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October 24, 2008

VIA HAND DELIVERY

Hon. Tre Hargett, Chairman
c/o Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

filed electronically in docket office on 10/24/08

Re: *Petition of CompSouth for Declaratory Ruling*
Docket No. 08-00184

Dear Chairman Hargett:

Enclosed for filing in the referenced docket are the original and four copies of AT&T Tennessee's *Response to the TRA's Notice of October 15, 2008 Regarding CompSouth's Petition for Declaratory Ruling.*

A copy has been provided to counsel for CompSouth.

Very truly yours,

Guy M. Hicks

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of CompSouth for Declaratory Ruling*

Docket No. 08-00184

RESPONSE OF AT&T TENNESSEE TO THE
TRA'S NOTICE OF OCTOBER 15, 2008
REGARDING COMPSOUTH'S PETITION FOR DECLARATORY RULING

BellSouth Telecommunications, Inc., dba AT&T Tennessee ("AT&T"), files this Response to the Tennessee Regulatory Authority's ("TRA" or "Authority") Notice of October 15, 2008 regarding the Competitive Carriers of the South, Inc.'s ("CompSouth") Petition for Declaratory Ruling ("Petition"). In that Notice, the TRA advised that any interested party[1] desiring to file comments or a brief on the issue of whether the TRA should convene a contested case in this matter should do so by October 24, 2008.

The TRA should decline to convene a contested case in response to CompSouth's Petition for the following reasons. 1) CompSouth's Petition is barred as a matter of law by *res judicata.* 2) Tennessee's declaratory judgment statutes do not provide a procedural mechanism for CompSouth to circumvent the appeals process. 3) The TRA is not obligated to reverse course and adopt the Eleventh Circuit's *NuVox* opinion. 4) The TRA's two standing orders on commingling are fully consistent with the FCC's national regulatory policy promoting facilities-based competition.

[1] CompSouth seeks to impose on AT&T, ***and no other company in Tennessee,*** a new wholesale obligation which the TRA has twice declined to impose on AT&T in Docket No. 04-00381, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law* ("Change of Law").

I. CompSouth's Petition Is Barred As A Matter Of Law By *Res Judicata.*

The relief requested in CompSouth's petition is barred as a matter of law by the *res judicata* doctrine. In short, *res judicata* bars the re-litigation of the same claim by the same parties. Without question, CompSouth is seeking to re-litigate the scope of AT&T's commingling obligation as determined by the TRA. While CompSouth couches its latest request for relief as a "Petition for Declaratory Ruling", there is no doubt that the Petition directly challenges the TRA's rulings in the *Change of Law Docket* wherein the TRA twice concluded that AT&T has no obligation under federal law "... to commingle UNEs 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] In its Petition for Declaratory Ruling, CompSouth asks the TRA to "... declare that based on a recent decision of ... the Eleventh Circuit ... federal law requires BellSouth to commingle facilities provided under 47 U.S.C. § 271 with those that must be provided under 47 U.S.C. § 251."[3] In its petition for reconsideration of the TRA's commingling ruling issued in the *Change of Law Docket,* CompSouth, essentially cited the same case CompSouth cites in its latest commingling Petition.[4] In both petitions, CompSouth urges the TRA to expand its commingling ruling to require AT&T to commingle network elements provided under § 251 with facilities provided under § 271. There is no question that CompSouth is seeking another

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[2] *See* Authority's Order dated November 28, 2007 in the *Change of Law Docket*, Docket No. 04-00381, at 32; and Order Granting Reconsideration of Issue 28 on the Merits and Denying Reconsideration of Issue 14 on the Merits, dated June 10, 2008, at 5.

[3] *See* Petition of CompSouth for Declaratory Ruling, filed September 23, 2008, at p. 1.

[4] In the *Change of Law Docket*, CompSouth cited *NuVox v. Edgar*, 511 F.Supp.2d 1198 (N.D. Fla. 2007) in its Petition for Reconsideration. Here, CompSouth cites the Eleventh Circuit's opinion that affirmed *NuVox v. Edgar.* 530 F.2d. 1330 (11th Cir. 2008).

reconsideration of the TRA's orders in the *Change of Law Docket*, Docket No. 04-00381.

