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

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| 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 |

**AT&T MISSOURI'S**
**COMMENTS ON ARBITRATOR'S DRAFT REPORT**

AT&T Missouri[1] respectfully submits that the ultimate conclusion in the Arbitrator's March 27, 2009, Draft Report turns on a fundamental misconstruction of undisputed facts and a misunderstanding of the distinct obligations imposed by the FCC Merger Commitments and the federal Telecommunications Act of 1996. AT&T Missouri respectfully requests that these errors, set out more fully below, be corrected.

Consistent with 4 CSR 240-36.040(20), these comments are directed to "factual, legal or technical errors made in the draft report" and refrain from merely rearguing positions taken during briefing. AT&T Missouri also notes that it has challenged the arbitrability of the issue Sprint[2] has raised in this proceeding through a motion to dismiss, which the Commission denied on February 19, 2009. AT&T Missouri has timely applied for reconsideration and/or rehearing of that order and its application is currently pending before the Commission.[3]

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[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri."

[2] Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. will be referred to as the "Sprint Companies" or "Sprint."

[3] In order to preserve its jurisdictional objection, AT&T Missouri, by this reference, incorporates into these comments its arguments from its December 30, 2008, Motion to Dismiss; its January 26, 2009, Reply; its February 27, 2009, Application for Reconsideration and/or Rehearing; and its March 10, 2009, Reply. In those pleadings, AT&T Missouri, among other things, explains that Section 252(b) does not authorize state commissions to enforce the FCC's merger commitments in arbitration proceedings.

## POINTS OF ERROR

1 The Draft Report Misconstrues Counsel's Statement. The Draft Report misconstrues AT&T Missouri counsel's opening statement as an admission that if parties negotiated an extension of an existing agreement, then the term issue would be subject to arbitration under Section 252 of the Act. This error underlies the Draft Report's incorrect conclusion that state commission jurisdiction existed under Section 252 to conduct this arbitration. According to the Draft Report:

> AT&T admits that if the parties were negotiating about the extension of the Missouri ICAs, then the term of those agreements would be an issue subject to arbitration.[4]

And

> . . . counsel for AT&T admitted in opening statements that if the parties were negotiating about the extension of the Missouri ICAs, then the duration of those agreements would be an issue subject to arbitration. The Arbitrator has found that the agreements were negotiated and therefore, even AT&T has admitted that the arbitration of the extensions is appropriate.[5]

The transcript, however, shows that such statements were not made. AT&T's Counsel said nothing about negotiations to extend the existing agreements. Rather, AT&T's Counsel merely said that if the parties were negotiating an agreement using the existing agreements as a starting point, the term of the agreement would be an arbitrable issue:

> Apparently, the Commission believes that the parties were negotiating under 252 using the current agreements as a starting point for negotiations and had a disagreement about the term of the agreements that they were negotiating. Well . . . if that was the case. . . certainly that term, that duration issue would be an arbitrable issue, but that's not what happened and that's not what the parties are negotiating about . . . But if the Commission believes that the Section 252 negotiations occurred using existing agreements as a starting point, it needs to understand that there were many other unresolved issues, issues that we had and the issues that neither party presented for arbitration because of the 11th-hour timing of Sprint's extension requests.[6]

[4] Arbitrator's Draft Report, Finding No. 106, p. 29.
[5] Arbitrator's Draft Report, Conclusion No. 28, p. 37.
[6] Transcript, pp. 17-18 (emphasis added).

The Report erroneously converts this statement into an "admission" that in a negotiation about an extension of the existing agreements, the term is an arbitrable issue.

