BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION

Verified Petition of Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company d/b/a AT&T Missouri	)))))))	Case No. CO-2009-0239

SPRINT'S BRIEF

Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively, "Sprint") urge the Commission to answer in the affirmative the question of whether Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T") must abide by the Merger Commitments and extend Sprint's existing interconnection agreements for three years from November 21, 2008.[1]

I. INTRODUCTION AND BACKGROUND

The Sprint entities have current and existing Interconnection Agreements (ICAs) with AT&T Missouri.[2] These ICAs were approved by the Missouri Commission and have never been replaced or superseded. The ICA between Sprint Spectrum L.P. and SBC Missouri, as amended, was originally approved by Commission Order in Case No. TK-2004-0180, effective December 15, 2003 and amended by tracking number filings VT-2005-0041 and VT-2005-0042. The ICA between Nextel West Corp. and Southwestern Bell Telephone was approved by Commission Order in Case No. TO-99-149, effective January 20, 1999 and subsequently amended in Case

[1] Ex. 6, Sprint Petition, ¶ 32. ("Sprint requests the Commission extend each of the Interconnection Agrements for a period of three years from November 21, 2008, the date that Sprint formally requested extension of its existing interconnection agreements under Merger Commitment 7.4."); Ex. 1, Felton Direct, p. 10.

[2] The three Interconnection Agreements have been approved by the Missouri Commission, Ex. 6, Sprint Petition, ¶ 29 and Exhibits 8,9, and 10.

No. TK-2005-309. The ICA between SBC Missouri and Sprint Communications Company L.P. was approved by Commission Order in Case No. TK-2006-0044, effective August 10, 2005.

On December 5, 2008, Sprint filed a Petition for Arbitration ("Petition") pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). Sprint's Petition contains one issue – an extension of its current ICAs with AT&T for an additional three-year term. The three-year extension arises from Sprint's acceptance of an AT&T and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. As part of the grant of authority to complete the merger, the FCC ordered compliance with the Merger Commitments.[3]

The Merger Commitment at issue in this proceeding is Merger Commitment 7.4 as follows:

Merger Commitment No. 7.4:

> **The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.[4]**

The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. Once the *FCC Order* was approved by the FCC, AT&T was required to make as a matter of law the offer to extend a current ICA, and

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[3] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*AT&T/BellSouth*" or "*FCC Order*") .

[4] *Id.* Merger Commitment 7.4, p. 149.

this is the offer that was accepted by Sprint during the parties' statutory 251/252 negotiations for a new agreement.

Sprint's Petition makes it clear that the single issue pertaining to the amendment is the establishment of an essential ICA term – the term of the ICA. The specific disputed issue is ***when*** the three-year extension commences. In other words, the sole disputed issue is the extended duration of Sprint's current ICA.

On December 30, 2008, AT&T filed a Motion to Dismiss ("Motion") Sprint's Petition. On February 19, 2009, the Missouri Commission denied AT&T's Motion holding that the "length of the agreements was at issue during negotiations because it is a necessary term to fulfilling the Section 251 duties."[5]

The parties filed Direct Testimony on February 4, 2009 and Rebuttal Testimony on February 18, 2009. The Hearing was conducted on February 25, 2009.

II. THE COMMISSION'S JURISDICTIONAL RULING WAS SUPPORTED DURING THE HEARING

AT&T presented evidence in its testimony and during the hearing that was directed to at the Commission's jurisdiction to arbitrate the three-year extension. This issue already has been addressed by the Commission in its Order Denying the Motion to Dismiss and Sprint incorporates by reference the arguments made in its response to the Motion to Dismiss[6] and in its Response to AT&T Missouri's Application for Reconsideration and/or Rehearing.[7] The evidence adduced in the testimony and during the hearing demonstrated that the Missouri Commission's decision in denying the Motion to Dismiss was correct.

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[5] CO-2009-0239, Order Denying Motion to Dismiss, February 19, 2009, p. 7.

[6] CO-2009-0239, Sprint's Response to AT&T Missouri Motion to Dismiss, January 16, 2009.

[7] CO-2009-0239, Sprint's Response to AT&T Missouri's Application for Reconsideration and/or Rehearing, March 4, 2009.

The Merger Commitments constitute a standing offer of interconnection-related terms. During the parties' statutory Sections 251/252 negotiations, Sprint accepted AT&T's interconnection-related offer that any requesting telecommunications carrier could extend its current ICA for three years.

The simple and straightforward facts are these. Sprint requested the three-year extension during the negotiation period under the Act. AT&T said no. AT&T now claims that this exchange is not "negotiations" and therefore Sprint cannot present this issue to the Commission. The Act does not require anything in addition to this exchange.

Sprint's request and AT&T's denial constitute negotiations under the Act.[8] Both AT&T witnesses agreed that Sprint's election to extend came during the appropriate period. Ms. Allen-Flood agreed that Sprint requested to extend its current ICAs during the timeframe associated with the Section 252 negotiations and before day 160.[9] Mr. McPhee acknowledged that Sprint's letter requesting the extension of its existing ICAs was received during the arbitration window.[10]

Sprint anticipates that AT&T will argue that it did not negotiate with Sprint regarding the extension amendments because the parties never exchanged redline drafts of the extension amendments and AT&T did not get the opportunity to add terms and provisions to the existing Sprint ICAs that it would have wanted.[11] The response to that argument is simple. Merger Commitment 7.4 does not allow for any changes to be made.

AT&T's position that it should be allowed to present additional issues is entirely contrary to the express language and the intent of Merger Commitment 7.4. There is only one issue for

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[8] Ex. 1, Felton Direct, p. 14.

[9] Tr. 73, 80.

[10] Tr. 110.

[11] Ex. 4, Allen-Flood Direct, p. 7; AT&T Application for Rehearing and Reconsideration ("Rehearing Application"), p. 3.

consideration – whether to extend the term of the ICAs for 3 years. If AT&T can present additional issues that would need to be arbitrated, it defeats the purpose of a merger commitment intended to reduce costs and streamline processes. Contrary to AT&T's assertions, the Merger Commitment does not permit AT&T to analyze the existing agreements and make counter-proposals.[12] Sprint's election to extend should only elicit a yes or no response from AT&T. AT&T answered no. No further negotiations or discussions are necessary or warranted in order for Sprint to present this matter to the Missouri Commission.

AT&T is unwilling to agree that the Missouri Commission has jurisdiction over the Merger Commitments no matter what form the proceeding. As Mr. McPhee admitted, there is no other action that Sprint could have taken to enforce Merger Commitment 7.4.[13] The crux of AT&T's position is that a carrier should have no recourse before a state commission if the carrier does not abide by AT&T's view of the Merger Commitments.