Consequently, CompSouth's Petition is barred by the doctrines of *res judicata* and collateral estoppel. *Res judicata* "bars a second suit between the same parties on the same cause of action with regard to all issues that were or could have been litigated in the former suit."[5] "It is based on the public policy favoring finality in litigation and does not depend upon correctness or fairness, as long as the underlying judgment is valid."[6] For *res judicata* to apply, four elements must be established: (1) the underlying judgment is rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3), the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits.[7] The United States Court of Appeals for the Sixth Circuit relied on the same four elements in denying relief to plaintiffs on *res judicata* grounds in *Hutcherson v. Lauderdale County,* 326 F.3d 747, 758-759 (6th Cir. 2003), 2003 U.S. App. LEXIS 6717 ***17. As explained by the Sixth Circuit, the state of Tennessee bars under *res judicata* all claims that were actually litigated or could have been litigated in the first suit between the same parties.[8] Because Tennessee is in the Sixth Circuit, Sixth Circuit law is binding on the TRA.

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[5] *Lee v. Hall*, 790 S.W.2d, 298, 294 (Tenn. App. 1990) (citing *Massengill v. Scott*, 738 S.W.2d 269, 631, (Tenn. 1987).

[6] *Id.* (citing *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1986)).

[7] *Id.* (citations omitted).

[8] Res judicata refers only to the preclusion of claims that have once been litigated or could have been litigated – also known as claim preclusion, merger, or bar. A second doctrine, the preclusion of issues that have once been decided, is called collateral estoppel. However, the use of the term *"res judicata"* as a "general term referring to all

Here, all the elements of *res judicata* are met. In particular, the TRA denied CompSouth's same arguments for mandating commingling in the context of the *Change of Law Docket*, Docket No. 04-00381. The TRA is a forum of competent jurisdiction. The Supreme Court has recognized that state agencies have the same standing as courts for purposes of analyzing issue preclusion doctrines such as *res judicata.*[9] BellSouth Telecommunications, Inc. (now dba AT&T Tennessee) and CompSouth were both directly involved in Docket No. 04-00381. Indeed, both participated fully in that docket as parties of record, advocating their respective positions on commingling. In its Petition, CompSouth seeks the exact same relief – a ruling that AT&T must commingle § 251 and § 271 elements – that CompSouth twice sought in Docket No. 04-00381. [10] The TRA's rejection of CompSouth's commingling argument in its deliberations and orders was a final judgment on the merits. The TRA twice specifically considered the arguments regarding commingling made by CompSouth, once in its Order of November 28, 2007 and again in its Order of June 10, 2008 denying reconsideration. The TRA orders addressed the merits of the commingling issue, are final orders, and are binding on the parties.

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of the ways in which one judgment will have a binding effect on another" has been endorsed. *See* Charles Alan Wright, The Law of Federal Courts § 100A, at 722-23 (5th ed. 1994); Black's Law Dictionary 1312 (7th ed. 1999). Because the Tennessee cases defining *"res judicata"* also use the term in the more general sense, we will do the same for the purposes of this appeal.

Hutcherson v. Lauderdale County, 326 F.3d at 758, n. 3., 2003 U.S. App. LEXIS 6717 ***17. Like the Sixth Circuit, AT&T will use the term *"res judicata"* to encompass the collateral estoppel doctrine as well.

[9] *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986).

[10] *See Change of Law Docket*, Docket No. 04-00381, Issue 14 *TRO – Commingling.*

It is important to note that CompSouth is not without remedy. Rather than attempting to re-litigate a matter, CompSouth's proper remedy was to take a direct appeal of the TRA rulings on commingling. Indeed, AT&T has appealed several rulings issued by the TRA in the *Change of Law Docket*.[11] Again, the TRA has twice rejected CompSouth's arguments with respect to commingling based on the record evidence and arguments made in those proceedings.[12] The CLECs chose, for their own reasons, to appeal the Florida PSC's commingling order, but not to appeal the TRA's order.

