

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**AT&T MISSOURI'S MOTION TO DISMISS  
AND MOTION FOR EXPEDITED TREATMENT**

AT&T Missouri<sup>1</sup> respectfully requests the Missouri Public Service Commission (“Commission”) to dismiss Sprint’s<sup>2</sup> December 5, 2008<sup>3</sup>, Arbitration Petition for lack of subject matter jurisdiction.<sup>4</sup>

No Section 252(b) arbitration jurisdiction exists here because Sprint seeks to arbitrate an issue that was never the subject of Section 252 negotiations between the parties -- and that could not possibly have been the subject of such negotiations, because it has nothing to do with the substantive requirements in Section 251.

Sprint’s demand to arbitrate AT&T Missouri’s refusal to extend the existing expired agreements under the FCC’s AT&T/BellSouth merger commitments is nothing more than another attempt to have the Commission enforce that FCC order, which the Commission has previously ruled is beyond its jurisdiction.

---

<sup>1</sup> Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as “AT&T Missouri.”

<sup>2</sup> Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. will be referred to in this pleading as “Sprint.”

<sup>3</sup> As Sprint filed its Petition for Arbitration on December 5, 2008, AT&T Missouri has until December 30, 2008, to file its Response. 4 CSR 240-36.040(7).

<sup>4</sup> AT&T Missouri makes this request pursuant to 4 CSR 240-2.116(4); 4 CSR 240-2.117(2); 4 CSR 240-36.040(7); and Section 252(b)(3) of the Telecommunications Act of 1996 (the “Act”).

AT&T Missouri respectfully requests expedited treatment of this Motion. Consistent with its suggestion in the proposed procedural schedule, AT&T Missouri respectfully requests Commission action on this Motion by February 18, 2009.

## **I. INTRODUCTION AND FACTUAL BACKGROUND.**

On November 21, 2008 -- just two weeks before the deadline for filing an arbitration petition in this case -- Sprint abruptly abandoned Section 252 negotiations on the open interconnection and other issues necessary to complete new Missouri agreements. The parties had been working together diligently for the last nine months to create new interconnection agreements in Missouri. These substantive negotiations actually predated Sprint's June 30, 2008 formal request for Section 252(a)(1) negotiations, as the parties had already been negotiating in earnest for many months in a multi-state effort to conform the Kentucky ICA for use in the 13 legacy AT&T states<sup>5</sup>, and had also worked through several substantive issues during the Missouri mediation in Case No. TC-2008-0182. After negotiations began pursuant to Sprint's request under Section 252 for Missouri, the parties agreed to take advantage of the work already

---

<sup>5</sup> Merger Commitment 7.1 requires the AT&T/BellSouth ILECs to:

Make available to any requesting telecommunications carrier and the entire effective interconnection agreement whether negotiated or arbitrated, and AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given a technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

Memorandum, Opinion and Order, In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, FCC 06-189, *rel.*, March 26, 2007 (the "Merger Approval Order"), Appendix F (Commitment No. 1 under the heading "Reducing Transaction Costs Associated with Interconnection Agreements") (emphasis added).

completed in conforming the Kentucky ICA for use in Missouri and other states and to use the existing redline draft as a starting point.<sup>6</sup>

As part of these efforts, the parties negotiated and reached closure on myriad technical and policy-related interconnection issues cutting across many areas including Resale, Network Elements, White Pages, General Terms and Conditions, Interconnection, Physical/Virtual/Microwave Collocation, Rights-of-Way, and Ordering and Billing. Several substantive issues, however, remained open, subject to further negotiation and/or arbitration in accordance with the procedures set out in the Act.

But on November 21, 2008, Sprint changed its mind. Instead of following the path set out in Section 252(b)(1) to seek arbitration of specific open interconnection issues, Sprint notified AT&T Missouri that Sprint wished to utilize FCC Merger Commitment 7.4 to extend its existing expired Missouri interconnection agreements for three years.<sup>7</sup>

At the time Sprint filed its arbitration petition, AT&T Missouri was still reviewing Sprint's new request and had not responded in writing. AT&T Missouri, however, had orally indicated to Sprint that it did not believe that Sprint's Missouri agreement was eligible for extension under the terms of FCC Merger Commitment 7.4.

---

<sup>6</sup> Sprint Arbitration Petition, paras. 19, 24, quoting a September 2, 2008, AT&T Missouri letter stating AT&T "is willing to use as a starting point for Sprint's requested negotiation of an interconnection agreement the redlined Kentucky ICA as it currently stands in light of our discussions over the last several months." A copy of AT&T's September 2, 2008, letter is attached to Sprint's Arbitration Petition as Exhibit 6.

<sup>7</sup> Sprint Arbitration Petition, para. 26.

