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June 19, 2006

HAND DELIVERY

Honorable Sara Kyle, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L.P. D/B/A SPRINT PCS FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A/ AT&T TENNESSEE D/B/A AT&T SOUTHEAST, TRA Docket No. 07-00132

Dear Chairman Kyle:

Enclosed for filing are the original and thirteen (13) copies of *Sprint's Response to AT&T Tennessee's Motion to Dismiss and Answer*. An additional copy of this filing is attached to be "file-stamped" for our records.

If you have any questions or require additional information, please let me know.

Respectfully submitted,

Melvin Malone

c: Parties of Record

BEFORE THE

TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

IN THE MATTER OF PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L. P. D/B/A SPRINT PCS FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T TENNESSEE D/B/A AT&T SOUTHEAST		Docket No. 07-00132

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

Sprint Communications Company L.P. and Sprint Spectrum L.P. (collectively, "Sprint") hereby files its Response to BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee's ("AT&T") Motion to Dismiss and Answer submitted on June 12, 2007. For the reasons set forth below, Sprint respectfully requests that the Tennessee Regulatory Authority ("Authority" or "TRA") deny AT&T's Motion to Dismiss in its entirety, dismiss AT&T's proposed Issue 2 on the pleadings, and promptly accept this matter for arbitration and establish a procedural schedule regarding Sprint's Issue 1.

I. INTRODUCTION

On May 18, 2007, Sprint filed a Petition for Arbitration ("*Petition*") with the Authority pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). Sprint's *Petition* seeks to implement an amendment to convert and extend its

current month-to-month Interconnection Agreement ("ICA") with AT&T to a fixed 3-year term. The amendment arises from Sprint's acceptance of an AT&T, Inc. and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates are required to comply with their Merger Commitments.[1]

The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. Otherwise, the Merger Commitments, in reality, ring hollow.[2] The specific condition at issue here is that AT&T "shall permit a requesting telecommunications carrier to extend its current interconnection agreement ... for a period of up to three years ...."[3] This is

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

[2] *See, e.g., c.f., In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.*, Order Granting Motion to Dismiss with Prejudice and Closing Docket, TRA Docket No. 02-01203, p. 2 (Feb. 21, 2007) ("BellSouth asserts that pursuant to the FCC's announced adoption of a Memorandum Opinion and Order approving the merger, BellSouth became obligated to cease all 'ongoing or threatened' EEL audits as of December 29, 2006.").

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

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

the offer that AT&T was required to make as a matter of law, and this is the offer that was accepted by Sprint during the parties' statutory 251-252 negotiations for a new agreement. The *Petition* makes it clear that the single Issue pertaining to the amendment is the establishment of essential ICA terms related to the 3-year extension, with the specific disputed term being ***when*** the 3-year extension commences.

On June 12, 2007, AT&T filed a Motion to Dismiss ("*Motion*") and its interrelated Answer ("*Answer*") to the *Petition*. Because the source of the 3-year extension offer is a voluntary Merger Commitment upon which the FCC conditioned its merger approval, AT&T contends that the *Petition* seeks an "interpretation of a merger commitment" that is a non-arbitrable issue unrelated to Section 251 of the Act.[4] According to AT&T, the FCC has "the sole authority to interpret, clarify, or enforce *any issue involving merger conditions* ...."[5] Without reference to any relevant authority or a clear explanation as to how it can now simply *ignore* Sprint's exercised acceptance of a 3-year ICA extension. AT&T not only seeks to dismiss Sprint's single arbitration Issue, but further requests the Authority to force upon Sprint, via AT&T's proposed Issue 2, a "new" ICA premised upon: a) the parties' former incomplete negotiations; and b) adoption of what is apparently AT&T's latest new "generic" Attachment 3 – which pertains to core "Network Interconnection" terms and conditions that have never been

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'default' provisions."

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

[4] *See Motion* at 1-2.

[5] *Id.* at 3 (emphasis added).

previously discussed by the parties.[6]

In response to the *Motion*,[7] Sprint's positions are as summarized below:

(1) During the course of the parties' negotiations, their current ICA automatically converted pursuant to its provisions to a month-to-month term as of January 1, 2005, and has not expired.

(2) Pursuant to Interconnection Merger Commitment No. 4, during the parties' statutory Sections 251-252 negotiations, AT&T made a required standing interconnection-related offer that any requesting telecommunications carrier could extend its current ICA for 3 years. AT&T even acknowledged that pursuant to such offer, Sprint could extend its current ICA for 3 years. Sprint has taken all action within its power to exercise its right and has accepted a 3-year extension of its current ICA. The only legitimate dispute to be resolved between the parties to implement such 3-year extension is this Authority's determination as to ***when*** the 3-year extension commences.

(3) There is a long history of FCC and state commission precedent that clearly establishes that the FCC and the TRA have *concurrent* statutory jurisdiction under the Act and state law over AT&T's interconnection-related Merger Commitments. This Authority has jurisdiction pursuant to both the Act and Tennessee law to arbitrate the

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[6] *Id.* at 11-13. For ease of reference, AT&T's request for approval of the interconnection agreement attached to its responsive pleading and its request regarding Attachments 3A and 3B are referred to herein as "AT&T's proposed Issue 2."

