

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SPRINT COMMUNICATIONS	)	
COMPANY L.P. AND SPRINT SPECTRUM L.P.	)	CASE NO.
D/B/A SPRINT PCS FOR ARBITRATION OF	)	2007-00180
RATES, TERMS AND CONDITIONS OF	)	
INTERCONNECTION WITH BELL SOUTH	)	
TELECOMMUNICATIONS, INC. D/B/A AT&T	)	
KENTUCKY D/B/A AT&T SOUTHEAST	)	

O R D E R

On May 7, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS (collectively, "Sprint") filed a petition for arbitration pursuant to 47 U.S.C. § 252(b) seeking resolution of one issue. In its petition, Sprint requests that the Commission determine the commencement date of the 3-year extension of its interconnection agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast ("AT&T").

On June 1, 2007, AT&T filed its response to Sprint's petition. In conjunction with its answer to the petition, AT&T moved for dismissal of the commencement date issue but also submitted an additional arbitration issue to the Commission concerning the adoption of certain portions of the interconnection agreement.

The parties have participated in an informal conference, and oral arguments were held in this matter on August 23, 2007. Briefs were filed by the parties. To date, the parties have not reached an agreement on the questions presented in this arbitration. Therefore, there are 3 issues to be decided by the Commission: (1) the

commencement date for the Sprint-AT&T agreement; (2) AT&T's motion to dismiss the Sprint petition; and (3) AT&T's request that the Commission adopt portions of the agreement.

The Commission is obligated to resolve each issue that is raised within a petition for arbitration and the responses thereto. Pursuant to the schedule outlined in 47 U.S.C. § 252, the Commission's decision on these matters is due no later than September 18, 2007.

### BACKGROUND

Sprint operates as a telecommunications carrier, offering both competitive local exchange carrier ("CLEC") and commercial mobile radio service ("CMRS"). AT&T serves as an incumbent local exchange carrier ("ILEC"). This background section contains details on the recent commercial history between the two carriers and a recent Federal Communications Commission ("FCC") order affecting the Sprint-AT&T interconnection relationship.

#### Interconnection Agreement

Sprint and AT&T previously entered into an interconnection agreement that was approved by the Commission in Case No. 2000-00480.<sup>1</sup> By agreement, the parties amended that agreement at various times. On July 1, 2004, Sprint sent AT&T a request for negotiation of an extension of the parties' interconnection agreement pursuant to

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<sup>1</sup> Case No. 2000-00480, The Petition of Sprint Communications Company, L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996. The interconnection agreement was approved by Order dated June 25, 2002.

Sections 251, 252, and 332 of the Telecommunications Act of 1996.<sup>2</sup> Since that date, the parties have conducted negotiations toward the goal of developing a comprehensive subsequent agreement. However, no agreement was reached prior to the expiration date of the existing contract on December 31, 2004. Pursuant to the terms of the original agreement, and to prevent the disruption of service to consumers while allowing the parties to continue negotiating the terms of a new agreement, Sprint and AT&T have operated on a month-to-month basis since January 1, 2005.

#### AT&T and BellSouth Corporation Merger

On December 29, 2006, the FCC approved the merger of AT&T, Inc. and BellSouth Corporation (“BellSouth”).<sup>3</sup> AT&T and BellSouth also closed their corporate merger on December 29, 2006.<sup>4</sup> On March 26, 2007, the FCC issued its final Order authorizing the merger. This Order contained certain voluntary merger commitments to be followed by the new AT&T-BellSouth corporate entity.<sup>5</sup> As an express condition of its merger authorization, the FCC ordered that the companies comply with the conditions set out in Appendix F of the FCC Order.

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

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<sup>2</sup> 47 U.S.C. §§ 251, 252, 332.

<sup>3</sup> FCC WC Docket No. 06-74, Order dated March 26, 2007.

<sup>4</sup> This Commission also issued an Order approving the merger of AT&T and BellSouth Corporation, pursuant to KRS 278.020. Case No. 2006-00136, Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T, Inc. and BellSouth Corporation, final Order dated July 25, 2006.

