COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF PETITION OF CRICKET COMMUNICATIONS, INC. FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T KENTUCKY	))))))))	Case No. 2010-00131

REPLY BRIEF ON THRESHOLD ISSUES OF CRICKET COMMUNICATIONS, INC.

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Filed: June 2, 2010

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I. INTRODUCTION

Cricket Communications, Inc. ("Cricket"), hereby replies to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky's (hereafter "BellSouth", "AT&T" or "AT&T Kentucky") initial brief ("AT&T Brief") on the threshold issues raised in this proceeding. In its initial brief AT&T goes beyond simply offering arguments in support of its legal positions on these disputed issues. Instead, AT&T initiates a not so subtle collateral attack on two prior Commission rulings that establish important rights for competitors in Kentucky.

First, AT&T argues that the Commission has no authority to arbitrate open issues between carriers concerning the term, and termination date, of carrier agreements. These arguments constitute an attack on the Commission's prior decision in Case No. 2007-00180, where it found that it has authority to arbitrate disputes between carriers over the extension of the term of agreements (including those arising under FCC-ordered merger commitments). Second, AT&T argues that the Commission is preempted from ruling that AT&T must include transit traffic terms in the section 251 agreement that may be arbitrated by this Commission. This

argument is nothing less than an attempt to undermine the Commission's prior determination in Case No. 2004-00044 that AT&T is required to include transit terms in its section 251/252 interconnection agreements with competitors in Kentucky.

These arguments, if accepted by the Commission, would seriously undermine the Commission's authority to enforce terms and conditions that support competitive choices, and would narrow the Commission's jurisdiction significantly. To ensure that result does not come about, the Commission must reject both of AT&T's collateral attacks and reaffirm its authority over carrier agreement term and termination provisions, and transit traffic terms incorporated into section 251/252 interconnection agreements.

The Commission can do so, in part, by rejecting AT&T's arguments on the merits. As will be demonstrated below, those arguments rely on a narrow and myopic reading of federal law, and require the Commission to ignore binding precedent and the clear language of the FCC Merger Commitments. Accordingly, the Commission must reject the arguments offered in AT&T's initial brief and affirm that: (1) it continues to possess the authority to arbitrate carrier agreement term issues, including those arising under FCC Merger Commitments; (2) that the Merger Commitments permit Cricket to extend the term of its current agreement with AT&T; and (3) that transit traffic terms must be included in the section 251/252 interconnection agreement that the Commission may arbitrate later in this proceeding.

II. THRESHOLD ISSUE 1: THE COMMISSION'S AUTHORITY TO ARBITRATE TERM EXTENSION ISSUES IS WELL ESTABLISHED, AND CRICKET'S TERM EXTENSION PROPOSAL IS CONSISTENT WITH THE PLAIN LANGUAGE OF MERGER COMMITMENT 7.4

A. AT&T Is Estopped From Re-litigating the Question of Whether the Commission Has Authority to Arbitrate the Term Extension Issue

AT&T first argues that the Commission's Decision in Case No. 2007-00180, concerning the term extension request of Sprint Communications, is distinguishable. *AT&T Brief* at 3. Specifically, AT&T argues that the decision in Case No. 2007-00180 is not binding here because AT&T is making different *arguments* than it did in that case. In its own words, AT&T explains: "AT&T Kentucky is not making here the exclusive jurisdiction ***argument*** it made in Case No. 2007-00180. Rather, [its] sole jurisdictional ***contention*** here is..." *Id.* (emphasis added).

Tellingly, AT&T does ***not*** attempt to distinguish the ***facts*** in Case No. 2007-00180 from the facts in this case. In this way AT&T implicitly concedes that Cricket's extension request in the instant case is factually indistinguishable from the facts in Case No. 2007-00180. Unable to distinguish this case from the Commission's previous decision on the same issue, AT&T asserts that it is raising a different argument, which it believes is sufficient to distinguish this case from the last case. But AT&T cannot simply rely on new (or more accurately, revised) arguments to re-litigate an issue that the Commission has already decided. Because the facts in this case are indistinguishable from those in the Sprint case, AT&T is barred from re-litigating the question of the Commission's authority to arbitrate the term extension issue.

The doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.[1] The

[1] *See In re Tariff Filing of Northern Kentucky Water District to Amend Its Cross-Connection Control Policy*, Order, Case No. 2004-00309, 2006 Ky. PUC LEXIS 563, at *7 n.12 (July 12, 2006) (citing 46 AM. JUR.2D JUDGMENTS § 514).

doctrine encompasses two sub-parts: claim preclusion and issue preclusion.[2] Issue preclusion, also known as collateral estoppel, prevents parties from re-litigating any issue actually litigated and decided upon in an earlier action. Issue preclusion bars further litigation when: (1) the issues in the two proceedings are the same; (2) the adjudicator in the previous proceeding reached a final decision or judgment on the merits of the case; (3) the estopped party has had a fair opportunity to litigate the issue; and, (4) the issue in the prior action was necessary to the adjudicator's final decision.[3] Further, the doctrine applies to agency decisions where the agency has acted in a judicial capacity.[4]

Each element of the issue preclusion test is satisfied here. First, the issue in this case, as stated by AT&T, "is whether the Commission has jurisdiction in this proceeding to adjudicate whether the current term of Cricket's interconnection agreement with AT&T Kentucky shall be extended pursuant to Merger Commitment 7.4." *AT&T Brief* at 1. That issue arises because Cricket filed a petition for arbitration asking the Commission to extend the term of its interconnection agreement with AT&T for a period of three years pursuant to Merger Commitment 7.4. In Case No. 2007-00180 Sprint filed a petition for arbitration asking the Commission to decide whether it should be permitted to extend the term of its interconnection agreement with AT&T for a period of three years pursuant to Merger Commitment 7.4.[5] The issue of whether the Commission had jurisdiction to decide Sprint's extension request in Case

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[2] *Id.* (citing *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky. 1998)).

[3] *Id.* (citing *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970)).

[4] *Godbey v. University Hospital of the Albert B. Chandler Medial Center, Inc.*, 975 S.W.2d 104, 105 (Ky. Ct. App. 1998).

[5] *See* Petition for Arbitration of Sprint Communications Company L.P. and Sprint Spectrum L.P. at 9, *In re Petition of Sprint Communications Company, L.P., et. al. 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 (Ky. PSC May 7, 2007).

