

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 5, 2007

IN RE: PETITION OF SPRINT COMMUNICATIONS)	
COMPANY L.P. AND SPRINT SPECTRUM L.P. D/B/A)	
SPRINT PCS FOR ARBITRATION OF THE RATES)	DOCKET NO.
TERMS AND CONDITIONS OF INTERCONNECTION)	07-00132
WITH BELL SOUTH TELECOMMUNICATIONS, INC.)	
D/B/A AT&T TENNESSEE D/B/A AT&T SOUTHEAST)	

**ORDER DENYING MOTIONS TO DISMISS, ACCEPTING MATTER FOR
ARBITRATION, AND APPOINTING PRE-ARBITRATION OFFICER**

This matter came before Chairman Eddie Roberson, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on September 10, 2007 for consideration of the following filings: (1) *Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast* ("Petition") filed on May 18, 2007; (2) *BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee's Motion to Dismiss and Answer* ("Motion" or "Answer") filed on June 12, 2007; and (3) *Sprint's Response to AT&T Tennessee's Motion to Dismiss and Answer* ("Response") filed on June 19, 2007.

THE PLEADINGS

In its *Petition*, Sprint raises an issue of first impression for the Authority. Sprint asks the Authority to determine the effect on the parties' current interconnection agreement

of a voluntary commitment undertaken by AT&T as a condition of the Federal Communication Commission's ("FCC") approval of its merger with BellSouth Corporation.¹ Specifically, Sprint frames the single issue for which it seeks arbitration as: "[m]ay AT&T effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4?"²

In its *Motion*, AT&T requests that the Authority dismiss Sprint's *Petition* because it fails to raise a Section 251 arbitration issue. Further, AT&T maintains that the *Petition* seeks arbitration of "the interpretation of a merger commitment, which lies within the exclusive jurisdiction of the FCC."³ In this pleading, AT&T also seeks to raise a different, unresolved issue for arbitration related to the parties' negotiations of a new interconnection agreement. The proposed issue is "[s]hould Attachments 3A and 3B . . . be incorporated into the new interconnection agreement as 'Attachment 3?'"⁴

On June 19, 2007, Sprint filed its *Response*. In its *Response*, Sprint requests the Authority deny AT&T's *Motion* in its entirety, dismiss AT&T's proposed issue, promptly accept its *Petition* for arbitration, and establish a procedural schedule.

POSITION OF THE PARTIES

Sprint

Sprint avers the interconnection agreement approved by the Authority in Docket No. 00-00691, and amended from time to time, is current. Sprint states that it requested by letter dated July 1, 2004 negotiation of a subsequent interconnection agreement, and that the parties have participated in negotiations to that end. Sprint further states that the

¹ *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Adopted December 29, 2006, Released: March 26, 2007) ("Merger Order").

² *Petition*, p.8 (May 18, 2007).

³ *Motion*, pp.1-2 (June 12, 2007).

⁴ *Motion*, p.11 (June 12, 2007).

parties' interconnection agreement converted to a month-to-month term effective January 1, 2005, and that the parties continue to operate pursuant to its terms.

Sprint points out that on December 29, 2006 the FCC approved the merger of AT&T, Inc. and BellSouth Corporation subject to certain conditions, which the merging parties voluntarily accepted. One of the accepted commitments listed in Appendix F to the *Merger Order* pertains to "Reducing Transaction Costs Associated with Interconnections Agreements." This commitment reads:

The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's default provisions.⁵

Sprint states that it advised AT&T in writing on March 20, 2007 that Sprint considers the FCC merger commitment as AT&T's "latest offer for consideration within the current 251/252 negotiations that supersede or may be viewed as an addition to any prior offers" made in the current negotiations.⁶ Sprint further states that on March 21, 2007 AT&T acknowledged receipt of Sprint's proposal and denied the request for a full three year extension of the parties' interconnection agreement beginning March 21, 2007 by offering only to extend the Sprint agreement until December 31, 2007. Sprint argues that the parties agree that Sprint is allowed to extend its current month-to-month agreement but disagree regarding the commencement date from which to begin the three (3) year extension. Sprint opines that such three (3) year extension should commence from the date of Sprint's request for the extension.

⁵ *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).

⁶ *Petition*, pp.6-7 (May 18, 2007).

Sprint opines that the commencement date of an interconnection agreement is a core Section 251 interconnection implementation issue and subject to Section 252 arbitration which is the responsibility of the Authority.

AT&T

AT&T opines that Sprint improperly seeks to arbitrate the interpretation of a merger commitment. AT&T further opines that merger commitment interpretation lies within the exclusive jurisdiction of the FCC.

AT&T also maintains that the issue as identified by Sprint is clearly not an arbitrable issue pursuant to the Federal Telecommunications Act of 1996 (“Act”) and therefore, is outside the scope of a Section 251 arbitration. In AT&T’s opinion, the FCC has sole jurisdiction over AT&T’s merger commitments as it states in the *Merger Order* in Appendix F: “...unless otherwise expressly stated to the contrary, all conditions and commitments proposed...are enforceable by the FCC...”⁷

In the event that the Authority does not grant its motion to dismiss, AT&T requests that the Authority dismiss Sprint’s issue offered for arbitration and instead adopt the issue it sets out for arbitration. AT&T asks the Authority to accept for arbitration only the issue of whether Attachments 3A and 3B, which relate to wireless interconnection services and wireline interconnection services, should be included in its proffered negotiated agreement.

