

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day
of February, 2009.

In the Matter of the 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

ORDER DENYING MOTION TO DISMISS

Issue Date: February 19, 2009

Effective Date: March 1, 2009

This order denies Southwestern Bell Telephone Company, d/b/a AT&T Missouri's motion to dismiss the arbitration petition filed by Sprint Communications Company, L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively referred to as "Sprint").

Case History:

On December 5, 2008, Sprint filed a Petition for Arbitration under Section 252(b) of the federal Communications Act of 1934, as amended,¹ seeking arbitration of an interconnection agreement between Sprint and AT&T. Sprint had previously filed a complaint² against AT&T seeking to port to Missouri a Kentucky interconnection agreement pursuant to the conditions imposed by the Federal Communications Commission on the merger between AT&T and BellSouth. The Commission dismissed that complaint stating

¹ 47 U.S.C. § 252(b)(1).

² Case No. TC-2008-0182.

that the Commission did not have jurisdiction to interpret and enforce a Kentucky-approved interconnection agreement.³ The Commission also stated that Sprint had not requested that the Commission arbitrate any open interconnection issues, approve or reject an interconnection agreement, or enforce an existing interconnection agreement as the Commission is authorized to do under the federal law.⁴

Failing in its attempt to port the Kentucky agreement to Missouri, Sprint now is seeking an extension by a period of three years of its current Missouri-approved interconnection agreements with AT&T. Sprint states in its petition that this request is also pursuant to an FCC-ordered condition of the AT&T and BellSouth merger.⁵ That condition requires AT&T “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.”⁶

Sprint’s original request to negotiate an interconnection agreement utilized the Kentucky interconnection agreement as the starting point for the Sections 251 and 252 negotiations.⁷ AT&T acknowledged that Sections 251 and 252 negotiations had begun and that the arbitration request window would close on December 8, 2008.⁸ In addition, AT&T

³ *Order Granting Motion to Dismiss* (effective July 4, 2008), Case No. TC-2008-0182.

⁴ *Id.*

⁵ Memorandum Opinion and Order, *In the matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007) (“Merger Order”).

⁶ Merger Order, Appendix F, p. 149. This item in the Merger Order is also referred to as “Merger Commitment 7.4.”

⁷ *Verified Petition for Arbitration of Sprint Communications Company L.P., Sprint Spectrum L. P., and Nextel West Corp.*(filed Dec. 5, 2008), Case No. CO-2009-0239, Exhibit 3.

⁸ *Id.* at Exhibit 4.

rejected the starting point request and suggested that its competitive local exchange carrier (CLEC) and wireless template agreement be used as a starting point for negotiations.⁹ In a footnote in that communication, AT&T suggested the alternative of using the Missouri-approved interconnection agreements as a starting point for negotiations.¹⁰

In a letter dated November 21, 2008, after several other starting point offers,¹¹ Sprint notified AT&T that it was electing to extend its current Missouri-approved interconnection agreements under the Merger Order's three-year extension requirement¹² and that "[i]f AT&T is unwilling to agree to Sprint's election to extend its existing [interconnection agreements] . . . , Sprint will submit its extension request as the issue in its current arbitration proceeding."¹³

Arbitration and Motion to Dismiss:

Sprint filed its petition for arbitration and presented as the only issue for arbitration, whether it should be allowed to extend its current Missouri interconnection agreements for a period of three years. On December 30, 2008, AT&T filed a motion to dismiss the petition for lack of jurisdiction. AT&T argues that "[t]he Commission is not being asked to arbitrate an open interconnection issue here that was voluntarily negotiated by the parties. Rather, it is being asked to interpret and enforce an FCC order from the

⁹ *Id.* AT&T indicated that this suggested starting point was pursuant to "Merger Commitment 7.3" of the Merger Order. Merger Commitment 7.3 requires that AT&T "allow a requesting telecommunications carrier to use its pre-existing interconnection agreement as the starting point for negotiating a new agreement." Merger Order, Appendix F.

¹⁰ *Petition*, Exhibit 4.

¹¹ *Id.*, Exhibits 5-6.

¹² Merger Commitment 7.4.

¹³ *Petition*, Exhibit 7.

AT&T/BellSouth merger”¹⁴ and the Commission has consistently held that it will not interpret and construe the application of an FCC merger order.¹⁵

Sprint replies that as a matter of law (the Merger Order), AT&T was required to offer extension of the current interconnection agreements for a period of up to three years, and that offer was accepted by Sprint during its negotiations with AT&T. Sprint adds that the issue being arbitrated is also an essential term of the agreements – the term of the interconnection agreements (and specifically, *when* the three-year extension would commence).

