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 MOTION TO DISMISS COMPLAINT

AT&T Missouri,[1] respectfully moves the Commission to dismiss the Complaint of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp. and NPCR, Inc. ("Complainants").

Complainants seek to have the Commission order AT&T Missouri to execute a Kentucky Interconnection Agreement (the "Kentucky ICA") that contains provisions inconsistent with Missouri law as established by the Commission. The Kentucky ICA, which was originally between BellSouth, Sprint Spectrum, LP, and Sprint Communications Company L.P., includes important provisions -- such as bill and keep for transport and termination of local traffic -- that were predicated on the balance of traffic between <u>those</u> carriers.[2] If all the Complainants here, which consist of a CLEC and *several* CMRS providers – whose traffic does not balance with

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

AT&T's in the same manner – were permitted jointly to port the agreement, they would reap an unwarranted windfall.[3]

Complainants' claims that AT&T Missouri has violated the FCC's merger commitments are appropriately addressed to the FCC. The Commission lacks jurisdiction over Complainants' claims and they must be dismissed.

I. INTRODUCTION AND FACTUAL BACKGROUND

The operative facts underlying Complainants' claims are generally not in dispute. AT&T Missouri and Sprint Communications Company L.P. ("Sprint CLEC") currently operate under an interconnection agreement approved by the Commission on August 5, 2005, in Case No. TK-2006-0044.[4] AT&T Missouri currently operates with Sprint Spectrum, L.P. an under interconnection agreement approved by the Commission on December 5, 2003 in Case No. TK-2004-0180.[5] And AT&T Missouri currently operates with Nextel West corp. under an interconnection agreement approved by the Commission on January 6, 1999 in Case No. TO-99-

[3] To be clear about the source of the windfall: As the FCC has ruled, bill and keep is an appropriate reciprocal compensation arrangement only when the party(ies) on each side of the arrangement deliver roughly equal volumes of traffic to each other, so that neither side suffers significant economic loss as a result of the arrangement whereby neither side pays the other reciprocal compensation. When AT&T and Sprint entered into the Kentucky ICA, their traffic was roughly balanced and they agreed to bill and keep. Subsequently, Sprint and Nextel combined, and Sprint/Nextel now seeks to make Nextel a beneficiary of the bill and keep arrangement in that ICA. But if *all* the Sprint/Nextel companies were permitted jointly to port an agreement with a bill and keep provision and if (as is very likely the case) the volume of local traffic the Sprint/Nextel companies in the aggregate deliver to AT&T Missouri significantly exceeded the volume of local traffic AT&T Missouri delivers to the Sprint/Nextel companies, then Sprint/Nextel would realize a windfall because AT&T Missouri would be terminating much more traffic for Sprint/Nextel without charge than Sprint/Nextel would be terminating for AT&T Missouri without charge. This is arbitrage. The FCC has devoted considerable effort to eliminating possibilities for arbitrage in the reciprocal compensation regime, and it should not be permitted here.

[4] Complaint, ¶ 3. See also *In the Matter of the Interconnection Agreement between Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and Sprint Communications Company, L.P., Arbitrated as a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Case No. TK-2006-0044, *Order Approving Arbitrated Interconnection Agreement*, issued August 5, 2005.

[5] Complaint, ¶ 3 See also *In Re: The Commercial Mobile Radio Services (CMRS) Interconnection Agreement Between SBC Missouri and Sprint Spectrum L.P. Under Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. TK-2004-0180, *Order Approving Interconnection Agreement*, issued December 5, 2003.

149.[6] On August 21, 2007, AT&T Missouri notified Sprint that it intended to terminate its agreements with Complainants.

On November 20, 2007, Complainants notified AT&T Missouri that they desired to "port" the Kentucky ICA into Missouri and adopt this agreement for Missouri.[7] Complainants' request was allegedly based upon certain voluntary commitments adopted by the Federal Communications Commission in its order approving the merger of BellSouth Corporation and AT&T Inc.[8]

The FCC, as a condition to its approval of the merger between AT&T, Inc. and BellSouth Corporation, accepted certain commitments offered by AT&T, Inc. and BellSouth. One of those commitments (hereinafter "Merger Commitment 7.1") provides:

> The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement … that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control, FCC 06-189, 22 FCC Rcd. 5662 (*rel*. Mar. 26, 2007) ("FCC Merger Order"), Appendix F, at 149.[9]

In Appendix F to the Merger Order, the FCC expressly reserved jurisdiction over the merger commitments, including Merger Commitment 7.1. The FCC unequivocally stated that,

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[6] Complaint, ¶ 3. See also *In the Matter of the Joint Application of Southwestern Bell Telephone Company and Nextel West Corp. for Approval of Interconnection Agreement under the Telecommunications Act of 1996*, Case No. TO-99-149, Order Approving Interconnection Agreement, issued January 6, 1999.

