions” of IP interconnection is not relevant to any issue CompSouth presented in its Application for Declaratory Ruling or that any Intervenor has raised.

³ Direct Testimony of Scott McPhee on Behalf of AT&T Kentucky (Oct. 26, 2016) at 6.

⁴ The Rebuttal routinely refers to “AT&T” – a term that Mr. Gillan does not define and that is not the actual name of any entity. There are many AT&T entities, including, for example, AT&T Corp., AT&T Teleholdings, Inc., AT&T Wireless, AT&T Mexico, and DirecTV. The only AT&T entity before the Commission in this proceeding is AT&T Kentucky, which, unlike the other AT&T entities in the foregoing list, is an incumbent local exchange carrier (“ILEC”) and therefore subject to the interconnection requirements in the FTA. Some of Mr. Gillan’s references to “AT&T” are obviously intended as references to AT&T Kentucky (the references to “AT&T’s testimony,” for example) – even though the Rebuttal also sometimes refers to “AT&T-KY”). Other references to “AT&T” in the Rebuttal, such as the one discussed above in the text, may at first blush appear to be about AT&T Kentucky but in fact are not, and cannot be.

2. Page 2, lines 9-12

This passage states that “CompSouth members . . . should have the right to review any agreement AT&T has reached . . . [and t]o do so . . . requires that the Commission make clear that AT&T must file its agreements.” But neither the asserted obligation of AT&T Kentucky (or of any other AT&T entity) to file agreements nor the CompSouth’s members’ supposed right to review any such agreements is relevant here. CompSouth established the parameters of this proceeding when it asked for a declaration that “regardless of underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic over two carriers’ networks, (a) the interconnection regimes under 47 U.S.C. §§ 251-252 and KRS 278.530 apply, and (b) these statutes permit (among other things) a requesting carrier to file a petition with the KPSC requesting an Order prescribing the rates, terms and conditions of proposed interconnection with an incumbent local exchange carrier.”⁵ CompSouth did not ask for a declaration that AT&T Kentucky is a party to agreements that provide for IP interconnection (which it is not); or that AT&T Kentucky is a party to any agreement that was not filed but that should be (which it is not); or that AT&T Kentucky has prohibited CompSouth members from reviewing agreements they are entitled to review (which it has not). And those subjects have no bearing on the questions CompSouth did pose in its Application, or on anything that any Intervenor has raised in opposition to that Application. CompSouth’s witness’ discussion of an alleged duty to file agreements and of alleged rights to review agreements should therefore be stricken as irrelevant.

⁵ Application of Competitive Carriers of the South, Inc. for a Declaratory Ruling (Aug. 14, 2015) (“Application”) at 1.

3. Page 2, line 14 – page 4, line 9

This passage concerns CompSouth’s contention that the Commission should require AT&T Kentucky and Verizon to file “any agreements similar to those of Verizon”⁶ (even though the Rebuttal acknowledges that the actual Verizon agreements do not have to be filed in Kentucky⁷ and AT&T Kentucky is not a party to any such agreement) and the fact that neither Verizon’s nor AT&T Kentucky’s testimony addresses CompSouth’s witness’ analysis of the Verizon agreements.

The entire passage is irrelevant because, as demonstrated above in the discussion of item 2, CompSouth’s Application does not ask the Commission to address whether AT&T Kentucky and/or Verizon are required to file such agreements and no Intervenor has made any assertion about agreement filing requirements in opposition to CompSouth’s Application.

Moreover, certain portions of this passage of the Rebuttal should be stricken for additional reasons. Specifically:

The Rebuttal states that “the *most* important conclusion of my rebuttal testimony, which is akin to the famous ‘dog that did not bark’” is the fact that Verizon and AT&T Kentucky did not address Mr. Gillan’s analysis of the Verizon agreements.⁸ Sherlock Holmes’s point, however, was that a dog does not bark if nothing troublesome is afoot, which is the case here: No Intervenor had reason to address the analysis in Mr. Gillan’s direct testimony because it is irrelevant. And the Rebuttal’s “*most* important conclusion” is even more patently irrelevant with respect to AT&T Kentucky, because AT&T Kentucky has made clear from the outset that it

⁶ Rebuttal at 3, lines 8-9

⁷ *Id.* at 3 n.5.