The mistake, of course, is that a negotiation using the existing agreements as a starting point is very different from a discussion about an extension of the existing agreements. Indeed, the FCC recognized this distinction in the Merger Commitments, establishing separate duties for each: Merger Commitment 7.3 for negotiating using pre-existing agreements as the starting point;[7] and Merger Commitment 7.4 for extension of those same agreements.[8] When an agreement is chosen as a starting point for Section 252 negotiations, all terms and conditions of that agreement are open for the give and take of negotiations, as is evident from the parties' extensive negotiations here using the Kentucky agreement as a starting point.[9]

Even Sprint concedes the critical difference between negotiations using the parties' existing agreements as a starting point and discussions concerning extension of those agreements. Sprint's witness, Mr. Felton, when asked about negotiating from the parties' agreement as a starting point, stated:

> . . . if Sprint had elected to negotiate an agreement pursuant to Merger Commitment 7.3 and begin with the current agreement as the starting point for negotiations, then, yes, AT&T would have had the right to propose modifications for that.[10]

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[7] Merger Commitment 7.3 states: "The AT&T/BellSouth ILECs shall allow a requesting telecommunications carrier to use its preexisting agreement as the starting point for negotiating a new agreement." See ; Schedule 3 to AT&T Witness Scott McPhee's Direct Testimony, which was admitted as Exhibit 3NP, at p. 149.

[8] Merger Commitment 7.4 states: "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 amendments to reflect prior or 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." Id. at p. 150.

[9] Undisputed evidence shows that the parties agreed to and did conduct their negotiations from the Kentucky document, that they exchanged several redlined versions of it, and during the course of multistate negotiations, addressed well over 100 disputed issues, resolving over 80% of them. See Exhibit 6, Sprint Arbitration Petition, paras. 23-24; and Exhibits 5 and 6 to Sprint's Petition; Felton, Tr. 31-32, and 36-37; Schedule 1P to AT&T Witness Scott McPhee's Direct Testimony, which was admitted as Exhibit 3P (General Terms and Conditions portion of the redlined Kentucky agreement from which the parties negotiated); and Allen-Flood, Tr. 84-85.

[10] Felton, Tr. 39.

In contrast, witness Felton explained that extensions are a different animal and that negotiations of an agreement's terms and conditions are not contemplated. And he confirmed that negotiations using the parties' existing agreements -- the type of negotiations referenced by AT&T's Counsel -- never occurred:

> [W]e didn't elect to negotiate an agreement pursuant to Merger Commitment 7.3. We elected to extend our current agreement pursuant to Merger Commitment 7.4, and under that Merger Commitment, I would not agree that AT&T had the right to propose modifications to that agreement. We have the right under Merger Commitment 7.4 to extend our current interconnection agreement without modification.[11]

Accordingly, the Draft Report should be revised to remove Finding No. 106 and Conclusion No. 28 from the Report.

2. The Draft Report Erroneously Concludes Section 252 Arbitration Jurisdiction Exists. The Report's failure to grasp the critical difference between negotiations using an existing agreement as a starting point (which would give rise to issues subject to arbitration under the 1996 Act) and a request to extend an existing agreement under Merger Commitment 7.4 (which cannot yield a disagreement subject to arbitration under the 1996 Act) is at the heart of the Report's failure to come to grips with the threshold jurisdictional question whether the 1996 Act authorizes state commissions to arbitrate disagreements concerning the application of the merger commitments -- which it clearly does not.

As should be clear from the discussion under the first point of error above, Merger Commitment 7.4 is not part of the Section 252 process, which contemplates detailed, substantive negotiations between the parties on the requirements set out in Sections 251(b) and (c). Rather, Merger Commitment 7.4 provides a route to an interconnection agreement that is an alternative

[11] Felton, Tr. at 39. See also Tr. 31-32, 37-38.

to the Section 252 negotiation process.[12] A request to extend an interconnection agreement under Merger Commitment 7.4 therefore has nothing whatsoever to do with the process for arriving at an interconnection agreement set forth in Section 252(b) of the 1996 Act.

Nevertheless, the Draft Report asserts that the Act grants arbitration authority to state commissions over any matter relating to interconnection agreements[13] and thus focuses on the question whether the parties negotiated Sprint's extension request, as if an affirmative answer to that question necessarily means the extension request is arbitrable.