[7] Complaint, ¶ 8.

[8] 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 ("Merger Approval Order.")

[9] The merger commitments in Appendix F to the Merger Order constitute several categories. The commitment we are referring to as "Merger Commitment 7.1" is item 1 in the seventh category, "Reducing Transaction Costs Associated with Interconnection Agreements."

"For the avoidance of doubt, unless otherwise expressly stated to the contrary, *all conditions and commitments proposed in this letter are enforceable by the FCC* …" Appendix F, at 147.

AT&T Missouri's position is that Merger Commitment 7.1 allows the Kentucky agreement to be ported to Missouri, but not jointly by all the Complainants. This is because the BellSouth Kentucky ICA is an arrangement between an ILEC, one CLEC, and one CMRS provider. In order for it to remain the same contract (subject only to state-specific modifications contemplated by the merger commitment), it must remain an arrangement between an ILEC, one CLEC, and one CMRS provider. For instance, a deviation from the BellSouth Kentucky arrangement would surely impact the balance of traffic assumptions that were predicates for the trunking and reciprocal compensation arrangements in the BellSouth Kentucky ICA. To the extent that Complainants seek in effect to convert an ICA between an AT&T ILEC and one CLEC and one CMRS provider into an ICA between an AT&T ILEC and one CLEC and multiple CMRS providers, Complainants are improperly attempting to convert a merger commitment whose sole purpose was to reduce the transaction costs associated with negotiating an interconnection agreement into an opportunity for arbitrage.

In addition, porting can occur only after the Kentucky ICA has been modified, consistent with the terms of the FCC Merger Approval Order, to conform with Missouri pricing, Missouri performance measures and remedy plans, and other applicable Missouri legal and regulatory requirements, as well as AT&T's technical, OSS, and network attributes and limitations in Missouri.

Complainants recognize that the Kentucky ICA cannot be ported into Missouri unless it is modified to reflect "state-specific pricing and performance plans and technical feasibility as

required by the Merger Commitments."[10] Complainants and AT&T Missouri disagree, however, as to the nature and extent of the modifications that must be made under Merger Commitment 7.1 in order to port the Kentucky ICA into Missouri. For example, the parties disagree as to whether the Kentucky ICA's provisions providing for "bill and keep" pricing for the transport and termination of local traffic and the provisions requiring equal sharing of interconnection facilities costs must be changed to comport with Missouri's state-specific pricing and other requirements.

This Commission does not permit "bill and keep" unless the balance of traffic exchanged by the parties is relatively equal. In the absence of balanced traffic, and thus balanced costs, a bill and keep arrangement inherently allows one party to over-recover its costs for transport and termination, while the other party will under-recover its costs. In an arbitration under the Act, one party had proposed using a bill and keep mechanism for the first nine months and then periodically reexamining the traffic flow. Under the proposal, bill and keep would remain in effect unless a "significant continuing disparity in the levels of traffic terminating on the respective networks can be demonstrated." The Commission rejected this proposal because a balance of traffic had not been shown: "The bill-and-keep mechanism assumes balanced traffic between the parties. Insufficient evidence was presented to determine if this is an accurate assumption. Therefore, a compensation arrangement should be used. Traffic should be measured by auditable Percent Local Usage (PLU) Reports."[11]

A balance in the exchange of traffic is not some minor technicality. It is not only an essential part of Missouri's pricing requirements, it is essential to the federal and state regulatory

[10] Complaint, ¶ 5.

[11] *In the matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. 97-40, 1996 Mo. PSC LEXIS 65 at *49.

schemes that compensation for transport and termination of traffic be based upon cost. If traffic is in balance, it may be reasonable to assume that each party's cost is roughly the same. Rather than exchanging equal amounts of money, the parties may agree to simply "bill-and-keep." On the other hand, if traffic is out of balance, one party is, in effect, charging less than its cost for transport and termination of traffic.

II. THE COMMISSION LACKS JURISDICTION OVER THE COMPLAINT

Regardless of the legal theories into which Complainants have attempted to shoe-horn their claims, their Complaint boils down to one thing: a claim that the FCC's Merger Order entitles them to port the Kentucky ICA -- including the bill and keep and facilities sharing pricing provisions -- into Missouri. Ultimately, resolution of the parties' disputes will turn on the meaning of the Merger Commitments incorporated in the FCC's Merger Order. The threshold issue that must be addressed is whether the Missouri Public Service Commission is the appropriate forum in which to litigate that dispute. It is not. It is well established that the Commission has no inherent or common law powers. As a creation of the Legislature, it possesses only that authority specifically granted by statute. [12] Therefore, a threshold question is whether the Commission has jurisdiction over the subject matter of the complaint.