⁸ *Id.* at 2, line 14 – 3, line 14.

would be taking no position on the requirements of the FTA because the Commission is only authorized to address those requirements in an arbitration proceeding under the FTA, and not in a proceeding on a request for declaratory ruling. Consequently, no inference can be drawn from AT&T Kentucky's non-response to Mr. Gillan's discussion of those requirements.

Finally, the Rebuttal's statement that "AT&T has prevented the Commission from performing this role [*i.e.*, reviewing agreements to determine whether they must be filed] by refusing to provide its agreements"⁹ is false in two ways. First, AT&T Kentucky has no such agreements. Second, there was no refusal. What the Rebuttal mischaracterizes as a refusal was actually a valid objection by AT&T Kentucky in which CompSouth acquiesced. Here is what happened:

In its Information Requests, most of which were objectionable, CompSouth asked AT&T Kentucky to produce "each agreement that AT&T Kentucky *or its affiliates* has entered into with a service provider . . . providing for or governing the exchange in IP format of voice traffic going from AT&T Kentucky to the other party as well as voice traffic coming from the other party to AT&T Kentucky."¹⁰

In the context of resolving their discovery differences, AT&T Kentucky informed CompSouth that AT&T Kentucky is not a party to any contract that provides for or governs the exchange in IP format of voice traffic going from AT&T Kentucky to the other party or voice traffic coming from the other party to AT&T Kentucky.¹¹ Upon information and belief, AT&T Kentucky's non-ILEC affiliate, AT&T Corp., is a party to contracts that provide for and govern

⁹ Rebuttal at 4, lines 6-9.

¹⁰ Competitive Carriers of the South, Inc.'s Information Requests to AT&T Kentucky (Nov. 9, 2016), Request 3 (emphasis added). Requests 4 and 5 similarly requested production of such agreements.

¹¹ AT&T Kentucky's Supplemental Responses to CompSouth's Information Requests (Jan. 12, 2017), at 2.

the exchange in IP format of certain voice traffic that originates with or terminates to end users in Kentucky, some but not all of which end users are customers of AT&T Kentucky. These are not ILEC agreements, and they are not subject to 47 U.S.C. §§ 251-252.¹²

AT&T Kentucky initially objected to the request for production of IP agreements on two separate grounds. The first was relevance: “In this proceeding, CompSouth seeks a declaration that, ‘regardless of underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic over two carriers’ networks, (a) the interconnection regimes under 47 U.S.C. §§ 251-252 and KRS 278.530 apply, and (b) these statutes permit (among other things) a requesting carrier to file a petition with the KPSC requesting an Order prescribing the rates, terms and conditions of proposed interconnection with an incumbent local exchange carrier.’ The agreements . . . have no bearing on the meaning or application of U.S.C. §§ 251-252 or KRS 278.530.”¹³

Second, AT&T Kentucky initially objected to the request to the extent it applied to agreements to which AT&T Kentucky is not a party – *i.e.*, the AT&T Corp. agreements – on the ground that “(1) AT&T Kentucky does not have possession, custody or control of such agreements, and (2) to the extent that such agreements may have been entered into by an AT&T Kentucky affiliate that is not an ILEC, the agreements are neither relevant nor reasonably likely to lead to the discovery of admissible evidence because non-ILECs are not subject to the interconnection duty of 47 U.S.C. § 251(c)(2).”¹⁴

¹² *Id.*

¹³ AT&T Kentucky’s Objections and Responses to CompSouth’s Information Requests (Nov. 23, 2016) (Response to Request 3. AT&T Kentucky asserted the same objections to CompSouth’s similar Requests 4 and 5.

