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 Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company d/b/a AT&T Missouri.	))))))	Case No. CO-2009-0239

AT&T MISSOURI'S
COMMENTS ON ARBITRATOR'S FINAL REPORT

AT&T Missouri[1] appreciates the professional and expeditious manner in which the Arbitrator has overseen this case. However, AT&T Missouri must respectfully raise certain errors[2] in the April 13, 2009, Final Arbitrator's Report that resulted in the improper conclusion that Section 252 arbitration jurisdiction exists here and that Sprint[3] should be permitted to extend its existing interconnection agreements for three years from November 21, 2008.

The parties' current interconnection agreements will, by their terms, remain in place until new agreements are executed and approved. Consequently, the Commission can correct the Final Report's fundamental error -- i.e., its decision to arbitrate Sprint's non-arbitrable request to extend the current agreements -- without impairing Sprint's ability to continue operating under those agreements, which is exactly what Sprint seeks. The Commission should dismiss the arbitration petition so that the parties can negotiate new interconnection agreements using the existing agreements as a starting point. When those negotiations are complete, the Commission

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri."

[2] AT&T Missouri also notes that it has challenged the arbitrability of the issue Sprint has raised in this proceeding through a motion to dismiss, which the Commission denied on February 19, 2009. AT&T Missouri has timely applied for reconsideration and/or rehearing of that order and its application is currently pending before the Commission.

[3] Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. will be referred to as the "Sprint Companies" or "Sprint."

can arbitrate any open issues under Section 252. Meanwhile, the parties will continue to operate under the existing agreements until that arbitration is complete and the resulting interconnection agreements have been approved.

1. The Final Report Erroneously Concludes Section 252 Negotiations Occurred.

The Final Report continues to confuse the distinct obligations imposed by the federal Telecommunications Act of 1996 to negotiate interconnection under Section 251 (which can be the subject of an arbitration under Section 252), and those arising under the FCC Merger Commitments (which cannot).

To support its finding of jurisdiction under Section 252 here, the Final Report adopts[4] a passage from a Kentucky Commission order explaining that state commission Section 252 arbitration jurisdiction flows from the parties' negotiation of the terms and conditions of interconnection under Section 251:

> The Telecommunications Act of 1996 has been interpreted to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements they approve. . . . [Section 251 of the Act] defines the specific interconnection duties of carriers. Under that statute, each carrier has the duty to interconnect directly or indirectly with the facilities or equipment of other carriers. Pursuant to 47 U.S.C. § 252, any party negotiating the terms of an interconnection agreement has the right, in the course of negotiations, to ask a state commission to [arbitrate] . . . any differences arising during negotiations . . .[5]

But the Final Report completely ignores the Act's intent that both parties be able to raise and negotiate terms and conditions for interconnection. As the FCC explained:

> Section 251(c)(1) of the statute imposes on incumbent LECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described" in sections 251(b) and(c),

[4] The Final Report describes the passage as a "straightforward and eloquent statement of [the Arbitrator's] own legal conclusions regarding the provisions of the Act." Final Arbitrator's Report, p. 32, fn. 114.

[5] Final Arbitrator's Report, Conclusion of Law No. 4, p. 32 (emphasis added).

> and further provides that "(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."[6]

Here, such bilateral negotiations of "the terms of an interconnection agreement" were never conducted, nor were they intended, with respect to an extension of the parties' existing agreements. Undisputed evidence, fully credited in the Final Report, demonstrates that when Sprint -- at the eleventh hour of the parties' negotiations based on the Kentucky agreement -- raised the extension of the parties' existing agreements, neither party intended for AT&T Missouri to be able to propose or negotiate any changes to make the agreements acceptable to it for future use. Finding of Fact No. 97 states:

> [Sprint witness] Mr. Felton's interpretation of the Merger Commitments was that AT&T had no right to offer any modifications to the agreements because Sprint had elected to extend all the terms of the Missouri ICAs.[7]

And Conclusion of Law No. 16 states:

> Sprint argues that as a matter of right it can "elect" to have AT&T extend the Missouri ICAs in accordance with Merger Commitment 7.4. Mr. Felton even went so far as to testify that AT&T would have no ability to offer amendments or modifications to the agreements if Sprint elected the extension under Merger Commitment 7.4. A plain reading of the Merger Order certainly appears to give Sprint that right under the terms of the order itself . . .[8]

While the Final Report discounts Sprint's witness' "'legal' opinion on this matter . . . substantially," because he is not an attorney,[9] the Report ignores that Sprint fully endorsed this position in its legal arguments during briefing:

> AT&T's position that it should be allowed to present additional issues is entirely contrary to the express language and the intent of Merger Commitment 7.4. There is only one issue for consideration -- whether to extend the term of the ICAs for three years. If AT&T can present additional issues that would need to

[6] . *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, para. 138 (1996) (emphasis added and subsequent history omitted), citing 47 U.S.C. § 251(c)(1).

[7] Final Arbitrator's Report, p. 28.

[8] Id., p. 36.

[9] Id., p. 28.

> be arbitrated, it defeats the purpose of a merger commitment intended to reduce costs and streamline processes. Contrary to AT&T's assertions, Merger Commitment 7.4 does not permit AT&T to analyze the existing agreements and make counterproposals.[10]

According to Sprint, a request to exercise rights under Merger Commitment 7.4 is either to be granted or rejected, not negotiated as one of various terms and conditions of interconnection:

> Sprint's election to extend should only elicit a yes or no response from AT&T. AT&T answered no. No further negotiations or discussions are necessary or warranted in order for Sprint to present this matter to the Commission.[11]

And Sprint's witness confirmed that there were no negotiations concerning the terms and conditions of the parties' existing agreements during the parties' limited communications about extending those agreements:

> [W]e didn't elect to negotiate an agreement pursuant to Merger Commitment 7.3. We elected to extend our current agreement pursuant to Merger Commitment 7.4, and under that Merger Commitment, I would not agree that AT&T had the right to propose modifications to that agreement. We have the right under Merger Commitment 7.4 to extend our current interconnection agreement without modification.[12]

As the posture of the parties' discussions concerning extension of their existing agreements unequivocally foreclosed negotiation of any modification to the terms and conditions of those agreements, the Final Report erred as a matter of law in concluding that those communications constituted Section 252 negotiations under the Act.

2. The Final Report Erroneously Concludes Section 252 Arbitration Jurisdiction Exists.

The Final Report fails to recognize the critical difference between Section 252 negotiations of the terms and conditions of interconnection (which would give rise to issues subject to arbitration under the 1996 Act) and a request to extend an existing agreement under

[10] Sprint Post Hearing Brief, pp. 4-5.

[11] Sprint Post Hearing Brief, p. 5.

[12] Felton, Tr. at 39. See also Tr. 31-32, 37-38.

Merger Commitment 7.4 (which cannot yield a disagreement subject to arbitration under the 1996 Act), and consequently erred by proceeding to arbitrate Sprint's extension request.

Merger Commitment 7.4 is not part of the Section 252 process, which contemplates detailed, substantive negotiations between the parties on the requirements set out in Sections 251(b) and (c). Rather, Merger Commitment 7.4 provides a route to an interconnection agreement that is an alternative to the Section 252 negotiation process.[13] A request to extend an interconnection agreement under Merger Commitment 7.4 therefore has nothing whatsoever to do with the process for arriving at an interconnection agreement set forth in Section 252(b) of the 1996 Act.

Nevertheless, the Final Report asserts that the Act grants arbitration authority to state commissions over any matter relating to interconnection agreements and thus focuses on the question whether the parties negotiated Sprint's extension request, as if an affirmative answer to that question necessarily means the extension request is arbitrable.[14] In doing so, the Report wholly fails to explain how the occurrence of such negotiations could confer on the Commission jurisdiction to arbitrate under Section 252 a disagreement about an extension request that plainly is not encompassed by Section 252.

The Final Report errs in its underlying premise. Section 252 only authorizes state commissions to arbitrate the terms and conditions that should be included in an interconnection agreement in order to comply with the requirements of the 1996 Act, not to arbitrate disagreements about the Merger Commitments. Arbitration jurisdiction under the Act derives from Section 252(b)(1), which provides that during the period from the 135th to the 160th day

[13] Memorandum, Opinion and Order, In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, FCC 06-189, *rel.*, March 26, 2007 (the "Merger Approval Order"), Appendix F (Commitment No. 1 under the heading "Reducing Transaction Costs Associated with Interconnection Agreements").

[14] Final Arbitrator's Final Report, pp. 32-39.

after the incumbent LEC receives a request for negotiation under Section 252(a), "the carrier or any party to the negotiations may petition a State commission to arbitrate any open issues." The scope of those "open issues" is prescribed by Section 251(c)(1), which precisely identifies the matters that are (and thus those that are not) the subject of such negotiations by imposing on ILECs the duty to negotiate "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this section [251(c)]" (which are resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled access, notice of changes and collocation).[15]

The assertion of jurisdiction here is erroneous because an extension under the FCC's Merger Commitments is not among the duties Section 251 imposes on ILECs, and nothing in the Act contemplates such an extension. Rather, it is an obligation created by the FCC's Merger Order and the Commission has already ruled that "it did not have jurisdiction under state or federal law to enforce those merger commitments."[16]

The Final Report's error is underscored by the fact that the standards for arbitration in Section 252(c) of the Act do not apply to the question Sprint has asked the Commission to arbitrate. If parties disagree about the term or termination date of an interconnection agreement for which they agreed on all other terms and conditions, the state commission is required to resolve the issue by referring to Section 252(c) of the 1996 Act, which provides that interconnection and access to unbundled network elements must be on terms and conditions that

[15] Section 252(a)(1) (which discusses "voluntary negotiations" between the parties) also makes clear that "any open issues" refers to the substantive issues arising from the obligations set forth in Section 251:

> Upon receiving a request for interconnection, services or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. . .

[16] Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc. v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Case No. TC-2008-0182, Order Denying Application for Rehearing, issued August 7, 2008, at p. 1.

are just and reasonable, and by determining what term or termination date is just and reasonable within the meaning of the 1996 Act.

Here, in contrast, there is no such issue -- no question to be resolved by reference to anything in the 1996 Act. Rather, the disagreement concerns *only* the meaning and application of the Merger Commitment: a disagreement *under the merger commitment* about whether Sprint's current agreements are eligible for extension *under the merger commitment*. That question can only be answered, as the Final Report does, by looking to the meaning of the Merger Commitment and the FCC's merger approval order.[17] By definition, the Commission would find no guidance in the Act or in any of the FCC's rules implementing the Act. When the FCC approved AT&T's merger commitments and ordered AT&T to abide by them, it was not exercising its authority under the 1996 Act; rather, it was exercising its altogether separate authority to evaluate and approve telecommunications mergers under 47 U.S.C. §§ 214(a) and 310(d).

As an extension under the FCC's Merger Commitments is not among the duties Section 251 imposes on ILECs, the Final Report erred as a matter of law in concluding that Sprint's extension request was an issue suitable for arbitration under the 1996 Act.

3. The Final Report Erroneously Determined the Extension Effective Date.

AT&T Missouri believes the Final Report erred in determining that the parties' existing agreements should be extended under Merger Commitment 7.4. AT&T Missouri does not comment on that error here, however. But the Final Report compounds that error by making the

[17] Final Arbitrator's Report, p. 40.

extensions effective as of November 11, 2008, and the Commission should not let that determination stand.[18]

The Final Report's making the extensions of the parties' existing interconnection agreements effective from November 21, 2008 -- when Sprint sent its eleventh hour notice it was electing to extend under the Merger Commitments -- is unreasonable and contrary to the public interest because it frustrates the purpose of the Merger Commitment itself (reducing transaction costs) and the federal policy of encouraging bilateral negotiations and dispute resolution as envisioned by the Act.

The Final Report recognizes that Sprint "changed its course late in the negotiation process," but attempts to excuse that lateness finding that "if [Sprint] had waited any longer to file the arbitration request, it would have had to start the 135-day negotiation period over again . . . because the arbitration window would have closed."[19] The Report, however, fails to grasp that this would have been the appropriate result because the extension was indeed a different issue than what the parties actually addressed in negotiations. With a new window, the parties would have been able to negotiate a replacement agreement with the give and take contemplated by Section 252. And requiring Sprint to restart the negotiation period would be neither unfair nor prejudicial because throughout that period, Sprint would continue to receive exactly what it seeks here -- continued operation under the parties' existing agreements.

But allowing Sprint to completely change the course of negotiation at the last minute precluded AT&T from being able to substantively respond to the request and have its own issues arbitrated. As AT&T Missouri's negotiator testified, it would have taken AT&T Missouri three

[18] As stated above, AT&T Missouri maintains that attempting to enforce the Merger Commitments under the guise of a Section 252 arbitration because implementation of Merger Commitment 7.4 does not envision nor require Section 252 negotiations. However, if the Commission finds otherwise, it should also find that the effective date for such extension as established in the Final Report is inappropriate.

[19] Final Arbitrator's Report, Conclusion No. 25, p. 38.

to four weeks and over 20 company subject matter experts to review and redline the parties' three existing Missouri agreements (one landline and two wireless agreements) in preparation for a negotiation using those agreements as the base documents. Thus, by making its extension request on November 21, 2008 (the Friday before the Thanksgiving holidays and just two weeks before it filed for arbitration[20]), Sprint precluded AT&T Missouri from being in any position to raise and negotiate its own issues. [21]

And keying the effective date of the extension from Sprint's last-minute request further rewards Sprint's gamesmanship with an additional five contractual months. Had Sprint initially sought negotiations using the parties' existing agreements as a starting point, the "request date" would have been five months earlier: June 30, 2008, when Sprint requested negotiations under the Act. At the outside, any extension granted should not be effective any later than this date.

While the MoPSC's rules call for baseball style arbitration, they allow the arbitrator to depart from picking only one of the parties' positions on an issue when the result would be unreasonable or contrary to the public interest. 4 CSR 240-36.040 (19) provides:

> The arbitrator shall issue a decision on the merits of the parties' positions on each issue raised by the petition for arbitration and response(s). Unless the result would be clearly unreasonable or contrary to the public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue.

AT&T continues to believe that the extension of Sprint's agreements is improper because an extension under the Merger Commitments is intended only to offer an additional three year term commencing with the stated expiration of that agreement. However, to the extent the Commission disagrees with that position, deviation from the Commission's baseball style rule is necessary here to prevent providing incentives to improperly manipulate the negotiation and

[20] Exhibit 6, Sprint Arbitration Petition, para. 26, and Exhibit 7 to Sprint's Petition,

[21] Final Arbitrator's Report, p. 24; Tr. 87.

arbitration process contemplated by Section 252. Thus, in no event should the effective date of any extension be later than Sprint's June 30, 2008, request for negotiations.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
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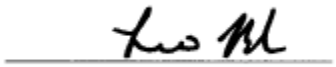
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 20, 2009.



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