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January 22, 2008

VIA HAND DELIVERY

filed electronically in docket office on 01/22/08

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*
Docket No. 04-00046

Dear Chairman Roberson:

Enclosed are the original and four copies of *AT&T Tennessee's Response to NuVox's Petition for Reconsideration and Clarification.*

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*

Docket No. 04-00046

AT&T TENNESSEE'S RESPONSE TO NUVOX'S PETITION FOR RECONSIDERATION AND CLARIFICATION

BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") respectfully submits this response to the Petition for Reconsideration and Clarification ("Petition") filed by NuVox Communications, Inc. ("NuVox") in the above-referenced arbitration docket.[1] In its Petition, NuVox requests the Tennessee Regulatory Authority ("Authority") to reverse course and change its commingling decision (Item 26) as set forth in the Authority's Final Order of Arbitration Award dated December 5, 2007 ("*Order*").[2] Regarding commingling, the Authority correctly concluded that AT&T Tennessee (then known as BellSouth) has no obligation under federal law "to commingle UNEs [unbundled network

[1] Although the arbitration petition was jointly filed by four competitive local exchange carriers ("CLECs"), only one CLEC, NuVox, remains active in this arbitration. Since the filing of the arbitration petition, two of the four original CLECs have merged (NewSouth and NuVox); the other two original CLECs (KMC Telecom and Xspedius) have settled matters with AT&T and have entered into interconnection agreements outside of the context of this arbitration.

[2] *Order* at 6-7. The Authority's commingling decision in this arbitration is consistent with the Authority's commingling ruling in the Authority's generic change of law docket, Docket No. 04-00381 ("Generic Docket").

elements] or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act."[3]

The Authority's commingling ruling is consistent with federal law as pronounced by the Federal Communications Commission ("FCC") in its *Triennial Review Order ("TRO")*,[4] wherein the FCC held that carriers like AT&T Tennessee were not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[5] Additionally, the Authority's commingling decision is completely consistent with the FCC's elimination of the UNE Platform ("UNE-P") regime in its *Triennial Review Remand Order ("TRRO")*[6] wherein the FCC ended the UNE-P regime in order to encourage facilities-based competition and discourage dependence on the networks of incumbent local exchange carriers ("ILECs") like AT&T Tennessee.[7]

In its Petition, NuVox, which is a member of the Competitive Carriers of the South, Inc. ("CompSouth"), incorporates by reference the commingling petition for reconsideration filed by CompSouth in the Generic Docket.[8] Accordingly, AT&T Tennessee incorporates by reference its response to CompSouth's reconsideration

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[3] *Id.* at 7.

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (*"Triennial Review Order"* or *"TRO"*), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004).

[5] *TRO* at ¶ 655, footnote 1989 (prior to the issuance of the *TRO*'s Errata, footnote 1989 was footnote 1990).

[6] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) (*"Triennial Review Remand Order"* or *"TRRO"*)(subsequent history omitted).

[7] *TRRO* at ¶ 218.

[8] Petition at 4.

petition. For the Authority's convenience, a copy of AT&T Tennessee's response is attached hereto as Exhibit A.

Additionally, NuVox urges the Authority to: (i) "clarify" its line conditioning ruling (Item 36); (ii) modify its load coil removal decision (Item 37); and (iii) strike a portion of its EEL audit ruling (Item 51). As explained herein, there is no need for the Authority to reconsider, modify, or clarify the *Order* in the manner requested by NuVox. Accordingly, NuVox's Petition should be denied.

Item 26: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

As previously noted, the Authority correctly concluded that AT&T Tennessee (then known as BellSouth) has no obligation under federal law "to commingle UNEs [unbundled network elements] or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act."[9] In support of its Petition, NuVox states that the Authority's decision is inconsistent with legal precedent, specifically – *NuVox Communications v. Edgar*, 511 F.Supp.2d 1198 (N.D. Fla. 2007)("*NuVox v Edgar*").[10] Regarding its cited legal precedent, NuVox failed to mention that the commingling aspect of the *NuVox v. Edgar* decision is on appeal and is currently pending before the United States Court of Appeals for the Eleventh Circuit.[11] In any event, NuVox's

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[9] *Order* at 7.