No. 2007-00180 was raised when AT&T moved to dismiss Sprint's petition "arguing that this Commission is without jurisdiction to decide . . ."[6]

Second, the adjudicator in Case No. 2007-00180 (the Commission itself) did reach a final decision on the merits of the case. The Commission determined that "it has jurisdiction and it is appropriate for the Commission to review and adjudicate [the Sprint] petition and the issue contained therein."[7] Further, the Commission denied AT&T's motion to dismiss the contract term extension issue "on the ground that this state lacks jurisdiction,"[8] and went on to rule that the term could be extended.[9]

Third, AT&T had a fair opportunity to litigate the issue of the Commission's jurisdiction in Case No. 2007-00180. The record in that case shows that AT&T had opportunities to make multiple filings setting forth its position, including a motion to dismiss, a brief, and other related papers. AT&T did not appeal the Commission's final order, which can reasonably be construed as an acknowledgement of the continuing validity of the Commission's final decision.

Fourth, and finally, resolution of the issue in the prior adjudication, whether the Commission had jurisdiction "to review and adjudicate [the Sprint] petition and the [term extension] issue contained therein"[10] was necessary to the Commission's final decision. As the Commission's final order recognizes, AT&T had moved to dismiss the Sprint petition on the grounds that the Commission did not have authority to adjudicate (arbitrate) the term extension issue. Therefore, the Commission was forced to decide the jurisdictional question, as that was the basis for AT&T's motion to dismiss.

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[6] *Id.* at 5.

[7] *Id.* at 9-10.

[8] *Id.*

[9] *Id.* at 13.

[10] *Id.* at 9-10.

Accordingly, the doctrine of *res judicata* (specifically, issue preclusion) bars AT&T from re-litigating the issue of whether the Commission has jurisdiction to arbitrate the term extension issue. The Commission should reject AT&T jurisdictional arguments and move directly to consideration of the merits of Cricket's term extension request.

B. The Commission's Authority to Arbitrate Term Extension Issue Is Well Established, and Need Not Rest Exclusively Under Federal Law

Even assuming AT&T is permitted to re-litigate this issue its arguments on the jurisdictional issue are not precluded from this case, they do not provide a basis for the Commission to deny the Cricket request on jurisdictional grounds. As noted above, AT&T does not attempt to distinguish the Commission decision in Case No. 2007-00180 from the facts in this case. As such, that decision is binding precedent here, as Cricket's extension request raises the same jurisdictional issues already decided by the Commission. Further, the Commission's decision in Case No. 2007-00180 has never been reversed, modified, stayed, or otherwise affected. It remains good law in Kentucky.

Despite the fact that the decision is binding precedent, and clearly on point with the facts in this case, AT&T attempts to minimize the Commission's legal conclusions in that case. Specifically, AT&T characterizes the Commission's legal conclusions in Case No. 2007-00180 as mere "observations" which are of no significance. *AT&T Brief* at 4. But AT&T's attempt to change prior Commission legal conclusions into something less is unpersuasive.

First, AT&T suggests that the Kentucky statute by which this Commission oversees the rates, terms and conditions of service between utilities is preempted, or subservient to, section 252(b) of the Act. *AT&T Brief* at 4. The assertion here, it seems, is that the Kentucky statute is irrelevant to the Commission's authority to review contract term issues in an arbitration proceeding. But this is not so. The Commission's prior legal finding concerning the scope of its

authority recognizes that section 252(e)(3) expressly permits states to impose conditions that arise out of state law, as long as they do not conflict with federal law.[11]

Second, AT&T also argues that the Commission's finding concerning its authority under the Telecommunications Act of 1996 ("1996 Act") to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements is irrelevant. *AT&T Brief* at 4. AT&T argues that the authority to oversee the implementation, and enforce the terms of, agreements does not include ordering the extension of a contract term. *Id.* But AT&T offers no support for its assertion. Further, this assertion ignores the plain fact that Cricket is asking this Commission extend the term of a contract, which logically involves the "implementation" of the term of the contract.

Third, AT&T also suggests that there is a meaningful distinction between this Commission's authority to arbitrate issues arising from the "commencement and termination dates of carrier-to-carrier contracts" with its authority to arbitrate the extension of the term of such contracts. *AT&T Brief* at 4-5, and 10-11. AT&T appears to concede that the Commission does have the authority to arbitrate commencement and termination date issues (including the term of an agreement), of new agreements. However, AT&T argues that such authority does not include the power to arbitrate issues arising from the commencement and termination date issues of existing agreements. There is no basis for recognizing AT&T's arbitrary distinction, which ignores well established federal law that state commission authority to arbitrate interconnection agreement terms extends to disputes arising after the agreement becomes effective.[12]

Finally, AT&T's attempt to limit the holding of the federal district court in *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F.Supp.2d 946 (E.D. Ky 2003),

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[11] *See Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

[12] *See Core Communications v. Verizon Pennsylvania, Inc.*, 485 F.3rd 757 (3rd Cir. 2007).

is not consistent with the court's ruling. AT&T argues that the authority affirmed by the federal court is only the authority to impose substantive requirements, but that it does not expand the state commission's jurisdiction. *AT&T Brief* at 5. But this argument ignores the fact that what the court held is that the state's *existing* authority is not preempted as long as the state rules do not interfere with federal law. *Id.* at 19-20. The underlying case in that instance was an arbitration proceeding, as is the case here. Therefore, the federal court's ruling in *Cinergy* can reasonably be construed as affirming this Commission's authority to impose an obligation that is not inconsistent with federal law in an arbitration proceeding.[13] Because the term extension issue is a right established under federal law, simply enforcing that right is clearly consistent with federal law.

AT&T also cites to several authorities finding that state commission authority to arbitrate issues outside of section 251 is limited. *AT&T Brief* at 7-8. The cases AT&T relies upon here generally involved the question of whether certain duties arising under a different section of the Telecommunication Act could be imposed upon incumbent LECs under section 251. That is a very different question from whether this Commission has authority to arbitrate a dispute arising under federal law, concerning the implementation and enforcement of the term of an agreement under the merger commitments.

As noted above, the Commission has already ruled that it does have such authority. And other state commissions, and a federal district court, have followed this Commission's decision on that issue. The federal district court in Michigan recently ruled that a term extension dispute arising under Merger Commitment 7.4 is an issue that can be arbitrated by a state commission.[14] The federal court affirmed the Michigan PSC's decision to extend Sprint's agreement with

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[13] *See also Michigan Bell*, 323 F.3d at 358 (6th Cir. 2003).

[14] *Mich. Bell Tel. Co. v. Isiogu*, No. 09-12577, 2010 U.S. Dist. LEXIS 18182 (E.D. Mich. March 2, 2010).

