

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

SPRINT COMMUNICATIONS COMPANY)
L.P., SPRINT SPECTRUM L.P., NEXTEL)
WEST CORP. AND NPCR, INC. D/B/A)
NEXTEL PARTNERS)

CAUSE NO. 43870

VS.)

APPROVED: SEP 15 2010

INDIANA BELL TELEPHONE COMPANY)
D/B/A AT&T INDIANA)

BY THE COMMISSION:

Larry S. Landis, Commissioner
Jeffery A. Earl, Administrative Law Judge

This Cause comes before the Indiana Utility Regulatory Commission (the "Commission") on a motion for summary judgment filed by Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. d/b/a Nextel Partners (collectively "Sprint").

On December 19, 2007, Sprint filed a complaint with the Commission under Cause No. 43408, asking the Commission to require AT&T to allow Sprint to adopt in Indiana an interconnection agreement ("ICA") in effect between BellSouth and other Sprint entities in Kentucky pursuant to a Merger Commitment entered into by AT&T and BellSouth with the FCC in the case of *In re AT&T, Inc. and BellSouth Corp., Application for Transfer of Control*, FCC 06-189, 22 F.C.C.R. 5662 (Dec. 29, 2007) (the "FCC Order"). The Commission issued an order in that cause on March 25, 2009. *Sprint Commc'ns Co., v. Ind. Bell Tel. Co.*, No. 43408, 2009 Ind. PUC LEXIS 123 (Ind. Util. Regulatory Comm'n March 25, 2009). In its Order, the Commission concluded AT&T must allow Sprint to adopt the Kentucky ICAs, but required the parties to reach agreement on the modification of the Kentucky ICAs to comport with Indiana law. The parties were unable to reach agreement. As a result, Sprint abandoned its efforts to adopt the Kentucky ICAs.

Each of the four Indiana Sprint entities has existing ICAs with AT&T, which have expired under their original terms¹; however, the parties have continued to operate under the terms of the expired ICAs. On February 2, 2010, Sprint notified AT&T of its intent to extend its current ICAs for three years pursuant to a separate Merger Commitment contained in the FCC Order. AT&T rejected Sprint's extension request on February 10, 2010, and on March 15, 2010, Sprint filed a complaint, asking the Commission to "enforce AT&T Merger Commitment 7.4 by ordering AT&T to enter into three-year extensions of the interconnection agreements under which AT&T Indiana and the Sprint Nextel entities presently operate" *Compl.* at 6. On, April 5, 2010, AT&T filed a motion to dismiss the complaint, arguing the Commission lacks

¹ The Nextel and NPCR ICAs each expired in August, 2001; the Sprint CLEC and Sprint PCS ICAs each expired in November, 2004.

subject matter jurisdiction. Sprint filed a response to the motion on April 15, 2010, and AT&T filed a reply on April 26, 2010. The Presiding Officers scheduled a pre-hearing conference on April 19, 2010. However, on April 16, 2010, the parties filed an agreed motion to have the case decided on summary judgment, and the Presiding Officers vacated the pre-hearing conference. Thereafter, Sprint filed a motion for summary judgment on May 3, 2010. AT&T filed its response to the motion for summary judgment on May 13, 2010. In its response, AT&T renewed its subject matter jurisdiction argument. Sprint filed its reply on May 20, 2010.

On May 28, 2010, the presiding Administrative Law Judge issued a docket entry denying AT&T's Motion to Dismiss. The docket entry determined the Commission lacked independent jurisdiction to enforce the Merger Commitments, but that it could enforce the Merger Commitments within the context of a request for arbitration under 47 U.S.C. section 252(b)(1). Because Sprint had not filed a request for arbitration, the docket entry stayed the case until the window for arbitration had opened and invited Sprint to file a formal request for arbitration. On June 8, 2010, Sprint appealed the May 28, 2010 docket entry to the full Commission. AT&T filed its response to Sprint's appeal on June 14, 2010, and Sprint filed its reply on June 21, 2010.

1. Commission Jurisdiction: In both its motion to dismiss and its response to Sprint's motion for summary judgment, AT&T argues the Commission lacks subject matter jurisdiction to enforce the Merger Commitments contained in the FCC Order. The presiding Administrative Law Judge's May 28, 2010, docket entry concluded the Commission has subject matter jurisdiction to enforce the Merger Commitments but only within the context of a request for arbitration of issues involved in the negotiation of an ICA under 47 U.S.C. § 252(b). For the reasons discussed below, the Commission concludes it has independent jurisdiction to consider Sprint's complaint to enforce the Merger Commitments.

The FCC Order describes the Merger Commitments as "a series of voluntary commitments that are enforceable by the [FCC]" FCC Order, 22 F.C.C.R. at 5772. The Merger Commitments section states: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC" *Id.* at App. F. However, the section also 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.

Id. Thus, while the FCC Order clearly grants jurisdiction over its enforcement to the FCC, it does not create exclusive jurisdiction in the FCC.

Although the Commission acknowledges the holding of the United States District Court for the Eastern District of Michigan in *Mich. Bell Tel. Co. v. Isiogu*, No. 09-12557, 2010 U.S. Dist. LEXIS 18182 (E.D. Mich. March 2, 2010) cited in the May 28, 2010, docket entry, the

Commission is not bound by that decision.² This issue has been raised in utility regulatory commissions of many states and most have determined they have independent statutory authority to enforce the Merger Commitments. *See Applic. of Sprint Commc'ns Co.*, No. 07-12-19RE02, 2010 Conn. PUC LEXIS 61, at *10-12 (Conn. Dept. of Pub. Util. Control June 9, 2010) (noting several court opinions and state commission decisions in determining the commission had jurisdiction to enforce the Merger Commitments). *See also Ill. Bell Tel. Co. v. Ill. Commerce Comm'n*, 921 N.E.2d 1147 (Ill. App. Ct. 2009); *Sprint Commc'ns Co. v. Sw. Bell Tel. Co.*, No. 10-SCCC-273-COM, 2010 Kan. PUC LEXIS 215 (Kan. Corp. Comm'n March 10, 2010); *Applic. of CoreTel*, No. 5-TI-1875, 2009 Wisc. PUC LEXIS 389 (Pub. Serv. Comm'n of Wisc. July 17, 2009); and *In re Pet. of Sprint Commc'ns Co.*, No. 2007-180, 2007 Ky. PUC LEXIS 763 (Ky. Pub. Serv. Comm'n Sept. 18, 2007) (all finding jurisdiction based on state law). *But see In re Compl. by Sprint Commc'ns Co.*, No. 09-099-C, 2010 Ark. PUC LEXIS 320 (Ark. Pub. Serv. Comm'n June 9, 2010) (finding jurisdiction within the context of a request for arbitration only); and *In Re NCP, Inc.*, Nos. 2007-UA-316, 2007-UA-317, 2007 Miss. PUC LEXIS 301 (Miss. Pub. Serv. Comm'n Oct. 30, 2007) (finding FCC has exclusive jurisdiction over enforcement of the FCC Merger Commitments).

Indiana Code section 8-1-2-5 gives the Commission general jurisdiction over ICAs. Specifically, section 8-1-2-5(b) states:

In case of a failure to agree upon such use or the conditions or compensation for such use, or in case of failure to agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, any public utility ... interested may apply to the commission and if after investigation the commission shall ascertain that public convenience and necessity require such use or such physical connections, and that such use or such physical connections would not result in irreparable injury to the owner or other users of such equipment or the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such owner or other public utilities or other users of such equipment or facilities, it shall by order direct that such use be permitted and prescribe reasonable conditions and compensations for such joint use

Although Indiana Code section 8-1-2.6-1.5 limits the authority of the Commission to regulate telecommunications utilities, that section carves out several exceptions wherein the Commission retains authority, including the Commission's general jurisdiction over interconnection agreements under Indiana Code section 8-1-2-5. Ind. Code § 8-1-2.6-1.5(a)(3). In addition, Indiana Code section 8-1-2.6-1.5(b)(5) maintains a "provider's ability to file a complaint with the commission to have a dispute decided by the commission." Most notably, the statute maintains the Commission's authority to hear a complaint filed by a telecommunications provider *in addition* to the Commission's authority to mediate or arbitrate a dispute between providers. *See* Ind. Code § 8-1-2.6-1.5(b). Thus, the statute contemplates and provides authority for the Commission to decide complaints related to ICAs independent of an arbitration

² The *Michigan Bell* decision agreed with the conclusion of the Michigan Public Service Commission ("MPSC") that while the MSPC did not have independent jurisdiction to enforce the Merger Commitments, it did have jurisdiction to enforce them in the context of a request for arbitration under 47 U.S.C. § 252(b).

proceeding under 47 U.S.C. § 252(b). Sprint's complaint to enforce Merger Commitment 7.4, allowing it to extend its current ICA, relates directly to the terms and conditions of its ICA with AT&T; therefore, the Commission has independent jurisdiction over Sprint's complaint to enforce the Merger Commitments.

2. Background: On March 26, 2007, the Federal Communications Commission ("FCC") issued a memorandum opinion and order authorizing the merger of AT&T and BellSouth Corp. As a condition of approving the merger, the FCC imposed certain conditions upon AT&T (the "Merger Commitments"). Among these commitments are the following:

1. The AT&T/BellSouth ILECs[, incumbent local exchange carriers,] shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state

* * *

3. The AT&T/BellSouth ILECs shall allow a requesting telecommunications carrier to use its pre-existing interconnection agreement as the starting point for negotiating a new agreement.

4. The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years

FCC Order at App. F. These commitments are hereinafter referred to as Merger Commitments 7.1, 7.3, and 7.4 respectively.

