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

AT&T MISSOURI'S POST HEARING BRIEF

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

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AT&T MISSOURI'S POST HEARING BRIEF

AT&T Missouri[1] respectfully submits its Post Hearing Brief and requests the Missouri Public Service Commission ("Commission") to find that arbitration is not appropriate here because Section 252(a) negotiations between the parties did not occur on the subject the Sprint Companies[2] seek to arbitrate.

In the event the Commission proceeds to the merits, it should find that under the terms of AT&T's November 16, 2007 Accessible Letter[3], the parties' existing interconnection agreements may not be extended. If the Commission determines not to enforce the Accessible Letter, the Commission should rule that only Sprint's landline agreement is eligible for extension under the plain language of Merger Commitment 7.4 from the FCC's AT&T/BellSouth merger order, which would permit it to be extended until April 29, 2011, three years from its April 29, 2008 expiration date.

AT&T Missouri has challenged the arbitrability of the issue Sprint seeks to raise in this proceeding through a motion to dismiss, which the Commission denied on February 19, 2009.

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

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

[3] AT&T issues accessible letters to communicate policies and procedures to its wholesale carrier customers and endeavors to follow them in an effort to ensure uniform and non-discriminatory application. Exhibit 3NP, McPhee Direct, p. 14.

AT&T Missouri has timely applied for reconsideration and/or rehearing of that order and its application is currently pending before the Commission.[4]

ARGUMENT

I. Arbitration is Not Appropriate Here because Section 252(a) Negotiations between the Parties did Not Occur on the Subject Sprint Seeks to Arbitrate.

It is clear under Section 252(a) of the federal Telecommunications Act that arbitration is not permitted on an issue where negotiations on that issue have not occurred. Here, the testimony of Sprint's own witness demonstrates that no Section 252(a) negotiations occurred concerning an extension under Merger Commitment 7.4. Instead, the evidence shows that Sprint merely stated a unilateral intent to elect to extend its interconnection agreements, which does not amount to the negotiations required by the Act:

> [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.[5]

Indeed, while the federal Act envisions that carriers will negotiate any issues in dispute in an effort to resolve them prior to arbitration, Sprint instead made clear its intention to arbitrate immediately if AT&T Missouri did not simply agree with Sprint regarding the agreement Sprint had proposed, thus bypassing negotiations altogether. Sprint's November 21, 2008, letter clearly

[4] In order to preserve its jurisdictional objection, AT&T Missouri, by this reference, incorporates into this brief its arguments from its December 30, 2008, Motion to Dismiss; its January 26, 2009, Reply; its February 27, 2009, Application for Reconsideration and/or Rehearing; and its March 10, 2009, Reply. In those pleadings, AT&T Missouri, among other things, explains that Section 252(b) does not authorize state commissions to enforce the FCC's merger commitments in arbitration proceedings.

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

states that if AT&T Missouri were "unwilling to agree" to its election, Sprint would take the dispute to the Commission, not negotiate:

> Rather than go to arbitration on the number of issues currently before the parties, Sprint has elected to extend its existing interconnection agreements under Merger Commitment 7.4. Please acknowledge if AT&T will agree to this extension request. If AT&T is unwilling to agree to Sprint's election to extend its existing ICAs, Sprint will submit its extension request as the issue in its current arbitration proceeding.[6]

Undisputed evidence shows that the "negotiations" Sprint claims underlie its arbitration request consist merely of: (1) two, brief, two-minute digressions during two of the many meetings that lasted one to two hours and were dedicated to Section 252(a) negotiations focused on conforming the Kentucky redlined agreement for Missouri and other states;[7] and (2) Sprint's November 21, 2008, letter (quoted above).