AT&T for a period of three years, rejecting AT&T's arguments that the PSC lacked authority to interpret and enforce FCC merger commitments. The court reasoned:

> Merger commitment 7.4 does not address issues and topics separate and apart from those subject to arbitration under the 1996 Act; to the contrary, it directly impacts the obligations of AT&T subsidiaries to enter into specific ICAs previously negotiated under § 251 of the 1996 Act [47 U.S.C. § 251].[15]

In addition, state commissions in Indiana, Missouri, and Michigan have also ruled that it is appropriate to arbitrate term extension issues arising under the merger commitments. Notably, the Administrative Law Judge in the Missouri proceeding cited this Commission's legal reasoning in Case No. 2007-00180 concerning the scope of authority granted under section 252 as a basis for the Missouri PSC to arbitrate the term extension issue.[16] The Indiana commission's decision, just issued on Friday, May 28, 2010, concluded that the question of whether the term of the Sprint-AT&T Indiana agreement should be extended for a three-year period is arbitrable since an ICA term extension request "is essentially a request to negotiate an ICA ..."[17]

C. Merger Commitment 7.4 Permits Cricket to Extend the Cricket-Kentucky Agreement Whether Or Not That ICA Was In Effect at the Time the Merger Commitment Was Approved by the FCC

On the merits, AT&T offers two arguments to support its position that Merger Commitment 7.4 does not apply to the Cricket Kentucky Agreement. First, AT&T argues that the commitment "only permitted carriers to extend ICAs to which they were parties when the

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[15] *Id.* at *19-20.

[16] *See, e.g., In the Matter of the Verified Petition of Sprint Communications Company L.P., et. al. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company, d/b/a AT&T Missouri*, Order Denying Application for Reconsideration, Case No. CO-2009-0239, 2009 Missouri PSC LEXIS 403, *32 (May 12, 2009) (citing Kentucky PSC Order, Case No. 2007-00180).

[17] *Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp. and NPCR, Inc. d/b/a Nextel Partners v. Indiana Bell Telephone Company d/b/a AT&T Indiana*, Order Denying Motion to Dismiss, Cause No. 43870, *mimeo. print* 4, (Ind. U.R.C. May 28, 2010).

merger commitment went into effect on December 29, 2006." *AT&T Brief* at 12. In other words, according to AT&T, the commitment does not apply to any ICA formed after December 29, 2006. Second, AT&T asserts that the commitment permits "any given ICA" to be extended only once, and Cricket's ICA was already extended once by Sprint. *Id.*

Both of these arguments fail under the plain language of Merger Commitment 7.4, which is not limited to agreements in place as of December 29, 2006, and applies separately to each telecommunications carrier that seeks to extend the term of "***its***" agreement with AT&T.

1. Merger Commitment 7.4 Applies to Agreements In Effect During the Forty Two Month Period That the Merger Commitments Are In Effect

AT&T's first argument, that the merger commitments apply only to agreements in effect as of December 29, 2006, is not supported by the language of the commitment. Specifically, nothing in Merger Commitment 7.4 limits its application to agreements in effect as of December 29, 2006. Merger Commitment 7.4 states:

> The AT&T/BellSouth ILECs ***shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of when its initial term 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.[18]

On its face, the commitment simply says that any "current" agreement may be extended during the period that the merger commitments are in effect. Cricket demonstrated in its opening brief that the reference to a "current" agreement must be construed as an agreement that is in effect at ***any*** time during the duration of the merger commitments. *See Cricket Initial Threshold Brief* at 7-10.

[18] *Merger Order* at Appendix F, Merger Commitment 7.4 (emphasis added).

If the commitment was intended to apply only to agreements in place as of December 29, 2006, as AT&T suggests, it would have been simple enough to include that limitation explicitly in the text. But no such limitation exists. This fact is significant because AT&T drafted these commitments and presented them to the FCC. As the drafter of the language at issue, it is reasonable to construe any ambiguities against the AT&T. [19]

Other state commissions have rejected AT&T's previous attempts to limit the scope and application of merger commitment 7.4. Those commissions have concluded that the merger commitment reference to a "current" agreement means that the agreement must be "current" as of the date of the extension proposal, and that the extension proposal must be made during the 42 months that the merger commitments are in effect.

For example, in Ohio AT&T argued that Sprint should not be permitted to extend its agreement with AT&T because the agreement between Sprint and AT&T was not "in effect" (i.e. the initial term had expired) on December 29, 2006. The Public Utility Commission of Ohio disagreed, and specifically rejected "any constraints" that AT&T would impose by its interpretation of Merger Commitment 7.4. Instead, the PUC of Ohio concluded that "an interpretation that is more consistent with the clear language of Merger Commitment 4 is that current interconnection agreements may be renewed at any point during the 42-month duration of the Merger Commitments." [20]

Similarly, the Missouri Public Service Commission affirmed an ALJ decision finding that AT&T "has no authority to alter the terms of the Merger Order . . . by creating a deadline by

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[19] *See, e.g, In the Matter of Amendment to Interconnection Agreement Between AT&T North Carolina and Alltel Communications, Inc.*, Order Allowing Extension of Agreement, Docket No. P-55, Sub. 1352, 2008 N.C. PUC LEXIS 1860, at *12 (N.C. Util. Comm'n Nov. 3, 2008) (construing ambiguities in the merger commitments against AT&T, as the drafter of the commitments).

[20] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., et. al. v. The Ohio Bell Telephone Company dba AT&T Ohio*, Entry of Order, Case No. 07-1136-TP-CSS, 2010 Ohio PUC LEXIS 348, at ¶ 26 (Oh. PUC Mar. 31, 2010) (emphasis added).

which carriers must comply or forfeit their rights, if any, under the Merger Commitments."[21] Instead, the ALJ found that "the Merger Order provides that carriers must be allowed to extend current, expired or unexpired interconnection agreements until such time the Merger Commitments sunset on June 29, 2010."[22]

In Kansas, the Corporation Commission concluded that "[t]he language of Merger Commitment 7.4 is clear and unambiguous and not subject to the interpretation put upon it by AT&T." [23] And, in California, the Public Utilities Commission found that the language of Merger Commitment 7.4 "plainly grants an interconnecting CLEC an ***unqualified right*** to extend an expired interconnection agreement (ICA) for an additional three-year term . . . ."[24] Also, in North Carolina the Utilities Commission rejected AT&T objections similar to those raised in this case, finding that "[u]nder the clear terms of the Merger Commitment 7.4, AT&T is required to extend its current interconnection agreement with AllTel, the requesting carrier, for a period of up to three years." [25] Further, the North Carolina Commission rejected AT&T's arguments that the merger commitment is limited, and instead found that "the ***only limitation***

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[21] *In the Matter of the Verified Petition of Sprint Communications Company L.P., et. al. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company, d/b/a AT&T Missouri*, Final Arbitrator's Report at ¶ 34, Case No. CO-2009-0239 (Mo. PSC May 12, 2009).

[22] *Id.* at ¶ 35.