[10] Petition at 2.

[11] Case No. 07-13028-F. The matter has been briefed and oral argument was held on January 17, 2008.

statement regarding legal precedent overlooks at least three federal court cases which are completely consistent with the Authority's commingling ruling.

First, in *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *appeals pending*, Docket Nos. 06-3701, 06-3726, 06-3727 (8th Cir.), the District Court reversed a state commission decision that had attempted to require the combination of Section 271 and Section 251 elements, holding that "the [Missouri] PSC's requirement that [SBC] combine switching, which is only required under § 271, with facilities required under § 251 creates the same substantive combination as the UNE Platform and is directly contrary to the FCC's holding." *Id.* at 1069. Second, in *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005), the District Court, quoting with approval the New York Public Service Commission, noted "that there is no federal right to 271-based UNE-P arrangements." *Id.* at 565. Finally, in *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 U.S. Dist. LEXIS 70221, at *13 (N.D. Ill. Sept. 28, 2006), the District Court rejected, on preemption grounds, the Illinois Commerce Commission's attempt to require the combination of § 251 elements and § 271 elements. Again, these three federal court cases support the Authority's well-reasoned commingling decision. Moreover, these federal court decisions all implicitly recognize that allowing access to the same set of facilities that comprised UNE-P (which is the commingling interpretation proposed by NuVox) is directly at odds with federal policy and law.

In *Nuvox v. Edgar*, the district court vacated a Florida Public Service Commission ("FPSC") ruling which held that BellSouth did not have an obligation under federal law to commingle UNEs with Section 271 elements.[12] In doing so, the District Court did not address the FCC's holding that BOCs (like AT&T Tennessee) are not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[13] The district court also failed to address the FPSC's conclusion that a requirement to provide Section 271 and Section 251 elements in pre-combined form would effectively recreate a hybrid form of UNE-P.

In short, the *Nuvox v. Edgar* decision cannot be squared with federal law regarding Section 271 and federal policy regarding the elimination of UNE-P. Ending UNE-P has been a central federal priority in order to encourage reliance on alternative facilities and discourage dependence on ILEC networks.[14] The Authority's commingling decision is consistent with such federal policy. Contrary to federal policy, NuVox's interpretation of the commingling rule would result in access to the same set of facilities that once comprised UNE-P. As such, the Authority should deny NuVox's Petition for Reconsideration on Item 26.

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[12] Final Order Regarding Petition for Arbitration, FPSC Docket No. 040130-TP, Order No. PSC-05-0975-TP, at 19.

[13] *Triennial Review Order* at¶ 655, footnote 1989.

[14] *See BellSouth v. MCImetro* 425 F.3d at 970; *TRRO* at ¶ 218.

Item 36: (A) How should line conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to Line Conditioning? (Attachment 2, Section 2.12.1)

In its *Order*, the Authority adopted NuVox's position and held that line conditioning should be defined as set forth in the FCC's line conditioning rule.[15] Not satisfied with winning this issue, NuVox asks the Authority to go beyond the language of the FCC's line conditioning rule and include "an express, affirmative ban on AT&T limiting the provisioning of line conditioning to circumstances in which it regularly performs line conditioning for its own customers."[16] As explained below, the Authority should summarily reject NuVox's request. First, NuVox is asking the Authority to define line conditioning in a manner that goes beyond the federal definition of line conditioning as set forth in the FCC's rules. This request is directly at odds with NuVox's position on this matter. Indeed, if the Authority chose to look beyond the FCC's line conditioning rule in deciding this issue, then the first place the Authority should look is the FCC's discussion of line conditioning in the *TRO* wherein the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers."[17] Of course, harmonizing the *TRO's* line conditioning discussion with the text of the FCC's line conditioning rule would require the Authority to adopt AT&T Tennessee's position on this issue, which presumably is not the result NuVox is seeking. Unless the Authority were to

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[15] *Order* at 31.
[16] Petition at 5.
[17] *TRO* at ¶ 643.

reconsider and adopt AT&T Tennessee's position, the Authority should deny NuVox's Petition with respect to Item 36.

