

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of)
SPRINT COMMUNICATIONS COMPANY L.P.,)
SPRINT SPECTRUM L.P., and NEXTEL WEST) Case No. U-15491
CORP., against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a AT&T MICHIGAN.)
_____)

At the August 12, 2008 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

ORDER

On December 21, 2007, Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively, Sprint) filed a complaint against AT&T Michigan, alleging that AT&T Michigan had impermissibly prevented Sprint from “porting” a Kentucky interconnection agreement between BellSouth Corporation and a Sprint competitive local exchange carrier (CLEC) and Sprint PCS. It asserted that the commitments¹ made to obtain Federal Communications Commission (FCC) approval of the BellSouth and AT&T Inc. merger require AT&T Michigan to permit Sprint to adopt the Kentucky agreement in Michigan. That approval is

¹Specifically, merger commitment 7.1.

contained in what is generally referred to as the Merger Order² and the commitments made are referred to as the merger commitments. The parties participated in a mediation process, but did not both accept the recommended settlement.

On March 5, 2008, a prehearing conference was held before Administrative Law Judge Mark D. Eyster. At that time, the parties stipulated to the suspension of the case to permit Sprint to file an amended complaint no later than March 26, 2008. Sprint filed a timely amended complaint in which it stated essentially the same allegations as the original complaint.

On April 9, 2008, AT&T Michigan filed its answer to the amended complaint along with a motion to dismiss. On April 23, 2008, Sprint and the Commission Staff (Staff) filed responses opposing the motion to dismiss. On April 30, 2008, AT&T Michigan filed a reply to the responses to its motion.

On May 6, 2008, a hearing was held at which the parties had an opportunity to fully argue their positions with respect to the motion. At the conclusion of those arguments, the ALJ issued an oral proposal for decision (PFD) in which he recommended that the Commission grant the motion to dismiss based on the lack of jurisdiction to entertain the questions raised.

On May 20, 2008, Sprint and the Staff filed exceptions to the PFD. AT&T Michigan filed a reply to those exceptions on June 3, 2008.

Positions of the Parties

A. Sprint

Sprint argues that the ALJ erroneously concluded that the Commission lacks jurisdiction to hear Sprint's complaint seeking enforcement of a merger commitment adopted as a condition of

²FCC 06-189, *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (rel'd March 26, 2007).

the FCC's approving a merger. Sprint states that the overwhelming majority of state commissions addressing the issue have determined that they have the authority and jurisdiction necessary to provide the relief requested in Sprint's complaint. The ALJ found that the complaint seeks relief that would be inconsistent with federal telecommunications law. Sprint argues this is an error.

Sprint argues that the Merger Order explicitly grants jurisdiction to state commissions to address Sprint's complaint. Appendix F to that order contains the merger commitments upon which the FCC's merger approval was conditioned. The explicit grant Sprint refers to comes from the following language from that appendix:

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.

It is the following paragraph, which follows the previous paragraph that AT&T Michigan relies upon to limit jurisdiction to the FCC for enforcement action:

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 and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter.

Sprint argues that the language from the Merger Order is nearly identical to the Verizon/MCI Order³ issued in 2005, which has previously been found to have the meaning Sprint ascribes to it, citing the appellate decision reviewing the State Corporation Commission of Virginia's order that imposed additional conditions on the merging parties. *MCI Metro Access Transmission Serv of Va Inc v Christie*, (EDVa, March 27, 2007).

³*Memorandum Opinion and Order, Verizon Communications, Inc, and MCI, Inc., Applications for Approval and Transfer of Control, 20 FCC Rcd 18433 (2005).*

Sprint argues that the Commission has ample jurisdiction to hear this complaint under Sections 251 and 252 of the federal Act. It argues that jurisdiction over interconnection disputes is shared equally between the FCC and the states. It cites an order in which the FCC stated: “We view sections 251 and 252 as creating parallel jurisdiction for the FCC and the states.”⁴ In Sprint’s view, the Commission is “fully empowered to review interconnection agreements as is the FCC. . . Interconnection agreements and disputes over interconnection are typically brought first to state commissions.” Sprint exceptions, p. 10. Sprint asserts that every federal court to consider the issue has determined or assumed that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements, despite the Act’s silence on that point.”⁵ Sprint argues that to adopt AT&T Michigan’s argument would render the merger commitments meaningless on a practical level, because without state forums, aggrieved parties would have nowhere to enforce their rights.