3. Summary Judgment: While Summary judgment is not commonly employed before the Commission, it may be guided generally by the relevant provisions of the Indiana Rules of Trial Procedure to the extent those rules are consistent with the Commission's Rules of Practice and Procedure. 170 Ind. Admin. Code 1-1.1-26(a). Trial Rule 56(C) allows the Commission to enter a summary judgment "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In deciding a motion for summary judgment, the Commission must determine which facts that arise from the evidentiary materials are both undisputed and material. *In re Compl. of N. Ind. Pub. Serv. Co.*, Nos. 43363, 43369, 2010 Ind. PUC LEXIS 158, at *21 (Ind. Util. Regulatory Comm'n May 11, 2010). However, in so doing, the Commission does "more than find facts; it deploy[s] its expertise in [utility law]." *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1017-18 (Ind. 2009). If the application of the law to the material facts requires judgment for either the moving party or any other party on the issues raised in the motion for summary judgment, the Commission must enter that judgment. *Id.*

The dispute in this Cause concerns the interpretation of the Merger Commitments agreed to by AT&T as a condition of FCC approval of its merger with Bell South, which are memorialized in the Appendix F of the FCC Order. Issues of contract or settlement agreement

interpretation are particularly appropriate for resolution through summary judgment. *Compl. of Ultimate Commc'ns Corp.*, No. 43076, 2006 Ind. PUC LEXIS 216, at *6 (Ind. Util. Regulatory Comm'n July 26, 2006) (citing *Ind. Bell Tel. Co. v. Time Warner Commc'ns of Ind., L.P.*, 786 N.E.2d 301, 309 (Ind. Ct. App. 2003)). Under Indiana law, “[w]here the terms of a contract are clear, the meaning of the contract is determined as a matter of law.” *In re Compl. of Int’l Bhd. Of Elec. Workers*, No. 43385, 2009 Ind. PUC LEXIS 187, at *10 (Ind. Util. Regulatory Comm’n May 13, 2009) (quoting *Anderson v. Horizon Homes, Inc.*, 644 N.E.2d 1281, 1290 (Ind. Ct. App. 1995), *trans. denied*).

4. Commission Discussion and Findings: If a contract is unambiguous, the Commission “is not to construe the contract or look at parol or extrinsic evidence to expand, vary, or explain the contract but rather will simply apply the contract provisions to determine the intent of the parties.” *Id.* (quoting *United Consulting Eng’rs v. Bd. of Comm’rs of Hancock County*, 810 N.E.2d 351, 354 (Ind. Ct. App. 2004); *Turnpaugh v. Wolf*, 482 N.E.2d 506, 508 (Ind. Ct. App. 1985)). “[I]t is not the proper function of the [Commission] by any rules of interpretation or construction to make another . . . entirely different contract for the parties from the one they made for themselves.” *Id.* (quoting *Smith v. Mercer*, 118 Ind. App. 575, 584, 79 N.E.2d 772, 776 (Ind. Ct. App. 1948)).

Here, the language of Merger Commitment 7.4 is clear and unambiguous:

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.

FCC Order at App. F.

Although the original ICA between Sprint and AT&T expired several years ago, Merger Commitment 7.4 requires AT&T to extend the current interconnection agreement, “regardless of whether its initial term has expired . . .” *Id.* The parties do not dispute they have continued to operate under the terms of the original ICA since its expiration. However, AT&T argues Merger Commitment 7.4 only requires it to extend an expired ICA for a period of three years from the date of expiration. AT&T’s argument finds no support in the text of Merger Commitment 7.4, which does not explicitly tie the three-year extension period to the expiration date of the original ICA. Rather, the Merger Commitment clearly contemplates a three-year extension from the date a telecommunications carrier requests the extension of its current ICA rather than from the date of original expiration, as demonstrated by the language “regardless of whether its initial term has expired.” *Id.* Therefore, the plain language of Merger Commitment 7.4 requires AT&T to allow Sprint to extend its current ICAs for a period of three years from the date Sprint requested the extension, subject to amendment to reflect prior and future changes of law.

Alternatively, AT&T argues Merger Commitment 7.4 at most requires it to extend an expired ICA for a period of three years from the date of the FCC Order. AT&T quotes oral

comments made during a motion hearing by a United States District Judge for the District of Connecticut to support its argument. However, AT&T's argument ignores the language of the FCC Order, which states with respect to the Merger Commitments: "all conditions and commitments proposed in this letter are enforceable by the FCC and would apply ... for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter." *Id.*

Sprint formally requested an extension of its existing ICAs pursuant to Merger Commitment 7.4 on February 2, 2010. AT&T does not dispute the Merger Commitments were still in force when Sprint made its request. Therefore, Sprint's request was timely under the terms of the Merger Commitments, and AT&T should have honored the request. As a result, the Commission concludes AT&T is required by Merger Commitment 7.4 to accept Sprint's request to extend its existing ICAs for a period of three years beginning on February 2, 2010, subject to amendment to reflect prior and future changes of law.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION THAT:

1. The Motion for Summary Judgment by Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp. and NPCR, Inc. d/b/a Nextel Partners is hereby GRANTED.

2. Pursuant to Merger Commitment 7.4 contained in Appendix F of the FCC Order, Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc. d/b/a Nextel Partners are each entitled to extend their existing interconnection agreements with Indiana Bell Telephone Company d/b/a AT&T Indiana for a period of three years beginning on February 2, 2010.

3. This Order is effective on and after its date of issuance.

HARDY, ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: SEP 15 2010

I hereby certify that the above is a true and correct copy of the Order as approved.


Brenda A. Howe
Secretary to the Commission