

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 10, 2008

IN RE:

BELLSOUTH'S PETITION TO ESTABLISH GENERIC
DOCKET TO CONSIDER AMENDMENTS TO
INTERCONNECTION AGREEMENTS RESULTING
FROM CHANGES OF LAW

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DOCKET NO.
04-00381

ORDER GRANTING RECONSIDERATION OF ISSUE 28 ON THE MERITS AND
DENYING RECONSIDERATION OF ISSUE 14 ON THE MERITS

This matter came before Chairman Eddie Roberson, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on April 21, 2008 for consideration on the merits of the *Petition for Reconsideration and Clarification* ("Summary Judgment Reconsideration Petition") filed by Competitive Carriers of the South, Inc. ("CompSouth") on June 20, 2006 and the *CompSouth Petition for Reconsideration* ("Final Order Reconsideration") filed by CompSouth on December 13, 2007.

BACKGROUND

On October 29, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Petition to Establish Generic Docket* ("Petition"), asserting that a generic docket was necessary to address recent decisions of the Federal Communications Commission ("FCC")¹ and a decision by the United

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 (2003), as modified by *Errata*, 18 FCC Rcd. 19020 (2003), vacated in part, *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("Triennial Review Order" or "TRO"); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, *Order and Notice of Proposed Rulemaking*, 19 FCC Rcd. 16783 (2004) ("Interim Rules Order").

States Court of Appeals for the District of Columbia Circuit (“DC Circuit”)² related to local unbundling rules, specifically the FCC’s *Triennial Review Order* (“TRO”), and the FCC’s *Interim Rules Order*.

On June 1, 2005, BellSouth filed its *Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling* (“*Motion for Summary Judgment*”). On June 6, 2006, the Authority issued its *Order Granting In Part And Denying In Part Motion For Summary Judgment And Denying Alternative Motion For Declaratory Ruling* (“*Summary Judgment Order*”). CompSouth filed its *Summary Judgment Reconsideration Petition* on June 20, 2006 in which it sought reconsideration and clarification of Issue 28. On June 23, 2006, BellSouth filed a *Response to Petition for Reconsideration and Clarification* (“*2006 Response*”). The Authority issued the *Order Granting Reconsideration* on October 31, 2006 which deferred consideration of the *Summary Judgment Reconsideration Petition* on the merits until a later date.

The Authority issued its *Order* (“*Final Order*”) on the remaining issues in the docket on November 28, 2007. CompSouth filed its *Final Order Reconsideration Petition* on December 13, 2007 in which it sought reconsideration of Issue 14. At its December 17, 2007 Authority Conference, the Authority appointed a Hearing Officer who was directed to determine whether the *Final Order Reconsideration Petition* should be granted or denied. On January 2, 2008, the Hearing Officer issued an *Order Granting Petition for Reconsideration* which deferred consideration of the *Final Order Reconsideration Petition* on the merits until a later date. On January 15, 2007, BellSouth (now AT&T Tennessee, hereinafter “AT&T”) filed *AT&T Tennessee’s Response to CompSouth’s Petition for Reconsideration* (“*2007 Response*”).

² *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA IP*”)

Position of the Parties

A. ISSUE 28

In its *Summary Judgment Reconsideration Petition*, CompSouth requests that the Authority reconsider and clarify its findings with regard to Issue 28 so that it is clear that when the Authority uses the term “fiber loops” on pages 35 and 38 of the *Summary Judgment Order* it means only fiber to the home and fiber to the curb loops as defined by the FCC.³ CompSouth asserts that absent clarification, BellSouth could use the Authority’s Order to claim more unbundling relief than the FCC granted.⁴ CompSouth notes that “review of the quoted language in context makes it clear that the FCC’s statement pertains only to specific class of fiber loops defined as FTTH loops (and FTTC loops, which were later deemed equivalent for purposes of unbundling relief).”⁵

AT&T asserts that reconsideration should be denied because the *Summary Judgment Order* clearly tracks the language of the FCC in the TRO.⁶

B. Issue 14

In its *Final Order Reconsideration Petition*, CompSouth requests that the Authority reconsider its decision regarding Issue 14 in which a majority of the panel found 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”).⁷

³ *Summary Judgment Reconsideration Petition*, p. 1.

⁴ *Id.*, p.2.

⁵ *Id.*

⁶ *2006 Response*, p. 2.

⁷ *Final Order Reconsideration Petition*, p. 1.