Sprint argues that the fact that its interconnection rights in this case arise from the Merger Order does not divest the Commission of jurisdiction over these claims in Michigan. It argues that commissions in other states have concluded that they have jurisdiction to enforce the merger commitments related to interconnection matters. Among the eight out of nine states assuming jurisdiction on these matters, Sprint states, are Kentucky, Florida, and Tennessee. Sprint asserts that only Mississippi has declined jurisdiction.

Sprint further argues that the ALJ erred when he determined that the Commission lacks jurisdiction under Michigan law to hear this complaint. It argues that the ALJ gave inappropriate

⁴*First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15544, ¶¶83-85. (1996); vac’d on other grds, *Iowa Util Bd v FCC*, 120 F3d 753 (CA 8, 1997), rev’d in part sub nom *AT&T v Iowa Util Bd*, 525 US 366; 119 S Ct 721 (1999).

⁵*CoreComm, Inc v Verizon Penn, Inc*, 493 F3d 333, 344 (CA3, 2007).

weight to AT&T Michigan's argument that MCL 484.2204 and MCL 484.2205 address procedural avenues for relief and not Commission jurisdiction. Sprint insists that its complaint is one in which it has a disagreement on a matter related to a regulated telecommunications service, thus falling within the purview of MCL 484.2204. Likewise, Sprint argues, MCL 484.2205 grants the Commission authority to investigate complaints brought to its attention regarding regulated services. It argues that interconnection-related disputes are "clearly regulated services over which this Commission has jurisdiction and authority to resolve a complaint that has been brought to its attention." In Sprint's view, dismissal of this action because it is not an arbitration is "an untenable and unreasonable abdication of authority." Sprint's exceptions, p. 22. In Sprint's view, the Commission has independent jurisdiction to hear the complaint under the state statutory grant to regulate telecommunications in Michigan.

Sprint further argues that the ALJ erred when he found that the Commission lacks jurisdiction under Michigan law to consider AT&T Michigan's alleged violation of MCL 484.2502. In Sprint's view, the ALJ erred when he determined that merger commitments and the accessible letter were clearly not false, misleading, or deceptive, which he then used as another reason to dismiss the complaint. Rather, Sprint says, the complaint stated that AT&T Michigan's actions in failing to abide by the terms of the merger commitments or the accessible letter were actions that violated MCL 484.2502(1)(a) and (h). Sprint states that it submitted testimony concerning AT&T Michigan's statements or representations regarding the conditions of providing a telecommunications service that are false, misleading, or deceptive in the testimony of Mark G. Felton. It argues that AT&T Michigan has delayed interconnection with Sprint and repeatedly raised roadblocks to implement the merger commitments that do not appear in the merger commitments themselves.

Sprint argues that its claim of violation of MCL 484.2502 should not be cavalierly dismissed without a trier of fact hearing the evidence of AT&T Michigan's violations.

B. The Staff

The Staff takes the position that the ALJ incorrectly recommended dismissal of this proceeding based on lack of jurisdiction. In its view, the Commission has general authority and jurisdiction to adjudicate this complaint under Sections 201, 203(1), 204, and 205(2). Additionally, the Staff argues, the Commission has concurrent jurisdiction with the FCC to resolve interconnection-related disputes, even when the disputes pertain to the application of an FCC-ordered merger condition. It argues that 47 USC 251 and 252 provide the Commission with delegated authority to address interconnection matters. It argues that the Commission may interpret and apply federal law in the exercise of its jurisdiction to decide these cases. It points out that the FCC recognizes its own role in the arbitration and approval of interconnection agreements as secondary; the FCC will act in the absence of state commission action, or if a carrier determines to pursue enforcement action with the FCC. The Staff states that 47 USC 252(e)(1) "requires a state commission to approve or reject an interconnection agreement like the one at issue in the present case." Staff's exceptions, p. 4.

The Staff cites the Commission's March 29, 2002 order in Case No. U-13072, a dispute involving Borderland Communications, LLC's (Borderland) complaint against Ameritech Michigan. That case was dismissed at Borderland's request to withdraw its complaint, which the order granted. However, the Commission stated its concern over the delay in interconnection that Borderland experienced as being inconsistent with state and federal law.

