

**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 REPLY TO SPRINT  
CONCERNING  
APPLICATION FOR RECONSIDERATION/REHEARING**

**1. It is appropriate for the Commission to take and consider evidence in determining its own jurisdiction.**

By mischaracterizing AT&T’s motion to dismiss for lack of jurisdiction as a motion to dismiss for a “failure to state a claim,” Sprint<sup>1</sup> seeks to preclude the Missouri Public Service Commission (“Commission”) from considering evidence demonstrating the lack of jurisdiction here.

Sprint claims that AT&T Missouri “inappropriately raises issues beyond the pleadings,” that “a motion to dismiss must rely upon the pleadings,”<sup>2</sup> and that “. . . the Commission here must accept as true Sprint’s allegations. AT&T’s citations to the transcript from the hearing and testimony must be disregarded.”<sup>3</sup>

Sprint is confused. It is correct, of course, that on a motion to dismiss for failure to state a claim, one does not look beyond the complaint, and all the allegations in the complaint are taken as true. That is because such a motion challenges the sufficiency of the complaint; the motion asserts that even if everything the complainant alleges is true, there is no claim. A

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<sup>1</sup> Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. will be referred to in this pleading as “Sprint.”

<sup>2</sup> Sprint Response to AT&T Missouri’s Application for Reconsideration and/or Rehearing (“Sprint Response”), p. 1.

<sup>3</sup> Sprint Response, p. 3.

motion to dismiss for lack of jurisdiction, in contrast, does not attack the sufficiency of the complaint, and the resolution of such a motion often turns on factual determinations that require the tribunal to look beyond the pleadings. This Commission has made the distinction clear:

Public Counsel's alternative motion to dismiss for failure to state a claim upon which relief may be granted, however, is a different matter. Because Public Counsel's argument is that the Commission lacks authority to grant the relief sought by UtiliCorp, the Commission will treat Public Counsel's motion as a motion to dismiss for lack of subject matter jurisdiction rather than as 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.<sup>4</sup>

Consequently, the MCImetro and the Eastwood v. North Central Missouri Drug Task Force cases (which Sprint cites in an attempt to confine the Commission to the arbitration petition and to force it to accept the petition's allegations as true) have no application here -- nor could they, because jurisdiction cannot be conferred by a bare allegation in a petition. As the party invoking jurisdiction, Sprint has the burden to show -- not merely allege -- that jurisdiction exists.<sup>5</sup> When the evidence shows that jurisdiction is lacking, the action must be dismissed.<sup>6</sup>

Like any tribunal, the Commission has a duty to determine its jurisdiction to proceed and it is entirely appropriate for the Commission to adduce and consider evidence on the issue, which it has done on a routine basis. As the Commission stated after conducting a hearing on a motion to dismiss in which it adduced evidence to support its complaint jurisdiction, it "would not be

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<sup>4</sup> 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) (emphasis added).

<sup>5</sup> 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)).

<sup>6</sup> 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").

acting in the interest of judicial economy to convene an evidentiary hearing on the substantive allegations raised by the complaint if the Commission lacks jurisdiction to proceed.”<sup>7</sup>

**2. The evidence demonstrates that Sprint is not proceeding under Section 252 of the Act.**

Contrary to its initial representation in its petition, it should be clear now that Sprint never sought to engage AT&T Missouri in a negotiation and arbitration as contemplated under Section 252 of the federal Telecommunications Act.

The Commission’s apparent belief that the parties were negotiating under Section 252(a) using their existing Missouri agreements as a starting point and had a disagreement about the term of the agreements they were negotiating<sup>8</sup> was obviously based on representations like the following from Sprint’s arbitration petition:

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.<sup>9</sup>

Had such negotiations occurred under Section 252(a), AT&T Missouri would have had a right under the Act to make counter proposals during negotiations and to present its own open issues

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<sup>7</sup> MCI Telecommunications Corporation, Inc. vs. Southwestern Bell Telephone Company, Inc., Case No. TC-97-303, 1997 Mo. PSC LEXIS 126, issued September 16, 1997, at \*6 (taking evidence on whether plaintiffs were certificated by the MoPSC to enable them to be purchasers or potential purchasers of defendant’s wholesale telecommunications service for determining whether the statutorily-required 25 plaintiff requirement had been met to vest the MoPSC with jurisdiction). See also In the Matter of the Petition of MCI Telecommunications Corporation et al. for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company, Case No. 97-40, 1998 Mo. PSC LEXIS 2, issued February 6, 1998 at \*1 (“The Commission . . . set a hearing for the parties to address the extent of the Commission’s jurisdiction. SWBT and MCI attended and presented oral argument and evidence at the . . . hearing on jurisdictional issues”).

<sup>8</sup> Order Denying Motion to Dismiss, Case No. CO-2009-0239, issued February 19, 2009, at p. 7 (“AT&T offered the Missouri agreements as a starting point during the negotiations and cannot now claim that it was not involved in negotiations regarding those agreements”).

<sup>9</sup> Sprint Arbitration Petition, para. 27.

for arbitration.<sup>10</sup> But not only has Sprint precluded<sup>11</sup> any type of counter proposal by making its extension request at the 11th hour (the Friday before the Thanksgiving holidays and just two weeks before it filed for arbitration<sup>12</sup>), Sprint also asserts that AT&T Missouri has no right even to make counter proposals or present its own issues for arbitration:

Merger Commitment 7.4 does not allow AT&T to add additional terms or to modify the current interconnection agreements. 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 3 years. If AT&T can present additional issues that would need to be arbitrated, it defeats the purpose of a merger commitment intended to reduce costs and streamline processes. Contrary to AT&T's assertions, the Merger Commitment does not permit AT&T to analyze the existing agreements and make counter-proposals.<sup>13</sup>

This attempt to deny AT&T Missouri rights accorded under the law to parties in a Section 252 arbitration unequivocally demonstrates that Sprint has not sought a Section 252 proceeding. It has simply labeled its merger commitment complaint as a Section 252 arbitration in order to avoid the Commission's prior ruling that it has no jurisdiction to enforce an FCC merger commitment.<sup>14</sup> It should now be clear that what Sprint has presented is NOT an arbitrable disagreement about the term of an interconnection agreement being negotiated under 252(a), but a non-arbitrable disagreement about Sprint's entitlement to extend under the merger commitment.

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<sup>10</sup> 47 U.S.C. 252(b)(3). See also MoPSC Rule 4 CSR 240-36.040(7) (“... The respondent shall also identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the commission's review”).

<sup>11</sup> Tr. 87.

<sup>12</sup> Hearing Exhibit 6, Sprint Arbitration Petition, para. 26 and Exhibit 7 to Sprint's Petition,

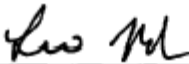
<sup>13</sup> Sprint Response, para. 7. See also Tr. 39.

<sup>14</sup> 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 Granting Motion to Dismiss, issued June 24, 2008.

WHEREFORE, AT&T Missouri respectfully requests the Commission to grant reconsideration and/or rehearing and dismiss the Sprint's Petition for Arbitration.

Respectfully submitted,

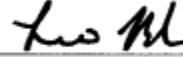
SOUTHWESTERN BELL TELEPHONE COMPANY,  
D/B/A AT&T MISSOURI

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## **CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on March 10, 2009.



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