## **II. SPRINT'S COMPLAINT IS OUTSIDE THE COMMISSION'S SECTION 252(b) JURISDICTION TO ARBITRATE OPEN INTERCONNECTION ISSUES.**

The Commission is an agency of limited jurisdiction and has only such powers as are conferred upon it by statute.<sup>8</sup> With respect to Section 252(b) arbitrations, the Commission has recognized that it operates under specific authority delegated to it under the Act:

Federal law allows the Commission to arbitrate open interconnection issues, to approve interconnection agreements, to reject interconnection agreements, and to interpret and enforce interconnection agreements it has approved.<sup>9</sup>

This authority derives from Section 252(b)(1), which provides that once the incumbent LEC receives a request for negotiation under Section 252(a), “the carrier or any party to the negotiations may petition a State commission to arbitrate any open issues.” (Emphasis added.) While some may wish to read this phrase expansively, Section 251(c)(1) precisely identifies the matters that are (and that are not) the subject of negotiation by imposing on ILECs the duty to negotiate “the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this section [251(c)]” (which are resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled access, notice of changes and collocation).<sup>10</sup>

Like the Commission, the Missouri federal courts view state commission Section 252 arbitrations as limited in scope to the terms of interconnection set out in Section 251(b) and (c):

---

<sup>8</sup> Inter-City Beverage Co. v. Kansas City Power & Light Co., 889 S.W.2d 875, 877 (Mo. Ct. App. 1994), citing State ex rel. Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046 (en banc 1943).

<sup>9</sup> Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc. v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Case No. TC-2008-0182, Order Granting Motion to Dismiss, issued June 24, 2008, at p. 6, 2008 MoPSC LEXIS 651 (emphasis added).

<sup>10</sup> Section 252(a)(1) (which discusses “voluntary negotiations” between the parties) also makes clear that “any open issues” refers to the substantive issues arising from the obligations set forth in Section 251:

Upon receiving a request for interconnection, services or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. . .

The duties of §251 are implemented through “interconnection agreements” between ILECs and CLECs. *See* 47 U.S.C. §252. The Act requires ILECs and CLECs to negotiate in good faith the terms and conditions of agreements to fulfill the duties described in §§251(b) and (c). *Id.*, §251(c)(1). If negotiations are unsuccessful, either party may ask the appropriate state public utility commission to arbitrate “any open issues” the parties have been unable to resolve. *See id.*, §252(b). In deciding these “open issues,” the state commission must adhere to the requirements of the statute and the FCC’s implementing regulations. *Id.*, §252(c).<sup>11</sup>

As this Commission is aware from its experience conducting numerous arbitrations under the Act, such issues run the gamut from setting rates for individual network elements using the TELRIC methodology, to selecting appropriate language for specific contract terms, to determining intercompany compensation on various types of telecommunications traffic exchanged between the negotiating parties.

But here, Sprint is not seeking to arbitrate any of the open substantive issues that arose from the parties’ Section 252 negotiations. The decision point list (“DPL”) Sprint attached to its petition does not list even one disputed rate, term or condition from the parties’ negotiations. Rather, the sole issue Sprint lists on its DPL focuses only on the FCC’s AT&T/BellSouth merger commitments:

Should Sprint be permitted to extend its existing Missouri Public Service Commission approved interconnection agreements, as amended, pursuant to AT&T/BellSouth Merger Commitment 7.4 for a period of three years from making the request?

Instead of requesting arbitration of a substantive term of interconnection under the Act, Sprint’s petition makes clear that it seeks to litigate a complaint it has under the FCC’s AT&T/BellSouth merger commitments: “Yet, AT&T again fails to live up to its merger commitments and objects

---

<sup>11</sup> Southwestern Bell Telephone v. Missouri Public Service Commission, 461 F. Supp.2d 1055, 1059 (E.D. Mo. 2006) (emphasis added), affirmed. Southwestern Bell Telephone v. Missouri Public Service Commission, 530 F.3d 676 (8<sup>th</sup> Cir. 2008), cert. filed October 20, 2008 (No. 08-531).

to Sprint's requests to extend its existing interconnection agreements."<sup>12</sup> And Sprint asks the Commission to "direct AT&T to execute" such extensions.<sup>13</sup>

State commission arbitration jurisdiction under Section 252, however, is carefully circumscribed and provides no enforcement jurisdiction over FCC's merger commitment orders. In rejecting a claim that state commissions have implicit authority in a Section 252 arbitration to enforce obligations under Section 271 of the Act, the Missouri federal district court looked to the express language in the statute and found the authority delegated there to be strictly limited:

Section 252 provides that the state commission's duty in arbitrating and approving agreements is limited to ensuring that the agreement 'meets the requirements of Section 251,' and does not mention any role for the state commission under §271. *See* 47 U.S.C. §§252(c)(1), (3)(2)(B).<sup>14</sup>

The Commission's lack of Section 252 arbitration jurisdiction over enforcement of FCC merger commitment orders is even more glaring. In the District Court case, the question was whether the Commission could enforce a provision that was at least part of the same statute and, as some argued, virtually duplicated the unbundling requirements in Section 251(c)(3). Here, the FCC Merger Commitment Orders are wholly separate and apart from Section 252 and impose obligations on AT&T Missouri that go beyond what is required under current law. Moreover, the arbitration standards the Act provides in Section 252(c)<sup>15</sup> for decisions it entrusts to state commissions plainly do not apply to the decision Sprint is asking the Missouri Commission to

---

<sup>12</sup> Sprint Arbitration Petition, p. 2.

