

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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

INITIAL BRIEF OF OF CINCINNATI BELL TELEPHONE COMPANY LLC

I. Introduction

a. Procedural Background

This proceeding was commenced by Competitive Carriers of the South, Inc. “CompSouth” by the filing of a petition for declaratory order, seeking a determination of the interconnection rights of carriers that provide voice service using Internet Protocol (“IP”) format. CompSouth requested the Commission to declare that interconnection under the federal Telecommunications Act, 47 U.S.C. §§ 251-52, and under state law, specifically KRS 278.530, apply on a technology-neutral basis, and that these federal and state laws permit a carrier to file a petition with the Commission for an order prescribing the rates, terms and conditions of interconnection with an incumbent local exchange carrier (“ILEC”).

On August 2, 2015, the Commission entered an Order requiring CompSouth to serve its petition on all ILECs, CLECs and CMRS providers in Kentucky and afforded all such providers the opportunity to intervene and respond in this proceeding. Cincinnati Bell Telephone Company LLC (“CBT”), BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”) and MCImetro Access Transmission Services LLC d/a/ Verizon Access Transmission Services LLC (“Verizon”) intervened. All of the Intervenors oppose the issuance of the requested declaratory ruling.

b. Staff Opinion 2013-015

CompSouth's request is based on an October 24, 2013 Staff Opinion, in response to a request from tw telecom of Kentucky, LLC,¹ that addressed the same issues that are being raised here: whether the federal and state statutes governing interconnection are "technology neutral" and whether any provider of voice communications may petition the Commission for an interconnection agreement. AT&T opposed the request for a legal opinion largely because these are issues of national significance that should be addressed by the FCC first. The FCC has an open proceeding where it is considering these issues among many others.²

Staff noted at the outset that tw telecom's request for an opinion had asked for "a generic interpretation of law, and did not ask Commission Staff to opine on the outcome of a specific factual scenario or application of the law."³ The Staff Opinion declined to conclude anything more than the general statement that the statutory interconnection regimes are "technology neutral."⁴ But Staff also cautioned that, while the FCC has stated that interconnection is "technology neutral," it has not determined if the regime under 47 U.S.C. § 251 is "service neutral," meaning that the FCC has not determined whether it applies to IP services or interconnection. Staff cited the ongoing FCC proceedings⁵ in which the FCC is addressing how

¹ tw telecom is not identified as a member of CompSouth in the Petition.

² See Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), at ¶¶ 1385-1395. Among the questions posed by the FCC were whether IP-to-IP interconnection would qualify as "the transmission and routing of telephone exchange service and exchange access," the prerequisite to § 251 interconnection (¶ 1389), and the extent to which an ILEC must be using IP protocol in its own network before it could be required to exchange traffic in IP protocol (¶ 1392).

³ Opinion at p. 3.

⁴ Opinion at p. 5.

⁵ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform: Mobility Fund,*

IP interconnection and services should be handled.⁶ Staff concluded that the FCC could preempt any action by the Commission regarding IP-enabled services or provide that a different interconnection scheme applies to IP services other than 47 U.S.C. § 251.

While Staff stated that a carrier could file for interconnection regardless of the underlying technology under either Kentucky or federal law, it also concluded that “each petition for arbitration stands on its own, and each case is ‘tied to factual circumstances or otherwise circumscribed in various ways’ and does not guarantee interconnection with an IP network.”⁷

c. The Petition

CompSouth requests the Commission to issue a declaratory ruling on the same issues that were the subject of Commission Staff Opinion 2013-015, to wit, that regardless of the underlying technology, transmission media, or protocol that may be used for the exchange of voice traffic between two carriers’ networks, (a) the interconnection regimes under 47 U.S.C. §§ 251-52 apply, and (b) a requesting carrier may file a petition with the Commission requesting an Order prescribing the rates, terms and conditions of proposed interconnection with an ILEC.

CompSouth would formalize the October 24, 2013 advisory Staff Opinion 2013-015 as a binding decision of the Commission. For the same reasons that Commission Staff declined to provide more than a generalized opinion in that matter, the Commission should decline to issue a declaratory ruling.

The Petition claimed that CompSouth’s members provide voice service to Kentucky end-users using IP format or in a format that can be converted to IP for purposes of transport.

WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) at ¶ 1381 (“*Connect America Fund*”).

⁶ Opinion at p. 5.

⁷ Opinion at p. 5.