Apart from AT&T's written denial of Sprint's request (issued the same day Sprint filed its petition for arbitration), no other contact between the parties concerning an extension of their existing Missouri agreements occurred, despite steady negotiations between the parties from July 2008 through November 2008 in which the parties met as often as twice a week. [8]

Sprint's answer to this gaping hole is unpersuasive. Sprint points to AT&T Missouri's July 16, 2008, letter offering as a starting point for negotiations either its generic template agreements or the parties' existing Missouri agreements (as it was

[6] Sprint Arbitration Petition, Exhibit 7.
[7] Allen-Flood, Tr. 73, 80-81, 85.
[8] Ibid.

required to do under Merger Commitment 7.3).[9] Sprint argues that it merely accepted AT&T Missouri's offer to negotiate from the existing agreements:

> Sprint's notification of extending its Missouri interconnection agreements essentially takes AT&T up on its offer in its July 16, 2008 letter to commence negotiations pursuant to Sprint's existing agreements.[10]

However, Sprint's argument is a misrepresentation of the facts. Both parties' witnesses readily agreed that had negotiations started from their existing agreements, a routine 252(a) negotiation would have occurred, with each being able to raise issues and any remaining disputes appropriately referable to the Commission for arbitration under the Act. AT&T Missouri witness McPhee testified with respect to Merger Commitment 7.3:

> If Sprint were to avail itself of 7.3 to start negotiating from its old expired Missouri agreements and if there were disagreements on the content of that language, then that language would be subject to arbitration at the Commission.[11]

Sprint witness Felton agreed:

> . . . if Sprint had elected to negotiate an agreement pursuant to Merger Commitment 7.3 and begin with the current agreement as the starting point for negotiations, then, yes, AT&T would have had the right to propose modifications for that.[12]

However, nothing of the sort occurred with respect to Merger Commitment 7.4.

Both parties' witnesses acknowledged that Section 252 negotiations are very structured and formal. To avoid any misunderstandings, the parties take great care in documenting the negotiation, including the actual request for negotiation and its acceptance, the negotiation start date, the arbitration window, the baseline document from which to negotiate, the agreed-to

[9] Sprint Arbitration Petition, paras. 21, 22, citing AT&T's July 16, 2008 letter and footnote 1 from that letter. A copy of AT&T's July 16, 2008, letter is attached to Sprint's Arbitration Petition as Exhibit 4. (Sprint's Arbitration Petition, including its attachments, has been admitted into evidence in this proceeding as Exhibit 6.)
[10] Exhibit 6, Sprint Arbitration Petition, para. 27.
[11] McPhee, Tr. 98.
[12] Felton, Tr. 39.

redline changes to the contract language, and the list of disputes that remain, which the parties normally reference as the "decision point list" or "DPL."[13]

In such a very carefully-worded letter, Sprint flatly rejected AT&T Missouri's offer to start negotiations from the existing Missouri agreements, and threatened to file another complaint at the Commission unless AT&T agreed to limit talks to the Kentucky document:

> We will continue our discussions in adopting the Kentucky ICA and making the minor modifications necessary under the Merger Commitments. If AT&T is unwilling to proceed in that manner, please advise and we will take this issue immediately to the Missouri Public Service Commission.[14]

And Sprint admits that that no redlined version of the existing Missouri agreements was exchanged, that such documents do not exist, that no negotiations occurred using the existing Missouri agreements as a starting point, and that the first time AT&T Missouri would have seen the amendments Sprint prepared to extend the existing Missouri agreements was as an attachment to Sprint's Missouri petition for arbitration.[15] At no time did the parties agree to use their existing agreements as a base from which to negotiate.[16]

On the other hand, the parties' documentation shows that their oral and written communications (which, for Missouri, occurred from July 2008 through November 2008) were limited to the conformance of the Kentucky redlined agreement for use in Missouri. Their correspondence shows that they agreed to work from the Kentucky redlined agreement as the base document,[17] that the parties actually conducted their negotiations from the Kentucky

[13] Allen Flood, Tr. 71-72; Felton, Tr. 33-37.
[14] Exhibit 5 to Sprint Arbitration Petition (admitted as Exhibit 6).
[15] Felton, Tr. 37-38, 40-42. Accord, Allen-Flood, Tr. 85-86.
[16] Allen-Flood, Tr. 79-81.
[17] Exhibit 6, Sprint Arbitration Petition, paras. 23-24; and Exhibits 5 and 6 to Sprint's Petition. See also Felton, Tr. 31.

