

**BEFORE THE KENTUCKY  
PUBLIC SERVICE COMMISSION**

In the matter of

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

**AT&T KENTUCKY’S SUPPLEMENTAL BRIEF**

AT&T Kentucky<sup>1</sup> respectfully submits this supplemental brief pursuant to the Commission’s August 6, 2018, Order in this matter.

**INTRODUCTION**

Starting at page 50 of its initial brief, Applicant Windstream Communications, Inc. (“Windstream”) discusses the threshold question in this case: whether the Legislature has authorized the Commission to issue the declaratory order that Windstream seeks. Although this is the first question the Commission must address, Windstream understandably buries it at the end of its brief, because, as we demonstrate below, Windstream’s argument that the Commission has jurisdiction to issue a declaration interpreting the federal Telecommunications Act of 1996 (the “FTA”) is frivolous, and its argument that the Commission should declare that Kentucky law requires IP interconnection is unpersuasive.

**PERTINENT FACTS**

The Application that initiated this case was filed by Competitive Carriers of the South, Inc. (“CompSouth”) on behalf of five of its members. By the time initial briefs were filed, two of the

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

five had dropped out.<sup>2</sup> Subsequently, CompSouth gave notice that two more of its members were no longer participating and that it was dissolving, and moved to substitute the only remaining CompSouth participant, Windstream, as the Applicant. The Commission granted that motion by Order dated February 7, 2018. Accordingly, Windstream Communications, Inc., is now the only party seeking a declaratory order in this case.

It appears from the Commission's records that Windstream Communications, Inc., is not registered with the Commission and is not a local exchange carrier ("LEC") in the Commonwealth of Kentucky. If that is the case, the requested declaratory order cannot be issued, because the Applicant could not possibly be "substantially affected" by such an order, as the law requires.<sup>3</sup>

There are Windstream companies that are registered with the Commission as local exchange carriers or competitive local exchange carriers ("CLECs") – but they are not Applicants here. And at least some of the Windstream companies that are registered with the Commission – Windstream Nuvox, LLC ("Nuvox"), Windstream Norlight, LLC ("Norlight") and Windstream KDL, LLC ("KDL") – already have interconnection agreements ("ICAs") with AT&T Kentucky pursuant to which they are entitled to obtain interconnection with AT&T Kentucky's network.<sup>4</sup> By their terms, each of those ICAs will remain in effect until either AT&T Kentucky or the Windstream company that is a party to that ICA terminates it. Neither Nuvox nor Norlight nor KDL has asked AT&T Kentucky to negotiate a new ICA, and none of them has asked AT&T Kentucky for IP interconnection. For that matter, neither Windstream Communications, Inc., nor

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<sup>2</sup> See AT&T Kentucky's Initial Brief ("AT&T Br.") at 3 n.6. Because of a clerical error, AT&T Kentucky's Initial Brief was filed without page numbers. A copy of that brief with hand-written page numbers is attached hereto as Exhibit 1 for ease of reference.

<sup>3</sup> 807 KAR 5:001, Section 19, permits the Commission to issue a declaratory order only "upon application by a person substantially affected."

<sup>4</sup> The attached Verification of John Scott McPhee attests to all facts set forth herein that are not already of record.

any of the other CompSouth carriers that were previously participating in this case has ever asked AT&T Kentucky for IP interconnection.

## ARGUMENT

### **I. KENTUCKY LAW PROHIBITS THE COMMISSION FROM ISSUING A DECLARATORY ORDER CONCERNING THE FEDERAL TELECOMMUNICATIONS ACT.**

Windstream does not dispute, and cannot dispute, that the Commission “has only such powers as granted by the General Assembly”<sup>5</sup> and that “powers not conferred” on the Commission “are just as plainly prohibited as those which are expressly forbidden.”<sup>6</sup> From this it necessarily follows that the Commission cannot lawfully issue the declaration Windstream requests unless the Kentucky Legislature has authorized it to do so.

807 KAR 5:001, Section 19, authorizes the Commission to issue declaratory orders, but only with respect to specific enumerated matters, namely:

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.

This listing of discrete matters with respect to which the Commission may issue declaratory orders contrasts sharply with the statute that authorizes Kentucky circuit courts to issue declaratory orders. That statute allows the courts to issue declarations with respect to any matter that is within their jurisdiction. Specifically, KRS 418.040 provides, “In any action in a court of record of this Commonwealth having general jurisdiction . . . the plaintiff may ask for a declaration of rights.”

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<sup>5</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).