CompSouth asserted that it is more efficient to exchange traffic that is in IP format than to convert traffic to TDM format “solely for the purposes of handing off the traffic to another provider at an interconnection point.”⁸ CompSouth asserted uncertainty whether such a carrier may file an arbitration petition absent an advance declaration from the Commission.⁹

CompSouth asserted that the state and federal statutory schemes are not limited to a particular technology, transmission media or protocol.¹⁰ It further asserted that KRS Chapter 278 encompasses any type of technology.¹¹ CompSouth contended that the FCC has stated that 47 U.S.C. § 251 is “technology neutral” and is not limited to circuit-switched voice traffic.¹² Finally, CompSouth claimed that Staff agreed in its advisory opinion that the statutory provisions are “technology neutral.”¹³ Without providing the details of any proposed interconnection arrangement in this proceeding, CompSouth requested the Commission to issue a binding declaratory order to the same effect.¹⁴

⁸ Petition at ¶ 3. CompSouth has presented no evidence that CBT transmits any voice traffic in IP format in Kentucky. As applied to CBT, CompSouth seems to seek to require the conversion of TDM traffic to IP format “solely for the purposes of handing off the traffic to another provider at an interconnection point.”

⁹ The uncertainty could have been resolved more efficiently by simply filing such an arbitration case, which would have been resolved one way or the other by now. And such a case would have presented a specific interconnection scenario that could be decided on actual facts.

¹⁰ Petition at ¶ 7.

¹¹ Petition at ¶ 8.

¹² Petition at ¶ 9.

¹³ Petition at ¶ 10.

¹⁴ Petition at p. 5. The failure to provide specific facts as to any given network and how it seeks to interconnect with any other specific network makes any attempt at a meaningful declaratory ruling in this matter impossible. The Petition did not specify what type of interconnection CompSouth sought to accomplish: to connect an IP network with a TDM network, two IP networks, or two TDM networks using an IP interface. Each scenario presents different legal and technical issues. It now appears that CompSouth wants to force TDM carriers to convert their traffic to IP protocol for the exchange of traffic, otherwise there would be no purpose for this proceeding.

d. Evidence.

Since the filing of the Petition, the Responses of the three Intervenors and CompSouth's Reply, each Party has filed its responses to Information Requests from the opposing side.¹⁵ In addition, CompSouth, AT&T Kentucky and Verizon have each filed the testimony of one witness, and CompSouth has filed rebuttal testimony of its witness.¹⁶

II. The Requirements For Issuance of a Declaratory Ruling Have Not Been Met.

The Commission Rule authorizing an application for a declaratory rule is 807 KAR 5:001, Section 19. Part (1) of the rule states:

The commission may, upon application by a person substantially affected, 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.

CompSouth's Petition is deficient in several regards and should be dismissed. Neither CompSouth nor any of its members is a "person substantially affected" as required by 807 KAR 5:001, Section 19(1). Neither the Petition, nor CompSouth's evidence, contains "a complete,

¹⁵ Response of Competitive Carriers of the South, Inc. to the First Set of Information Requests from MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (filed Sept. 9, 2016); Response of Cincinnati Bell Telephone Company LLC to Competitive Carrier of the South's Information Requests (filed Nov. 18, 2016); AT&T Kentucky's Objections and Responses to CompSouth's Information Requests (filed Nov. 23, 2016); Verizon's Responses to CompSouth's Data Requests (filed Nov. 23, 2016); AT&T Kentucky's Supplemental Responses to CompSouth's Information Requests (filed Jan. 12, 2017); Supplemental Response of Verizon to CompSouth's Information Requests (filed Jan. 17, 2017).

¹⁶ Testimony of Joseph Gillen on behalf of CompSouth (filed Aug. 4, 2016); Direct Testimony of Paul B. Vasington on behalf of Verizon Access (filed Oct. 25, 2016); Direct Testimony of Scott McPhee on behalf of AT&T Kentucky (filed Oct. 26, 2016); Rebuttal Testimony of Joseph Gillen on behalf of CompSouth (filed Feb. 17, 2017). As of this writing, portions of the Rebuttal Testimony of Mr. Gillen on behalf of CompSouth are the subject of a Motion to Strike by AT&T Kentucky.

accurate, and concise statement of facts upon which” the Commission could issue a declaratory ruling. 807 KAR 5:001, Section 19(2)(b). CompSouth does not describe any specific network configuration, any particular interconnection request, nor any particular interconnection arrangement that is sought or any proposed contractual interconnection terms. In short, the request is so generic as to be meaningless even if issued. Any actual interconnection controversy that might come before the Commission in the future would have to be decided on its specific facts, none of which are presented here. A general declaration that telecommunications laws are “technology neutral” is meaningless until applied to a real situation. No such situation has been presented here. CompSouth admitted in its Reply that its Application essentially presented only a legal question. CompSouth’s witness agreed that this case is really a legal question,¹⁷ but nevertheless proceeded to offer his lay opinions on what the law requires.