Sprint’s Response to AT&T’s Motion

Sprint asserts AT&T’s *Motion* should be denied. Sprint opines that the FCC and the Authority have concurrent jurisdiction regarding disputes pertaining to interconnection agreement related matters, including disputes over the merger commitments in the *Merger Order*. Sprint also requests that the Authority dismiss AT&T’s proposed interconnection

⁷ *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).

agreement issue because it is irrelevant and because AT&T is requesting that the Authority authorize it to breach its merger commitment.

FINDINGS AND CONCLUSIONS

AT&T's *Motion* is based on two premises: (1) the issue raised by Sprint is not a Section 251 arbitrable issue and (2) the FCC has sole jurisdiction over AT&T's merger commitments. The Tennessee Supreme Court has held that "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 Further, a motion to dismiss 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."⁹

In applying that legal framework to the instant case, the Authority must determine whether Sprint's *Petition* asserts any facts which trigger the Authority's jurisdiction under Section 252(b) of the Act to arbitrate an open issue related to the parties' interconnection agreement. When viewing the *Petition* in this light, the Authority finds that Sprint has asserted facts that "constitute a cause of action" under Section 252. Specifically, the Authority finds the following relevant facts averred in the *Petition*:

1. The parties have an existing interconnection agreement.
2. The parties entered into Sections 251-252 negotiations in order to negotiate a new interconnection agreement.
3. The *Merger Order* provided that a requesting telecommunications carrier may extend its current interconnection agreement for a period of up to three years.
4. Sprint advised AT&T that it considered the Merger Commitment to constitute an offer in its Sections 251-252 negotiations to extend the current agreement three years and accepted said offer and requested an amendment to the current agreement to convert the current month to month agreement and extend it from March 20, 2007 to March 20, 2010.

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

⁹ *Stein v. Davidson Hotel Co.*, 945 S.W. 2d 714, 716 (Tenn. 1997).

5. AT&T contends that any three year extension commences from December 31, 2004.¹⁰

The Authority finds that these averments bring into question a core issue of an interconnection agreement, i.e., the commencement and end dates of the parties' agreement. In so doing, Sprint has raised an arbitrable open issue under Section 251 and triggered the Authority's subject matter jurisdiction under Section 252(b).

AT&T's second basis for its motion to dismiss is essentially a pre-emption argument – that the FCC has sole jurisdiction over AT&T's merger commitments. The courts, the FCC, and the Authority have grappled with the hybrid jurisdictional scheme created by the Act's "cooperative federalism."¹¹ That the states have been given a shared role in telecommunications regulation is not in question. Consistent with the concurrent state and federal jurisdiction under the Act, the FCC's language in Appendix F explicitly recognizes that there may be instances in which states may well be faced with interpreting its *Merger Order*, and specifically, the merger commitments. Because the issue in the instant case inextricably links a Section 251 open issue with one of the interconnection merger commitments, the Authority finds that AT&T's pre-emption argument is not well-founded and that under the plain language of the *Merger Order*, which provides that nothing in the voluntary merger commitments are meant to "restrict, supercede or otherwise alter state . . . jurisdiction," the Authority possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the voluntary commitments.¹²

Finally, Sprint's request for the Authority to dismiss the issue raised by AT&T is essentially a motion to dismiss and must therefore be reviewed under the same legal

¹⁰ *Petition*, ¶¶ 7, 8, 9, 12, 14, 15 (May 18, 2007).

¹¹ *See In re: Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth, Inc.*, TRA Docket No. 01-00193, Order, pp. 5-6 (June 28, 2002); *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003).

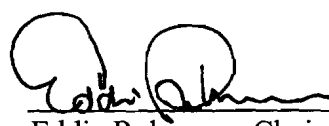
¹² *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).

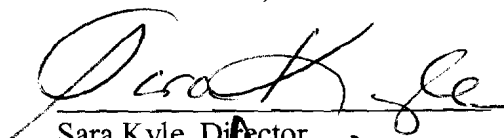
standard set out above for reviewing the AT&T *Motion*. The Authority finds that AT&T has, in fact, articulated an open issue which is ripe for arbitration under Section 252. Therefore, the Authority finds that Sprint has failed to meet the legal burden required to sustain its request that the Authority dismiss AT&T's issue.

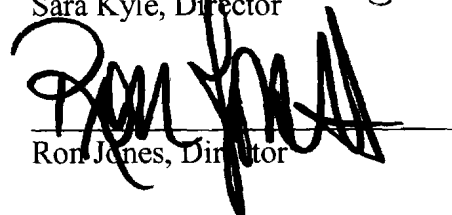
At the September 10, 2007 regularly scheduled Authority Conference, the panel voted unanimously to deny AT&T's *Motion* and Sprint's request for dismissal of AT&T's issue, accept the matter for arbitration, including both the issue raised by Sprint in its *Petition* as well as the issue raised by AT&T in its *Answer*, and appoint a Pre-Arbitration Officer to prepare the matter for arbitration.

IT IS THEREFORE ORDERED THAT:

1. AT&T's *Motion to Dismiss* is denied.
2. Sprint's request to dismiss AT&T's issue is denied.
3. Both the issues raised in Sprint's *Petition* and AT&T's *Answer* are accepted for arbitration.
4. General Counsel or his designee is appointed to serve as the Pre-Arbitration Officer to prepare this matter for hearing.


Eddie Roberson, Chairman


Sara Kyle, Director


Ron Jones, Director