The burden is on the Complainants to establish that the Commission has jurisdiction. Complainants allege, in a pro forma fashion, that the Commission has jurisdiction over the Complaint under Sections 251 and 252 of the federal Telecommunications Act of 1996, 47

[12] *State ex rel. Util. Consumers Council, v. P.S.C.*, 585 S.W.2d 41, 49 (Mo. banc 1979) ("Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted . . . while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, 'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the commission is authorized by the statute," quoting *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (banc 1923)).

U.S.C. §§ 251, 252.[13] Complainants, however, fail to allege any facts that would support their jurisdictional assertions because they cannot.

Each count of the Complaint is based upon the same premise: that AT&T Missouri is required, under the Merger Approval Order, to enter into a new interconnection agreement with Complainants based on the Kentucky ICA. Regardless of the substantive merits of Complainants' claims, nothing in Missouri law purports to give the Commission jurisdiction to enforce FCC orders in general, let alone the Merger Approval Order.[14]

A. Enforcement of Federal Merger Commitments Has Not Been Delegated to the Commission

The Complaint alleges, in conclusory fashion, that:

> The Commission has jurisdiction over this Complaint. Pursuant to Sections 251 and 252 of the Federal Communications Act of 1934, as amended, the FCC delegated authority over interconnection agreements to the state commissions."[15]

Complainants fail to explain, however, how any provisions of the Federal Act purport to give the Commission jurisdiction over enforcement of the Merger Approval Order.[16] Section 251 does not delegate jurisdiction to state commissions to do anything. Section 252 authorizes state commissions to arbitrate interconnection agreements (47 U.S.C. § 252(b)) and to approve or reject interconnection agreements (*id.* § 252(e)), but that is all the statute explicitly authorizes

[13] Complaint, ¶ ¶ 5 – 11.
[14] Indeed, the FCC has broad authority to evaluate the public interest of mergers under its jurisdiction – authority that the Legislature did not grant the Commission.
[15] Complaint, ¶ 15.
[16] The FCC Merger Order was not an exercise of the FCC's authority under the 1996 Act. On the contrary, the FCC's responsibility to evaluate and approve telecommunications mergers pre-dates the 1996 Act by more than sixty years; it is found in Section 214 of the Communications Act of 1934 (47 U.S.C. § 214). And the FCC's authority to condition its approval of the AT&T/BellSouth merger on the merger commitments – including the interconnection agreement-related merger commitment at issue here – arises not out of the 1996 Act, but out of Section 214 and Section 303(r) of the 1934 Act. *See* FCC Merger Order ¶ 22 & n.78. Indeed, the very significance of the merger commitments is that they go beyond the requirements of the 1996 Act.

state commissions to do with respect to interconnection agreements. Congress did not generally delegate authority over interconnection agreements to state commissions.[17]

This is not an arbitration under Section 252. Indeed, Complainants expressly disclaims any intent to rely upon the negotiation and arbitration provisions of the Federal Act: Complainants claim that they commenced this proceeding in lieu of a "full-blown arbitration proceeding."[18]

There is no doubt that the FCC has the authority to interpret and enforce its orders. *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959). 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.

Complainants do not and cannot point to any statutory or other regulatory authority that purports to delegate the FCC's authority over interpretation or enforcement of the Merger Commitments to the Commission. To the contrary, 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 FCC ...[19]

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[17] Indeed, while it is now generally recognized that state commissions have jurisdiction to interpret and enforce the interconnection agreements they approve under Section 252, the statute does not explicitly so provide, and the state commissions' authority to interpret and enforce interconnection agreements was not a foregone conclusion in the years following enactment of the 1996 Act. Thus, for example, it was not until 2000 that the United States Court of Appeals for the Fifth Circuit determined that state commissions have such authority. *SW. Bell Tel. Co. v. Pub. Util. Comm'n of. Texas*, 208 F.3d 475, 479 (5th Cir. 2000). In its decision, the Fifth Circuit recognized that Section 252 could be construed to "limit state commission jurisdiction to decisions approving or disapproving, or arbitrating, an interconnection agreement," in which event "commission jurisdiction would not extend to interpreting or enforcing a previously approved contract." *Id*. Based on decisions of other courts and on an FCC pronouncement that the court accorded deference, the court rejected that construction and held that "the Act's grant to the state commissions of plenary 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." *Id.*

[18] Complaint, ¶ 14.

