BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 13, 2007

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

COMPSOUTH PETITION FOR RECONSIDERATION

Pursuant to Tennessee Code Annotated Section 4-5-317(a) and Tennessee Regulatory Authority Rule 1220-1-2-.20, Competitive Carriers of the South, Inc. ("CompSouth")[1] submit the following Petition for Reconsideration of one aspect of the Authority's November 28, 2007 Order (the "Order") in the above-captioned proceeding. CompSouth requests the Authority reconsider its decision regarding Issue 14, regarding commingling requirements established by the FCC.[2] Specifically, CompSouth urges the Authority to reconsider the decision of a majority of the panel that BellSouth is not required to commingle network elements provided pursuant to Section 251 with those provided pursuant to Section 271 of the Telecommunications Act of 1996 ("the Act"). The decision of the panel majority is inconsistent with the only federal court decision that is precisely on point,[3] and is also out of step with the decisions of the majority of the state commissions in the BellSouth region.[4]

In the Order, "the majority of the panel found that unbundling and commingling are Section 251 obligations, and when BellSouth provides an element pursuant only to Section 271,

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1 CompSouth's members participating in this docket include the following companies: [TO COME]

2 Issue 14 is addressed at pages 27-33 of the Authority's Order.

3 *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007).

4 Only three state commissions (Florida, Mississippi, and South Carolina) have supported the position taken in the Order, and the Florida PSC's decision was reversed by the federal court in the *NuVox* case cited above. The state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina have ruled consistently with position advocated by CompSouth here.

BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service."[5] In reaching its conclusion, "the majority of the panel found that the CLECs are relying," in their argument that commingling is required, on a portion of the FCC's *Triennial Review Order* ("*TRO*")[6] that was removed by the FCC in its *Errata* to the *TRO*.[7] The majority held that "[t]hrough the *Errata*, the FCC removed the issue of commingling Section 251 elements with Section 271 independent unbundled elements."[8] In addition, the majority reasoned that requiring commingling involving the switching network element would result in "the equivalent of UNE-P, which is a type of arrangement the FCC has said BellSouth must no longer provide."[9]

The Order notes that "Director Jones did not vote in favor of the prevailing motion," and states that it is Director Jones' opinion that "the commingling obligation includes both resell services provided pursuant to Section 251(c)(4) and wholesale services provided pursuant to Section 271."[10] Director Jones detailed the basis for his views in a separate opinion on the commingling issue filed on December 5, 2007, in Docket No. 04-00046, an arbitration proceeding in which commingling requirements were also in dispute.[11] Since Director Jones'

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5 Order at 30.

6 In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36, 18 F.C.C.R. 19,020, Report and Order on Remand and Further Notice of Proposed Rulemaking (Aug. 21, 2003) ("TRO").

7 In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36, Errata (Sept. 17, 2003) ("TRO Errata").

8 *Id.* at 31.

9 *Id.* at 32.

10 *Id.* at 33, n.141.

11 Separate Opinion of Director Ron Jones, Docket No. 04-00046, In Re: Joint Petition For Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC of an Interconnection Agreement with BellSouth (Dec. 5, 2007).

separate opinion was filed in another docket, but is referred to herein, it is attached hereto as Attachment A.

CompSouth respectfully urges that the decision on commingling reached by the majority of the panel is based on an erroneous interpretation of the FCC's *TRO* and the record evidence in this case.[12] The majority's decision is incorrect for three reasons: (a) the *TRO* provides that BellSouth must commingle Section 251 unbundled network elements ("UNEs") with "wholesale services" provided by BellSouth; (b) the facilities or services provided by BellSouth to satisfy its Section 271 checklist obligations qualify as "wholesale facilities or services" and are subject to commingling requirements; and (c) the consequence of the proper application of the FCC's commingling rules does not result in services that are "the equivalent of UNE-P."

A. THE TRO PROVIDES THAT BELLSOUTH MUST COMMINGLE SECTION 251 UNES WITH "WHOLESALE SERVICES" PROVIDED BY BELLSOUTH.

The Order correctly notes that, in the *TRO*, the FCC first included, then deleted in its *Errata*, specific references to commingling and Section 271 checklist elements. The critical question before the Authority, however, is not what the *deleted* provisions said. What matters going forward is the text the FCC left in the *TRO* as its final interpretation of the Act. There is no dispute that, after amendments made by the *Errata*, the FCC found that commingling means:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.