AT&T's position is wrong. State commissions routinely enforce FCC Orders pertaining to interconnection-related matters. AT&T's claim that this *FCC Order* is not subject to the Missouri Commission's jurisdiction only demonstrates the unreasonable nature of its postion. It is no different than claiming that the FCC's Local Competition Order couldn't be enforced by the state commissions.

The FCC not only expects the state commissions to be involved in the ongoing administration of interconnection-related merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-related disputes pursuant to § 252. For example, in the GTE/Bell Atlantic merger, the FCC stated:

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[12] Rehearing Application at 3.

[13] Tr. 144.

> Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. **Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.**[14]

Case law subsequent to the GTE/Bell Atlantic merger also finds that state commissions have continuing, concurrent jurisdiction to enforce interconnection-related merger conditions pursuant to Section 252. In *Core Communications*,[15] CLECs filed a complaint action against SBC at the FCC over alleged violations of Ameritech/SBC merger conditions. Ironically, in that case, SBC (the predecessor to AT&T) asserted that the FCC lacked jurisdiction to hear the complaint under Sections 206 and 208 of the Act on a theory that the state's authority under Section 251 and 252 overrode the FCC's Section 206 and 208 enforcement jurisdiction. The FCC determined that it also had 206 and 208 enforcement authority (as opposed to finding that only the FCC had enforcement authority) and, in her concurring opinion, then Commissioner Abernathy stated:

> This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe that there are significant limitations on the circumstances in which complainants will actually be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.

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[14] *In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control,* CC Docket No. 98-184 (Released: June 16, 2000), at ¶ 348 (emphasis added).

[15] *In the Matter of Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, et al.,* Memorandum Opinion and Order, 18 FCC Rcd 7568, 2003 FCC Lexis 2031 (2003) (*"Core Communications") vacated and remanded on other grounds,* 407 F.3d 1223 (U.S.App.D.C. 2005) (vacated for further proceedings in which Commission may develop and apply its interpretation of the conditions under which CLECs may waive specified merger rights).

> ... as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement – its change of law provisions, for example – likely would foreclose any remedy under section 208.[16]

Based on the foregoing, it is apparent that states continue to retain 251/252 authority over disputes regarding interconnection-related merger conditions in an FCC order.

Of course, AT&T does not object if a State commission approves an ICA, as long as the parties agree.[17] However, if a carrier does not agree with AT&T with respect to the Merger Commitments, in AT&T's erroneous view, the only course of action is before the FCC. The Missouri Commission properly ruled that it has jurisdiction over this matter and that decision was reinforced during the hearing.

III. AT&T CANNOT MODIFY MERGER COMMITMENT 7.4

A. AT&T cannot modify the terms of Merger Commitment 7.4 through an Accessible Letter

AT&T rejected Sprint's request to extend its current ICAs because Sprint's request did not comport with the deadlines contained in the Accessible Letter dated November 16, 2007 ("Accessible Letter").[18] The Accessible Letter, though, cannot modify the Merger Commitments and Sprint is not bound by the arbitrary deadlines contained in the Accessible Letter. The Merger Commitments were approved in the *FCC Order* and the only way that they can be modified or changed is by the FCC.

AT&T's Accessible Letter is nothing more than a self-serving way to rewrite the Merger Commitments in a manner more palatable to AT&T. Despite the language in the Merger

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[16] *Core Communications* at page 17.

[17] Tr. 128-130.

[18] The Accessible Letter is attached to Ex. 3NP, Mr. McPhee's Direct Testimony as Schedule 5.

Commitment that allows carriers to extend current interconnection agreements, *whether expired or unexpired*, for three years, the Accessible Letter attempts to require interconnecting carriers whose agreements had expired before January 15, 2008 to provide notice to AT&T of its intent to extend before January 15, 2008. Mr. Felton testifies that AT&T's position:

> is baseless and appears to be an attempt by AT&T to renege on promises it made to the FCC and the entire telecommunications industry in exchange for merger approval. The January 15, 2008 deadline that the AT&T inserted in the CLEC accessible letter is completely arbitrary and does not appear in the Merger Commitments. Merger Commitment 7.4 expressly states that it does not matter if an interconnection agreement has expired, current interconnection agreements can be extended for up to three years.[19]

Despite the clear language of Merger Commitment 7.4 allowing an interconnection agreement to be extended for three years whether or not its initial term had expired, AT&T applied the Merger Commitment in another manner. Under AT&T's view, this Merger Commitment provided no real benefit to requesting carriers if the initial term had expired more than three years prior to the request date because AT&T would only add three years to the initial term.[20] Carriers, including Sprint, disagreed with AT&T's ridiculous interpretation of Merger Commitment 7.4.[21] The Merger Commitment clearly allows a carrier to add three years to its ICA, no matter the expiration date.

When questioned, Mr. McPhee acknowledged that the January 15, 2008 deadline is not part of Merger Commitment 7.4.[22] He also testified that the FCC had never adopted the Accessible Letter.[23]

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[19] Ex. 1, Felton Direct, p. 11.

[20] Tr. 145-146.

[21] Tr. 114-115.

[22] Tr. 114.

[23] Tr. 112.

The only appropriate deadline for carriers to exercise their rights to extend their interconnection agreements under Merger Commitment 7.4 is the June 29, 2010 sunset date of the Merger Commitments as specified in the FCC's Order. Mr. Felton stated:

> The FCC specified that the Merger Commitments would apply for forty-two months from the merger closing date. As the AT&T – BellSouth merger closed on December 29, 2006, the Merger Commitments remain in effect through June 29, 2010. Therefore, AT&T's arbitrary deadline of January 15, 2008 set forth in its CLEC accessible letter for requesting carriers to take advantage of Merger Commitment 7.4 is completely without merit. Under the Merger Commitment, Sprint should be permitted to extend its existing ICAs for three years, regardless of whether their initial terms have expired.[24]

AT&T must not be allowed to unilaterally rewrite the Merger Commitment to prevent Sprint from exercising the Merger Commitment and the right to extend its current interconnection agreements.

The Missouri Commission should find that the Accessible Letter cannot impose arbitrary deadlines upon a carrier's election to extend its current ICAs under the Merger Commitments. The *FCC Order* approving the Merger Commitments is no different than any other FCC Order that establishes, clarifies or interprets interconnection-related obligations.

A state commission's authority over merger conditions only extends to the interpretation of merger conditions. A state commission is not authorized to modify merger conditions. In an interconnection proceeding before the FCC, Verizon and WorldCom disagreed concerning the dispute resolution provision to be included in their arbitrated interconnection agreement. WorldCom contended that a sentence proposed by Verizon should be deleted in order to make clear that the alternative dispute resolution procedure required by the *GTE/Bell Atlantic* merger condition remained available to WorldCom, while Verizon contended that the Bureau, acting as

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[24] Ex. 1, Felton Direct, p. 12.

a Section 252(b) arbitrator, lacked the authority to require the inclusion of an arbitration provision in the interconnection agreement. The Bureau disagreed, ruling that "[t]he Act gives us broad authority, ***standing in the shoes of a state commission,*** to resolve issues raised in this proceeding."[25] Indeed, the Bureau found that failing to give effect to the merger condition when arbitrating an interconnection agreement "would essentially modify that Commission order, which we cannot do . . . ."[26] Likewise, the Missouri Commission should not accept AT&T's attempt to modify the Merger Commitments with the Accessible Letter.