<sup>5</sup> FCC WC Docket 06-74, Appendix F at 147, Order dated March 26, 2007.

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.

The specific merger commitment that is the subject of Sprint's petition is titled "Reducing Transaction Costs Associated with Interconnection Agreements." Paragraph 4 of this commitment<sup>6</sup> states:

4. 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 of 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.<sup>7</sup>

On March 20, 2007, by letter, Sprint informed AT&T that it considered the merger commitment to equal AT&T's latest offer for consideration within the Sprint-AT&T current interconnection agreement negotiations. Pursuant to Merger Commitment No. 4, Sprint requested that the current month-to-month status of the interconnection agreement be converted to a 3-year term, commencing on March 20, 2007 and terminating on March 19, 2010, in addition to other terms and considerations. Although AT&T acknowledged receipt of Sprint's March 20, 2007 letter request, AT&T provided no response and did not execute the proposed amendment outlining the

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<sup>6</sup> Hereinafter, Paragraph 4 will be referred to as "Merger Commitment No. 4."

<sup>7</sup> FCC WC Docket No. 06-74, Appendix F at 150, Order dated March 26, 2007.

commencement date for the new 3-year interconnection agreement. Sprint then filed its petition for arbitration on May 7, 2007.

This matter is currently before the Commission, as the parties cannot reach an agreement as to the commencement date for the 3-year extension. AT&T has moved to dismiss the issue, arguing that this Commission is without jurisdiction to decide this matter. Additionally, AT&T has submitted a second issue for arbitration. The second issue, which AT&T contends does fall within this Commission's jurisdiction to decide, concerns the adoption of certain portions of the proposed Sprint-AT&T interconnection agreement, titled "Attachments 3A and 3B." The Commission shall first address AT&T's motion to dismiss.

#### MOTION TO DISMISS

In conjunction with its response to Sprint's petition, AT&T included a motion to dismiss the arbitration issue. AT&T argues that Sprint is improperly seeking to arbitrate the interpretation of a merger commitment, which lies within the exclusive jurisdiction of the FCC. AT&T contends that, since the FCC was the agency that issued the Order approving the national AT&T-BellSouth merger and issued the appendix adopting the voluntary commitments to be followed by the companies after merger, it is the only agency with the authority to "interpret, clarify, or enforce any issues involving merger conditions. . . ."<sup>8</sup> AT&T admits that it agreed to extend the interconnection agreement with Sprint, but claims that the merger commitment which is the subject of Sprint's

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<sup>8</sup> AT&T's Motion to Dismiss and Answer at 3.

petition is “separate and distinct from any obligations set forth in Section 251 of the Telecommunications Act of 1996”<sup>9</sup> and, therefore, results in a non-arbitrable issue.

The petition, as filed by Sprint, concerns the issue of determining the commencement date for an interconnection agreement. Interconnection agreements establish the rates, terms, and conditions concerning the services and facilities to be provided between utilities operating in states such as Kentucky. This Commission is charged by statute with overseeing the rates, terms, and conditions of service provided by and between utilities operating in Kentucky.<sup>10</sup>

The Telecommunications Act of 1996 has been interpreted to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements they approve.<sup>11</sup> 47 U.S.C. § 251 defines the specific interconnection duties of carriers. Under that statute, each carrier has the duty to interconnect directly or indirectly with the facilities or equipment of other carriers. Pursuant to 47 U.S.C. § 252, any party negotiating the terms of an interconnection agreement has the right, in the course of negotiations, to ask a state commission to mediate any differences arising during negotiations. When presented with a petition for arbitration, Section 252 requires that state commissions ensure that the resolution of disputed issues meets the requirements of Section 251, in addition to establishing rates for interconnection, services, or network elements and providing a schedule for the implementation of the terms and conditions of the agreements. Section 251(c)(2)(D)

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<sup>9</sup> Id.

<sup>10</sup> KRS 278.040.