The Draft Report, however, errs in its underlying premise. Section 252 only authorizes state commissions to arbitrate the terms and conditions that should be included in an interconnection agreement in order to comply with the requirements of the 1996 Act, not to arbitrate disagreements about the Merger Commitments. Arbitration jurisdiction under the Act derives from Section 252(b)(1), which provides that during the period from the 135th to the 160th day after 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." The scope of those "open issues" is prescribed by Section 251(c)(1), which precisely identifies the matters that are (and thus those that are not) the subject of such negotiations 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

[12] 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").

[13] Arbitrator's Draft Report, Conclusion No. 4, p. 30 (citing the Kentucky Commission arbitration decision in Case No. 2007-00180).

are resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled access, notice of changes and collocation).[14]

The assertion of jurisdiction here is erroneous because an extension under the FCC's Merger Commitments is not among the duties Section 251 imposes on ILECs, and nothing in the Act contemplates such an extension. Rather, it is an obligation created by the FCC's Merger Order and the Commission has already ruled that "it did not have jurisdiction under state or federal law to enforce those merger commitments."[15]

The Draft Report's error is underscored by the fact that the standards for arbitration in Section 252(c) of the Act do not apply to the question Sprint has asked the Commission to arbitrate. If parties disagreed about the term or termination date of an interconnection agreement for which they agreed on all other terms and conditions, the state commission is required to resolve the issue by referring to Section 252(c) of the 1996 Act, which provides that interconnection and access to unbundled network elements must be on terms and conditions that are just and reasonable, and by determining what term or termination date is just and reasonable within the meaning of the 1996 Act.

Here, in contrast, there is no such issue -- no question to be resolved by reference to anything in the 1996 Act. Rather, the disagreement concerns *only* the meaning and application of the Merger Commitment: a disagreement *under the merger commitment* about whether Sprint's current agreements are eligible for extension *under the merger commitment*. That question can be answered only by looking to the meaning of the Merger Commitment and the

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[14] 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. . .

[15] 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.

FCC's merger approval order. By definition, the Commission would find no guidance in the Act or in any of the FCC's rules implementing the Act. And note in this regard that when the FCC approved AT&T's merger commitments and ordered AT&T to abide by them, it was not exercising its authority under the 1996 Act; rather, it was exercising its altogether separate authority to evaluate and approve telecommunications mergers under 47 U.S.C. §§ 214(a) and 310(d).

Accordingly, the Draft Report should be revised to conclude that there is no issue here suitable for arbitration under the 1996 Act.

3. The Draft Report's Finding 252 Negotiations is Against the Weight of the Evidence. In order to proceed to arbitrate the parties' dispute, the Draft Report strains to find some indicia of the give and take that occurs during Section 252 negotiations.[16] All the Draft Report points to are three "short conversations about taking a different approach than the approach [the parties] had been taking for months,"[17] Sprint's November 21, 2008 letter notifying AT&T Missouri of Sprint's election to extend and AT&T Missouri's December 5, 2008 response letter denying the extension.[18]

The finding that these communications constituted Section 252 negotiations is against the weight of the evidence credited in the Draft Report. First, the Draft Report appears to incorrectly recite that three short conversations occurred concerning the extension ("the November 11, 1008, November 21, 2008, and December 2, 2008 conversations between Ms. Allen-Flood and Mr. Broughton").[19] The record clearly indicates that only two very brief conversations occurred. Responding to a question at hearing concerning Sprint's negotiator Mr. Broughton raising an

[16] Notably, the Draft Report fails to explain how the occurrence of such negotiations could confer on the Commission jurisdiction to arbitrate under Section 252 a disagreement about an extension request that plainly is not encompassed by Section 252.
[17] Arbitrator's Draft Report, Conclusion No. 25, pp. 36-37.
[18] Id., Conclusion No. 26, p. 37.
[19] Id., fn. 131, p. 37.

issue of whether Sprint could extend its existing agreements, Ms. Allen-Flood stated: "Yes, he raised the question on two occasions. It was probably a two-minute conversation".[20] Those very brief asides occurred during the course of negotiation sessions that typically lasted one to two hours at a time.[21] On December 2, 2008, Mr. Broughton only inquired as to whether Sprint's November 21, 2008 letter was received and Ms. Allen-Flood confirmed receipt.[22]

Second, the Draft Report ignores the fact that Sprint chose not to have its negotiator testify in this proceeding as to the negotiations and whether he intended those discussions to constitute 252 negotiations. While the Draft Report correctly notes that Sprint's Mr. Felton "was not present at any meeting with AT&T where the Missouri ICAs were discussed,"[23] and that "Mr. Fred Broughton, lead negotiator for the Sprint companies, did not testify,"[24] the Report fails to question why Sprint withheld its negotiator from cross examination and being questioned by the arbitrator and her Staff.

And third, the following facts -- credited in the Draft Report -- overwhelmingly contradict any finding that negotiations under Section 252 occurred between the parties concerning an extension of their existing agreements:

(a) Sprint actually rejected AT&T Missouri's offer to negotiate using the parties existing agreements as a starting point;[25]

(b) The parties never agreed to negotiate using the Missouri agreements as a starting point.[26]

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[20] Allen-Flood, Tr. 73, 80-81. See also Tr. p. 68 ("Q: You spoke about it verbally twice; is that right? A: Yes").
[21] Id., p. 85.
[22] Arbitrator's Draft Report, Finding No. 86, p. 26, citing Exhibit 5, p. 8.
[23] Arbitrator's Draft Report, Finding No. 15, p. 9
[24] Id., Finding No. 27, p. 11.
[25] Arbitrator's Draft Report, Finding No. 60, p. 22, citing Exhibit 6 at Exhibit 5 and Tr. Pp. 21-32.
[26] Id., Finding No. 72, p. 24, citing Tr. pp. 79-81.

(c) Per the Draft Report, the only redline language exchanged between the parties referencing an issue concerning an agreement's term was contained in the Kentucky redline agreement.[27]

(d) Sprint testified that AT&T "would have no ability to offer amendments or modifications to the agreements if Sprint elected the extension under Merger Commitment 7.4," which the arbitrator stated was a "right" the plain language of the Merger Order "appears to give Sprint under the terms of the order itself";[28]

(e) Sprint's letter concerning the extension simply "notified AT&T that Sprint was electing to utilize Merger Commitment 7.4 to extend its existing Missouri ICAs" and did not contain any request for negotiations.[29]

(f) AT&T's final response was sent the same day Sprint filed its arbitration petition.[30]

Accordingly, the Draft Report should be revised to conclude that no Section 252 negotiations concerning extension of the parties existing agreements occurred.[31]

4. The Draft Report Erroneously Determined the Extension Effective Date. While AT&T disagrees with the Draft Report's determination that an extension of the parties' existing agreements is appropriate, the Report erroneously found that the extensions should be effective from the date Sprint requested the extension. The Draft Report cites no authority for its selection of this effective date and no supporting state commission decisions or other authorities exist. Only the Kentucky Commission has addressed the issue and it in no uncertain terms rejected the extension request date as the appropriate effective date. Instead, it ruled that December 29, 2006, the effective date of the FCC's Merger Approval Order, was the appropriate date:

[27] Id., Finding No. 74, p. 24, citing Exhibit 5, pp. 5-6.
[28] Arbitrator's Draft Report, Conclusion No. 15, p. 34.
[29] Arbitrator's Draft Report, Finding No. 84, p. 25-26.
[30] Id., Finding No. 87, p. 26.
[31] Alternatively, the Draft Report could be revised to conclude that because Section 252 does not confer jurisdiction on state commissions to arbitrate disputes about the meaning and application of Merger Commitment 7.4, it makes no difference whether or to what extent the parties discussed Sprint's request under that commitment.

> In light of the evidence and arguments presented, the Commission finds that the date of December 29, 2006 is the proper commencement date of the extension of the interconnection agreement between the parties. This is the effective date of the FCC Order and the merger commitments, including Merger Commitment No. 4, which compels AT&T to extend the life of a current interconnection agreement at the request of a connecting carrier, regardless of whether the initial term has expired. In the preamble of Appendix F of the Memorandum Opinion and Order approving the merger, the FCC stated:
>
> > The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them. Unless otherwise specified herein, the commitments described herein shall become effective on the Merger Close Date . . .[32]

Inasmuch as the Draft Report has relied on this decision of the Kentucky Commission for authority to conduct a Section 252 arbitration of the parties' dispute over the meaning of the FCC's Merger Commitments, the Draft Report should be consistent in the application of this order. Accordingly, the Draft Report should be revised to specify that any extension of the parties' existing interconnection agreements under Merger Commitment 7.4 should be effective on December 29, 2006, the Merger Close date.

The Draft Report's making the extensions of the parties existing interconnection agreements effective from November 21, 2008 -- when Sprint sent its eleventh hour notice it was electing to extend under the Merger Commitments -- is unreasonable and contrary to the public interest because it frustrates the purpose of the Merger Commitment itself (reducing transaction costs) and the federal policy of encouraging bilateral negotiations and dispute resolution as envisioned by the Act.

The Draft Report recognizes that Sprint "changed its course late in the negotiation process," but attempts to excuse that lateness finding that "if [Sprint] had waited any longer to

[32] 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 (the "Kentucky Arbitration Decision"), p. 11-12 (emphasis in original). AT&T Missouri notes that its position in Kentucky (which it continues to believe correct) was that under the intent of the commitment, the term should begin with the stated expiration date of the existing agreement. The Kentucky Commission, however, rejected that view.

file the arbitration request, it would have had to start the 135-day negotiation period over again . . because the arbitration window would have closed."[33] The Report, however, fails to grasp that this would have been the appropriate result because the extension was indeed a different issue than what the parties actually addressed in negotiations. With a new window, the parties would then have been able to negotiate a replacement agreement with the give and take contemplated by Section 252. And requiring Sprint to restart the negotiation period would be neither unfair nor prejudicial because throughout that period, Sprint would continue to receive exactly what it seeks here -- continued operation under the parties' existing agreements.

But allowing Sprint to completely change the course of negotiation at the last minute precluded AT&T from being able to substantively respond to the request and have its own issues arbitrated. As AT&T Missouri's negotiator testified, it would have taken AT&T Missouri three to four weeks and over 20 company subject matter experts to review and redline the parties' three existing Missouri agreements (one landline and two wireless agreements) in preparation for a negotiation using those agreements as the base documents. Thus, by making its extension request on November 21, 2008 (the Friday before the Thanksgiving holidays and just two weeks before it filed for arbitration[34]), Sprint precluded AT&T Missouri from being in any position to raise and negotiate its own issues. [35]

And keying the effective date of the extension from Sprint's last-minute request further rewards Sprint's gamesmanship with an additional five contractual months. Had Sprint initially sought negotiations using the parties' existing agreements as a starting point, the "request date" would have been five months earlier: June 30, 2008, when Sprint requested negotiations under the Act. At the outside, any extension granted should not be effective any later than this date.

[33] Arbitrator's Draft Report, Conclusion No. 22, p. 36.
[34] Exhibit 6, Sprint Arbitration Petition, para. 26, and Exhibit 7 to Sprint's Petition,
[35] Tr. 87.

While the MoPSC's rules call for baseball style arbitration, they allow the arbitrator to depart from picking only one of the parties' positions on an issue when the result would be unreasonable or contrary to the public interest. 4 CSR 240-36.040 (19) provides:

> The arbitrator shall issue a decision on the merits of the parties' positions on each issue raised by the petition for arbitration and response(s). Unless the result would be clearly unreasonable or contrary to the public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue.

AT&T continues to believe that the extension of Sprint's agreements is improper because an extension under the Merger Commitments is intended only to offer an additional three year term commencing with the stated expiration of that agreement. However, to the extent the arbitrator disagrees with that position, deviation from the Commission's rule is necessary to prevent providing incentives to improperly manipulate the negotiation and arbitration process contemplated by Section 252. In no event should the effective date of any extension be later than Sprint's June 30, 2008, request for negotiations.

WHEREFORE, AT&T Missouri respectfully requests that these errors be corrected.

Respectfully submitted,

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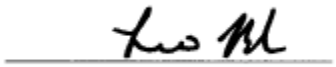
**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on April 6, 2009.



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