Moreover, the Staff argues, 47 USC 252(i) requires that an incumbent local exchange carrier (ILEC) make available any interconnection, service, or network element provided under an

agreement approved under Section 252 to another requesting carrier, upon the same terms and conditions as those provided in the agreement. In the Staff's view, this provision does not require that the sought after interconnection agreement be approved by the same state in which the requesting carrier desires to operate. The Staff takes the position that an interconnection agreement entered into and approved in another state may be adopted pursuant to 47 USC 252(i) in Michigan. It says that AT&T Michigan's failure to adopt the Kentucky interconnection agreement in Michigan constitutes the violation at the root of this complaint.

The Staff agrees with Sprint that the Merger Order expressly recognized the Commission's concurrent jurisdiction over AT&T Michigan's interconnection related merger commitments. It states that the Merger Order language permits disputes to be heard at the FCC, but does not require them to be brought there and nowhere else. The Staff argues that the Merger Commitment language demonstrates that the federal Act was designed to create dual jurisdiction in the state commission and the FCC.

The Staff further states that AT&T Michigan's claim that state specific pricing does not permit bill and keep unless the traffic balance is roughly equal is also a matter that the Commission may decide pursuant to the jurisdiction provided by merger commitment 7.1 and the Michigan Act. The Staff urges the Commission to promptly reverse the ALJ's finding and remand the matter for an evidentiary hearing.

C. AT&T Michigan

AT&T Michigan argues that the Merger Order does not explicitly grant jurisdiction to the Commission to address Sprint's complaint. It further argues that the FCC, like any state utility commission, is a statutory creature, that has only the authority delegated to it. AT&T Michigan argues that the FCC has no statutory authority to delegate enforcement of merger obligations to

state commissions. AT&T Michigan argues that a statute must express Congressional intent to permit delegation before the FCC may delegate any of its powers to the states.⁶ It argues that the savings clause inserted in the Merger Order merely preserves whatever authority the individual state commissions have with respect to various commitments, so long as that authority is exercised consistent with the merger commitments. It argues that is far from a grant of authority to states to enforce merger commitment 7.1.

AT&T Michigan further argues that Sprint's reliance on *MCI Metro, supra*, is misplaced. In that case, the Virginia commission imposed conditions on the merger pursuant to authority granted it in Virginia law, in addition to those imposed by the FCC. The appellate court rejected the argument that the FCC's authority preempted Virginia's authority to impose conditions.

AT&T Michigan further argues that Sprint's exposition of jurisdiction granted under 47 USC 251 and 252, which broadly states that jurisdiction over interconnection matters is shared equally between the FCC and the states, is an overly simplistic statement that, contrary to Sprint's argument, is not settled law. Rather, AT&T Michigan states, the Commission is a creature of statute without authority except that granted by statute. AT&T Michigan argues that Section 251 delegates nothing to the states. It argues that although Section 252 admittedly makes certain authority delegable to the states, it is only the Michigan Legislature that may delegate authority to the Commission. AT&T Michigan argues that in the context of the *First Report and Order, supra*, the idea of parallel jurisdiction for some delegated authority made sense. However, it argues, that statement does not provide a basis for claiming that the state commissions automatically have jurisdiction over matters that have not been delegated to them.

⁶*United States Telecom Ass'n v FCC*, 349 F3d 554, 565 (CA DC, 2004); cert den, 125 S Ct 313 (2004).

AT&T Michigan agrees that state commissions have authority to interpret and enforce interconnection agreements that they have approved. However, it counters that its agreement does nothing to support Sprint's position. In the present case, Sprint has not requested that the Commission interpret or enforce the current interconnection agreement that is in place between the parties. Rather, AT&T Michigan argues, Sprint requests that the Commission interpret and enforce a merger commitment that arose out of the FCC's authority to approve the merger.

AT&T Michigan further argues that Sprint's assertion that it would have no way to enforce its rights under the merger commitments without state jurisdiction is irrelevant and inaccurate. It argues that the Commission does not have any "jurisdiction by necessity." AT&T Michigan reply, p. 15. Moreover, AT&T Michigan argues, the commitments specifically provide that they may be enforced by the FCC, where the present dispute is currently pending.