<sup>11</sup> Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997).

requires an ILEC to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Section 252(b)(4)(B) gives each state commission the power to arrive at its best decision based upon the information provided during the arbitration process. The 1996 Telecommunications Act gives suitable room for the promulgation and enforcement of state regulations, orders, and requirements of state commissions as long as they do not prevent the implementation of federal statutory requirements.<sup>12</sup>

In its March 26, 2007 Order approving the merger between AT&T and BellSouth, the FCC made no statement or ruling that state commissions would be without jurisdiction to address interconnection agreement questions stemming from the merger commitments.<sup>13</sup> Therefore, both federal and state laws unequivocally empower this Commission to hear this case.<sup>14</sup> Laws existing at the time that an agreement is made become part of that agreement.<sup>15</sup>

The Commission finds that AT&T's argument that the FCC is the sole and exclusive agency with the authority to arbitrate the commencement date issue lacks merit. The Commission reviewed the FCC's Order approving merger, as well as the arguments presented by AT&T regarding the FCC's alleged jurisdiction over interconnection commencement dates. However, no argument or evidence has been

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<sup>12</sup> BellSouth Telecommunications, Inc. v. Cinergy Communications, Co., 297 F. Supp. 2d 946, 952 (E.D. Ky., 2003).

<sup>13</sup> FCC WC Docket 06-07, Order dated March 26, 2007.

<sup>14</sup> Pursuant to KRS Chapter 278 et seq., the Commission is vested with the authority to regulate telephone companies providing service within this state.

<sup>15</sup> See *generally* Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (1954).

presented that is so compelling as to convince the Commission that simply because AT&T and BellSouth chose to submit voluntary commitments to the FCC in conjunction with the request for merger approval, this serves as an affirmative demonstration that the Commission would suddenly lose jurisdiction over intrastate interconnection matters, including the commencement date of an agreement. AT&T has not presented a sufficient argument or evidence to establish the presumption that a federal order was intended to supersede the exercise of power of the state. For this to be true, AT&T needed to present evidence of a clear manifestation of the FCC's intention to do so. The exercise of federal supremacy cannot be and should not be lightly presumed.<sup>16</sup> The FCC stated that "all conditions and commitments. . .are enforceable by the FCC."<sup>17</sup> However, even under the most liberal interpretation, the phrase "are enforceable" in reference to the merger commitments is not synonymous with the word "exclusive." Simply because the Commission has to refer to a federal agency's Order to resolve a dispute does not mean that the Commission is completely preempted from using its statutorily bestowed power of arbitration. The FCC may have created and issued its merger Order, but it did not restrict the rights of state commissions to review, interpret, and apply the meaning of that document.

The Commission believes it maintains concurrent jurisdiction with the FCC to resolve such post-merger or merger-related disputes, unless clearly and unequivocally told otherwise pursuant to an FCC Order or regulation. The Commission has primary

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<sup>16</sup> See BellSouth Telecommunications, Inc. v. Cinergy Communications, supra, 297 F. Supp. 2d 946 at 953.

<sup>17</sup> FCC WC Docket No. 06-74, supra, Appendix F at 147 (emphasis added).



jurisdiction over general issues regarding the interpretation and implementation of interconnection agreements<sup>18</sup> and has affirmatively maintained jurisdiction over previous arbitration matters concerning the commencement and termination dates of carrier-to-carrier contracts.<sup>19</sup> Therefore, the Commission finds that it has jurisdiction and it is appropriate for the Commission to review and adjudicate this petition and the issue

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<sup>18</sup> See Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F. 3d 1270, 1275 (11<sup>th</sup> Cir., 2003).

<sup>19</sup> See *generally* Case No. 2001-00224, Petition of Brandenburg Telecom LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Verizon South Inc. Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Order dated November 15, 2001; and Case No. 2004-00044, Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Order dated March 14, 2006.

contained therein.<sup>20</sup> For these reasons, AT&T's motion to dismiss the commencement date issue in the petition on the ground that this state lacks jurisdiction is denied.<sup>21</sup>

#### COMMENCEMENT DATE

Sprint argues that there are two potential dates the Commission could determine as the date by which the 3-year extension of the current interconnection agreement would commence. Sprint first proposes 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.<sup>22</sup> As stated previously in this Order, although AT&T acknowledged receipt of this letter, it provided no response by the due date outlined in the letter. In the alternative, Sprint also proposes a commencement date of December

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<sup>20</sup> Specifically, the Commission has previously retained jurisdiction to determine the termination date of an interconnection agreement. See Case No. 1996-00478, Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order dated February 14, 1997.