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[12] CompSouth does not propose that it be permitted to present new evidence in support of its request for reconsideration. The issue here is a matter of legal interpretation. *See* TRA Rule 1220-1-2-.20(1) (stating requirements for petitions for reconsideration that base the request for reconsideration on a request to present new evidence).

The FCC held that commingling is available for the connection of Section 251 UNEs with any "wholesale facilities and services" provided by BellSouth. The *Errata* did not change that FCC ruling. In fact, the *Errata* shows that the FCC considered excluding Section 271 wholesale offerings from its commingling rules and decided against it.

The portion of the *TRO Errata* that the panel majority cites to support its position in the Order resulted in the following deletion from the original [deletion in brackets]:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including [any network elements unbundled pursuant to section 271 and] any services offered for resale pursuant to section 251(c)(4) of the Act.[13]

Importantly, the editorial deletion does not result in a sentence that diminishes commingling obligations. The cited passage (post-*Errata*) still reads "...we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services."

Moreover, a companion deletion in the *TRO Errata* further undermines Order's rationale. The FCC's *Errata* deleted the following from the initial *TRO* draft [deletion in brackets below]:

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). [We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.][14]

Had the FCC intended to exempt the § 271 competitive checklist from its commingling rules, it would not have eliminated this express finding. The original pre-*Errata* language in footnote 1990 would have supported the panel majority's finding that "the FCC removed the issue of

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[13] *TRO Errata* ¶ 27 (amending *TRO* ¶ 584).

[14] *TRO Errata* ¶ 31 (amending *TRO* footnote 1990).

commingling Section 251 elements with Section 271 independent unbundled elements."[15] After the *Errata*, however, it is clear that the FCC did not explicitly refuse to apply its commingling rules to Section 271 elements.

Rather, the *TRO* provides that ILECs must commingle Section 251 UNEs with any "wholesale facilities or services" offered to CLECs. The FCC made clear that "combinations" rules apply only to the linking of Section 251 UNEs to one another. Therefore, combinations rules do not require ILECs to combine Section 251 and Section 271. That is the FCC finding that was upheld by the D.C. Circuit in *USTA II*, and cited on page 31 of the Order. The FCC also held that an ILEC must commingle Section 251 UNEs with any other "wholesale facilities or services." The *USTA II* decision did not support the limitation on commingling supported by the panel majority in the Order.[16]

The FCC made clear that in order to qualify for commingling with a Section 251 UNE, the facilities or services must be made available by the ILEC at wholesale; the question of whether the ILEC offering is made pursuant to Section 271 is not the salient question. This was precisely the point made by the federal district court in *NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007). In *NuVox*, the court reversed a decision of the Florida Public Service Commission that reached the same conclusion regarding commingling as the panel majority here. The court, after reviewing the relevant paragraphs of the *TRO* and *TRO Errata*, held that "the common element of all the above paragraphs is the requirement that commingling

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15 *Order* at 31.

16 The panel majority's assertion in the Order that "CLECs are relying on" portions of the *TRO* deleted by the *Errata* as the basis of their argument on commingling is in error. The "Joint CLEC Post-Hearing Brief," filed on October 28, 2005 in this docket, does not assert that pre-*Errata TRO* ¶ 584 provides the basis for commingling Section 251 and Section 271 elements. Rather, the CLECs explicitly rely on the same arguments presented here, namely, that Section 251 UNEs must be commingled with any other wholesale facilities and services, including Section 271 checklist elements. *See* Joint CLEC Post-Hearing Brief, at 69-70, 73-74.

applies to wholesale facilities and services. If § 271 checklist elements are wholesale facilities and services, then the commingling requirement does in fact apply to those elements as well."[17]

The *NuVox* court rejected the argument that the *TRO Errata* deletions change the FCC's fundamental ruling that Section 251 and Section 271 elements must be commingled:

> Reading the relevant paragraphs of the *TRO* in context, it becomes apparent that the *Errata* deletions were made in order to avoid conflating distinct concepts. For example, paragraph 584 addresses BellSouth's resale obligations. The modification to paragraph 584 simply eliminated the irrelevant UNE clause. *Errata* at 3, ¶ 27. Similarly, the last sentence of footnote 1990 was deleted in order to avoid contradicting the paragraph which contained it. *Errata* at 3, ¶ 31. That paragraph, in pertinent part, noted that "BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis." *TRO* ¶ 655. Maintaining consistency required the removal of a footnote declining to apply the commingling rule to "services that must be offered pursuant to these checklist items," i.e., Section 271 elements. ... Thus, the Court finds that the FPSC misinterpreted the *TRO* to prohibit commingling of 251 elements with 271 checklist elements.[18]

The panel majority's focus on the changes made by the FCC in the *TRO Errata* obscure the real question on which the commingling dispute turns in this proceeding: do Section 271 elements qualify as "wholesale facilities or services" eligible for commingling with Section 251 UNEs?

B. THE FACILITIES OR SERVICES PROVIDED BY BELLSOUTH TO SATISFY ITS SECTION 271 CHECKLIST OBLIGATIONS QUALIFY AS "WHOLESALE FACILITIES OR SERVICES" AND ARE SUBJECT TO COMMINGLING REQUIREMENTS.

The Order does not examine whether Section 271 checklist elements qualify as "wholesale facilities or services" because it erroneously concludes that the FCC's *TRO Errata* removed Section 271 elements from commingling requirements. For the reasons discussed above, CompSouth urges the Authority to reconsider its reasoning underlying that determination. If the Authority reviews the *TRO* and *TRO Errata* fully, it is apparent that, as the court in *NuVox*

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17 *NuVox*, 511 F. Supp.2d at 1203 (emphasis supplied).

18 *Id.* at 1204.

held, the next question in the analysis is: do Section 271 checklist elements qualify as "wholesale facilities or services"? In *NuVox*, the court found that Section 271 checklist elements do qualify as wholesale facilities or services for purposes of the FCC's commingling requirements. CompSouth urges the Authority to make the same determination here.[19]

Section 271 checklist elements constitute "wholesale facilities and services" for several reasons. First, in *NuVox*, a reviewing federal court interpreted the FCC's use of the term "wholesale facilities and services" to include Section 271 elements. The *NuVox* court is the only federal court to rule on the specific question of whether Section 271 elements are "wholesale facilities and services." Other courts, as in the *USTA II* decision cited by the panel majority, have held that combinations rules do not apply to elements made available under provisions other than Section 251.[20] Those courts have not, however, held that Section 271 elements may not be commingled with Section 251 UNEs under the FCC's commingling rules. That is not the question before the Authority here; the issue in dispute is the one before the *NuVox* court, where the court held that Section 271 elements are wholesale facilities or services that may be commingled with Section 251 UNEs.

Second, FCC statements demonstrate that the FCC views Section 271 elements as wholesale facilities or services. In *NuVox*, the district court quoted an FCC Order in which it refers to "section 271(c) wholesale obligations."[21] In addition, the court referenced a statement by former FCC Commissioner Abernathy, in which she stated: "Section 271 obligations to

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[19] The separate opinion of Director Jones on commingling issues filed December 5, 2007 in Docket No. 04-00046, cited in full in footnote 9 *supra*, includes an analysis of the status of Section 271 checklist elements as "wholesale facilities and services," and concludes that "a facility or service obtained pursuant to a section 271 is a facility or service obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling." Separate Opinion of Director Ron Jones, at 7.

[20] *See, e.g., Southwestern Bell v. Missouri Public Service Comm'n*, 461 F. Supp.2d 1055 (E.D. Mo. 2006); *Illinois Bell v. O'Connor-Diaz*, 2006 WL 2796488 (N.D. Ill. 2006 – not reported in F. Supp.2d).

[21] *NuVox*, 511 F. Supp.2d at 1203.

provide wholesale access to local loops, local transport, and local switching at just and reasonable prices."[22] The FCC's statements, according to the court, "would seem to alleviate any doubt about the matter" of whether Section 271 elements constitute wholesale facilities or services.[23]