AT&T's arbitrary and unreasonable nature is demonstrated by its continued refusal to extend even the Sprint Communications Company L.P. ("CLEC") ICA. The CLEC ICA, approved by the Commission in August, 2005, did not expire until April 29, 2008.[27] Even under AT&T's initial interpretation of Merger Commitment 7.4, Sprint should have been entitled to extend this ICA for three years, or until April 29, 2011. Even when this point was made with Mr. McPhee, he reiterated that AT&T was not willing to extend the CLEC ICA.[28]

Like the Wireline Competition Bureau when it was arbitrating an interconnection agreement under § 252 on behalf of a state commission in the *WorldCom Virginia Arbitration*, this Commission must interpret and apply the merger conditions, not any self-serving Accessible Letter, in order to resolve the issue in this arbitration.

B. The Kentucky Public Service Commission ruled that AT&T's initial modification of Merger Commitment 7.4 was erroneous

The ability of a carrier to extend its ICA from the time of its request, rather than AT&T's

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[25] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(a)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia., Inc. and for Expedited Arbitration,* 17 FCC Rcd. 27039, (Wireline Competition Bureau, Released July 17, 2002) ("*WorldCom Virginia Arbitration*"), at ¶ 703.

[26] *Id.* at ¶ 702.

[27] See Exhibit 10 to the Petition, General Terms and Conditions, Section 5.2.

[28] Tr. 139-140.

view that the extension is retroactive to the end of the initial term, is precisely the issue presented to the Kentucky Commission by Sprint in its arbitration proceeding there. The Kentucky Commission - the only state commission to issue a decision - ruled against AT&T, finding that "AT&T's assertion that the interconnection agreement should be extended for 3 years from the initial expiration date of December 31, 2004 [ending date of Kentucky ICA original term] is *wholly inconsistent with the FCC merger commitment directive and would create an unreasonable result.*"[29]

The issue presented to the Kentucky Commission was AT&T's original unreasonable interpretation of Merger Commitment 7.4. AT&T argued that the only conceivable commencement date for the extension was December 31, 2004, the date on which the most recent ICA concluded under its fixed term.[30] The Kentucky Commission rejected AT&T's argument, noting that "within the terms of its merger order, the FCC clearly contemplated situations where interconnection agreements would be extended and effective beyond the initial term of the agreement."[31] The Kentucky Commission found that the Merger Order was intended to be applied on a going-forward basis so as to address competitive concerns resulting from the unification of AT&T and BellSouth.[32]

The Kentucky Commission noted that the case before it was identical to actions filed by

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[29] *In the Matter of: Petition of Sprint Communications Company, L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection With BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast,* Before the Kentucky Public Service Commission, Order, Case No. 2007-00180 at 12(Sept. 18, 2007) (emphasis added).

[30] *Id.* at p. 11.

[31] *Id.* at p.12.

[32] *Id.* at p. 13. After the Kentucky Commission rejected AT&T's rationale, it decided that the commencement date of the extension should commence from December 29, 2006 (the effective date of the *Merger Order*). This was one of two dates proposed by Sprint in that proceeding. *Id.* at pp. 10-11. Sprint is not proposing the December 29, 2006 date as the appropriate date in this proceeding, and as demonstrated below in Section III.C, AT&T has extended many interconnection agreements under this Merger Commitment from the date of the request.

Sprint in the other 8 states in the former BellSouth territory.[33] Following the Kentucky Commission decision, AT&T finally permitted Sprint to extend its ICAs in the 8 remaining BellSouth states for three years from the request date of March 20, 2007,[34] effectively mooting those proceedings. It was only after Sprint was forced to file arbitration proceedings in all 9 states that Sprint was able to obtain the extensions that it was entitled to under the Merger Commitments. Indeed, Mr. McPhee admitted that no state commission had ruled in a manner that supported AT&T's interpretation of Merger Commitment 7.4.[35] Mr. McPhee also admitted that only the Kentucky Commission had ruled on this substantive issue.[36]

C. AT&T Continues to Discriminate against Sprint in its Modifications to Merger Commitment 7.4

Despite the Kentucky Commission's finding that AT&T was not able to arbitrarily apply the Merger Commitments, AT&T continues to unilaterally revise them. The timing of the Accessible Letter is no coincidence. Following the Kentucky decision, AT&T recognized that its interpretation would no longer stand. AT&T acknowledges that the Accessible Letter was intended to resolve disputes concerning the interpretation of Merger Commitment 7.4.[37] AT&T agreed that other carriers interpreted Merger Commitment 7.4 in the same manner as Sprint – that the 3-year extension started with the request date and was not added to the original term of the interconnection agreement.[38] The Accessible Letter is nothing more than an acknowledgement that AT&T's initial interpretation in the BellSouth region was unreasonable.

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[33] *Id.* at p. 10, fn 21.

[34] See Ex. 1, Felton Direct, MGF-3, p. 6 of 23.

[35] Tr. 27.

[36] *Id.*

[37] Tr. 146.

[38] Tr. 114-115.

In the Accessible Letter, AT&T placed another unreasonable condition upon the Merger Commitments by requiring that extension requests be submitted by January 15, 2008, for those ICAs whose original term expired prior to January 15, 2008. Mr. McPhee testified that AT&T could have selected other dates.[39]

Not only are the deadlines imposed by the Accessible Letter an improper modification of the merger conditions, AT&T's application of the Accessible Letter can be described as capricious at best. Mr. McPhee acknowledged that some carriers were allowed to extend their ICAs despite the fact that the requests did not meet the deadlines.[40] In one instance, AT&T extended the agreement of Michigan Access even though the request was received nearly 4 months later.[41] AT&T's attempts to explain away its disparate treatment only serves to demonstrate the inconsistent manner AT&T treats carrier requests.

AT&T continues to discriminate against Sprint by its failure to extend the Sprint ICAs even though it has extended other carriers' ICAs, including ICAs with original terms that had expired many years ago. The fact that the Sprint Spectrum and Nextel West ICAs have been in existence for many years is also no reason that the ICAs should not be extended. For example, the Verizon Wireless ICA had been in effect since 1997[42] (prior to both of Sprint's wireless ICAs), and AT&T agreed to extend that ICA until May 10, 2010.[43] AT&T's misplaced reliance upon the Accessible Letter as the reason it will not extend Sprint's ICAs demonstrates AT&T's unreasonableness.

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[39] Tr. 115.

[40] Tr. 118-120.

[41] Tr. 119-120.