[23] *Sprint Communications Company, L.P., et. al. v. Southwestern Bell Telephone Company d/b/a AT&T Kansas*, Order Denying Reconsideration, Docket No. 10-SCCC-273-COM, 2010 Kan. PUC LEXIS 372, at ¶ 5 (Kan. Corp. Comm'n Apr. 28, 2010) (emphasis added).

[24] *In the Matter of the Application of Sprint Communications Company L.P. (U-5112-C), for Commission Approval of an Amendment Extending its Existing Interconnection Agreement for Three Years with the Pacific Bell Telephone Company d/b/a AT&T California pursuant to the Merger Commitment Voluntarily Created and Accepted by AT&T, Inc. (AT&T), as a Condition of Securing Federal Communications Commission Approval of AT&T's Merger with BellSouth Corporation*, Decision Granting Applicant's Motion for Reconsideration, 10-01-008; Application 09-06-006, 2010 Cal. PUC LEXIS 17 (Cal. PUC Jan. 22, 2010) (emphasis added).

[25] *In the Matter of Amendment to Interconnection Agreement Between AT&T North Carolina and Alltel Communications, Inc.*, Order Allowing Extension of Agreement, Docket No. P-55, Sub. 1352, 2008 N.C. PUC LEXIS 1860 (N.C. Util. Comm'n Nov. 3, 2008).

contained within the text of the Condition [7.4] is that the agreement which the requesting carrier seeks to extend must be the ***current*** agreement between the parties."[26]

Each of these cases tells us that it would be error to read the merger commitments as including the implied limitation that AT&T seeks. There is simply no limiting language in the commitments. Had the FCC intended to limit the commitments in the manner AT&T suggests, it could have simply so stated. As the California PUC explained:

> Since it would have been a simple matter for the limiting language that AT&T asks us to imply in the document to have been explicitly set forth therein, and since the language of the Merger Commitment was the product of negotiation between AT&T and the FCC, we conclude that the FCC deliberately omitted such limiting language.[27]

Tellingly, the only support that AT&T can find for its argument that the merger commitments include implied limitations is the extemporaneous remarks of a single Connecticut judge which afford no precedential value. A review of the transcript reveals that Judge Underhill's remarks were, by his own admission, merely a statement of his initial views on the construction of the language of the merger commitments, which he conceded "seems to be different from anybody else's reading [of Merger Commitment 7.4]."[28] Notably, the decision by the District of Connecticut was merely a remand to the Connecticut DPUC to clarify and further describe the basis for the DPUC's prior order. The court, therefore, made no formal findings or conclusions on its interpretation of Merger Commitment 7.4. The Connecticut court's lack of

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[26] *Id.* at *12-13.

[27] *In the Matter of the Application of Sprint Communications Company L.P. (U-5112-C), for Commission Approval of an Amendment Extending its Existing Interconnection Agreement for Three Years with the Pacific Bell Telephone Company d/b/a AT&T California pursuant to the Merger Commitment Voluntarily Created and Accepted by AT&T, Inc. (AT&T), as a Condition of Securing Federal Communications Commission Approval of AT&T's Merger with BellSouth Corporation*, Decision Granting Applicant's Motion for Reconsideration, 10-01-008; Application 09-06-006, 2010 Cal. PUC LEXIS 17 (Cal. PUC Jan. 22, 2010) (emphasis added).

[28] *See* Exhibit 5 to AT&T Kentucky Initial Threshold Brief at page 3, line 25 (excerpt of transcript from Connecticut oral argument).

any formal ruling stands in contrast to the federal district court of Michigan's recent ruling that , the Michigan PSC properly granted an extension of the term of the Sprint—AT&T Michigan agreement.[29]

Finally, AT&T incorrectly asserts that this Commission read Merger Commitment 7.4 in the same way (i.e. that it only applied to agreements in effect on December 29, 2006) when it ruled in Case No. 2007-00180 that December 29, 2006 should be the start of the term extension period for the agreement between Sprint and AT&T. *See AT&T Brief* at 14. That assertion is not persuasive. The Commission's decision to use that date as a starting point for calculating the three year extension of the Sprint Kentucky Agreement was a fact-specific question based upon the circumstances of each party in that proceeding. There is no language in the Commission's decision to support AT&T's suggestion that the Kentucky Commission construed Merger Commitment 7.4 in the narrowest way possible.[30]

Accordingly, the Kentucky Commission should reject AT&T's assertion that the merger commitment should be read to implicitly limit itself only to those agreements in effect as of December 29, 2006. There is no language in the commitment to support such a narrow reading, and AT&T's limiting construction of the merger commitments has been rejected by all other commissions to decide the question (or similar questions).

2. Cricket's Right to Extend the Term of Its Agreement with AT&T Is Separate and Distinct From the Previous Extension of Agreements between AT&T and Other Entities In Kentucky

AT&T also argues that Merger Commitment 7.4 only permits extension of "any given" interconnection agreement for a single three year term. *AT&T Brief* at 12. Specifically, AT&T

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[29] *Mich. Bell Tel. Co. v. Isiogu*, No. 09-12577, 2010 U.S. Dist. LEXIS 18182 (E.D. Mich. March 2, 2010).

[30] Cricket will also demonstrate, at pages 18-19 below, that the decision to use December 29, 2006 as the starting point for the Sprint Kentucky Agreement was based on the specific facts between Sprint and AT&T, and should not be blindly applied to Cricket's request to extend its agreement.

asserts that because Cricket adopted the interconnection agreement between Sprint and AT&T, which itself was extended, Cricket is precluded from extending the term of its agreement with AT&T. *Id.*

This argument relies upon an inaccurate assumption: that the agreement (contract) between Sprint and AT&T, and the agreement (contract) between Cricket and AT&T, are one and the same. In other words, to accept AT&T's argument the Commission must conclude that two separate contracts, i.e. the interconnection between Sprint and AT&T in Kentucky ("Sprint Kentucky Agreement") and the interconnection between Cricket and AT&T in Kentucky ("Cricket Kentucky Agreement"), are one and the same.

Upon this unstated (and inaccurate) premise AT&T asserts that "***the ICA*** was already extended"; *id.* at 14, and "***the ICA*** Cricket seeks to extend was extended by Sprint . . . ."; *id.* at 15, and, finally, "Cricket cannot extend ***the same ICA*** a second time . . . ." *Id.* (emphasis added in all). Note that in the quoted portions of the AT&T brief (and elsewhere) AT&T uses vague and imprecise language when referring to either the Sprint Kentucky Agreement, or the Cricket Kentucky Agreement, in hopes that the Commission will treat the two contracts as one and the same.