¹⁴ *Id.* AT&T Kentucky asserted the same objections to CompSouth’s similar Requests 4 and 5.

CompSouth filed a motion to compel further responses to many of the requests to which AT&T Kentucky objected, including the agreements that the Rebuttal now says AT&T Kentucky refused to produce.¹⁵ The parties thereafter negotiated their discovery differences and reached an agreement that AT&T Kentucky would provide certain additional information notwithstanding its objections and that CompSouth would not pursue any additional information through discovery.¹⁶ Among the information that CompSouth chose not to pursue was the agreements that it now claims are crucial. Thus, and contrary to the Rebuttal, AT&T Kentucky did not “refuse” to provide agreements. Rather, it asserted valid objections to producing irrelevant AT&T Corp. agreements that AT&T Kentucky does not have, and CompSouth acquiesced in that objection. If those agreements were as important as the Rebuttal suggests and were a proper subject of discovery, one wonders why CompSouth agreed they need not be produced.

4. Page 4, line 11 – page 5, line 5

This portion of the Rebuttal purports to rebut the following position of AT&T Kentucky: CompSouth has asked for a declaration concerning the application of KRS 278.530, but only a “person substantially affected” can apply for such a declaration.¹⁷ None of the participating CompSouth members would be substantially affected by a declaratory ruling on KRS 278.530 as it might apply to AT&T Kentucky, because all of them already have ICAs with AT&T Kentucky pursuant to which they have established interconnection with AT&T Kentucky. Furthermore, KRS 278.530, by its plain terms, comes into play only when one telephone company refuses the request of another telephone company to permit interconnection upon reasonable terms, rates and

¹⁵ Motion to Compel and Motion to Extend Procedural Schedule (Dec. 7, 2016).

¹⁶ AT&T Kentucky’s Supplemental Responses to CompSouth’s Information Requests (Jan. 12, 2017), at 1-2.

¹⁷ 807 KAR 5:001(19)(1) (emphasis added).

conditions.¹⁸ Here, none of CompSouth’s members has any grievance with AT&T Kentucky under KRS 278.530, because AT&T Kentucky has not refused a request by any of them for interconnection on reasonable rates, terms and conditions. As AT&T Kentucky’s witness testified and CompSouth does not dispute, “None of the participating CompSouth members has requested IP interconnection with AT&T Kentucky. AT&T Kentucky has not refused the request of any participating CompSouth member to establish interconnection.”¹⁹ Accordingly, “CompSouth does not assert, and cannot assert, that AT&T Kentucky has denied any request for interconnection by any of its members. Consequently, none of the participating CompSouth carriers could possibly obtain relief under KRS 278.530, and none of them would be ‘substantially affected,’ as 807 KAR 5:001 requires, by any declaration the Commission might make concerning that statute.”²⁰

The Rebuttal purports to rebut this argument by stating that a certain “non-disclosure agreement between *AT&T* and Level 3” shows that *AT&T* and Level 3 have discussed IP interconnection, and that, “I believe that AT&T’s discovery responses make clear that *the parties* have discussed IP interconnection . . . ”²¹ This is patently irrelevant. In the first place, whether or not there have been discussions of IP interconnection is neither here nor there. The point is that a carrier can only be “substantially affected” by a declaration concerning KRS 278.530 if that carrier has made a request for interconnection on reasonable terms, rates and conditions and

¹⁸ KRS 278.530(1) provides, “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.” (Emphasis added.)

¹⁹ Direct Testimony of Scott McPhee on Behalf of AT&T Kentucky (Oct. 26, 2016) (“McPhee Direct”), at 6.

²⁰ AT&T Kentucky’s Position on CompSouth’s Request for Declaratory Order (Attachment JSM-1 to McPhee Direct), at 3.

²¹ Rebuttal at 4, lines 11-21 (emphases added).

that request has been refused. CompSouth still does not and cannot assert that any of its members made such a request or that AT&T Kentucky (or any of its affiliates) refused such a request. *In fact, Level 3 itself states that the request for IP interconnection that led to the discussions referenced in the Rebuttal was made by AT&T Corp., not by Level 3.*²² There has been no refusal to provide interconnection on reasonable terms, rates or conditions, and the mere fact that there have been discussions – initiated by AT&T Corp. – makes no difference whatsoever.

Second, the discussions were not with AT&T Kentucky, which is the only AT&T entity that is before this Commission. The non-disclosure agreement to which the Rebuttal refers is not between Level 3 and *AT&T Kentucky*. Rather, it is between Level 3 and *AT&T Corp.* The Rebuttal’s statement that “AT&T’s discovery responses make clear that *the parties* have discussed IP interconnection . . .” (emphasis added) is clearly wrong and misleading for the same reason, because AT&T Corp. is not a party to this proceeding. The Rebuttal does not explain what it is about AT&T Kentucky’s discovery responses that makes clear that there were such discussions, but one thing that is absolutely clear from those responses is that any such discussions were with AT&T Corp., not AT&T Kentucky.

5. Page 5, lines 13-18

This passage relates solely to carriers’ asserted right to review interconnection agreements, which is irrelevant, as discussed above in item 2.

6. Page 5, line 20 – page 6, line 6

This passage asks and answers the question “Does AT&T-KY have any IP voice interconnection agreements.” Whether AT&T Kentucky has or does not have any IP voice

²² See Exhibit 1 hereto.

interconnection agreements – which it unequivocally does not – is irrelevant, because it has no possible bearing on the issues concerning the meaning of 47 U.S.C. §§ 251-252 and KRS 278.530 that CompSouth raised in its Application, or on any issue raised by an Intervenor. Moreover, the crux of this passage (at page 6, lines 2-6) is that the Commission should draw some inference in favor of CompSouth’s position because in its Supplemental Responses to CompSouth’s Information Requests, “AT&T never explains how the IP voice traffic is then exchanged with AT&T-KY” But the content of those supplemental responses was negotiated by CompSouth and AT&T Kentucky. Consequently, anything that AT&T Kentucky did not explain is something that CompSouth agreed need not be explained. The only inference that can be drawn from the fact that AT&T Kentucky did not explain the traffic flow in detail is that CompSouth did not ask for it. For that reason, too, the passage is irrelevant.

7. Page 6, lines 8-16

The fact that some of AT&T Kentucky’s consumer lines are served using IP technology has no bearing on any issue in this case.

8. Page 7, lines 1-9

This passage merely reasserts CompSouth’s positions concerning the filing of agreements and review of agreements by requesting carriers, and is irrelevant for the reasons set forth in item 2.

Respectfully submitted,

/s/ Cheryl R. Winn
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FILING NOTICE AND CERTIFICATE

The undersigned hereby certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days; that the electronic filing was transmitted to the Commission on February 24, 2017; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Cheryl R. Winn

Attachment 1



February 10, 2017

AT&T

Attention: Contract Notices

Annamarie Lemoine, General Attorney

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Atlanta, GA 30308

(404) 335-0719

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Sent Via E-Mail

Dear Ms. Lemoine,

Level 3 Communications and AT&T-KY are involved in Case# 2015-00283 before the Kentucky Public Service Commission ("KY-PSC"). Pursuant to paragraph 7 of the attached Mutual Non-Disclosure Agreement and Consent, Level 3 is giving AT&T Corp. five business days' advance written notice, that in the context of this proceeding through rebuttal testimony due on February 17, 2017, Level 3 plans to inform the KY-PSC that AT&T Corp. requested IP Voice Interconnection with Level 3 and the Parties have entered negotiations regarding the exchange of voice traffic in Internet Protocol format effective April 1, 2015.

If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

Carolyn Ridley

Senior Director State Public Policy

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