BEFORE THE TENNESSEE REGULATORY AUTHORITY NASHVILLE, TENNESSEE

October 24, 2008

Petition of CompSouth for Declaratory Ruling))	Docket No. 08-000184
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COMMENTS OF COMPSOUTH

In response to the procedural order issued by the General Counsel on October 15, 2008, CompSouth submits the following comments concerning how this matter ought to proceed before the Authority.

The preliminary issue to be addressed is whether the agency should take the case <u>i.e.</u>, whether the TRA should convene a contested case and issue a declaratory ruling -- one way or the other -- on the legal issue raised in CompSouth's Petition. Under the declaratory judgment statute, T.C.A. § 4-5-223, a petitioner must first request a ruling from the appropriate state agency. If the agency declines to open a contested case proceeding, the statute provides that the petitioner may then take his request to a state court. The purpose of the two-step process is to ensure that the agency most familiar with the issue has an opportunity to address it before the matter is presented to a judge. This not only helps to avoid unnecessary appeals but also allows a reviewing court to have the benefit of the agency's expertise.

Here, the only issue raised in CompSouth's Petition is how the FCC's "commingling" rule should be interpreted in light of the recent decision of the United States Court of Appeals for the Eleventh Circuit in <u>Nuvox Communications</u>, <u>Inc.</u> et al. v. <u>BellSouth Communications</u>, <u>Inc.</u>, 503 F.3d 1330 (2008). Although the TRA has previously addressed the meaning of the rule (see

Docket 04-00381, Order of November 28, 2007 and Order on Reconsideration, June 10, 2008), the agency's decisions preceded the <u>Nuvox</u> case and were based on arguments which the Eleventh Circuit has now rejected. As the Court explained, the meaning of the FCC's commingling rule is a question of law and can best be resolved by examining the words of the rule itself. Those words, according to the Court, are clear.

Because the agency has considered these issues twice before, CompSouth respectfully suggests that it is unnecessary for the parties to submit, yet again, full briefs on the meaning of the commingling rule. Instead, the TRA should ask the parties to address the question of how the rule should be interpreted in light of the <u>Nuvox</u> opinion and any other relevant decisions which have been, or may be, released following the TRA's last order.¹

Finally, it should be noted that although the TRA has addressed this issue twice in Docket 04-00381, the matter was decided each time by a divided vote. Moreover, two of the Directors assigned to this docket (Director Freeman and Chairman Hargett) have never had the opportunity to interpret the commingling rule. They should have the opportunity to make their own decision -- especially in view of the <u>Nuvox</u> ruling -- before this matter is put before a court.

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¹ As explained in the Petition, there are no other court decisions directly addressing the FCC's commingling rule (as opposed to the separate "combination" rule) and only one court where the commingling issue is still pending. <u>See, BellSouth v. Kentucky Public Service Commissions</u>, Docket 08-cv-7-DCR, United States District Court for the Western District of Kentucky. The Kentucky appeal has been briefed and argued; a decision should be issued soon.

For these reasons, CompSouth urges the TRA to open a contested case proceeding to consider the proper interpretation of the commingling rule in light of recent legal developments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded electronically and via U.S. Mail, first class, postage prepaid, to:

Guy Hicks AT&T Tennessee 333 Commerce Street Suite 2101 Nashville, TN 37201-3300

on this the 24th day of October, 2008.

Henry Walker