As explained in detail below, the declaratory judgment statutes in Tennessee were never intended to allow disappointed litigants to make "end runs" around the appeals process. CompSouth is improperly asking the TRA to enter a declaratory order reversing previous agency orders in lieu of following the well-established reconsideration and appeals process mandated by state law. Under state law, persons seeking to challenge TRA orders "shall file any petition for review with the middle division of the court of appeals." A person who is aggrieved by a final decision in a contested case in entitled to judicial review "... under this chapter which shall be the ***only*** available method of judicial review."[13] (emphasis added.)

The Eleventh Circuit entered its order in *NuVox* on June 18, 2008[14], only ten days after the TRA denied CompSouth's motion for reconsideration in Docket 04-

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[11] *See* Case No. 3:08-0059 pending in the United States District Court for the Middle District of Tennessee.

[12] *See* the *Change of Law Docket*, Docket No. 04-00381.

[13] Tenn. Code. Ann. § 4-5-322(b)(1).

[14] *See* Eleventh Circuit Order attached to CompSouth's *Petition for Declaratory Order* filed in this docket on September 26, 2008.

00381. Therefore, CompSouth had ample time to file a timely appeal in Tennessee based on *NuVox*, pursuant to Tenn. Code Ann. § 4-5-322, which allows parties 60 days to appeal Authority orders. Having decided not to follow the required appeals process in Tennessee, CompSouth is now improperly attempting to circumvent that process.

II. Tennessee's Declaratory Judgment Statutes Do Not Provide A Procedural Mechanism For CompSouth To Circumvent The Appeals Process.

The state statute which CompSouth relies upon in its Petition authorizes state agencies to enter declaratory orders only under limited circumstances.[15] The statute does not allow the TRA to enter a declaratory order in the circumstances presented by CompSouth. Specifically, Tenn. Code Ann. § 4-5-223 allows state agencies to enter declaratory orders "... as to the validity or applicability of a statute, rule or order within the ***primary*** jurisdiction of the agency." CompSouth is seeking a declaratory order requiring AT&T to provide pre-packaged combinations of Section 271 and Section 251 piece parts of its telecommunications network. The TRA does not have any jurisdiction over Section 271 of the federal Telecommunications Act of 1996, much less ***primary*** jurisdiction. As ten federal courts recently have held, state commissions such as the TRA have ***no*** authority to implement Section 271. Rather,

[15] The special form of actions known as "declaratory judgments" are statutory remedies, designed to enable parties to determine their legal rights when the doubt as to such rights creates a justiciable controversy. These forms of actions are designed to provide legal adjudication without awarding any form of consequential relief to the litigants. Courts have noted that this special form of action is not, however, a "catch-all" to enable parties to obtain advice from courts or to avoid other, more applicable procedures, such as appellate review. See, for example, *Stanley v. Avery*, 387 F.2d 637, (6th Cir. 1968) (holding that the federal declaratory judgment statute cannot be used as a substitute for appeal, *habeas corpus*, *coram nobis* or other procedures for inmates seeking review of their convictions or sentences).

the text and structure of that statutory provision make clear that Congress intended ***only*** the FCC to implement its requirements. The TRA lacks the authority to order AT&T to provide Section 271 elements and accordingly lacks ***primary*** jurisdiction to enter a declaratory order mandating "commingling" of Section 271 elements.[16]

It is revealing that CompSouth did not cite the state declaratory order statute that applies specifically to the TRA. Tenn. Code Ann. § 65-2-104 provides that the TRA may issue a declaratory ruling with respect to any rule or statute enforceable by the TRA or with respect to the ***meaning and scope*** of any order of the TRA. Clearly, CompSouth is not asking the TRA about a rule or statute or the "meaning and scope" of the TRA's commingling orders. CompSouth understands perfectly well what those orders say. Rather, CompSouth is asking the TRA to ***reverse*** its commingling orders in the *Change of Law Docket*, Docket No. 04-00381. As previously stated, if reversal of a TRA decision is the goal, then the appeal process is the proper route for a party to undertake.