[19] Merger Approval Order, at page 147.

It is hardly surprising that enforcement of federally imposed merger commitments would remain the exclusive province of the federal agency that imposed them. Pursuant to the federal Communications Act of 1934, the FCC is vested with responsibility for evaluating and approving telecommunications mergers. 47 U.S.C. §§ 214(a), 310(d). The FCC has an exhaustive merger review process under which it takes public comment and investigates whether the proposed transaction complies with federal law and FCC rules and is in the public interest. In approving a merger, the FCC "has the authority to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction … Indeed, [its] public interest authority enables [it] to impose and enforce conditions based upon an extensive regulatory and enforcement experience …" Merger Approval Order, p. 14, ¶ 22; see also 47 U.S.C. § 303(r).[20]

As the Mississippi Public Service Commission concluded in *NPCR, Inc. ("Nextel Partners") Petition for Adoption of the Existing Interconnection Agreement by and Between BellSouth Telecomm., Inc. and Sprint Communications Co., Sprint Spectrum L.P.*, Docket No. 2007-UA-316 (Miss. Pub. Serv. Comm. Oct. 30, 2007), "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."

Indeed, the very issue that underlies this proceeding -- the meaning of Merger Commitment 7.1 -- is presently pending before the FCC. On February 5, 2008, the AT&T

[20] In contrast, Missouri statutes do not grant the Commission jurisdiction over telecommunications holding company mergers and the Commission itself has ruled that it does not. *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).)

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.[21] On February 14, 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.[22] The comment cycle has now been completed, and the matter is awaiting FCC action.

III. EVEN IF THE COMMISSION HAS JURISDICTION, IT SHOULD NOT EXERCISE THAT JURISDICTION

Even if the Commission should decide it has concurrent jurisdiction with the FCC to enforce the FCC's Merger Approval Order, it should decline to exercise such jurisdiction. As discussed above, the dispute between AT&T and Complainants is currently pending before the FCC.

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 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.

It is essential that the FCC, rather than 22 state commissions, resolve issues relating to the merger commitments in order to ensure a uniform regulatory framework and to avoid conflicting and diverse interpretations of FCC requirements. Accordingly, even if the Commission had jurisdiction, it should decline to exercise it. That is what the Public Service

[21] *Petition for Declaratory Ruling that Sprint Nextel Corporations may not impose a Bill-and-Keep Arrangement,* WC Docket No. 08-23, attached as Exhibit 1.
[22] Attached as Exhibit 2 are AT&T's Reply Comments.

Commission of South Carolina ("PSCSC") did when Complainants[23] asked it to enforce another merger commitment relating to the period during which the BellSouth ICA could be extended pursuant to Merger Commitment 7.4. The PSCSC declined to make that determination, "since we believe that the FCC is the entity that should more appropriately rule on [the question] in this instance."[24] The PSCSC reasoned:

> [T]he *[FCC] Merger Order* … does not provide over-arching guidance to be applied by the states. Instead, the *Merger Order* adopts specific 'conditions and commitments' that are 'enforceable by the FCC …' We can discern no legal or policy reason that one of these specific conditions and commitments should be interpreted to mean one thing in one state and other things in other states. … We find that … uniformity … can best be achieved by having Complainants present its issue to the FCC.[25]

For similar reasons, the Louisiana Public Service Commission, presented with the same question, concluded that matter should be referred to the FCC and abated its proceeding for 90 days in order to allow that to happen.[26]

In California, the Administrative Law Judge to which the same Sprint/AT&T California dispute as in this proceeding was assigned recently declined to rule on the correct interpretation of the Merger Conditions, finding 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."[27]

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[23] When we refer to "Sprint" in connection with proceedings in other states, the reference is to the pertinent Sprint-affiliated companies in those states – not necessarily the entities that are Complainants here.
[24] *Petition of Sprint Comms. Co. et al. for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Tel., Inc.*, Docket No. 2007-215-C (S. Car. Pub. Serv. Comm. Oct. 5, 2007), at 8.
[25] Id.
[26] *Petition of Sprint Comms. Co. et al. for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Tel., Inc.*, Docket No. U-30179 (La. Pub. Serv. Comm. Sept. 7, 2007), at 4-6.
[27] *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).

IV. CONCLUSION

The Commission lacks jurisdiction to adjudicate the Complaint. Nothing in state law grants jurisdiction to the Commission to interpret and enforce the FCC's Merger Commitments. 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 has jurisdiction, it should defer to the FCC. Accordingly, the Complaint should be dismissed.

Respectfully submitted,

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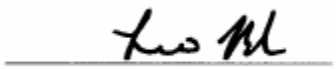
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 14, 2008.



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