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

creation of an ICA amendment term that expressly establishes ***when*** the 3-year extension of the parties' existing ICA commences.

(4) Through its newly proposed Issue 2, AT&T requests the TRA to authorize a proposed, unlawful breach by AT&T of not only its Merger Commitments but also of 47 U.S.C. § 251(c)(2)(D) and 47 C.F.R. § 51.305(a)(4), by permitting AT&T to withdraw an admittedly accepted 3-year extension of the parties' ICA, which is an interconnection term that AT&T is now required to provide to any requesting carrier. Not only is such relief unwarranted under the law, it is unsupported by facts as alleged in the *Petition*, **and admitted** by AT&T to the effect that Sprint is entitled to a 3-year extension and the only issue is when such extension commences. Accordingly, AT&T's proposed Issue 2 should be dismissed based on the pleadings alone.

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

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

A motion to dismiss "admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action

as a matter of law."[8] In considering a motion to dismiss "courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true."[9] Under Tennessee law, the *Motion* must be denied "unless it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief."[10]

The *Petition* alleges the following essential operative facts to establish the existence of a single arbitrable open issue within the Authority's jurisdiction under Section 252(b)(1) of the Act:

- The parties have an existing ICA and entered into 251-252 negotiations;[11]
- During such negotiations, AT&T made an interconnection-related offer as required by law to the effect that all interconnecting carriers can extend their current interconnection agreements with AT&T 3 years;[12]
- AT&T confirmed that the 3-year extension was available to Sprint;[13]
- Sprint accepted AT&T's offer of a 3-year extension of its current ICA and requested an amendment to implement its right to such 3-year extension;[14]
- AT&T has refused to implement the requested amendment based on a dispute between the parties regarding ***when*** the accepted 3-year extension commences;[15] and,
- Sprint timely filed its *Petition* to resolve the narrow dispute as to when the 3-year extension commenced.[16]

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[8] *Bell v. Icard*, 986 S.W.2d 550, 554 (Tenn. 1999).

[9] *Id.*

[10] *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)

[11] *Petition*, ¶¶ 7-9.

[12] *Id.* at ¶¶ 10-12.

[13] *Id.* at ¶ 13.

[14] *Id.* at ¶ 14.

[15] *Id.* at ¶¶ 15-19.

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

The linchpin of AT&T's Motion is a general, unsupported assertion that "the FCC has the sole authority to interpret, clarify, or enforce any issue involving merger conditions set forth in its Merger Order."[17] To the contrary, however, actual case law clearly establishes that the Authority has *concurrent* jurisdiction with the FCC to resolve interconnection-related disputes, even when such interconnection-related disputes pertain to the application of an FCC-ordered merger condition.

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

Sprint's right to receive, and AT&T's obligation to provide, a 3-year extension of the parties' current ICA is an interconnection right that arises as a result of an FCC order. The fact that resolution of the parties' dispute regarding such extension involves the TRA's interpretation and application of "federal law" provides no reason whatsoever to dismiss Sprint's Issue 1. In fact, a fair number of, if not most, Section 252 petitions for arbitration under the Act require state commissions to construe the Act, FCC orders and federal court decisions related to both the Act and said orders. While not binding on the FCC, it is too common for dispute that state commissions may interpret and apply federal law in the exercise of their jurisdiction under the Act.[18] The Act expressly

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[16] *Id.* at ¶ 6.

[17] *Motion* at 3.

[18] *See, e.g.*, Order of Arbitration Award, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration*

provides a jurisdictional scheme of "cooperative federalism" under which Congress and the FCC have specifically designated areas in which they anticipate that state commissions have a role,[19] which undeniably includes matters relating to interconnection pursuant to Sections 251 and 252 of the Act.

Regarding the specific dispute in this case – i.e., implementation of an amendment that defines ***when*** the 3-year extension of the parties ICA commences – consistent with Section 252(b) of the Act it is clear that Tennessee law, including, but not limited to, Tenn. Code Ann. §§ 65-4-104, 65-4-106, 65-4-123, and 65-4-124,

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Under the Telecommunications Act of 1996, TRA Consolidated Docket No. 03-00585 (Jan. 12, 2006).

See also, e.g., In Re: Complaint against BellSouth Telecommunications, Inc. for Alleged Overbilling and Discontinuance of Service, and Petition for Emergency Order Restoring Service, by IDS Telecom LLC, Order Granting BellSouth's Partial Motion to Dismiss, Florida PSC Docket No. 031125-TP, Order No. PSC-04-0423-FOF-TP, p. 8 (April 26, 2004) (Commission "find[s] BellSouth's argument is without merit to the extent that it argues that IDS's complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute … Thus, the fact that a count of this Complaint asks this Commission to interpret and apply federal law is not in and of itself reason to dismiss that portion of the complaint").

