COMMONWEALTH OF KENTUCKY

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PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION

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	)	Case No. 2007-00180

SPRINT'S RESPONSE TO AT&T KENTUCKY'S MOTION TO DISMISS AND ANSWER

Sprint Communications Company L.P. and Sprint Spectrum L.P. (collectively, "Sprint") hereby files its Response to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky's ("AT&T") Motion to Dismiss and Answer filed on June 1, 2007.

I. INTRODUCTION

On May 7, 2007, Sprint filed a Petition for Arbitration ("Petition") pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). Sprint's Petition seeks to implement an amendment to convert and extend its current month-to-month Interconnection Agreement ("ICA") with AT&T to a fixed 3-year term. The amendment arises from Sprint's acceptance of an AT&T, Inc. and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates are required to comply with their Merger Commitments.[1]

The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. The specific condition at issue here is that AT&T "shall permit a requesting telecommunications carrier to extend its current interconnection agreement ... for a period of up to three years ...."[2] This is the offer that AT&T was required to make as a matter of law and this is the offer that was accepted by Sprint during the parties' statutory 251-252 negotiations for a new agreement. Sprint's Petition makes it clear that the single Issue pertaining to the amendment is establishment of essential ICA terms related to the 3-year extension, with the specific disputed term being ***when*** the 3-year extension commences.

On June 1, 2007, AT&T filed a Motion to Dismiss and its interrelated Answer ("Motion") to Sprint's Petition. Apparently because the source of the 3-year extension offer is a voluntary Merger Commitment upon which the FCC conditioned its merger

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[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*AT&T/BellSouth*" or "*FCC Order*") .

[2] The Merger Commitment representing AT&T's voluntarily offered 3-year ICA extension is identified in the *FCC Order* as "Reducing Transaction Costs Associated with Interconnection Agreements" paragraph No. 4, which expressly provides:

> The AT&T/BellSouth ILECs ***shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period up to three years***, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's 'default' provisions."

FCC Order at p. 150, APPENDIX F (emphasis added).

approval, AT&T contends Sprint's Petition seeks an "interpretation of a merger commitment" that is a non-arbitrable issue unrelated to Section 251 of the Act.[3] Per AT&T, the FCC has "the sole authority to interpret, clarify or enforce *any issue involving merger conditions. . .*"[4] Without reference to any authority or explanation as to how it can now simply *ignore* Sprint's exercised acceptance of a 3-year ICA extension in this proceeding, AT&T not only seeks to dismiss Sprint's single arbitration Issue but further requests the Commission to force upon Sprint via AT&T's proposed Issue 2 a "new" ICA premised upon: a) the parties' former incomplete negotiations; and b) adoption of what is apparently AT&T's latest new "generic" Attachment 3 – which pertains to core "Network Interconnection" terms and conditions that have never been previously discussed by the parties.[5]

In response to AT&T's Motion,[6] it is Sprint's position that:

1) As alleged in Sprint's Petition, the essential operative facts are that: during the parties' statutory Sections 251-252 negotiations AT&T made a required standing interconnection-related offer that any requesting telecommunications carrier could extend its current ICA for 3 years; AT&T even acknowledged that pursuant to such offer, Sprint can extend its current ICA for 3 years; Sprint has taken all action within its power to exercise its right and has accepted a 3-year extension of its current ICA; and,

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[3] *See* Motion at p. 1-2.

[4] *Id.*, at p. 3 (emphasis added).

[5] *Id.*, at p. 9-11.

[6] To the extent that any further response than what is set forth herein may be deemed necessary to alleged facts contained in AT&T's Motion, Sprint denies all such AT&T alleged facts except to the extent otherwise expressly admitted herein.

the only legitimate dispute to be resolved between the parties to implement such 3-year extension is this Commission's determination as to ***when*** the 3-year extension commences.