In Opinion 2013-015, the informal opinion that CompSouth seeks to formalize here, Staff noted that tw telecom’s request had asked for a “generic interpretation of a law” and not the “outcome of a specific factual scenario.” To ask the Commission to issue a binding declaratory ruling with no more specifics is a meaningless exercise. To rule that any telephone company, regardless of the technology employed, may invoke the Commission’s jurisdiction to seek an interconnection agreement accomplishes little. The details of a specific interconnection arrangement control and CompSouth offers no such detail. The more appropriate procedure would be for IP format carriers who seek interconnection agreements with ILECs to make a proper request for interconnection, engage in good faith negotiations, and *if* the parties are unable to negotiate an agreement, come to the Commission to arbitrate an agreement. The Commission

¹⁷ Direct Testimony of Joseph Gillan at p. 4.

could then determine whether the applicant is entitled to seek interconnection and, if so, to establish the terms and conditions of interconnection based on the specific facts of that case.

III. The Commission Should Decline to Issue a Declaratory Ruling Under Kentucky Law Because CompSouth Has Not Demonstrated That KRS 278.530(1) Applies to Any of its Members

KRS 278.530(1) states:

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.

CompSouth seeks a declaration whether the procedures in subsections (2) and (3) are available to its members.

The Commission should deny CompSouth's request because the statute only applies when "another telephone company . . . refuses to permit" it to connect its lines. There is no evidence in this case that any member of CompSouth has been refused interconnection by any telephone company in Kentucky, or that any of them is currently seeking interconnection for that matter. Thus, no member of CompSouth is "a person substantially affected" within the meaning of 807 KAR 5:001, Section 19, and there is no basis for issuing a declaratory ruling with respect to their rights under KRS 278.530.

CompSouth has not proven any unsuccessful attempt to reach an interconnection agreement with any telephone company. The Commission should decline to issue an advisory opinion where there is no pending dispute. Even if the Commission were to issue the opinion sought, it would not resolve any controversy that might appropriately come before the Commission in an actual arbitration case because no details have been presented in this case about any proposed type of interconnection that present any basis for making a specific ruling that could have future application. Such a decision should wait until two parties with an actual

interconnection controversy come before the Commission. Until then, all the Commission can do is engage in speculation, which is a waste of its valuable time and resources.

IV. The Commission May Not (And Should Not) Issue a Declaratory Ruling With Respect to Federal Law

The regulation authorizing a declaratory ruling, 807 KAR 5:001, Section 19, only authorizes a declaratory ruling with regard to an “administrative regulation of the commission or provision of KRS Chapter 278.”¹⁸ The regulation does not authorize the Commission to issue a declaratory ruling on federal law. The only proceeding in which the Commission may establish federal interconnection rights is a § 252 arbitration proceeding. The Telecommunications Act does not authorize a state commission to issue a declaratory ruling outside of an arbitration case. A state commission “shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).”¹⁹ A condition precedent to filing an arbitration petition is a request to negotiate an interconnection agreement with an ILEC and the passage of at least 135, but no more than 160, days without the conclusion of an agreement.²⁰ CompSouth has not offered evidence that any of its members has a pending negotiation request or any unresolved interconnection issue with any other service provider.²¹ Thus, the Commission’s jurisdiction under the

¹⁸ 807 KAR 5:001, Section 19(1).

¹⁹ 47 U.S.C. § 252(b)(4).

²⁰ 47 U.S.C. § 252(b)(1).

²¹ See Response of Cincinnati Bell Telephone Company LLC to Competitive Carriers of the South Inc.’s Information Requests, filed November 18, 2016. (No. 1: CBT has no interconnection agreements providing for the exchange of traffic in IP format; No. 2: CBT has had no negotiations with anyone for the exchange of voice traffic in IP format); AT&T Kentucky’s Supplemental Responses to CompSouth’s Information Requests, filed January 12, 2017, at p. 2 (AT&T Kentucky is not a party to any contract for the exchange of voice traffic in IP format and is not engaged in any such negotiations). Verizon is not an ILEC in Kentucky.