<sup>13</sup> *Id.* p. 2.

<sup>14</sup> Southwestern Bell Telephone v. Missouri Public Service Commission, 461 F. Supp.2d at 1067 (emphasis added); affirmed Southwestern Bell Telephone v. Missouri Public Service Commission, 530 F.3d 676 (8<sup>th</sup> Cir. 2008), cert. filed October 20, 2008 (No. 08-531).

<sup>15</sup> 47 U.S.C. Section 252(c) states:

(c) STANDARDS FOR ARBITRATION. -- In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall --

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

make here. The lack of standards for the question Sprint seeks to present confirms that Section 252 contemplates no state commission role over FCC merger commitment enforcement.

In a similar case in Florida, in which Sprint tried to arbitrate the denial of its request to extend its interconnection agreement under the FCC's AT&T/BellSouth Merger Commitment Order, the Florida Public Service Commission dismissed Sprint's petition for lack of subject matter jurisdiction, stating:

. . . we grant AT&T's Motion to Dismiss because Sprint is requesting that we enforce an allegedly known right (the Merger Commitments as interpreted by Sprint) under an FCC order as opposed to arbitrating an "open" issue concerning Section 251 obligations.<sup>16</sup>

Even if a merger commitment claim could be shoe-horned into Section 252, Sprint's claim is still beyond the Commission's jurisdiction here because it was never the subject of the parties' voluntary negotiations. As the Fifth Circuit explained:

The jurisdiction of the PUC as arbitrator . . . is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.<sup>17</sup>

---

<sup>16</sup> In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast, Docket No. 070249-TP, Order No. PSC-07-0680-FOF-TP, Order Granting Motion to Dismiss issued August 21, 2007. Although not quite on point with the issues being raised here, AT&T Missouri wishes to disclose that the Kentucky and South Carolina Commissions found they had concurrent jurisdiction with the FCC to decide when the three-year extension period under Merger Commitment 7.4 would commence (AT&T had agreed to extend the contracts, but disagreed on the start date). South Carolina, however, declined to exercise that jurisdiction because it believed the FCC was the more appropriate entity that should resolve the question. 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, Kentucky PSC Case No. 2007-00180, Order, issued September 18, 2007. In re: 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 South Carolina d/b/a AT&T Southeast, S. Carolina PSC Docket No. 2007-215-C, Order No. 2007-683, Order Ruling on Arbitration, issued October 5, 2007.

<sup>17</sup> Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Company, 350 F.3d 482, 487 (5<sup>th</sup> Cir. 2003) (holding that while state commissions may arbitrate any issue that was the subject of voluntary negotiations, the PUC properly denied jurisdiction over issue being raised because it was not a mutually agreed upon subject of voluntary negotiation between the ILEC and CLEC).

Sprint's demand to extend its existing expired agreements under the FCC's AT&T/BellSouth Merger Commitment Order is not an open issue from the parties' Section 252 negotiations. Accordingly, it is beyond the scope of the arbitration jurisdiction delegated to the Commission under Section 252(b) of the Act and must be dismissed.

### **III. THE COMMISSION HAS NO JURISDICTION OVER ENFORCEMENT OF THE MERGER APPROVAL ORDER.**

Not more than six months ago, the Commission, on jurisdictional grounds, dismissed a similar claim Sprint brought complaining that AT&T Missouri had violated the FCC's AT&T/BellSouth merger commitments:

Any jurisdiction the Commission has to resolve this dispute is found in federal law, not state law. Federal law allows the Commission to arbitrate open interconnection issues, to approve interconnection agreements, to reject interconnection agreements, and to interpret and enforce interconnection agreements it has approved. Sprint's complaint does not ask the Commission to arbitrate open interconnection issues, to approve an interconnection agreement, to reject an interconnection agreement, or to interpret or enforce an interconnection agreement it has approved. Therefore, the Commission has no jurisdiction, and the Commission will grant AT&T Missouri's Motion to Dismiss.<sup>18</sup>