Neither of the declaratory order statutes provide a mechanism for CompSouth to circumvent the appeals process and seek reversal of standing and final TRA orders. That CompSouth chose not to reference the declaratory order statute in Title 65 directly applicable to the TRA suggests that CompSouth recognizes this legal flaw in its Petition.

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[16] As previously noted, AT&T appealed several TRA rulings in the *Change of Law Docket* (Docket No. 04-00381), including the TRA's decision in the *Change of Law Docket* to assume jurisdiction over Section 271-based switching rates is currently pending in U.S. District Court in Nashville (Docket No. 3:08-CV-00059). AT&T's appeal is supported by an overwhelming string of federal court decisions uniformly holding that it is the FCC, and not state public service commissions, that has jurisdiction over Section 271 matters. Most of these federal court decisions were made ***after*** the TRA reached its decisions in the *Change of Law Docket*.

III. The TRA Is Not Obligated To Reverse Course And Adopt The Eleventh Circuit *NuVox* Opinion.

CompSouth's Petition relies solely on a June, 2008 Order from the Eleventh Circuit Court of Appeals. Tennessee is in the Sixth Circuit, not the Eleventh Circuit. The TRA is not obligated to follow the guidance of the Eleventh Circuit. The Sixth Circuit has not ruled on the commingling issue. CompSouth is asking the TRA to reverse course based on one Circuit Court of Appeals opinion. If the TRA grants CompSouth's request and another Circuit Court of Appeals later reaches a different conclusion, it is unlikely that CompSouth will want to defer to the later Court opinion. CompSouth implicitly acknowledges this by stating in its Petition that the Eleventh Circuit in *NuVox* "appears" to have settled the commingling issue. CompSouth knows full well that other Circuits, including the Sixth, may not agree with the *NuVox* opinion.

IV. The TRA's Two Standing Orders on Commingling Are Fully Consistent With The FCC's National Regulatory Policy Promoting Competition.

The TRA's two standing orders on commingling are fully consistent with the FCC's stated national regulatory policy of encouraging facilities-based competition. Expanding commingling to encompass the combining of Section 251 and 271 elements does not promote facilities-based competition. The Authority's commingling rulings are consistent with the FCC's determination that carriers like AT&T Tennessee have no obligation to provide Section 271 elements in a combined, pre-packaged form. Additionally, the Authority's commingling decisions are consistent with the FCC's elimination of the unbundled network element platform ("UNE-P") in favor of

facilities-based competition. In its Petition for Declaratory Ruling, CompSouth urges the Authority to reverse course and adopt a commingling ruling that undermines this federal policy and which would result in access to the same set of pre-packaged facilities that comprises UNE-P. CompSouth argues that because the Eleventh Circuit has issued an opinion contrary to the TRA orders, the issue is now one of federal law as opposed to federal regulatory policy. CompSouth overlooks the fact that the TRA relied on its orders on such policy.

> The majority of the panel found this ***[AT&T's] 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.[17] (emphasis added.)

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, et al. v. BellSouth Telecommunications, Inc.*, 503 F.3d 1330 (2008).[18] 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 had attempted to require Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC") to combine Section 271 elements with Section 251 facilities:

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[17] *See* Order Granting Reconsideration of Issue 28 on the Merits and Denying Reconsideration of Issue 14 on the Merits, June 10, 2008, *Change of Law Docket*, Docket No. 04-00381.

[18] Petition at 1.

> 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 combination as the UNE Platform and is directly contrary to the FCC's holding. The Court agrees.[19]

The Eighth Circuit affirmed, stating that "... the plain language of Section 271 makes clear states have no authority to interpret or enforce the obligations of Section 271."[20]

In light of the text and structure of Section 271, which grants sole authority to the FCC, ten federal courts recently have held that state commissions like the TRA lack authority to implement Section 271.[21] The only court to have gone the other way, a district court in Maine, was subsequently reversed on this point by the United States Court of Appeals for the First Circuit.[22]

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[19] *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1069 (E.D. Mo. 2006), *affirmed,* 530 F.3d 676 (8th Cir. 2008).

