

**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 INITIAL BRIEF**

AT&T Kentucky<sup>1</sup> respectfully submits its initial brief.<sup>2</sup>

**INTRODUCTION**

It is well-settled that the Commission has only those powers conferred upon it by the Legislature, and the Kentucky Legislature has not authorized this Commission to issue the declaration of federal interconnection law that CompSouth has requested.<sup>3</sup> Just as indisputably, Kentucky law does not entitle CompSouth to the declaration of Kentucky interconnection law that CompSouth has requested. It would help no one – including the carriers that CompSouth represents – for the Commission to issue unauthorized declarations. Accordingly, AT&T Kentucky urges the Commission to deny CompSouth’s Application for Declaratory Order and to wait to resolve the issues CompSouth has raised, if at all, in the proper forum – an interconnection agreement arbitration under the federal Telecommunications Act of 1996 (“FTA”). CompSouth

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

<sup>2</sup> Given that the issues in this case are predominately legal, the parties agreed to forego an evidentiary hearing. Under these circumstances, AT&T Kentucky believes oral argument would be helpful to the Commission and is contemporaneously filing a motion seeking oral argument.

<sup>3</sup> As discussed below, CompSouth’s members could ask the Commission to address their issues in the context of an arbitration pursuant to the federal Telecommunications Act of 1996, in the context of concrete proposed language for inclusion in an interconnection agreement, but they have chosen not to do so. Instead, they have asked the Commission to declare matters of federal law in a vacuum and in a manner the Commission is not authorized to do.

seeks a declaration concerning interconnection under the FTA and under KRS 278.530.<sup>4</sup> Specifically, CompSouth requests 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.”<sup>5</sup>

CompSouth’s request for a declaration concerning the FTA is contrary to law. The Commission can only do what the Kentucky Legislature has authorized it to do by statute, and no Kentucky statute authorizes the Commission to issue a declaration concerning federal law. 807 KAR 5:001, on which CompSouth relies, only authorizes declarations concerning Kentucky law. This is not to say that the Commission can never decide questions concerning the FTA. On the contrary, the FTA provides for state commissions to resolve issues arising under the federal statute when they arbitrate interconnection agreements (“ICAs”). But this is not an ICA arbitration. It is a proceeding on an improper application for a declaration of federal law that the law does not authorize the Commission to issue.

Unlike the interconnection provisions of federal law, the interconnection provisions of KRS 278.530 are within the scope of the Commission’s declaratory order authority under 807 KAR 5:001. As Staff has noted, however, relief is available under KRS 278.530 only when the carrier requesting interconnection has no existing contract or interconnection with the carrier with

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<sup>4</sup> Interconnection is the physical linking of two networks for the mutual exchange of telecommunications traffic. See First Report and Order (FCC 96-325) *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15,499, ¶ 176 (1996).

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

which interconnection is sought. Here, the undisputed evidence establishes that all the CompSouth carriers participating in this proceeding have ICAs with AT&T Kentucky *and* have established interconnections between their networks and AT&T Kentucky’s pursuant to their ICAs. Indeed, 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, because none of them would be “substantially affected,” as 807 KAR 5:001 requires, by any declaration the Commission might make concerning that statute. Accordingly, the Commission should deny CompSouth’s request for a declaration with respect to the state interconnection statute as well as the FTA.

### **PERTINENT FACTS**

Three CompSouth members are participating in this case: Birch Communications, Inc. (“Birch”); Level 3 Communications, LLC (“Level 3”); and Windstream Communications, Inc. (“Windstream”).<sup>6</sup> Each of those carriers has an existing ICA with AT&T Kentucky pursuant to which it is entitled to obtain interconnection with AT&T Kentucky’s network.<sup>7</sup> By its terms, each of the ICAs will remain in effect until one party or the other terminates it.<sup>8</sup> None of the ICAs has been terminated, and none of the participating CompSouth members has requested negotiation of a new ICA.<sup>9</sup>

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<sup>6</sup> Application ¶ 1 lists those three CompSouth members and also XO Communications, LLC (“XO”) and EarthLink Business, LLC (“EarthLink”). However, XO has since withdrawn (see August 29, 2016, Notice of Withdrawal) and Earthlink is no longer a member of CompSouth (see Testimony of Joseph Gillan on behalf of CompSouth at 1 n.1).

