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Witness: J. Scott McPhee
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Sponsoring Party: Southwestern Bell
Telephone Company, d/b/a/
AT&T Missouri
Case No: CO-2009-0239

SOUTHWESTERN BELL TELEPHONE COMPANY,
d/b/a AT&T MISSOURI

CASE NO. CO-2009-0239

REBUTTAL TESTIMONY

OF

J. SCOTT McPHEE

San Ramon, California
February 18, 2009

ATT Exhibit No. 4
Case No(s). CO-2009-0239
Date 2/25/09 Rptr PF

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Verified Petition of Sprint Communications Company,)
L.P., Sprint Spectrum, L.P., and Nextel West Corp. For) Case No. CO-2009-0239
Arbitration of Interconnection Agreements with)
Southwestern Bell Telephone Company d/b/a AT&T)
Missouri.

AFFIDAVIT OF SCOTT MCPHEE

STATE OF CALIFORNIA)
) SS
CITY OF SAN FRANCISCO)

I, Scott McPhee, of lawful age, being duly sworn, depose and state:

1. My name is Scott McPhee. I am presently Associate Director – Wholesale Regulatory Policy.
2. Attached hereto and made a part hereof for all purposes is my rebuttal testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my knowledge and belief.

*State, California
Contra Costa County*



Scott McPhee

Subscribed and sworn to before this ^{18th} ~~17~~th day of February, 2009
BY SCOTT MCPHEE _____



Notary Public

My Commission Expires: APRIL 23RD 2009

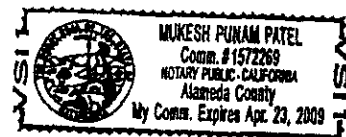


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I.
INTRODUCTION

1
2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is J. Scott McPhee. My business address is 2600 Camino Ramon, San Ramon,
4 California, 94583.

5
6 **Q. ARE YOU THE SAME SCOTT MCPHEE THAT FILED DIRECT TESTIMONY**
7 **IN THIS CASE?**

8 A. Yes. My Direct Testimony was filed on February 4, 2009.

II.
PURPOSE OF TESTIMONY

9 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

10 A. The purpose of my testimony is to rebut testimony filed by Sprint witness Mark Felton.
11 Specifically, I will respond to Mr. Felton's claim that the issue Sprint raises (whether
12 AT&T Missouri violated a commitment contained in the FCC's AT&T/BellSouth Merger
13 Order by refusing to extend the term of Sprint's three Missouri interconnection
14 agreements) is subject to arbitration under Section 252 of the Telecommunications Act. I
15 will also respond to his claim that AT&T has treated another carrier differently under
16 Merger Commitment 7.4. And finally, I will explain how the Commission should handle
17 Sprint's extension requests in the event the Commission does not credit AT&T's
18 November 16, 2007 Accessible Letter as Mr. Felton advocates.

III.

REBUTTAL OF TESTIMONY OF MARK FELTON

1 Q. ON PAGE 6 OF HIS DIRECT TESTIMONY, MR. FELTON STATES "BASED
2 UPON THE COMMISSION'S ORDER, THE ONLY WAY SPRINT COULD
3 AVAIL ITSELF OF THE MERGER COMMITMENTS WAS VIA A 251/252
4 ARBITRATION PROCEEDING." DO YOU AGREE WITH THIS CLAIM?

5
6 A. No. Mr. Felton omits that the FCC, as the author of the AT&T/BellSouth Merger Order
7 (which imposed the Merger Commitments), retained jurisdiction to ensure the
8 appropriate application and enforcement of the Merger Commitments.

9
10 Q. DO YOU AGREE THAT THE MISSOURI COMMISSION'S JUNE 24, 2008
11 ORDER DISMISSING SPRINT'S PRIOR COMPLAINT INDICATED THAT IT
12 WOULD HAVE HAD JURSDICTION OVER THE COMPLAINT IF IT WAS
13 SIMPLY RECAST AS A REQUEST FOR ARBITRATION?

14
15 A. No. The Commission's Order Granting Motion to Dismiss was clear. The Commission
16 wrote:

17 Sprint and AT&T Missouri have not submitted a negotiated interconnection
18 agreement for the Commission's approval in this case, and also have not asked the
19 Commission to arbitrate any open issues between them. Therefore, only if the
20 Commission is interpreting an interconnection agreement does the Commission
21 have jurisdiction to hear this case.
22

23 Nowhere in the Order does the Commission endorse the idea that a party can make a
24 complaint under the FCC merger commitments an arbitrable issue under Section 252
25 simply by labeling its claim as an arbitration request.
26

27 Q. DO YOU AGREE WITH MR. FELTON'S CHARACTERIZATION OF SPRINT'S
28 EXTENSION REQUEST AS AN "OPEN ISSUE" UNDER SECTION 252?

29
30 A. No. As I discussed in my Direct Testimony, the issue Sprint seeks to arbitrate is not an
31 arbitrable issue under the Act. AT&T's commitment to extend an existing

1 interconnection agreement ("ICA") under Merger Commitment 7.4 (as well as 7.1) is a
2 separate and distinct duty from its duties under Section 251 and imposes requirements
3 above and beyond the requirements in Section 251. There is no "open issue" before this
4 Commission that has been negotiated by the parties. Regardless of how one characterizes
5 Sprint's request and AT&T's refusal, those communications were not part of the Section
6 252 negotiations of *new interconnection* agreements, and thus did not somehow render
7 this non-arbitrable issue arbitrable. Whether AT&T is obligated to extend Sprint's
8 *existing* interconnection agreements cannot appropriately be the subject of a Section 252
9 arbitration.

10
11 **Q. MR. FELTON AT PAGE 12, STATES THAT THE "TERM OR LENGTH, OF AN**
12 **ICA [IS] COMMONLY INCLUDED IN INTERCONNECTION AGREEMENTS."**
13 **DO YOU AGREE?**

14
15 **A.** Yes, I do. Sprint's existing agreements each specify the agreement's term.¹ And, like
16 Mr. Felton, I am unaware of any interconnection agreement that omits provisions for the
17 term of an ICA, whether they are explicit inception and expiration dates, or some other
18 provisions to determine when that agreement is in effect (e.g., will become effective ten
19 days after Commission approval; or will expire upon 120 days notice, etc.).

20
21 **Q. IF THAT IS SO, WHY SHOULDN'T THE DURATION OF AN ICA, AS MR.**
22 **FELTON CLAIMS, BE SUBJECT TO ARBITRATION AS "ONE OF THE**
23 **TERMS AND CONDITIONS THAT MUST BE JUST, REASONABLE, AND**

¹ Sprint Communications Company L.P.'s Agreement expired on April 29, 2008, Sprint Spectrum's Wireless Agreement expired on November 30, 2004, and Nextel West Corp's Wireless Agreement expired on November 1, 2003.

1 **NON-DISCRIMINATORY AS CONTEMPLATED IN SECTION 251(c)(2)(D) OF**
2 **THE TELECOM ACT?”²**
3

4 A. Mr. Felton is mixing two distinct things. When parties are negotiating a *new agreement*,
5 they of course discuss the term and termination, and if they cannot agree, they may
6 arbitrate the issue, which the state commission will decide, as Mr. Felton states, under the
7 “just, reasonable and non-discriminatory” standard in Section 251. But that is not what is
8 happening here. Sprint is not asking the Commission to decide the term of new ICAs
9 under the “just, reasonable and non-discriminatory” standard in Section 251, but instead
10 is asking the Commission to extend the parties’ existing ICAs for three years under
11 Sprint’s reading of Merger Commitment 7.4. Here, the parties had been negotiating for
12 months to conform the contract language of the Sprint Kentucky agreement for use in
13 Missouri, as Sprint had requested. If the new agreement’s term were a disputed open
14 issue, the parties would have agreed to include that issue in the arbitration along with the
15 other open issues from that negotiation. But here, Sprint abandoned those negotiations
16 and instead notified us of its election to extend its existing agreements under Merger
17 Commitment 7.4. The provisions setting the term of the existing interconnection
18 agreements Sprint now seeks to extend were previously agreed upon years ago and
19 incorporated into the filed and approved agreements at that time. These provisions are
20 not open, unresolved issues arising from the parties’ current § 252(a) negotiations that
21 resulted in this arbitration.

22
23 Q. **MR. FELTON, ON PAGE 14, LINES 2 – 16, DISCUSSES HIS BELIEF THE**
24 **PARTIES NEGOTIATED THE TERMS OF THE MISSOURI ICAS. DID, IN**

² Felton Direct, p. 13.

1 **FACT, THE PARTIES DISCUSS THE TERM OF THE MISSOURI ICAS "IN**
2 **THE CONTEXT OF THIS ARBITRATION" AS MR. FELTON ALLEGES?**

3
4 A. No, they did not. AT&T witness Lynn Allen-Flood has already testified to the scope of
5 the negotiations between AT&T Missouri and Sprint. As Ms. Allen-Flood described in
6 her Direct Testimony, the parties negotiated terms and conditions for conforming Sprint's
7 Kentucky ICA for use in Missouri. They did not discuss the content of Sprint's three
8 existing Missouri ICAs at all. In fact, AT&T Missouri has had no opportunity to
9 negotiate the terms of the existing Missouri ICAs, as it would have had if Sprint had
10 requested to negotiate a new agreement based upon the Missouri ICA – an option Sprint
11 had available to it under Merger Commitment 7.3.

12
13 Q. **MR. FELTON, AT P. 5, STATES THAT AT&T MISSOURI DENIED SPRINT'S**
14 **REQUEST TO PORT THE PARTIES' KENTUCKY INTERCONNECTION**
15 **AGREEMENT TO MISSOURI. IS THAT CORRECT?**

16
17 A. No. AT&T Missouri did not refuse the port request. As AT&T Missouri witness Lynn
18 Allen-Flood indicates at pp. 3 – 5 of her Direct Testimony, AT&T responded to Sprint's
19 porting request by preparing a redlined version of the Kentucky agreement showing the
20 changes that would be needed to conform the agreement for use in Missouri pursuant to
21 Merger Commitment 7.1 (and did the same for other jurisdictions as well). Once Sprint
22 received the redline draft, the parties met about twice a week to work through the
23 redlined changes. While Sprint has rejected several of the proposed changes, the parties
24 have continued working and have resolved most issues, but remain at impasse on others.

25
26 Q. **WHILE ACKNOWLEDGING THAT AT&T HAS EXTENDED THE TERMS OF**
27 **MANY OTHER REQUESTING CARRIERS' AGREEMENTS PURSUANT TO**
28 **MERGER COMMITMENT 7.4, MR. FELTON IDENTIFIES ONE CARRIER'S**
29 **AGREEMENT AS HAVING BEEN EXTENDED IN A MANNER**

1 **INCONSISTENT WITH MERGER COMMITMENT 7.4. WAS THAT CARRIER**
2 **ACTUALLY TREATED DIFFERENTLY THAN OTHER CARRIERS?**

3
4 A. No.

5
6
7 **Q. PLEASE EXPLAIN.**

8 A. As Mr. Felton pointed out on page 15, line 7 of his Direct testimony, the ICA for Hunt
9 Telecommunications, LLC in Louisiana had an initial expiration date prior to January 15,
10 2008, yet AT&T Missouri's discovery response to Sprint, attached to Felton Direct
11 testimony as Exhibit MGF-3, shows that AT&T granted an extension under Merger
12 Commitment 7.4 based upon a June 21, 2008 request date, extending the agreement for
13 three years beyond the ICA's initial expiration date of May 25, 2007.

14
15 Special circumstances explain why AT&T granted Hunt's extension request: On
16 February 15, 2007, Hunt asked its AT&T negotiator to extend the Hunt ICA under
17 Merger Commitment 7.4. For whatever reason, the negotiator (who is no longer an
18 AT&T employee) erroneously advised Hunt that its ICA was ineligible for extension
19 under Merger Commitment 7.4. When Hunt raised the issue again on June 21, 2008, we
20 determined from the negotiator's notes that Hunt had indeed requested extension on
21 February 15, 2007, and that we should have honored Hunt's previous request. In order to
22 apply the Merger Commitment in a non-discriminatory manner, we agreed to grant
23 Hunt's initial February 15, 2007 request. I would also note that because Hunt made its
24 initial request prior to AT&T's issuance of the Accessible Letter, AT&T did not apply
25 the terms of the AL but, pursuant to the Merger Commitment, extended Hunt's
26 agreement for three years from its initial expiration date of May 25, 2007.

1 **Q. EVEN IF THE COMMISSION FINDS THAT AT&T'S TREATMENT OF**
2 **HUNT'S EXTENSION REQUEST WAS INCONSISTENT WITH THE POLICY**
3 **AT&T IS ADVOCATING HERE, SHOULD THAT PRECLUDE AT&T FROM**
4 **APPLYING ITS POLICY GOING FORWARD?**

5
6 A. No. As Sprint's Schedule MFG- 3 shows, AT&T has handled over 650 extension
7 requests under Merger Commitment 7.4. With the one exception of the Hunt request,
8 AT&T handled all 650 requests consistently with how it handled Sprint's request here.
9 AT&T's handling of the Hunt request should not have any bearing on the decision to be
10 made here and should not result in AT&T forfeiting its right to apply the policy.

11
12 **Q. MR. FELTON, AT PP. 11 – 12 CHALLENGES AT&T'S AUTHORITY TO SET**
13 **THE JANUARY 15, 2008, DEADLINE FOR CARRIERS WITH EXPIRED**
14 **AGREEMENTS TO REQUEST AN EXTENSION UNDER MERGER**
15 **COMMITMENT 7.4. HOW SHOULD THE COMMISSION PROCEED HERE IF**
16 **THE COMMISSION DOES NOT CREDIT AT&T'S NOVEMBER 16, 2007**
17 **ACCESSIBLE LETTER, WHICH SET THIS DEADLINE?**

18
19 A. If the Commission does not credit AT&T's November 16, 2007 Accessible Letter, it
20 should follow the plain language of Merger Commitment 7.4, which states:

21 The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier
22 to extend its current interconnection agreement, regardless of whether its initial
23 term has expired, for a period of up to three years, subject to amendments to
24 reflect prior or future changes of law. During this period, the interconnection
25 agreement may be terminated only via the carrier's request unless terminated
26 pursuant to the agreement's "default" provisions.³
27
28

29 **Q. HOW DOES THAT LANGUAGE APPLY TO THE SPRINT AGREEMENTS AT**
30 **ISSUE HERE?**

31
32 A. It would allow Sprint's CLEC agreement to be extended until April 29, 2011 (i.e., the
33 Sprint Communications Company L.P. agreement). But Sprint's two wireless

³ A full copy of the entire text of the AT&T/BellSouth Merger Commitments was attached to my Direct Testimony as Schedule 3.

1 agreements would not be eligible for extension (i.e., the Sprint Spectrum L.P. and Nextel
2 West Corp. agreements).

3 **Q. WHY WOULD THE SPRINT CLEC AGREEMENT BE ELIGIBLE FOR**
4 **EXTENSION UNDER THE LANGUAGE OF THE MERGER COMMITMENT**
5 **(I.E., ASSUMING THERE WERE NO ACCESSIBLE LETTER)?**
6

7 A. By its terms, Merger Commitment 7.4 allowed an extension of a carrier's current
8 agreement for a period of up to three years (36 months) from the expiration of the
9 agreement's initial term. Because the initial term of Sprint's CLEC agreement expired on
10 April 29, 2008, it would be eligible for an extension until April 29, 2011.
11

12 **Q. ASSUMING THE ACCESSIBLE LETTER HAD NEVER BEEN ISSUED,**
13 **SPRINT'S WIRELESS AGREEMENTS WOULD STILL BE INELIGIBLE FOR**
14 **EXTENSION. WHY IS THAT?**
15

16 A. There are two reasons. First, adding three years to their initial terms would do nothing to
17 extend the life of those agreements. The initial term of the Sprint Spectrum agreement
18 expired November 31, 2004⁴; adding three years would only extend it to November
19 2007. The initial term of the Nextel West agreement expired November 1, 1999; adding
20 three years would only extend it to November 2002.
21

22 **Q. WHAT IN THE PLAIN LANGUAGE OF THE MERGER COMMITMENTS**
23 **SAYS THE EXTENSION IS THREE YEARS FROM THE INITIAL TERM**
24 **EXPIRATION?**
25

26 A. The Merger Commitment explicitly says that the extension is available "regardless of
27 whether its initial term has expired." That means that the extension is keyed off of the

⁴ See Section 19.2.1 of the Sprint Spectrum Agreement. A full copy was attached as Exhibit 8 to Sprint's Arbitration Petition.

1 initial term of the ICA. The Merger Commitment was intended to reduce transaction
2 costs by allowing carriers to extend the term of an ICA – which is typically three years -
3 for an additional three years, or six years total. The Merger Commitment was not
4 intended to further extend any agreements that may have already been in effect for 7 or
5 more years, which have not been replaced by successor agreements. In those latter
6 circumstances, the carrier has already reduced transaction costs by remaining in an
7 agreement for an extended period of time. In addition, to allow an extension from the
8 date of the extension request permits some carriers to game the system in order to
9 maintain an old agreement longer than the Merger Commitment intended. In this case,
10 for example, Sprint first opted to port an agreement pursuant to another Merger
11 Commitment. When Sprint found that it would be held to the modifications required by
12 the porting Merger Commitment, Sprint abandoned its port request and requested Section
13 252 negotiations for a new agreement. Sprint and AT&T expended resources to negotiate
14 a new ICA for several months. At the end of the negotiation period, Sprint wholly
15 abandoned the negotiation and requested an extension of its existing ICA. Delay tactics
16 such as these should not permit any carrier to obtain a longer extension than would have
17 been available to a carrier that made a timely extension request. However, that would be
18 the result if carriers were permitted to use the request date as the date from which the
19 extension is granted.

20
21 **Q. IF AT&T INTERPRETED MERGER COMMITMENT 7.4 AS STATED ABOVE,**
22 **WHY DID AT&T ISSUE THE ACCESSIBLE LETTER ALLOWING CARRIERS**
23 **ADDITIONAL TIME TO EXTEND?**

1 A. As Mr. Felton mentioned, Sprint had initiated litigation in all 9 Southeast States with
2 AT&T, as did Verizon Wireless here in Missouri and Aerialink in Michigan, all related to
3 AT&T's implementation of Merger Commitment 7.4. In a good faith effort to resolve
4 this litigation as well as any other disputes we may have had with carriers on this issue,
5 AT&T decided to issue the Accessible Letter to allow those carriers who had older ICAs
6 to extend for three years where extension was not permitted under the plain terms of
7 Merger Commitment 7.4. The Accessible Letter, which was released in November of
8 2007, provided carriers with a 60-day period to renew or make requests to extend ICAs
9 that had expired prior to January 15, 2008, regardless of the expiration date, for a three
10 year period from the date of the extension request. All carriers that had initiated litigation
11 (including Sprint) took advantage of the terms of the Accessible Letter, so Sprint was
12 well aware of the requirements for timing of requests to extend.

13
14 **Q. YOU SAID THERE WERE TWO REASONS THAT THE TWO WIRELESS**
15 **AGREEMENTS COULD NOT BE EXTENDED. WHAT IS THE SECOND**
16 **REASON?**

17
18 A. By its terms, Merger Commitment 7.4 allows a requesting carrier to extend its "current
19 interconnection agreement," and neither of the Sprint wireless agreements is "current."
20 Not only are they expired, but both have terminated by their own terms. Section 19.2.7
21 of the Sprint Spectrum agreement states

22 SWBT and Carrier agree to interconnect pursuant to the terms defined in this
23 Agreement for an initial period terminating November 1, 1999, and thereafter the
24 Agreement shall continue in force and effect unless and until terminated as
25 provided herein. Either Party may terminate this Agreement by providing written
26 notice of termination to the other Party, such written notice to be provided at least
27 sixty (60) days in advance of the date of termination; provided, however, that no
28 such termination shall be effective prior to the date one year from the Effective

1 Date of this Agreement. By mutual agreement, SWBT and Carrier may amend
2 this Agreement in writing to modify its terms.
3

4 Similarly, Section 18.2 of the Nextel West agreement states:

5 The rates, terms and conditions of this Agreement shall continue in full force and
6 effect until the earlier of (i) the effective date of its successor agreement, whether
7 such successor agreement is established via negotiation, arbitration or pursuant to
8 Section 252(i) of the Act; or (ii) the date that is ten (10) months after the date on
9 which SBC-13STATE received Carrier's Section 252(a)(1) request, at which
10 time the Agreement shall terminate without further notice.
11

12 Here, AT&T Missouri gave such notices to Sprint on August 21, 2007.⁵ Thus, when
13 Sprint notified AT&T Missouri on November 21, 2008 that it wished to extend the
14 agreement under Merger Commitment 7.4, both of Sprint's wireless agreements had
15 already terminated by their own terms.
16

17 **Q. MR. FELTON, AT P. 7 OF HIS DIRECT TESTIMONY INDICATES THAT**
18 **"SPRINT AND AT&T CONTINUE TO OPERATE UNDER THE CURRENT ICAs**
19 **WITHOUT INTERRUPTION." IS THAT CORRECT?**
20

21 **A.** No, the ICA is no longer the parties' "current" agreement, as it has terminated. However,
22 AT&T is continuing to provide services to Sprint based upon the rates and terms that
23 were contained in those expired agreements.
24

25 **Q. IF THE COMMISSION WERE TO RULE THAT SPRINT IS NOT ENTITLED**
26 **TO EXTEND ANY OF ITS AGREEMENTS UNDER MERGER COMMITMENT**
27 **7.4, WOULD AT&T MISSOURI CEASE PROVIDING SERVICE TO SPRINT?**
28

29 **A.** No. AT&T Missouri plans to continue to do business with Sprint without interruption
30 until successor agreements are in place.

⁵ See AT&T Lead Negotiator Kay Lyon's August 21, 2007 letters to Mr. Ralph Smith and to Mr. Fred Broughton at Sprint, which were included as part of Exhibit 1 to Sprint's Arbitration Petition.

IV.
CONCLUSION

1 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

2 **A. Yes.**