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. 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 REPLY TO SPRINT
CONCERNING MOTION TO DISMISS

Sprint[1] has failed to show that the issue it now attempts to raise is an "open issue" subject to arbitration under Section 252(b) of the Telecommunications Act of 1996.. Nor could it have made such a showing, because Sprint's demand to extend its existing interconnection agreements under FCC Merger Commitment 7.4 has nothing to do with the substantive requirements in Section 251, or with the procedural framework of Section 252. In fact, its demand to *extend* its *existing* interconnection agreements doesn't have anything to do with a request to *negotiate* a *new* agreement at all.

The parties did conduct negotiations for a new agreement under Section 252, but contrary to the representations in Sprint's Response, there were no Section 252 negotiations concerning an extension of Sprint's existing agreements. An extension of an existing agreement under the Merger Commitments and a Section 252 negotiation are two entirely different things. As Exhibit 7 to Sprint's Petition reflects, Sprint abandoned arbitration on the open issues the parties had been negotiating under Section 252 and unilaterally notified AT&T Missouri[2] that Sprint "elects to utilize Merger Commitment 7.4 to extend its existing Missouri interconnection

[1] Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. will be referred to in this pleading as "Sprint."
[2] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri."

agreements." [3] The law is well settled that state commissions can only arbitrate under Section 252(b) issues that were the subject of negotiations under Section 252(a). Parties are not permitted to use the Act's compulsory arbitration process to obtain arbitration on issues that were not the subject of negotiations. Here, not only was there no negotiation concerning Sprint's proposal to extend its current agreements under the merger commitment, but Sprint did not even request any such negotiation.

Furthermore, the 1996 Act enumerates the matters AT&T Missouri is obliged to negotiate under Section 252(a), and an extension under a merger commitment is not one of those matters. Thus, in addition to the fact that there was no negotiation about the extension request, and in addition to the fact that Sprint did not ask for such negotiations, AT&T Missouri would not have negotiated with Sprint under Section 252(a) even if Sprint had asked. Rather, AT&T Missouri would have told Sprint that while it was willing to discuss Sprint's request, any such discussion would not be part of the Section 252(a) negotiations.

The Commission should recognize that Sprint, by wrapping its demand in the cloak of Section 252(b), is trying to put the Commission into the position of having to arbitrate a matter that is not arbitrable under the Act. Accordingly, the Commission should dismiss Sprint's petition for arbitration.

[3] Sprint Arbitration Petition, p. 10, para. 26, Exhibit 7.

I. SPRINT HAS THE BURDEN TO DEMONSTRATE COMMISSION JURISDICTION

The party invoking jurisdiction has the burden to show that jurisdiction exists.[4] Whenever it appears that subject matter jurisdiction is lacking, the action must be dismissed.[5] Subject-matter jurisdiction concerns "the nature of the cause of action or the relief sought" and exists only when the court "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed."[6] Jurisdiction of the subject matter is obtained by operation of law.[7] And when the tribunal engages in the exercise of a special statutory power, it is confined strictly to the authority given by the statute.[8]

II. SPRINT HAS FAILED TO DEMONSTRATE AN "OPEN ISSUE" EXISTS WITHIN THE SCOPE OF SECTION 252(b) OF THE ACT

Just calling something an "interconnection related issue"[9] does not make it subject to arbitration under the Act. State commission authority to conduct arbitrations 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." (Emphasis added.) The "open issues" are issues arising out of the parties' negotiations –

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[4] May Dept. Stores Co. v. Wilansky, 900 F. Supp. 1154, 1159 (E.D. Mo. 1995) (citing Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651, 653 (8th Cir. 1982)). Digi-tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 522 (8th Cir. 1996) (prima facie showing of personal jurisdiction over defendant required to survive motion to dismiss).

[5] Mo. Sup. Ct. R. 55.27(g)(3) ("whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Bagsby v. Gehres, 169 S.W.3d 543, 547 (Mo. Ct. App. 2005)("before we reach the merits of this appeal, we must *sua sponte* determine whether we have jurisdiction . . . If the trial court did not have jurisdiction over this action, any judgment entered thereon would be void, and we would have no jurisdiction except to reverse the judgment and remand the cause for dismissal").

[6] State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69, 72 (Mo. banc 1982) quoting Cantrell v. City of Caruthersville, 221 S.W.2d 471, 476 (Mo. 1949). Kuyper v. Stone County Com., 838 S.W.2d 436 (Mo. 1992)("jurisdiction . . . is the authority of a court to hear and determine the controversy presented in a case").

[7] United Cemeteries Co. v. Strother, 119 S.W.2d 762, 765 (Mo. 1938); Lambert, 154 S.W.2d at 57

[8] See King v. Kinder, 690 S.W.2d 408, 409 (Mo. banc 1985); Randles v. Schaffner, 485 S.W.2d 1, 3 (Mo. 1972); State ex rel. Kansas City v. Public Service Com'n, 362 Mo. 786, 244 S.W.2d 110, 115 (Mo. 1951).

[9] See, e.g., Sprint Response, pp. 2, 12.

negotiations for which Congress allotted a minimum of 135 days in order to ensure ample opportunity for negotiation before open issues are brought to the state commission for resolution.

The universe of issues subject to arbitration is circumscribed 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 are resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled access, notice of changes and collocation).[10]

Clearly, an extension under the FCC's AT&T/BellSouth merger approval order is not among the duties Section 251 imposes on ILECs and nothing in the Act contemplates such an extension. As AT&T Missouri explained in its Motion to Dismiss[11], the standards for arbitration in Section 252(c) of the Act do not apply to the question Sprint now asks the Commission to arbitrate. That question can be answered only by looking to the meaning of the AT&T/BellSouth merger commitment and the 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.

Sprint's claim that the AT&T/BellSouth merger commitments as a "standing offer by AT&T" which "became part of any new or ongoing AT&T negotiations" is absurd. 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,

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[10] 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. . .

[11] See AT&T Motion to Dismiss, pp. 6-7.

Merger Commitment 7.4 provides a route to an interconnection agreement that is an alternative to the Section 252 negotiation process.[12] Indeed, imagine that Sprint, instead of initiating Section 252(a) negotiations and then abandoning them shortly before the statutory negotiation period ended, as actually happened, had asked AT&T Missouri in the first place to extend Sprint's current ICAs. Imagine further that AT&T Missouri responded that it was willing to talk about Sprint's extension request for the 135-day to 160-day period specified in Section 252(b), and took the position that only after that negotiation period could Sprint raise an issue if AT&T Missouri said no. Sprint would protest vehemently that it should not have to wait for 135 or 160 days for an answer, and that the Section 252 process has nothing to do with its request under the merger commitment. And Sprint would be right. It would be immediately entitled to file a complaint in the appropriate forum -- i.e., not in this Commission -- alleging a violation of the FCC's merger order. A request to extend an interconnection agreement under Merger Commitment 7.4 has nothing whatsoever to do with the process for arriving at an interconnection agreement set forth in Section 252(b) of the 1996 Act.

Sprint's attempt to bring the parties' disagreement within the ambit of Section 252(b) by portraying it as a disagreement over "the establishment of an essential ICA term"[13] is disingenuous. The parties do not have a disagreement about the termination date of a replacement contract for which all other terms and conditions are agreed. Rather, the parties have a disagreement *under the merger commitment* about whether Sprint's current ICAs are eligible for extension *under the merger commitment*. When carriers arbitrate the term or termination date of an interconnection agreement under Section 252(b), as they sometimes do,

[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] Sprint's Response, p. 2, 15-17 ("ICA" references an interconnection agreement).

the state commission resolves 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. There is no issue here suitable for arbitration under the 1996 Act.[14]

Sprint provides no authority to support its assertion that merger commitments are within the scope of Section 252(b) and subject to arbitration. The cases it cites stand only for the undisputed proposition that the merger commitments did not divest state commissions of any authority they already have. But that is irrelevant here. The question is whether the issue that Sprint has presented for arbitration is subject to arbitration under Section 252(b), not whether the Commission has been divested of any authority. Indeed, although we do speak in terms of "jurisdiction," the fundamental question presented by AT&T Missouri's motion to dismiss is not about the Commission's power, but is about what is and what is not an arbitrable issue under Section 252(b). The answer to that question is found in the statute, not in authorities concerning the allocation of authority between state commissions and the FCC. Sprint's citation of a "savings clause" in the Merger Commitments[15] is misplaced for that same reason, and also because the savings clause confers no authority on state commissions. Rather, it disclaims an intent to preempt state authority that otherwise exists to the extent the State's authority is "not

[14] If this were a proper arbitration of replacement agreements under the 1996 Act, AT&T Missouri certainly would not have agreed to replicate in the replacement agreement the content of the parties' current ICAs, but instead would have presented numerous issues for arbitration – as it would have every right to do.

[15] Sprint Response, p. 5. The "savings clause" from the Merger Commitments states:

> 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 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.

inconsistent with these commitments." A statement that the merger commitments do not "supersede or otherwise alter state or local jurisdiction" is not a grant of jurisdiction. It neither restricts a state's jurisdiction nor expands it.

Sprint is also off base in claiming the Commission must exercise jurisdiction here because it previously exercised authority to approve an extension of AT&T's Missouri agreement with Verizon under the Merger Commitments.[16] While AT&T Missouri and Verizon Wireless did have a dispute concerning Merger Commitment obligations, the parties themselves resolved the dispute and Verizon Wireless dismissed its Complaint with prejudice.[17] The only action the Commission took was the routine approval of a voluntarily agreed-to amendment to the parties' interconnection agreement to reflect their own resolution of the dispute. The Commission's Section 252(e)(2)(A) authority to approve a voluntary agreement confers no arbitration authority as it is wholly separate from its Section 252(b) authority to conduct arbitrations under the Act.

Sprint has similarly taken liberties with the Florida Public Service Commission decision AT&T cited in its Motion to Dismiss, claiming AT&T Missouri "failed to disclose" that the dismissal resulted from "an issue with Sprint's pleading rather than on the merits of AT&T's argument."[18] Aside from showing that Sprint added language to the quote not in the Florida Commission's decision, a plain reading of that decision makes clear that the "problem" with Sprint's pleading was that it sought to raise the exact same issue Sprint attempts to raise here:

> Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward. Sprint argues as follows:

[16] Sprint Response, pp. 11-12.
[17] See Verizon Wireless' February 26, 2008, filing dismissing its Complaint in Case No. TC-2008-0150 with prejudice, and the Commission's March 10, 2008, Notice taking note of the dismissal and closing the case.
[18] Sprint Response, pp. 14-15.

> 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.[19]

While stressing that its decision was not intended to rule on competing interpretations of particular Merger Commitments, it specifically ruled that "Sprint's petition must be dismissed because it seeks to enforce the particular Merger Commitments as a known right, not arbitrate it as an open, Section 251 issue."[20] AT&T Missouri provided, simultaneously with its filing, a full copy of the Florida Commission's decision (as well as other cases AT&T Missouri cited) to the Arbitrator and opposing counsel as the arbitrator requested the parties to do. While the Florida Commission's liberal procedural rules allowed Sprint to amend its petition at least once, AT&T again moved to dismiss. But because the parties resolved their dispute, no further ruling was needed by the Florida Commission.

Sprint contends that the FCC's merger commitment order is "no different than any other FCC Order that establishes, clarifies or interprets interconnection-related obligations," which state commissions routinely apply in arbitrations[21] Sprint is dead wrong. There is all the difference in the world. Section 252(d) of the Act directed the FCC to promulgate regulations implementing the requirements of Section 251. The FCC did so, initially in its 1996 *Local Competition Order*, and later in subsequent orders. Under Section 252(c) - - which sets out the arbitration standards - - those FCC regulations effectively became part of the statute, as Section 252(c) states that when a state commission arbitrates, it must ensure that its resolutions of the issues meet the requirements of Section 251, "including the regulations prescribed by the [FCC]

[19] 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, at p. 5.
[20] Id.
[21] Sprint Response, p. 6.

pursuant to Section 251." Thus, FCC orders that (in Sprint's words) "establish[], clarify[y] or interpret[] interconnection related obligations" are actually part of what the state commission is required to enforce in an arbitration under Section 252(b).

The FCC's merger commitment order, however, stands in stark contrast. It does not in any way, shape or form implement the Telecommunications Act of 1996. Rather, it implements the FCC's duties as the federal agency charged with protecting the public interest with respect to telecommunications mergers.[22] The FCC's responsibility to evaluate and approve telecommunications mergers has nothing to do with the 1996 Act. Indeed, it pre-dates the 1996 Act by more than sixty years. The FCC's authority to condition its approval of the AT&T/BellSouth merger on the merger commitments -- including the merger commitment at issue here -- arises out of Section 214 and Section 303(r) of the 1934 Act.[23] Indeed, the very significance of the merger commitments is that they go above and beyond the requirements of the 1996 Act, which Sprint itself admits.[24]

As the issue Sprint seeks to arbitrate is not a Section 252(b) issue, the Commission must dismiss this proceeding.

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[22] The FCC clearly possesses jurisdiction over the Merger Commitments. Serv. Storage & Transfer Co. v. Virginia, 359 U.S. 171, 177 (1959). The Merger Approval Order itself specifically provides: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC." Merger Approval Order, p. 147.

[23] See FCC Merger Order ¶ 22 and n. 78. In contrast, the Missouri Commission has no jurisdiction to review or approve mergers of holding companies like AT&T Inc. and BellSouth Corporation. In the Matter of the Application for Approval of the Transfer of Control of New Edge Network, Inc., d/b/a New Edge Networks, to Earthlink, Inc., Case No. TM-2006-0307, 2006 Mo. PSC LEXIS 173, issued February 23, 2006 ("The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level. For example, in a case involving the merger of SBC Communications and Ameritech Corporation, the Commission found that 'there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.' On that basis, the Commission will again find that it has no jurisdiction over the proposed transaction," citing In the Matter of the Merger of SBC Communications, Inc. and Ameritech Corporation, 7 Mo. P.S.C. 3d 528, 532 (1998).)

[24] Sprint Response, p. 13 (acknowledging that the merger commitments "must provide rights beyond those that already exist").

III. SPRINT CANNOT DEMAND ARBITRATION OF AN ISSUE THAT WAS NEVER THE SUBJECT OF THE PARTIES' SECTION 252 NEGOTIATIONS.

Sprint, for the first time in this proceeding, claims that the "term of the proposed interconnection agreement was negotiated between AT&T and Sprint."[25] But Sprint's own correspondence (attached to its Petition for Arbitration as Exhibit 7) sent two weeks before the arbitration window closed reflects that the issue Sprint demands to be arbitrated here was never part of the parties' Section 252 negotiations. Referencing the parties negotiations under Section 252 to revise the Kentucky interconnection agreement for Missouri, Sprint's letter stated:

> . . . Sprint indicated a desire to continue discussions based upon the Kentucky ICA. However, those discussions have reflected a wide divergence of opinion on a number of issues.
>
> Rather than go to arbitration on the number of issues currently before the parties, Sprint has elected to extend its existing interconnection agreements under Merger Commitment 7.4. Please acknowledge if AT&T will agree to this extension request. If AT&T is unwilling to agree to Sprint's election to extend its existing ICAs, Sprint will submit its extension request as the issue in its current arbitration proceeding.[26]

This letter demonstrates that Sprint categorically abandoned arbitration on the open issues the parties had been negotiating under Section 252 and unilaterally notified AT&T Missouri that Sprint was electing to extend its existing Missouri interconnection agreements under the merger commitments. Clearly, the formulation of Sprint's demand precluded voluntary negotiations. And in fact, Sprint acknowledged that AT&T Missouri "refuses to implement" Sprint's demand to extend its agreements.[27]

Sprint disingenuously claims that "AT&T did not refuse to negotiate the term of the interconnection agreement," pointing to a statement AT&T Missouri made in its July 16, 2008 letter that it was willing to "commence negotiations pursuant to [Sprint's] existing Missouri

[25] Sprint Response, pp. 4, 16-18.
[26] Sprint Arbitration Petition, Exhibit 7.
[27] Sprint Response, p. 12.

interconnection agreements"[28] Subsequent correspondence from Sprint reveals that Sprint rejected using the existing Sprint agreements as a basis for negotiations and instead insisted on working from the Kentucky agreement (which the parties did).[29]

The law is well settled that state commissions can only arbitrate issues under Section 252 that were the subject of voluntary negotiations under the Act. The Fifth Circuit explained:

> The jurisdiction of the PUC as arbitrator is not limited by the terms of §251(b) and (c); instead, it 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.[30]

Sprint in its response tries to limit this decision to issues "not normally included in Section 252 arbitrations," claiming it has no application here because "the issue in dispute – the term of the ICA – is one that is common in every ICA."[31] But the Fifth Circuit's decision did not turn on the distinction Sprint seeks to make. Certainly the result would have been the same in that case had the CLEC sought to arbitrate physical collocation issues without first conducting voluntary Section 252(b) negotiations. Furthermore, the issue Sprint has presented is *not*, as we explained above, a routine arbitration issue concerning the term of an ICA that can be resolved by reference to the "just and reasonable terms and conditions" requirements of Section 251. Notwithstanding Sprint's attempt at camouflage, the issue is whether certain existing ICAs can be extended under Merger Commitment 7.4.

Thus, even if the issue Sprint raises were a proper issue for arbitration under Section 252(b), the absence of negotiations on this issue bars Sprint from compelling arbitration on it.

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[28] Sprint Response, p. 17, referencing AT&T Missouri's July 16, 200, attached as Exhibit 4 to Sprint's Petition.
[29] Sprint Response, Exhibits 5, 6 and 7.
[30] Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Company, 350 F.3d 482, 487 (5th 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).
[31] Sprint Response, p. 17.

All Sprint can point to is AT&T's solitary statement that it did not believe that Sprint's existing agreements were eligible for extension under the terms of FCC Merger Commitment 7.4. This statement hardly constitutes an acceptance of Section 252(b) negotiations, especially since Sprint never requested such negotiations.

IV. CONCLUSION

The Commission is being asked here to arbitrate an issue that is neither arbitrable under Section 252(b) of the Act, nor the subject of the requisite prior Section 252(b) negotiations. Accordingly, it should dismiss Sprint's petition.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
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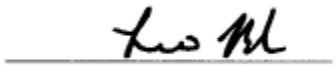
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on January 26, 2009.



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