[42] Tr. 123.

[43] Ex. 3NP, McPhee Direct, Schedule 2.

IV. SPRINT'S ICAS ARE CURRENT AND ELIGIBLE FOR EXTENSION UNDER MERGER COMMITMENT 7.4

Sprint's current ICAs are eligible for extension under Merger Commitment 7.4. AT&T is grasping at straws in arguing that the three ICAs, under which everyone agrees the parties are operating under, somehow are not the "current interconnection agreements" that may be extended.[44] The ICAs are current, effective, and have not been replaced by successor agreements. While AT&T may have sent a notice of intent to terminate the ICAs, the ICAs themselves never terminated as the parties continue to exchange traffic and otherwise abide by the terms and conditions of the ICAs.

In fact, AT&T's argument that the ICAs cannot be extended because they are terminated is incompatible with the second sentence in Merger Commitment 7.4, which states, "[d]uring this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's 'default' provisions."[45] AT&T is not citing default as a reason that it served notice to terminate.

The ICAs all have post-termination operation language that allow for continued operation of the agreements after expiration or termination. In addition, the ten-month termination provisions in the Sprint Spectrum L.P. wireless ICA and the Sprint Communications Company L.P. CLEC ICA are triggered by the arbitration window beginning July 1, 2008, not AT&T's termination letters in 2007. Finally, Missouri law and cases from other jurisdictions recognize the continued effectiveness of an agreement post-termination. Therefore, Merger Commitment 7.4 applies and AT&T must be ordered to extend Sprint's current ICAs for three years.

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[44] Ex. 4, McPhee Rebuttal, pp. 9-10.

[45] *FCC Order*, Merger Commitment 7.4, p. 149.

A. The ICAs Are Current, Effective and Existing

The ICAs are current, effective, and have not been replaced by successor agreements. Mr. Felton of Sprint testifies:

> Q. Are Sprint's ICAs with AT&T Missouri still effective?
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> A. Yes. Sprint and AT&T continue to operate under the current ICAs without interruption.[46]

Mr. Felton also testifies that the Sprint Spectrum and Nextel West ICAs had been amended to account for changes of law.[47]

AT&T admits in direct testimony and at hearing that Sprint seeks to extend its existing or current ICAs on numerous occasions.[48] While AT&T may have sent a notice intending to terminate the ICAs, those agreements never ended as the parties continue to exchange traffic.[49] Both Ms. Allen-Flood and Mr. McPhee stated that the parties continue to operate under the ICAs.[50] Mr. McPhee also assumed that AT&T continues to send Sprint PCS and Nextel bills for traffic under those ICAs.[51] In addition, when asked if he agrees that the "parties have not entered into replacement agreements," Mr. McPhee responded: "That's right." [52] And no other ICAs have been filed with the Missouri Public Service Commission "replacing those ICAs."[53]

As late as December 5, 2008, in written correspondence AT&T acknowledged that the

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[46] Ex. 1, Felton Direct, p. 7.

[47] Ex. 1, Felton Direct, p. 10.

[48] See, e.g. Tr. 109 (Q: "You don't disagree that Sprint has requested a three-year extension of its existing agreements, do you?" A: (Mr. McPhee) "I don't disagree that Sprint is seeking that."); Ex. 3NP, McPhee Direct, p. 3 ("I will show that Sprint is not entitled to extend its current ICAs ...."), p. 4 ("...Sprint's request to extend its current ICAs"); p. 6 ("Here, Sprint is seeking an extension of its *existing* agreements under Merger Commitment 7.4.").

[49] Id.

[50] Tr. 78, 134.

[51] Tr. 135.

[52] Tr. 134.

[53] Tr. 136.

Sprint companies wished "to extend the term of their *current Agreements* in the state of Missouri for a period of three (3) years."[54] In fact, AT&T admits that it did not argue that the ICAs were not *current* until Mr. McPhee raised the issue in his rebuttal testimony on February 18, 2008. Mr. McPhee stated: "I don't know if I made that distinction (that the ICAs were not current) until it came up in my rebuttal testimony."[55] Then Mr. McPhee admits that the issue of whether Sprint's ICAs were current did not appear in the December 5th letter, as it could not, because in that letter AT&T rejected Sprint's attempts to extend its *current* ICAs, citing only as a reason that the requests were too late under the terms of the Accessible Letter.[56]

AT&T's arguments that the ICAs are not current ring hollow. The ICAs are the current agreements, whether or not the initial term has expired, and therefore should be extended upon request under Merger Commitment 7.4.

B. The Relevant ICAs Allow for Continuation and Post-Termination Operation

Sprint's Petition[57] identified the interconnection agreements that it desired to extend according to Merger Commitment 7.4. Mr. Felton stated in his testimony:

> Sprint's Verified Petition for Arbitration identifies in paragraph 29 the current functioning interconnection agreements between the Sprint entities and AT&T Missouri. They are: (1) Agreement for Interconnection Between Sprint Spectrum L.P. and SBC Missouri, as amended, originally approved by Commission Order in Case No. TK-2004-0180; amended by tracking number filings VT-2005-0041 and VT-2005-0042, Exhibit 8 to Verified Petition (2); Agreement for Reciprocal Compensation and Interconnection between Nextel West Corp. and Southwestern Bell Telephone, as amended, approved by Commission Order in Case No. TO-99-149, Amendment approved in Case No. TK-2005-309; Exhibit 9 to Verified Petition; and (3) Interconnection Agreement between SBC Missouri and Sprint Communications Company L.P., approved by Commission Order in Case No.

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[54] Ex. 3NP, McPhee Direct, schedule 4. (italics added)

[55] Tr. 132. See also, Tr. 134.

[56] Tr. 134; See Ex. 3NP, McPhee Direct, schedule 4.

[57] Ex. 6.

TK-2006-0044. Exhibit 10 to Verified Petition for Arbitration.[58]

AT&T claims that its letters of August 21, 2007 terminated the existing ICAs and therefore they are not eligible for extension under Merger Commitment 7.4.[59] Sprint does not acknowledge that the ICAs have been terminated as the parties have continued to operate under the ICAs as detailed in Section IV.A. above. The terms and conditions of the ICAs survive as the parties did not enter into successor ICAs and no other terms and conditions govern their relationship. Accordingly, there are no other *current* ICAs available for extension under Merger Commitment 7.4.

But even if the ICAs had been terminated, each of the ICAs contains provisions that allow for the parties to continue operating under the ICA. If the Commission determines that the ICAs have been terminated, the Commission would need to determine which obligations survive. Those obligations would then constitute the *current* ICA which would then be eligible for extension. As both parties acknowledge that they continue to operate under all the terms and conditions of Sprint's ICAs, this is an unnecessary exercise.