<sup>7</sup> Direct Testimony of Scott McPhee on Behalf of AT&T Kentucky, at 6

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

All three participating CompSouth members have existing interconnections with AT&T Kentucky pursuant to their ICAs with AT&T Kentucky.<sup>10</sup>

None of the participating CompSouth members has requested IP interconnection with AT&T Kentucky.<sup>11</sup>

AT&T Kentucky has not refused the request of any participating CompSouth member to establish interconnection.<sup>12</sup>

### **ARGUMENT**

#### **I. THE COMMISSION SHOULD NOT MAKE UNAUTHORIZED DECLARATIONS CONCERNING THE INTERCONNECTION PROVISIONS OF THE FTA.**

##### **A. Kentucky Law Prohibits the Commission from Issuing A Declaratory Order Concerning the Federal Telecommunications Act.**

CompSouth requests a declaratory ruling “[p]ursuant to 807 KAR 5:001, Section 19.”<sup>13</sup> That rule, however, does not authorize the Commission to issue declarations concerning the FTA. Rather, it authorizes the Commission only to:

issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.

The principal question CompSouth poses is whether the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol that may be

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Application at 1.

used for the exchange of voice traffic between two carriers' networks.<sup>14</sup> Plainly, that is not a question about the Commission's jurisdiction, the applicability of an order or administrative regulation of the Commission, or a provision of KRS Chapter 278. Nor is it a question about the meaning or scope of such an order, regulation or provision. Rather, it is a question about the meaning and effect of a provision of ***federal*** law, namely 47 U.S.C. § 251(c)(2).<sup>15</sup> By its plain terms, 807 KAR 5:001, Section 19, does not authorize the Commission to address that question.

The Commission is a creature of statute, and “has only such powers as granted by the General Assembly.”<sup>16</sup> Kentucky “common law has long adhered to the doctrine that the powers of administrative agencies are limited to those conferred expressly by statute or which exist by necessary and fair implication. But these implications are never extended beyond fair and reasonable inferences. ***Powers not conferred are just as plainly prohibited as those which are expressly forbidden.***”<sup>17</sup> CompSouth cites no Kentucky statute that either expressly or by necessary and fair implication authorizes the Commission to issue declarations concerning the meaning or application of the interconnection provisions of the FTA. Absent such a statute, and with 807 KAR 5:001, Section 19, clearly inapplicable, the Commission is affirmatively prohibited from issuing a declaration on the principal question posed by the Application.

In addition to the principal question of federal law (*i.e.*, whether FTA § 251(c)(2) applies regardless of underlying technology, transmission media, or protocol), the Application also poses

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<sup>14</sup> *Id.*

<sup>15</sup> Section 251(c)(2) is the FTA provision that requires incumbent local exchange carriers, such as AT&T Kentucky, to provide interconnection to requesting carriers.

<sup>16</sup> *Commonwealth, ex rel. Stumbo v. Kentucky Pub. Serv. Comm'n*, 243 S.W.3d 374, 378 (Ky. Ct. App. 2007); *see also Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001) (same).

<sup>17</sup> *Baker v. Commonwealth*, 2007 WL 3037718, at \*34 (Ky. Ct. App. Oct. 19, 2007) (emphasis added; citations and quotations omitted).

a subsidiary question of federal law: whether the FTA permits a requesting carrier to petition the Commission for an order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier.<sup>18</sup> That question, like the first, asks about the FTA and so is not within the scope of 807 KAR 5:001 or of the jurisdiction the Legislature has conferred on the Commission.

