BEFORE THE
MISSOURI PUBLIC UTILITY COMMISSION

Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp and NPCR, Inc., Complainants,	)))))	
vs,	))	Case No. TC-2008-0182
Southwestern Bell Telephone Company d/b/a AT&T Missouri, Respondent.	)))	

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

Response in Opposition to AT&T Missouri's Motion to Dismiss Complaint

Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp (collectively "Sprint"), by and through their attorneys, hereby responds to AT&T Missouri's Motion to Dismiss Complaint filed on April 14, 2008. The Complaint filed by Sprint on November 28, 2007 ("Complaint") and the accompanying exhibits state claims for which relief can be granted. The Motion to Dismiss filed by AT&T Missouri (the "Motion") is nothing more than policy arguments as to why it should be allowed to choose the forum for resolution of Sprint's Complaint. Sprint's Complaint validly presents claims that Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T") should be required to allow Sprint to port the Sprint/AT&T Kentucky

Interconnection Agreement (the "Kentucky ICA") into Missouri and how AT&T's denial of such violates the Federal Telecommunications Act[1] and Federal Communications Commission's orders that this Commission has authority and jurisdiction to enforce. Accordingly, AT&T's Motion must be denied.

I. Introduction

Sprint filed its Complaint with the Commission seeking an Order requiring AT&T to allow Sprint to port the Kentucky ICA into Missouri. Sprint's election to port the Kentucky ICA is based upon a voluntary "Merger Commitment" made by AT&T to allay concerns of the Federal Communications Commission ("FCC") about the AT&T/BellSouth merger. The FCC's order approving the merger requires compliance with those Merger Commitments,[2] which are set forth in Appendix F of the Merger Order.

The specific merger condition at issue here, found under the heading "Reducing Transaction Costs Associated with Interconnection Agreements," is the requirement that AT&T "*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. . . .*"[3] This, and the other interconnection-related Merger

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[1] Federal Telecommunications Act, 47 USC § 151 *et seq.* (the "Act").

[2] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order at 113, Ordering Clause ¶ 227, WC Docket No. 06-74 (rel. Mar. 26, 2007) ("Merger Order").

[3] Merger Order at 149-150, Appendix F (attached to Mr. Felton's Amended Testimony as Exhibit C-1). This Merger Commitment is set forth in the FCC Order as paragraph 1 under the seventh section titled "Reducing Transaction Costs Associated with Interconnection Agreements" ("Merger Commitment 7.1"). The full text of Merger Commitment 7.1 provides:

Commitments, must be viewed as a standing offer by AT&T with any carrier regarding interconnection under the Federal Telecommunications Act of 1996 ("the Act"); otherwise, they have no meaning at all.

Indeed, an essential purpose of the interconnection-related Merger Commitments were to encourage competition by reducing interconnection costs between a requesting carrier such as Sprint and the new 22-state mega-billion dollar, post-merger AT&T.[4] There was acknowledged FCC concern regarding a merger that created a "consolidated entity – one owning nearly all of the telephone network in roughly half the country –

> 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.

[4] See Merger Order at 169, Concurring Statement of Commissioner Michael J. Copps:

> . . . we Commissioners were initially asked to approve the merger the very next day ***without a single condition*** to safeguard consumers, businesses, or the freedom of the Internet. This is all the more astonishing when you consider that this $80-some odd billion dollar acquisition would result in a new company with an estimated $100 billion dollars in annual revenue, employing over 300,000 people, owning 100% of Cingular (the nation's largest wireless carrier), covering 22 states, providing service to over 11 million DSL customers, controlling the only choice most companies have for business access services, serving over 67 million access lines, and controlling nearly 23% of this country's broadband facilities. (Emphasis in original.)

using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether:"[5]

> "To mitigate this concern, the merged entity has agreed to allow the portability of interconnection agreements ***and to ensure that the process of reaching such agreements is streamlined***. These are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition."[6]

AT&T's offer to port an agreement from another state must remain open for the duration of its Merger Commitment as a matter of law; this standing offer is the one accepted by Sprint. AT&T has, however, refused to cooperate with Sprint to take the steps necessary to complete the filing and approval of the Kentucky ICA. Sprint's Complaint seeks to require AT&T to honor its commitments as they apply to the ICA adoption and approval process here in Missouri.

II. Standard For Motion to Dismiss and Motion For Summary Disposition

AT&T moves to dismiss the Complaint stating that Sprint's Complaint claim falls outside of the Commission's jurisdiction. The PSC has provided the standard of when it can dismiss a complaint in multiple cases.

> In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the standard for review has been clearly established by Missouri's courts as follows:
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> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to

[5] *Id.* at 172 (emphasis added).

[6] *Id.* (emphasis added).

> determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.[7]

As in the Commission's Order denying CenturyTel's motion to dismiss, the Commission here must accept as true Sprint's allegations. In MCI, the Commission stated:

> If the allegations in MCI's complaint are accepted as true, as they must be for purposes of considering the motion to dismiss, it is apparent that MCI has stated a cause upon which the Commission can grant relief. MCI has alleged numerous violations of applicable statutes, regulations, and various interconnection agreements. The Commission has the authority to remedy those violations through the complaint process. CenturyTel's motion to dismiss disputes the truth of MCI's allegations but, as MCI states in its response, those disputes cannot be resolved simply on the pleadings, but rather the Commission must consider the evidence and arguments of the parties.[8]

Sprint here has alleged the Commission's statutory authority to enforce the Merger Commitments made by AT&T. As a regulated utility in Missouri, under RSMo. § 386.250[9] the Commission has authority to review AT&T's failure to abide by the Merger Commitments it made to secure the FCC's approval of its merger. Moreover, under Missouri law, complaints may be made by any corporation "setting forth any act or

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[7] *MCIMetro Access Trans. Svc. Et al. v CenturyTel of Missouri, Inc.*, Missouri Public Service Commission Case No. LC-2005-0080, Order Denying Motion to Dismiss (Nov. 23, 2004) at 3-4, *citing, Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo. App. W.D. 2000).

[8] Id at 4.

[9] § 386.250. Jurisdiction of commission

(2) To all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state,

thing done or omitted to be done by any corporation, person or public utility ..."[10] Sprint here alleges that AT&T has failed to live up to its Merger Commitments and therefore has omitted to implement the Merger Commitments in violation of Missouri law and the Commission rule 4 CSR 240-2.070 implementing RSMo. § 386.390.1.

The Commission has jurisdiction over AT&T and its attempts to shift the venue to the FCC cannot supersede the Commission's general supervisory authority over AT&T and the Commission's ability to hear complaints regarding a jurisdictional company's failure to act. Taking Sprint's allegations as true, as it must under Missouri law at the motion to dismiss stage, the Commission must entertain Sprint's Complaint as it clearly falls within its subject matter jurisdiction.

III. Short Response to AT&T's Extraneous Claims in its Introduction

While attempting to dismiss Sprint's claims due to a lack of Commission jurisdiction, AT&T's Motion raises arguments and issues of fact in its Introduction and Factual Background Section. AT&T argues in this section that the bill and keep and facilities-sharing provisions in the Kentucky ICA are state-specific pricing and therefore cannot be ported into Missouri. AT&T then goes on to argue why, in its view, that the Kentucky ICA cannot be ported by all of the Complainants and why the bill and keep arrangement cannot be ported into Missouri. Without even considering the lack of merit of AT&T's arguments, they must be dismissed as inappropriate for a motion for dismiss as AT&T is arguing issues beyond state jurisdiction.

[10] RSMo. § 386.390.1

First, AT&T suggests that the Kentucky ICA can only be ported after the ICA is modified to comport with the provisions related to state-specific pricing.[11] Sprint disagrees with AT&T's interpretation. The Merger Commitment requires that AT&T make an interconnection agreement available "subject to" state-specific pricing. The intent of the state-specific pricing provision in the Merger Commitments is to insert the state-specific prices into the existing agreement – it doesn't mean that the porting process should be delayed. Rather, the insertion of the state-specific prices should be a straightforward administrative act and the requesting party should not be penalized while the parties dispute whether a provision in the ICA requires modification to conform with state-specific pricing. The Merger Commitments have a limited shelf life and delay limits the benefits purportedly conferred under the Merger Order.

Next, AT&T argues on page 5 of the Motion that the bill and keep provision can only be ported if the traffic balance is relatively equal. First, AT&T immediately jumps to the assumption that bill and keep provision in the Kentucky ICA is a "state-specific" price that must be modified. In fact, the bill and keep and facilities-sharing provisions are not prices or rates, but are arrangements or accommodations that the parties reached in the Kentucky ICA to avoid further disputes. Essentially, AT&T's position is that these provisions in the Kentucky ICA require modification to state-specific pricing simply because AT&T does not want to port these provisions. The Commission must first determine whether AT&T has met its burden of proof to establish that the bill and keep and facilities-sharing provisions do indeed require modification to comport with state specific pricing, or whether they are simply non state-specific arrangements.

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[11] AT&T Motion to Dismiss at 4.

AT&T then argues that the Missouri Commission decision had rejected a bill and keep arrangement because insufficient evidence was submitted on the balance of traffic issue. This case is easily distinguishable as Sprint is not asking the Commission to impose bill and keep arrangements under FCC Rule 51.713.[12] Sprint is simply seeking to enforce Merger Commitment 7.1 where AT&T agreed to port "any entire effective interconnection agreement."

Moreover, to prove its contention, AT&T must demonstrate with facts that traffic between it and the Sprint entities is not roughly balanced. Based on similar cases in other states, Sprint already knows how AT&T calculates traffic balances and Sprint contends that AT&T is not counting all of its intra-MTA traffic for balance of traffic calculations.

AT&T suggests that the examination of traffic balance is relevant for the issue of whether the bill and keep and facilities-sharing arrangements are state-specific. Of course, Sprint disputes that the issue of traffic balance is even relevant in the circumstance where Sprint is seeking to port into Missouri a voluntarily negotiated provision in the Kentucky ICA. While not conceding it is necessary to do so in light of the clear language of Merger Commitment 7.1, Sprint does contend, in fact, that the traffic is roughly balanced between it and AT&T. That, of course, is one major reason the bill and keep provision from the Kentucky ICA is desirable – it prevents disputes between the parties on determining the types of traffic that fall within the definition of reciprocal compensation.

AT&T's arguments regarding balance of traffic require development of facts, which Sprint would be happy to provide, if necessary. But what is crystal clear is that it

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[12] 47 CFR § 51.713.

is inappropriate at the motion to dismiss stage for AT&T to raise arguments regarding the balance of traffic between the parties.

In sum, the Commission should ignore the substantive arguments raised by AT&T in its section entitled "Introduction and Factual Background" as they have no bearing on the jurisdictional basis for the Commission to consider Sprint's Complaint.

IV. The Missouri Commission possesses the requisite authority to enforce Merger Commitments

AT&T argues that the Missouri Commission lacks jurisdiction over Sprint's Amended Complaint because it seeks enforcement of a Merger Commitment. AT&T raises this argument even though the overwhelming authority from other State Commissions is that they can enforce Merger Commitments. The Act, the FCC's Merger Order, and judicial precedent all unequivocally indicate that the Commission has the authority and jurisdiction necessary to provide the relief requested in Sprint's Complaint.

A. THE MERGER ORDER EXPLICITLY GRANTS JURISDICTION TO THE COMMISSION TO ADDRESS SPRINT'S COMPLAINT.

On page 8 of its Motion to Dismiss, AT&T relies on the following quote to conclude that the FCC reserved exclusive jurisdiction over the Merger Commitments to itself: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC . . ."[13] Relying on this language AT&T goes on to state that "the enforcement of federally imposed merger commitments .... remain the exclusive province" of the FCC. This

[13] Merger Order, at 147, Appendix F.

conclusion is inaccurate and AT&T omits important language that contradicts its position.

In its Motion, AT&T omits the following language in the Merger Commitments – which immediately precedes the sentence that AT&T quotes.. With this statement, the FCC made abundantly clear that the states have jurisdiction to interpret and enforce the Merger Commitments:

> "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."[14]

While not strictly necessary, it was good policy for the FCC to clarify that the states are free to enforce the Merger Commitments as the states would be called upon to take actions under the auspices of the merger order in advance of the FCC. As is illustrated by the instant matter, the state commissions would be the first to address Merger Commitments related to interconnection agreements. Accordingly, the FCC made clear, as is evident from the language quoted above, that the states are authorized to enforce the Merger Commitments. Only after making this statement did the FCC clarify that its express authorization for states to enforce the Merger Commitments should not be read to diminish its own authority, but instead affirmed that there is parallel authority between the states and the FCC to enforce the Merger Commitments. AT&T's

[14] *Id.* It should also be noted that the quoted language was not part of AT&T's originally proposed Merger Commitments, as filed with the FCC. This language was specifically added by the FCC for the purpose of recognizing that the Merger Order would be subject to the state commissions' primary jurisdiction over interconnection disputes.

interpretation, which would improperly limit state's authority over the Merger Commitments, is inaccurate.

It also bears noting that the language preserving state authority over merger commitments has previously been found to have exactly that meaning ascribed to it by Sprint. In 2005, the FCC issued an order approving a merger between Verizon Communications, Inc. and MCI, Inc. (the "Verizon/MCI Order").[15] The Verizon/MCI Order contained language that is nearly identical to the language found in the Merger Order. The language in the Verizon/MCI Order, as is the language in the Merger Order, was contained in an appendix to the Order wherein the FCC stated:

> "It is not the intent of these Conditions 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 Conditions, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these Conditions."[16]

This language is identical to the language in the Merger Order save that what are called "commitments" in the Merger Order are called "Conditions" in the Verizon/MCI Order, a distinction of no consequence.

This language explicitly preserves state authority. In separately reviewing the proposed Verizon and MCI merger, the State Corporation Commission of Virginia ("SCC") imposed certain conditions of its own. MCI objected to the SCC's merger conditions alleging, among other things, that the Verizon/MCI Order preempted any action by the SCC. The reviewing court relied on the above quoted language to conclude that "[t]he FCC in its [Verizon/MCI] Order expressly disclaimed any intent to preempt

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[15] *Memorandum Opinion and Order, Verizon Communications, Inc. and MCI, Inc. Applications for Approval and Transfer of Control*, 20 FCC Rcd 18433 (2005).

[16] *Id.* at 18559, Appendix G.

state regulations that are "not inconsistent" with the conditions therein."[17] In further defining the meaning intended by the FCC in the above quoted language from the Verizon/MCI Order, that the District Court stated that

> "the FCC's use of the disjunctive "or" in the above-quoted clause means that it intended the states to have authority over all matters reserved to the states by the Communications Act, as amended, as well as over matters which are not reserved to the states by the Act, but which do appear in the Conditions."[18]

The District Court's interpretation is identical to Sprint's. Any contrary interpretation, such as that urged by AT&T, requires an awkward interpretation of the Merger Order that ignores its plain and obvious meaning. In light of the foregoing, the Commission must conclude that the Merger Order neither restricts nor prohibits the Commission from acting on Sprint's Complaint and granting the requested relief.

B. THE COMMISSION HAS AMPLE JURISDICTION TO HEAR SPRINT'S COMPLAINT PURSUANT TO SECTIONS 251 AND 252 OF THE ACT.

AT&T makes a specious argument when it claims that the Act does not grant the Commission jurisdiction sufficient to grant the relief requested in Sprint's Complaint. According to AT&T, "Section 251 does not delegate jurisdiction on state commissions to do anything," and "Congress did not generally delegate authority over interconnection agreements to state commissions."[19] Contrary to AT&T's statements, it is well settled law that jurisdiction over interconnection disputes is shared equally between the FCC and the states.

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[17] *MCIMetro Access Transmission Serv of Va Inc v Christie*, Civil Action No. 3:06CV740, 2007 US Dist. Lexis 21708 (EDVa March 27, 2007).

[18] *Id.*

[19] AT&T Motion to Dismiss at 7 - 8.

In its first comprehensive review of the Telecommunications Act of 1996, the FCC stated the following about the system of shared jurisdiction the 1996 Act created over interconnection agreements:

> "We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues ... Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. . . . We view sections 251 and 252 as creating ***parallel jurisdiction*** for the FCC and the states."[20]

The FCC's declaration that the Act created *parallel jurisdiction* between the states and itself to assert jurisdiction over interconnection agreements holds as true today as it did when first announced. By defining its jurisdiction as parallel with the state commissions, the FCC indicated clearly that the state commissions are as fully empowered to review interconnection agreements as is the FCC. The system of shared or parallel regulation between the states and the federal government is evident from the case law analyzing the states' role in regulating interconnection between carriers. Interconnection agreements, and disputes over interconnection are typically brought first to state commissions.

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[20] *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15544, para. 83-85 (1996)(emphasis provided, and footnotes omitted)(the "Local Competition Order"), *vacated in part on other grounds, Iowa Utils Bd v FCC*, 120 F3d 753 (8th Cir 1997), *rev'd in part sub nom, AT&T v Iowa Utils Bd*, 525 US 366, 119 SCt 721 (1999).

The FCC has designated areas in which they anticipate that State Commissions have a role, which includes matters relating to interconnection 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.
>
> > (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. Notably, the Commission already has exercised its authority of approving interconnection agreements to enforce a similar merger commitment made by AT&T. 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. 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 FCC did not approve the Verizon Wireless/AT&T interconnection agreement made pursuant to the Merger Commitments. The Missouri Public Service Commission did as is required under 47 U.S.C. § 252(e). The Commission must similarly exercise its jurisdiction here to adjudicate the dispute regarding the porting of the Kentucky ICA and then approve it as it is required to do under federal law.

The AT&T only lightly touches on the issue, casually noting that "it is now generally recognized that state commissions have jurisdiction to interpret and enforce the interconnection agreements they approve under Section 252(e) . . ."[21] Despite AT&T's effort to dilute the Commission's authority, numerous courts have held "that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission."[22] "Indeed, every federal appellate court to consider the issue has determined or assumed that state commissions have the authority to hear interpretation and enforcement actions regarding approved interconnection agreements, despite the Act's silence on that point."[23]

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[21] AT&T Motion to Dismiss at 8, fn 17.

[22] *Core Comm, Inc v Verizon Penn, Inc*, 493 F3d 333, 344 (3d Cir 2007)("Core").

[23] *Id.* at n 7 (*emphasis added*) (*citing, Puerto Rico Tel Co v Telecommunications Reg Bd*, 189 F3d 1, 10-13 (1st Cir 1999); *see also, Bell Atlantic Md, Inc v MCI WorldCom*, 240 F3d 279, 304 (4th Cir 2001), *vacated on other grounds, Verizon Maryland, Inc v Public Serv Comm'n of Md*, 535 US 635, 122 SCt 1753, 152 LEd 2d 871 (2002); *Southwestern Bell Tel Co v Public Util Comm*, 208 F3d 475, 479-80 (5th Cir 2000); *Illinois Bell Tel Co v Worldcom Techs, Inc*, 179 F3d 566, 573 (7th Cir 1999); *Iowa Utils Bd v FCC*, 120 F3d 753, 804 (8th Cir 1997), *rev'd in part on other grounds, Iowa Utils Bd*, 525 US at 385; *Southwestern Bell Tel Co v Brooks Fiber Comm of Ok, Inc*, 235 F3d 493, 497 (10th Cir 2000); *BellSouth Telecomm, Inc v. MCIMetro Access Transmission Servs, Inc*, 317 F3d 1270, 1278 (11th Cir 2003) (*en banc*)).

In addition to the language of the Merger Order and relevant case law analyzing other FCC-approved mergers, federal law clearly establishes that the Commission has parallel jurisdiction with the FCC to resolve interconnection-related disputes, even when such interconnection-related disputes pertain to the application of an FCC-ordered merger condition. Indeed, AT&T's apparently contrary view, if taken to its logical extreme, would make the Merger Commitments completely meaningless.

State commissions have been delegated the authority under Sections 251 and 252 of the Act to address interconnection matters. There is no dispute that Merger Commitment 7.1 imposes an obligation upon AT&T regarding interconnection. Pursuant to Sections 251 and 252, the only reasonable avenue to enforce this Merger Commitment 7.1 is at the state commission with jurisdiction over AT&T's interconnection agreements in that state. Otherwise, the intended beneficiaries of Merger Commitment 7.1 would have no way to enforce their rights.

The fact that Sprint's interconnection right in this matter arises from the Merger Order does not divest the Commission of jurisdiction over interconnection matters in Missouri. In fact, a fair number of, if not most, Section 252 complaints for arbitration under the Act require state commissions to construe the Act, FCC orders and federal court decisions related to both the Act and such orders.[24] It is no longer subject to dispute that state commissions may interpret and apply federal law in the exercise of their jurisdiction in deciding these cases.[25] The Act expressly provides a jurisdictional scheme

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[24] *See, e.g.*, 47 USC § 252(e)(2)(B) (requiring state commission to evaluate interconnection agreement for compliance with both Section 252 and FCC regulations).

[25] *See supra* n 23. *See also*, *Consolidated Comm of Fort Bend Co v Public Util Comm'n*, 497 FSupp2d 836 (WD Tex 2007) (construing 47 USC §§ 251(f) and 153(44)); *Cbeyond Communications of Texas LP v Public Util Comm'n*, Case No. A-05-CA-862-SS (WD Tex 2006); (*unpublished*) (construing Triennial Review Remand Order and associated FCC rules); *Southwestern Bell Tel Co v Public Util Comm'n*, 208 F3d 475 (5th Cir 2000) (construing 47 USC § 251(b)(5)).

of cooperative federalism under which Congress and the FCC have specifically designated those areas in which the state commissions are vested with initial and primary jurisdiction related to interconnection agreements and disputes pursuant to Sections 251 and 252 of the Act. [26]

In this particular dispute between Sprint and AT&T, in proceedings outside Missouri, other state commissions have decided that they do have jurisdiction to enforce Merger Commitments related to interconnection matters. As noted in Sprint's complaint, the Kentucky Public Service Commission has already ruled that it can enforce the Merger Commitments, even though AT&T argued that the state commission lacked jurisdiction.[27] Similarly, on October 16, 2007, the Florida Public Service Commission denied AT&T's motion to dismiss, which was premised on the unsuccessful argument that the Florida commission did not have authority to interpret and enforce the AT&T merger conditions.[28]

The Tennessee Regulatory Authority ruled in a similar manner on October 5, 2007, noting that "[c]onsistent with the concurrent state and federal jurisdiction under the Act, the FCC's language in Appendix F explicitly recognizes that there may be instances in which states may well be faced with interpreting its Merger Order, and specifically, the

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[26] *See, Verizon Corp v FCC*, 535 US 467, 489, 122 SCt 1646, 1661 (2002) (With respect to Congress' passage of the Act, the Supreme Court noted that "[t]he approach was deliberate, through a hybrid jurisdictional scheme").

[27] *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 of Kentucky d/b/a AT&T Southeast*, Case No. 2007-00180, Order (Ky Pub Serv Comm'n Sept. 18, 2007).

[28] *In re Notice of Adoption of Existing Interconnection Agreement between BellSouth Telecommunications, Inc d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company LP, Sprint Spectrum LP, by NPCR, Inc d/b/a Nextel Partners,* Fla PSC Docket No. 070368-TP, and *In re Notice of Adoption of Existing Interconnection Agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company LP, Sprint Spectrum LP, by Nextel South Corp. and Nextel West Corp,* Docket No. 070369-TP, Order Denying Motion to Dismiss (Fla Pub Serv Comm'n Oct 16, 2007).

merger commitments."[29] Consequently, the Tennessee commission ruled that it "possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the voluntary commitments."[30]

In fact, of the nine states in the former BellSouth region that have been presented with the question of jurisdiction over Merger Commitments, only one, Mississippi, has ultimately decided that it did not have jurisdiction to enforce the Merger Commitments as related to the facts of the cases. The Mississippi commission noted, however, that it was not suggesting "that interpreting and enforcing the Merger Commitments are off limits to us in all circumstances as there may be situations in which such interpretation and enforcement would be subject to our jurisdiction."[31]

The State Commissions in the legacy SBC states have continued the pattern of asserting jurisdiction. AT&T has continued to file motions to dismiss on jurisdictional grounds, and no state has divested itself of jurisdiction. In fact, the only two State Commissions to squarely address the issue, Ohio and Kansas, have ruled that they do have authority to enforce the Merger Commitments.[32]

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[29] *In re Petition of Sprint Communications Company LP and Sprint Spectrum LP d/b/a Sprint PCS for Arbitration of the Rates Terms and Conditions of Interconnection with BellSouth Telecommunications Inc d/b/a AT&T Tennessee d/b/a AT&T Southeast*, Docket No. 07-00132, Order Denying Motion to Dismiss, Accepting Matter for Arbitration, and Appointing Pre-Arbitration Officer, at 6 (Tenn Reg. Authority Oct 5, 2007).

[30] *Id.*

[31] *In the matter of NPCR, Inc ("Nextel Partners") Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company, LP, Sprint Spectrum LP,* Docket No. 2007-UA-316, Final Order at 6 (Miss Pub Serv Comm'n Oct 30, 2007).

[32] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L P, Sprint Spectrum L P, Nextel West Corp, and NPCR, Inc v The Ohio Bell Telephone Company d/b/a AT&T Ohio*, Case No. 07-1136-TP-CSS, Finding and Order (Feb 5, 2008)("Ohio Order"); *In the Matter of the Complaint of Sprint Communications LP, Sprint Spectrum LP, Nextel West Corp and NPCR, Inc, Complainants vs Southwestern Bell Telephone Company d/b/a AT&T Kansas*, Docket No 08-SWBT-602-COM, Order Of Presiding Officer Determining Commission Has Jurisdiction To Enforce Merger Commitments (March 12, 2008) ("Kansas Order") (Reconsideration granted on other grounds).

The Ohio Commission explicitly concluded that "the FCC clarified that the states have jurisdiction over matters arising under the commitments."[33] In Kansas, the Presiding Officer "concludes that the FCC did not take exclusive jurisdiction over the Merger Commitments. Rather, if the 'avoidance of doubt' provision was not erroneously placed with the Merger Commitments by the FCC, then the FCC meant only to advise the readers that it stood prepared to enforce the Commitments along with the states."[34]

Despite these rulings, AT&T continues to implausibly assert that state commissions do not have authority over the Merger Commitments.

C. THE COMMISSION NEED NOT DEFER THIS MATTER TO AWAIT ACTION BY THE FCC.

AT&T argues that the Commission should decline to exercise that jurisdiction and defer to the FCC.[35] Sprint acknowledges that AT&T has submitted issues to the FCC related to the Merger Commitments. However, Sprint views AT&T's FCC petition as another tactic in its strategy to avoid compliance with the Merger Commitments. The longer AT&T drags out this process, the longer it can avoid its obligations.

Furthermore, there is no guarantee that the FCC will act in a timely manner, nor that the FCC will not ultimately conclude that the applicable State Commission must decide the issue. Since the Merger Commitments in question are related to interconnection agreements and state-specific issues, the FCC may decide that the issues presented by AT&T are better addressed at the appropriate State Commissions. This Commission has a statutory duty to resolve this dispute. Deferring this matter to the FCC would not allow this Commission control over its ability to resolve this complaint.

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33 Ohio Order at 13.

34 Kansas Order at 13.

35 AT&T Motion to Dismiss at 10-11.

In approving a merger between Bell Atlantic and NYNEX, the FCC imposed nine conditions that were to remain effective for four years following the merger.[36] These nine conditions were set forth in Appendix C of the order approving this merger. The conditions required the merged entity ("Bell Atlantic") to take affirmative steps in negotiations and in certain instances before state commissions regarding interconnection, UNEs, transport and termination, and other matters. Unhappy with what it perceived as failure by Bell Atlantic to implement the sixth merger condition, AT&T (a predecessor to the AT&T named in this Complaint) and MCI separately brought suit against Bell Atlantic before the FCC. The FCC dismissed the case.[37] In its decision the FCC recognized that the Act authorizes the state commissions to resolve intercarrier disputes regarding interconnection.[38] The FCC indicated that its merger order

> "was not independently designed to bypass the statutory procedural framework for ensuring compliance with that methodology under section 252. Complainants' contrary position misconstrues the purpose of the Merger Order and could unnecessarily raise substantial comity concerns."[39]

In short, the FCC announced that its merger order intended to and did rely on the state commissions' statutorily prescribed role as the primary forum for resolution of interconnection disputes. The FCC was wary of superimposing its judgment for that of each of the state commissions for fear of upsetting the process established in the Act and of inaccurate application of state interconnection requirements. MCI appealed. In ruling against MCI, the DC Circuit stated as follows:

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[36] *See, Memorandum Opinion and Order, Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp, Transferee, For Consent to Transfer of Control of NYNEX Corp. and its subsidiaries*, 12 FCC Rcd 19985, 20069-79 (1997).

[37] *Memorandum Opinion and Order, In the Matter of AT&T Corporation v Bell Atlantic*, 15 FCC Rcd 17066 (rel Aug 18, 2000).

[38] *Id.* at 17069.

[39] *Id.* at 17071.

> "At issue are prices for complex network elements and inputs -- and each category would have to be calculated for each of the seven jurisdictions, taking into account the unique circumstances in each location. The Commission's task in adjudicating the merits of MCI's complaint thus would be larger than the task confronting any individual state commission. Contrary to MCI's assertion, there is no great streamlining to be gained should the FCC adjudicate the issue, as it would have to consider the relevant facts on a state-by-state basis too. The FCC is reasonable in its conclusion that these disputes are as readily resolved in the *section 252* process as in a *section 208* complaint."[40]

From the quoted passage it is evident that the proper process for addressing the multi-jurisdictional effects of a merger order is for each State Commission to resolve the effects of the order specific to its own state. Indeed, the FCC recognized that the Act prescribed this methodology, and clarified that it did not intend its merger order to create a bypass from this framework.

If each State Commission deferred to the FCC, as AT&T suggests the Commission should, not only would the Merger Commitments create the very bypass the FCC previously disavowed, but the FCC would need to simultaneously consider twenty-two (22) different sets of prices and performance plans unique to each state. This would be an overwhelming task. For each State Commission, however, the task is far more manageable as each is fully versed in its own state-specific pricing and performance plans and has the more modest task of determining what effects an FCC merger order has in its state only.

But the simple fact is that nothing prevents this Commission from reexamining its determinations regarding the Merger Commitments, if necessary, should the FCC issue a future ruling that might be contrary to this Commission's determination. Delay directly

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[40] *MCI Worldcom Network Servv. FCC*, 274 F3d 542 (DC Cir 2001)(emphasis in original) ("*MCI v. FCC*").

harms Sprint because AT&T will undoubtedly argue that the 42-month "clock" on the effectiveness of the AT&T Merger Commitments pursuant to Appendix F of the AT&T Merger Order is running all the while that AT&T's Petition is pending before the FCC. If this Commission defers to the FCC, then time will most definitely be on AT&T's side, and Sprint may never in practical terms get the benefit of what AT&T promised in the Merger Commitments.

V. Conclusion

Sprint has been attempting to avail itself of the benefits of AT&T's Merger Commitments for months, with AT&T fighting every step of the way. Even after consistently losing its jurisdictional argument, AT&T is still claiming State Commissions have no jurisdiction over anything related to interconnection agreements affected by the Merger Commitments and is still using dilatory tactics to prevent the related benefits from accruing to competitors. Sprint urges the Commission to deny AT&T's Motion to Dismiss, and to expeditiously process its election to port the Sprint/AT&T Kentucky ICA to Missouri for all of the Sprint entities that have requested such in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Complaint has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 24th day of April, 2008, to:

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