Second, the Authority reached the same line conditioning conclusion in the Generic Docket.[18] Notably, CompSouth (of which NuVox is a member) was satisfied with winning the line conditioning issue in the Generic Docket and thus did not seek reconsideration of the Authority's line conditioning ruling in the Generic Docket. Here, NuVox has offered no legitimate basis for the Authority to re-visit its line conditioning ruling. As such, the Authority should deny NuVox's Petition for Reconsideration of Item 36.

Item 37: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less? (Attachment 2, Section 2.12.2)

NuVox requests for the Authority to delete the following statement, which is contained at the end of the Authority's "Deliberations and Conclusions" portion of section: "The majority of the Panel voted that any provision of service that BellSouth provides for its own customers shall also be made available to CLECs regardless of length."[19] NuVox claims that this straightforward sentence is somehow "ambiguous and confusing."[20] NuVox's claim lacks credibility. The statement appears to be nothing more than a summation AT&T Tennessee's general non-discrimination obligation with respect to the services AT&T Tennessee

[18] Generic Docket Order at 63-64.
[19] *Order a*t 33.
[20] Petition at 6.

provides to its retail and wholesale customers. What is ambiguous and confusing is why NuVox wishes to have this non-controversial statement deleted.

With other issues in this arbitration (for example, payment due date), NuVox attempted to obtain an unfair competitive advantage by requiring AT&T Tennessee to confer special treatment upon NuVox. It is unclear what NuVox is attempting to accomplish by requesting deletion of the language in question. What is clear is that the Authority should not assist NuVox in any attempt to obtain special treatment that goes above and beyond how AT&T Tennessee treats other CLECs operating in Tennessee. As such, the Authority should deny NuVox's Petition for Reconsideration on Item 37.

Item 51: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?

The Authority held that "reimbursement of audit costs should conform to the provisions of paragraph 627 of the *Triennial Review Order.*"[21] Asserting that reimbursement of audit costs were not an issue in the arbitration, NuVox requests for the Authority to strike the reimbursement language (quoted above).[22] There is no need for the Authority to strike such language. First, as NuVox acknowledges, the parties have agreed upon audit reimbursement language that comports with the *Triennial Review Order.*[23] As such, there is no need for the Authority to waste time addressing a matter that is not in dispute. Second, AT&T Tennessee is concerned

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[21] *Order* at 19.
[22] Petition at 7.
[23] *Id.*

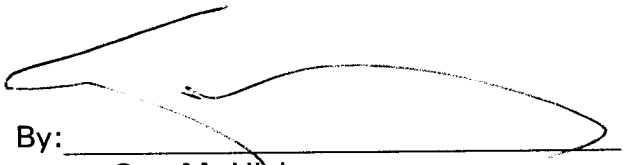
that deleting the language in question may create the erroneous impression that the Authority's EEL audit reimbursement position differs from the FCC's position on the issue as set forth in the *Triennial Review Order*. To avoid such confusion, the Authority should deny NuVox's Petition for Reconsideration on Item 51.

CONCLUSION

For the reasons set forth herein and in AT&T Tennessee's Response to CompSouth's Petition for Reconsideration in the Generic Docket, the Authority should deny NuVox's Petition for Reconsideration and Clarification.

Respectfully submitted,

AT&T TENNESSEE



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January 15, 2008

VIA HAND DELIVERY

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Roberson:

Enclosed are the original and four copies of *AT&T Tennessee's Response to CompSouth's Petition for Reconsideration.*

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

Exhibit A

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

AT&T TENNESSEE'S RESPONSE TO COMPSOUTH'S PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") respectfully submits this response to the Petition for Reconsideration ("Petition") filed by the Competitive Carriers of the South, Inc. ("CompSouth") in the above-referenced docket. In its Petition, CompSouth requests the Tennessee Regulatory Authority ("Authority") to reverse course and change its commingling decision (Issue 14) as set forth in the Authority's Order dated November 28, 2007 ("*Order*").[1] Regarding commingling, the Authority correctly concluded that AT&T Tennessee (then known as BellSouth) has no obligation under federal law "to commingle UNEs [unbundled network elements] or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act."[2] As discussed below, the Authority's commingling ruling is consistent with federal law as pronounced by the Federal Communications Commission ("FCC") in its *Triennial Review Order*,[3] wherein the

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[1] *Order* at 27-33.

[2] *Id.* at 32.

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated and remanded in part, aff'd in part,*

FCC held that carriers like AT&T Tennessee were not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[4] Additionally, the Authority's commingling decision is completely consistent with the FCC's elimination of the UNE Platform ("UNE-P") regime in its *Triennial Review Remand Order* ("*TRRO*")[5] wherein the FCC ended the UNE-P regime in order to encourage facilities-based competition and discourage dependence on the networks of incumbent local exchange carriers ("ILECs") like AT&T Tennessee.[6]

In its Petition, CompSouth largely repeats it core commingling argument (i.e. that "wholesale facilities and services" that are subject to the FCC's commingling rule should be expanded to include elements unbundled pursuant to Section 271 of the Telecommunications Act of 1996 (the "Act").[7] This tired argument has already been made, considered, and properly rejected by the Authority. Except as noted below, because CompSouth offers nothing new in support of its position – a position that would impermissibly resurrect access to the same set of facilities that comprise UNE-P[8] -- the Authority should deny CompSouth's Petition.[9]

United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*), *cert. denied, NARUC v. United States Telecom Ass'n,*, 125 S. Ct. 313 (2004).

[4] *TRO*, ¶ 655, footnote 1989 (prior to the issuance of the *TRO*'s Errata, footnote 1989 was footnote 1990).

[5] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[6] *TRRO*, ¶ 218.

[7] *Cf.* Petition *and* CLEC Post-Hearing Brief at pp. 69-75.

[8] If commingling were permitted in the manner suggested by CompSouth, that would not change the fact that switching as a Section 271 checklist item remains subject only to a market-rate pricing requirement. *See TRO*, ¶ 664. It remains AT&T Tennessee's position that the

That said, CompSouth offers two new arguments in support of its Petition. As discussed below, both arguments are unavailing and should be disregarded by the Authority.

The Authority should disregard the *NuVox v. Edgar* court opinion because the opinion undermines federal law regarding the scope of 271 obligations and is contrary to federal policy mandating the eliminate of UNE-P in favor of genuine competition.

In support of its Petition, CompSouth claims that the Authority's decision is inconsistent with the "only" federal court decision that is on point – *NuVox Communications v. Edgar,* 511 F.Supp.2d 1198 (N.D. Fla. 2007)("*NuVox v Edgar*").[10] This assertion overlooks other federal court cases. In an appeal of an arbitration order issued by the Missouri Public Service Commission ("MPSC"), the federal court reversed the MPSC's decision which had required Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC") to combine Section 271 elements with Section 251 facilities:

> Separate from the issue of the MPSC's jurisdiction to impose obligations on SBC under § 271, SBC argues that the substantive obligations imposed in the Arbitration Order contravene the clear intent of the FCC as expressed in the TRRO, and are therefore preempted. Specifically, SBC contends that the MPSC's requirement that it combine switching, which is only required under § 271, with facilities required under § 251 creates the same substantive

Authority has no jurisdiction to determine compliance with Section 271. *See* 47 U.S.C. § 271(d)(6).

[9] For the Panel's convenience, AT&T Tennessee has as attached as Exhibit A to this response, the commingling discussion set forth in BellSouth Telecommunications, Inc.'s Post-Hearing Brief. To the extent necessary, AT&T Tennessee incorporates by reference the aforementioned commingling position.