CompSouth argues that (1) the panel mistakenly interpreted that the *TRO Errata*⁸ does not require BellSouth to commingle Section 251 UNEs with Section 271 wholesale elements; (2) the Authority erred by concluding that the FCC removed Section 271 elements from commingling requirements; and (3) the Authority incorrectly concluded that requiring BellSouth to commingle a Section 251 local loop with Section 271 unbundled local switching would effectively recreate UNE-P, because it would not have to price switching at TELRIC rates.⁹ CompSouth adds that a federal District Court in *NuVox v. Edgar* reversed a Florida PSC Order based on the same conclusion as that reached by the majority of Directors.¹⁰ NuVox avers that while BellSouth is not required to *combine* Section 251 with Section 271, it must commingle Section 251 elements with Section 271 elements.

AT&T points out that the commingling aspect of the *NuVox v. Edgar* decision is on appeal to the U.S. Court of Appeals for the Eleventh Circuit,¹¹ and it maintains that the decisions in three other federal district court cases are consistent with the Authority's ruling.¹² AT&T contends that the Authority's decision is consistent with federal law, and that CompSouth's position would effectively recreate UNE-P.

⁸ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16,978 (August 21, 2003), *corrected by Errata*, 18 FCC Rcd 19,020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("Triennial Review Order" or "TRO").

⁹ *CompSouth Petition for Reconsideration* (December 13, 2007).

¹⁰ *CompSouth Petition for Reconsideration*, citing *NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007) (December 13, 2007).

¹¹ *AT&T Tennessee's Response to CompSouth's Petition for Reconsideration* (January 15, 2008).

¹² *AT&T Tennessee's Response to CompSouth's Petition for Reconsideration*, citing *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n* ("Missouri Decision"), 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005) and *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) (January 15, 2008).

FINDINGS AND CONCLUSIONS

This matter came before the panel at the regularly scheduled April 21, 2008 Authority Conference. Based upon arguments of counsel and the record as a whole, a majority of the panel¹³ voted to grant reconsideration of Issue 28 and, consistent with the language from the *Final Order*, thereby clarify that the term “fiber loop” only refers to fiber to the curb and fiber to the home loops.


As to Issue 14, based upon arguments of counsel and the record as a whole, the panel made the following findings. A majority of the panel found that in reviewing holdings from other states there is a divergence of opinion as to the meaning of the FCC’s *TRO Errata* regarding the commingling issue. The majority of the panel found that Paragraph 27 of the *TRO Errata* evinced the FCC’s intention to remove Section 271 from commingling requirements. The majority found this interpretation consistent with the FCC’s clear intent to encourage facilities-based competition. Further, the panel found that consistent with the *USTA II* and the *Missouri Decision* that combination rules do not apply to elements made available under provisions other than Section 251. The majority found that to require commingling of Section 271 and Section 251 elements would result in the equivalent of re-creating UNE-P which is contrary to the FCC’s intent. In light of these findings, a majority of the panel¹⁴ voted to deny reconsideration of Issue 14.


¹³ Director Kyle voted to deny reconsideration of Issue 28 finding that CompSouth’s own filing noted that when reading the paragraph in the whole which supports the panel’s decision it is clear that the FCC only referred to fiber to the curb and fiber to the home loops. As all parties acknowledge that the basis of the panel’s decision is a quotation from an FCC order, Director Kyle found that the requested clarification and reconsideration was unnecessary.

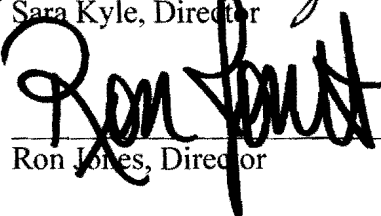
¹⁴ Director Jones voted to grant the reconsideration. He noted that he put forth his opinion that the commingling obligations includes both resell services provided pursuant to Section 251(c)(4) and wholesale services provided pursuant to Section 271 in footnote 141 of the November 28, 2007 *Order* filed in this docket and in his separate opinion filed in Docket No. 04-00046 on December 5, 2007, and that his opinion has not changed.

IT IS THEREFORE ORDERED:

1. The *Petition for Reconsideration and Clarification* filed by Competitive Carriers of the South, Inc. on June 20, 2006 is granted as discussed herein.
2. The *CompSouth Petition for Reconsideration* filed by Competitive Carriers of the South, Inc. on December 13, 2007 is denied.


Eddie Roberson, Chairman


Sara Kyle, Director


Ron Jones, Director