It is instructive to compare the language of 807 KAR 5:001, Section 19, limiting the Commission to issuing declaratory orders concerning specific, well-defined subjects, with the much broader language the Legislature used in KRS 418.040 when authorizing circuit courts to issue declaratory orders. KRS 418.040 gives the circuit courts broad declaratory authority, providing:

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.”<sup>19</sup>

807 KAR 5:001, Section 19, in contrast, is much more narrow. Rather than authorizing the Commission to issue declarations with respect to nearly any issue that it might encounter, as it did with the circuit courts, the Rule specifies three and only three matters with respect to which the Commission may issue a declaratory order: (1) the jurisdiction of the Commission; (2) the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278; and (3) the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278. The contrast with KRS 418.040 underscores that the limitations in 807 KAR 5:001 must be respected.

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<sup>18</sup> Application at 1.

<sup>19</sup> The courts of general jurisdiction referred to in KRS 418.040 are the circuit courts. *See* KRS 23A010(1).

**B. CompSouth’s Contention That It Is Seeking A Ruling About The Commission’s Jurisdiction Is Without Merit.**

In a futile attempt to shoehorn its way into 807 KAR 5:001, Section 19, CompSouth contends that it is seeking a ruling about the Commission’s jurisdiction, which is within the scope of that rule.<sup>20</sup> That contention is demonstrably wrong. CompSouth’s request is for a ruling 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.”<sup>21</sup> Obviously, that question – as it relates to 47 U.S.C. §§ 251-252 – is about the meaning and scope of a federal statute, not about the jurisdiction of the KPSC. This is easily confirmed: To answer CompSouth’s question, one would examine the FTA, not the Kentucky statutes that define this Commission’s jurisdiction. Indeed, as CompSouth itself has emphasized, the FTA “cannot give the PSC authority that is not granted to it by the Kentucky General Assembly.”<sup>22</sup> So, by definition, a question about the meaning of the FTA cannot possibly be a question about the Commission’s jurisdiction.

CompSouth’s contention that it has posed a question about the Commission’s jurisdiction is apparently based on the notion that if the interconnection regime in the FTA does not apply to

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<sup>20</sup> CompSouth made that contention in the Reply by Applicant Competitive Carriers of the South, Inc., filed November 2, 2015 (“CompSouth Reply”), which responded to, among other things, the demonstration that the Commission should deny CompSouth’s request for a declaratory order set forth in AT&T Kentucky’s October 14, 2015, Amended Response to CompSouth’s Request for a Declaratory Order.

<sup>21</sup> Application at 1 (emphasis added).

<sup>22</sup> CompSouth Reply at 2.

interconnection in IP format, the Commission would lack *jurisdiction* to address IP interconnection in an ICA arbitration under the 1996 act. That notion is mistaken. If the law requires a criminal court to impose a sentence of at least five years, that does NOT mean that the court lacks *jurisdiction* to impose a lesser sentence; the court has *jurisdiction* to decide the sentence, but a rule of law limits the court's choices when it exercises that jurisdiction. Similarly, if the law says that summary judgment cannot be granted when there is a conflict in the evidence, that does not mean that a court lacks *jurisdiction* to enter summary judgment in a case where there is a conflict in the evidence; again, the court has *jurisdiction* to rule on the motion for summary judgment, but a legal rule governs the court's exercise of that jurisdiction. Similarly here, the interconnection regime in the FTA either does or does not apply to IP interconnection – and in an arbitration proceeding commenced under the FTA, the KPSC has jurisdiction to decide whether it does or does not apply to IP interconnection. If the interconnection regime in the FTA does not apply to IP interconnection, that means that if a State commission is presented with the question in an arbitration, it should so rule – but it does NOT mean that the State commission does not have jurisdiction to decide the question. Thus, if the KPSC ruled in an AT&T Kentucky arbitration that the FTA requires IP interconnection, and imposed terms and conditions for IP interconnection, AT&T Kentucky could argue on appeal that the Commission should be reversed because it misread the FTA's interconnection requirement, but it would not argue that the Commission exercised jurisdiction that it does not have.