[19] *See In Re: Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth, Inc.*, Order, TRA Docket No. 01-00193, pp. 5-6 (June 28, 2002) ("To Implement the 1996 Act, Congress sought the assistance of state regulatory agencies. In what has been termed "cooperative federalism," Congress partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility…No generalization can therefore be made about where, as between federal and State agencies, responsibility lies for decisions. The areas of responsibility are a patchwork and the dividing lines are sometimes murky. Certain provisions of the 1996 Act, such as those related to arbitrating and approving interconnection agreements mandate that State Commissions apply federal law within their existing State procedural structures."). *See also Verizon Corp. v. FCC*, 535 U.S. 467, 489, 122 S.Ct. 1646, 1661 (2002) (With respect to Congress' passage of the Act, the Supreme Court noted that "[t]he approach was deliberate, through a hybrid jurisdictional scheme[.]"); and *Lucre, Inc. v. Michigan Bell Telephone Co.*, No. 06-1144, 2007 WL 1580101, p. 1 (6th Cir. May 31, 2007) ("The Act has been called one of the most ambitious regulatory programs operating under 'cooperative federalism,' and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets.") (attached hereto).

authorizes the TRA to establish terms and conditions of interconnection, and to arbitrate any dispute regarding interpretation of interconnection terms and conditions.[20]

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

The fact that Sprint's right to extend its ICA 3 years emanates from the *FCC Order* does not *divest* this Authority of its Section 252 jurisdiction and its jurisdiction under Tennessee law to interpret and implement Sprint's interconnection right to the 3-year extension. The FCC has repeatedly and expressly recognized in its merger orders that adoption of merger conditions does not limit the authority of the states to impose or enforce requirements, which can even go beyond FCC-required conditions.[21] The FCC not only expects the states to be involved in the ongoing administration of interconnection-related merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-related disputes pursuant to § 252. For example,

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[20] *See, e.g., In Re: Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, TRA Docket No. 96-1152 (Consolidated with Docket No. 96-01271), p. 7 (Jan. 23, 1997) ("After due consideration of . . . the applicable federal and state laws, rules and regulations . . . the Arbitrators deliberated and reached decisions with respect to the issues before them."). *See also, cf., In Re: Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements*, Interim Order on Phase 1 of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements, TRA Docket No. 97-01262, pp. 2-3 (Jan. 25, 1999) (agency relied upon both federal and state law for its actions in this docket under the Act).

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

in the *GTE/Bell Atlantic* merger the FCC provides:

> Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. **Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.**[22]

Regarding implementation of the merged firm's interconnection-related "Most-Favored-Nation" and "Multi-State Interconnection and Resale Agreements" commitments, the FCC also made it clear that "[d]isputes regarding the availability of an interconnection arrangement ... shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable."[23]

Case law subsequent to the *GTE/Bell Atlantic* and *Ameritech/SBC* merger also finds that state commissions have continuing, concurrent jurisdiction to enforce interconnection-related merger conditions pursuant to Section 252. In *Core*

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

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

Communications,[24] CLECs filed a complaint action against SBC at the FCC over alleged violations of *Ameritech/SBC* merger conditions. SBC asserted that the FCC lacked jurisdiction to hear the complaint under Sections 206 and 208 of the Act on a theory that the state's authority under Section 251 and 252 overrode the FCC's Section 206 and 208 enforcement jurisdiction. The FCC determined that it *also* had 206 and 208 enforcement authority (as opposed to finding that only the FCC had enforcement authority) and, in her concurring opinion, then Commissioner Abernathy stated:

> This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe that there are significant limitations on the circumstances in which complainants will actually be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.
>
> ... as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement – its change of law provisions, for example – likely would foreclose any remedy under section 208.[25]

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

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

[25] *Core Communications* at 17.

statements made by a dissenting Commissioner in light of the FCC's *Ameritech/SBC* merger order:

> It is important that the public not be left with inaccurate statements concerning the extent, if any, to which FCC action in merger cases alters, modifies or preempts the federal statutory scheme of shared responsibility between the state commissions and the FCC over matters relating to opening local exchange markets to competition and the monitoring of the terms and conditions of interconnection agreements entered into by the ILEC's with competitors.
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> * * *
>
> It is fundamental to the scheme of shared regulation found in the Telecommunications Reform Act of 1996 that state commissions and the FCC preserve their respective spheres of authority to ensure that the general obligations of ILEC's to provide nondiscriminatory interconnection features to requesting entities, and that the states retain a particularly important role in the review and approval of interconnection agreements. 47 U.S.C. §§ 251(c) and (d), 252(e).
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> * * *
>
> The Merger Order simply doesn't stand as any valid extra-jurisdictional reconfiguration of state v. federal authority in these matters, as the FCC has been careful to indicate in its own Merger Order.
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> ... it may well be true, as the dissent has noted, that the FCC in some sense has "final enforcement authority" over issues concerning SBC/Ameritech's OSS, to the extent that the FCC may preempt any state commission failing to fulfill its responsibilities under 47 U.S.C. 252 in reviewing interconnection agreements. It is not true, however, that the Merger Order does anything (as indeed it may not) to alter the primary authority of state commissions in review of interconnection agreements, and the terms and conditions of same.[26]

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

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

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

Appendix F to the *FCC Order* contains the Merger Commitments that the FCC adopted in conjunction with its approval of the AT&T/BellSouth merger. AT&T asserts that "the FCC explicitly reserved jurisdiction over the merger commitments" by virtue of the following language in the *Order*: "[f]or the avoidance of doubt, unless otherwise stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC."[27] AT&T then goes on to assert that "[n]owhere in Appendix F does the FCC provide that interpretation of merger commitment No. 4 is to occur outside the FCC."[28] This is simply not an accurate statement with respect to Appendix F.

The FCC clearly recognized in Appendix F that it has no authority to alter the states' *concurrent* statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments. The paragraph immediately preceding the

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[27] *Motion* at 4.

[28] *Motion* at 5.

language relied upon by AT&T states:

> ***It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments***, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.[29]

It should be noted that the above language was not part of the proposed Merger Commitments as filed by AT&T with the FCC via Mr. Robert Quinn's December 28, 2006 letter. Rather, it was *specifically added by the FCC.* This language serves the obvious purpose of recognizing, similar to what the FCC has done in prior merger orders as already discussed herein, that the Act is designed with dual authority for both the states and the FCC. The *FCC Order* reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for arbitrating, finalizing and implementing a dispute between the parties over a now required 3-year interconnection extension amendment. As recognized in the Act and articulated by the Wisconsin PSC in *Ameritech ADS*, the FCC's role in this regard is secondary, unless the state fails to take action or, as stated by the FCC itself in *Core Communications,* a carrier elects to pursue a direct enforcement action with the FCC pursuant to Section 206 and 208.

Considering the former SBC's post-merger action in the *Core Communications* case (*i.e.*, contending the FCC lacked enforcement jurisdiction over a merger condition

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[29] *FCC Order* at 147, APPENDIX F (emphasis added).

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

Indeed, when the FCC's Wireline Competition Bureau was faced with an issue similar to the one raised by AT&T's Motion, it relied upon its authority pursuant to § 252(e)(5) to act in the stead of a state commission in arbitrating interconnection agreements, and not upon its authority as a Bureau of the FCC, in resolving the issue. In the *GTE/Bell Atlantic* merger order, the merged firm was required to "offer telecommunications carriers, subject to the appropriate state commission's approval, an option of resolving interconnection agreement disputes through an alternative dispute resolution mediation process that may be state-supervised."[30] Subsequently, the Wireline Competition Bureau arbitrated the terms of interconnection agreements between Verizon and the former WorldCom, Inc. and former AT&T Corp. after the Virginia Corporation Commission declined to do so.[31]

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[30] *GTE/Bell Atlantic* at ¶ 317.

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

In the *WorldCom Virginia Arbitration,* Verizon and WorldCom disagreed concerning the dispute resolution provision to be included in their arbitrated interconnection agreement. WorldCom contended that a sentence proposed by Verizon should be deleted in order to make clear that the alternative dispute resolution procedure required by the *GTE/Bell Atlantic* merger condition remained available to WorldCom, while Verizon contended that the Bureau, acting as a Section 252(b) arbitrator, lacked the authority to require the inclusion of an arbitration provision in the interconnection agreement. The Bureau disagreed, ruling that "[t]he Act gives us broad authority, ***standing in the shoes of a state commission,*** to resolve issues raised in this proceeding."[32] Indeed, the Bureau found that failing to give effect to the merger condition when arbitrating an interconnection agreement "would essentially modify that Commission order, which we cannot do . . . ."[33] The TRA has no more authority to modify the AT&T/BellSouth merger conditions than the Wireline Competition Bureau had to modify the *GTE/Bell Atlantic* merger order. Like the Wireline Competition Bureau when it was arbitrating an interconnection agreement under § 252 on behalf of a state commission, this Authority must interpret and apply the merger conditions consistent with the FCC order in resolving the issue in this arbitration.

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

[33] *Id.* at ¶ 702.

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

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

AT&T attempts to make an issue out of *incomplete* negotiations that occurred before AT&T acknowledged Sprint's right to extend the ICA for 3 years, stating:

> In December of 2006 the parties did reach an agreement in principle and were working on finalizing the language to be placed in the new agreement. Subsequent to the merger of AT&T and BellSouth, Sprint withdrew its acceptance of the agreement and began pursuing an alternate path of extending its current agreement purportedly in accordance with the merger commitments.[34]

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

[34] *Motion* at 11. As noted above, Sprint denies AT&T's allegations that the parties ever reached a final agreement, in principle or otherwise.

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

In addition, AT&T is clearly requesting that this Authority authorize an unlawful AT&T breach of its Merger Commitment, as well as § 251(c)(2)(D)[35] of the Act and the FCC's corresponding Rule, 47 C.F.R. § 51.305(a)(4),[36] by enabling AT&T to avoid providing Sprint a 3-year extension of its current ICA even though AT&T is expressly required by federal law to provide exactly such an interconnection term and condition to all requesting telecommunications carriers.