2) There is a long history of FCC and state commission precedents that clearly establish the FCC and this Commission have *concurrent* statutory jurisdiction under the Act and state law over AT&T's interconnection-related Merger Commitments. This Commission has jurisdiction pursuant to both the Act and Kentucky law to arbitrate the creation of an ICA amendment term that expressly establishes ***when*** the 3-year extension of the parties' existing ICA commences.

3) Based on not only the facts as alleged in Sprint's Petition, but also the admission of such facts by AT&T, AT&T's newly proposed Issue 2 requests this Commission to authorize a proposed, unlawful breach by AT&T of not only its Merger Commitments but also 47 U.S.C. § 251(c)(2)(D) and 47 C.F.R. § 51.305(a)(4) by permitting AT&T to withdraw an admittedly accepted 3-year extension of the parties' ICA, which is an interconnection term that AT&T is now required to provide to any requesting carrier. Accordingly, AT&T's proposed Issue 2 should be dismissed based on the pleadings alone.

For the reasons stated above and explained in greater detail below, Sprint respectfully requests that the Commission deny AT&T's Motion in its entirety; dismiss AT&T's proposed Issue 2 because it seeks Commission approval contrary to the *FCC Order*, the Act and FCC Rules for AT&T to affirmatively breach AT&T's legal interconnection-related obligations as to Sprint; and, issue a procedural Order regarding the further consideration of this arbitration proceeding as to only Sprint's Issue 1.

II. AT&T'S MOTION MUST BE DECIDED BASED UPON THE FACTS AS ALLEGED IN SPRINT'S PETITION

A motion to dismiss must, as a matter of law, address the sufficiency of the facts alleged in the Petition to state a cause of action. For AT&T's Motion to be sustained, AT&T must demonstrate that "the pleading party would not be entitled to relief under any set of facts which he could provide in support of his claim."[7] In ruling on AT&T's Motion, the Commission should "presume that all the factual allegations in the complaint are true and must draw any reasonable inference in favor of the non-movant."[8]

Sprint's Petition alleges the following essential operative facts to establish the existence of a single arbitrable open issue within this Commission's jurisdiction under Section 252(b)(1) of the Act and Kentucky Revised Statutes Chapter 278.040 and 278.260:

- The parties have an existing ICA and entered into 251-252 negotiations;[9]
- During such negotiations, AT&T made an interconnection-related offer as required by law to the effect that all interconnecting carriers can extend their current interconnection agreements with AT&T 3 years;[10]
- AT&T confirmed that the 3-year extension was available to Sprint;[11]
- Sprint has accepted a 3-year extension of its current ICA and requested an amendment to implement its right to such 3-year extension;[12]

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[7] <u>Commonwealth v. Anthem Insurance Companies, Inc.,</u> 8 S.W.3d 48, 51.

[8] *Id.*

[9] Petition ¶¶ 7-9.

[10] Petition ¶¶ 10-12.

[11] Petition ¶ 13.

[12] Petition ¶ 14.

- AT&T has refused to implement the requested amendment based on a dispute between the parties regarding ***when*** the accepted 3-year extension commences;[13] and,

- Sprint timely filed its Petition to resolve the narrow dispute as to when the 3-year extension commenced.[14]

III. THE FCC AND THE COMMISSION HAVE CONCURRENT JURISDICTION REGARDING DISPUTES PERTAINING TO INTERCONNECTION-RELATED MERGER COMMITMENTS

The linchpin of AT&T's Motion is a general, unsupported assertion that "the FCC has the sole authority to interpret, clarify, or enforce any issue involving merger conditions set forth in its Merger Order."[15] Actual case law to the contrary, however, clearly establishes that this Commission has *concurrent* jurisdiction with the FCC to resolve interconnection-related disputes, even when such interconnection-related disputes pertain to the application of an FCC-ordered merger condition.