CompSouth has asserted that if a CLEC files for arbitration seeking IP interconnection, “the ILECs will argue that the PSC does not have jurisdiction to adjudicate an ICA for IP

exchange of voice traffic.”<sup>23</sup> That assertion is false. AT&T Kentucky might well argue that the FTA does not require IP interconnection, but it would not make any argument concerning the Commission’s jurisdiction. Exhibit 1 to this brief corroborates this. Sprint and AT&T Michigan arbitrated an ICA in the Michigan Public Service Commission (“MPSC”), and Sprint proposed terms for IP interconnection. As pages 1-28 of Exhibit 1 show, AT&T Michigan opposed Sprint’s proposal, but it did not argue or suggest that the MPSC did not have jurisdiction to address the issue in the arbitration. CompSouth is 100% wrong when it asserts that AT&T Kentucky would argue in an ICA arbitration that the KPSC is without jurisdiction to decide whether the FTA applies to IP interconnection.

Finally, CompSouth has asserted that AT&T Kentucky is “arguing that the PSC declare that it is without jurisdiction to issue a declaratory ruling involving interpretation of federal statutes based on a (wrong) interpretation of those federal statutes.”<sup>24</sup> Again, CompSouth is wrong. At no point in this proceeding has AT&T Kentucky offered any interpretation of any federal statute. On the contrary, AT&T Kentucky’s demonstration that the Commission is without authority to issue a declaration concerning the applicability of the FTA is based solely on the language of 807 KAR 5:001, Section 19, which plainly does not authorize declaratory rulings about federal law.

**C. Even If The Commission Could Lawfully Issue A Declaratory Order On The Federal Questions CompSouth Presents, The Commission Should Not Do So.**

807 KAR 5:001, Section 19, begins with the words, “The commission *may*, upon application by a person substantially affected, issue a declaratory order . . . .” (Emphasis added.)

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<sup>23</sup> CompSouth Reply at 13.

<sup>24</sup> CompSouth Reply at 3.

Thus, the rule merely allows for the issuance of a declaratory order in appropriate instances; as the Commission has noted, it “does not mandate the issuance of such orders.”<sup>25</sup> As demonstrated above, the Commission has no authority to issue a declaratory order on the federal questions presented in the Application. Moreover, even if it had such authority, there are compelling reasons for the Commission to decline to issue such an order.

First and foremost, the only appropriate forum for state commission resolution of federal interconnection issues is an arbitration of an ICA. That is the forum Congress created for dealing with such matters, and it is only in the context of the competing contract language proposals that are presented in an arbitration that a state commission can properly decide them. Indeed, a Commission declaration about interconnection under federal law in this proceeding would have little if any effect, as a practical matter, because, as explained below, the ICA pathway mandated by the FTA is the only mechanism by which a requesting carrier can actually obtain interconnection under the FTA.

As the Commission has stated, 807 KAR 5:001 provides a procedure for obtaining guidance “where no other available remedy or process is readily available to address the proposed act or conduct.”<sup>26</sup> Here, an appropriate remedy or process will be readily available when and if Kentucky telecommunications carriers have a ripe disagreement about interconnection under the FTA: arbitration pursuant to the FTA.

In the FTA, Congress established a straightforward procedure for state commission resolution of disagreements about the interconnection and other provisions of section 251 of the

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<sup>25</sup> Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, \*6 (KPSC Jan. 3, 2014).

<sup>26</sup> Order, Case No 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity*, 2014 WL 31773, \*6 (KPSC Jan. 3, 2014).

FTA. The process begins with a request to negotiate.<sup>27</sup> If the parties do not arrive at a complete ICA via negotiation, either party may petition the state commission to arbitrate open issues,<sup>28</sup> and the State commission rules on the open issues by applying the federal statute (section 251 and pricing standards in section 252(d)) and the regulations established by the FCC to implement the statute.<sup>29</sup> After the State commission resolves the open issues, the parties submit a conforming ICA for the commission to review.<sup>30</sup> The State commission then approves or rejects the ICA in accordance with criteria set forth in the statute.<sup>31</sup> After the State commission approves or rejects the ICA, the FTA provides for federal court review of the commission's application of federal law in the proceedings.<sup>32</sup>

This is the one and only process Congress established for state commission resolution of disagreements about interconnection agreements under the FTA, and the courts have rejected state commission attempts to use other procedures to implement FTA requirements. In *Verizon North, Inc. v. Strand*,<sup>33</sup> for example, the Michigan Public Service Commission ("MPSC") ordered an incumbent LEC to tariff its prices for unbundled network elements required by the FTA. The ILEC challenged the order, and the federal district court reversed the MPSC, stating

Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by

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<sup>27</sup> 47 U.S.C. § 252(a)(1). As noted above, no participating CompSouth member has asked AT&T Kentucky to renegotiate its existing ICA or has asked AT&T Kentucky to provide IP interconnection.

<sup>28</sup> *Id.* § 252(b)(1).

<sup>29</sup> *Id.* § 252(c)(1).

<sup>30</sup> *Id.* § 252(e)(1).

<sup>31</sup> *Id.* § 252(e)(2).

<sup>32</sup> *Id.* § 252(e)(6).

<sup>33</sup> 309 F.3d 935 (6th Cir. 2002).

Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring [the ILEC] to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase [the ILEC's] network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act . . . . Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.<sup>34</sup>

The Sixth Circuit affirmed, reasoning, “[T]he MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents’ services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is inconsistent with the provisions of [the FTA], and therefore preempted.”<sup>35</sup> Similarly, in *Wisconsin Bell Inc. v. Bie*,<sup>36</sup> the Seventh Circuit affirmed the district court’s reversal of a state commission order requiring tariffing of unbundled network elements, stating, “The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiation scales . . . .”

Thus, even if Kentucky law did authorize the Commission to issue the declaration of federal law that CompSouth requests – and it plainly does not – the Commission should decline to do so because, as *Verizon North* and *Wisconsin Bell* make clear, arbitration is the only appropriate forum for state commission adjudication of the substantive requirements of the FTA.

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<sup>34</sup> *Id.* at 940.

<sup>35</sup> *Id.* at 941.

<sup>36</sup> 340 F.3d 441, 444 (7th Cir. 2003).

Moreover, there is a compelling practical reason for not making any decision about IP interconnection until and unless the issue is presented in an ICA arbitration. If this Commission is presented with a question concerning IP interconnection in an arbitration, the question will be presented not in the abstract, as it is here, but in the context of proposed terms for an interconnection agreement. It is in that context, and only in that context, that Congress intended state commissions to interpret and apply the requirements of FTA section 251, and it is in that context that state commissions can most prudently do so. This is illustrated by a decision of the Illinois Commerce Commission in an arbitration in which Sprint asked the ICC to require the incumbent carrier, AT&T Illinois, to provide IP interconnection, but with the details to be determined later. The Commission rejected Sprint's proposal, based in significant part on the recommendation of its Staff:

Staff notes that Sprint proposes . . . that the details of IP-to-IP Interconnection should be determined at a later date, but separately proposes the Commission determine that Sprint has a right to exchange traffic with AT&T in IP format. Staff explains, however, that in arbitrating disputes brought pursuant to Section 252(b) of the Act, the Commission is required by Section 252(c) to ensure that resolution and conditions of interconnection meet the requirements of Section 251 of the Act and the FCC's Part 51 rules implementing the requirements of Section 251. Staff recommends that the Commission make no such determinations because Sprint, with one exception, has not identified the terms and conditions under which it seeks IP interconnection and, therefore, the Commission does not have a proposal before it that would allow the Commission to assess whether the terms and conditions under which Sprint seeks IP interconnection meet the requirements of Section 251 of the Act and Part 51 of the FCC's rules implementing the requirements of Section 251.<sup>37</sup>

Consistent with its Staff's recommendation, the Illinois Commission rejected Sprint's proposal for IP interconnection, stating,

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<sup>37</sup> Arbitration Decision, Docket 12-0550, *SprintCom, 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* (Ill. Comm'n Comm. June 26, 2013), at 32.

The Commission notes that it has not determined that any provider has the right to exchange traffic with an incumbent local exchange carrier in IP format. Indeed, the legal question of whether IP Interconnection can be compelled pursuant to Section 251 has not been decided by the FCC. Also, the Commission has not determined any rates, terms, or conditions under which IP interconnection would occur, consistent with the requirements of Section 251 of the Act or the FCC and ICC rules and regulations implementing it. While the Commission might or might not have the authority to order IP interconnection, this decision cannot be made until it is presented with an IP-to-IP interconnection proposal of sufficient detail to allow it to assess whether such a plan is technically feasible or otherwise comports with the requirements of the 1996 Act.<sup>38</sup>

That reasoning applies with even greater force here. The ICC prudently declined to decide whether the FTA requires IP interconnection because the carrier that requested IP interconnection proposed contract language that left most of the detail for future discussion. All the more clearly, this Commission should decline to address that question unless and until it is presented with a concrete proposal in an arbitration rather than, as here, in the abstract.

Finally, the declaratory ruling that CompSouth seeks would have little effect, if any, even if the Commission could issue it. Assume the Commission were to issue an order stating yes, the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol. Then, in the next ICA negotiation between AT&T Kentucky and a participating CompSouth member, that carrier would presumably propose terms for IP interconnection. If the parties did not reach agreement, the matter would become a subject for arbitration. For all practical purposes, that arbitration would look exactly the same as it would have looked in the absence of the prior declaratory ruling. In that arbitration, AT&T Kentucky – if only to preserve the federal court review the FTA provides<sup>39</sup> – would argue that the FTA does

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<sup>38</sup> *Id.* at 34.

<sup>39</sup> Under the regime Congress established in the FTA, a state commission's application of the federal law provisions of the FTA are expressly subject to direct review by federal courts. *See* 47 U.S.C. § 252(e)(6). CompSouth's

not require IP interconnection, and the Commission would have to decide again the same question CompSouth is asking it to decide here.

Simply put, Congress provided a specific role for state commissions in the adjudication of issues that arise under the FTA – arbitration and approval of interconnection agreements. Even if 807 KAR 5:001 allowed the Commission to issue a declaration concerning the meaning or effect of the interconnection provisions of the FTA, which it indisputably does not, it would be imprudent for the Commission to do so.

## **II. THE COMMISSION SHOULD MAKE NO DECLARATION CONCERNING KRS 278.530.**

### **A. No CompSouth Participant In This Proceeding Would Be Substantially Affected By The Declaration That CompSouth Requests.**

The Commission has discretion to issue a declaratory order concerning its own jurisdiction, the application of its own orders or regulations, or the application of a provision in KRS Chapter 278, but only “upon application *by a person substantially affected.*”<sup>40</sup> 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 (1) all of them already have ICAs with AT&T Kentucky pursuant to which they have established interconnection with AT&T Kentucky, and (2) none of them has a cognizable grievance with AT&T Kentucky because none of them has asked AT&T Kentucky for IP interconnection and AT&T Kentucky has not refused an interconnection request of any sort from any of them. Accordingly, the Commission should decline to issue a declaratory order concerning KRS 278.530.

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application seeks to evade this carefully-constructed regime by asking the Commission to make determinations about the FTA in a proceeding that does not expressly provide for direct review by federal courts.

<sup>40</sup> 807 KAR 5:001(19)(1) (emphasis added).

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.)

By its plain terms, that statute comes into play only when one telephone company refuses the request of another telephone company to permit interconnection upon reasonable terms, rates and conditions. Moreover, as the KPSC Staff stated in an advisory opinion that CompSouth cites, “The Commission . . . has interpreted KRS 278.530 to apply to situations where interconnection does not already exist. . . . Therefore, Commission Staff concludes that . . . **KRS 278.530 . . . only applies in the absence of an existing contract or interconnection.**”<sup>41</sup>

Here, all of the participating CompSouth members have ICAs with AT&T Kentucky and have interconnected their networks with AT&T Kentucky’s network. Furthermore, none of the CompSouth 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.