AT&T Michigan argues that the Commission's previous approval of a number of amendments to interconnection agreements to meet the merger commitments does not indicate it has jurisdiction to enforce the Merger Order. Rather, it argues the Commission has delegated authority to approve interconnection agreements voluntarily entered into by the parties. 47 USC 252(e). AT&T Michigan posits that should interconnection agreement terms be voluntarily negotiated between these parties, the resulting agreement would be submitted to the Commission for like approval.

AT&T Michigan further argues that reliance upon various preliminary orders of other state commissions under particular state-specific jurisdiction statutes is not particularly helpful. It asserts that the question here is whether the Michigan Legislature has granted the Commission authority to resolve this complaint. It argues that because no substantive provision grants that power the answer to the question hinges on whether the federal Act delegates that power to the

Commission. It argues that nothing in 47 USC 251 or 252 permits the Commission to enforce the merger commitment or the Merger Order.

AT&T Michigan argues that MCL 484.2204 and MCL 484.2205 do not grant jurisdiction but rather provide procedural avenues for seeking relief. It argues that MCL 484.2203 describes one procedural vehicle – the formal complaint. MCL 484.2204 describes another procedural vehicle – the application. Finally, MCL 484.2205(2) describes some remedies available to the Commission to redress claims within its jurisdiction. It argues that these sections do not grant subject matter jurisdiction.

Finally, as to Sprint’s claims under MCL 484.2502, AT&T Michigan states that Sprint failed to take exception to the determination that the Commission lacks jurisdiction over Sprint’s claims, since they are wholly derivative of Count I. However, as to the exception to the alternative grounds that the ALJ misread the complaint, AT&T Michigan states that Sprint’s “revisionist history” does not comport with the allegations of the amended complaint. The complaint alleges that statements in the accessible letter are false, misleading, or deceptive, or caused a probability of confusion or misunderstanding. Viewing the pleading in a light most favorable to the complainants, the ALJ determined that AT&T’s accessible letter did not misstate the merger commitment. AT&T Michigan points out that claims under MCL 484.2502(1)(a) and (h) deal with false and misleading statements, not actions. It concludes that differing views on the meaning of the FCC’s Merger Order should not be converted into a state law violation.

As to the Staff’s arguments, AT&T Michigan states that the Staff relies upon some provisions upon which the amended complaint does not rely. AT&T Michigan argues that the Staff does not point to any particular language in the Michigan Act or in the federal Act that grants the Commission authority over the dispute.

Next, AT&T Michigan states, the Staff's claim that MCL 484.2203(1) provides jurisdiction fails because there is no demonstration that Sprint filed a complaint "under this act" as required by that section. AT&T Michigan argues that it is not enough to claim that the complaint was filed under the Michigan Act, when the facts do not bear that statement out. AT&T Michigan asserts that the ALJ correctly held that Sections 203, 204, and 205 refer to available procedures without granting subject matter jurisdiction of the present complaint.

AT&T Michigan argues that 47 USC 252 (a), (b), and (e) delegate to state commissions tasks that the Michigan Legislature has empowered the Commission to undertake. It may review and either approve or reject interconnection agreements that have been arrived at through voluntary negotiation or compulsory arbitration. It argues that these sections do not constitute a generalized federal delegation of authority over all "interconnection matters." It argues that the allegations of the complaint simply do not fall within the authority delegated to the Commission under 47 USC 252. Further, AT&T Michigan agrees with the ALJ's conclusion that the complaint seeks relief that is not consistent with the federal Act.

AT&T Michigan further argues that reliance upon the Commission's March 29, 2002 order concerning Borderland cannot provide support for reversing the dismissal. First, AT&T Michigan points out that the order dismissed the case with prejudice, and the remaining language in the order should be considered mere *dicta*. Second, the case involved a complaint of delayed interconnection in violation of MCL 484.2305(1)(b). The present complaint does not allege that there has been a delay in interconnection that violates MCL 484.2305. Indeed, AT&T Michigan points out, it is interconnected with Sprint currently under an approved interconnection agreement.