A. THE COMMISSION HAS AUTHORITY TO INTERPRET AND APPLY FEDERAL LAW APPLICABLE TO AN INTERCONNECTION-RELATED DISPUTE

Sprint's right to receive, and AT&T's obligation to provide, a 3-year extension of the parties' current ICA is an interconnection right that arises as a result of an FCC order. The fact that resolution of the parties' dispute regarding such extension involves this Commission's interpretation and application of "federal law" provides no reason whatsoever to dismiss Sprint's Issue 1. While not binding on the FCC, state Commissions may interpret and apply federal law in the exercise of its jurisdiction under

[13] Petition ¶¶ 15-19.

[14] Petition ¶ 6.

[15] Motion at p. 3.

the Act.[16] Further, the Act expressly provides a jurisdictional scheme of "cooperative federalism" under which Congress and the FCC have specifically designated areas in which they anticipate that state commissions have a role, which undeniably includes matters relating to interconnection pursuant to Sections 251 and 252 of the Act.

Regarding the specific dispute in this case – i.e., implementation of an amendment that defines ***when*** the 3-year extension of the parties ICA commences – consistent with Section 252(b) of the Act it is well established that Kentucky Revised Statutes Chapter 278 authorizes the Commission to establish terms, and conditions of interconnection, and to arbitrate any dispute regarding interpretation of interconnection terms and conditions.

B. FCC MERGER ORDERS DO NOT RESTRICT, SUPERSEDE OR OTHERWISE ALTER THE FCC AND STATES' CONCURRENT JURISDICTION OVER INTERCONNECTION-RELATED MERGER COMMITMENTS

The fact that Sprint's right to extend its ICA 3 years emanates from the *FCC Order* does not *divest* this Commission of its Section 252 jurisdiction and its jurisdiction

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[16] See, e.g., In the Matter of: Brandenburg Telecom LLC, Complainant v. Verizon South, Inc., Defendant, Order, Kentucky Public Service Commission Case No. 2002-00143 (May 23, 2002) (Interpreting federal law in an interconnection dispute and concluding that "even if the [interconnection] contract could be construed as Verizon suggests, the contract itself would be in violation of federal law requiring an ILEC to provide interconnection at parity to a requesting telecommunications carrier.").See also, In Re: Complaint against BellSouth Telecommunications, Inc. for Alleged Overbilling and Discontinuance of Service, and Petition for Emergency Order Restoring Service, by IDS Telecom LLC, Order Granting BellSouth's Partial Motion to Dismiss at page 8, Florida PSC Docket No. 031125-TP, Order No. PSC-04-0423-FOF-TP (April 26, 2004) (Commission "find[s] BellSouth's argument is without merit to the extent that it argues that IDS's complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute ... Thus, the fact that a count of this Complaint asks this Commission to interpret and apply federal law is not in and of itself reason to dismiss that portion of the complaint").

under Kentucky law to interpret and implement Sprint's interconnection right to a 3-year extension that Sprint was granted in the *FCC Order*. The FCC has repeatedly and expressly recognized in its merger orders that adoption of merger conditions does not limit the authority of the states to impose or enforce requirements, which can even go beyond FCC-required conditions.[17] The FCC not only expects the states to be involved in the ongoing administration of interconnection-related merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-related disputes pursuant to § 252. For example, in the *GTE/Bell Atlantic* merger the FCC stated:

> Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. **Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.**[18]

Regarding implementation of the merged firm's interconnection-related "Most-Favored-Nation" and "Multi-State Interconnection and Resale Agreements" commitments, the FCC also made it clear that "[d]isputes regarding the availability of an interconnection arrangement ... shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent

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[17] See, In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control, CC Docket No. 98-184 (Adopted: June 16, 2000, Released: June 16, 2000) ("GTE/Bell Atlantic") at ¶ 254; In the Applications of Ameritech Corp. and SBC Communications, Inc., For Consent to Transfer Control, CC Docket No. 98-141 (Adopted: October 6, 1999, Released: October 8, 1999) ("Ameritech/SBC") at ¶ 358.