A. UNDISPUTED FACTS ESTABLISHED BY THE PLEADINGS

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

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

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

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

(emphasis added).

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

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

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

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

3. Sprint and AT&T previously entered into an Interconnection Agreement that was initially deemed approved by the TRA in Docket No. 00-00691. By mutual agreement, the Interconnection Agreement has been amended from time to time. On information and belief, Sprint believes all such amendments have likewise been filed by AT&T with the Authority. A true and correct copy of the Parties' current, 1,169 page Interconnection Agreement, as amended, can be viewed on AT&T's website at:

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

(*Petition* ¶ 7; *Answer* ¶ 11).

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

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(emphasis added).

and in person to discuss issues in dispute between the Parties. (*Petition* ¶ 8; *Answer* ¶ 12).

5. On December 29, 2006, the FCC approved the merger of AT&T, Inc. and BellSouth Corporation (collectively "AT&T/BellSouth") subject to certain AT&T/BellSouth voluntary merger commitments ("Merger Commitments") in a letter from AT&T, Inc.'s Senior Vice President – Federal Regulatory, Robert W. Quinn, Jr., filed with the FCC on December 28, 2006. The AT&T/BellSouth merger also closed on December 29, 2006 (the "Merger Closing Date"). On March 26, 2007 the FCC issued its formal Order authorizing the AT&T/BellSouth merger, which incorporated the AT&T/BellSouth offered Merger Commitments.[37] As an express condition of its merger authorization, the FCC Ordered that "AT&T and BellSouth shall comply with the conditions set forth in Appendix F" of the FCC Order.[38] A copy of the Table of Contents and Appendix F to the FCC Order is attached as Exhibit "B" to the *Petition*. AT&T is the same pre-merger BellSouth entity which provides wireline communications services, including local exchange, network access, intraLATA long distance services, Internet services and the services to Sprint under the current interconnection agreement in Tennessee and became a post-merger AT&T/BellSouth ILEC subsidiary entity that is bound by the Merger Commitments. (*Petition* ¶ 10; *Answer* ¶ 14).

6. Soon after the FCC approved Merger Commitments were publicly

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[37] *FCC Order*.

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

announced on December 29, 2006, the Parties considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. ***AT&T acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such 3-year extension.*** (*Petition* ¶ 13 (emphasis added); *Answer* ¶ 17).

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

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

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

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

Sprint further provided and requested AT&T to execute and return no later than Friday, March 30, 2007, two copies of Sprint's proposed Amendment to implement Sprint's

request regarding Interconnection Merger Commitment No. 4. Sprint's March 20, 2007 letter and proposed Amendment are attached to the *Petition* as Exhibit "C." (*Petition* ¶ 14; *Answer* ¶ 18).

8. On March 21, 2007, AT&T acknowledged both electronic and hard-copy receipt of Sprint's March 20, 2007 letter and proposed Amendment. (*Petition* ¶ 15, first sentence; *Answer* ¶ 19).

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

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

The foregoing simple operative facts are indisputable, uncontested and admitted. Sprint has already done everything within its power to exercise its right to obtain a 3-year extension of the parties' current ICA, and there is no basis under any theory for AT&T to preclude Sprint from obtaining the benefit of such extension. There can also be no question that a 3-year extension to a party's current interconnection agreement is an "interconnection term" that AT&T is now mandated by federal law to provide any

requesting carrier. Accordingly, not only under the terms of the *FCC Order* but pursuant to 47 U.S.C. § 251(c)(2)(D) and 47 C.F.R. § 51.305(a)(4), AT&T is required as a matter of law to provide Sprint as an interconnection term and condition, a 3-year extension of the parties' current ICA. There simply is no basis in the Merger Commitments or under the Act and FCC Rules to allow AT&T to unilaterally decide to which carriers it will and will not "permit" an amendment to implement the interconnection term of a 3-year extension.

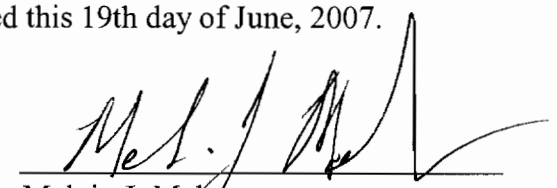
Having admitted that Sprint is entitled to a 3-year extension of the parties' current ICA and that Sprint took the requisite action within its power to request such extension, there is no cognizable legal basis upon which AT&T can legitimately ignore Sprint's request for such extension and, instead,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

CONCLUSION

For all of the reasons stated herein, Sprint respectfully requests that the TRA deny AT&T's Motion in its entirety, dismiss AT&T's proposed Issue 2 on the pleadings, and accept this matter for arbitration and establish a procedural schedule regarding the further consideration of this arbitration proceeding as to Sprint's Issue 1.[39]

[39] In its *Motion*, AT&T asserts, perhaps as a fallback position, that "FCC resolution of all issues relating to merger conditions ensures a uniform regulatory framework and avoids a conflicting and diverse

Respectfully submitted this 19th day of June, 2007.



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interpretation of FCC requirements." *Motion* at 3. Basically, this is nothing more than "forum-shopping," and it should not be condone by the Authority. *See, e.g., c.f.,* Initial Order of Hearing Officer, *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No. 98-00118, p. 11 (April 21, 1998), *aff'd*, Order Affirming the Initial Order of Hearing Officer, TRA Docket No. 98-00118 (Aug. 17, 1998) (agency addressed matter, rendered ruling and rejected request to forego prompt ruling and await FCC's opportunity to address the same).

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2007, a true and correct copy of the foregoing has been served on the parties set forth below, via the method(s) indicated below:

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Lucre, Inc. v. Michigan Bell Telephone Co.
C.A.6 (Mich.),2007.
Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONPlease use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,
Sixth Circuit.
LUCRE, INC., Plaintiff-Appellant,
v.
MICHIGAN BELL TELEPHONE CO., d/b/a SBC Michigan, Defendant-Appellee.
No. 06-1144.

May 31, 2007.

On Appeal from the United States District Court for the Western District of Michigan.

Before MARTIN, NORRIS, and GIBBONS, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

***1** Plaintiff Lucre, Inc. filed suit in the district court to challenge the decisions of the Michigan **P**ublic Service Commission dismissing its complaint and denying its motion to reopen and enlarge the record. Lucre had submitted a claim to the Commission against defendant SBC Michigan, alleging that SBC breached the parties' interconnection agreement. Before the district court, Lucre alleged that the Commission's decision on the merits was arbitrary and capricious, and that the Commission's denial of its request to reopen the record amounted to a due process deprivation in violation of the Fourteenth Amendment. The district court denied both of Lucre's claims, and Lucre now appeals.

I.

The newcomer to Telecommunications Act jurisprudence might wonder why an appeal from a state agency can be brought in federal court. We have previously explained this unique procedural mechanism, and have little reason to plow the field anew:

To deregulate the telephone industry, Congress enacted the **Telecommunications** Act of 1996, codified in 47 U.S.C. Section 251 et seq. The Act has been called one of the most ambitious regulatory programs operating under "**cooperative federalism**," and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets. We have often reiterated the Act's purposes, which are ending local telephone company monopolies and promoting competition in local telephone markets. E.g., *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir.2002).

The Act encourages competitive local telephone markets by imposing several duties on incumbent local exchange carriers, the telephone companies holding monopolies in local markets prior to the Act's implementation. The incumbent must negotiate or arbitrate agreements with competing local carriers, the new entrants into the deregulated market, by providing one of three methods of competition: 1) the incumbent carrier must provide interconnection to its network to a competing carrier that builds or has its own network, 47 U.S.C. § 251(c)(2); (2) the incumbent carrier must provide access to its network elements on an "unbundled basis" to a competing carrier wishing to lease all or part of the incumbent's network, rather than build its own, 47 U.S.C. § 251(c)(3); and (3) the incumbent must sell its retail services at wholesale prices to a competing carrier that will resell the services at retail prices. 47 U.S.C. § 251(c)(4).

Interconnection agreements set forth terms, rates, and conditions of the arrangements between the incumbent local exchange carrier and a competing local exchange carrier. The Act provides for arbitration of an agreement, review of arbitrated or negotiated agreements, and judicial review of agreements. State utility commissions review and give final approval to interconnection agreements. 47 U.S.C. § 252(e)(1); § 252(e)(2)(A); *Verizon Md. v.. Pub. Serv. Comm'n*, 535 U.S. 635, 122 S.Ct. 1753, 1756, 152 L.Ed.2d 871, 878 (2002). A party aggrieved by a commission decision may bring suit in federal district court to review whether the agreement or statement of terms complies with the Act. 47 U.S.C. § 252(e)(6); *Verizon Md.*, 122 S.Ct. at 1758.

***2** *Mich. Bell Tel. Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir.2003).

Under this somewhat complex framework, the federal courts employ a hybrid standard of review, depending upon the issue presented in an appeal from a state agency decision. On the one hand, this Court reviews state agency interpretations of the Telecommunications Act de novo, "according little deference to the Commission's interpretation of the Act." *Id.* at 354. On the other hand, state agency findings of fact are reviewed under the arbitrary and capricious standard, which this Court has described as "the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole." *Id.* Adding another unique ingredient to the mix, the federal courts have supplemental jurisdiction "to review state commission interpretations for compliance with state law," when the state law questions share a common nucleus of operative fact with the claims brought under the Act. *Id.* at 357. Unlike a state agency's interpretation of the Act, this Court "give[s] deference to a state commission's resolution of state law issues and applies an arbitrary and capricious standard in our review." *Id.*

In this case, we have jurisdiction to review the state agency's decisions as set forth in *MCI Metro*. The issue on appeal turns primarily on interpretation of the interconnection agreement under Michigan law, however, calling for review of the Commission's decision under the arbitrary and capricious standard. The parties agree that Lucre's constitutional due process claim is subject to de novo review. *See Coalition for Fair & Equitable Regulation of Docks v. FERC*, 297 F.3d 771, 778 (8th Cir.2002).

