BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION

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

SPRINT'S RESPONSE TO AT&T MISSOURI'S MOTION TO DISMISS

Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively, "Sprint") files its Response to Southwestern Bell Telephone Company d/b/a AT&T Missouri's ("AT&T") Motion to Dismiss and Motion for Expedited Treatment filed on December 30, 2008.

I. Introduction and Background

1. On December 5, 2008, Sprint filed a Petition for Arbitration ("Petition") pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). Sprint's Petition contains one issue – an extension of its current Interconnection Agreements[1] ("ICAs") with AT&T for an additional three-year term. The three-year extension arises from Sprint's acceptance of an AT&T and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. As part of the grant of authority to complete the merger, the FCC ordered compliance with the Merger Commitments.[2]

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[1] The three Interconnection Agreements have been approved by the Missouri Commission, Sprint Petition, ¶ 29 and Exhibits 8,9, and 10.

[2] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*AT&T/BellSouth*" or "*FCC Order*").

2. 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. The specific condition at issue here is that AT&T pursuant to Merger Commitment number four will "extend its current interconnection agreement, regardless of whether its initial term has expired, for a period up to three years, subject to amendment to reflect prior and future changes of law."[3] This is the offer that AT&T was required to make as a matter of law, and this is the offer that was accepted by Sprint during the parties' statutory 251/252 negotiations for a new agreement.

3. Sprint's Petition makes it clear that the single issue pertaining to the amendment is the establishment of an essential ICA term – the term of the ICA. The specific disputed issue is ***when*** the three-year extension commences. In other words, the sole disputed issue is the extended duration of Sprint's current ICA.

4. On December 30, 2008, AT&T filed a Motion to Dismiss ("Motion") Sprint's Petition. AT&T contends that the Missouri Commission lacks subject matter jurisdiction over Sprint's Petition.[4] AT&T argues that the term of an ICA is not subject to arbitration because it was not an open interconnection issue.[5] AT&T then argues that the Commission is without jurisdiction

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[3] The Merger Commitment representing AT&T's voluntarily offered 3-year ICA extension is identified in the *FCC Order* as "Reducing Transaction Costs Associated with Interconnection Agreements" paragraph No. 4, which expressly provides:

> **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 up to three years*, **subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's 'default' provisions."**
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> ***FCC Order* at p. 150, APPENDIX F (emphasis added).**

[4] AT&T Missouri's Motion to Dismiss and Motion for Expedited Treatment ("AT&T Motion to Dismiss"), p. 1.

[5] *Id.* at p. 4.

to enforce a Merger Commitment Order.[6] AT&T's Motion to Dismiss is simply another effort by AT&T to renege on the promises it made to obtain approval for the BellSouth merger.

5. Under the Act, Missouri law and the unambiguous language of the Merger Commitments, this Commission has jurisdiction to address Sprint's requested three-year extension in this Section 251/252 arbitration proceeding.[7] Sprint's arbitration petition is in direct response to this Commission's order dated June 24, 2008, wherein the Commission dismissed Sprint's complaint seeking to enforce a different merger condition for lack of jurisdiction. In its order, the Commission stated:

> Any jurisdiction the Commission has to resolve this dispute is found in federal law, not state law. *Federal law allows the Commission to arbitrate open interconnection issues*, to approve interconnection agreements, to reject interconnection agreements, and to interpret and enforce an interconnection agreement it has approved.[8]

6. Now that Sprint has done precisely what this Commission said needed to be done – seek Commission resolution of an open interconnection issue, the term of the ICA -- AT&T remarkably still claims that the Commission has no jurisdiction over this issue.

7. In response to AT&T's Motion,[9] Sprint asserts the following:

1) State commissions in general, and the Missouri Commission in this immediate proceeding, have the authority to enforce interconnection-related Merger Commitments. The FCC and this Commission have *concurrent* statutory jurisdiction under the Act and federal law

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[6] *Id.* at p. 8.

[7] 4 CSR240-36.040

[8] *Sprint Communications Company, L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. v. Southwestern Bell Telephone Company d/b/a AT&T Missouri,* Case No. TC-2008-0182, Order Granting Motion to Dismiss, June 24, 2008, p. 6. (Two Commissioners filed a persuasive dissenting opinion to that Order asserting that the Missouri Commission did have jurisdiction over all interconnection-related disputes).

[9] To the extent that any further response than what is set forth within may be deemed necessary to alleged facts contained in AT&T's Motion, Sprint denies all such AT&T alleged facts except to the extent otherwise expressly admitted within.

over AT&T's interconnection-related Merger Commitments. This Commission has jurisdiction pursuant to both the Act and Missouri law to arbitrate the provision in an ICA provision that expressly establishes ***when*** the three-year extension of the parties' existing ICA commences;

2) The Merger Commitments constitute a standing offer of interconnection-related terms. During the parties' statutory Sections 251/252 negotiations, Sprint accepted AT&T's interconnection-related offer that any requesting telecommunications carrier could extend its current ICA for three years; and,

3) Pursuant to Section 252 and Missouri law, Sprint filed its arbitration petition with the Missouri Commission to arbitrate an open issue between it and AT&T - the sole issue being a three-year extension to the existing ICA between Sprint and AT&T. Since the three-year extension is a standing offer from AT&T that can be accepted at any time, it is automatically an open issue that can be arbitrated. Moreover, the facts in Sprint's Petition and in AT&T's Motion demonstrate that the term of the proposed interconnection agreement was negotiated between AT&T and Sprint. Sprint sought a three year extension of its current ICA and AT&T rejected the request.[10]

8. For the reasons stated above and explained in greater detail below, Sprint respectfully requests that the Commission deny AT&T's Motion in its entirety and arbitrate the issue presented before it in Sprint's Petition.

II. This Commission has Authority to Enforce Federal Law that Creates Obligations Related to Interconnection

A. State Commissions have Jurisdiction over Interconnection-Related Merger Conditions

[10] Sprint Petition for Arbitration, ¶¶ 2, 26,29, 32, 33, 39, 40; AT&T Motion to Dismiss, p. 3 ("AT&T Missouri, however, had orally indicated to Sprint that it did not believe that Sprint's Missouri agreement was eligible for extension under the terms of FCC Merger Commitment 7.4.")

9. The simple fact is that AT&T is once again attempting to duck its obligations under the Merger Commitments. This Commission has authority under both federal and state law to extend the existing ICA for the three years sought in this arbitration. The fact that Sprint's right to extend its ICA three years emanates from the *FCC Order* does not divest this Commission of its Section 252 jurisdiction, and its jurisdiction under Missouri law to interpret and implement Sprint's interconnection rights. The FCC clearly recognized in Appendix F of its Order that it has no authority to alter the states' *concurrent* statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments. The FCC stated:

> ***It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments***, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.[11]

10. The *FCC Order* reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for arbitrating, finalizing and implementing a dispute between the parties over a now required 3-year interconnection extension amendment.

11. The Commission should note that the language from Appendix F was not part of the proposed Merger Commitments as filed by AT&T with the FCC via Mr. Robert Quinn's December 28, 2006 letter – it was *specifically added by the FCC*. This language serves the obvious purpose of recognizing that the Act is designed with dual authority for both the states and the FCC. The *FCC Order* reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for arbitrating, finalizing and implementing a dispute between the parties over interconnection issues.

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[11] *FCC Order* at p. 147, Appendix F (emphasis added).

12. The *FCC Order* approving the Merger Commitments is no different than any other FCC Order that establishes, clarifies or interprets interconnection-related obligations. The fact that this Order stems from the merger approval does not reduce its applicability to interconnection agreements.[12] State Commissions routinely enforce FCC Orders pertaining to interconnection-related matters and AT&T's attempt to cast this *FCC Order* in a different light is absurd. It is no different than implying that the FCC's Local Competition Order couldn't be enforced by the State Commissions.

13. In fact, the FCC has repeatedly and expressly recognized in its merger orders that adoption of merger conditions does not limit the authority of the states to impose or enforce requirements, which can even go beyond FCC-required conditions.[13] The FCC not only expects the states to be involved in the ongoing administration of interconnection-related merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-related disputes pursuant to § 252. For example, in the *GTE/Bell Atlantic* merger the FCC stated:

> Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. **Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.**[14]

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[12] AT&T cites to the *NuVox* case for the proposition that merger orders cannot be interpreted by the Missouri Commission (AT&T Motion to Dismiss, p. 9). However, that proceeding did not involve a specific interconnection agreement dispute as in the instant case.

[13] See, *In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control,* CC Docket No. 98-184 (Adopted: June 16, 2000, Released: June 16, 2000) ("GTE/Bell Atlantic") at ¶ 254; In the Applications of Ameritech Corp. and SBC Communications, Inc., For Consent to Transfer Control, CC Docket No. 98-141 (Adopted: October 6, 1999, Released: October 8, 1999) ("Ameritech/SBC") at ¶ 358.

[14] GTE/Bell Atlantic at ¶ 348 (emphasis added).

14. Regarding implementation of the merged firm's interconnection-related "Most-Favored-Nation" and "Multi-State Interconnection and Resale Agreements" commitments, the FCC also made it clear that "[d]isputes regarding the availability of an interconnection arrangement . . . shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable."[15]

15. Case law subsequent to the *GTE/Bell Atlantic* and *Ameritech/SBC* merger also finds that state commissions have continuing, concurrent jurisdiction to enforce interconnection-related merger conditions pursuant to Section 252. In *Core Communications*,[16] CLECs filed a complaint action against SBC at the FCC over alleged violations of *Ameritech/SBC* merger conditions. Ironically, in that case, SBC (the predecessor to AT&T) asserted that *the FCC* lacked jurisdiction to hear the complaint under Sections 206 and 208 of the Act on a theory that the state's authority under Section 251 and 252 overrode the FCC's Section 206 and 208 enforcement jurisdiction. The FCC determined that it also had 206 and 208 enforcement authority (as opposed to finding that only the FCC had enforcement authority) and, in her concurring opinion, then Commissioner Abernathy stated:

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[15] *Id.*, at "Conditions for Bell Atlantic/GTE Merger", Section IX. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements ¶¶ 30, 31(a), 31(b), 32 and Section X. Multi-State Interconnection and Resale Agreements ¶ 33; *see also, Ameritech/SBC* at "Appendix C CONDITIONS", Section XII. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements ¶¶ 42, 43, Section XII. Multi-State Interconnection and Resale Agreements ¶ 44, and XVIII. Alternative Dispute Resolution through Mediation ¶ 54 ("Participation in the ADR mediation process established by this Section is voluntary for both telecommunications carriers and state commissions. The process is not intended and shall not be used as a substitute for resolving disputes regarding the negotiation of interconnection agreements under Sections 251 and 252 of the Communications Act, or for resolving any disputes under Sections 332 of the Communications Act. The ADR mediation process shall be utilized to resolve local interconnection agreement disputes between SBC/Ameritech and unaffiliated telecommunications carriers at the unaffiliated carrier's request").

[16] *In the Matter of Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 2003 FCC Lexis 2031 (2003) (*"Core Communications") vacated and remanded on other grounds,* 407 F.3d 1223 (U.S.App.D.C. 2005) (vacated for further proceedings in which Commission may develop and apply its interpretation of the conditions under which CLECs may waive specified merger rights).

> This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe that there are significant limitations on the circumstances in which complainants will actually be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.
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> ... as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement – its change of law provisions, for example – likely would foreclose any remedy under section 208.[17]

16. Similarly, in *Ameritech ADS*, in the context of granting "Alternative Telecommunications Utility" certification to a post-merger *Ameritech/SBC* affiliate, Commissioner Joe Mettner found it necessary to issue a concurring opinion to the Wisconsin Public Service Commission's ("WPSC") decision in order to address statements made by a dissenting Commissioner in light of the FCC's *Ameritech/SBC* merger order:

> It is important that the public not be left with inaccurate statements concerning the extent, if any, to which FCC action in merger cases alters, modifies or preempts the federal statutory scheme of shared responsibility between the state commissions and the FCC over matters relating to opening local exchange markets to competition and the monitoring of the terms and conditions of interconnection agreements entered into by the ILEC's with competitors.
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> It is fundamental to the scheme of shared regulation found in the Telecommunications Reform Act of 1996 that state commissions and the FCC preserve their respective spheres of authority to ensure that the general obligations of ILEC's to provide nondiscriminatory interconnection features to requesting entities, and that the states retain a particularly important role in the review and approval of interconnection agreements. 47 U.S.C. §§ 251(c) and (d), 252(e).
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[17] *Core Communications* at page 17.

> The Merger Order simply doesn't stand as any valid extra-jurisdictional reconfiguration of state v. federal authority in these matters, as the FCC has been careful to indicate in its own Merger Order.
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> ... it may well be true, as the dissent has noted, that the FCC in some sense has "final enforcement authority" over issues concerning SBC/Ameritech's OSS, to the extent that the FCC may preempt any state commission failing to fulfill its responsibilities under 47 U.S.C. 252 in reviewing interconnection agreements. It is not true, however, that the Merger Order does anything (as indeed it may not) to alter the primary authority of state commissions in review of interconnection agreements, and the terms and conditions of same.[18]

17. Based on the foregoing, it is apparent that not only do the states continue to retain 251-252 authority over disputes regarding interconnection-related merger conditions in an FCC order, but also that the FCC itself has expressed a belief that even its complaint enforcement authority may be considered secondary to the states with respect to such disputes.

18. Considering the former SBC's post-merger action in the *Core Communications* case (*i.e.*, contending the FCC lacked enforcement jurisdiction over a merger condition complaint), the language relied on by AT&T merely serves to make it clear that the FCC's enforcement authority remains an *available* avenue as opposed to the *exclusive* avenue to address any AT&T interconnection-related Merger Commitment violations. Appendix F does not contain, nor could it, any provision that even attempts to divest the states of their jurisdiction over interconnection-related merger commitment disputes and vest *exclusive* jurisdiction over such disputes in the FCC.

19. Indeed, when the FCC's Wireline Competition Bureau faced an issue similar to the one raised by AT&T's Motion, it relied upon its authority pursuant to § 252(e)(5) to act in the stead

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[18] *Petition of Ameritech Advanced Data Services of Wisconsin, Inc. for Authorization to Resell Frame Relay Switched Multimegabit Data, and Asynchronous Transfer Mode Services on an Intrastate Bases and to Operate as an Alternative Telecommunications Utility in Wisconsin; Investigation into the Digital Services and Facilities of Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin),* Final Decision and Certificate, 2000 Wisc. PUC Lexis 36 (January, 2000) *("Ameritech ADS").*

of a state commission in arbitrating interconnection agreements, and not upon its authority as a Bureau of the FCC, in resolving the issue. In the *GTE/Bell Atlantic* merger order, the merged firm was required to "offer telecommunications carriers, subject to the appropriate state commission's approval, an option of resolving interconnection agreement disputes through an alternative dispute resolution mediation process that may be state-supervised."[19] Subsequently, the Wireline Competition Bureau arbitrated the terms of interconnection agreements between Verizon and the former WorldCom, Inc. and former AT&T Corp. when the Virginia Corporation Commission declined to do so.[20]

20. In the *WorldCom Virginia Arbitration,* Verizon and WorldCom disagreed concerning the dispute resolution provision to be included in their arbitrated interconnection agreement. WorldCom contended that a sentence proposed by Verizon should be deleted in order to make clear that the alternative dispute resolution procedure required by the *GTE/Bell Atlantic* merger condition remained available to WorldCom, while Verizon contended that the Bureau, acting as a Section 252(b) arbitrator, lacked the authority to require the inclusion of an arbitration provision in the interconnection agreement. The Bureau disagreed, ruling that "[t]he Act gives us broad authority, ***standing in the shoes of a state commission,*** to resolve issues raised in this proceeding."[21] Indeed, the Bureau found that failing to give effect to the merger condition when arbitrating an interconnection agreement "would essentially modify that Commission order, which we cannot do . . . ."[22] This Commission has no more authority to modify the

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[19] GTE/Bell Atlantic at ¶ 317.

[20] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration,* DA-02-1731, CC Docket No. 00-218 *et al.,* (Adopted July 17, 2002; Released July 17, 2002) ("WorldCom Virginia Arbitration").

[21] WorldCom Virginia Arbitration at ¶ 703.

[22] *Id.* at ¶ 702.

AT&T/BellSouth merger conditions than the Wireline Competition Bureau had to modify the *GTE/Bell Atlantic* merger order. Like the Wireline Competition Bureau when it was arbitrating an interconnection agreement under § 252 on behalf of a state commission, this Commission must interpret and apply the merger conditions in order to resolve the issue in this arbitration.

21. The unambiguous language of Appendix F and the history of other merger conditions make clear that this Commission has concurrent jurisdiction to enforce and interpret interconnection agreements based on AT&T's merger commitments. In addition, as described below, the Act also gives this Commission jurisdiction to arbitrate the three-year extension.

B. The Telecommunications Act Allows this Commission to Exercise Jurisdiction Over Interconnection Issues

22. The FCC has delegated authority to State Commissions over interconnection-related issues pursuant to Sections 251 and 252 of the Act. Once an interconnection agreement is finalized, it must be submitted to the State Commission. Section 252(e)(1) of the Act literally requires a State Commission to approve or reject an interconnection agreement like the one at issue in the present case:

> (e) Approval by State commission.
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> (1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

The Commission's authority is clear. Federal law requires that it must approve any interconnection agreement submitted by Sprint and AT&T before it is enforceable.

23. Notably, the Commission already has exercised its authority of approving interconnection agreements to enforce the promise made by AT&T to extend existing interconnection agreements for three years. In Case No. TC-2008-0150, Verizon Wireless entities filed a complaint against AT&T Missouri seeking the Commission to enforce Merger Commitment 7.4

relating to AT&T's promise in the Merger Commitments to extend existing interconnection agreements for a period of three years. AT&T initially resisted Verizon Wireless' efforts but eventually relented and agreed to extend the subject interconnection agreements. The Commission approved the amendment in Case No. IK-2008-0222 on February 13, 2008 and the Order became effective on February 23, 2008.

24. The Commission's Order Directing Filing of February 26, 2008 in Case No. TC-2008-0150 explains that the Commission's approval of the interconnection agreement amendment in Case No. IK-2008-0222 makes the Complaint case moot. *Therefore, the Commission already has exercised its authority in approving an interconnection agreement entered into as a result of the Merger Commitments.* The Missouri Public Service Commission acted as it is required under 47 U.S.C. § 252(e). The Commission must similarly exercise its jurisdiction here to adjudicate the dispute submitted in this arbitration proceeding and then approve it as required under federal law.

25. The Commission must reject AT&T's Motion to Dismiss. Otherwise, carriers will be left with no recourse before a state commission to enforce interconnection-related disputes arising out of Merger Conditions.

IV. The Three year Extension Is an Issue Subject to Arbitration

A. Interconnection-Related Merger Conditions Can Be Arbitrated

26. The Telecommunications Act dictates the jurisdiction of this Commission to arbitrate interconnection-related issues. The *FCC Order* approving the AT&T/BellSouth merger created a standing offer by AT&T on certain interconnection-related conditions. One of those conditions is the three-year extension of a party's current ICA. It is this extension offer, which Sprint accepted and AT&T refuses to implement, that is the subject of this arbitration.

27. To be clear, Sprint does not believe that it should be required to seek arbitration in order

to obtain the benefits of the Merger Commitments. If the Merger Commitments have any benefit at all, they must provide rights beyond those that already exist. Sprint is entitled to seek arbitration against AT&T even without the existence of the Merger Commitments. Enforcement of the Merger Commitments through the arbitration process appears to defeat the purpose of those conditions.

28. Sprint's arbitration petition, however, is in direct response to this Commission's order dated June 24, 2008, wherein the Commission dismissed Sprint's complaint for lack of jurisdiction. In its order, the Commission stated:

> Any jurisdiction the Commission has to resolve this dispute is found in federal law, not state law. *Federal law allows the Commission to arbitrate open interconnection issues*, to approve interconnection agreements, to reject interconnection agreements, and to interpret and enforce an interconnection agreement it has approved.[23]

29. Now that Sprint has done precisely what this Commission said needed to be done – file an arbitration under Section 251/252 and Missouri Rule 240 CSR 36.040 and seek Commission resolution of an open interconnection issue, the term of the ICA -- AT&T remarkably still claims that the Commission has no jurisdiction over this issue.

30. Under Missouri law, a party may petition for arbitration if it entered into a negotiation pursuant to sections 251 and 252 of the Act.[24] This is the exact type of negotiation Sprint is engaged in with AT&T, and it is therefore appropriate for this Commission to exercise jurisdiction over this issue. Doing so would also follow the precedent of other state commissions.

31. When Sprint asked the Kentucky Public Service Commission to arbitrate this same issue,

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[23] *Sprint Communications Company, L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. v. Southwestern Bell Telephone Company d/b/a AT&T Missouri,* Case No. TC-2008-0182, Order Granting Motion to Dismiss, June 24, 2008, p. 6.

[24] 4 CSR 240-36.040.

the KPSC asserted its jurisdiction over the matter. The KPSC held that the merger commitments gave it jurisdiction to extend the existing interconnection agreement between AT&T and Sprint.[25] The KPSC recognized that although "[t]he FCC may have created and issued its merger Order . . . it did not restrict the rights of state commissions to review, interpret, and apply the meaning of that document."[26] The parties' interconnection agreement was extended for three years as a result of the KPSC's ruling, and the resulting ICA was filed with and approved by the KPSC under Section 252.[27]

32. In AT&T's citation to a Florida Public Service Commission (FPSC) ruling dismissing a Sprint arbitration proceeding,[28] AT&T failed to disclose that the FPSC dismissed that proceeding because of an issue with Sprint's pleading rather than on the merits of AT&T's argument.[29] In fact, the FPSC recognized that it did not "suggest that interpreting and enforcing the Merger Commitments are off limits to us in all circumstances. There may be situations in which such interpretation and enforcement are inextricably intertwined with determining matters normally subject to [its] jurisdiction and thus permissible."[30]

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[25] *In the Matter of: Petition of Sprint Communications Company, L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection With BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast,* Before the Kentucky Public Service Commission, Order, Case No. 2007-00180 at 16 (Sept. 18, 2007).

[26] *Id.* at p. 8.

[27] *In the Matter of: Petition of Sprint Communications Company, L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection With BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast,* Before the Kentucky Public Service Commission, Order, Case No. 2007-00180 (Nov. 7, 2007).

[28] AT&T Missouri's Motion to Dismiss, p. 7.

[29] *In re: Petition of 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*, Before the Florida Public Service Commission (Florida Proceeding), Order granting Motion to Dismiss, Docket No. 070249-TP at 5(Aug. 21, 2007).

[30] *Id.*

33. After the FPSC dismissed Sprint's complaint, Sprint filed an amended petition.[31] Shortly after Sprint filed its amended petition, the Kentucky Commission ruled on the merits of the jurisdictional argument, and held that it had jurisdiction under the Merger Commitments to extend Sprint's existing interconnection agreement with AT&T by three years. Following the Kentucky decision, AT&T agreed to allow Sprint to extend its existing interconnection agreement in Florida, making the amended proceeding moot. The extended ICA was submitted to the FPSC and the FPSC, under its Section 252 authority, approved it on January 29, 2008.[32]

B. Under the Telecommunications Act, the Three Year Extension is an Open Issue Subject to Arbitration

34. Sprint in accordance with the Telecommunications Act asks this Commission to arbitrate an "open issue" between it and AT&T.[33] Sprint asks this Commission to arbitrate an open issue – the extension of its existing interconnection agreement with AT&T. AT&T acknowledged in its July 16, 2008, letter that the parties were engaged in negotiations under Sections 251 and 252.[34]

35. One of the most important elements of an interconnection agreement is its term. The fact that the term of an ICA is not listed as an obligation or duty under Section 251 does not mean that it is not an open interconnection issue. The term of the ICA is no different than other general contractual provisions that are necessary to fulfill basic contract principles. That Sprint has not presented any other open issues for arbitration regarding UNEs, interconnection terms and conditions or intercompany compensation, cannot be used to remove the Commission's jurisdiction over determining the appropriate term of the ICA.

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[31] Florida Proceeding, supra Note 27, Amended Petition (October 16, 2007).

[32] Florida Proceeding, Order Approving Amendment.

[33] 47 U.S.C. § 252(b)(1).

[34] *See* AT&T Letter, July 16, 2008, Exhibit 4 to Sprint's Petition; AT&T Motion to Dismiss, p. 3

36. Remarkably, AT&T's argument – boiled down – is that Sprint's one issue arbitration Petition is too simple for the Commission to have jurisdiction. If Sprint had presented more issues for arbitration, the Commission would have jurisdiction. The fallacy of that argument is readily apparent. The Commission has jurisdiction under Section 252(b)(1) of the Act and 4 CSR 240-36.040 to conduct an arbitration and resolve one or multiple open interconnection issues.

37. AT&T suggests that the Commission does not have jurisdiction to arbitrate this matter because Sprint is not asking the Commission to "select between the parties' competing contractual provisions on an issue."[35] To the contrary, this is exactly what Sprint asks the Commission to do. On one hand, Sprint "[p]ursuant to Merger Commitment 7.4" asks the Commission to "extend its existing interconnection agreements [with AT&T Missouri] for a period of three years."[36] Conversely, AT&T "indicate[s] . . . that it [does] not believe that Sprint's Missouri agreement [is] eligible for extension under the terms of Merger Commitment 7.4."[37]

38. Sprint requests a specific term – a three-year extension of its existing interconnection agreement with AT&T. AT&T, by its own admission, indicated to Sprint that it would not agree to the term requested by Sprint. This arbitration deals precisely with the disputed issue of the term of the ICA and this Commission must determine which party's contractual interpretation should be implemented.

39. AT&T claims that this matter is not subject to the Commission's jurisdiction because it

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[35] AT&T Motion to Dismiss, p. 8.

[36] Sprint Arbitration Petition, ¶ 29.

[37] AT&T Motion to Dismiss, p. 3.

was not subject to the parties' voluntary negotiations.[38] However, AT&T's letter must constitute a manifestation of its intent to voluntarily negotiate the term of the ICA because the term is one of the basic components of any contract. AT&T's rejection of Sprint's request is an admission that the term (and more precisely, the three-year term) was an issue that was discussed.[39] Even if the Commission determines that the Merger Commitment does not constitute a standing offer, it should recognize that the parties did negotiate the three-year extension.

40. AT&T cannot avoid having an open issue by simply pretending that no negotiations took place or by refusing to negotiate. AT&T cites to *Coserv v. Southwestern Bell,* for the proposition that only voluntarily negotiated issues are subject to arbitration.[40] However, in *Coserv*, the CLEC attempted to insert into the arbitration process an issue not normally included in Section 252 arbitrations.[41] The ILEC refused to negotiate the issue[42] and the Fifth Circuit held that the commission did not have jurisdiction to arbitrate the issue.[43] Coserv is not applicable in the instant case, where the issue in dispute – the term of the ICA – is one that is common in every ICA.

41. AT&T did not refuse to negotiate the term of the interconnection agreement. In fact, AT&T informed Sprint that it was willing to "commence negotiations pursuant to [Sprint's] existing Missouri interconnection agreements."[44] Moreover, AT&T by its own admission

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[38] AT&T Motion to Dismiss, p. 7.

[39] *Id.* at p. 3.

[40] *Id.* at p. 7.

[41] Coserv sought to add to the negotiations its proposed rates, terms and conditions for compensated access. 2003 U.S. App. LEXIS 23781, **5 (Compensated access was the term that Coserv used to represent the fees that it charged other providers for the right to access its facilities at various apartment complexes).

[42] *Id.*

[43] *Id.* at **6.

[44] AT&T Letter, July 16, 2008.

"orally indicated to Sprint that it did not believe that Sprint's Missouri agreement was eligible for extension under the terms of FCC Merger Commitment 7.4."[45] Thus, AT&T did not refuse to negotiate the term of the interconnection agreement, but simply disagreed with Sprint's position.

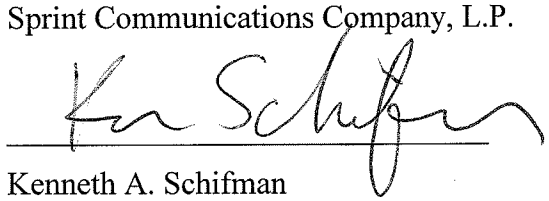
42. The Act and the FCC's interpretation of the Act give this Commission concurrent jurisdiction to arbitrate an interconnection issue related to a merger commitment. This Commission should therefore exercise its jurisdiction to determine whether Sprint can extend its existing interconnection agreement with AT&T by three years.

CONCLUSION

For all of the reasons stated above, Sprint respectfully requests that the Commission deny AT&T's Motion in its entirety and conduct the arbitration pursuant to the schedule agreed to by the parties and the ALJ.

Respectfully submitted on January 16, 2009.

Sprint Communications Company, L.P.



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[45] AT&T Missouri's Motion to Dismiss, p. 3.

VERIFICATION

State of Kansas)
) ss:
County of Johnson)

I, Kenneth A. Schifman, being first duly sworn, state that I am Director and Senior Counsel, State Government Affairs Regulatory for Sprint Nextel Corporation, the Petitioner in the foregoing Response to AT&T Missouri's Motion to Dismiss; that I am authorized to make this Verification on its behalf; that the foregoing Response was prepared under my direction and supervision; and that the contents are true and correct to the best of my knowledge, information and belief.

Kenneth A. Schifman

Sworn and subscribed before me this 16th day of January, 2009.

Notary Public

My commission expires: 9-12-2012

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Response to AT&T Missouri's Motion to Dismiss has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 16th day of January, 2009, to:

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