

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**December 3, 2008**

**IN RE:**

**PETITION OF COMPSOUTH FOR  
DECLARATORY RULING**

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**DOCKET NO.  
08-00184**

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**ORDER DECLINING TO CONVENE CONTESTED CASE**

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This matter came before Chairman Tre Hargett, Director Eddie Roberson and Director Mary W. Freeman of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 10, 2008, for consideration of convening a contested case on the *Petition of CompSouth for Declaratory Ruling* (“*Petition*”) filed by Competitive Carriers of the South, Inc. (“CompSouth”).

**BACKGROUND**

CompSouth filed its *Petition* on September 26, 2008. On October 10, 2008, BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T”) filed a *Petition of AT&T Tennessee for Leave to Intervene* requesting that AT&T be permitted to state its legal position regarding whether the Authority should convene a contested case in this docket. CompSouth responded on October 10, 2008, stating that it did not oppose AT&T’s request and asking that AT&T’s filing be made in time for the panel to consider this matter at the November 10, 2008 Authority Conference. On October 15, 2008, the Authority filed a *Notice of Filing* in which any interested parties were advised that if they desired to file comments or a brief on the issue of whether the

TRA should convene a contested case in this matter that such filings were to be made by October 24, 2008. Both CompSouth and AT&T made filings on October 24, 2008. CompSouth and AT&T filed additional comments on October 27, 2008 and October 30, 2008, respectively.

### **FINDINGS AND CONCLUSIONS**

The issue currently before the Authority is solely the question of whether the Authority should convene a contested case to hear CompSouth's request and issue a declaratory ruling. Tenn. Code Ann. § 4-5-223<sup>1</sup> provides that a state agency, upon petition for a declaratory order, must either convene a contested case and issue a declaratory order or refuse to issue a declaratory order within sixty days of receipt of the petition. The underlying issue for which CompSouth is seeking a declaratory ruling is whether "federal law requires [AT&T] to commingle facilities provided under 47 U.S.C. § 271 with those that must be provided under 47 U.S.C. § 251."<sup>2</sup> The commingling issue has previously been ruled on four times by the Authority in two different dockets: Docket No. 04-00381 and Docket No. 04-00046. Five different directors have weighed in on the commingling issue.

In Docket No. 04-00381, *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, a

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<sup>1</sup> Tenn. Code Ann. § 4-5-223(a) provides:

- (a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule, or order within the primary jurisdiction of the agency. The agency shall:
  - (1) Convene a contested case hearing pursuant to the provisions of this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or
  - (2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225.

Tenn. Code Ann. § 4-5-223(c) states that "[i]f an agency has not set a petition for declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order."

<sup>2</sup> *Petition*, p. 1.

majority of the panel (Directors Kyle and Miller) found that AT&T is not required to commingle network elements provided pursuant to § 251 with those provided pursuant to § 271. Director Jones dissented. The final order in that docket was issued on November 28, 2007. CompSouth sought reconsideration of that issue, and a majority of the panel (then Director Kyle and Director Roberson, appointed to the panel to replace Director Miller) voted to uphold the original ruling. The order reflecting this decision was issued on June 10, 2008. Director Jones, consistent with his original ruling, dissented in the June 10, 2008 order.

In 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 Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC of an Interconnection Agreement with BellSouth*, a majority of the panel (Directors Miller and Kyle) also found in favor of AT&T on the commingling issue. Director Jones dissented. The final order in that docket was issued on December 5, 2007. NuVox Communications, Inc. sought reconsideration of that issue, and a majority of the panel (then Director Kyle and Director Hargett, appointed in place of Director Miller) voted to uphold the original ruling. The order reflecting this decision was issued on June 9, 2008. Director Jones, consistent with his original ruling, dissented in the June 9, 2008 order.

CompSouth seeks a declaratory ruling from the Authority regarding the impact of an 11<sup>th</sup> Circuit Court of Appeals' decision in *NuVox Communications, Inc. et. al. v. BellSouth Communications, Inc.* That *NuVox* decision was issued on June 18, 2008 and is found at 503 F.3d 1330 (2008). Tennessee is in the 6<sup>th</sup> Circuit and is not bound by a decision of the 11<sup>th</sup> Circuit. At this time, neither the 6<sup>th</sup> Circuit nor the U.S. Supreme Court has ruled on this issue

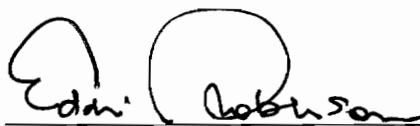
although there is potential that that could happen in the future. A ruling from either the 6<sup>th</sup> Circuit or the Supreme Court would be binding on the Authority.

In reviewing the entire record of this docket, the panel<sup>3</sup> voted unanimously to decline to convene a contested case in this matter thereby exercising its discretion pursuant to Tenn. Code Ann. § 4-5-223(a)(2) to refuse to issue a declaratory order. In making its decision, the panel made the following findings: (1) the Authority has previously ruled on the commingling issue four times in two different dockets, Docket No. 04-00381 and Docket No. 04-00046; (2) the final order denying CompSouth's reconsideration of the commingling issue in Docket No. 04-00381 was issued on June 10, 2008; (3) CompSouth's appropriate remedy for having the Authority's denial of reconsideration ruling reviewed was to file a timely appeal of the Authority's decision; and (4) CompSouth has not offered any binding, precedential legal authority which would compel the Authority to consider the commingling issue again.

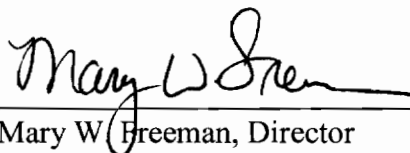
**IT IS SO ORDERED.**



Tre Hargett, Chairman



Eddie Roberson, Director



Mary W. Freeman, Director

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<sup>3</sup> Director Freeman clarified that her vote in favor of the motion was based solely on the procedural question before the panel, and she was not making any ruling regarding the merits of the underlying issue.