Third, the services provided by BellSouth pursuant to Section 271 are not appreciably different from the services provided under Section 251 or its tariffs. There is no difference that would make one wholesale and the other not wholesale; they are all services sold to other carriers rather than to retail end users. For example, at hearing, BellSouth witness Ms. Tipton agreed that the transition from a DS1 loop offered as a Section 251 UNE to a tariffed special access service for the same loop primarily involves a "records change" in BellSouth's system.[24] From a network perspective, there is nothing different about the loops, and they are both sold at wholesale (subject to different wholesale prices) to CLECs. In addition, when BellSouth witness Ms. Blake explained what BellSouth sells CLECs to replace UNEs de-listed under Section 251, she testified that "[w]hen a Section 251(c)(3) element is 'de-listed,' the incumbent LEC will most likely provide a wholesale service similar to such element."[25] Clearly, BellSouth views the services it provides to CLECs – regardless of the legal obligation under which they provide it – as "wholesale" services. As Director Jones' stated in his Separate Opinion on this issue: "When the services are provided pursuant to section 251 they are considered wholesale services. The

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22 *Id.*

23 *Id.*

24 Hearing Tr. Vol. III., at 255-56.

25 Docket No. 04-00381, Direct Testimony of Kathy K. Blake on Behalf of BellSouth Telecommunications, Inc., at 12 (July 26, 2005) (emphasis supplied).

fact that the statutory authority obligating BellSouth to provide the service has changed does not alter the nature of the service as being wholesale."[26]

Finally, BellSouth's argument that the FCC limited commingling to its tariffed services has no basis in the FCC's orders or rules. Rather, in the *TRO* the FCC merely provided examples of various services that could be commingled with Section 251 UNEs. The fact that the FCC provided examples does not limit the definition of "wholesale" to the examples the FCC chose to provide. As the *NuVox* court held: "Tariffed services are listed as examples of such wholesale services (see *TRO* ¶¶ 581, 583, 585), but the word 'including' indicates that the item is used as an example and does not denote an exhaustive list."

The FCC meant what it said when it ordered that commingling requires an ILEC to connect a Section 251 UNE to "one or more facilities or services that a requesting carrier has obtained at wholesale form an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act."[27] The commingling rules apply to the wholesale facilities and services sold to CLECs pursuant to Section 271, because Section 271 unbundling constitutes a "method other than unbundling under Section 251(c)(3) of the Act." CompSouth urges the Authority to join the state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina in recognizing that the FCC required commingling of Section 251 and Section 271 elements.

C. THE CONSEQUENCE OF THE PROPER APPLICATION OF THE FCC'S COMMINGLING RULES DOES NOT RESULT IN SERVICES THAT ARE "THE EQUIVALENT OF UNE-P."

The panel majority bases its ruling on Issue 14 in part on a concern that commingling a Section 251 UNE loop with Section 271 switching would create "the equivalent of UNE-P,

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[26] Docket No. 04-00046, Separate Opinion of Director Jones, at 8-9.

[27] *TRO* ¶ 579.

which is the type of arrangement the FCC said BellSouth must no longer provide."[28] CompSouth urges that this concern is misplaced, for two reasons.

First, a commingled arrangement that permits a CLEC to offer a service using BellSouth loops and switching is not "the equivalent of UNE-P." Switching unbundled pursuant to Section 271 is not subject to TELRIC pricing, but rather to the "just and reasonable" standard applicable to Section 271 checklist items. Therefore, BellSouth need no longer make available the TELRIC-priced combination formerly known as UNE-P.

Second, when the FCC adopted commingling rules that permitted commingling of Section 251 UNE loops with unbundled switching "obtained at wholesale form an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act,"[29] it expressly authorized service packages that provided an end-user services using the same network elements that supported UNE-P services. As noted above, the critical difference is that the FCC held that TELRIC-priced switching could not be included in the package – thus barring the re-creation of UNE-P as it existed previously. The FCC would not have written the commingling rules the way it did if it intended to prevent CLECs from obtaining switching not provided pursuant to Section 251(c)(3) (whether via Section 271 or "commercial" agreements with BellSouth) with UNE loops.

In sum, the Authority will not be authorizing a return to TELRIC-priced UNE-P if it reconsiders and revises its determination regarding commingling.

D. CONCLUSION

For all the reasons stated, CompSouth respectfully requests that the Authority reconsider its decision on Issue 14, and revise the Order in this docket to provide that Section 251 UNEs

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[28] Order at 32.

[29] *TRO* ¶ 579.

may be commingled with any wholesale facilities or services, including Section 271 checklist elements, pursuant to the FCC's commingling rules.

Respectfully submitted,

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