<sup>6</sup> *Baker v. Commonwealth*, 2007 WL 3037718, at \*34 (Ky. Ct. App. Oct. 19, 2007) (emphasis added; citations and quotations omitted).

As we note again below, Windstream argues that the Commission must have authority to issue a declaration concerning the meaning of the interconnection requirement in the FTA because it has authority to enforce that requirement in arbitrations under the FTA. That argument fails, because 807 KAR 5:001, Section 19, does *not* authorize the Commission to issue a declaration concerning anything that is within its subject matter jurisdiction, but only concerning the enumerated matters. And the question Windstream asks is not one of those matters.

Plainly, the question whether the interconnection regime under the FTA applies regardless of underlying technology, transmission media, or protocol is not a question about the Commission's jurisdiction, or about the applicability of an order or administrative regulation of the Commission, or about 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>7</sup> By its plain terms, 807 KAR 5:001, Section 19, does not authorize the Commission to address that question. And the same is true of the subsidiary question that Windstream poses about the FTA, namely, whether that federal statute permits a requesting carrier to petition for an order prescribing the rates, terms, and conditions of proposed interconnection with an incumbent local exchange carrier. That question, like the first, is about what the FTA means, and it would be answered solely by reference to the FTA. Accordingly, it, like the first question, is not within the scope of the declaratory order jurisdiction the Legislature conferred on the Commission in 807 KAR 5:001, Section 19.

Windstream argues that the Commission does have jurisdiction to issue the declaration of federal law that the Application requested, but its arguments are baseless.

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<sup>7</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.

1. Windstream first contends that AT&T Kentucky should not be allowed to challenge the Commission's jurisdiction because it once suggested that a proceeding for declaratory order would be an appropriate forum for the IP interconnection issue.<sup>8</sup> But it is black letter law that subject matter jurisdiction cannot be waived.<sup>9</sup> If the Kentucky Legislature did not empower the Commission to issue the declaration of federal law that Windstream seeks and it did not the Commission is prohibited from issuing such a declaration; it cannot do so on the theory that AT&T Kentucky forfeited the right to object.

2. Windstream asserts, 807 KAR 5:001, Section 19(1) specifically states that the Commission shall have authority to issue a declaratory order with respect to the jurisdiction of the commission . . . .<sup>10</sup> That is true, but irrelevant, because Windstream has not asked for a declaratory order with respect to the Commission's jurisdiction, as AT&T Kentucky has demonstrated.<sup>11</sup> To answer the questions posed in the Application, one would inquire only into the scope of the interconnection requirements in the FTA and KRS 278.530, not the scope of the Commission's jurisdiction under any jurisdiction-conferring statute. Indeed, AT&T Kentucky agrees that the Commission has jurisdiction to decide, in an arbitration under the FTA, whether the FTA requires IP interconnection. Consequently, if the Application did ask a question about

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<sup>8</sup> Brief of Competitive Carriers of the South, Inc. (Applicant Brief) at 50-51.

<sup>9</sup> *E.g., Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) (subject matter jurisdiction cannot be waived).

<sup>10</sup> Applicant Br. at 51.

<sup>11</sup> See AT&T Br. at 7-9.

the Commission's jurisdiction, as Windstream mistakenly claims it does, no declaration could issue, because an essential prerequisite for a declaratory ruling would be missing: a disagreement.<sup>12</sup>

3. Since the Kentucky statute that authorizes the Commission to issue declaratory orders plainly does not authorize a declaration of the meaning of a federal law, Windstream tries to create the impression that the FTA gives the Commission that authority. It asserts, "47 U.S.C. § 252 confers jurisdiction upon state regulatory agencies to implement and enforce the interconnection agreement negotiation, arbitration and filing portions of the [federal] Act."<sup>13</sup> This assertion fails for two reasons. First, the FTA does not authorize state commissions to issue declaratory orders. The FTA contemplates that state commissions will conduct arbitrations (47 U.S.C. § 252(b)) and will approve or reject ICAs (47 U.S.C. §252(e)), but it nowhere states or implies that state commissions may issue declaratory orders. Second, a federal statute cannot in any event authorize the Commission to do something that Kentucky law prohibits. As demonstrated above, Kentucky law does not authorize the Commission to declare, and thus prohibits the Commission from declaring, the meaning of federal law, including the FTA.

4. Windstream says, "Clearly, the Commission's own regulation is not an impediment to moving towards a permanent resolution of these important issues."<sup>14</sup> That misses the point. No one is suggesting that any regulation blocks some authority that the Commission would otherwise have to issue the requested declaration. Rather, the point, for which Windstream has no answer, is that the Legislature simply has not authorized it to do that which Windstream wants it to do.