[18] *GTE/Bell Atlantic* at ¶ 348 (emphasis added).

applicable."[19]

Case law subsequent to the *GTE/Bell Atlantic* and *Ameritech/SBC* merger also finds that state commissions have continuing, concurrent jurisdiction to enforce interconnection-related merger conditions pursuant to Section 252. In *Core Communications*,[20] CLECs filed a complaint action against SBC at the FCC over alleged violations of *Ameritech/SBC* merger conditions. SBC asserted the FCC lacked jurisdiction to hear the complaint under Sections 206 and 208 of the Act on a theory that the state's authority under Section 251 and 252 overrode the FCC's Section 206 and 208 enforcement jurisdiction. The FCC determined that it also had 206 and 208 enforcement authority (as opposed to finding that only the FCC had enforcement authority) and, in her concurring opinion, then Commissioner Abernathy stated:

> This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe that there are significant limitations on the circumstances in which complainants will actually be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.

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[19] *Id.*, at "Conditions for Bell Atlantic/GTE Merger", Section IX. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements ¶¶ 30, 31(a), 31(b), 32 and Section X. Multi-State Interconnection and Resale Agreements ¶ 33; *see also, Ameritech/SBC* at "Appendix C CONDITIONS", Section XII. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements ¶¶ 42, 43, Section XII. Multi-State Interconnection and Resale Agreements ¶ 44, and XVIII. Alternative Dispute Resolution through Mediation ¶ 54 ("Participation in the ADR mediation process established by this Section is voluntary for both telecommunications carriers and state commissions. The process is not intended and shall not be used as a substitute for resolving disputes regarding the negotiation of interconnection agreements under Sections 251 and 252 of the Communications Act, or for resolving any disputes under Sections 332 of the Communications Act. The ADR mediation process shall be utilized to resolve local interconnection agreement disputes between SBC/Ameritech and unaffiliated telecommunications carriers at the unaffiliated carrier's request").

[20] *In the Matter of Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 2003 FCC Lexis 2031 (2003) (*"Core Communications") vacated and remanded on other grounds,* 407 F.3d 1223 (U.S.App.D.C. 2005) (vacated for further proceedings in which Commission may develop and apply its interpretation of the conditions under which CLECs may waive specified merger rights).

> … as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement – its change of law provisions, for example – likely would foreclose any remedy under section 208.[21]

Similarly, in *Ameritech ADS*, in the context of granting "Alternative Telecommunications Utility" certification to a post-merger *Ameritech/SBC* affiliate, Commissioner Joe Mettner found it necessary to issue a concurring opinion to the Wisconsin Public Service Commission's ("WPSC") decision in order to address statements made by a dissenting Commissioner in light of the FCC's *Ameritech/SBC* merger order:

> It is important that the public not be left with inaccurate statements concerning the extent, if any, to which FCC action in merger cases alters, modifies or preempts the federal statutory scheme of shared responsibility between the state commissions and the FCC over matters relating to opening local exchange markets to competition and the monitoring of the terms and conditions of interconnection agreements entered into by the ILEC's with competitors.
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> * * *
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> It is fundamental to the scheme of shared regulation found in the Telecommunications Reform Act of 1996 that state commissions and the FCC preserve their respective spheres of authority to ensure that the general obligations of ILEC's to provide nondiscriminatory interconnection features to requesting entities, and that the states retain a particularly important role in the review and approval of interconnection agreements. 47 U.S.C. §§ 251(c) and (d), 252(e).
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> * * *
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> The Merger Order simply doesn't stand as any valid extra-jurisdictional reconfiguration of state v. federal authority in these matters, as the FCC has been careful to indicate in its own Merger Order.

[21] *Core Communications* at page 17.

> ... it may well be true, as the dissent has noted, that the FCC in some sense has "final enforcement authority" over issues concerning SBC/Ameritech's OSS, to the extent that the FCC may preempt any state commission failing to fulfill its responsibilities under 47 U.S.C. 252 in reviewing interconnection agreements. It is not true, however, that the Merger Order does anything (as indeed it may not) to alter the primary authority of state commissions in review of interconnection agreements, and the terms and conditions of same.[22]

Based on the foregoing, it is apparent that not only do the states continue to retain 251-252 authority over disputes regarding interconnection-related merger conditions in an FCC order, but also that the FCC itself has expressed a belief that even its complaint enforcement authority may be considered secondary to the states with respect to such disputes.

C. THE *FCC ORDER* EXPRESSLY RECOGNIZES THE STATES' CONCURRENT AUTHORITY OVER AT&T'S INTERCONNECTION-RELATED MERGER COMMITMENTS

Appendix F to the *FCC Order* contains the Merger Commitments that the FCC adopted in conjunction with its approval of the AT&T/BellSouth merger. AT&T asserts that "the FCC explicitly reserved jurisdiction over the merger commitments" by virtue of the following language in the *Order*: "[f]or the avoidance of doubt, unless otherwise stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC." AT&T then goes on to assert that "[n]owhere in Appendix F

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[22] *Petition of Ameritech Advanced Data Services of Wisconsin, Inc. for Authorization to Resell Frame Relay Switched Multimegabit Data, and Asynchronous Transfer Mode Services on an Intrastate Bases and to Operate as an Alternative Telecommunications Utility in Wisconsin; Investigation into the Digital Services and Facilities of Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin),* Final Decision and Certificate, 2000 Wisc. PUC Lexis 36 (January, 2000) *("Ameritech ADS").*

does the FCC provide that interpretation of merger commitment No. 4 is to occur outside the FCC."[23] This is simply not an accurate statement with respect to Appendix F.

The FCC clearly recognized in Appendix F that it has no authority to alter the states' *concurrent* statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments. The paragraph immediately preceding the language relied upon by AT&T states:

> ***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 the 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.

FCC Order at p. 147, APPENDIX F (emphasis added).

It should be noted that the above language was not part of the proposed Merger Commitments as filed by AT&T with the FCC via Mr. Robert Quinn's December 28, 2006 letter – it was *specifically added by the FCC.* This language serves the obvious purpose of recognizing, similar to what the FCC has done in prior merger orders as already discussed herein, that the Act is designed with dual authority for both the states and the FCC. The *FCC Order* reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for arbitrating, finalizing and implementing a dispute between the parties over a now required 3-year interconnection extension amendment. As recognized in the Act and articulated by the Wisconsin PSC in *Ameritech ADS*, the FCC's role in this regard is secondary unless the state fails to take

[23] Motion at p. 4.

action or, as stated by the FCC itself in *Core Communications,* if a carrier elects to pursue a direct enforcement action with the FCC pursuant to Section 206 and 208.

Considering the former SBC's post-merger action in the *Core Communications* case (*i.e.*, contending the FCC lacked enforcement jurisdiction over a merger condition complaint), the language relied on by AT&T merely serves to make it clear that the FCC's enforcement authority remains an *available* avenue as opposed to the *exclusive* avenue to address any AT&T interconnection-related Merger Commitment violations. Appendix F does not contain, nor could it, any provision that even attempts to divest the states of their jurisdiction over interconnection-related merger commitment disputes and vest *exclusive* jurisdiction over such disputes in the FCC.

Indeed, when the FCC's Wireline Competition Bureau was faced with an issue similar to the one raised by AT&T's Motion, it relied upon its authority pursuant to § 252(e)(5) to act in the stead of a state commission in arbitrating interconnection agreements, and not upon its authority as a Bureau of the FCC, in resolving the issue. In the *GTE/Bell Atlantic* merger order, the merged firm was required to "offer telecommunications carriers, subject to the appropriate state commission's approval, an option of resolving interconnection agreement disputes through an alternative dispute resolution mediation process that may be state-supervised."[24] Subsequently, the Wireline Competition Bureau arbitrated the terms of interconnection agreements between Verizon

[24] *GTE/Bell Atlantic* at ¶ 317.

and the former WorldCom, Inc. and former AT&T Corp. when the Virginia Corporation Commission declined to do so.[25]

In the *WorldCom Virginia Arbitration,* Verizon and WorldCom disagreed concerning the dispute resolution provision to be included in their arbitrated interconnection agreement. WorldCom contended that a sentence proposed by Verizon should be deleted in order to make clear that the alternative dispute resolution procedure required by the *GTE/Bell Atlantic* merger condition remained available to WorldCom, while Verizon contended that the Bureau, acting as a Section 252(b) arbitrator, lacked the authority to require the inclusion of an arbitration provision in the interconnection agreement. The Bureau disagreed, ruling that "[t]he Act gives us broad authority, ***standing in the shoes of a state commission,*** to resolve issues raised in this proceeding."[26] Indeed, the Bureau found that failing to give effect to the merger condition when arbitrating an interconnection agreement "would essentially modify that Commission order, which we cannot do … ."[27] This Commission has no more authority to modify the AT&T/BellSouth merger conditions than the Wireline Competition Bureau had to modify the *GTE/Bell Atlantic* merger order. Like the Wireline Competition Bureau when it was arbitrating an interconnection agreement under § 252

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[25] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration,* DA-02-1731, CC Docket No. 00-218 *et al.,* (Adopted July 17, 2002; Released July 17, 2002) ("*WorldCom Virginia Arbitration*").

[26] *WorldCom Virginia Arbitration* at ¶ 703.

[27] *Id.* at ¶ 702.

on behalf of a state commission, this Commission must interpret and apply the merger conditions in order to resolve the issue in this arbitration.

IV. BASED ON THE UNDISPUTED FACTS, AT&T's PROPOSED ISSUE 2 SHOULD BE DISMISSED BECAUSE IT IS IRRELEVANT, AND SEEKS COMMISSION AUTHORIZATION FOR AT&T TO PROSPECTIVELY BREACH ITS MERGER COMMITMENTS AND THE ACT

Based on the undisputed facts as admitted by AT&T, AT&T's proposed Issue 2 requests this Commission to ignore Sprint's already exercised acceptance of AT&T's required offer of a 3-year ICA extension and, instead, authorize an AT&T breach of its Merger Commitment and the Act.

AT&T states:

> In December of 2006 the parties did reach an agreement in principle and were working on finalizing the language to be placed in the new agreement. Subsequent to the merger of AT&T and BellSouth, Sprint withdrew its acceptance of the agreement and began pursuing an alternate path of extending its current agreement purportedly in accordance with the merger commitments.[28]

No matter how AT&T chooses to mis-characterize the status of the parties' pre-AT&T/BellSouth negotiations, such negotiations are entirely irrelevant due to the simple, undeniable fact that no final agreement was ever reached, reduced to writing and executed by the parties. Notwithstanding that even AT&T concedes no agreement was reached as to the core aspect of any agreement – *i.e.*, the "Network Interconnection" Attachment 3 – AT&T did not submit a list of unresolved Attachment 3 issues to the Commission. Instead, AT&T submitted an entirely new contract section Attachment 3 – i.e., AT&T's most recent generic "Standard" Attachment 3 – which was never part of

[28] Motion at page 10. As noted above, Sprint denies AT&T's allegations that the parties ever reached a

any discussion between the parties. AT&T is clearly attempting to obfuscate the single, true issue in this dispute and seeks to sanction Sprint for actually acting upon the representations that AT&T has made to the world and is obligated to honor.

In addition, AT&T is clearly requesting that this Commission authorize an unlawful AT&T breach of its Merger Commitment, as well as § 251(c)(2)(D)[29] of the Act and the FCC's corresponding Rule, 47 C.F.R. § 51.305(a)(4)[30] by enabling AT&T to avoid providing Sprint a 3-year extension of its current ICA even though AT&T is expressly required by federal law to provide exactly such an interconnection term and condition to all requesting telecommunications carriers.