1. Sprint Spectrum ICA

In the Sprint Spectrum ICA, the following terms govern term and termination. The sections that support continued operation of the ICA after it has expired or terminated are underlined. The underlining does not appear in the actual ICA. Sections 19.2.10 and 19.9.1 discuss survival of the ICA's obligations post termination.

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[58] Ex. 1, Felton Direct, pp. 4-5.

[59] Ex. 4, McPhee Rebuttal, p. 9.

19. MISCELLANEOUS PROVISIONS

19.1 Effective Date

19.1.1 The Effective Date of this Agreement (the "Effective Date") shall be the date the Commission approves this Agreement under Section 252(e) of the Act or, absent such Commission approval, the date this Agreement is deemed approved under Section 252(e)(4) of the Act.

19.2 Term and Termination

19.2.1 The Term of this Agreement shall commence upon the Effective Date of this Agreement and shall expire on 31st day of November 30, 2004 (the **"Term"**). This Agreement shall expire if either Party provides written notice, within one hundred-eighty (180) Days prior to the expiration of the Term, to the other Party to the effect that such Party does not intend to extend the Term. Absent the receipt by one Party of such written notice, this Agreement shall remain in full force and effect on and after the expiration of the Term, subject to the provisions of this Section 19.

19.2.2 Notwithstanding any other provision of this Agreement, either Party (at its sole discretion) may terminate this Agreement, and the provision of Interconnection and services, in the event the other Party (1) fails to perform a material obligation or breaches a material term of this Agreement and (2) fails to cure such nonperformance or breach within forty-five (45) Days after written notice thereof. Should the nonperforming or breaching Party fail to cure within forty-five (45) Days after such written notice, the noticing Party may thereafter terminate this Agreement immediately upon delivery of a written termination notice.

19.2.3 If pursuant to Section 19.2.1, this Agreement continues in full force and effect after the expiration of the Term, either Party may terminate this Agreement after delivering written notice to the other Party of its intention to terminate this Agreement, subject to Sections 19.2.4 and 19.2.5. Neither Party shall have any liability to the other Party for termination of this Agreement pursuant to this Section 19.2.3 other than its obligations under Sections 19.2.4 and 19.2.5.

19.2.4 Upon termination or expiration of this Agreement in accordance with Sections 19.2.1, 19.2.2 or 19.2.3:

19.2.4.1 Each Party shall continue to comply with its obligations set forth in Section 19.9, "Survival of Obligations"; and

19.2.4.2 Each Party shall promptly pay all amounts owed under this Agreement, subject to Section 17, "Dispute Resolution".

19.2.5 If **SBC-13STATE** serves notice of expiration or termination pursuant to Section 19.2.1 or Section 19.2.3, Carrier shall provide **SBC-13STATE** written confirmation, within ten (10) Days, that Carrier either wishes to (1) commence negotiations with **SBC-13STATE**, or adopt an agreement, under Sections 251/252 of the Act, or (2) terminate its agreement. Carrier shall identify the action to be taken for each affected agreement identified in **SBC-13STATE**'s notice.

19.2.6 If Carrier serves notice of expiration or termination pursuant to Section 19.2.1 or Section 19.2.3, and also wishes to pursue a successor agreement with **SBC-13STATE**, Carrier shall include a written request to commence negotiations with **SBC-13STATE**, or adopt an agreement, under Sections 251/252 of the Act and identify which state(s) the successor agreement will cover. Upon receipt of Carrier's Section 252(a)(1) request, the Parties shall commence good faith negotiations on a successor agreement.

19.2.7 The rates, terms and conditions of this Agreement shall continue in full force and effect until the earlier of (i) the effective date of its successor agreement, whether such successor agreement is established via negotiation, arbitration or pursuant to Section 252(i) of the Act; or (ii) the date that is ten (10) months after the date on which **SBC-13STATE** received Carrier's Section 252(a)(1) request, at which time the Agreement shall terminate without further notice.

19.2.8 If at any time during the Section 252(a)(1) negotiation process (prior to or after the expiration date or termination date of this Agreement), Carrier withdraws its Section 252(a)(1) request, Carrier must include in its notice of withdrawal a request to adopt a successor agreement under Section 252(i) of the Act or affirmatively state that Carrier does not wish to pursue a successor agreement with **SBC-13STATE** for a given state. The rates, terms and conditions of this Agreement shall continue in full force and effect until the later of: 1) the expiration of the Term of this Agreement, or 2) the expiration of ninety (90) Days after the date Carrier serves notice of withdrawal of its Section 252(a)(1) request. If the Term of this Agreement has expired, on the earlier of (i) the ninety-first (91st) Day following **SBC-13STATE** receipt of Carriers notice of withdrawal of its Section 252(a)(1) request or (ii) the effective date of the agreement following approval by the Commission of the adoption of an agreement under 252(i), the Parties shall, have no further obligations under this Agreement except those set forth in Section 19.2.4 of this Agreement.

19.2.9 If Carrier does not affirmatively state that it wishes to pursue a successor agreement with **SBC-13STATE** as provided in Section 19.2.4.1 or Section 19.2.4.2 above, then the rates, terms and conditions of this Agreement shall continue in full force and effect until the later of 1) the expiration of

the Term of this Agreement, or 2) the expiration of ninety (90) Days after the date Carrier provided or received notice of expiration or termination. Thereafter, the Parties shall have no further obligations under this Agreement except as provided in Section 19.2.4 above.

19.2.10 In the event of expiration or termination of this Agreement when there is no successor agreement between **SBC-13STATE** and Carrier, **SBC-13STATE** and Carrier shall cooperate in good faith to effect an orderly transition of service under this Agreement; provided, Carrier shall be solely responsible (from a financial, operational and administrative standpoint) to ensure that its End User Customers are transitioned to another Telecommunications Carrier, if applicable.

19.9 Survival of Obligations

19.9.1 The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.[60]

The Sprint Spectrum ICA clearly contemplates continued effectiveness of the ICA even in the event of a notice by a party. The ICA also provides for post-expiration or termination duties by both parties. Section 19.2.10 calls for the parties to cooperate post expiration to transition services and Section 19.9.1 requires obligations which by their nature are intended to continue post expiration or termination to survive expiration or termination. Since Sprint and AT&T never conducted talks about transitioning services to another party, continued to negotiate for a new agreement and engaged in this process where Sprint elected to extend its ICA under the Merger Commitment, the obligations of the agreement continued to survive under Sections 19.2.10, and 19.9.1. Service was continued and never transitioned to another carrier. In addition, it is clear that the intent of the ICA is for it to continue until a successor ICA is approved.

2. Nextel West ICA

[60] Ex. 6, Verified Petition of Arbitration, Ex. 8, Sprint Spectrum L.P. ICA, pp. 51-55. AT&T witness McPhee misidentified the provisions of the Sprint Spectrum agreement on page 9 his Rebuttal testimony. He mistakenly identified a provision of the Nextel ICA.