Sprint states:

The fact that Sprint’s right to extend its [interconnection agreements] . . . three years emanates from the [Merger Order] . . . does not divest this Commission of its Section 252 jurisdiction, and its jurisdiction under Missouri law to interpret and implement Sprint’s interconnection rights. The FCC clearly recognized in Appendix F of its Order that it has no authority to alter the states’ *concurrent* statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments. The FCC stated:

It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.¹⁶

¹⁴ *AT&T Missouri’s Motion to Dismiss and Motion for Expedited Treatment* (filed Dec. 30, 2008), p. 10.

¹⁵ Citing *In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired under the TRRO*, Case No. TO-2006-0360, *Report and Order*, issued March 31, 2008 at p. 16.

¹⁶ *Sprint’s Response to AT&T Missouri’s Motion to Dismiss*, (filed January 16, 2009), citing to Merger Order at p. 47, Appendix F. (Added emphasis removed.)

Sprint further argues that the Commission must interpret and apply the merger conditions in order to resolve the issue in this arbitration.

Discussion

The Commission has jurisdiction “to arbitrate any open issues” that are the subject of the parties’ Sections 251 and 252 negotiations.¹⁷ Sprint has asked that the Commission arbitrate the single issue of extending the term of the current interconnection agreements.

AT&T asserts that because the length of the contract is not enumerated in Section 251 as one of the incumbent local exchange carrier’s (ILEC’s) duties of interconnection, the Commission lacks jurisdiction to arbitrate that item. The Commission disagrees with AT&T. Simply because the length of the contract is not enumerated as a substantive issue in Section 251 does not mean that the Commission has no jurisdiction. Section 251 states that the ILEC has a duty to negotiate “the particular terms and conditions of agreements **to fulfill** the duties [of resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation]. . . .”¹⁸ As Sprint argues, the term of the agreement is a “term and condition” that is necessary for AT&T to fulfill its Section 251 duties.

Regardless of whether this term falls under Section 251, the Commission has authority to arbitrate any of the open issues between the parties.¹⁹ In addition to arguing that the term of the agreement is not one of its Section 251 duties, AT&T argues that the

¹⁷ 47 U.S.C.A. § 252(b)(1).

¹⁸ 47 U.S.C.A. § 251(c)(1). (emphasis added)

¹⁹ 47 U.S.C.A. § 252(b)(1).

term of the agreement is not an open issue that has been negotiated between the parties and that the Commission may only arbitrate those items which have been voluntarily negotiated.²⁰

AT&T is correct in its assertion that merely calling something an open issue or an interconnection-related issue does not make it so. In this instance, however, AT&T is the first to interject the Missouri interconnection agreements into the negotiations.²¹ In addition, the length of the agreement is certainly one of the items in the Missouri agreements as well as in the Kentucky agreement and the template agreements which were all part of the negotiations. Sprint, while seemingly abrupt during this phase of negotiations, was merely continuing negotiations that AT&T had earlier suggested with the addition of a three year extension of the Missouri agreements.

The terms of the FCC Merger Order are not relevant to the Commission's decision regarding the motion to dismiss this arbitration for lack of jurisdiction. The Merger Order only comes into play in determining what terms should be contained in a lawful and non-discriminatory interconnection agreement.

The Commission has authority to interpret and enforce interconnection agreements and to determine through arbitration the appropriate lawful and non-discriminatory terms of that agreement.²² That Commission authority comes from the federal legislature and no additional authority (e.g., the Merger Order) is necessary for the Commission to conduct this arbitration.

²⁰ *Citing Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Company*, 350 F.3d 482, 487 (5th Cir. 2003).

²¹ *Petition*, Exhibit 4, footnote 1.

²² 47 U.S.C.A. §§ 251 and 252.

Decision

The length of the agreements was at issue during negotiations because it is a necessary term to fulfilling the Section 251 duties. It was a term in all of the various agreements discussed during negotiations, and Sprint specifically stated it was a term that would be presented to the Commission for arbitration. Furthermore, AT&T offered the Missouri agreements as a starting point during the negotiations and cannot now claim that it was not involved in negotiations regarding those agreements. Therefore, the Commission has jurisdiction to arbitrate these agreements and the motion to dismiss is denied.

THE COMMISSION ORDERS THAT:

1. The motion to dismiss filed by Southwestern Bell Telephone Company, d/b/a AT&T Missouri, on December 30, 2008, is denied.
2. This order shall become effective on March 1, 2009.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge