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.	))))	**File No. CO-2009-0239**

ARBITRATOR'S DRAFT REPORT

Issue Date: March 27, 2009

Effective Date: March 27, 2009

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APPEARANCES

For Sprint Communications Company, L.P., Sprint Spectrum L.P., and Nextel West Corp.:

Kenneth A. Schifman, Director and Senior Counsel, State Regulatory Affairs, Mailstop KSOPHN0212-2A303, 6450 Sprint Parkway, Overland Park, Kansas 66251.

Jeffrey M. Pfaff, Senior Counsel, KSOPHN0212-2A303, 6450 Sprint Parkway, Overland Park, Kansas 66251.

For Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri:

Leo J. Bub, Senior Counsel, SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101.

ARBITRATOR: Nancy Dippell, Deputy Chief Regulatory Law Judge.

Arbitration Advisory Staff:

William Voight

ARBITRATION REPORT

PROCEDURAL HISTORY

Petition for Arbitration:

On December 5, 2008, Sprint Communications Company, L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively referred to as "Sprint") filed a Petition for Arbitration under Section 252(b) of the federal Communications Act of 1934, as amended,[1] and under 4 CSR 240-36.040, seeking arbitration of an interconnection agreement between Sprint and Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T"). Sprint presented as the only issue for arbitration whether it should be allowed to extend its current Missouri interconnection agreements ("ICAs") for a period of three years.

Sprint had previously filed a complaint, File No. TC-2008-0182, 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 the complaint stating that the Commission did not have jurisdiction to interpret and enforce a Kentucky-approved interconnection agreement and 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.

[1] 47 U.S.C. § 252(b)(1) ("the Act").

Notice of Arbitration:

The arbitration was conducted according to Commission Rule 4 CSR 240-36.040, which governs arbitrations under Section 251 of the Act ("the Rule"). On December 11, 2008, the parties were notified of the appointment of Nancy Dippell, Deputy Chief Regulatory Law Judge, as Arbitrator. On December 12, 2008, Notice was issued by the Arbitrator notifying AT&T that it must respond to the petition no later than December 30, 2008, and a date for an initial arbitration meeting was set for December 18, 2008. Also on December 12, 2008, the Arbitrator appointed William Voight as her arbitration advisory staff.

Initial Arbitration Meeting:

The Initial Arbitration Meeting was held on December 18, 2008, as scheduled. A principal topic of that meeting was the procedural schedule. Section (15) of the Rule authorizes the Arbitrator to vary the procedures and timelines set out in the Rule as necessary to complete the arbitration within the period specified in the Act:

> Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out in this rule; however, the arbitrator's procedures must substantially comply with the procedures listed herein. . . .

Response to the Petition for Arbitration:

The Act provides that the non-petitioning party "may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition."[2] On December 30, 2009, AT&T filed a motion to dismiss the arbitration for lack of jurisdiction arguing that "[t]he Commission is not being asked to

[2] 47 U.S.C. § 252(b)(3).

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."[3]

Procedural Schedule:

After considering the parties' joint procedural schedule proposal, the Arbitrator issued an Order Adopting Procedural Schedule on January 14, 2009. The schedule departed from the timelines in Rule 4 CSR 240-36.040 and modified various procedures. On March 24, 2009, with the consent of the parties, the Arbitrator slightly amended the remaining procedural schedule.

Denial of Motion to Dismiss:

The Commission denied AT&T's motion to dismiss on February 19, 2009. AT&T filed an application for rehearing and request for reconsideration on February 27, 2009. That application is still pending.

Limited Evidentiary Hearing:

According to the procedural schedule, the parties filed prepared direct and rebuttal testimony. The hearing was held on February 25, 2009, with both Sprint and AT&T presenting witnesses. Both parties filed briefs on March 11, 2009.

[3] AT&T Missouri's Motion to Dismiss and Motion for Expedited Treatment (filed 12-30-08), p. 10.

FINDINGS OF FACT

Having considered all the evidence in the record and in compliance with Commission Rule 4 CSR 240-36.040(21), the Arbitrator hereby makes the following findings of fact. When making findings of fact based upon witness testimony, the Arbitrator will assign the appropriate weight to the testimony of each witness based upon his or her qualifications, expertise and credibility.

The Parties:

1. Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. are indirect wholly-owned subsidiaries of Sprint Nextel Corporation existing under the laws of the State of Delaware, with headquarters at 6200 Sprint Parkway, Overland Park, Kansas 66251.[4]

2. Sprint Communications Company L.P. ("Sprint Communications") is authorized to provide competitive local exchange ("CLEC") and interexchange ("IXC") services in Missouri.[5]

3. Sprint Communications Company L.P. provides local exchange, long distance, and data telecommunications services.[6]

4. Sprint Spectrum L.P. ("Sprint Spectrum") is a Delaware limited partnership.

[4] Exhibit 6 ("*Petition")*, para. 3.

[5] Ex. 6, citing File Nos. TA-96-424 and TA-97-269.

[6] Ex. 6, para. 3.

5. As agent and General Partner for WirelessCo, L.P.,[7] SprintCom, Inc.,[8] Sprint Telephony PCS, L.P. f/k/a Cox Communications PCS, L.P.,[9] and APC PCS, LLC,[10] and PhillieCo, L.P.,[11] all the foregoing entities jointly do business as Sprint PCS.[12]

6. Sprint Spectrum provides commercial mobile radio service ("CMRS") in Missouri under licenses issued by the Federal Communications Commission ("FCC").[13]

7. Nextel West Corp. ("Nextel"), a Delaware corporation, provides CMRS in Missouri under licenses issued by the FCC.[14]

8. Sprint's principal place of business is 6200 Sprint Parkway, Overland Park, Kansas 66251.[15]

9. AT&T is a Missouri corporation having an office at One Bell Center, St. Louis, Missouri 63101. [16]

10. AT&T provides local exchange telecommunications services in Missouri under certificates issued by the Commission.[17]

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[7] A Delaware limited partnership.

[8] A Kansas corporation.

[9] A Delaware limited partnership.

[10] A Delaware limited liability company.

[11] A Delaware limited partnership.

[12] Ex. 6, para. 3.

[13] Ex. 6, para. 3.

[14] Ex. 6, para. 3.

[15] Ex. 6, para. 5.

[16] Ex. 6., para. 6.

[17] Ex. 6., para. 6.

The Witnesses:

11. Mark G. Felton testified on behalf of Sprint Nextel. Mr. Felton is employed as a Contracts Negotiator III in the Access Strategy group of Sprint United Management, the management subsidiary of Sprint Nextel Corporation. Mr. Felton graduated from the University of North Carolina at Wilmington in 1988 with a Bachelor of Science in Economics. He received a Masters degree in Business Administration from East Carolina University in 1992. He began his career as a Management Intern with Carolina Telephone, a subsidiary of Sprint (or of its predecessor parent), in 1988 and has held positions of increasing responsibility since that time.[18]

12. In June of 1999 Mr. Felton assumed responsibility for negotiations and implementation of Sprint's interconnection agreements with various telecommunications carriers, including BellSouth. He has also been engaged in Sprint's efforts to implement the interconnection-related merger commitments made by AT&T and BellSouth.[19]

13. Mr. Felton is not an attorney, though he has been required to understand and implement on a day-to-day basis a telecommunications carrier's rights and obligations under the Act, the FCC rules implementing the Act, and the federal and state authorities regarding the Act and the FCC rules.[20]

14. Mr. Felton was generally knowledgeable about the facts of this case and his testimony was generally credible.

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[18] Exhibit 1, Direct Testimony of Mark G. Felton, p. 2.

[19] Ex. 1, pp. 2-3.

[20] Ex. 1, p. 3.

15. Mr. Felton was generally knowledgeable about the Missouri negotiations, though his participation in the Missouri-specific agreements was regarding unbundled network elements.[21]

16. Mr. Felton was not present at any meeting with AT&T where the Missouri ICAs were discussed.

17. J. Scott McPhee testified on behalf of AT&T. Mr. McPhee is employed as an Associate Director – Wholesale Regulatory Policy in AT&T's Wholesale Specialized Services organization. That organization supports AT&T incumbent local exchange carriers ("ILECs") throughout AT&T's 22-state Regional Bell Operating Company region, including AT&T Missouri. He is responsible for developing, supporting, and communicating AT&T's wholesale product policy positions in regulatory proceedings across the 22 AT&T ILEC states, including Missouri.[22]

18. Mr. McPhee began employment with Southwestern Bell Telephone Company ("SBC") in 2000 in the Wholesale Marketing – Industry Markets organization as Product manager for Reciprocal Compensation throughout SBC's 13-state region. His responsibilities included developing and implementing product policies and methods and procedures to assist negotiators and witnesses for SBC's reciprocal compensation and interconnection arrangements, as well as SBC's transit traffic offering. [23]

19. In June of 2003, Mr. McPhee moved into his current role. In this position, his responsibilities include helping define AT&T's positions on certain issues for wholesale

[21] Tr. pp. 32-33.

[22] Exhibit 3NP, Direct Testimony of J. Scott McPhee, p. 1.

[23] Ex. 3NP, p. 1.

services, and ensuring that those positions are consistently articulated in proceedings before state commissions.[24]

20. Mr. McPhee has a Bachelor of Arts degree with a double major in Economics and Political Science from the University of California at Davis. Prior to joining SBC, Mr. McPhee spent nine and a half years working in the insurance industry, primarily as an underwriter of worker's compensation insurance.[25]

21. Mr. McPhee was generally knowledgeable about the facts of this case and his testimony was generally credible.

22. Lynn Allen-Flood testified on behalf of AT&T. Ms. Allen-Flood is employed as Lead Interconnection Agreements manager for AT&T. Ms. Allen-Flood is responsible for negotiating interconnection agreements with Competitive Local Exchange Carriers (CLECs) across AT&T's 22 ILEC states, including Missouri.[26]

23. Ms. Allen-Flood received her Bachelor of Science in Business Administration with a major in Management from Georgia State University. She began her employment with Southern Bell, Inc., in 1975. Southern Bell became part of BellSouth Telecommunications, Inc., and is now part of AT&T, Inc. She has held positions in several departments including Tariff manager, Pricing Manager, and Product Manager for Operator Services. In 2000 she was assigned to negotiate interconnection agreements between CLECs and BellSouth.[27]

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[24] Ex. 3NP, p. 2.

[25] Ex. 3NP, p. 2.

[26] Exhibit 5, Direct Testimony of Lynn Allen-Flood, p. 1.

[27] Ex. 5, p. 1

24. Ms. Allen-Flood was the point person and lead negotiator for Sprint's request to port the Kentucky ICAs to Missouri and for the negotiations for a successor ICA under Section 252 in Missouri. In that role she was the primary conduit for questions and the exchange of correspondence with Fred Broughton, Sprint's lead negotiator.[28]

25. Ms. Allen-Flood's was generally knowledgeable and generally credible.

26. Ms. Allen-Flood was the only witness with first-hand knowledge of the negotiation meetings.

27. Mr. Fred Broughton, lead negotiator for the Sprint companies, did not testify.

The Interconnection Agreements:

28. AT&T and Sprint Communications have been operating in Missouri under an interconnection agreement for several years, with the latest version of the agreement effective in August, 2005.[29]

29. AT&T and Sprint Spectrum have been operating in Missouri under an interconnection agreement for several years, with the latest version of the agreement effective in 2003.[30]

30. Nextel and AT&T have been operating under the interconnection agreement originally entered into in August 1998.[31]

[28] Ex. 5, pp. 2-3.

[29] Ex. 6, para. 7.

[30] Ex. 6, para. 7.

[31] Ex. 6, para 7.

31. The specific agreements that Sprint seeks to extend and that are the subject of this arbitration are:

a. Agreement for interconnection Between Sprint Spectrum L.P. and SBC Missouri, as amended, originally approved by the Commission in File No. TK-2004-0180;[32]

b. Agreement for Reciprocal Compensation and Interconnection between Nextel West Corp. and Southwestern Bell Telephone, as amended, approved by the Commission in File No. TO-99-149, as amended and approved in Commission File No. TK-2005-309;[33] and

c. Interconnection Agreement between SBC Missouri and Sprint Communications Company L.P., approved by the Commission in File No. TK-2006-0044.[34]

32. The **Sprint Spectrum** agreement contains the following provisions, in part:

19. MISCELLANEOUS PROVISIONS

* * *

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 . . . 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.

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[32] Ex. 6 at Exhibit 8 (“Sprint Spectrum L.P. ICA”).

[33] Ex. 6 at Exhibit 9.

[34] Ex. 6 at Exhibit 10.

* * *

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)(I) 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 Section19.2.4.2 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, SBC13STATE 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.[35]

33. **Nextel's** wireless agreement contains the following provisions, in part:

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.

* * *

18.8 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.[36]

34. **Sprint Communications'** interconnection agreement contains the following provisions, in part:

5. EFFECTIVE DATE, TERM, AND TERMINATION

* * *

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

[35] Ex. 6 at Exhibit 8, Sprint Spectrum L.P. ICA, pp. 51-55.

[36] Ex. 6 at Exhibit 9 ("Nextel West ICA"), p. 33.

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.

* * *

5.4 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)(l) 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.[37]

35. Each of the above interconnection agreements has been amended since its initial execution.[38]

36. The Sprint Spectrum and the Nextel agreements have been amended to account for changes of law.[39]

37. AT&T sent Sprint Communications, Sprint Spectrum, and Nextel letters dated August 21, 2007, which AT&T intended to serve as notice that it desired to terminate the Missouri ICAs.[40]

38. The parties agreed that Sprint Communications, Sprint Spectrum, and Nextel, have been operating under all the terms and conditions of the above agreements with

[37] Ex. 3NP, Schedule 4; Ex. 6 at Exhibit 10, Section 5.2.

[38] Ex. 6, para. 7.

[39] Ex. 1, p. 10.

[40] Ex. 6 at Exhibit C of Exhibit 1.

AT&T (or its predecessors) since they were originally approved and the companies continue to operate in that manner exchanging traffic with each other.[41]

39. AT&T does not intend to quit exchanging traffic with Sprint under the Missouri ICAs until successor agreements are in place.[42]

History of the Negotiations:

40. On March 4, 2006, AT&T's parent corporation, AT&T Inc., entered into an agreement to merge with BellSouth Corporation, the parent company of BellSouth Telecommunications, Inc.[43]

41. On March 31, 2006, AT&T, Inc., and BellSouth Corporation filed a series of applications seeking FCC approval of the transaction.[44]

42. During the resulting FCC proceeding, AT&T, Inc., made a number of promises in the form of commitments in order to elicit FCC approval.[45]

43. The FCC approved the merger of AT&T, Inc., and Bellsouth Corporation with certain conditions ("Merger Commitments").[46]

44. The AT&T/BellSouth merger closed on December 29, 2006.[47]

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[41] Ex. 1, pp. 4-5 and 7; Exhibit 4, Rebuttal Testimony of J. Scott McPhee, p. 10; Ex. 6, para. 30; Tr. pp. 76, 78 and 134.

[42] Tr. p. 136.

[43] Ex. 6, para. 8.

[44] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, FCC 06-189, paragraphs 14, 17 (released March 26, 2007).

[45] Ex. 6, para. 8.

[46] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("Merger Order"); Tr. p. 93.

[47] Ex. 1, p.12; Tr. p. 93.

45. AT&T attempts to implement interconnection agreements among all carriers in a consistent manner and uses “Accessible Letters” to communicate those policies to the individual carriers.[48]

46. AT&T sent an Accessible Letter dated November 16, 2007, to Sprint indicating that it would extend expired interconnection agreements for three years from the date of the request for ICAs expiring prior to January 15, 2008, or from the “initial” expiration date of the ICA if it expired on January 15, 2008, or later.[49]

47. AT&T chose the January 15, 2008 date for its convenience and in order to settle disputes.[50]

48. AT&T could have chosen a different deadline.[51]

49. Also in November 2007, Sprint asked to port its Kentucky ICA to each of the states in AT&T’s 13-state region, including Missouri, pursuant to Merger Commitment 7.1.[52]

50. Sprint filed a complaint at the Commission against AT&T on November 28, 2007, alleging that AT&T refused to port a Kentucky ICA that Sprint had with BellSouth (the "Kentucky ICA") under Merger Commitment 7.1.[53]

51. The Commission dismissed the Complaint stating that the Complaint was beyond the Commission's jurisdiction.[54]

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[48] Tr. pp.138-139; Ex. 3NP, p. 14.

[49] Ex. 6 at Exhibit 11.

[50] Tr. pp. 138-139.

[51] Tr. p.115.

[52] Ex. 5, p. 3; Ex. 6, para. 25.

[53] File No. TC-2008-0182.

[54] File No. TC-2008-0182, *Order Granting Motion to Dismiss*, p. 6.

52. After a red-lined version of the Kentucky agreement was provided to Sprint by AT&T in February 2008, the parties began meeting twice weekly to negotiate the terms of the Kentucky agreement.[55]

53. Sprint then sent a request for negotiations of a new interconnection agreement to AT&T on June 30, 2008.[56]

54. The June 30, 2008 letter requested that the parties utilize the Kentucky ICA as the starting point for negotiations.[57]

55. The June 30, 2008 letter was received by AT&T on July 1, 2008.[58]

56. AT&T responded in a letter dated July 16, 2008. AT&T acknowledged Sprint's request for negotiations under the Act.[59]

57. AT&T's July 16, 2008 letter (signed by Ms. Allen-Flood)[60] rejected Sprint's request to utilize the Kentucky ICA as the starting point for negotiations and instead offered to utilize its template CLEC and wireless agreements as a starting point for negotiations.[61]

58. The July 16, 2008 letter from Ms. Allen-Flood to Mr. Broughton states, "Moreover, given that the parties will be negotiating under Section 252 of the Act, each party is free to offer *any* language and take *any* position it sees fit subject to its statutory duty to negotiate in good faith."[62]

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[55] Ex. 5. p. 3.

[56] Ex. 6, para. 18 and Exhibit 3; Ex. 5, p. 3.

[57] Ex. 6 at Exhibit 3; and Ex. 5, p. 4.

[58] Ex. 6 at Exhibit 4.

[59] Ex. 6 at Exhibit 4; and Ex. 5, p. 4.

[60] Tr. p. 79.

[61] Ex. 6 at Exhibit 4; and Ex. 5, p. 4.

[62] Tr. p. 79; Ex. 6 at Exhibit 4 (emphasis added).

59. The July 16, 2008 letter also included a footnote stating, "If Sprint would like to commence negotiations pursuant to its *existing* Missouri interconnection agreements, AT&T Missouri is willing to do so in accordance with Merger Commitment 7.3."[63]

60. Sprint rejected AT&T's alternative offer to extend its Missouri ICAs under Merger Commitment 7.3 and again requested to use the Kentucky ICA as a starting point in negotiations.[64]

61. In a letter dated September 2, 2008, AT&T agreed to use the red-lined Kentucky ICA as a starting point.[65]

62. From February 2008 through November 2008, Ms. Allen-Flood for AT&T and Mr. Broughton for Sprint continued to negotiate face-to-face regarding the red-lined Kentucky ICA. In addition, the two negotiators included subject matter experts as required in the meetings. Outside of the negotiation meetings, each negotiator met with his or her companies' internal experts regarding outstanding issues.[66]

63. Many issues were resolved during the course of negotiations, though no ICA for Missouri was finalized.[67]

64. By the time the petition for arbitration was filed on December 5, 2008, Sprint still did not have a final approved interconnection agreement in any state where it attempted to port the entire Kentucky ICA pursuant to Merger Commitment 7.1.[68]

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[63] Ex. 6 at Exhibit 4, footnote 1 (emphasis added).

[64] Ex. 6 at Exhibit 5; and Tr. pp. 31-32.

[65] Ex. 6 at Exhibit 6.

[66] Ex. 5, p. 4-5.

[67] Ex. 5, p. 5; Tr. p. 84.

[68] Ex. 6, para. 25.

65. Frustrated by the lack of progress with the Kentucky agreement and faced with the short remaining duration of that agreement, Sprint changed its course late in the negotiation process.[69]

66. A proposed amendment to extend the Missouri ICAs was attached to the petition, but was not exchanged during the negotiations of the companies and there were no negotiations between the companies specific to that document.[70]

67. Although Ms. Allen-Flood had reviewed Sprint's petition for arbitration and its attachments including the proposed amendments, at the hearing she could not say what, if any, changes AT&T would propose to that proposed amendment.[71]

68. AT&T did not file any proposed changes to the amendment or to the provisions of the Missouri ICAs.

69. Interconnection agreements negotiations are done in different ways by different companies.[72]

70. Both parties acknowledged that the usual method of negotiating ICAs is to exchange written acknowledgements as to what parts of the ICA remained in controversy. These sections are usually designated as either "open" or "closed" issues and would ultimately become the decision point list ("DPL").[73]

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[69] Tr. pp. 48-49.

[70] Ex. 6 at Exhibit 12; Tr. p. 42.

[71] Tr. pp. 59-60.

[72] Tr. p. 37.

[73] Ex. 5, p. 5; Tr. pp. 33-37; Tr. pp. 71-72.

71. The only red-lined version of an interconnection agreement exchanged during the negotiations was based on the Kentucky ICA.[74]

72. The parties never agreed to negotiate using the Missouri agreements as a starting point.[75]

73. At the time Sprint requested arbitration, several "open" issues remained in the GT&C [General Terms and Conditions] and Attachment 3—Interconnection attachments to the Kentucky red-lined ICA.[76]

74. One of the items marked as an "open" issue on the sample portion of the Kentucky agreement was the term of the new ICA.[77]

75. Sprint's Missouri ICAs each specify the term for the agreement.[78]

76. Neither Mr. Felton nor Mr. McPhee were aware of any interconnection agreement that omits a provision defining the term of the agreement.[79]

77. Prior to Sprint's arbitration petition being filed, the negotiation meetings were last held on November 11, 2008, November 13, 2008, November 21, 2008, and December 2, 2008.[80]

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[74] Tr. pp. 37-38 and 40-42; Tr. pp.85-86.

[75] Tr. pp. 79-81.

[76] Ex. 5, p. 6.

[77] Ex. 5, pp.5-6.

[78] Ex. 4, p. 2.

[79] Ex. 1, p. 12; Ex. 4, p. 2.

[80] Ex. 5, p. 6.

78. At the November 11th and November 21st negotiation sessions, Mr. Broughton inquired about extending the existing contracts under Merger Commitment 7.4 rather than arriving at a new agreement.[81]

79. Ms. Allen-Flood told Mr. Broughton that her understanding of AT&T's policy with regard to extending the Missouri ICA is that AT&T would not extend it unless the ICA had not yet expired and Sprint's agreements had all expired.[82]

80. Even if Mr. Broughton had continued to ask, AT&T would not have extended the Missouri ICAs because it was not the company policy.[83]

81. The conversations about the extensions between Ms. Allen-Flood and Mr. Broughton were short.[84]

82. Ms. Allen-Flood did not understand that the November 11th and November 21st discussions with Mr. Broughton about extending the Missouri ICA were Section 251/252 negotiations.[85]

83. Ms. Allen-Flood did not tell Mr. Broughton that she did not believe the requests to extend the Missouri ICAs to be Section 252 negotiations. [86]

84. By letter dated November 21, 2008, Sprint notified AT&T that Sprint was electing to utilize Merger Commitment 7.4 to extend its existing Missouri ICAs. Specifically, Sprint stated in its letter:

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[81] Ex. 5, p. 6.

[82] Ex. 5, p. 7; Tr. p. 69.

[83] Tr. p. 141.

[84] Tr. p. 73.

[85] Ex. 5, p. 7.

[86] Tr. p. 74.

> 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.[87]

85. AT&T received the November 21, 2008 letter on November 24, 2008.[88] November 24, 2008, was the Monday before Thanksgiving.

86. At the December 2, 2008 meeting between Mr. Broughton and Ms. Allen-Flood, Mr. Broughton told Ms. Allen-Flood about the November 21, 2008 letter and she confirmed that AT&T had received the letter.[89]

87. AT&T responded to the November 21, 2008 request by letter dated December 5, 2008.[90]

88. In its December 5, 2008 letter, AT&T referred to Sprint's request "to extend the term of their *current* Agreements in the state of Missouri for a period of three (3) years."[91]

89. AT&T refused to honor the request for an extension because the request was received after January 15, 2008 (the deadline set by AT&T in its Accessible Letter).[92]

90. It was not until the filing of rebuttal testimony that AT&T's witnesses began suggesting that Sprint's agreements were not "current." Prior to that time, AT&T had

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[87] Ex. 6 at Exhibit 7.

[88] Ex. 5, p. 8; Tr. 110.

[89] Ex. 5, p. 8.

[90] Ex. 3NP, Schedule 4.

[91] Ex. 3NP, Schedule 4 (emphasis added).

[92] Ex. 3NP, Schedule 4.

maintained that Sprint could not renew its Missouri ICA under Merger Commitment 7.4 because Sprint had missed the Accessible letter deadline.[93]

91. Ms. Allen-Flood is the most credible witness regarding the negotiation meetings because she was present for them. She is not, however, an attorney and therefore her opinion as to whether the negotiations regarding the extension under Merger Commitment 7.4 were Section 251/252 negotiations is somewhat discounted because it requires legal analysis.

92. In Mr. McPhee's opinion, the November 11th and November 21st discussions between Ms. Allen-Flood and Mr. Broughton about extending the Missouri ICA were not Section 251/252 negotiations.[94]

93. Mr. McPhee was knowledgeable in his field and generally credible. However, he is not an attorney, and he was not present at the negotiation sessions when the request to extend the Missouri ICA was made.[95] Therefore, his opinion on this matter is discounted even more substantially that Ms. Allen-Flood's regarding this issue.

Unresolved Issues:

94. Sprint included as the only unresolved issue for arbitration, the issue of whether Sprint should be allowed "to extend its existing interconnection agreements in Missouri for a period of three years"[96] "from November 21, 2008, the date that Sprint

[93] Tr. p. 132.

[94] Ex. 5, p. 7.

[95] Tr. p. 133 ("I wasn't a party to the negotiations, so I don't know what was or was not said.").

[96] Ex. 6, para. 29.

formally requested extension of its existing interconnection agreements under Merger Commitment 7.4."[97]

95. Although Exhibit MGF-3 appears to show some carriers were allowed to extend their agreements even though they had not made the request to do so prior to January 15, 2008, Mr. McPhee did not admit that was the case. Instead, he indicated that there may have been an explanation for the dates in the table provided as Exhibit MGF-3 attached to Mr. Felton's Direct Testimony.[98]

96. Since the implementation of the November 16, 2007 Accessible Letter, more than 650 carriers, including Sprint companies in nine states, have used its provisions to extend their agreements with AT&T.[99]

97. Also, since the November 16, 2007 Accessible Letter, Sprint is the only carrier that AT&T has had a dispute with about the extension of interconnection agreements.[100]

98. AT&T concedes that under the plain language of Merger Commitment 7.4, Sprint Communications would be eligible to have its agreement extended for three years until April 29, 2011, from the April 29, 2008 expiration date of the agreement.[101]

99. The Commission has previously approved a three-year extension under the provisions of Merger Commitment 7.4 between Verizon Wireless and AT&T in Commission File No. IK-2008-0222.[102] That order became effective on February 23, 2008.

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[97] Ex. 6, para. 32 and Exhibit 7.

[98] Tr. pp. 121-122.

[99] Ex. 4, p. 6.

[100] Tr. pp. 138 and 146.

[101] Ex. 3NP, p. 14.

[102] Ex. 6, para. 35.

100. The Verizon Wireless interconnection agreement with AT&T had been in effect since 1997[103] and AT&T agreed to extend the ICA until May 10, 2010.[104]

101. Verizon Wireless requested the extension prior to January 15, 2008.[105]

Resolved Issues and Proposed Agreements:

102. Sprint alleges in its petition that all issues with the exception of the term of the contract are resolved in that they are identical to the terms and conditions of the expired interconnection agreements.[106]

103. Sprint submitted as its proposed interconnection agreement an amendment to be executed by the parties providing for the extension.[107]

104. Sprint's petition also included the single issue as its attached decision point list ("DPL") for the Commission.[108]

105. AT&T did not submit a DPL or propose any alternative language.

106. 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.[109]

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[103] Tr. p. 123.

[104] Ex. 3NP, Schedule 2.

[105] Ex. 1 at Exhibit MGF-3.

[106] Ex. 6, paras. 37 and 40.

[107] Ex. 6, para. 38 and Exhibit 12.

[108] Ex. 6, para. 39 and Exhibit 13.

[109] Tr. p. 17. Opening Statement of Counsel for AT&T: "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. . . .[i]f that were the case, you know, certainly that term, that duration issue would be an arbitrable issue . . . ."

107. AT&T claims that it did not have sufficient time to respond once Sprint indicated that it wanted to extend its Missouri ICAs instead of using the Kentucky ICA.[110]

CONCLUSIONS OF LAW

The Arbitrator has arrived at the following conclusions of law:

General Jurisdiction:

1. AT&T is an incumbent local exchange carrier as defined by 47 U.S.C. § 251(h). AT&T is subject to the Commission's general regulatory jurisdiction pursuant to Chapter 392, RSMo.

2. Sprint Communications is a local exchange carrier as defined in 47 U.S.C. § 3(26). Sprint Communications is subject to the general jurisdiction of the Commission pursuant to Chapter 392, RSMo.

3. Sprint Spectrum and Nextel are wireless carriers under the jurisdiction of the Commission with regard to interconnection agreements pursuant to the provisions of the Act. The Sprint entities are "telecommunications carriers" under the Act.

4. As stated by the Kentucky Public Service Commission in a similar arbitration:[111]

> The Telecommunications Act of 1996 has been interpreted to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements they approve.[112] . . . [Section 251 of the Act] defines the specific interconnection duties of carriers. Under that statute, each carrier has the duty to interconnect directly or

[110] Tr. p. 17.

[111] *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 Kentucky d/b/a AT&T Southeast,* Kentucky PSC Case No. 2007-00180, Order, issued September 18, 2007 ("the Kentucky Arbitration Decision").

[112] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997). (Footnote in the original as footnote 11.)

> indirectly with the facilities or equipment of other carriers. Pursuant to 47 U.S.C. § 252, any party negotiating the terms of an interconnection agreement has the right, in the course of negotiations, to ask a state commission to [arbitrate] . . . any differences arising during negotiations. When presented with a petition for arbitration, Section 252 requires that state commissions ensure that the resolution of disputed issues meets the requirements of Section 251, in addition to establishing rates for interconnection, services, or network element and providing a schedule for the implementation of the terms and conditions of the agreements. Section 251(c)(2)(D) requires an ILEC to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Section 252(b)(4)(B) gives each state commission the power to arrive at its best decision based upon the information provided during the arbitration process. The 1996 Telecommunications Act gives suitable room for the promulagation [*sic*] and enforcement of state regulations, orders, and requirements of state commissions as long as they do not prevent the implementation of federal statutory requirements.[113]

Arbitration Style:

5. Rule 4 CSR 240-36.040(5), "Style of Arbitration," provides:[114]

> An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:
>
> (A) Final offer arbitration shall take the form of issue-by-issue final offer arbitration, unless all of the parties agree to the use of entire package final offer arbitration. . . .

6. Rule 4 CSR 240-36.040(19), "Filing of Arbitrator's Draft Report," provides in pertinent part that, "[u]nless 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."

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[113] *BellSouth Telecommunications, Inc. v. Cinergy Communications, Co.,* 297 F. Supp. 2d 946, 952 (E.D. Ky., 2003). (Footnote in the original as footnote 12.)

[114] This style of arbitration is also popularly known as “baseball arbitration,” in which an arbitrator picks either the player’s or the club’s final offer and decides what a Major League Baseball player’s salary will be when the parties cannot agree to a contract.

7. In this particular matter, the Arbitrator was presented with only one issue: "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?"[115]

Arbitration Standards:

8. In conducting an arbitration, Section 252(c) of the Act provides:

> In resolving by arbitration under subsection (b) of this section 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 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

9. Section 251(b) of the Act provides that local exchange carriers are obligated to negotiate in good faith under Section 252 of the Act in order to fulfill its duties of interconnection with regard to the terms and conditions of agreements necessary for: (1) Resale; (2) Number portability; (3) Dialing parity; (4) Access to rights-of-way; and (5) Reciprocal compensation.

[115] Ex. 6 at Exhibit 13, p.1.

The BellSouth/AT&T Merger Order and the Merger Commitments:

10. On December 29, 2006, AT&T and BellSouth closed their merger. Along with authority to merge, the FCC ordered compliance with commitments made by AT&T and BellSouth and included those commitments as conditions of its approval of the merger.[116]

11. In the Merger Order, Appendix F, under the heading "Reducing Transaction Costs Associated with Interconnection Agreements" the FCC included the following (collectively, the Merger Commitments"):

> 1. The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an 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 ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the 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.[117]
>
> 2. The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.[118]
>
> 3. The AT&T/BellSouth ILECs shall allow a requesting telecommunication carrier to use its pre-existing interconnection agreement as the starting point for negotiating a new agreement.[119]
>
> 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

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[116] Merger Order at para. 227. (“IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order.").

[117] Merger Commitment 7.1.

[118] Merger Commitment 7.2.

[119] Merger Commitment 7.3.

> amendment to reflect prior and future changes of law. During this period, the agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.[120]

12. According to the Merger Order, "[u]nless otherwise specified . . . , the commitments described . . . [in the Merger Order] shall become effective on the Merger Closing Date."[121]

13. The Merger Closing Date was December 29, 2006.

14. In addition, the Merger Commitments remain in effect until June 29, 2010, at which time they "automatically sunset."[122]

Concurrent Jurisdiction:

15. Sprint argues that as a matter of right it can "elect" to have AT&T extend the Missouri ICAs in accordance with Merger Commitment 7.4. Mr. Felton even went so far as to testify 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. A plain reading of the Merger Order certainly appears to give Sprint that right under the terms of the order itself. The Commission's authority to arbitrate, however, does not come from the provisions of the Merger Order.

16. The Merger Order specifically states that enforcement of that order shall lie with the FCC.[123]

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[120] Merger Commitment 7.4.

[121] Merger Order, Appendix F, p. 147.

[122] Merger Order, Appendix F, p. 147.

[123] "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this latter are enforceable by the FCC . . . ." Merger Order, Appendix F, p. 147.

17. The FCC also clearly stated that its Merger Order would not interfere in any manner with the authority of the state commissions to address interconnection agreements.[124] In that manner, the Commission may proceed with arbitration of open interconnection issues under the arbitration authority granted to it in Section 252 of the Act. That authority runs concurrently with the FCC's authority to "enforce" the Merger Commitments.

18. In conducting this arbitration the Commission looks to the FCC's Merger Order for guidance in how to interpret and implement the provisions of the Act with regard to interconnection agreements. In this instance, the Merger Order, and specifically Merger Commitment 7.4, serves as a guide as to what is a reasonable time frame for an extension of the agreements.

Section 252 Negotiations:

19. The Act requires that a request for arbitration be made between the 135th and 160th days of Section 252 negotiations.[125]

20. Sprint's requests for extension of the Missouri ICAs were made between the 135th and the 160th days of negotiation so the request was timely under the Act.

21. Although AT&T argues that Sprint changed course too late in the process for AT&T to respond, AT&T has no right to complain about the timing of the request to extend the agreements. The dates set within the Act for negotiations are somewhat expedited. An arbitration request must be filed within the 135th day to the 160th day period.

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[124] Merger Order, Appendix F, p. 147.

[125] 47 U.S.C. §252(b)(1).

22. Once Sprint had decided to switch course, if it had waited any longer to file the arbitration request, it would have had to start the 135-day negotiation period over again under the provisions of the Act because the arbitration window would have closed. Upon evaluation of their progress and the length of time remaining on the Kentucky agreement, it was reasonable for Sprint to interject the extension during this negotiation period. And, although it was not likely, it was not unreasonable to think that AT&T could have changed its position even at the late point in the negotiations.[126]

23. The November 21, 2008 letter specifically notified AT&T that Sprint believed the extension request to be part of the negotiations.

24. The fact that there was no Missouri red-lined agreement exchanged is given little weight because no such specific negotiating tool is required by law. The methods for negotiation are not prescribed. And, as Mr. Felton pointed out, in this scenario where the parties have been negotiating and litigating about the Kentucky agreement literally for years, and AT&T had already verbally refused to accept the Missouri ICA extension, it would not have made sense to have passed red-lined versions of the proposed amendment to the Missouri ICAs because the entire amendment would have been struck through.[127]

25. Ms. Allen-Flood admitted in her testimony that at the Section 252 negotiation sessions Mr. Broughton brought up the subject of extending the existing ICAs instead of arriving at a new agreement.[128] Ms. Allen-Flood is obviously an experienced negotiator and was very familiar with the positions of these two parties. To have a conversation

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[126] It had taken AT&T from July 1 to September 2 (64 of the 160 days to negotiate) to agree to use the Kentucky agreement as a starting point even though the parties had been negotiating that agreement for months.

[127] Tr. p. 52.

[128] Ex. 5, p. 6.

during negotiation sessions, even a short conversation, about taking a different approach than the approach they had been taking for months should have raised flags. In addition, in the original response letter from Ms. Allen-Flood, she specifically stated that the negotiations were open to *any* issue.[129]

26. Each of the letters between the companies[130] as well as Ms. Allen-Flood and Mr. Broughton's face-to-face conversations[131] were part of the companies' Section 251/252 negotiations.

27. The extension of the Missouri ICAs under Merger Commitment 7.4 was a negotiated issue under Section 251/252 of the Act.

28. Further, 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.[132] The Arbitrator has found that the agreements were negotiated and therefore, even AT&T has admitted that the arbitration of the extensions is appropriate.

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[129] Ex. 6 at Exhibit 4.

[130] Ex. 6 at Exhibits 3-7, and Ex. 3NP, Schedule 4.

[131] The November 11, 2008, November 21, 2008 and December 2, 2008, conversations between Ms. Allen-Flood and Mr. Broughton.

[132] The rule on judicial admissions in opening statements at trial has been enunciated by the Missouri Supreme Court in *McCarthy v. Wulff*, 452 S.W.2d 164, 167(1) (Mo.1970), and *Bayer v. American Mutual Casualty Company*, 359 S.W.2d 748, 753(5) (Mo.1962). Both of these cases have established that where an attorney, in his opening statement, makes a clear, unequivocal admission as to a fact, that admission is binding on his client. Where, however, an attorney merely outlines anticipated proof on one or more issues in the case no binding admission results.

Rawlings v. Young, 591 S.W.2d 34, 38 (Mo. App. E.D. 1979).

Accessible Letter:

29. AT&T next argues that the Missouri ICAs are not eligible for extension because Sprint did not meet the deadline set in the Accessible Letter. The Accessible Letter dated November 16, 2007, was an offer to extend the ICAs under certain conditions set by AT&T.

30. That offer, however, was not made during the negotiation period that is the subject of this arbitration.

31. While AT&T may make offers which expire, it has no authority to alter the terms of the Merger Order through its Accessible Letter by creating a deadline by which carriers must comply or forfeit their rights, if any, under the Merger Commitments. No such arbitrary deadline exists in Merger Commitment 7.4 or in the Act.

32. Instead, the Merger Order provides that carriers must be allowed to extend current, expired or unexpired interconnection agreements until such time the Merger Commitments sunset on June 29, 2010.

33. Therefore, the terms of the Accessible Letter, and Sprint's lack of compliance with those terms, do not alter the Commission's authority in this arbitration.

Expired Agreements:

34. Merger Commitment 7.4 expressly states that current ICAs are to be extended "regardless of whether the initial term has expired."

35. Next AT&T argues that the Missouri ICAs are not eligible for extension because no additional "life" is added to those agreements by extending them three years from the initial expiration dates. According to the terms of each agreement, Sprint

Communications' interconnection agreement expired on April 29, 2008;[133] Sprint Spectrum's wireless interconnection agreement expired on November 30, 2004;[134] and Nextel's wireless agreement expired on November 1, 2003.[135] Therefore, if the ICAs were extended for three years from the expiration date, only the Sprint Communications agreement would have an unexpired term remaining.

36. AT&T concedes that under the plain language of Merger Commitment 7.4, if the Commission were to determine to extend the agreements, Sprint Communications would be eligible to have its agreement extended for three years until April 29, 2011, from the April 29, 2008 expiration date of the agreement.[136]

Terminated Agreements:

37. Section 19 of Sprint Spectrum's ICA provides for termination upon written notice. The ICA also provides, however, for the continuance of the obligations even after an agreement is terminated.

38. Section 28 of Nextel's ICA provides for termination of the ICA upon written notice. This section also provides for survival of the terms and conditions after termination.

39. Section 5 of Sprint Communications' ICA provides for termination upon written notice but the terms shall continue in full force and effect until a successor agreement is in place. In addition, Section 41 of the ICA provides for survival of many of the terms and conditions.

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[133] Ex. 3NP, Schedule 4; Ex. 6 at Exhibit 10, Section 5.2.

[134] Ex. 3NP, Schedule 4.

[135] Ex. 3NP, Schedule 4.

[136] Ex. 3NP, p. 14.

40. AT&T gave written notice of its intent to terminate the agreements via letters dated August 21, 2007.

41. Thus, each of the agreements was terminated by its provisions.

42. Each of the agreements contains a provision that provides for the parties to continue to operate even if the ICAs have been terminated.[137] The agreements also contain a provision requiring an orderly transition toward actually ending the relationship between the companies.

43. Even though the agreements have been "terminated," the companies have continued to operate under the same terms and conditions as those in their terminated agreements and have taken no actions toward actually transitioning services. In addition, AT&T's witness indicated that AT&T did not intend to stop operating under the terms of that agreement until a successor agreement was reached.

Current Agreements:

44. AT&T also argues that the ICAs are not eligible for extension because they have been terminated and thus are not "current." AT&T concedes that under the plain language of Merger Commitment 7.4, Sprint Communications would be eligible to have its agreement extended for three years until April 29, 2011, from the April 29, 2008 expiration date of the agreement.[138]

45. Merger Commitment 7.4 provides for the extension of "current interconnection agreements." The FCC did not explain or define the term "current interconnection

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[137] Sections 19.2.10 and 19.9.1 of the Sprint Spectrum ICA; Sections18.2 and 18.8 of the Nextel ICA; Sections 5 and 41 of the Sprint Communications ICA. The ICAs are attached as Exhibits 8, 9, and 10 of the Petition for Arbitration (Hearing Exhibit 6).

[138] Ex. 3NP, p. 14.

agreement."[139] Thus, the Arbitrator looks to the plain meaning of the word "current." When used as an adjective, "current" is defined as: "a. Belonging to the present time. b. Being in progress now."[140]

46. The companies are presently operating under all of the terms and conditions of the expired and terminated Missouri ICAs. Under the plain meaning of the words, the parties are operating under "current" agreements and it is those agreements which are eligible for extension.

Extension Begins with Request Date:

47. The Merger Order requires AT&T to extend current agreements for three years *regardless* of whether they are expired. AT&T argues that even if there is jurisdiction to arbitrate and even if the Missouri ICAs are "current interconnection agreements," the only date from which to extend the agreements is the initial expiration date. To extend from the initial expiration date, however, does not make sense with regard to agreements whose initial terms expired more than three years ago.

48. The Merger Order specifically applies to "*current* interconnection agreements, *regardless* of whether the initial term has expired."[141] Thus, the extension should be applied on a going-forward basis. The "current" agreement is that under which the companies are presently operating and therefore the extension should be from the formal request date.

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[139] Merger Commitment 7.4. Even AT&T uses the term "current" when referring to the Missouri ICAs in its December 5, 2008 response letter.

[140] The American Heritage® Dictionary of the English Language, Fourth Edition. Retrieved March 26, 2009, from Dictionary.com website: http://dictionary.reference.com/browse/current.

[141] Emphasis added.

49. The written request to extend was made on November 21, 2008. Therefore, the extension should be made from this date.

50. The Arbitrator finds in favor of Sprint on the single issue before her of whether the Missouri ICAs should be extended for a period of three years from the request date.

The Agreements Comply with Sections 251 and 252:

51. The Commission has previously approved a three-year extension under the provisions of Merger Commitment 7.4 between Verizon Wireless and AT&T in Commission File No. IK-2008-0222.[142] That order became effective on February 23, 2008.

52. The Commission has previously approved each of these agreements.[143]

53. AT&T did not bring forward any additional language or changes to the proposed amendment put forth by Sprint.

54. The Commission has previously approved the language in the Missouri ICAs as non-discriminatory and as meeting all the other criteria under the Act. There is no evidence in this arbitration that anything has changed in that regard. In fact, the parties continue to operate under all the terms and conditions of the agreements. Therefore, it is determined that an extension from the request date for the Missouri ICAs would also meet all the Section 251 and 251 criteria of the Act.

55. The Arbitrator certifies that a three-year extension from the request date of the terms and conditions of the Missouri ICAs meets the requirements of §§ 251 and 252 of the Act.

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[142] Ex. 6, para. 35.

[143] File Nos. TK-2004-0180, TO-99-149, TK-2005-0309, and TK-2006-0044.

ARBITRATOR'S DECISION

The Commission has the authority under the Act to conduct arbitrations of negotiated issues as set out in Sections 251 and 252. In the course of correspondence and meetings between sophisticated negotiators, AT&T and Sprint negotiated the issue presented by Sprint: the extension of the Missouri ICAs for a term of three years beyond November 21, 2009. The conversations coupled with the letters certainly sound and look like negotiations. And, as the old saying goes, "If it walks like a duck and sounds like a duck, then it is a duck." These were Section 252 negotiations.

Because these were Section 252 negotiations, the Commission has jurisdiction to arbitrate the issue. Even AT&T admits that if negotiations occurred the agreements must be extended. It then falls to the question of from when does the extension apply?

The Missouri ICAs are long-standing agreements between the parties and they are currently operating under all the terms and conditions of the agreements and intend to continue doing so until successor agreements are in place. Even though the agreements were both expired and terminated, no action was taken to cease operations and the companies have continued to operate under the same terms and conditions and will continue until a new agreement is in place.

Although the FCC reserved enforcement of the Merger Commitments for its own jurisdiction, the Commission can look to the Merger Commitments for guidance and to help it determine if the proposed amendment meets the standards required of interconnection agreements.

Merger Commitment 7.4 requires AT&T to extend current agreements for three years. The Commission has already approved such an extension agreed to by AT&T and

Verizon Wireless. Furthermore, the Commission has previously approved these very agreements and found them to meet the criteria of the Act. In addition, AT&T did not present any contrary agreement language for resolution. Therefore, the Arbitrator finds that an extension of three years of these agreements will also meet the standards for Section 251 agreements.

The final issue is from what date does the extension occur? AT&T argues that even if there is jurisdiction to arbitrate and even if the Missouri ICAs are "current interconnection agreements" the only date from which to extend the agreements is the initial expiration date. To extend from the initial expiration date would not make sense in this instance. If applied to the initial expiration date, two of the agreements would have again expired and there would be no benefit of reducing transaction costs for Sprint in that instance. It has been determined that agreements are "current" because of the fact that they exist now and the parties are operating under them in the present. So it only makes sense to extend the ICAs from the present, *e.g.*, the date of the written request to extend. The written request to extend was made and received on November 21, 2008, and so the three-year extension should begin from that date.

Therefore, the Arbitrator finds in favor of Sprint with regard to the single issue of whether the Missouri ICAs should be extended for a period of three years from the request date. The parties shall file the amendment to their current Missouri ICAs extending the

terms from November 21, 2008, for a period of three years and in compliance with this decision.

Respectfully submitted,

/s/ Nancy Dippell

Nancy Dippell
Arbitrator

Dated at Jefferson City, Missouri,
on this 27th Day of March, 2009.