[20] 530 F.3d at 682.

[21] *See Verizon New England, Inc. v. Main Pub. Utils. Comm'n,* 509 F.3d 1, 207 WL 2509863, at *4-*6, *reh'g denied*, 509 F.3d 13 (1st Cir. 2007); *BellSouth Telecommunications, Inc. v. Competitive Carriers of the South, Inc.*, Nos. 1:06-CV-00162-CC and 1:06-CV-00972-CC, slip op. at 7-12 (N.D. Ga. Jan. 03, 2008); *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL. 2868633 (E.D. Mich. Sept. 26, 2007), *appeals pending*, Nos. 07-2469, 07-2473 (6th Cir.); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC, 2007 WL 2736544 (E.D. Ky. Sept. 18, 2007); *Qwest Corp. v. Arizona Corp. Comm'n,* 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 2007), *appeals pending,* Nos. 07-17079, 07-17080 (9th Cir.); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 0a6-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F.Supp.2d 1281, 1285-86 (N.D. Fla. 2006); *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n,* 461 F.Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *appeal pending*, Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94, 2006 WL 2433249 at *8 (D.N.H. Aug, 22, 2006), *aff'd, Verizon New England*, 509 F.3d 1; *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F.Supp.2d 557, 565-66 (S.D. Miss. 2005).

[22] *See Verizon New England*, 2007 WL 2509863, at *4-*6.

A federal district court in Michigan, which is in the Sixth Circuit, recently declared an indistinguishable state commission mandate to be unlawful, holding that the Michigan commission "does not have the authority to direct the parties to negotiate those terms and conditions which pertain to Section 271 in the interconnection agreement process" and that the commission's order requiring such negotiations was "unlawfully issued and must be set aside."[23]

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.'"[24]

CompSouth cannot dispute that *USTA II* upheld the FCC's determination that BOCs (like AT&T Tennessee) have no obligation to ***combine*** 271 elements with 251 elements,[25] but then makes the strained argument this does not necessarily mean that AT&T Tennessee has no obligation to ***commingle*** 271 elements with 251

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[23] *See Lark*, 2007 WL 2868633, at *6.

[24] *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.").

[25] 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)

elements.[26] 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. 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 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. The FCC barred access to UNE-P based on a finding that access to those combined facilities undermined facilities-based competition.

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.[27] Regardless of pricing, CompSouth's 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

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[26] Petition at 7.
[27] Petition at 10.

based on a finding that it "frustrated sustainable, facilities-based competition," and moreover was "anticompetitive and contrary to federal policy."[28]

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.[29] The Authority's commingling ruling is consistent with the Missouri federal district court's finding, upheld by the Eighth Circuit, 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."[30]

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 do so.*"[31] 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

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[28] *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.").

[29] *TRRO*, ¶ 218.

[30] *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.

[31] 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).

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).[32] 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.[33] 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 telecommunications market in order to incent real, facilities-based competition.

CONCLUSION

The TRA should not revisit its prior denials of CompSouth's request that AT&T be required to provide commingled Section 271 and Section 251 network elements. For the reasons stated above, the TRA orders were appropriate and are consistent with both the TRA's and the FCC's public policy favoring facilities-based competition. The TRA is not required to follow the Eleventh Circuit Opinion because Tennessee is in the Sixth Circuit, and the Sixth Circuit has not addressed the commingling issue. Neither of the statutes authorizing state agencies to issue declaratory orders authorize

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[32] *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).

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

CompSouth to circumvent the normal reconsideration and appeals process. Nor do those statutes authorize the TRA to reverse standing orders. Finally, CompSouth's Petition is barred as a matter of law by *res judicata.*

Based on the foregoing, the TRA should decline to convene a contested case or otherwise deny the relief requested.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
DBA AT&T TENNESSEE

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2008, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

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