II.

The following factual background is taken from the district court's opinion:
Pursuant to the Telecommunications Act of 1996, specifically 47 U.S.C. § 252(a), Plaintiff and Defendant Michigan Bell Telephone Company ("Michigan Bell") executed an interconnection agreement, wherein Plaintiff contracted to connect its telecommunications network to Defendant Michigan Bell's local exchange network. The interconnection agreement was approved in May 1999, and actual network linkage began in June 1999. Plaintiff and Defendant Michigan Bell interconnected their networks through a joint Synchronous Optical Network ("SONET") ring.[FN1] The parties' dispute began over multiplexing fees. [FN2]

FN1. A SONET is a standard protocol for transmitting calls over fiber optic cable on one network or transmitting calls over fiber optic cable between two different networks. A SONET passes light back and forth over fiber cable in lockstep with a master clock so transmissions will arrive and depart neither lost nor jumbled. Harry Newton, NEWTON'S TELECOM DICTIONARY 736 (2003).

FN2. Multiplexing describes the process whereby multiple signals are transmitted over a single line or separating multiple signals from a single line to multiple lines. Newton, *supra* note 1 at 527. In the context of this case, Plaintiff seeks to charge Defendant Michigan Bell for calls that originate on Defendant Michigan Bell's network and terminate on Plaintiff's network.

Section 3.2.4 of the interconnection agreement provides:
Based on the physical architecture and Reciprocal Compensation arrangements that the Parties agree to in this Agreement, each Party shall be responsible for establishing and maintaining certain physical facilities and logical trunking necessary for Interconnection. Each Party shall provide, at its own expense, the physical facilities and logical trunking on its side of the common physical meet point with respect to each Interconnection which provides for the transmission, routing and termination of Telephone Exchange Service traffic and Exchange Access traffic to their respective Customers. Such facilities and logical trunking shall be provided on a basis consistent with the standards set forth in this Agreement. Lucre may purchase such facilities from Ameritech at the rates set forth at Item V of the Pricing Schedule. Any Interoffice Transmission Facilities purchased by Lucre from Ameritech for such transmission shall be at the rates for Dedicated Interoffice Transmission Facilities.
***3** According to Plaintiff, it discovered that it had inadvertently failed to bill Defendant Michigan Bell for multiplexing services. Predictably, Defendant Michigan Bell denied owing Plaintiff for multiplexing. Plaintiff's administrative complaint

sought recovery of these fees.
Although Plaintiff's administrative complaint contained several counts, the parties mediated the dispute and the Commission perceived only one issue before it: whether Plaintiff could charge Defendant Michigan Bell for multiplexing telephone calls during the course of Plaintiff and Michigan Bell's interconnection agreement. The Commission ordered that Plaintiff could not charge for multiplexing. The Commission also subsequently denied Plaintiff's petition for rehearing and reopening.

D. Ct. Op. at 1-3.

In affirming the Commission's decision, the district court agreed that the contract is ambiguous with regard to payment for multiplexing services, despite Lucre's argument that the plain language of the agreement provided for billing of such services. For this reason, it rejected the plaintiff's argument that the Commission's decision was arbitrary and capricious for looking beyond the plain meaning of the agreement, as Michigan law endorses such an approach to interpreting an ambiguous contract. Even though Lucre posited a potentially reasonable interpretation of the contract's application to multiplexing fees, given the facial ambiguity, the past practices of the parties, and the meaning ascribed to certain terms by the parties in other portions of the agreement, the district court determined that the Commission's decision was reasonable and affirmed it accordingly.

The district court also denied Lucre's due process claim, ruling that it had articulated no protectable property or liberty interest and that its opportunity to be heard was adequate nonetheless.

A. Does the plain language of the interconnection agreement cover billing for multiplexing services?

Lucre continues to argue on appeal that the Commission and the district court ignored the that the plain language of the interconnection agreement did not provide for multiplexing fees, the Commission and the district court focused primarily on section 3.2.4, quoted above, as supporting SBC Michigan's position. That section provides in pertinent part that "each Party shall be responsible for establishing and maintaining certain physical facilities and logical trunking necessary for Interconnection," and that "each Party shall provide, at its own expense, the physical facilities and logical trunking necessary on its side of the common physical meet point with respect to each Interconnection which provides for the transmission, routing, and termination of Telephone Exchange Service traffic and Exchange Access traffic to their respective Customers."

The meaning of these provisions does not jump off the page to the non-telecommunications expert, underscoring the wisdom of the policy that requires federal courts to defer to the expertise of state commissions in these types of cases. The Commission concluded that multiplexing services "are essential for the proper transportation and delivery of a usable signal to customers," and that multiplexing services were "necessary in order to complete calls on their respective sides of the joint SONET ring." This conclusion, and the ruling that Lucre had to pay for multiplexing services itself, is certainly not contravened by the plain meaning of the agreement, as Lucre contends. It in fact appears to be supported by this contractual language and is not, at a minimum, an arbitrary and capricious decision.