The expiration and termination provisions of the Nextel West wireless ICA follow.[61] They are much less specific than the Sprint Spectrum wireless ICA but they clearly contemplate in Section 18.8 that the ICA can survive post-termination. If the Missouri Commission determines that the ICAs were terminated (which Sprint opposes), the Commission would then need to determine which of the obligations survive post-termination under the survival clauses. It would be these remaining obligations then that would be the current ICA subject to a three-year extension. Sprint believes that this exercise is unnecessary because AT&T admitted that it continues to operate according to all the terms and conditions of the ICAs.

18.2 **Term and Termination**

18.2.1 SWBT and Carrier agree to interconnect pursuant to the terms defined in this Agreement for an initial period terminating November 1, 1999, and thereafter the Agreement shall continue in force and effect unless and until terminated as provided herein. Either Party may terminate this Agreement by providing written notice of termination to the other Party, such written notice to be provided at least sixty (60) days in advance of the date of termination; provided, however, that no such termination shall be effective prior to the date one year from the Effective Date of this Agreement. By mutual agreement, SWBT and Carrier may amend this Agreement in writing to modify its terms.

18.2.2 Either Party may terminate this Agreement upon thirty (30) days written notice of a material breach of this Agreement by the other Party to this Agreement, which material breach remains uncured for the thirty (30) day period after written notice of the material breach by the non-breaching Party to the breaching Party; provided, however, that so long as the breaching Party is taking diligent, timely, and substantive action towards curing a breach that cannot be cured within such thirty days, then the non-breaching Party may not terminate the Agreement.

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[61] Ex. 6, Verified Petition of Arbitration, Ex. 9, Nextel West ICA, p. 33. AT&T witness McPhee misidentified the provisions of the Nextel West agreement on page 10 his Rebuttal testimony. He mistakenly identified a provision of the Sprint Spectrum ICA.

18.8 **Survival of Obligations**

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, any obligation of a Party under the provisions regarding indemnification, Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, will survive cancellation or termination thereof.

3. Sprint Communications Company L.P. ICA

In the Sprint Communications Company L.P. ICA, the following terms govern term and termination. The sections that support continued operation of the ICA after it has expired or terminated are underlined. The underlining does not appear in the actual ICA.

5. EFFECTIVE DATE, TERM, AND TERMINATION

5.1 In SBC-13STATE, with the exception of SBC OHIO, the Effective Date of this Agreement shall be ten (10) calendar days after the Commission approves this Agreement under Section 252(e) of the Act or, absent such Commission approval, the date this Agreement is deemed approved under Section 252(e)(4) of the Act. In SBC OHIO, based on the PUC-OH, the Agreement is Effective upon filing and is deemed approved by operation of law on the 91st day after filing.

5.2 The term of this Agreement shall commence upon the Effective Date of this Agreement and shall expire on November 01, 2006, provided; however, should CLEC implement (i.e. provided assurance of payment, ordered facilities, and submitted ASRs for trunking) this Agreement within six (6) months of the Effective Date, then this Agreement will automatically renew for one additional year and expire on April 29, 2008 (the "Term"). Absent the receipt by one Party of written notice from the other Party within 180 calendar days prior to the expiration of the Term to the effect that such Party does not intend to extend the Term, this Agreement shall remain in full force and effect on and after the expiration of the Term until terminated by either Party pursuant to Section 5.3 or 5.4.

5.3 Notwithstanding any other provision of this Agreement, either Party may terminate this Agreement and the provision of any Interconnection, Resale Services, Lawful Unbundled Network Elements, functions, facilities, products or services provided pursuant to this Agreement, at the sole discretion of the terminating Party, in the event that the other Party fails to perform a material obligation or breaches a material term of this Agreement and the other Party fails to cure such nonperformance or breach within forty-five (45) calendar days after written notice thereof. Any termination of this Agreement pursuant to this Section 5.3 shall take

effect immediately upon delivery of written notice to the other Party that it failed to cure such nonperformance or breach within forty-five (45) calendar days after written notice thereof.

5.4 If pursuant to Section 5.2, this Agreement continues in full force and effect after the expiration of the Term, either Party may terminate this Agreement after delivering written notice to the other Party of its intention to terminate this Agreement, subject to Sections 5.5 and 5.6. Neither Party shall have any liability to the other Party for termination of this Agreement pursuant to this Section 5.4 other than its obligations under Sections 5.5 and 5.6.

5 .5 Upon termination or expiration of this Agreement in accordance with Sections 5.2, 5.3 or 5.4:

5.5.1 Each Party shall continue to comply with its obligations set forth in Section 41; and

5.5.2 Each Party shall promptly pay all amounts owed under this Agreement or place any Disputed Amounts into an escrow account that complies with Section 8.4 hereof;

5.5.3 Each Party's confidentiality obligations shall survive; and

5.5.4 Each Party 's indemnification obligations shall survive.

5.6 If either Party serves notice of expiration pursuant to Section 5.2 or Section 5.4, CLEC shall have ten (10) calendar days to provide SBC-13STATE written confirmation if CLEC wishes to pursue a successor agreement with SBC-13STATE or terminate its agreement. CLEC shall identify the action to be taken on each applicable (13) state(s). If CLEC wishes to pursue a successor agreement with SBC- 13STATE, CLEC shall attach to its written confirmation or notice of expiration/termination, as applicable, a written request to commence negotiations with SBC-13STATE under Sections 251/252 of the Act and identify each of the state(s) the successor agreement will cover. Upon receipt of CLEC's Section 252(a)(1) request, the Parties shall commence good faith negotiations on a successor agreement.

5.7 If written notice is not issued pursuant to Section 5.2, the rates, terms and conditions of this Agreement shall continue in full force and effect until the earlier of (i) the effective date of its successor agreement, whether such successor agreement is established via negotiation, arbitration or pursuant to Section 252(i) of the Act; or (ii) the date that is ten (10) months after the date on which SBC-13STATE received CLEC's Section 252(a)(1) request.

5.8 If at any time during the Section 252(a)(1) negotiation process (prior to or after the expiration date or termination date of this Agreement), CLEC withdraws its Section 252(a)(1) request, CLEC must include in its notice of withdrawal a request to adopt a successor agreement under Section 252(i) of the Act or affirmatively state that CLEC does not wish to pursue a successor agreement with SBC-13STATE for a given state. The rates, terms and conditions of this Agreement shall continue in full force and effect until the later of: 1) the expiration of the term of this Agreement, or 2) the expiration of ninety (90) calendar days after the date CLEC provides notice of withdrawal of its Section 252(a)(1) request. If the Term of this Agreement has expired,

on the earlier of (i) the ninety-first (91st) calendar day following SBC-13STATE's receipt of CLEC's notice of withdrawal of its Section 252(a)(1) request or (ii) the effective date of the agreement following approval by the Commission of the adoption of an agreement under 252(i), the Parties shall, have no further obligations under this Agreement except those set forth in Section 5.5 of this Agreement.

