

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 30, 2008

IN RE:)	
)	
BELLSOUTH’S PETITION TO)	DOCKET NO.
ESTABLISH GENERIC DOCKET TO)	04-00381
CONSIDER AMENDMENTS TO)	
INTERCONENCTION AGREEMENTS)	
RESULTING FROM CHANGES OF LAW)	

DISSENTING OPINION OF DIRECTOR RON JONES

This docket came before a panel of the Tennessee Regulatory Authority (“Authority”) at an Authority Conference held on December 17, 2007, for consideration of the *CompSouth Petition for Reconsideration* (“*Petition*”) filed by the Competitive Carriers of the South, Inc. (“CompSouth”) on December 13, 2007. During the Authority Conference, a majority of the panel voted to appoint a Hearing Officer for the following two purposes: (1) to determine whether to grant or deny the *Petition* and (2) to determine the status of Issue 28. The majority memorialized its decision in the *Order Appointing a Hearing Officer* issued on January 4, 2008. Because I disagree with the decision to delegate to the Hearing Officer the task of initially considering the *Petition*, I dissent from the *Order Appointing a Hearing Officer*.

I. RELEVANT PROCEDURAL HISTORY

On November 28, 2007, the Authority issued the *Order* setting forth the panel’s decisions of March 6, 2006 and May 15, 2006, including the panel’s decision on Issue 14. On December 13, 2007, CompSouth filed its *Petition* seeking reconsideration of the decision on Issue 14. At the time of the filing of the *Petition*, Authority Conferences were scheduled for December 17,

2007, and January 14, 2008, the latter date being beyond the deemed denied date of January 2, 2008.¹

Appropriately, this docket was placed on the Authority Conference for December 17, 2007. During the conference, the majority voted to “appoint the Authority’s General Counsel or his designee to act as Hearing Officer in this proceeding for the purpose of determining whether to grant or deny the *Petition* and determining the status of Issue 28,” an issue that is the subject on an earlier filed *Petition for Reconsideration and Clarification*.² No response to the *Petition* was filed, and the Hearing Officer issued an order on January 2, 2008, granting the *Petition* and setting January 15, 2008, as the date by which AT&T must file a response to the merits of the *Petition*.³

II. DISSENT

During the Authority Conference, I expressed my disagreement with the majority’s decision to appoint the Hearing Officer to make the initial determination as to whether to deny the *Petition* or grant the *Petition* and set the matter for further proceedings.⁴ It is my opinion that

¹ By operation of law, absent action by the panel, CompSouth’s *Petition* would be deemed denied on January 2, 2008. The Uniform Administrative Procedures Act provides:

(c) The person or persons who rendered the initial or final order, which is the subject of the petition, shall, within twenty (20) days of receiving the petition, enter a written order either denying the petition, granting the petition and setting the matter for further proceedings; or granting the petition and issuing a new order, initial or final, in accordance with § 4-5-314. **If no action has been taken on the petition within twenty (20) days, the petition shall be deemed to have been denied.**

Tenn. Code Ann. § 4-5-317(c) (2005 Repl.) (emphasis supplied).

² *Order Appointing a Hearing Officer* (Jan. 4, 2008) (referencing the *Petition for Reconsideration and Clarification* filed on June 20, 2006, by CompSouth).

³ *Order Granting Petition for Reconsideration*, p.1 (Jan. 2, 2008).

⁴ I read the language of the prevailing motion as not giving the Hearing Officer authority to grant the *Petition* and issue a new order, one of the three options provided in Section 4-5-317 of *Tennessee Code Annotated*. The relevant language of the prevailing motion reads:

I move that a hearing officer be appointed to consider the petition for reconsideration for the purpose of deciding only whether to grant the request. If granted, the panel can consider the reconsideration request on its merits.

Transcript of Authority Conference, p. 20 (Dec. 17, 2007).

the initial consideration of a petition for reconsideration of an order issued by the Directors is of such consequence that it should be made by the Directors, if any are available.

The Uniform Administrative Procedures Act provides that the “petition shall be disposed of by the same person or persons who rendered the initial or final order, if available.”⁵ In this instance, Director Pat Miller, who had been a part of the original decision, was not available for the December 17, 2007, Authority Conference as a result of his having resigned his post prior to the conference. Nevertheless, the remaining two panel members were available and Director Miller’s vacancy on the panel was filled by Chairman Roberson. Given that two of the three Issue 14 decision makers were available at the December 17, 2007, Authority Conference and a new panel member assigned, the panel, including the available decision makers, could have addressed the *Petition* at that time. If additional time was needed to review the *Petition*, the panel could have voted to set a special conference on a different date to resolve the matter. The facts relating to the timing of the Authority Conferences and the departure of a single Director do not, in my opinion, necessitate the abdication of the decision makers’ duty.

While the majority may have viewed their December 17, 2007, decision as innocuous, I do not share this view. I have no doubt that this decision will serve as precedent so that the next time a petition for reconsideration is filed and the timing is such that the panel cannot hear the petition at a regularly scheduled Authority Conference prior to the petition being deemed denied, the panel will look back at the decision in this docket and take the same approach. This is an unfortunate result.

In response to this opinion, some may wish to point out that I was in the minority with regard to the determination of Issue 14. This fact is not controlling, however, to the extent that the December 17, 2007, decision is referenced in the future as permitting a hearing officer to

make the initial determination with regard to a petition for reconsideration. In fact, it is my opinion, that the Authority has already acted, albeit silently, consistent with the decision in this docket.

In Docket No. 04-00046, the panel issued the *Final Order of Arbitration Award* on December 5, 2007. In response thereto, NuVox Communications, Inc. filed a *Petition for Reconsideration and Clarification* on December 20, 2007. Although the matter was not brought before the panel, the Hearing Officer assigned to Docket No. 04-00046 issued an order on January 7, 2008, granting the *Petition* with the merits to be considered by the panel at a later date. According to a footnote in the order, the Hearing Officer relied on the *Order Appointing Pre-Arbitration Officer* as the source of his authority to make the January 7, 2008, decision.⁶ Despite the stated reliance on the appointing order, I cannot help but to conclude that the majority's action in this docket influenced the Hearing Officer in Docket No. 04-00046 when deciding that he had authority to and should, in fact, act on the *Petition for Reconsideration and Clarification*. This conclusion is grounded in my opinion that the appointing order was not intended to and could not be interpreted to negate the provisions of Section 4-5-317(b) requiring that the petition "be disposed of by the same person or persons who rendered the initial or final order, if available." As in this docket, in Docket No. 04-00046, two of the three decision makers were available to rule on the petition.

⁵ Tenn. Code Ann. § 4-5-317(b) (2005 Repl.).

⁶ See *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*, Docket No. 04-00046, *Order Granting Petition for Reconsideration*, p.1 n.1 (Jan. 7, 2008).

III. CONCLUSION

Based on the foregoing, I respectfully dissent from the *Order Appointing a Hearing Officer* issued on January 4, 2008.



Ron Jones, Director