

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

|  |   |                       |
|--|---|-----------------------|
| 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.                            | ) |                       |

**STAFF’S BRIEF REGARDING JURISDICTION IN  
RESPONSE TO COMMISSION’S ORDER DIRECTING FILING**

**COMES NOW**, counsel on behalf of the Staff of the Missouri Public Service Commission (“Staff”) and respectfully states the Missouri Public Service Commission (“Commission”) appears to lack jurisdiction to resolve the complaint in the above mentioned case. In support of Staff’s Brief Regarding Jurisdiction in Response to Commission’s Order Directing Filing, counsel for Staff respectfully states as follows:

**Procedural History**

1. On November 28, 2007, Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively “Sprint”) filed a Complaint against Southwestern Bell Telephone Company d/b/a/ AT&T Missouri (“AT&T Missouri”). Sprint petitions this Commission to direct AT&T Missouri to execute an adoption amendment to port in and adopt the interconnection agreement between BellSouth Telecommunications Inc. d/b/a/ AT&T Southeast and Sprint Communications Company L.P. and Sprint Spectrum L.P., as extended and approved in Kentucky (“Kentucky ICA”), in accordance with Merger Commitments made by AT&T Inc., and included in the Federal Communications Commission’s (“FCC”) Merger Order.

*In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, FCC 06-189, 22 FCC Rcd. 5662 (*rel.* March 26, 2007). EFIS Docket #1.

2. On December 10, 2007, Notice Of Complaint was sent by the Commission to AT&T Missouri. EFIS Docket #2.

3. On January 4, 2008, AT&T Missouri requested mediation, to which Sprint consented on January 17, 2008. AT&T Missouri's 30-day time period in which to answer the Complaint was suspended upon the Commission's receipt of the mediation request. EFIS Docket #4.

4. The mediator filed a report on April 8, 2008, stating no settlement was reached between the parties. The tolling of the time period for AT&T Missouri's Answer was ended and the Commission ordered the Answer be filed no later than April 14, 2008. EFIS Docket ##8, 9.

5. AT&T Missouri filed its Answer and Affirmative Defenses on April 14, 2008. EFIS Docket # 10.

6. Additionally, AT&T Missouri filed its Motion To Dismiss Complaint on April 14, 2008. Their main argument stems from Appendix F of the Merger Order, in which AT&T Missouri argues the FCC expressly reserved jurisdiction over the Merger Commitments, citing the language "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC..." EFIS Docket #1, Exhibit A, at 147. However, even if the Commission were to find jurisdiction over the Complaint, AT&T Missouri argues the Commission should decline to exercise its jurisdiction. AT&T Missouri argues "it is essential that the FCC, rather than 22 state commissions, resolve issues relating to the merger commitments in order to ensure a uniform regulatory framework and to avoid conflicting and diverse interpretations of FCC requirements." Additionally, it is

asserted that Sections 251 and 252 of the Federal Telecommunications Act (“Act”) of 1996, 47 U.S.C. §§ 251, 252, are not applicable to this matter, as this proceeding is not an arbitration of an interconnection agreement. Finally, AT&T Missouri notes other commissions which have failed to extend jurisdiction over the same issue presented here. EFIS Docket #11.

7. Sprint filed a Response in Opposition to AT&T Missouri’s Motion to Dismiss Complaint on April 24, 2008. Sprint asserts this Commission’s exercise of jurisdiction is proper, also citing language contained in Appendix F of the Merger Order. Sprint asserts the following language: “[i]t is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.” EFIS Docket #1, Exhibit A, at 147. Additionally, Sprint argues Sections 251 and 252 of the Act creates parallel jurisdiction to review interconnection agreements. Finally, Sprint cites to other commissions which have exercised jurisdiction in the matter before this Commission, and two cases decided by this Commission which Sprint argues are applicable. EFIS Docket #12.

8. On May 5, 2008, AT&T Missouri filed its Reply to Sprint Concerning Motion to Dismiss. AT&T Missouri states that “Complainants have failed to carry their burden of demonstrating that the Commission has subject matter jurisdiction to adjudicate this dispute over the meaning of merger commitments from the FCC’s Merger Approval Order.” Further, AT&T reasserted the arguments presented in its original Motion To Dismiss Complaint. EFIS Docket #14.

### Argument

9. Section 386.390 RSMo (2000) allows a complaint in writing, setting forth any act or thing done or omitted to be done by any.... public utility,.... in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.”

10. The FCC stated the following of the Federal Telecommunications Act of 1996:

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 frame work, 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 section 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.

Sprint’s Response in Opposition to AT&T Missouri’s Motion To Dismiss Complaint at 13, EFIS Docket #12, citing *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). This parallel jurisdiction of the Act may suggest the Commission is empowered to the same extent as the FCC to review interconnection agreements.

11. The Act requires a State Commission to review any submitted interconnection agreement and approve such before it is enforceable. Section 252(e)(1) of the Act provides:

“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.” 47 U.S.C. 252(e)(1) (2006).

12. Sprint entered into an interconnection agreement with BellSouth Telecommunications, Inc., effective January 1, 2001, for the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, and Tennessee. EFIS Docket #1. By Order dated November 7, 2007, the Kentucky Public Service Commission extended the interconnection agreement between Sprint and AT&T for three years from December 29, 2006, known as the Kentucky ICA. EFIS Docket #1, Exhibit B.

13. As part of the AT&T Inc. and BellSouth Corporation merger, voluntary commitments were made and enumerated in the FCC’s Merger Order released March 26, 2007. EFIS Docket #1, Exhibit A at 147.

14. Pursuant to Merger Commitment 4 under “Reducing Transaction Costs Associated with Interconnection Agreements,” “[t]he 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 amendment to reflect prior and future changes of law.” EFIS Docket #1, Exhibit A at 150.

15. Merger Commitment 1 under “Reducing Transaction Costs Associated with Interconnection Agreements” reads:

[t]he 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 agreement 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. (emphasis added).

EFIS Docket #1, Exhibit A, at 149. The language, arguably, allows this Commission to assert jurisdiction over this matter and enter an Order directing AT&T Missouri to execute an adoption amendment adopting the Kentucky ICA.

16. AT&T Missouri quotes in their Motion To Dismiss language from the Merger Order, under “Merger Commitments” of Appendix F, which states “[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC.” EFIS Docket #11. However, as Sprint emphasizes in their Response, the “Conditions” section of Appendix F, which immediately precedes the “Merger Commitments” states “[i]t 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.” EFIS Docket #12.

17. Several other commissions have asserted jurisdiction over the same matter filed in their respective jurisdictions: Tennessee, Ohio, Kansas, South Carolina, and Kentucky.

18. In response to AT&T’s Motion To Dismiss in Tennessee, the Tennessee Regulatory Authority denied the Motion in its Order Denying Motions To Dismiss, Accepting Matter For Arbitration, And Appointing Pre-Arbitration Officer, stating

[t]hat the states have been given a shared role in telecommunications regulation is not in question. Consistent 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 merger commitments. Because the issue in the instant case inextricably links a Section 251 open issue with one of the interconnection merger commitments, the Authority finds that AT&T’s pre-emption argument is not well founded-and under the plain language of the *Merger Order*, which provides that nothing in the voluntary merger commitments are meant to “restrict,

supercede or otherwise alter state...jurisdiction,” the Authority possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the voluntary commitments. (emphasis in original).

*In Re: Petition of Sprint Communications Company L.P.*, Docket No. 07-00132 (2007).

19. In the Finding And Order issued by the Public Utilities Commission Of Ohio, the Ohio Commission stated “at issue is whether a particular interconnection agreement is available for adoption and porting pursuant to a merger commitment approved by the FCC.” Their finding of jurisdiction was based on the Appendix F Conditions of the Merger Order, specifically noting

[a]t the outset, the FCC stated the following: [i]t 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.

*Sprint Communications Company L.P.*, Case No. 07-1136-TP-CSS (2008). Immediately after the above quoted language, but before the Merger Commitments, the FCC stated in the Merger Order “[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC.” *Id.* From this language, the Ohio Commission opined

the FCC sought to make clear that it retains jurisdiction over matters that could otherwise be considered exclusively within the jurisdiction of the states. In other words, the FCC, at first, establishes that states retain jurisdiction. To remove any doubt about its own jurisdiction, the FCC specifically states that it retains concurrent authority to enforce all conditions and commitments.

*Id.* Additionally,

[t]o shed additional light on the issue of jurisdiction, it is noteworthy that in Merger Commitment 1 the FCC mandated that interconnection agreements be subject to state-specific pricing, performance plans, and technical feasibility. To us, the existence of state-specific standards *suggests* that the states would be better qualified than the FCC to determine whether interconnection agreements adhere to unique state standards. Concluding that the FCC has specifically carved out a place for state jurisdiction in the enforcement of merger commitments, it

would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do.

Id. (emphasis in original).

20. The State Corporation Commission Of The State Of Kansas relied on the Ohio Order, stating "although certainly not binding on the Commission, [the opinion] is worth noting with respect to the authority of state commissions to enforce the AT&T/BellSouth Merger Commitments." *Sprint Communications L.P.*, Docket No. 08-SWBT-602-COM (2008). The Commission also found *MCIMetro Access Transmission Services of Virginia, Inc. v. Christie*, 2007 WL 951853 (E.D. Va., 2007) persuasive. Although an unpublished opinion, the Kansas commission stated the Court in *MCIMetro* found states have authority to interpret and enforce conditions or commitments contained in merger orders.

21. In a short Commission Directive issued by the Public Service Commission of South Carolina, the Commission found it had concurrent jurisdiction to decide the issue, but deferred the decision to the FCC. *Sprint Communications Company L.P.*, Docket No. 2007-215-C (2007).

22. Before the Public Service Commission of the Commonwealth of Kentucky, the original Petition filed by Sprint concerned the issue of determining the commencement date for an interconnection agreement. AT&T's Motion To Dismiss for lack of jurisdiction was denied. The Kentucky Commission stated

AT&T has not presented a sufficient argument or evidence to establish the presumption that a federal order was intended to supersede the exercise of power of the state. For this to be true, AT&T needed to present evidence of a clear manifestation of the FCC's intention to do so. The exercise of federal supremacy cannot be and should not be lightly presumed.

*Sprint Communications Company L.P.*, Case No. 2007-00180 (2007), citing *BellSouth Telecommunications, Inc. v. Cinergy Communications*, 297 F.Supp.2d 946 at 953. The



commission further noted it “maintains concurrent jurisdiction with the FCC to resolve such post-merger or merger related disputes, unless clearly and unequivocally told otherwise pursuant to an FCC Order or regulation.” *Sprint Communications Company L.P.*, Case No. 2007-00180 (2007). This Commission could use the same reasoning to exercise jurisdiction over this matter.

### **Legal Analysis and Recommendation**

23. Sprint’s Complaint requests the Commission to order AT&T Missouri to enter into an agreement adopting the Kentucky ICA. Sprint’s Complaint cites to Sections 251 and 252 of the Act as authority for its request. EFIS Docket #1.

24. Sections 251 and 252 authorize a state commission to arbitrate and approve interconnection agreements. Federal courts have held that state commission authority under sections 251 and 252 includes authority to interpret and enforce interconnection agreements that the state commission has approved. *See e.g., Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000).

25. Sprint’s Complaint states that it arises out of its Commission approved interconnection Agreement, and also from AT&T Missouri’s violation of the FCC Merger Commitments. EFIS Docket #1. Yet, nowhere in its Complaint does Sprint ask the Commission to interpret or enforce any provision from its existing Commission approved interconnection agreement with AT&T Missouri. Consequently, the Commission does not have authority under sections 251 and 252 of the Act to hear this Complaint.

26. Sprint’s Response to AT&T Missouri’s Answer cites to sections 386.250(2) and 386.390 RSMo (2000), as additional authority for the Commission to hear this Complaint. EFIS Docket #6.

27. Section 386.250(2) provides “[t]he jurisdiction, supervision, powers and duties of the public service commission....shall extend....[t]o all telecommunications facilities, telecommunications services and to all telecommunication companies [offering intrastate telecommunications services.]”

28. The Commission is a creature of statute and limited thereby. Chapters 386 and 392 RSMo (2000), contain the actions which the Commission is authorized to engage in. Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the Commission is authorized by the statute. *State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service Commission*. 929 S.W.2d 768,772 (Mo. App. W.D. 1996)

29. Section 386.390 authorizes the Commission to entertain a “complaint in writing, setting forth any act or thing done or omitted to be done by any.... public utility,.... in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.”

30. Sprint’s Complaint does not claim a violation of any provision of law, or of any rule or order of the Commission. Consequently, the Commission does not have authority under Section 386.390 to hear this Complaint.

31. In its Motion To Dismiss, AT&T Missouri cites to the following Merger Commitment language in Appendix F of the Merger Order: “[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC.” EFIS Docket #1, Exhibit A at 147. Sprint responds that the Commission’s exercise of jurisdiction is proper under the following Conditions language of Appendix F in the Merger Order: “[i]t is not the intent of these commitments to restrict,

supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.” EFIS Docket #1, Exhibit A at 147.

32. The section of Appendix F cited by Sprint raises the question what jurisdiction does a state possess that is not being restricted, superseded, or altered? As noted above, a state commission has authority under sections 251 and 252 of the Act to arbitrate and approve interconnection agreements, and to interpret and enforce those approved interconnection agreements. That authority is not restricted by the Merger Commitments.

33. Sprint did have a remedy available at the Commission when its negotiations with AT&T Missouri were unsuccessful. Sprint could have petitioned the Commission to arbitrate any unresolved issues concerning state-specific pricing and performance plans and technical feasibility. In fact, Sprint did petition the Kentucky Public Service Commission to arbitrate another Merger Condition-- one allowing a carrier to extend its current interconnection agreement for a period up to three years. *Sprint Communications Company L.P.*, Case No. 2007-00180 (2007).

**WHEREFORE**, the Staff respectfully recommends the Commission appears to lack jurisdiction to order AT&T Missouri to enter into an agreement adopting the Kentucky ICA.

Respectfully submitted,

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I certify that a true and accurate copy of the foregoing was sent via electronic mail to all parties of record on this 9<sup>th</sup> day of May, 2008.

**/s/ Dawn M. Carafeno**