document and exchanged several redlined versions of the Kentucky document.[18] When the parties began negotiations, which started on a multistate basis, well over 100 disputed issues existed between them.[19] They had resolved over 80% of those issues by November 2008, when Sprint abruptly abandoned those negotiations.[20] Yet, the parties still had significant disagreements under the Kentucky agreement, including the bill and keep issue, the facility sharing provision, and the definition of wireless local traffic.[21] Neither party, however, has presented any of them for arbitration.

Sprint's 11th hour attempt to change playing fields from the Kentucky agreement to the existing Missouri agreements has effectively precluded AT&T Missouri from exercising its rights to negotiate under Section 252(a). As its negotiator testified, it would have taken AT&T Missouri three 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[22]), Sprint precluded AT&T Missouri from being in any position to negotiate an extension of its existing agreements. [23]

Sprint will likely again point to the Kentucky Public Service Commission's arbitration concerning the extension of the parties' Kentucky interconnection agreement under Merger

[18] Felton, Tr. 32, 36-37. For example, the General Terms and Conditions portion of the redlined Kentucky agreement from which the parties negotiated is attached as Schedule 1P to AT&T Witness Scott McPhee's Direct Testimony, which was admitted as Exhibit 3P.
[19] Allen-Flood, Tr. 84.
[20] Id., p. 85.
[21] Id., p. 64.
[22] Exhibit 6, Sprint Arbitration Petition, para. 26, and Exhibit 7 to Sprint's Petition,
[23] Tr. 87.

Commitment 7.4[24] and argue that the Missouri Commission should similarly proceed with this arbitration. The Commission should note, however, the Kentucky Commission perceived that extensive negotiations occurred between the parties, producing agreement on the eligibility of the Kentucky agreement for extension, but not on a start date for the extension:

> After the December 29, 2006 announcement of the FCC's approval of the merger, Sprint and AT&T deliberated the impact of the merger commitments upon their negotiations of their interconnection agreement. The parties agree that during the course of the deliberations, AT&T acknowledged that, pursuant to the merger commitments, Sprint could extend its current agreement for 3 years. However, despite this agreement on the right to extend the contract, the parties have not reached a consensus as to the exact date of commencing the extension.[25]

The evidence in this case shows that similar negotiations did not take place with respect to Missouri.

As no voluntary Section 252(a) negotiations between the parties occurred for an extension of their agreements -- the issue before the Commission in this matter--arbitration under Section 252(b) is improper. As the Fifth Circuit explained:

> The jurisdiction of the PUC as arbitrator . . . is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.[26]

In sum, arbitration of the single issue Sprint raised in this case is not appropriate. The federal Act requires that parties negotiate before either can force the other to compulsory arbitration. Bypassing that requirement, as Sprint seeks to do, is not permitted under Section 252

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[24] In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast, Kentucky PSC Case No. 2007-00180, Order, issued September 18, 2007 (the "Kentucky Arbitration Decision").

[25] Kentucky Arbitration Decision, p. 3-4. Sprint provided a copy of this decision to the arbitrator on January 20, 2009.

[26] Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Company, 350 F.3d 482, 487 (5th Cir. 2003) (holding that the PUC properly denied jurisdiction over issue being raised because it was not a mutually agreed upon subject of voluntary negotiation between the ILEC and CLEC).

of the federal Act. In addition, allowing a party to bypass negotiations frustrates the policy of encouraging bilateral negotiations and dispute resolution, and prevents AT&T Missouri from raising additional issues with regard to the negotiated agreement, as is clearly its right under Section 252(b)(3). These important policies would be advanced only by finding in favor of AT&T Missouri on this point.

II. The Existing Interconnection Agreements are not Eligible for Extension.

(a) Under AT&T's November 16, 2007, Accessible Letter, Sprint's Agreements are not Eligible for Extension.

AT&T Missouri denied Sprint's request to extend its existing interconnection agreements under AT&T's November 16, 2007 Accessible Letter, not under Merger Commitment 7.4.[27] Through this Accessible Letter, AT&T sought to resolve extension disputes with various carriers -- primarily Sprint -- by granting carriers additional rights to extend agreements that had expired:

> Merger Commitment 7.4 allows carriers to extend the terms of their current ICAs for a period of up to three (3) years, subject to amendment to reflect prior and future changes of law. The question has arisen whether ICAs may be extended for three years from the expiration date of the ICA's initial term (as interpreted and implemented by AT&T) or some other date (e.g., the merger close date of December 29, 2006 or the date of a carrier's extension request). While AT&T believes that its interpretation is supported by the plain language of Merger Commitment 7.4, as well as by the *ex parte* documents submitted to the FCC and the negotiations of the commitment prior to release of the Merger Order, AT&T is modifying its position to allow carriers additional opportunities to extend the terms of their agreements.

The Accessible Letter in effect provided a grace period. For agreements that expired prior to January 15, 2008, AT&T was willing to extend the agreement three years from the date of the request, as long as the carrier submitted its request prior to that date (i.e., AT&T gave carriers 60 days -- from November 16, 2007 until January 15, 2008 -- to request such an extension). For agreements expiring after January 15, 2008, AT&T was willing to extend the

[27] Copies of AT&T's written response to Sprint and its November 16, 2007 Accessible letter were attached as Schedules 4 and 5 to AT&T Missouri witness Scott McPhee's Direct Testimony (admitted as Exhibit 3NP).

agreement for three years as long as the request was made prior to the agreement's expiration and the initial term was to expire prior to the merger commitments' sunset date.[28]

Sprint's November 21, 2008, extension request,[29] however, was untimely. In order to benefit from the expanded application of the merger commitment, Sprint (under the Accessible Letter's first option, which applied to expired agreements) would have had to request extension of its two wireless agreements prior to January 15, 2008, because both agreements expired prior to January 2008. And Sprint (under the Accessible Letter's second option, which applied to agreements expiring on or after January 15, 2008) would have had to submit its request to extend its landline agreement prior to the expiration of that agreement's initial term on April 29, 2008. Because Sprint did not submit its request for extension of its agreements until November 21, 2008, AT&T Missouri, consistent with the Accessible letter and its treatment of other carriers, denied the request.[30]

While AT&T submitted its November 16, 2007 Accessible Letter to the FCC and received no objection to it from the FCC,[31] AT&T Missouri readily acknowledges both that the FCC did not formally adopt it[32] and that the merger commitment did not contemplate the deadlines set forth in the Accessible Letter.[33]

AT&T Missouri, however, requests the Commission to enforce these deadlines as a matter of fairness. Before AT&T issued the Accessible Letter, Sprint and other carriers were taking issue with AT&T's application of Merger Commitment 7.4, complaining that it provided no benefit to their older agreements (for example, an agreement that expired in 1997, even with a

[28] Exhibit 3NP, McPhee Direct, p. 12; McPhee, Tr. 115.
[29] A copy of Sprint's November 21, 2008 letter requesting extension was attached to Sprint's Arbitration Petition as Exhibit 7 (Sprint's entire Arbitration Petition was admitted as Exhibit 6).
[30] Exhibit 3NP, McPhee Direct, p. 13 and Schedule 4.
[31] McPhee, Tr. 112.
[32] Ibid.
[33] Id., at 114.

three year extension, would still be expired). While AT&T continued to believe its reading was correct, it modified its application of the commitment for a limited period of time in order to resolve these disputes. The Accessible Letter included some gives and takes – it gave Sprint the benefit of an extension to which the merger commitment did not actually entitle Sprint, but it required Sprint to avail itself of its rights by a specified date in order to enjoy that benefit.[34]

Outside of an apparent initial miscue in defining the grace period's exact end point,[35] AT&T has applied the November 16, 2007 Accessible Letter's deadline to all requesting carriers in a uniform manner.[36] More than 650 carriers -- including Sprint in the Southeast region -- have taken advantage of the expanded rights the Accessible Letter provided and AT&T has treated them consistently with Sprint.[37] And no carrier, other than Sprint in Missouri, has filed a complaint concerning the Accessible Letter.[38]

Sprint was fully aware of the terms of the additional "grace period" and did make timely requests in nine of AT&T's 22 states, which resulted in AT&T's granting of extension requests that it would have denied under the merger commitment.[39] Until it filed this arbitration, Sprint voiced no objection to AT&T's November 16, 2007 Accessible Letter.[40] Having availed itself of

[34] Exhibit 3NP, McPhee Direct, p. 12; Exhibit 4, McPhee Rebuttal, p. 9; and McPhee, Tr. 145-146.
[35] The exact wording of the November 16, 2007, Accessible Letter permitted extensions of expired agreements "provided that AT&T receives the carrier's extension request prior to January 15, 2008." Perhaps allowing for processing time, AT&T allowed extensions received on January 15, 2008. McPhee, Tr. 117-119.
[36] McPhee, Tr. 122. Sprint, based on discovery answers AT&T provided to Sprint, has claimed two aberrations in AT&T's application of the Accessible Letter's deadlines: Hunt Telecommunications, LLC, and Michigan Access. The evidence shows AT&T treated these two companies consistently with how it treated Sprint in Missouri. AT&T honored Hunt's extension request (shown in the discovery response as received June 21, 2008) because it determined that Hunt had actually made a timely request. AT&T confirmed from its account manager's notes that Hunt had requested an extension on February 15, 2007, and that the account manager had incorrectly denied the request. Exhibit 4, McPhee Rebuttal, p. 5. AT&T honored Michigan Access's request (shown in the discovery response as received May 8, 2008) because the customer, in challenging the initial denial of its request, represented it submitted the letter to AT&T on November 30, 2007. AT&T took the customer at its word and processed the extension request. McPhee, Tr. 119-120, 163-164.
[37] Ex. 4, McPhee Rebuttal, p. 6.
[38] McPhee, Tr. 146.
[39] Exhibit 3NP, McPhee Direct, p. 13; McPhee, Tr. 113.
[40] Exhibit 3NP, McPhee Direct, pp. 14-15.

the benefits of the Accessible Letter, Sprint, in fairness, should not now be allowed to ignore the deadline for making a request under the Accessible Letter.

(b) Sprint's Wireless Agreements are not Eligible for Extension under Merger Commitment 7.4.

In the event the Commission decides not to enforce AT&T's November 16, 2007, Accessible Letter, Sprint's wireless agreements remain ineligible for extension under the plain language of Merger Commitment 7.4. AT&T Missouri does, however, acknowledge that the plain language of the Commitment would have permitted the extension of Sprint's landline agreement to April 29, 2011, three years from its April 29, 2008, expiration date.[41]

1. Adding three years to Sprint's wireless agreements does not add additional life to those agreements.

Merger Commitment 7.4 requires AT&T to "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."[42] This language, on its face, allows the addition of three years to the initial term of a carrier's current agreement.

Adding three years to the initial term of Sprint's wireless agreements would not add additional life to those agreements. Section 19.2.1 of the Sprint Spectrum LP agreement provides for expiration of its initial term in November 2004.[43] Adding three years to its initial term would only extend it until November 2007. Section 18.2.1 of Sprint's Nextel West Corp. agreement provides for expiration of its initial term in November 1999.[44] Adding three years to

[41] Exhibit 3NP, McPhee Direct, p. 14.
[42] Exhibit 3NP, McPhee Direct, Schedule 3 (p. 150).
[43] Section 19.2.1 of the Sprint Spectrum LP agreement states: "The Term of this Agreement shall commence upon the Effective Date of this Agreement and shall expire on the 31st day of November 30, 2004 (the "Term") . . ." This agreement was attached as Exhibit 8 to Sprint's Arbitration Petition, which was admitted as Exhibit 6.
[44] Section 18.2.1 of Sprint's Nextel West Corp. agreement states: "SWBT and carrier agree to interconnect pursuant to the terms defined in this Agreement for an initial period terminating November 1, 1999, and thereafter the Agreement shall continue in force and effect unless and until terminated as provided herein . . ." This agreement was attached as Exhibit 9 to Sprint's Arbitration Petition, which was admitted as Exhibit 6.

its initial term would only extend it until November 2002. Consequently, even with three year extensions, these two agreements would remain expired.[45]

Sprint, on the other hand, wishes to add language to the Merger Commitment that is not there. It wishes the Commitment to be read as requiring AT&T to extend the agreements an additional three years -- not from the end of the initial term, as the merger commitment indicates -- but from the date of Sprint's request, November 21, 2008, until November 21, 2011.[46] Instead of a three year extension, Sprint's interpretation would result in a seven year extension of the Sprint Spectrum agreement[47], and a twelve year extension of its Nextel agreement.[48] That is not what the language of the Commitment allows.

The Merger Commitment was intended to reduce transaction costs by allowing carriers to extend the term of an ICA -- which is typically three years -- for an additional three years, or six years total. The Merger Commitment was not intended to further extend any agreements that may have already been in effect for seven or more years, which have not been replaced by successor agreements. In those latter circumstances, the carrier has already reduced transaction costs by remaining in an agreement for an extended period of time.[49]

2. Sprint's wireless agreements are not eligible for extension under the Merger Commitment because they are not "current" agreements.

By its terms, Merger Commitment 7.4 only allows a requesting carrier to extend its "current interconnection agreement."[50] Neither of the Sprint wireless agreements is eligible for extension because neither is a "current" agreement.

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[45] Exhibit 4, McPhee Rebuttal, p. 7.
[46] Exhibit 1, Felton Direct, p. 3.
[47] Under Section 19.2.1, the Sprint Spectrum agreement expires in November 2004. See fn. 42 supra. Extending it until November 2011 would result in a seven year extension.
[48] Under Section 18.2.1, the Nextel agreement expires in November 1999. See fn. 43 supra. Extending it until November 2011 would result in a 12 year extension.
[49] Exhibit 4, McPhee Rebuttal, p. 8.
[50] Exhibit 3NP, McPhee Direct, Schedule 3 (p. 150).

Not only are Sprint's wireless agreements expired, but both have also terminated by their own terms. Section 19.2.7 of the Sprint Spectrum agreement states:

> The rates, terms and conditions of this Agreement shall continue in full force and effect until the earlier of (i) the effective date of its successor agreement, whether such successor agreement is established via negotiation, arbitration or pursuant to Section 252(i) of the Act; or (ii) the date that is ten (10) months after the date on which **SBC-13STATE** received Carrier's Section 252(a)(1) request, at which time the Agreement shall terminate without further notice.[51]

Similarly, Section 18.2 of the Nextel West agreement states:

> SWBT and Carrier agree to interconnect pursuant to the terms defined in this Agreement for an initial period terminating November 1, 1999, and thereafter the Agreement shall continue in force and effect unless and until terminated as provided herein. Either Party may terminate this Agreement by providing written notice of termination to the other Party, such written notice to be provided at least sixty (60) days in advance of the date of termination; provided, however, that no such termination shall be effective prior to the date one year from the Effective Date of this Agreement. By mutual agreement, SWBT and Carrier may amend this Agreement in writing to modify its terms.[52]

Here, AT&T Missouri gave such notices to Sprint on August 21, 2007.[53] Thus, when Sprint notified AT&T Missouri on November 21, 2008 that it wished to extend the agreements under Merger Commitment 7.4, both of Sprint's wireless agreements had already terminated by their own terms.[54] Accordingly, they are not "current" agreements under Merger Commitment 7.4 and are not eligible for extension.

[51] See Exhibit 8 to Sprint's Arbitration Petition, which was admitted as Exhibit 6.
[52] See Exhibit 9 to Sprint's Arbitration Petition, which was admitted as Exhibit 6.
[53] 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 (which in total has been admitted as Exhibit 6).
[54] Unlike its wireless agreements, Sprint's landline agreement does not contain a similar provision that would cause the agreement to terminate after such notice was given.

III. Questions Posed by the Arbitrator.

(a) If an extension is to be granted, when should the extension commence?

In the event the Commission decides not to enforce AT&T's November 16, 2007, Accessible Letter, the Commission should focus on the plain language of Merger Commitment 7.4. It requires AT&T to "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."[55] This language, on its face, allows the addition of three years to the initial term of a carrier's current agreement.

Using the Merger Commitment's plain language, Sprint's landline agreement would be eligible for an extension until April 29, 2011, three years from its April 29, 2008, expiration date.[56] As explained in further detail in Section II(b)(1), supra, Sprint's wireless agreements would remain expired, because of their age, even if three years were added to their initial term.

Sprint, on the other hand, argues that the Commission should permit a three year extension under the Merger Commitment for all three of its agreements and that the extension should commence with its extension request.[57] Here, that would extend the three agreements from November 21, 2008 (the date of Sprint's request) until November 20, 2011. Instead of a three year extension, Sprint's interpretation would result in a seven year extension of the Sprint Spectrum agreement[58], and a twelve year extension of its Nextel agreement,[59]

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[55] Exhibit 3NP, McPhee Direct, Schedule 3 (p. 150).
[56] Exhibit 3NP, McPhee Direct, p. 14.
[57] Exhibit 1, Felton Direct, p. 3.
[58] Under Section 19.2.1, the Sprint Spectrum agreement expires in November 2004. See fn. 42 supra. Extending it until November 2011 would result in a seven year extension.
[59] Under Section 18.2.1, the Nextel agreement expires in November 1999. See fn. 43 supra. Extending it until November 2011 would result in a 12 year extension.

The Commission should note that no state commission or other authority has endorsed Sprint's position that an extension under Section 7.4 should commence on the extension request date.

In fact, the only state commission that addressed the issue rejected the position Sprint is taking here.[60] In the Kentucky arbitration case (which Sprint has cited in this proceeding for other purposes[61]), Sprint argued that there are two potential dates the Commission could determine as the date by which the three year extension of the Kentucky agreement would commence:

> Sprint first proposed March 20, 2007 as a potential commencement date, as it is the date on which Sprint notified AT&T in writing that the merger commitments, as outlined in the FCC's merger approval Order, qualified as AT&T's most recent offer for consideration within the parties' negotiations to extend the current interconnection agreement . . . In the alternative, Sprint also proposes a commencement date of December 29, 2006, which is the date of the AT&T-BellSouth merger and the effective date of the FCC merger Order and merger commitments. Sprint contends this date is the absolute earliest date by which the commencement of the 3-year extension could occur.[62]

The Kentucky Commission rejected Sprint's position that the extension should commence on the extension request date and instead ruled that December 29, 2006, the effective date of the merger approval order, was the appropriate date:

> In light of the evidence and arguments presented, the Commission finds that the date of December 29, 2006 is the proper commencement date of the extension of the interconnection agreement between the parties. This is the effective date of the FCC Order and the merger commitments, including Merger Commitment No. 4, which compels AT&T to extend the life of a current interconnection agreement at the request of a connecting carrier, regardless of whether the initial term has

[60] In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast, Kentucky PSC Case No. 2007-00180, Order, issued September 18, 2007 (the "Kentucky Arbitration Decision"). In candor to the tribunal, AT&T Missouri would note that the Kentucky Commission also rejected AT&T's interpretation of Merger Commitment 7.4.

[61] Sprint cited the Kentucky Arbitration Decision in Sprint's Response to AT&T Missouri's Motion to Dismiss, at p. 14. Sprint also cited this decision in its pre-filed testimony. See Exhibit 1, Felton Direct, p. 9; and Exhibit 2, Felton Rebuttal, p. 9. Sprint provided a copy of this decision to the arbitrator on January 20, 2009.