5.9 If CLEC does not affirmatively state that it wishes to pursue a successor agreement with SBC- 13STATE in its, as applicable, notice of expiration or termination or the written confirmation required after receipt of the SBC-owned ILEC's notice of expiration or termination, then the rates, terms and conditions of this Agreement shall continue in full force and effect until the later of 1) the expiration of the Term of this Agreement, or 2) the expiration of ninety (90) calendar days after the date CLEC provided or received notice of expiration or termination. If the Term of this Agreement has expired, on the ninety-first (91st) day following CLEC provided or received notice of expiration or termination, the Parties shall have no further obligations under this Agreement except those set forth in Section 5.5 of this Agreement.

5.10 In the event of termination of this Agreement pursuant to Section 5.9, SBC-13STATE and CLEC shall cooperate in good faith to effect an orderly transition of service under this Agreement; provided that CLEC shall be solely responsible (from a financial, operational and administrative standpoint) to ensure that its End Users have been transitioned to a new LEC by the expiration date or termination date of this Agreement.

5.11 CLEC may elect at any time to terminate this Agreement in its entirety at CLEC's sole discretion, upon ninety (90) days written notice to 13State. Each Party agrees to cooperate in an orderly and efficient transition to CLEC or another vendor. CLEC will continue to pay for service(s), Interconnection, or Network Element(s) or Telecommunication Service(s) until of the same are terminated or transitioned to another vendor. Additionally, CLEC shall reimburse SBC-13State for additional costs incurred by SBC- 13State as a result of such transition.

41. SURVIVAL

41.1 The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement. Without limiting the general applicability of the foregoing, the following terms and conditions of the General Terms and Conditions are specifically agreed by the Parties to continue beyond the termination or expiration of this Agreement: Section 5.5; Section 5.6, Section 7.3; Section 8.1; Section 8.4; Section 8.5; Section 8.6; Section 8.7; Section 8.8; Section 10, Section 11; Section 13; Section 14; Section 15; Section 16.1; Section 18; Section 19; Section 20; Section 22; Section 25.4; Section 26.1.3; Section 32; Section 34 and Section 42.

The Sprint Communications Company ICA clearly contemplates continued effectiveness of the ICA while the parties are seeking a successor ICA, as discussed below. The ICA also contains provisions related to post expiration or termination duties by both parties and continued

effectiveness of the ICA. Section 5.10 calls for the parties to cooperate post expiration to transition services and Section 41.1 requires obligations which by their nature are intended to continue post expiration or termination to survive expiration or termination. Since Sprint and AT&T never conducted talks about transitioning services to another party, continued to negotiate for a new agreement and engaged in this process where Sprint elected to extend its ICA under the Merger Commitment, the obligations of the agreement continued to survive under Sections 5.10 and 41.1 Service was continued and never transitioned to another carrier. In addition, it is clear that the intent of the ICA is for it to continue until a successor ICA is approved.

C. The ICAs Continue To Be Effective As The ICAs Allow For Continuation During Negotiations For A New ICA

Under the Merger Commitment, all current interconnection agreements, whether expired or unexpired, can be extended for three years. AT&T attempts to evade its obligations to extend any *current* interconnection agreement by contending that the identified agreements have expired and terminated and therefore are not *current*.[62] AT&T cites its notice letters issued on August 21, 2007 as evidence that the ICAs have terminated.[63] In addition to the Survival of Obligations provisions in the ICAs cited above,[64] other provisions in the Sprint Communications Company L.P. and Sprint Spectrum L.P. make it clear that the existing ICAs survive while the parties are negotiating and/or arbitrating successor ICAs.

Section 5.6 of the Sprint Communications Company L.P. ICA requires the parties to negotiate in good faith a successor ICA if written notice to expiration is served. The ICA remains in evergreen status as long as the parties attempt to obtain a new ICA. There is no doubt

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[62] Ex. 4, McPhee Rebuttal, pp.9-10.

[63] Ex. 4, McPhee Rebuttal, p. 10, citing Ex. 6, Verified Petition, Ex. 1 (Sprint Porting Complaint), Ex. C.

[64] Sections 19.2.10, and 19.9.1 of the Sprint Spectrum ICA, Section 18.8 of the Nextel West ICA, Sections 5.10 and 41.1 of the Sprint Communications Company L.P. ICA.

that both parties want to achieve a replacement ICA.[65] The ICA is not terminated under this provision.

If written notice is not served, Section 5.7 of the Sprint Communications Company L.P. ICA requires that the terms and conditions of the ICA remain in full force and effect until the earlier of the effective date of a new ICA or 10 months after AT&T received Sprint's Section 252(a)(1) request. The relevant Section 252(a)(1) request here is the one dated June 30, 2008 and received by AT&T on July 1, 2008.[66] Consequently, if there was no written notice, then the parties existing ICA did not expire or terminate as it continues to be effective ten months after July 1, 2008.

Similar provisions in the Sprint Spectrum ICA mandate that it has not terminated. Section 19.2.7 requires that the terms and conditions of the ICA remain in full force and effect until the earlier of the effective date of a new ICA or 10 months after AT&T received Sprint's Section 252(a)(1) request. The relevant Section 252(a)(1) request here is the one dated June 30, 2008 and received by AT&T on July 1, 2008.[67] The Sprint Spectrum ICA has not terminated because it continues to be effective ten months after July 1, 2008. It is the current ICA that is subject to extension under Merger Commitment 7.4.[68] Therefore, the terms of the Sprint Communications

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[65] Tr. 136. Q: "Do you have any reason to believe that Sprint is not interested in some sort of successor agreement?" A: "I believe Sprint is interested in a successor agreement."

[66] Ex. 6, Petition, Ex. 3.

[67] Ex. 6, Petition, Ex. 3.

[68] AT&T may argue that its August 21, 2007 letters "intending to terminate" the various Sprint ICAs should trigger any ten month windows in the existing ICAs. Putting aside whether a letter "intending to terminate" means that the agreement actually *is* terminated, such an argument would be faulty. In response to that letter, Sprint filed its Complaint to port the Kentucky ICA, which the Commission eventually dismissed. [Ex. 6, Verified Petition, Ex. 1 (Porting Complaint);. Ex. 1, Felton Direct, pp. 5-7.] The parties continued to operate under the identified ICAs. See, Ex. 1, Felton Direct, p. 7. And the parties continued to negotiate according to an open arbitration window as acknowledged by AT&T in its letter of July 16, 2008 where Sprint opened an arbitration window beginning on July 1, 2008. Ex. 6, Verified Petition, Ex. 4. As late as December 5, 2008, in written correspondence AT&T acknowledged that Sprint companies wished "to extend the term of their *current Agreements* in the state of Missouri for a period of three (3) years." Ex. 3NP, McPhee Direct, schedule 4. (italics added). In sum, AT&T's and Sprint's

Company L.P. and Sprint Spectrum ICAs allow for the ICAs to extend if negotiations and eventual arbitrations are continuing for successor ICAs. That is the process that the parties are undertaking. Therefore, the ICAs are *current* and undoubtedly eligible for extension under Merger Commitment 7.4.