A. UNDISPUTED FACTS ESTABLISHED BY THE PLEADINGS

Sprint has alleged and AT&T has affirmatively admitted that:

1. AT&T is an incumbent local exchange company ("ILEC") as defined

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final agreement, in principle or otherwise.

[29] Pursuant to 47 U.S.C. § 251(c)(2)(D):

> [E]ach incumbent local exchange carrier has ... [t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network- ... *on* rates, *terms, and conditions that are just, reasonable, and nondiscriminatory*, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(Emphasis added).

[30] Pursuant to 47 C.F.R. § 51.305(a)(4):

> An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: ... *[O]n terms and conditions that are just, reasonable, and nondiscriminatory* in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules *including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers*, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(Emphasis added).

under Section 251(h) of the Act, and is certified to provide telecommunications services in the Commonwealth of Kentucky. (Petition ¶ 3, first sentence; Answer ¶ 7).

2. By the current negotiations schedule mutually agreed to by the Parties, the 135th day of the Section 252 arbitration "window" was extended to May 5, 2007, and the 160th day is May 30, 2007. See Petition Exhibit "A". Accordingly, the Petition is timely filed. (Petition ¶ 6; Answer ¶ 10).

3. Sprint and AT&T previously entered into an Interconnection Agreement that was initially approved by the Commission in Case No. 2000-480. By mutual agreement, the Interconnection Agreement has been amended from time to time. On information and belief, Sprint believes all such amendments have likewise been filed by AT&T with the Commission. A true and correct copy of the Parties' current, 1,169 page Interconnection Agreement, as amended, can be viewed on AT&T's website at:

http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf.

(Petition ¶ 7; Answer ¶ 11).

4. On July 1, 2004, Sprint sent AT&T a request for negotiation of a subsequent interconnection agreement ("RFN") pursuant to Sections 251, 252 and 332 of the Act. Following the RFN, Sprint and AT&T conducted negotiations toward a comprehensive subsequent interconnection agreement. Accordingly, the Parties agreed to several extensions of the arbitration window in order to continue negotiations. AT&T and Sprint have met on many occasions during the negotiation period both telephonically and in person to discuss issues in dispute between the Parties. (Petition ¶ 8; Answer ¶ 12).

5. On December 29, 2006 the FCC approved the merger of AT&T, Inc. and BellSouth Corporation (collectively "AT&T/BellSouth") subject to certain AT&T/BellSouth voluntary merger commitments ("Merger Commitments") in a letter from AT&T, Inc.'s Senior Vice President – Federal Regulatory, Robert W. Quinn, Jr., filed with the FCC on December 28, 2006. The AT&T/BellSouth merger also closed on December 29, 2006 (the "Merger Closing Date"). On March 26, 2007 the FCC issued its formal Order authorizing the AT&T/BellSouth merger, which incorporated the AT&T/BellSouth offered Merger Commitments.[31] As an express condition of its merger authorization, the FCC Ordered that "AT&T and BellSouth shall comply with the conditions set forth in Appendix F" of the FCC Order.[32] A copy of the Table of Contents and Appendix F to the FCC Order is attached as Exhibit "B" to the Petition. AT&T is the same pre-merger BellSouth entity which provides wireline communications services, including local exchange, network access, intraLATA long distance services, Internet services and the services to Sprint under the current interconnection agreement in Kentucky and became a post-merger AT&T/BellSouth ILEC subsidiary entity that is bound by the Merger Commitments. (Petition ¶ 10; Answer ¶ 14).

6. Soon after the FCC approved Merger Commitments were publicly announced on December 29, 2006, the Parties considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. ***AT&T acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint***

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[31] *FCC Order*.

[32] *FCC Order*, Ordering Clause ¶ 227 at page 112.

can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such 3-year extension. (Petition ¶ 13 (emphasis added); Answer ¶ 17).