But it would be a mistake to do so. The contract governing AT&T's duties and obligations with Sprint is a legally distinct and separate contract from that which governs AT&T's duties with Cricket. The Sprint Kentucky Agreement was approved by the Commission in September of 2001 in Case Number 2000-00480. The Cricket Kentucky Agreement was approved by the Commission in September of 2008 in Case Number 2008-0331.

AT&T ignores the fact that these are two separate and distinct contracts because it knows that the merger commitments apply to ***each*** agreement that an individual telecommunications

carrier has with AT&T. Notably, Merger Commitment 7.4 states that "AT&T/BellSouth ILECs shall permit ***a requesting telecommunications carrier*** to extend ***its*** current interconnection agreement . . . ."[31] As written, the commitment allows any carrier to extend "***its***" agreement. Clearly, the use of the pronoun "its" in this context is possessive, such that the term "its" means ***that*** particular carrier's agreement with AT&T (and not any other carrier's agreement). Thus, the merger commitment applies to each agreement that an individual carrier may have with AT&T. It necessarily follows then, that Cricket's right to extend ***its*** agreement under Merger Commitment 7.4 is separate and distinct right from another carrier's right to extend its agreement with AT&T (or whether such agreement has been extended).

AT&T also makes a quasi-equitable argument which recognizes that the Sprint Kentucky Agreement and the Cricket Kentucky Agreement are two separate contracts. Specifically, AT&T asserts that Cricket's extension request should be denied because Sprint extended the Sprint Kentucky Agreement with AT&T in 2007, and because Cricket later adopted that agreement "Cricket has enjoyed the benefit of that extension." *AT&T Brief* at 15.

Cricket has not "enjoyed" the benefits of Sprint's extension, and that is not a proper basis for this Commission to determine the viability of Cricket's legal rights under the merger commitments. Although Cricket did adopt the Sprint Kentucky Agreement in 2008, it only operated under the terms of that agreement for a mere nine (9) months before AT&T sent its notice of termination of that agreement (in June 2009).

Moreover, the fact that Cricket adopted a previously extended agreement between AT&T and another carrier does not negate Cricket's extension rights, as a matter of law, under Merger Commitment 7.4. Notably, that commitment does not limit a carrier's extension rights based

[31] *Merger Order* at Appendix F, Merger Commitment 7.4 (emphasis added).

upon whether its agreement was formed via negotiation, arbitration or adoption. There is no language in the commitments to suggest that agreements formed via the adoption process would be excluded from the rule. And, since every agreement formed by the adoption process is necessarily a carbon copy of the underlying adopted agreement, the FCC must have contemplated that two agreements with identical (or near identical) terms, could be extended.

Accordingly, the Commission must recognize that the Sprint Kentucky Agreement is separate and distinct from the Cricket Kentucky Agreement. It necessarily follows, that because merger commitment 7.4 applies to each agreement a carrier has with AT&T, whether formed by negotiation, arbitration or adoption, AT&T's suggestion that the Cricket Kentucky Agreement can not be extended must fail.

AT&T also offers a hypothetical example of what it asserts is a real risk that the extension could be "converted into an extension lasting decades." Specifically, it suggests that all of the competitive providers in Kentucky could act in concert to engage in a scheme that would first extend the term of an agreement under Merger Commitment 7.4, which would then be adopted by another competitive provider. This, basic sequence, would then be repeated over and over again by every competitive provider in Kentucky. *AT&T Brief* at 15-26.

AT&T's hypothetical fails for several reasons. First, it is telling to note that the merger commitments have been in place since December of 2006, for forty-two months, without anything like this occurring. Moreover, even if this elaborate "adopt and extend" scheme were possible, there is no risk that any party could use Cricket's adoption of the Sprint agreement to perpetuate such a scheme since the merger commitments expire at the end of this month (on June 30, 2010). Second, the hypothetical ignores the real world fact that the number of competitors and CMRS providers in Kentucky is limited, and there are simply not enough competitive

providers in the state to engage in this sophisticated "adopt and extend" scheme that AT&T suggests would occur. Third, even if there were more competitors, the likelihood that all such providers would engage in the sophisticated "adopt and extend" scheme AT&T suggests is negligible. The fact that the merger commitments have been available for forty two months, but no so such scheme has unfolded, is sufficient proof that AT&T's scheme is nothing but conjecture.

3. The Commission Should Extend the Cricket Kentucky Agreement for a Period of Three Years from the Date that AT&T Delivered Its Notice of Intent to Terminate the Cricket Kentucky Agreement

AT&T also argues that if Merger Commitment 7.4 does apply to the Cricket Kentucky ICA, then "the logic of the Commission's decision in Case No. 2007-0001080" compels the conclusion that the extension ended on December 28, 2009. *AT&T Brief* at 14.

What AT&T fails to recognize, however, is that the Commission's decision in Case No. 2007-00180, at least on the question of when the extension should apply from, was a fact-based decision relying upon the specifics of the Sprint agreement with AT&T. Specifically, the Commission's decision to use December 29, 2006 as the starting point for the term extension of the Sprint Kentucky Agreement was made "[i]n light of the evidence and arguments presented" in that case.[32] That evidence included facts surrounding the initial termination date of the Sprint Kentucky Agreement (December, 2004), pre-filed testimony offered in another proceeding, and other points. Because none of those facts exist in this case, the Commission's prior decision to use December 29, 2006 in the Sprint-AT&T proceeding should not be applied to Cricket's term extension request.

[32] Case No. 2007-00180, Order at 11.

Instead, the Commission should again review the evidence and arguments unique to the Cricket agreement, and apply a "start date" that is reasonable and equitable. Cricket has proposed that a reasonable and equitable start date is that point in time when AT&T first provided Cricket notice of its intent to terminate the Cricket Kentucky Agreement. Specifically, Cricket proposed that the term of the Kentucky Agreement be extended three years from the date of AT&T's termination notice letter (June 24, 2009).

The use of that date is equitable because it is the first point in time that Cricket became aware of AT&T's intentions to terminate the agreement, and therefore, the first point in time that Cricket knew of the potential need to extend the term of the agreement under Merger Commitment 7.4. The date is reasonable because it is more than one year before this Commission will render a decision concerning extension of the agreement. While other state commissions have permitted extension of the agreement from the date of their order approving such extensions, Cricket does not request such an extension.

For those reasons the Commission should reject the suggestion that its decision to extend the Sprint agreement from December 29, 2006 should also apply to any potential extension of the Cricket Kentucky ICA. Instead, the Commission should conclude that the Cricket Kentucky Agreement can be extended pursuant to Merger Commitment 7.4 for a period of three years from the date of AT&T's notice of its intent to terminate the agreement, i.e., three years from June 24, 2009.

III. THRESHOLD ISSUE 2: THE COMMISSION HAS ALREADY DETERMINED THAT AT&T'S PREDECESSOR, BELLSOUTH, IS OBLIGATED TO PROVIDE TRANSIT TERMS IN AGREEMENTS WITH COMPETITORS IN KENTUCKY, AND THE COMMISSION SHOULD REAFFIRM THAT RULING IN THIS CASE

A. AT&T Is Collaterally Estopped From Re-litigating The Commission's Decision Requiring AT&T To Provide Transit Terms In A Section 251/252 Interconnection Agreement

AT&T argues that this Commission cannot require AT&T Kentucky to include transit terms in its section 251/252 interconnection agreement with Cricket. *AT&T Brief* at 16-24. AT&T bases this argument on its assertion that transit service is not an ILEC obligation under section 251(c)(2). *Id.* AT&T also argues that the FCC has preempted state commissions from imposing transit service obligations on ILECs. *Id.* at 18-24.

The merits of AT&T's arguments aside, they ignore the Commission's prior binding decision on this same issue. That decision is a final decision applied against AT&T in a prior proceeding and as such, AT&T cannot now collaterally attack the Commission's prior decision by asking the Commission to re-litigate the issue in this proceeding. As discussed above, the doctrine of *res judicata* (and more specifically, issue preclusion) precludes re-litigation of an issue once a court in a previous proceeding has decided the same issue of fact or law on the merits.[33]

All of the elements of issue preclusion exist here. First, the issue in this case as stated by AT&T is "[s]hould the interconnection agreement include terms governing the exchange of transit traffic over AT&T's network?"[34] In Case No. 2004-00044,[35] the section 252 arbitration

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[33] *See supra* note 1.

[34] Case No. 2010-00131, Response of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky to Petition for Arbitration, Exhibit 2 at 2 (filed Apr. 20, 2010).

[35] *See In re Joint Petition For Arbitration of NewSouth Communications Corp., et al of an Interconnection Agreement With Bellsouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Case No. 2004-00044, Order, 2005 Ky. PUC LEXIS 810 (Sep. 26, 2005) ("*NewSouth Order*"); *In re Joint Petition For Arbitration of Newsouth Communications Corp., et al of an Interconnection Agreement With*

petition included the issue of whether AT&T could charge competitors a Tandem Intermediary Charge ("TIC"). Necessary to deciding the TIC issue was the question of whether AT&T had any obligation to provide transit at all because if it did not, the Commission had no jurisdiction to decide the question of whether AT&T's transit charge was lawful. AT&T first raised the issue of whether it had any obligation to provide transit in the Revised Issued Matrix filed in the proceeding,[36] it its initial Post-Hearing Brief,[37] raised again in its Post-Hearing Reply Brief,[38] and then raised once more in its motion for rehearing of the Commission's order.[39] Each time AT&T Kentucky argued that it had no obligation to provide a transit service under the 1996 Act and cited many of the same sources it cites in this proceeding.

Second, the Commission reached a final decision of the issue on the merits in its original hearing and on rehearing. Responding to AT&T's arguments, the Commission held in its *NewSouth Order* that AT&T Kentucky was required to provide transit service as part of an interconnection agreement.[40] In its order on rehearing of its *NewSouth Order*, the Commission affirmed its previous holding and stated:

> [AT&T Kentucky] has not demonstrated that the Commission is precluded by the FCC from requiring [AT&T Kentucky] to transit traffic. . . . However, based on the Commission's previous determinations regarding third-party transiting, and because

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Bellsouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Case No. 2004-00044, Order, 2006 Ky. PUC LEXIS 159 (Mar. 14, 2006) ("*NewSouth Recon Order*") (collectively, "*Newsouth Orders*").

[36] Case No. 2004-00044, Revised Issues Matrix, p. 26 (filed Jul. 14, 2004).

[37] Case No. 2004-00044, BellSouth Telecommunications, Inc.'s Post-Hearing Brief, pp. 54-55 (filed Jul. 15, 2005) ("BellSouth only has an obligation to negotiate and arbitrate those issues listed in Section 252(b) and (c) of the Act. In addition, the Commission only has the authority under the Act to arbitrate non-251 issues if the issue was a condition required to implement the agreement.") (citations omitted)).

[38] Case No. 2004-00044, BellSouth Telecommunications, Inc.'s Post-Hearing Reply Brief, p. 38 (filed Aug. 12, 2005) ("BellSouth has no obligation to provide a transit function under the Act.").

[39] Case No. 2004-00044, BellSouth Telecommunications, Inc.'s Motion for Rehearing and Request for Oral Argument, pp. 19-25 (filed Oct.. 18, 2005).

[40] *NewSouth Order*, 2005 Ky. PUC LEXIS 810, *22.

> transiting uses intra-state facilities to provide an intra-state service, the Commission finds that it has jurisdiction over these matters until and unless the FCC specifically preempts the state commission.[41]

Third, AT&T had a fair opportunity to litigate the issue of whether it was required to include transit terms in a section 251/252 interconnection agreement. The record shows that AT&T had opportunities to make multiple filings setting forth its position, including an initial post hearing brief, a post hearing reply brief, and a motion for rehearing. AT&T did not appeal the Commission's *NewSouth Recon Order*, which can reasonably be construed as an acknowledgement of the validity of the Commission's order.

Fourth and finally, resolution of the issue in Case No. 2004-00044 was necessary to the Commission's final decision. The Commission is required under section 252(b)(4)(C) to adjudicate each issue set forth in the arbitration petition. The Commission needed to determine whether AT&T was required to provide transit service under section 251 before determining if the TIC was a proper rate for the service. Thus, the Commission was forced to decide the transit obligation issue.

Nothing has changed since the Commission issued its *NewSouth Orders* and ruled that AT&T Kentucky must provide transit service. Accordingly, the doctrine of *res judicata* (and specifically issue preclusion) bars AT&T from re-litigating the issue of whether AT&T must include transit terms as part of its section 251/252 interconnection agreement with Cricket.

B. AT&T Mischaracterizes the Scope of the FCC's Prior Ruling Regarding Transit Obligations Under Section 251(c)(2)

Notwithstanding the Commission's binding precedent on transit, AT&T asserts that it has no obligation to include transit terms as part of the interconnection agreement with Cricket

[41] *NewSouth Recon Order*, 2006 Ky. PUC LEXIS 159, *27-28.

because "[t]he FCC has repeatedly ruled that nothing in the 1996 Act or its rules or order requires it to treat transiting as part of interconnection under section 251(c)(2)." *AT&T Brief* at 18. This assertion, however, mischaracterizes the FCC's prior statements on the issue.

AT&T characterizes the FCC's Wireline Competition Bureau ("WCB") *Virginia Arbitration Order*[42] as an affirmative determination by the FCC that an ILEC is not required to provide transit service under section 251(c)(2). The WCB, however, made no such determination, nor could it. Under the FCC's rules, the WCB, acting under delegated authority, "shall not have authority to act on any application or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents or guidelines."[43] The WCB was bound by that limitation and accordingly concluded:

> [T]he [FCC] has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of [section 251(c)(2)], nor do we find clear [FCC] precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates.[44]

Thus, the WCB acknowledged the fact that it had no authority to decide the issue, and refused to do so in that proceeding.[45]

AT&T's reliance on the FCC's decisions in BellSouth's and Qwest's section 271 applications is similarly misplaced. *See AT&T Brief* at 18. Subsequent to the *Virginia Arbitration Order*, the FCC issued its decisions allowing BellSouth and Qwest to provide

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[42] *In re 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*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (WCB 2002) ("*Virginia Arbitration Order*").

[43] 47 C.F.R. § 0.291(a)(2).

[44] *Virginia Arbitration Order*, 17 FCC Rcd at 27101 ¶ 117.

[45] The parties involved in the *Virginia Arbitration Order* could have sought full FCC review of the WCB's decision, in which case the FCC would have been required to decide the issue. For whatever reason, no party chose to do so.

interLATA toll service within several states in their service areas.[46] In each decision cited by AT&T in its opening brief the FCC came to the same conclusion that "the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under section 251(c)(2), and we do not find clear [FCC] precedent or rules declaring such a duty."[47] In other words, the FCC refused to address the merits of whether transit service is (or is not) a section 251(c)(2) obligation in a section 271 application.

In fact, AT&T's reliance on the FCC's section 271 orders runs counter to the FCC's express precedent regarding its section 271 orders:

> In accordance with prior section 271 orders, "new interpretive disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve per se violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."[48]

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[46] *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002) ("*BellSouth Kentucky 271 Order*"); *In re Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002) ("*BellSouth Florida 271 Order*"); *In re Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota*, 18 FCC Rcd 7325 (2003) ("*Qwest 271 Order*").

[47] *BellSouth Kentucky 271 Order*, 17 FCC Rcd at 17719 n.849; *BellSouth Florida 271 Order*, 17 FCC Rcd at 25910-11 ¶ 155; *Qwest 271 Order*, 18 FCC Rcd at 7376 n.305 (citing *BellSouth Kentucky 271 Order*, 17 FCC Rcd at 17719 n.849).

[48] *BellSouth Kentucky 271 Order*, 17 FCC Rcd at 17721-22 ¶ 227 (citing *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17470 ¶ 92 (2001); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9075 ¶ 114 (2002); *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18366 ¶ 24 (2000); *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6246 ¶ 19 (2001)).

Accordingly, because the FCC concluded that there is no "clear [FCC] precedent or rules" declaring transit service a section 251(c)(2) obligation, the FCC made it clear that it would not have used its section 271 orders to issue any "rul[ing] that nothing in the 1996 Act or its rules or orders requires [ILECs] to treat transiting as part of interconnection under section 251(c)(2)." *AT&T Brief* at 18.

Furthermore, AT&T attempts to argue that the FCC is compelled to find that no transit service obligation exists under section 251(c)(2) because of the FCC's interpretation of the term interconnection. As usual, AT&T's interpretation of its obligations under the 1996 Act is as narrow as can be imagined. AT&T contends that under section 251(c)(2) it is only required to permit interconnection with its network for the sole purpose of allowing the interconnecting carrier to exchange traffic with AT&T, not a third party. There is, however, no such limitation in section 251(c)(2). What this section requires is for the ILEC to "provide . . . interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access . . . ."[49] Neither the definition of "telephone exchange service" or "exchange access" is limited to traffic exchanged by directly interconnected carriers.[50]

The FCC's own conclusions regarding an ILEC's obligations under section 251(c)(2) refutes AT&T's interpretation. In its *First Local Competition Report*, the FCC concluded "that the phrase 'telephone exchange service and exchange access' imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing [1] telephone exchange traffic or [2] exchange access traffic or [3] both."[51] The FCC noted that "Congress made clear that incumbent LECs must provide interconnection to carriers

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[49] 47 U.S.C. § 251(c)(2).

[50] *See* 47 U.S.C. § 153(16), (47).

[51] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15594 ¶ 184 (1996) ("*First Local Competition Order*").

that seek to offer telephone exchange service and to carriers that seek to offer exchange access."[52] Consequently, once Cricket provides telephone exchange service, which it does, AT&T must provide interconnection pursuant to section 251(c)(2). That is it. Nowhere does the FCC limit where calls must be transmitted and routed when an incumbent provides interconnection under section 251(c)(2). In other words, interconnection for the purpose of exchanging telephone exchange service traffic, logically includes transiting traffic.[53]

Qwest Corporation, another ILEC, in an appeal of a state commission's finding that Qwest was required to provide transit service cited the same authorities and made the same arguments as AT&T does here.[54] In that case, the federal district court "thoroughly considered the FCC rules and decisions cited by Qwest" and held that "it does not find that the FCC intended the cited authorities to be conclusive on the issue of whether an ILEC is required to provide transit."[55] Furthermore, the court held that "the clear language of *Section 251* requires an ILEC to provide transit service pursuant to its interconnection obligation under *Section 251(c)(2)*."[56]

In short, there are no "repeated" FCC rulings or orders that finds that an ILEC, such as AT&T, does not have an obligation under section 251(c)(2) to provide transit terms in a section 251/252 interconnection agreement. As explained in Cricket's Opening Brief, providing transit service is part of AT&T's obligations under section 251(c)(2). *Cricket Brief* at 16-18.

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[52] *Id.* (emphasis added).

[53] The FCC's exclusion of transport and termination from the definition of interconnection is meant to clarify that section 251(b)(5) reciprocal compensation obligations between interconnected carriers do not arise simply because two carriers are interconnected.

[54] *See Qwest Corp. v. Cox Nebraska Telecom, LLC*, No. 4:08CV3035, 2008 U.S. Dist. LEXIS 102032 (D. Neb. Dec. 17, 2008).

[55] *Id.* at *15.

[56] *Id.* (emphasis in original). The court also concluded that since it found that Qwest was obligated under section 251(c)(2) to provide transit traffic service, it was not necessary to determine whether section 251(a) provides an independent basis for requiring Qwest to provide transit traffic service. *Id.* n.14.

C. State Commissions Are Not Preempted From Requiring An ILEC To Provide Transit In An Interconnection Agreement

AT&T next argues that even if the Commission agrees with Cricket's arguments that transit service is a section 251(c)(2) obligation, the Commission is preempted from mandating that transit terms be included in its interconnection agreement with Cricket. *AT&T Brief* at 21-24. AT&T's preemption argument, however, rests entirely on its incorrect premise that the FCC has expressly declined to treat transit service as an obligation of interconnection, *AT&T Brief* at 22; therefore, AT&T's preemption argument necessarily fails. As Cricket has discussed in detail above, the FCC has not affirmatively decided that transit service is ***not*** an obligation of interconnection. Moreover, there is no case law, FCC rule or decision that holds that a state is preempted from requiring an ILEC to provide transit service.

Unquestionably, the FCC possesses the authority to preempt state regulations in certain circumstances; however, Congress also preserved the authority of state commissions to "establish[] or enforce[e] other requirements of State law in its review of an agreement . . . ."[57] Accordingly, a federal district court found that "[s]ince federal law does not preclude mandatory transiting, under the [1996 Act's] savings clause, the [Michigan Public Service Commission] is allowed to impose additional competitive requirements under state law."[58] Similarly, this Commission found it necessary under state law to require AT&T Kentucky to provide transit service to competitors and include such transit terms in its interconnection agreements.[59] Recognizing the potential reach of the FCC's preemption authority, this Commission found that "because transiting uses intra-state facilities to provide an intra-state service, the Commission

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[57] 47 U.S.C. §§ 251(d)(3)(A), 252(e)(3). *See Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

[58] *Michigan Bell Tel. Co. v. Chappelle*, 222 F.Supp.2d 905, 918 (E.D. Mich. 2002).

[59] *NewSouth Recon Order*, 2006 Ky. PUC LEXIS 159, *27-28 (emphasis added).

finds that it has jurisdiction over these matters ***until and unless*** the FCC specifically preempts the state commission."[60] The FCC has yet to do so, either expressly or implicitly, and as such, the Commission should re-affirm its decision that AT&T Kentucky is obligated to provide transit service and must include transit terms in its section 251/252 interconnection agreements.

The cases cited by AT&T in support of its preemption argument are distinguishable. In both *Fidelity Federal Savings and Loan* and *Geier*,[61] the federal agency promulgated regulations giving the regulated industry a choice of options. In both cases, the Supreme Court held that a state is preempted from taking away that choice. That is not the case here, however. To be sure, if the FCC had promulgated a rule or issued an order giving ILECs the option to provide transit in an interconnection agreement at their discretion, then any state requirement requiring transit terms in an ICA would be preempted. The FCC, however, has not done so and the cases cited by AT&T are inapposite.

Finally, AT&T's contends that any requirement that it must include transit terms in its interconnection agreement with Cricket would interfere and be inconsistent with the implementation of the 1996 Act. *AT&T Brief* at 23. Nothing could be further than the truth. Requiring AT&T to provide transit service would actually further the 1996 Act's purpose, which is to promote competition. The FCC recognized this in its *Intercarrier Compensation Reform FNPRM* in which it reached a conclusion that LECs, at least as a policy matter, should be required to provide transit functions because of competitive concerns. After receiving comments on the issue, the FCC concluded:

> It is evident that competitive LECs, CMRS carriers, and rural LECs often rely upon transit service from the incumbent LECs to

[60] *Id.*

[61] *Fidelity. Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982); *Geier v. American Honda Motor Co.*, 529 US 861 (2003).

> facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks . . . Moreover, it appears that indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic.[62]

Carriers that are not able to secure transit service on reasonable rates, terms and conditions would not be able to interconnect indirectly, and as a result, would be required to directly interconnect with every carrier they need to exchange traffic with. The latter is neither economical nor efficient and would prevent competitors from entering the market. Accordingly, requiring AT&T to include transit terms as part of its interconnection agreement with Cricket is neither inconsistent with nor does it interfere with the implementation of the 1996 Act.

D. If Section 251(a)(1) Requires AT&T To Provide Transit Service, Such Transit Terms Are Arbitrable In A Section 252 Proceeding

Lastly, AT&T argues that even if section 251(a) obligates AT&T to provide transit services, which it does not believe is the case, the Commission may not arbitrate transit service issues under section 252 because arbitration under that section are limited to unresolved issues mandated by sections 251(b) and (c). *AT&T Brief* at 24-25.

There is simply no precedent for AT&T's assertion. An obligation to provide transit service under section 251(c)(2) is necessary to give meaning to the right to interconnect indirectly under section 251(a)(1). The corollary of the AT&T's view is that, in order to fully effectuate rights and obligations, everyone must have an interconnection agreement with everybody else, even if the amount of traffic exchanged is minimal. The overall impact would be a tendency to stifle competition by the imposition of uneconomic costs, for example, by the construction of redundant facilities. *See Cricket Initial Threshold Brief* at 20-21. At least one

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[62] *In re Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 ¶¶ 125-126 (2005) ("*Intercarrier Compensation FNPRM*").

federal district court that had the opportunity to look at the issue has recognized this and held that "[w]hen *Section 251(a)* is read in conjunction with *Section 251(c)*, it is clear that Congress imposed [a transit] obligation in *Section 251(c)* . . . ."[63]

Accordingly, because indirect interconnection under section 251(a)(1) implies a transit obligation under section 252(c)(2), transit terms are arbitrable in a section 252 arbitration proceeding.

IV. CONCLUSION

In conclusion, the Commission should prohibit AT&T from re-litigating the issues that it has already litigated, and which this Commission has already decided, concerning the Commission's authority to arbitrate term extension issues and AT&T's transit obligations. Further, Cricket respectfully requests that this Commission affirm that AT&T is obligated to extend the term of the Cricket Kentucky ICA for three years from the date of AT&T's notice of termination (June 24, 2009), or the date that this Commission issues its final order in this proceeding. The federal courts have conclusively ruled that this Commission has the authority to address the issue based on sections 251 and 252 of the Act, and other federal and state law.

Accordingly, this Commission should direct the parties to execute an amendment to extend the term of their current agreement, and conclude this proceeding without further substantive action. In addition, if the Commission finds that the term of the Cricket Kentucky ICA should not be extended, then the Commission should direct the Parties to present their unresolved, open issues related to transit traffic terms to this Commission for arbitration.

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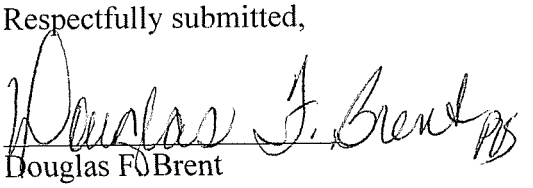
[63] *Qwest Corp. v. Cox Nebraska Telecom, LLC*, No. 4:08CV3035, 2008 U.S. Dist. LEXIS 102032, at *9 (D. Neb. Dec. 17, 2008) (emphases in original).

Respectfully submitted,



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June 2, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by First Class Mail on those persons whose names appear below this 2nd day of June, 2010.

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