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<sup>12</sup> *E.g., Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 434 S.W.3d 726, 735 (Ky. 2014) (holds, in a case arising out of a request for a declaration of rights, "For a cause to be justiciable there must be a present and actual controversy presented . . . by parties with adverse interests in the subject to be adjudicated.ö).

<sup>13</sup> Applicant Br. at 51.

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

5. Windstream next argues that the Commission has jurisdiction to decide this case because the intervenors are “utilities” under Kentucky law and the Commission’s sweeping authority to regulate interconnection among utilities does not “somehow end[] if the interconnection exchange is . . . accomplished in IP format.”<sup>15</sup> Again, this misses the point. Windstream identifies no Kentucky statute that authorizes the Commission to do anything and everything imaginable in the service of regulating interconnection. There is no such statute. The only statute that authorizes the Commission to issue declaratory orders is 807 KAR 5:001, Section 19, and that statute does not authorize the issuance of a declaratory order interpreting federal law. Indeed, if the Commission’s general regulatory authority implicitly included authority to issue declaratory orders, as Windstream implies, there would have been no need to enact 807 KAR 5:001, Section 19. And if 807 KAR 5:001, Section 19, were intended to authorize the Commission to issue declarations with respect to any and all matters it regulates, it would say so — like the statute that authorizes Kentucky circuit courts to issue declaratory orders.<sup>16</sup> Instead, Section 19 specifically enumerates the matters about which the Commission may issue a declaration, and those matters do not include the meaning of a federal statute.

6. Showing its desperation, Windstream claims that AT&T Kentucky is “effectively arguing that the Commission should declare it is without jurisdiction to issue a declaratory ruling involving interpretation of federal statutes based on an obviously inaccurate interpretation of those very federal statutes that is itself inconsistent with Commission precedent.”<sup>17</sup> Windstream is wrong. AT&T Kentucky’s demonstration that the Commission is without authority to issue a

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<sup>15</sup> *Id.* at 52.

<sup>16</sup> See *supra* at 3-4.

<sup>17</sup> Applicant Br. at 52.

declaration concerning the applicability of the FTA rests squarely on the language of 807 KAR 5:001, Section 19, not on the interpretation of any federal statute.

7. Windstream notes that the Federal Communications Commission (FCC) has urged state commissions to take action to clarify which agreements should be filed for their approval.<sup>18</sup> That urging, however, cannot be construed as a suggestion that state commissions act in ways that exceed their authority and if that were the FCC's intention, it would have to be disregarded.

8. Windstream claims that AT&T Kentucky is in effect arguing that the Commission somehow loses jurisdiction over telecommunications service if the technology underlying that service improves, and that the intervenors have utterly failed to identify any provision of the [FTA], FCC regulations, or case law that preempts the Commission from deciding issues about its own jurisdiction.<sup>19</sup> That argument is based on the false premise that the Application poses a question about the Commission's jurisdiction, which it indisputably does not.<sup>20</sup> Also, Windstream has it backwards. AT&T Kentucky's contention is not that the Commission loses jurisdiction over interconnection matters when the interconnection involves internet protocol. Rather, it is that the Commission can only do that which the Legislature has authorized it to do, and that the Legislature has not authorized the Commission to issue declarations about the meaning of the FTA.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 53.

<sup>20</sup> See AT&T Br. at 7-9.



9. Windstream relies on *Sprint Commc'ns v. Jacobs*, which it asserts is "extremely relevant to this proceeding."<sup>21</sup> That decision is in fact off point, because it sheds no light on the meaning of 807 KAR 5:001, Section 19, or its application to this case.

10. Finally, Windstream's attempt to distinguish the federal courts of appeals decisions in *Verizon North v. Strand*, 309 F.3d 935 (6th Cir. 2002), and *Wisconsin Bell v. Bie*, 340 F.3d 441 (7th Cir. 2003),<sup>22</sup> is futile. Those decisions rejected state commission attempts to apply FTA requirements outside the arbitration/ICA approval process that Congress established in the FTA on the ground that "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,"<sup>23</sup> so that state commission implementation of those duties outside the process established in the FTA "has to interfere with the procedures established by the federal act. It places a thumb on the negotiation scales."<sup>24</sup> If the Commission were to issue the declaration Windstream requests, it would thereby place a thumb on the negotiation scales in precisely the way the Sixth and Seventh Circuits disapproved. If a Windstream affiliate asks AT&T Kentucky to negotiate a new ICA that provides for IP interconnection, AT&T Kentucky will have the opportunity, as Congress intended, to put its own issues on the table, and Windstream would likely raise additional issues as well. Then, as Congress intended, the give and take of the ensuing negotiations may resolve some issues and will certainly inform the ensuing arbitration, if any. But if the Commission were to declare now, even though Kentucky law does not permit it to do so, that the FTA either does or does not require IP

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<sup>21</sup> Applicant Br. at 56.