[62] Kentucky Arbitration Decision, p. 10.

expired. In the preamble of Appendix F of the Memorandum Opinion and Order approving the merger, the FCC stated:

> The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them. Unless otherwise specified herein, the commitments described herein shall become effective on the Merger Close Date . . .[63]

(b) What is the legal significance of the wireless agreements being terminated vs. expired, when the parties continue to operate under the terms of those agreements?

The significance of the wireless agreements being "terminated" (as explained in more detail in Section II(b)(2), supra) is that those agreements are no longer "current" agreements and therefore are not eligible for extension under the plain language of Merger Commitment 7.4. Termination resulted, under the operation of specific contract clauses in those two agreements, from AT&T's affirmative act in giving written notice of termination to Sprint with respect to those agreements.[64] Absent that affirmative act, the agreements by their terms were to continue in force and effect, even after the expiration of their initial terms.[65]

But as AT&T Missouri witness Scott McPhee testified, even though Sprint's wireless agreements are no longer the parties' "current" agreements, AT&T is continuing to provide services to Sprint based upon the rates and terms that were contained in those terminated agreements. In the event the Commission were to rule that Sprint is not entitled to extend these agreements under Merger Commitment 7.4, AT&T Missouri would not cease providing service

[63] Kentucky Arbitration Decision, p. 11-12 (emphasis in original).
[64] These letters, dated August 21, 2007, were included as part of Exhibit 1 to Sprint's Arbitration Petition, admitted as Exhibit 6.
[65] See Section 19.2.7 of the Sprint Spectrum agreement, which was Exhibit 8 to Sprint's Arbitration Petition; and Section 18.2.1 of Sprint's Nextel agreement, which was Exhibit 9 to Sprint's Arbitration Petition (the entire Arbitration Petition was admitted as Exhibit 6).

to Sprint. AT&T Missouri plans to continue to do business with Sprint without interruption until successor agreements are in place.[66]

The fact that the parties have no current wireless contracts in place does not prevent them from continuing to do business. At the hearing, Mr. McPhee analogized the situation to one in which a union contract has expired and the union workers continue to work without a contract. In that situation, those workers would still be compensated in a manner consistent with the terms of the old contract.[67] Here, AT&T Missouri expects the parties to continue to operate consistently with the terms of the old contracts until successor agreements are in place.

In the event a dispute arose over payment for the exchange of traffic, the parties would have the remedy of quantum meruit, which is based on a promise implied in law that a person will pay reasonable and just compensation for valuable services provided at that person's request and/or his approval.[68] If one of the parties elects to proceed in quantum meruit, it may introduce the contract as prima facie evidence of reasonable value.[69]

CONCLUSION

Arbitration is not appropriate here because Section 252(a) negotiations between the parties did not occur on the subject that Sprint seeks to arbitrate. But in the event Commission proceeds to the merits, it should find that the parties' existing interconnection agreements may not be extended under the terms of AT&T's November 16, 2007 Accessible Letter. If the Commission determines not to enforce the Accessible Letter, the Commission should rule that only Sprint's landline agreement is eligible for extension under the plain language of Merger

[66] Exhibit 4, McPhee Rebuttal, p. 10.
[67] McPhee, Tr. 136.
[68] McDowell v. Schuette, 610 S.W.2d 29 (Mo. App. 1980); Bogert Construction Co. v. Lakebrink, 404 S.W.2d 779 (Mo. App. 1966).
[69] Humfeld v. Langkop, 591 S.W.2d 251, 255 (Mo. App. 1979); Reed Schmidt and Associates, Inc. v. Carafiol Furniture Co., 469 S.W.2d 876, 880 (Mo. App. 1971).

Commitment 7.4 from the FCC's AT&T/BellSouth merger order, which would permit it to be extended until April 29, 2011, three years from its April 29, 2008 expiration date.

Respectfully submitted,

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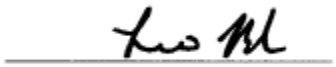
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on March 11, 2009.



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