<sup>21</sup> The case currently before the Commission is one of 9 identical actions that have been filed by Sprint against AT&T in every state within the former BellSouth service territory. The actions are identical and concern exactly the same issues that are presented in this action. On August 10, 2007, Commission Staff for the Louisiana PSC moved to hold Sprint's petition in abeyance. Louisiana Docket No. U-30179. If the motion is granted by their PSC, the Louisiana staff intends to seek a declaratory ruling from the FCC to clarify when the 3-year period for interconnection agreements was intended to commence. See Letter from AT&T to Beth O'Donnell, August 17, 2007, and letter from Sprint to Beth O'Donnell, August 22, 2007. As of the date of this Order, this Commission is not aware if the Louisiana petition has been filed with the FCC or the likely date the FCC would issue a ruling after the petition is filed. This Commission shall go forward in ruling upon the issues that have been presented before it in this matter.

<sup>22</sup> Petition for Arbitration at 6.

29, 2006, which is the date of the AT&T-BellSouth merger and the effective date of the FCC merger Order and merger commitments.<sup>23</sup> Sprint contends this date is the absolute earliest date by which the commencement of the 3-year extension could occur.<sup>24</sup>

AT&T's primary argument in regard to this petition issue is that the Commission lacks the jurisdiction to adjudicate the commencement date issue. However, in addition to arguing for dismissal by alleging that the merger commitments are beyond the scope of an arbitration under 47 U.S.C. § 251, AT&T alternatively contends that December 31, 2004 is the only conceivable commencement date for the extension of the interconnection agreement.<sup>25</sup> December 31, 2004 is the date on which the most recent Sprint-AT&T agreement concluded under a fixed term and converted to a month-to-month operation.

In light of evidence and arguments presented, the Commission finds that the date of December 29, 2006 is the proper commencement date of the extension of the

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<sup>23</sup> Petition for Arbitration at 8, 9.

<sup>24</sup> See North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294, Sub 31, dated May 1, 2007. Pre-Filed Testimony of Felton at 16,17,18. Filed in the record of the Commission on August 22, 2007. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission has given the appropriate weight to the North Carolina Commission's record, as it felt was necessary and due.

<sup>25</sup> AT&T's Pre-Argument Brief at 3. AT&T contends that December 31, 2004 was the amended expiration date of the last 3-year agreement between the parties. Based on this date, AT&T states that the 3-year agreement would expire on December 31, 2007.

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 expired. In the preamble of Appendix F of the Memorandum Opinion and Order approving 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 Closing Date. . . .

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.<sup>26</sup>

AT&T's assertion that the interconnection agreement should be extended for 3 years from the initial expiration date of December 31, 2004 is wholly inconsistent with the FCC merger commitment directive and would create an unreasonable result. The Commission finds that within the terms of its merger order, the FCC clearly contemplated situations where interconnection agreements would be extended and effective beyond the initial term of the agreement. Again, the FCC stated in Merger Commitment No. 4 that "[t]he AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial terms has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law." AT&T and Sprint have been,

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<sup>26</sup> FCC WC Docket No. 06-74, Appendix F, p. 147 (emphasis added).

and are currently, operating under the interconnection agreement, as amended, originally established in Case No. 2000-00480.<sup>27</sup> In fact, the agreement has been repeatedly amended by both parties at various times well after the initial expiration date of December 31, 2004 specified in the original agreement.<sup>28</sup> If this Commission followed AT&T's reasoning and chose a commencement date of December 31, 2004, this would result in the extension of the interconnection agreement being applied in a retroactive manner prior to existence of the newly merged AT&T-BellSouth entity which is the subject of the FCC order. The FCC's merger commitments in question did not exist until December 29, 2006, and its only purpose was to direct the commercial behavior, in part, of this brand new entity collectively known as "AT&T." The Commission has found no portion of the FCC's merger order dictating that it should be applied retroactively. The Commission finds that the FCC's merger order was intended to be applied on a going-forward basis so as to address competitive concerns and other commercial issues resulting from the unification of AT&T and BellSouth. It is for these reasons that the Commission finds that the date of December 29, 2006 is to serve as the date for the commencement of the extension of the AT&T-Sprint interconnection agreement.