[10] Petition at 1.

combination as the UNE Platform and is directly contrary to the FCC's holding. The Court agrees.[11]

Additionally, a federal court in Mississippi has likewise concluded that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it . . . clear that there is no federal right to 271-based UNE-P arrangements.'"[12] In short, CompSouth's claim that *NuVox v Edgar* is the only case on point is inaccurate. Further, although NuVox Communications, Inc. is a CompSouth member, CompSouth failed to mention that the commingling aspect of the *NuVox v Edgar* decision is on appeal and is currently pending before the United States Court of Appeals for the Eleventh Circuit.[13]

In *Nuvox v. Edgar*, the district court vacated a Florida Public Service Commission ("FPSC") ruling which held that BellSouth did not have an obligation under federal law to commingle UNEs with Section 271 elements.[14] In doing so, the District Court did not address the FCC's holding that BOCs (like AT&T

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[11] *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1069 (E.D. Mo. 2006), *appeals pending*, Docket Nos. 06-3701, 06-3726, 06-3727 (8th Cir.).

[12] *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005) (quoting Order Implementing TRRO Changes, Case No. 05-C-0203, 2005 WL 607973, at *13 (N.Y. Pub. Serv. Comm'n Mar. 16, 2005)); *see also Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *14 (N.D. Ill. Sept. 28, 2006) (rejecting state commission's attempt to require the combination of § 251 elements and § 271 elements); Opinion, *Indiana Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communications Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, 2006 Ind. PUC LEXIS 40, at *53 (Ind. Util. Reg. Comm'n Jan. 11, 2006) ("[F]ootnote 1990 also holds that ILECs are not required to combine Section 271 network elements because Section 271 does not contain any such requirement. Since neither Section 271 nor the FCC's interpretation requires commingling of Section 271 network elements, the same analysis applies.").

[13] Case No. 07-13028-F (oral argument scheduled for January 17, 2008).

[14] Final Order Regarding Petition for Arbitration, FPSC Docket No. 040130-TP, Order No. PSC-05-0975-TP at 19.

Tennessee) are not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[15] The district court also failed to address the FPSC's conclusion that a requirement to provide Section 271 and Section 251 elements in pre-combined form would effectively recreate a hybrid form of UNE-P, which the FPSC noted would be "contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[16] Again, the *Nuvox v. Edgar* decision is on appeal, and as discussed above, the district court's decision cannot be squared with federal law regarding Section 271 and federal policy regarding the elimination of UNE-P. As such, the Authority should decline the invitation to adopt the reasoning in *NuVox v. Edgar* and thus should deny CompSouth's Petition for Reconsideration.

CompSouth concedes, as it must, that *USTA II* upheld the FCC's determination that BOCs (like AT&T Tennessee) have no obligation to combine 271 elements with 251 elements,[17] but then makes the strained argument this does not necessarily mean that AT&T Tennessee has no obligation to commingle 271 elements with 251 elements.[18] In essence, CompSouth suggests that the same substantive result is required so long as it is termed a "commingling" request and not a request for a "combination" of facilities. Such a suggestion is incorrect.

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[15] *Triennial Review Order*, ¶ 655 footnote 1989.

[16] Final Order Regarding Petition for Arbitration, FPSC Docket No. 040130-TP, Order No. PSC-05-0975-TP at 19

[17] Petition at 7; *Triennial Review Order*, ¶ 655 footnote 1989. The D.C. Circuit specifically affirmed the FCC's decision not to require that companies like AT&T Tennessee provide on a combined basis facilities offered only under Section 271 with other facilities. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589-590 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004)

[18] Petition at 7.

Again, the FCC specifically discussed the concept of "combining" in terms of Section 271 facilities, and it declined to impose such an obligation in this context. Nowhere in the *TRO* did the FCC indicate that its limitation on combining as to Section 271 was utterly meaningless because, as CompSouth argues here, the same substantive obligation is imposed by the separate commingling rules. The FCC's decision should be interpreted so that all of the agency's determinations have meaning, not in the self-defeating and internally contradictory manner urged by CompSouth.

Moreover, CompSouth's interpretation of the commingling rule would also undermine the FCC's specific determination that carriers should no longer have access to the combined facilities that make up UNE-P. As the Eleventh Circuit has observed, the FCC barred access to the UNE-P based on a finding that access to those combined facilities undermined facilities-based competition and was thus "anticompetitive and contrary to federal policy."[19]

The Authority should dismiss as completely unpersuasive CompSouth's contention that its commingling position would not result in the recreation of UNE-P.