7. By letter dated March 20, 2007, Sprint advised AT&T in writing that Sprint considers the Merger Commitments to constitute AT&T's latest offer for consideration within the Parties' current 251/252 negotiations that supersede or may be viewed in addition to any prior offers BellSouth has made to the contrary. Pursuant to the express terms of Interconnection Merger Commitment No. 4, Sprint requested an amendment to Section 2 of the Parties' current month-to-month interconnection agreement that:

a) Converts the Agreement from its current month-to-month term and extends it three years from the date of the March 20, 2007 request to March 19, 2010; and,

b) Provides that the Agreement may be terminated only via Sprint's request unless terminated pursuant to a default provision of the Agreement; and,

c) Since the Agreement has already been modified to be TRRO compliant and has an otherwise effective change of law provision, recognizes that all other provisions of the Agreement, as amended, shall remain in full force and effect.

Sprint further provided and requested AT&T to execute and return no later than Friday, March 30, 2007, two copies of Sprint's proposed Amendment to implement Sprint's request regarding Interconnection Merger Commitment No. 4. Sprint's March 20, 2007 letter and proposed Amendment are attached to the Petition as Exhibit "C." (Petition ¶ 14; Answer ¶ 18).

8. On March 21, 2007, AT&T acknowledged both electronic and hard-copy

receipt of Sprint's March 20, 2007 letter and proposed Amendment. (Petition ¶ 15, first sentence; Answer ¶ 19).

B. AT&T SEEKS TO IMPROPERLY OBFUSCATE THE SINGLE LEGITIMATE ISSUE PENDING BEFORE THE COMMISSION AND OBTAIN AUTHORIZATION TO BREACH ITS LEGAL OBLIGATION

Without any limitation based upon a requesting telecommunications carrier's identity, Merger Commitment No. 4 requires AT&T to permit **any** requesting telecommunications carrier to extend its current interconnection agreement up to 3 years, regardless of the status of such ICA. AT&T acknowledged that Sprint could extend its ICA pursuant to Interconnection Merger Commitment No. 4, and Sprint took the requisite action to obtain its 3-year extension. ***The only legitimate issue is when such extension commences.***

The foregoing simple operative facts are indisputable, uncontested and admitted. Sprint has already done everything within its power to exercise its right to obtain a 3-year extension of the parties' current ICA, and there is no basis under any theory for AT&T to preclude Sprint from obtaining the benefit of such extension. There can also be no question that a 3-year extension to a party's current interconnection agreement is an "interconnection term" that AT&T is now mandated by federal law to provide any requesting carrier. Accordingly, not only under the terms of the *FCC Order* but pursuant to 47 U.S.C. § 251(c)(2)(D) and 47 C.F.R. § 51.305(a)(4), AT&T is required as a matter of law to provide Sprint as an interconnection term and condition, a 3-year extension of the parties' current ICA. There simply is no basis in the Merger Commitments or under the Act and FCC Rules to allow AT&T to unilaterally decide to which carriers it will and will not "permit" an amendment to implement the interconnection term of a 3-year extension.

Having admitted Sprint is entitled to a 3-year extension of the parties' current ICA and that Sprint took the requisite action within its power to request such extension, there is no cognizable legal basis upon which AT&T can legitimately ignore Sprint's request for such extension and, instead, ask this Commission to force a "new" agreement upon Sprint. In light of AT&T's admissions, the Commission should not sanction AT&T's attempt to use this Commission to bless AT&T's blatant violation of its interconnection-related Merger Commitments. AT&T's proposed Issue 2 is ripe for dismissal on the pleadings alone.

CONCLUSION

For all of the reasons stated herein, Sprint respectfully requests that the Commission deny AT&T's Motion in its entirety; dismiss AT&T's proposed Issue 2 on the pleadings; and, issue a procedural Order regarding the further consideration of this arbitration proceeding as to Sprint's Issue 1.

Respectfully submitted this 11th day of June, 2007.

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Certificate of Service:

I certify that a copy of this Response was served by first class mail the 11th day of June, 2007 on:
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