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<sup>27</sup> See n. 1.

<sup>28</sup> See North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294 Sub 31, dated July 31, 2007. Testimony of Felton at pages 21-24. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission will examine and give the appropriate weight to the North Carolina Commission's record, as it feels is necessary and due.

### ATTACHMENTS 3A AND 3B

In responding to a petition for arbitration, under 47 U.S.C. § 252(b), the non-petitioning party may also provide additional information. Pursuant to this section, AT&T, in combination with its motion to dismiss the commencement date issue, responded by submitting to the Commission a request for approval of a proposed section of the Sprint-AT&T interconnection agreement.

AT&T contends that, during the course of interconnection extension negotiations with Sprint, the companies had reached a point of consensus, in principle, on every issue within the proposed agreement when Sprint allegedly withdrew from negotiations and filed the petition for arbitration.<sup>29</sup> AT&T argues that, prior to Sprint's withdrawal, the only issues under discussion and to be subsequently finalized were the terms to be enumerated in Attachment 3A, which concern wireless interconnection services, and Attachment 3B, which concern wireline interconnection services. AT&T is requesting that the Commission approve the adoption of these "generic" attachments<sup>30</sup> so that they may be included in the General Terms and Conditions and all other attachments of the Sprint-AT&T interconnection agreement.

In response to this issue, Sprint denies that the parties reached any final agreement, in principle or otherwise, and no such agreement was ever reduced to

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<sup>29</sup> Attached as Exhibit B to its response to the petition, AT&T provided what it categorized as the final agreement the parties had reached through negotiations for the General Terms and Conditions and attachments. See AT&T Answer to Petition at 10 and Exhibit B.

<sup>30</sup> AT&T Pre-Argument Brief at 14.

writing or signed by the parties.<sup>31</sup> Additionally, Sprint states that the terms outlined within Attachments 3A and 3B were not part of any discussion between the parties.<sup>32</sup>

The Commission finds that the generic language for Attachments 3A and 3B as proposed by AT&T should not be adopted for the extension of the Sprint-AT&T interconnection agreement. The Commission declines to approve the adoption, as there is no evidence that the parties adhered to the single most important and basic rule of contract law, which is a “meeting of the minds.” As stated in previous parts of this Order, the parties are currently functioning on month-to-month contract terms and have not agreed upon final terms of the 3-year extension. Because of this fact, the Commission cannot approve the proposed Attachments 3A and 3B, as submitted by AT&T, when Sprint has not approved one word of their terms. To constitute a binding contract, or any portion thereof, the minds of the parties must meet, and one party cannot be bound to uncommunicated terms without consent.<sup>33</sup> For these reasons, this issue, as submitted by AT&T, is dismissed as a matter of law.

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<sup>31</sup> Sprint’s Response to AT&T’s Motion to Dismiss and Answer at 15.

<sup>32</sup> Sprint Pre-Argument Brief at 21.

<sup>33</sup> Oakwood Mobile Homes, Inc. v. Sprowls, 82 S.W.3d 193 (Ky. 2002), citing Harlan Public Service Co. v. Eastern Construction Co., 71 S.W.2d 24 (Ky. App. 1934).

## CONCLUSION

The Commission, having considered the petition of Sprint, AT&T's response and motion, and the evidence of the record in this proceeding and other sufficient advice, HEREBY ORDERS that:

1. AT&T's motion to dismiss is denied.
2. The commencement date for the new Sprint-AT&T interconnection agreement is December 29, 2006 for a fixed 3-year term.
3. AT&T's petition to adopt Attachments 3A and 3B is dismissed.
4. This Order is final and appealable.

Done at Frankfort, Kentucky, this 18<sup>th</sup> day of September, 2007.

By the Commission

ATTEST:



Executive Director