While Sprint seeks to bring its current FCC AT&T/BellSouth merger commitment claim as an "arbitration" under the Act, merely labeling it as an arbitration does not make it one. Despite its label, Sprint's arbitration petition does not identify any of the open issues from the parties' Section 252 negotiations for Commission arbitration. It does not ask the Commission to set a disputed rate, or to select between the parties' competing contractual provisions on an issue. Rather, it asks the Commission to enforce an FCC order: "Specifically, Sprint petitions the Commission to direct AT&T to execute a three (3) year extension of its existing Commission

---

<sup>18</sup> Sprint Communications, 2008 Mo. PSC LEXIS 651 at \* 10 (emphasis added). See also Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc. v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Case No. TC-2008-0182, Order Denying Application for Rehearing, issued August 7, 2008, at p. 1 ("The Commission dismissed the complaint on June 24, finding that it did not have jurisdiction under state or federal law to enforce those merger commitments").



approved interconnection agreements in accordance with Merger Commitment 7.4 made by AT&T.”<sup>19</sup>

By necessity, Sprint’s request would require the Commission to interpret and construe the application of an FCC merger order, which the Commission has consistently held it will not do. When asked to determine, as a result of a commitment from the SBC/AT&T merger, whether AT&T Missouri correctly identified certain wire centers as non-impaired for certain facilities, the Commission held that requests for interpretation of FCC orders should be directed to the FCC: “The Commission concludes that because this issue involved interpretation of a merger agreement approved by the FCC, the parties should seek interpretation of the agreement from the FCC.”<sup>20</sup> As Sprint’s request here would similarly require interpretation of an FCC merger agreement order, the Commission should dismiss the petition and direct the parties to the FCC if a resolution is needed.<sup>21</sup>

#### **IV. MOTION FOR EXPEDITED TREATMENT**

As set out above, AT&T Missouri has moved to dismiss this case because Sprint has presented a matter that is beyond the subject matter jurisdiction of this Commission. If practicable, AT&T Missouri, pursuant to 4 CSR 240-2.080(16), requests a ruling on its Motion by February 18, 2009, before this case goes to hearing.

A prompt ruling on this Motion will give the parties certainty as to the appropriate future proceeding of this case and could prevent the unnecessary expenditure of time, money and other valuable resources of the Commission, its appointed arbitration personnel and the parties in

---

<sup>19</sup> Sprint Arbitration Petition, p. 2.

<sup>20</sup> 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.

<sup>21</sup> In the event that the Commission does not dismiss the Petition for lack of jurisdiction, AT&T Missouri will demonstrate in subsequent submissions that Sprint is not in fact entitled to extend its current expired interconnection agreements.

prosecuting this case, preparing for hearing, drafting briefs, and proposed orders. There will be no negative effect on the parties' customers or the general public if the Commission rules on this jurisdictional issue in the timeframe AT&T Missouri requests.

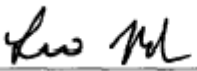
AT&T Missouri could not have filed this Motion for Expedited Treatment sooner as it accompanies its Motion to Dismiss which, in accordance with the proposed procedural schedule outlined by the parties during the initial arbitration meeting, is scheduled to be filed today. Although Sprint opposes this request for expedited ruling on jurisdiction, the parties in crafting a proposed schedule attempted to provide the Commission sufficient time to digest their jurisdictional pleadings and render a ruling if it believes appropriate. AT&T Missouri has incorporated this Motion for Expedited Treatment here as it is seeking Commission action by a specific date. 4 CSR 240-2.080(16).

## **V. CONCLUSION**

The 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 AT&T/BellSouth merger. As the Commission previously ruled, it has no jurisdiction in this area. Accordingly, it should dismiss the petition.

Respectfully submitted,

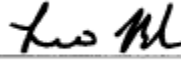
SOUTHWESTERN BELL TELEPHONE COMPANY,  
D/B/A AT&T MISSOURI

BY   
TIMOTHY P. LEAHY #36197  
LEO J. BUB #34326  
ROBERT J. GRYZMALA #32454

Attorneys for AT&T Missouri  
One AT&T Center, Room 3518  
St. Louis, Missouri 63101  
314-235-2508 (Telephone)/314-247-0014(Facsimile)  
[leo.bub@att.com](mailto:leo.bub@att.com)

**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on December 30, 2008.



---

Leo J. Bub

General Counsel  
Missouri Public Service Commission  
PO Box 360  
Jefferson City, MO 65102  
[general.counsel@psc.mo.gov](mailto:general.counsel@psc.mo.gov)

Public Counsel  
Office of the Public Counsel  
PO Box 7800  
Jefferson City, MO 65102  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)

Kenneth A. Schiffman  
Jeffrey M. Pfaff  
Sprint Communications Company L.P.  
6540 Sprint Parkway  
Overland Park, KS 66251  
[kenneth.schiffman@sprint.com](mailto:kenneth.schiffman@sprint.com)  
[jeff.m.pfaff@sprint.com](mailto:jeff.m.pfaff@sprint.com)