Thus, any declaration by the Commission concerning KRS 278.530 would have no effect whatsoever on any of the participating CompSouth members, so none of them has the required “substantial interest” in the requested declaration. Consequently, CompSouth not only is not entitled to the declaration it requests under the express terms of 807 KAR 5:001, but also cannot

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<sup>41</sup> KPSC Staff Opinion 2013-015, p. 4 (cited in Application at 4, ¶ 10) (emphasis added). Analogous cases have found that the absence of an agreement is a “jurisdictional requirement” for proceeding under such statutes. *See, e.g., Ind. Tel. Corp. v. Ind. Bell Tel. Co.*, 171 Ind. App. 616, 623 (Ind. Ct. App. 1976), *modified by* 360 N.E.2d 610 (Ind. Ct. App. 1977), and as described by *Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219, 1222 (7th Cir. 1980) (noting that the Indiana Utility Regulatory Commission has the power to set charges between competing phone services in the absence of agreement, that since the parties had voluntarily entered into a written agreement the Commission had no statutory authority over the dispute, and that therefore the Commission was ousted of jurisdiction).

meet the threshold requirement of standing to pursue the declaration it requests. Even with regard to declaratory rulings, a party must show a legally “recognizable interest in the subject matter of the suit.” Not only that, but the party’s interest must be determined to be “present and substantial as opposed to a mere expectancy.” *Gen. Drivers, Warehouseman & Helpers Local Union No. 89 v. Chandler*, 968 S.W.2d 680, 683 (Ky. Ct. App. 1998). CompSouth fails this test.

That conclusion is bolstered by CompSouth’s Application, which fails to sufficiently allege that the participating members will be “substantially affected” by the requested declaratory order. To be sure, the Application parrots the language of 807 KAR 5:001 by reciting that the members will be “substantially affected,” but all it offers in support of the recitation is purported uncertainty that “*could have* the effect of slowing the transition” from TDM to IP-based voice services at some uncertain time in the future.<sup>42</sup> That is not the present and substantial interest that Kentucky law requires.

CompSouth offered testimony that one CompSouth member – Level 3 – discussed IP interconnection not with AT&T Kentucky, but with AT&T Corp., which is an affiliate of AT&T Kentucky that is not before this Commission.<sup>43</sup> That testimony does not detract in the slightest from AT&T Kentucky’s demonstration that no member of CompSouth has a grievance against AT&T Kentucky under KRS 278.530, because the dispositive facts remain: No CompSouth member has asked AT&T Kentucky for IP interconnection, and AT&T Kentucky has not refused any request for interconnection by any CompSouth member. For that matter, there is no evidence

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<sup>42</sup> Application ¶ 3 (emphasis added).

<sup>43</sup> Rebuttal Testimony of Joseph Gillan on Behalf of CompSouth (Feb. 17, 2017), at 4-5.

that AT&T Corp. refused such a request either. Indeed, it was AT&T Corp. that asked Level 3 to interconnect in IP format.<sup>44</sup>

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<sup>44</sup> See Attachment 1 to AT&T Kentucky's Motion to Strike Irrelevant Portions of Rebuttal Testimony of Joseph Gillan and Request for Expedited Ruling to Facilitate Scheduling Discussions (February 24, 2017).

**B. It Would Not Be Prudent For The Commission To Issue A Declaratory Ruling On KRS 278.530.**

As a matter of law, CompSouth's lack of the substantial interest that 807 KAR 5:001(19)(1) requires forecloses consideration of CompSouth's request for declaratory relief. Even if that were not the case, it would not be prudent for the Commission to exercise its discretion to issue a declaratory ruling on KRS 278.530.<sup>45</sup>

One reason for this is the simple fact that if the Commission is ever called upon to actually apply KRS 278.530 to a request for IP interconnection, it will almost certainly be in an ICA arbitration under FTA, where the requesting carrier argues that both the FTA and KRS 278.530 require IP interconnection. Indeed, CompSouth itself has asserted that "KRS 278.530 is the natural basis for the PSC's arbitration of ICA terms and conditions under 47 U.S.C. §§ 251-252."<sup>46</sup> Since the Commission cannot lawfully issue a declaration concerning the applicability of the FTA to IP interconnection in this proceeding, but must instead await an arbitration, it is only reasonable to defer any decision about the applicability of KRS 278.530 to that same hypothetical arbitration.

In addition, there is, at a minimum, a serious question whether state law allows this Commission to regulate IP interconnection at all outside the context of an arbitration proceeding under the FTA. In 2004, the Legislature enacted KRS 278.5462(1), which provides that "[t]he provision of broadband services shall be . . . not subject to state administrative regulation," and, subject to exceptions that are not pertinent here, that "no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to . . . (a) [t]he

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<sup>45</sup> As explained above in Section I.C., 807 KAR 5:001(19)(1) does not mandate issuance of a declaratory ruling in any instance. Rather, it merely gives the Commission discretion to issue a declaratory order in appropriate instances.

<sup>46</sup> CompSouth Reply at 4

availability of facilities or equipment used to provide broadband services.”<sup>47</sup> As defined in KRS 278.5461, “‘Broadband’ means any service that is used to . . . provide access to the internet and that consists of the offering of the capability to transmit information at a rate that is generally not less than two hundred (200) kilobits per second in at least one direction; or any service that combines computer processing, information storage, and protocol conversion to enable users to access Internet content and services.”

The Legislature further constrained the Commission’s jurisdiction in the area of emerging digital technologies in 2006, when it amended the definition of “Service” in KRS 278.010 to expressly exclude “Voice over Internet Protocol (VOIP) service” – the very service for which carriers would seek IP interconnection. As a result of that amendment, this Commission’s jurisdiction “over the rates and *services* of utilities” in KRS 278.040 does not encompass VoIP service.

AT&T Kentucky is not urging the Commission to rule in this proceeding that Kentucky law strips the Commission of jurisdiction over IP interconnection in general. Rather, the point is that there is a serious question whether this Commission does have such jurisdiction under state law, and it would therefore be imprudent for the Commission to exercise such jurisdiction in a case, like this one, where there is no pressing reason – if any reason at all – to do so.<sup>48</sup>

Finally, by the time this Commission is called upon to arbitrate an IP interconnection issue, there may be no need to consider KRS 278.530 at all. The FCC is currently considering the

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<sup>47</sup> These provisions do not limit or modify a local exchange carrier’s duties 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*” or FCC regulations. *Id.* §278.5462(2).

<sup>48</sup> AT&T Kentucky’s suggestion that Kentucky law may prohibit the Commission from regulating IP interconnection is not at all inconsistent with AT&T Kentucky’s argument that CompSouth’s question about the meaning and application of the federal interconnection statute is not a question about the Commission’s jurisdiction.

question whether the FTA requires IP interconnection,<sup>49</sup> and if the FCC were to answer that question in the affirmative, that would render the state law question moot.

### **CONCLUSION**

The Commission is not authorized by 807 KAR 5:001 or any other provision of Kentucky law to issue a declaration concerning the meaning or effect of the interconnection provisions of the federal Telecommunications Act of 1996, and even if it were, it would not be prudent for the Commission to do so. The Commission should also deny CompSouth's request for a declaration concerning KRS 278.530, because all the participating CompSouth members have ICAs and existing interconnections with AT&T Kentucky; no CompSouth member has requested IP interconnection with AT&T Kentucky; and no CompSouth member has made any request for interconnection that AT&T Kentucky has denied – and because the Commission should not exercise jurisdiction that it may not have in order to decide a question it may never need to decide.

Respectfully submitted,

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<sup>49</sup> See AT&T Kentucky's Position on Application of CompSouth for a Declaratory Order (Attachment JSM- to McPhee Direct), at 14-16.

**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 March 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