

**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.)	

**AT&T MISSOURI’S REPLY TO SPRINT
CONCERNING MOTION TO DISMISS**

AT&T Missouri¹ respectfully submits this reply to the response Complainants² filed in opposition to AT&T Missouri’s motion to dismiss complaint for lack of jurisdiction.

Complainants in this proceeding essentially claim one thing: that the FCC’s Order approving the merger of BellSouth Corporation and AT&T Inc.³ entitles them to port the Kentucky ICA⁴ into Missouri -- including the bill and keep and facilities sharing pricing provisions. Ultimately, resolution of the parties’ disputes will turn on the meaning of the Merger Commitments incorporated in the FCC’s Merger Order.

But for the purposes of this Motion, the only issue before the Missouri Public Service Commission (“Commission”) is whether it has authority to resolve the parties’ dispute. It does

¹ Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as “AT&T Missouri.” It files this reply pursuant to 4 CSR 240-2.080(15).

² Complainants Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp. and NPCR, Inc. will be referred to in this pleading as “Complainants.”

³ 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”).

⁴ The Interconnection Agreement at the center of this dispute is between BellSouth, Sprint Spectrum, LP, and Sprint Communications Company L.P. for the state of Kentucky (the “Kentucky ICA”).

not. And even if the Commission determines it has jurisdiction to adjudicate this dispute, the Commission should defer any decision until the FCC has had an opportunity to rule on AT&T's Petition asking the FCC to interpret the merger commitments. Accordingly, the Commission should dismiss this complaint.

I. COMPLAINANTS HAVE THE BURDEN TO DEMONSTRATE COMMISSION JURISDICTION

The party invoking jurisdiction has the burden to show that jurisdiction exists.⁵

Whenever it appears that subject matter jurisdiction is lacking, the action must be dismissed.⁶

The courts have explained that authority to adjudicate a controversy is based on three essential elements: jurisdiction of the subject matter, jurisdiction of the res or the parties, and jurisdiction to render the particular judgment in the particular case.⁷

Subject-matter jurisdiction concerns “the nature of the cause of action or the relief sought” and exists only when the court “has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.”⁸ Jurisdiction of the subject matter is obtained by operation of law.⁹ And when the tribunal engages in the exercise of a special statutory power, it is confined strictly to the authority given by the statute.¹⁰ The

⁵ May Dept. Stores Co. v. Wilansky, 900 F. Supp. 1154, 1159 (E.D. Mo. 1995) (citing Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651, 653 (8th Cir. 1982)). Digi-tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 522 (8th Cir. 1996) (prima facie showing of personal jurisdiction over defendant required to survive motion to dismiss).

⁶ Mo. Sup. Ct. R. 55.27(g)(3) (“whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action”). Bagsby v. Gehres, 169 S.W.3d 543, 547 (Mo. Ct. App. 2005) (“before we reach the merits of this appeal, we must *sua sponte* determine whether we have jurisdiction If the trial court did not have jurisdiction over this action, any judgment entered thereon would be void, and we would have no jurisdiction except to reverse the judgment and remand the cause for dismissal”).

⁷ Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 21-22 (Mo. 2003) citing State ex rel. Lambert v. Flynn, 154 S.W.2d 52, 57 (Mo. banc 1941).

⁸ State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69, 72 (Mo. banc 1982) quoting Cantrell v. City of Caruthersville, 221 S.W.2d 471, 476 (Mo. 1949). Kuyper v. Stone County Com., 838 S.W.2d 436 (Mo. 1992) (“jurisdiction . . . is the authority of a court to hear and determine the controversy presented in a case”).

⁹ United Cemeteries Co. v. Strother, 119 S.W.2d 762, 765 (Mo. 1938); Lambert, 154 S.W.2d at 57.

¹⁰ See King v. Kinder, 690 S.W.2d 408, 409 (Mo. banc 1985); Randles v. Schaffner, 485 S.W.2d 1, 3 (Mo. 1972); State ex rel. Kansas City v. Public Service Com'n, 362 Mo. 786, 244 S.W.2d 110, 115 (Mo. 1951).

Commission has readily acknowledged this limit and the appropriateness of challenging subject matter jurisdiction through a motion to dismiss (distinguishing such a motion from a motion to dismiss for failure to state a claim):

A motion to dismiss for failure to state a claim upon which relief can be granted attacks the legal sufficiency of the petition by claiming that, even if the facts in the pleading are true, the facts do not constitute legal grounds for any relief . . . A motion to dismiss for lack of subject matter jurisdiction, on the other hand, questions the authority of the tribunal to grant the requested relief.¹¹

As set out below, 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. Accordingly, the Commission must dismiss this complaint.

II. THE MISSOURI COMMISSION HAS NO JURISDICTION TO ENFORCE THE FCC MERGER COMMITMENTS

Nothing in state law, the FCC's Merger Approval Order or the federal Act grants the Commission jurisdiction to adjudicate Complainants' claims.

A. State Law Provides No Basis for Commission Jurisdiction

The Commission is an agency of limited jurisdiction and has only such powers as are conferred upon it by statute.¹² Here, there is nothing in Missouri law that purports to give the Commission jurisdiction to enforce the FCC's Merger Approval Order. To the contrary, the

¹¹ In the Matter of the Tariff Filing of Missouri Public Service (MPS), a Division of UtiliCorp United, Inc., to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri Service Area of MPS, MoPSC Case No. ER-2001-672, 2001 Mo. PSC LEXIS 1338 at *23, October 2, 2001, citing 26 J.R. Devine, Missouri Civil Pleading & Practice, Sections 9-1 and 20-3 (1986).

¹² Inter-City Beverage Co. v. Kansas City Power & Light Co., 889 S.W.2d 875, 877 (Mo. Ct. App. 1994), citing State ex rel. Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046 (banc 1943).

Commission itself has ruled that it has no jurisdiction over mergers of telecommunications holding companies like AT&T Inc. and BellSouth Corporation.¹³

Complainants assert that “Section 386.250 RSMo (2000) gives the Commission jurisdiction to review AT&T’s failure to abide by the merger commitments it made to secure the FCC’s approval of its merger” because AT&T Missouri is a “regulated utility.”¹⁴ Section 386.250, however, is simply the Commission’s general jurisdiction statute that sets out its supervisory powers over telecommunications companies and other utilities and provides no independent basis for the Commission to adjudicate rights and obligations under federal law.¹⁵ Complainants also assert Commission jurisdiction under Section 386.390.1 RSMo. (2000),¹⁶ apparently claiming that this section elevates the allegations that “AT&T has failed to live up to its Merger Commitments” into a violation of Missouri law.¹⁷ Complainants’ claims are misplaced. This provision provides no jurisdiction to the Commission to adjudicate rights arising under federal law. As the Commission itself has recognized, in the federal arena, it “has

¹³ In the Matter of the Application for Approval of the Transfer of Control of New Edge Network, Inc., d/b/a New Edge Networks, to Earthlink, Inc., Case No. TM-2006-0307, 2006 Mo. PSC LEXIS 173, issued February 23, 2006 (“The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level. For example, in a case involving the merger of SBC Communications and Ameritech Corporation, the Commission found that ‘there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.’ On that basis, the Commission will again find that it has no jurisdiction over the proposed transaction,” citing In the Matter of the Merger of SBC Communications, Inc. and Ameritech Corporation, 7 Mo. P.S.C. 3d 528, 532 (1998).)

¹⁴ Complainants’ Response, p. 5.

¹⁵ Section 386.250(2) creates and extends the Commission’s “jurisdiction, supervision, powers and duties”:
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 . . .

¹⁶ Section 386.390. 1 RSMo (2000) states, in pertinent part:

Complaint may be made . . . by petition . . . in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or 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. . .

¹⁷ Complainants’ Response, p. 6.

only that authority which the Congress has expressly delegated to it.”¹⁸ Here, Complainants’ claim is tantamount to an assertion that Section 386.250 confers jurisdiction on the Commission to adjudicate state utility federal income tax disputes because paying such taxes is an “act or thing done or omitted to be done by any . . . public utility.” Such an absurd claim should be summarily rejected.

Some state commissions have determined that the FCC’s jurisdiction with respect to the Merger Commitments is exclusive. The Mississippi Public Service Commission concluded “the FCC has exclusive jurisdiction over the enforcement of the FCC Merger Commitments contained in the FCC’s Merger Order as related to the facts of these two cases.”¹⁹ Other commissions have come to different conclusions based upon their jurisdictional statutes.

It is not necessary to decide whether the Missouri legislature *could* have granted the Commission jurisdiction to enforce the FCC’s Merger Approval Order as Complainants request or whether Congress could have delegated such enforcement authority to the states. The fact is that neither the Missouri Legislature nor Congress purported to give any authority to the Commission to enforce Section 214 merger commitments.

As Complainants fail to point to any substantive statutory provision that purports to grant the Commission jurisdiction to adjudicate disputes arising out of an FCC Merger Approval Order, the Commission must dismiss this proceeding.

¹⁸ In the Matter of the Petition of Alma Telephone Company for Arbitration of Unresolved Issues Pertaining to a Section 251(b)(5) Agreement with T-Mobile USA, Inc., Case No. IO-2005-0468, 2005 Mo. PSC LEXIS 1766 at *21 (October 6, 2005), citing AT&T v. Southwestern Bell, 86 F. Supp. 2d 932, 946 (W.D.Mo.1999) (“[a]bsent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies.”) See also Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942, 946 (C.A.8 (Ark.) 2000) (state commission power to enforce Section 252 interconnection agreements granted from the Act and not from state law).

¹⁹ NPCR, Inc. (“Nextel Partners”) Petition for Adoption of the Existing Interconnection Agreement by and Between BellSouth Telecomm., Inc. and Sprint-Nextel Communications Co., Sprint-Nextel Spectrum L.P., Docket No. 2007-UA-316 (Miss. Pub. Serv. Comm. Oct. 30, 2007).

B. The Merger Approval Order Does Not Delegate Enforcement of the Merger Commitments to the Commission.

As the author of the Merger Order and the federal agency charged with protecting the public interest with respect to telecommunications mergers, the FCC clearly possesses jurisdiction over the Merger Commitments.²⁰ Indeed, the Merger Approval Order specifically provides:

For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC²¹

Complainants acknowledge the FCC's jurisdiction to enforce the Merger Commitments, but claim that the "Merger Order explicitly grants jurisdiction to the commission to address Sprint's complaint."²² To support this claim, Complainants point to a "savings clause" in the Merger Commitments that provides:

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 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.²³

This savings clause, however, does not purport to delegate any authority to state commissions. It simply disclaims an intent to preempt state authority that otherwise exists to the extent the state's authority is "not inconsistent with these commitments." A statement that the merger commitments do not "supersede or otherwise alter state or local jurisdiction" is not the same as an explicit grant of jurisdiction. To the contrary, it is an explicit recognition that nothing in the Merger Approval Order will "alter state or local jurisdiction." It neither restricts a state's jurisdiction -- at least to the extent the jurisdiction is exercised consistent with the FCC's order --

²⁰ Serv. Storage & Transfer Co. v. Virginia, 359 U.S. 171, 177 (1959).

²¹ Merger Approval Order, p. 147.

²² Complainants' Response, p. 9.

²³ Id.

nor expands it. This simple statement preserving existing state authority does not transform the savings clause into an affirmative delegation of federal authority.

Any attempt to bootstrap the savings clause into an express delegation of authority to state commissions to enforce the Merger Commitments would be invalid. The FCC may not delegate its authority to state commissions without express Congressional authorization. For example, the DC Circuit held that an FCC order delegating its responsibilities with respect to identifying network elements under Section 251 of the 1996 Act to state commissions was invalid: “We therefore hold that [the FCC] may not subdelegate to outside entities -- private or sovereign -- absent affirmative evidence of authority to do so.”²⁴ Likewise, an attempt by the FCC to delegate its merger approval authority under the 1934 Communications Act to a state commission would be invalid.

C. Sections 251 and 252 of the Federal Telecommunications Act of 1996 Do Not Delegate Authority to the Commission to Enforce Merger Commitments.

In its Motion to Dismiss, AT&T Missouri explained that Section 251 of the federal Act does not delegate authority to state commissions to do anything, and that Section 252’s delegation to the states is subject to specific parameters, rather than being a blanket delegation of authority over interconnection agreements to state commissions. Complainants, however, claim this argument is “specious” and that it is “settled law that jurisdiction over interconnection disputes is shared equally between the FCC and the states.”²⁵ But Complainants’ only legal

²⁴ United States Telecom Association v FCC, 359 F.3d 554, 565 (D.C. Cir. 2004), cert denied, 125 S. Ct. 313 (2004)

²⁵ Complainants’ Response, p. 12.

support for this “settled law” is a 1996 FCC order that was largely vacated and does nothing to support its expansive claims.²⁶

AT&T Missouri does not dispute that both the FCC and state commissions are given roles with respect to interconnection agreements and the resolution of disputes under those agreements. Those roles are, however, carefully defined and circumscribed by the 1996 Act. Accordingly, in reviewing the FCC’s Local Competition Order Complainants cite, the Supreme Court rejected a challenge by state commissions to the FCC’s TELRIC pricing rules based upon Section 252(c)(2)’s delegation to state commissions the task of establishing rates for interconnection.²⁷ It is simply not sufficient to claim that the 1996 Act created “parallel” jurisdiction without asking: jurisdiction over what?

For example, the states have no role in deciding which network elements must be provided under an interconnection agreement. Indeed, when the FCC attempted to carve out such a role for the states, its decision to do so was vacated by the Courts.²⁸ While states are charged with the responsibility of setting rates for certain elements that are provided under interconnection agreements, they are not free to use any methodology they choose, but must comply with the FCC’s TELRIC cost methodology.²⁹

The FCC’s responsibility to evaluate and approve telecommunications mergers has nothing to do with the 1996 Act. Indeed, it pre-dates the 1996 Act by more than sixty years. The FCC’s authority to condition its approval of the AT&T/BellSouth merger on the merger

²⁶ The paragraph Complainants quote largely addresses the significant jurisdictional changes wrought by the 1996 Act. The prior regime, under which states addressed “intrastate” telecommunications issues and the FCC addressed “interstate” telecommunications issues was replaced by a system under which the FCC was granted significant authority over intrastate as well as interstate telecommunications, while the states were granted some limited authority over some aspects of interstate telecommunications.

²⁷ AT&T Corp. v Iowa Utilities Board, 525 U.S. 366 (1999).

²⁸ United States Telecom Association v FCC, 359 F.3d 554, 565 (D.C. Cir. 2004), cert denied, 125 S. Ct. 313 (2004).

²⁹ AT&T v Iowa Utils. Bd., 525 U.S. 366 (1999).

commitments -- including the interconnection agreement-related merger commitment at issue here -- arises out of Section 214 and Section 303(r) of the 1934 Act.³⁰ Indeed, the very significance of the merger commitments is that they go above and beyond the requirements of the 1996 Act.

Moreover, nothing in Sections 251 or 252 purports to delegate enforcement of merger conditions adopted under wholly different provisions of federal law to the Commission, simply because one of those conditions involves interconnection agreements from other states. AT&T Missouri does not dispute that a state commission has jurisdiction to interpret and enforce the interconnection agreements it approves under Section 252(e).³¹ Had the claims in this case arose out of an interconnection agreement approved by this Commission, a much different issue may have been presented. But the fact that the Commission has authority to interpret and enforce interconnection agreements it approves under Section 252(e) does not mean it has authority to enforce an FCC order approving a merger, simply because that order addresses interconnection agreements approved by some other state commission.

Finally Complainants assert that state commissions may interpret and apply federal law in the exercise of their jurisdiction.³² This claim is irrelevant and supplies no independent basis for jurisdiction. AT&T Missouri acknowledges that where a state commission has concurrent jurisdiction with the FCC, the commission may be called upon to interpret FCC orders. But the state commission must first have subject matter jurisdiction. Here, the issue is not whether the

³⁰ See FCC Merger Order ¶ 22 and n. 78. In contrast, the Missouri Commission has no jurisdiction to review or approve mergers of holding companies like AT&T Inc. and BellSouth Corporation. See fn. 13, supra.

³¹ As AT&T Missouri noted in its motion to dismiss, while it is now generally recognized that state commissions have jurisdiction to interpret and enforce the interconnection agreements they approve, this was not always so. Section 252 does not explicitly set forth state commissions' authority to interpret and enforce interconnection agreements they approve. In *SW. Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000), the Fifth Circuit held that Section 252's grant to the state commissions of authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.

³² Complainants' Response, p. 16.

Commission could interpret an FCC order or a provision of federal law in a case properly within its jurisdiction. Rather, the issue is whether the Commission has jurisdiction in the first instance. As set out above, nothing in state law, the Merger Conditions or the Act itself give the Commission jurisdiction to adjudicate Complainants' claims arising out of the FCC's Merger Approval Order.³³ Accordingly, the Commission must dismiss this Complaint.

III. EVEN IF THE COMMISSION DETERMINES THAT IT HAS CONCURRENT JURISDICTION, IT SHOULD DEFER TO THE FCC.

Complainants recognize that the issue in this proceeding -- the meaning of Merger Commitment 7.1 -- is presently pending before the FCC. On February 5, 2008, the AT&T ILECs filed a Petition for Declaratory Ruling with the FCC seeking, *inter alia*, a declaration that the Kentucky ICA bill and keep and facility pricing provisions are "state-specific pricing" that cannot be ported under Merger Commitment 7.1.³⁴ On February 25, 2008, the FCC established an expedited comment cycle on AT&T's petition calling for initial comments on February 25, 2008 and reply comments on March 3, 2008.³⁵ The comment cycle has now been completed, and the matter is awaiting FCC action.

While there is no guarantee on exactly when the FCC will act, there cannot be any doubt that the FCC's decision on the proper interpretation of its Merger Approval Order will be binding on this and every other state commission. For that reason, even if the Commission

³³ In the cases cited by Sprint from the public service commissions in Kentucky, Tennessee, and Florida, the interconnection agreements at issue had all been approved by the respective state commissions.

³⁴ Petition for Declaratory Ruling that Sprint-Nextel Nextel Corporations may not impose a Bill-and-Keep Arrangement, WC Docket No. 08-23. This Petition can be viewed at:

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841371

³⁵ AT&T's Reply Comments can be viewed at:

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519862243

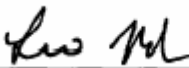
believed that it had been delegated concurrent jurisdiction to enforce the merger conditions, prudence would dictate that it defer any decision until the FCC has had an opportunity to rule.³⁶

IV. CONCLUSION

The Commission lacks jurisdiction to adjudicate Complainants' claims. Nothing in state law grants jurisdiction to the Commission to interpret and enforce the FCC's Merger Commitments. Congress has not delegated the FCC's merger approval authority to the Commission, nor has the FCC purported to do so. The interpretation and enforcement of the FCC's Merger Approval Order, including the commitments, are within the exclusive jurisdiction of the FCC. To the extent the Commission believes it has jurisdiction, it should defer to the FCC. Accordingly, the Complaint should be dismissed.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

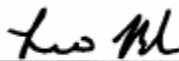
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³⁶ In California, the Administrative Law Judge to which the identical Sprint/AT&T California dispute was assigned recently held that "while parties have filed extensive briefs in support of their interpretations of the FCC's merger order, the FCC is in the best position to interpret its own order." Application of Sprint for Commission Approval of Interconnection Agreement, California Public Utilities Commission Docket No. 07-12-017, Administrative Law Judge's Ruling (March 26, 2008).

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on May 5, 2008.



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