Telecommunications Act has not been invoked and there is no basis for the Commission to render an abstract opinion on federal law.

While CompSouth asserts that §§ 251-52 of the Telecommunications Act are not limited to a particular technology, transmission media, or protocol, § 251 only applies to a “telecommunications carrier” and the FCC has never determined that an IP-protocol voice service provider is a “telecommunications carrier.” The FCC itself has said: “It is unsettled whether VoIP providers themselves had a right to interconnection under section 251 of the Communications Act.”²² The FCC has declined to mandate IP interconnection “as the Commission currently is considering the appropriate policy framework for VoIP interconnection in pending proceedings.”²³

Even if this Commission could issue a declaratory ruling on the meaning of federal law, it should not. The FCC is already considering numerous specific issues about IP services and how/whether interconnection of IP networks should be regulated. Staff acknowledged in Opinion 2013-015 that the FCC had an open proceeding that will comprehensively address IP interconnection issues (one of the first of which is whether IP interconnection is even subject to the same rules as TDM interconnection). To date, the FCC still has not even declared that interconnected VoIP service is a “telecommunications service,” a prerequisite to invoking many rights under the Telecommunications Act.²⁴

²² FCC Brief for Respondents, *AT&T v. FCC*, Case No. 15-059 (D.C. Cir. Oct. 5, 2015).

²³ *Numbering Policies for Modern Communications*, 30 FCC Rcd 6839, ¶ 50 (2015).

²⁴ The FCC continues to defer deciding that issue which is unnecessary because its authority over interconnected VoIP services does not depend on whether they were “telecommunications services” or “information services,” as it has authority to regulate both. *Connect America Fund*, ¶ 63, n. 67, ¶ 954.

Most importantly, the FCC's decision to subject VoIP-PSTN interconnection to the intercarrier compensation requirements of § 251(b)(5) was limited to the exchange of VoIP-PSTN traffic in TDM (and not IP) format.²⁵ Thus, the FCC's "technology neutral" discussion was specifically limited to the context of traffic exchange in TDM format.

Even CompSouth's witness acknowledges that the FCC deferred the question of IP interconnection and *only* decided that § 251(b)(5) applies when traffic is exchanged in TDM format.²⁶ Thus, the FCC has not required TDM carriers to exchange traffic with IP carriers in IP format. The reason it makes a difference whether the calls are exchanged in TDM or IP format is that an ILEC that has a TDM-only network would have to convert its traffic to IP in order to exchange it in that format. The FCC (nor any state to CBT's knowledge) has never imposed that burden on a TDM carrier. Thus, it does make a difference what technology is used for the *interchange*. Mr. Gillan argues with the FCC's decision not to decide the issue, but the fact is that the FCC has not decided that issue and that should be controlling here as well.

The FCC has invoked other bases for its jurisdiction to regulate interconnected VoIP service, at the same time making clear that it may preempt state commissions' ability to regulate the same.²⁷ Whatever the FCC decides with respect to IP protocol interconnection will likely preempt any contrary ruling by a state commission. The Commission should stay out of the field until the FCC has established the ground rules (absent an actual § 252 petition for arbitration,

²⁵ *Connect America Fund*, ¶ 940; 47 C.F.R. § 51.913(a)(1).

²⁶ Gillen Direct Testimony, p. 5.

²⁷ See *Petition of Vonage Holdings Corporation for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 04-267, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

where the Commission would be called upon to decide a real case on real facts within its statutory jurisdiction).

V. CompSouth's Own Actions Are Inconsistent With the Relief Sought.

CompSouth contends that all IP interconnection agreements are subject to §§ 251-52, should be filed with state commissions publicly and be available for any service provider to review to see if they are discriminatory and to determine whether to adopt the pursuant to § 252(i).²⁸ CompSouth witness Gillen contends that nothing is more fundamental than the requirement to publicly file interconnection agreements for approval.²⁹ He cites the ability of other carriers to opt-in to agreements, making it necessary for them to fully review the agreements. Mr. Gillan says that the process cannot work if some agreements are secret and competitors cannot get the same terms.

CompSouth's position is undermined by its own behavior and that of its members. CompSouth sought confidential treatment and the prevention of disclosure of agreements between its members and third parties regarding the exchange of voice traffic in IP format. CompSouth objected to discovery requests from Verizon that asked it to identify and produce its members IP interconnection agreements.³⁰ CompSouth contended that "Confidential Information includes proprietary information regarding its participating members' IP voice traffic agreements."³¹ Further, "CompSouth has been advised and believes the open disclosure of this Confidential Information would allow competitors of CompSouth's participating

²⁸ Gillen Rebuttal Testimony, pp. 2, 5.