<sup>22</sup> See the discussion of these decisions in AT&T Br. at 11-12.

<sup>23</sup> *Verizon North*, 309 F.3d at 940.

<sup>24</sup> *Wisconsin Bell*, 340 F.3d 441, 444.

interconnection, that would inevitably skew the negotiations and thereby interfere with the negotiation/arbitration procedures established by the FTA.

**II. EVEN IF THE COMMISSION DID HAVE POWER TO ISSUE A DECLARATORY ORDER INTERPRETING THE FTA, IT WOULD BE IMPRUDENT FOR THE COMMISSION TO DO SO.**

In its initial brief, AT&T Kentucky gave a number of reasons that the Commission would be ill-advised to issue the declaration of federal law Windstream requests even if it had power to do so.<sup>25</sup> Those reasons remain valid, but we do not discuss them at length here, because the failure of Applicant's initial brief to identify a basis for jurisdiction to issue such a declaration leaves no doubt on that score. Two points warrant mention, however.

First, there is no pressing need for a declaration of federal law concerning IP interconnection in Kentucky. In the more than three years since the Application was filed, neither the Applicant nor any of its affiliates that are not Applicants nor any of the CLECs that were participants in the case at that time has asked AT&T Kentucky to provide IP interconnection. Nor did any Kentucky CLEC seek to intervene in the proceeding. Moreover, during the more than six months since Windstream became the sole Applicant in this case, Windstream did nothing to urge a decision and even after AT&T Kentucky pointed out in its initial brief that none of the CompSouth members had asked AT&T Kentucky for IP interconnection,<sup>26</sup> neither Windstream nor any of its Kentucky affiliates nor any other former CompSouth participant in this case has done so.

Second, Windstream's principal response to AT&T Kentucky's demonstration that the proper forum for addressing IP interconnection is an ICA arbitration is false. Windstream asserts

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<sup>25</sup> AT&T Br. at 9-15.

<sup>26</sup> *Id.* at 4.

that if it seeks to arbitrate IP interconnection with AT&T Kentucky, AT&T Kentucky will likely argue that the Commission does not have jurisdiction to adjudicate an interconnection agreement for the IP exchange of voice traffic.<sup>27</sup> As AT&T Kentucky has made clear, however, AT&T Kentucky will not argue and no AT&T ILEC has argued that the state commission is without jurisdiction to decide in an arbitration whether the interconnection requirement in the FTA applies to IP interconnection or, if it does, what the terms and conditions of IP interconnection should be.<sup>28</sup> On the contrary, AT&T Kentucky recognizes that the Commission does have jurisdiction, in an arbitration conducted under the FTA, to decide whether the FTA obliges AT&T Kentucky to provide IP interconnection. Thus, Windstream is also wrong when it states that it is only then [in an arbitration] that the Commission should rule on whether it has jurisdiction pursuant to federal and state law to adjudicate the arbitration.<sup>29</sup> The Commission will not need to rule on that jurisdiction question in any arbitration to which AT&T Kentucky is a party, because AT&T Kentucky will concede that the Commission has jurisdiction to adjudicate the arbitration.<sup>30</sup>

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>31</sup> Here, an appropriate remedy or process will be readily available when and if

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<sup>27</sup> Applicant Br. at 54.

<sup>28</sup> See AT&T Br. at 9.

<sup>29</sup> Applicant Br. at 54.

<sup>30</sup> To be clear, AT&T Kentucky may take the position that the FTA does not require it to provide IP interconnection, but it would concede that the Commission has jurisdiction to decide in an arbitration whether the FTA does or does not so require.

<sup>31</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).

Kentucky telecommunications carriers have a ripe disagreement about IP interconnection under the FTA: arbitration pursuant to the FTA.

### III. THE COMMISSION CANNOT LAWFULLY MAKE A DECLARATION CONCERNING KRS 278.530.

807 KAR 5:001, Section 19, permits the Commission to issue a declaratory order concerning, the application of KRS Chapter 278, but only upon application *by a person substantially affected.*<sup>32</sup> 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, “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>33</sup>

AT&T Kentucky previously demonstrated that none of the then-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 had ICAs with AT&T Kentucky pursuant to which they have established interconnection with AT&T Kentucky, and (2) none of them had a cognizable grievance with AT&T Kentucky because none of them had asked AT&T Kentucky for

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<sup>32</sup> 807 KAR 5:001(19)(1) (emphasis added).