***4** Lucre points to additional portions of the agreement on appeal, contending that they provide support for its position on multiplexing fees. First, it points to Recital E at the very beginning of the 100-plus page agreement, which provides that "[t]he Parties are entering into this Agreement to set forth the respective obligations of the Parties and the terms and conditions under which the Parties will interconnect their networks and facilities and provide to each other Telecommunications Services as required by the Act as set forth herein." This vague statement of purpose does nothing to counter the proposition that both parties might be responsible for their own multiplexing fees and is irrelevant to the specific issue challenged by Lucre here.

Next, Lucre points to section XXVII.1 of the agreement, which provides that "[e]ach party will bill all applicable charges, at the rates set forth herein, in the Pricing Schedule and as set forth in applicable tarriffs or contracts referenced herein, for the services provided by that Party to the other Party...." Again, this extremely generalized statement does not indicate whether multiplexing is an applicable charge or a service provided by Lucre to SBC Michigan. Although Lucre asks us to find that it would be covered by such a definition, such a ruling would amount to a substitution of our judgment for the expertise of the Commission. The language of the statute and its cooperative federalism approach simply do not support such a reading with that level of specificity.

Finally, Lucre points to a pricing schedule, appended to the agreement, which references multiplexing. According to SBC, this schedule is merely a list of prices, and does not amount to an authorization to bill. Moreover, this schedule does not appear to provide for rates at which Lucre can bill SBC. To the contrary, the schedule is referenced in section 3.2.4 (the section relied upon by the Commission) which states that "Lucre can purchase such facilities from Ameritech at the rates set forth at Item V of the Pricing Schedule." Based on the manner in which it is referenced in the main body of the agreement, the schedule appears to us to have nothing to do with Lucre's billing of SBC.

In short, Lucre points to nothing in the plain language of the agreement that undermines the holdings of the Commission or the district court. We therefore affirm those decisions with respect to the issue of billing for multiplexing services.

B. Due Process

Lucre also argues that the Commission violated its due process rights by refusing to reopen the administrative record to allow it to introduce evidence of its own course of performance and of AT & T Michigan's invoicing for multiplexing. In denying these requests, the Commission reasoned that "Lucre should have realized at the time that it filed its complaint that the explanation of its failure to bill SBC for nearly four years could have a significant effect on the outcome of this proceeding."

***5** Lucre's due process argument fails at the outset under the state action requirement. In order to raise a due process claim, a party must have a property or liberty interest of which it is deprived by **state action,** as the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Blum v. Yaretsky,* 457 U.S. 991, 1002 (1982) ("[A]ction inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States."). The only alleged property rights here were Lucre's rights under the interconnection agreement, and these rights could only be said to have been "deprived" by SBC Michigan, not by the Commission. SBC Michigan is a private company rather than a state actor, and Lucre has not alleged facts that would render it a state actor here. *Cf. Wittstock v. Mark A. Van Sile, Inc.,* 330 F.3d 899, 902 (6th Cir.2003) ("A private actor may be considered a person acting under color of state law (a state actor) if (1) the deprivation complained of was caused by the exercise of some right or privilege created by the state and (2) the offending party acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."). The Supreme Court has also "consistently held that the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 52 (1999). Thus, even assuming that Lucre would have a property right in the interconnection agreement by operation of Michigan law that provides for the enforcement of contracts,[FN3] the deprivation of that contractual right by a private entity-i.e. SBC Michigan's alleged refusal to comply with the contract-simply does not implicate due process concerns. *See also Paul v. Davis,* 424 U.S. 693, 710-11 (1976) (liberty and property "interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.").

> FN3. *See Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 485 (1988) ("A cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."). This rule would only appear to go to a state's abolition of a cause of action, rather than conduct by a private party that gives rise to the cause of action, but we need not delve into the nuances of this distinction to address Lucre's claim here.

Perhaps recognizing the futility of its due process claim raised against SBC Michigan, Lucre turns its guns toward the Commission, which is of course a state actor. It argues that the Commission deprived it of due process by refusing to reopen the record. Lucre's "right to be heard" by reopening of the record might amount to a "procedural right," but cannot constitute a property right. *See Richardson v. Township of Brady,* 218 F.3d 508, 518 (6th Cir.2000) (A party "can have no protected property interest in the procedure itself.").

Thus, Lucre's due process claim is essentially missing a critical link. Although Lucre articulates a property right that is tied to its claim for breach of contract,

this right was denied by a private actor, not by the state. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."). The state actor that it does identify-the Commission-cannot be said to have denied it of any property right. (Not to mention the fact that the Commission is not and never has been named as a party). Without a connection between the deprivation and the property right in question, Lucre's due process claim fails.

III.

***6** For the foregoing reasons, we affirm the district court's dismissal of Lucre's claims.

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