²⁹ Gillen Direct Testimony, p. 6, at line 9:

³⁰ CompSouth's September 9, 2016 Response to Verizon's First Request, Item 1 (which asked CompSouth to identify its members that have agreements regarding the exchange of voice traffic in IP format, and the counterparties to such agreements) and Item 2, which requested those agreements.

³¹ September 9, 2016 Motion for Confidential Treatment, ¶ 5.

members to gain an unfair advantage in future contract negotiations. The Confidential Information also constitutes a trade secret since it is commercial information, which, if disclosed to the public, could cause competitive harm to CompSouth’s participating members.”

CompSouth argued that these materials were *proprietary* information that *if publicly disclosed* would place CompSouth in a competitive disadvantage, and were *exempt* from public disclosure pursuant to KRS 61.878(1)(c)(1). All Verizon had requested was agreements “providing for or governing the exchange in IP format of voice traffic going from you to the other party as well as voice traffic coming from the other party to you.” CompSouth’s General Objection claimed that these were “commercial agreements.” On March 2, 2017, the Commission granted confidential treatment.³²

If agreements to exchange traffic in IP format were interconnection agreements subject to the requirements of §§ 251-252 of the Telecommunications Act, they would by definition have had to be publicly filed with the relevant state commission and would be open to inspection and adoption by any other carrier pursuant to 47 U.S.C§ 252(i). CompSouth would be prohibited from keeping them secret. By seeking and obtaining confidential treatment of these agreements, CompSouth has admitted that its members’ IP traffic-exchange agreements are not regulated interconnection agreements, but private commercial agreements. It is more than ironic that CompSouth has done the very thing here that it says it is trying to prohibit.

VI. The Purpose of the Petition Can Only Be to Force TDM Carriers to Interconnect in IP Format.

The Petition in this case asked the Commission to declare that interconnection was “technology neutral” but did not specify exactly what it sought to accomplish as a practical

³² On March 21, 2017, the Commission granted rehearing to Verizon to grant confidential treatment to the same information where it was discussed in the testimony of Verizon’s witness.

matter. It should now be apparent that CompSouth must be attempting to force TDM carriers to interconnect in IP format. The FCC has never required a TDM carrier to convert its traffic to IP format in order to exchange it with another carrier. But that must be what CompSouth seeks, as is certainly free to convert its IP traffic to TDM format and demand interconnection with an ILEC in TDM protocol.³³ As Verizon's witness states, a TDM-IP conversion is always necessary to exchange traffic between a legacy TDM endpoint and an IP endpoint.³⁴ Thus, since CompSouth's members can already convert their traffic to TDM and require interconnection, the true purpose of this case must be to force TDM carriers to perform a conversion to IP for CompSouth's members. That is something the FCC has so far declined to do. This Commission should not be the first to take that step, especially with the absence of any evidence in this record to support such a move.

VII. Conclusion

The Commission should deny CompSouth's request for a declaratory ruling. There is no legal basis for the Commission to issue a declaratory ruling on the federal Telecommunications Act. The Commission may only determine federal interconnection requirements in the actual arbitration of a specific interconnection agreement pursuant to 47 U.S.C. § 252.

Under Kentucky law, CompSouth has not established the necessary prerequisite for a declaratory ruling. KRS 278.530 requires that a telephone company first seek and be refused interconnection by another telephone company, but there is no evidence that any CompSouth member has done so, as required by 807 KAR 5:001(19)(2)(b). In any event, CompSouth has presented no details to the Commission that could yield a meaningful declaratory ruling on any

³³ *Connect America Fund*, ¶ n. 2004.

³⁴ Direct Testimony of Paul B. Vasington at p. 10.

issue. Even if the Commission might say that the applicable statutes are “technology neutral,” that is meaningless until presented with a specific interconnection situation requiring resolution. It would be impossible and unwise to prejudge an unknown situation through an abstract and generic ruling. The Commission should deny the request for declaratory ruling.

Respectfully submitted,

/s/ Douglas E. Hart

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CERTIFICATE OF SERVICE AND FILING

Counsel 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.

This 24th day of March, 2017

/s/ Douglas E. Hart _____
Douglas E. Hart
Attorney for Cincinnati Bell
Telephone Company LLC