<sup>33</sup> KPSC Staff Opinion 2013-015, p. 4 (cited in Application at 4, ¶ 10) (emphasis added).

IP interconnection and AT&T Kentucky had not refused an interconnection request of any sort from any of them.<sup>34</sup>

Despite the fact that the Commission can issue a declaratory ruling only upon the application of a person who will be substantially affected by such a ruling, and despite the fact that AT&T Kentucky emphasized this requirement in its response to CompSouth's Application,<sup>35</sup> Windstream's initial brief did not even contend, let alone demonstrate, that Windstream or any other then-participating CompSouth member would be affected, substantially or otherwise, by the requested declaratory order.

The Applicant's failure to satisfy the "substantially affected" requirement is even more stark now than it was when initial briefs were filed. Windstream Communications, Inc., is now the sole Applicant and, as noted above, it appears that that company is not registered with the Commission and is not a local exchange carrier in Kentucky. If that is indeed the case, the Applicant would plainly be unaffected by the requested declaration.

Moreover, even if the Commission were to disregard the identity of the particular Windstream company that is the sole Applicant and were to proceed as if its affiliate Windstream Nuvox, LLC, for example, were the Applicant, a declaratory order still could not issue. That company has a binding interconnection agreement with AT&T Kentucky; has not asked to renegotiate that contract; has not asked AT&T Kentucky for IP interconnection; and so, of course, has not been refused IP interconnection by AT&T Kentucky. These facts are fatal to the Application for two related reasons: First, a carrier is entitled to relief under KRS 278.530 only when a request for interconnection has been refused — as the statute states in so many words — and

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<sup>34</sup> AT&T Br. at 15-17.

<sup>35</sup> See AT&T Kentucky's Amended Response to Application of CompSouth for a Declaratory Order at 14-16.

not when there is an existing interconnection, as Staff has stated. Accordingly, Windstream (or Nuvox) is not entitled to relief under KRS 278.530, declaratory or otherwise. Second, the facts foreclose any contention that Windstream (or Nuvox) would be substantially affected by the requested declaration.

Windstream argues that it makes no difference under KRS 278.530 that the complaining carrier is already interconnected with AT&T Kentucky pursuant to the parties' existing ICA, because that ICA calls for TDM interconnection and it seeks a declaration about IP interconnection.<sup>36</sup> That argument goes nowhere, because, as Staff implicitly recognized when it said that KRS 278.530 only applies where interconnection does not already exist, KRS 278.530 does not require any particular type of interconnection, and does not entitle Windstream to its preferred form of interconnection. By its plain and unambiguous terms, the statute comes into play only when a 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. Here, AT&T Kentucky has permitted Nuvox to interconnect upon terms, rates and conditions to which Nuvox agreed, and Nuvox has not asked AT&T Kentucky to interconnect on other rates, terms or conditions. Undeniably, Nuvox (which is not even a party to this proceeding) would not be substantially affected by the declaration Windstream requests.

### **CONCLUSION**

The Commission should deny the Application for Declaratory Order and close this proceeding.

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<sup>36</sup> Applicant Br. at 61.

Respectfully submitted,

/s/Cheryl R. Winn

Waters Law Group, PLLC  
12802 Townepark Way, Suite 200  
Louisville, KY 40243  
Telephone: (502) 425-2424  
Facsimile: (502) 425-9724  
Email: [crwinn@waterslawgroup.com](mailto:crwinn@waterslawgroup.com)

Dennis G. Friedman  
J. Tyson Covey  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, IL 60606  
Telephone: (312) 782-0600  
Email: [dfriedman@mayerbrown.com](mailto:dfriedman@mayerbrown.com)  
[jcovey@mayerbrown.com](mailto:jcovey@mayerbrown.com)

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

**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 September 5, 2018; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Cheryl R. Winn





**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

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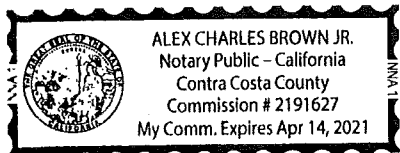
On 8/28/18 before me, Alex Charles Brown Jr. (Notary Public)  
Date Here Insert Name and Title of the Officer

personally appeared John Mephee  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



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