Regarding the resurrection of UNE-P, CompSouth claims that a commingling arrangement that combines loops and switching is not the equivalent of UNE-P because the switching component of a combined package of loops and switches would not be subject to TELRIC pricing.[20] Regardless of pricing, CompSouth's

[19] BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., 425 F.3d 964, 970 (11th Cir. 2005).

[20] Petition at 10.

proposed interpretation of the commingling rule would undermine the FCC's elimination of UNE-P. As the Eleventh Circuit has explained, the FCC rejected UNE-P based on a finding that it "frustrated sustainable, facilities-based competition," and moreover was "anticompetitive and contrary to federal policy."[21]

Regardless of whether it is labeled "combining" or "commingling," connecting a Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid form of UNE-P, which is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.[22] The Authority's commingling ruling is consistent with the Missouri federal district court's finding that "facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, pre-packaged form," and that the Missouri commission's contrary decision was "preempted" because it "permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation."[23]

Indeed, in granting in part a forbearance petition filed by Qwest (a BOC like AT&T Tennessee), the FCC explained that Qwest had "introduc[ed] a commercial product designed to replace [UNE-P]," "*even in the absence of a legal mandate to*

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[21] *BellSouth v. MCImetro*, 425 F.3d at 970 (internal quotation marks and alterations omitted); *see TRRO*, ¶ 218 (holding that UNE-P "hinder[s] the development of genuine . . . competition"), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *USTA II*, 359 F.3d at 576 ("After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition.").

[22] *TRRO*, ¶ 218.

[23] *Southwestern Bell*, 461 F. Supp. 2d at 1070; *see also BellSouth v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d at 565; *Illinois Bell*, 2006 WL 2796488, at *14.

do so."[24] The FCC would not have made such a statement if, as CompSouth urges, the commingling rule imposes a legal mandate to combine facilities made available under Section 251 (such as loops) with those provided under Section 271 (such as switching). Specifically, the commercial product that the FCC analyzed in the *Qwest* decision was a UNE-P replacement; such arrangements contain both loops (§ 251 UNEs), and switches (available only under § 271, if at all).[25] In other words, the commercial product at issue precisely fits CompSouth's understanding of a "commingled" arrangement.

In sum, ending UNE-P has been a central federal priority in order to encourage reliance on alternative facilities and discourage dependence on ILEC networks.[26] The Authority's commingling decision is consistent with such federal policy. In contrast, accepting CompSouth's commingling position would place the Authority squarely at odds with the FCC's decision to *change* – not *perpetuate* – the regulatory nature of the telecom market in order to incent real, facilities-based competition As such, the Authority should deny CompSouth's Petition for Reconsideration.

CONCLUSION

The Authority's commingling ruling is consistent with the FCC's determination that carriers like AT&T Tennessee have no obligation to provide

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[24] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area , Qwest Order* ("*Qwest Order*"), 20 FCC Rcd at 19455, ¶ 82 (emphasis added).

[25] *See Qwest Order*, 20 FCC Rcd at 19455, ¶ 82; 47 C.F.R. § 51.319(a) (requiring § 251 access to basic loops); 47 U.S.C. § 271(c)(2)(B)(vi) (requiring access to unbundled switching).

[26] *See BellSouth v. MCImetro* 425 F.3d at 970; *TRRO*, ¶ 218.

Section 271 elements in a combined, pre-packaged form. Additionally, the Authority's commingling decision is consistent with the FCC's elimination of UNE-P in favor of facilities-based competition. In its Petition for Reconsideration, CompSouth urges the Authority to reverse course and adopt a commingling ruling that undermines and negates the aforementioned federal law and which would result in access to the same set of facilities that comprise UNE-P. Rather than adopting a position that is contrary to federal law, the Authority should deny CompSouth's Petition for Reconsideration.

Respectfully submitted,

AT&T TENNESSEE

By:

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