Under the terms of the ICAs, the parties continued to operate under the existing ICAs during negotiations to replace the existing ICAs. The provisions in each ICA make it clear that the agreements were never terminated. And if they had been, the parties continued to exchange traffic, pay each other for traffic exchange and otherwise operate under the ICAs. AT&T concedes as much in its testimony[69] and at the hearing.[70]

D. Case Law Confirms That The Expiration Or Termination Of A Contract Does Not Mean That The Contract Is Not Current

Contrary to AT&T's assertions, the existing ICAs are current and eligible under Merger Commitment 7.4 to be extended for three years. As described above, the terms of the ICAs continue post expiration and post termination. If it is determined that the ICAs have terminated under their terms, then the Commission is permitted to examine the parties' course of conduct and find that the ICAs continued in effect.

In *City of Bridgeton v. Missouri-American,*[71] the Missouri Supreme Court found that continued performance under an expired franchise forms an implied contract. There, a franchise to lay and maintain water pipes expired in 1971 but the city and the franchisee behaved as

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actions never demonstrated that the parties thought the agreements were terminated. To the contrary, they negotiated and arbitrated to obtain successor ICAs leaving their existing ICAs intact according to their terms.

[69] Ex. 4, McPhee Rebuttal, p. 10.

[70] Tr. 78.

[71] *City of Bridgeton v. Missouri-American*, 219 S.W.3d 226, 231-232 (Mo. 2007).

though the franchise was still in force.[72] The Court recognized that the parties "are operating under an implied contract with the same terms and conditions of the Bridgeton Franchise cancelable upon reasonable notice."[73] The Court found therefore that "Missouri-American has present authority to lay and maintain facilities within the Taussig Road right-of-way."[74] The same is true here as AT&T and Sprint have continued to behave under their existing interconnection agreements and AT&T continues to pledge that it will honor the ICAs and will operate under their terms and conditions.[75] Like the Missouri Supreme Court's determination that the parties' conduct after the franchise expired gave the utility the "present authority" to lay pipes, Sprint and AT&T's conduct demonstrate that the ICAs are current and eligible for extension under Merger Commitment 7.4.

The Missouri Court of Appeals in a recent case held that an expired and terminated contract was the current agreement between two parties.[76] An apartment complex and a cable company entered into a 15-year contract in which the apartment complex only provided the cable company's services to its tenants. The apartment complex notified the cable company eight months before the 15-year agreement expired that it did not wish to renew the agreement. Instead, the complex indicated that after the agreement expired they would operate on a month-to-month basis. Three months later the apartment complex notified the cable company that it did not wish to renew the agreement and wished to terminate the agreement on the original 15-year date. But, after the agreement's expiration date passed the parties continued to exchange services and bills as if the original agreement were still in effect. Although the original

[72] *Id.* 219 S.W.3d at 232.

[73] *Id.*

[74] *Id.*

[75] Ex. 4, McPhee Rebuttal, p. 10.

[76] *Guidry v. Charter Communications,* 269 S.W.3d 520 (Mo. Ct. App. E.D. 2008).

agreement expired, the court concluded that there was sufficient evidence based on the parties' conduct (payment of percentage of subscription fees to apartment complex in exchange for cable company's right to provide cable service to apartment tenants) that they continued to operate under the agreement.[77] The Court enforced the expired agreement's exclusivity provision even after the original agreement was terminated in writing. Here, the parties similarly continue to behave under the terms and conditions of the ICAs after AT&T sent notice of intent to terminate.

In a Section 252 case, the Alabama Commission accepted a stipulation where AT&T's now corporate affiliate BellSouth agreed that an expired interconnection agreement stayed in effect while the parties negotiated a replacement agreement.[78] The stipulated facts stated that BellSouth notified Z-Tel that its November 30, 2000 ICA having an expiration date of November 29, 2002 was expired and it requested a successor agreement. The parties negotiated and finally entered into a successor interconnection agreement effective on April 18, 2003. BellSouth and Z-Tel stipulated that the November 30, 2000 ICA was in effect the entire time from November 30, 2000 until April 17, 2003. In other words, BellSouth agreed that even though the ICA expired on November 29, 2002 due to BellSouth's written notice, it remained in effect post expiration until the time that the new ICA became effective.[79] AT&T's corporate affiliate therefore agreed that expired ICAs can continue to be effective post expiration while the parties are attempting to obtain a successor ICA.

Case law confirms that parties can continue to operate under an expired/terminated agreement. If the parties manifest their intent to do so, the terms of the agreement can continue

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[77] *Id.,* 269 S.W.3d at 529.

[78] *Z-Tel Communications v. BellSouth Communications, Inc.* Order, Alabama Public Service Commission, Docket 29080 (November 7, 2006).

[79] *Id., pp. 3-4.*

to be enforced. Here, even if one disregards the plain language of the ICAs calling for their provisions to remain in effect post termination, AT&T and Sprint's actions manifest the intent that the ICAs remain the current ICAs eligible for extension under Merger Commitment 7.4.

V. CONCLUSION

For all of the reasons stated above, Sprint respectfully requests that the Commission issue its Order extending Sprint's three interconnection agreements with AT&T for 3 years from November 21, 2008, the date that Sprint elected to extend its agreements

Respectfully submitted on March 11, 2009.

Kenneth A. Schifman Mo. #42287
Director and Senior Counsel, State
Regulatory Affairs
Mailstop: KSOPHN0212-2A303
6450 Sprint Parkway
Overland Park, KS 66251
Voice: 913-315-9783
Fax: 913-523-9827
Email: kenneth.schifman@sprint.com

Jeffrey M. Pfaff Mo. # 39286
Senior Counsel
6450 Sprint Parkway
Overland Park, Kansas 66251
Mailstop: KSOPHN0212-2A553
(913) 315-9294 (voice)
(913) 315-0785 (facsimile)
Email: Jeff.m.pfaff@sprint.com

SPRINT COMMUNICATIONS
COMPANY L.P.
SPRINT SPECTRUM L.P.
NEXTEL WEST CORP.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Brief has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 11th day of March, 2009, to:

Southwestern Bell Telephone, L.P. d/b/a
AT&T Missouri
Timothy P. Leahy
Leo J. Bub
Robert J. Gryzmala
One AT&T Center, Room 3516
St. Louis, Missouri 63101
(314) 235-6060 (Telephone)
(314) 247-0014 (Fax)
Leo.bub@att.com
Robert.gryzmala@att.com

General Counsel
Missouri Public Service
Commission
P.O. Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov
William.haas@psc.mo.gov

Public Counsel
Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov