

**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.)	

**DISSENTING OPINION OF COMMISSIONERS KEVIN D. GUNN
AND ROBERT M. CLAYTON III**

These Commissioners respectfully dissent from the majority's Order Granting Motion to Dismiss in which the majority granted Southwestern Bell Telephone Company, d/b/a AT&T Missouri's ("AT&T Missouri's") motion to dismiss for lack of subject matter jurisdiction and ceded authority to the Federal Communication Commission ("FCC"). The FCC and this Commission have concurrent authority over the interconnection agreement at issue, and the Commission should have asserted its jurisdiction in this case rather than deferring all authority to the FCC.

Background

On November 28, 2007, Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp and NPCR, Inc. (collectively "Sprint") filed a Complaint against AT&T Missouri. Sprint petitioned 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,” in accordance with merger commitments made by AT&T Inc. (“Merger Commitments”), and included in the FCC’s Memorandum Opinion and Order issued in *In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control* (the “Merger Order”)¹.

On April 14, 2008, AT&T Missouri filed a Motion to Dismiss Complaint. AT&T Missouri argued that the FCC expressly reserved jurisdiction over the Merger Commitments through the following language contained 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...” AT&T Missouri further argued that, even if the Commission were to find it has jurisdiction over the Complaint, the Commission should decline to exercise that jurisdiction because, “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.”

The majority agreed with AT&T Missouri and granted its Motion to Dismiss ceding authority to the FCC stating:

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 interconnection agreements it has approved. Sprint’s complaint does not ask the Commission to arbitrate open interconnection issues to approve interconnection agreements, to reject interconnection agreements, or to interpret and enforce interconnection agreements it has approved. Therefore the

¹ FCC 06-189, 22 FCC Rcd. 5662 (*rel.* March 26, 2007).

Commission has no jurisdiction, and the Commission will grant AT&T Missouri's Motion to Dismiss.²

Commission Authority

It is well established that the Commission has authority over interconnection agreements in Missouri. Section 252(e)(1) of the Federal Telecommunications Act of 1996³ 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.

Clearly, this Commission has specific authority over interconnection agreements, however, this particular interconnection agreement directly relates to the Merger Order issued by the FCC. Therefore, the question presented is: Does the FCC have exclusive jurisdiction over all matters mentioned in the Merger Order, or may a state assert either exclusive or concurrent jurisdiction over issues related to the Merger Order?

While not binding on this Commission, how other states have asserted their jurisdiction in similar cases does give us guidance. In a similar matter before the Tennessee Regulatory Authority AT&T Southeast⁴ filed a Motion to Dismiss on similar grounds. In response to AT&T Southeast's motion in that case, the Tennessee Regulatory Authority denied the motion in its Order Denying Motions To Dismiss, Accepting Matter For Arbitration, And Appointing Pre-Arbitration Officer, stating:

² June 24, 2008 Order Granting Motion to Dismiss, p. 6.

³ 47 U.S.C. 252(e)(1).

⁴ AT&T Southeast refers to BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee, d/b/a AT&T Southeast.

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, supersede 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).⁵

These Commissioners believe that the Tennessee Regulatory Authority answered the question presented correctly. State Commissions have concurrent authority over the interconnection agreements even though they are covered by the Merger Order.

Tennessee is not the only state to assert jurisdiction in this matter. Both Ohio and Kansas have asserted jurisdiction as well. The Public Utilities Commission of Ohio felt that the Merger Order language specifically recognized State jurisdiction in the matter with the FCC asserting only concurrent jurisdiction. Specifically it said:

From this language, we conclude that the FCC clarified that the states have jurisdiction over matters arising under the commitments. Even more, states are granted authority to adopt rules, regulations, programs, and policies respecting the commitments.

Immediately after, and before setting forth the commitments, the FCC states the following: "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 ...". From this, we gather that the FCC sought to make clear that it retains jurisdiction over matters that could otherwise be considered

⁵ *In Re: Petition of Sprint Communications Company L.P.*, Docket No. 07-00132 (2007).

exclusively within the jurisdiction of the states. In other words, the FCC, at first, establishes that states retain jurisdiction, the FCC specifically states that it retains concurrent authority to enforce all conditions and commitments.

To 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.

The Kansas Commission, citing the Ohio Public Utilities Commission also found that the language in the Merger Order was "meant only to advise the readers that it stood prepared to enforce the commitments along with the States."⁶

The Ohio and Kansas Commissions ordered the interconnection agreement at issue ported to their state, subject to their respective states' rules and regulations.

The Tennessee regulatory authority, while finding jurisdiction, did not order the agreement ported but deferred ruling pending the outcome of an arbitration.

While agreeing with the rationale of both the Ohio and Kansas Commissions, these Commissioners cite the decisions only as a rationale for jurisdiction. These Commissioners do not cite these cases for the ultimate

⁶ *In Re: Complaint of Sprint Communications L.P., Sprint Spectrum L.P., Nextel West Corp and NPCR, Inc., vs. Southwestern Bell Telephone Company, d/b/a AT&T Kansas*, Kansas Corporation Commission Docket No. 08-SWBT-602-COM (March 12, 2008), p. 12-13, ¶ 22.

resolution of the dispute and do not ultimately concur with those commissions that the agreement should be ported to Missouri.

Additionally, these Commissioners believe that the Commission should be aggressive in asserting its own jurisdiction. As the Missouri General Assembly continually limits the jurisdiction of the Commission in the area of telecommunications, the Commission should not cede authority to the federal government where current state authority exists.

These Commissioners take no position on the merits of Sprint's claim. In fact, it is possible that the Commission as a whole would ultimately find in favor of AT&T Missouri and issue an order stating that Sprint may not port a Kentucky interconnection agreement to Missouri. However, the Commission should assert its jurisdiction, hold a proceeding and ultimately decide on the merits. As the majority's decision does not do that and instead defers all authority to the FCC, the majority's dismissal is premature and unnecessarily weakens future assertions of PSC jurisdiction.

For the foregoing reasons, these Commissioners respectfully dissent.

Respectfully submitted,


Kevin D. Gunn
Commissioner


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri
On this 19th day of August, 2008.