AT&T Michigan further argues that the Staff's argument that 47 USC 252(i) grants the Commission jurisdiction, although novel, is without merit. First, AT&T Michigan states, there is

no reliance upon this section in the amended complaint. Second, the statute applies to an interconnection agreement approved under this section to which the local exchange carrier is a party. AT&T Michigan states that it is not a party to the interconnection agreement between the Sprint entities in Kentucky and BellSouth that Sprint desires to adopt for Michigan. It argues that Section 252(i) does not require that a local exchange carrier make available interconnection agreements offered by their affiliates in other states. Had it done so, AT&T Michigan argues, there would have been no need for the merger commitment at issue in this case. Third, AT&T Michigan states, the FCC has ruled, contrary to the Staff's assertion, that 47 USC 252(i) requires any negotiated agreement be made available to all interested carriers in the same state.⁷

Conclusions of Law

The Commission finds that this complaint should be dismissed as recommended by the ALJ, although it adopts a slightly different position with respect to the Commission's jurisdiction to entertain issues related to the Merger Order or the commitments approved and adopted as conditions for the merger approval. The Commission concludes that it has no jurisdiction to adjudicate an action based on a claim of violation of an FCC order such as the Merger Order or its commitments. In this respect, the Commission finds AT&T Michigan's arguments more persuasive and legally sound. However, that does not leave Sprint without a forum for obtaining what it says it desires. If it desires to import the interconnection agreement entered into between an affiliate of AT&T Michigan and Sprint, it may petition the Commission for arbitration of terms of an interconnection agreement under the provisions of 47 USC 252. For such an action, the Commission clearly has jurisdiction. Sprint may seek to import the contract, and argue that failure

⁷ *In re Application of GTE Corp and Bell Atlantic Corp*, Memorandum Opinion and Order, CC Docket No 98-184, FCC 00-221, ¶314, rel'd June 16, 2000.

to permit it to adopt the provisions is contrary to FCC orders or federal law. The issue of state-specific pricing and the bill and keep reciprocal compensation issue also could be resolved. The arbitration procedure put in place by Congress and delegated specifically to the states is a proper place for discussing these issues. Any terms or conditions must be consistent with federal law and FCC orders and rules. To this extent, the Commission may be in a position of interpreting the conditions that were adopted by the FCC. But it will do so in a context that has been specifically delegated to the states with authority granted by our state Legislature to do so. MCL 484.2201.

It is unfortunate that Sprint chose to file a complaint rather than a petition for arbitration. Had it done the latter, it would likely be well on its way toward resolution of the issues.

The Commission does have authority to interpret and to enforce interconnection agreements that it has approved. However, there is no dispute with regard to the interconnection agreement that the Commission has approved for these parties. The dispute centers on a desire for particular terms of a new interconnection agreement, a matter properly brought by a petition for arbitration.

On the other hand, an action to enforce the FCC Merger Order does not properly belong before this Commission. Interpreting merger orders for purposes of enforcement and imposing any sanctions for violations should be determinations made by the FCC, the body initially adopting the commitments as conditions for its approval of the merger.

The Commission finds that the savings clause language quoted from the Merger Order does not grant the Commission any additional jurisdiction to adjudicate the claims raised in this case. Rather, that language merely states that it does not preclude or alter a state's preexisting authority with respect to the matters described therein or related matters. Although in certain respects, the Commission has parallel jurisdiction over interconnection matters, that jurisdiction does not extend to Commission authority to entertain actions to enforce a FCC merger order.

As to the allegations of misrepresentation or false statements, the Commission finds persuasive AT&T Michigan's argument that the statements claimed to be false or misleading were, as a matter of law, not misleading or false. Whether AT&T Michigan abided by those statements is not the question properly raised in the complaint. And, as AT&T Michigan points out, the MCL 484.2502(1)(a) prohibitions relate to statements, not actions or failure to act. The federal Act has provided a method by which requesting carriers may obtain interconnection agreements in 47 USC 251 and 252. That method does not encompass filing a complaint with a state commission alleging violations of merger commitments adopted by the FCC.

Finally, the Staff's assertions of jurisdiction under MCL 484.2305 must be rejected, as the complaint contains no allegation that the statute was violated. Indeed, the parties are currently interconnected, so there is no delay in interconnection. The Borderland case is inapposite to the present one on these bases. Also, the Commission notes that jurisdiction to hear the matter did not appear to be an issue that was argued by the parties or resolved by the Commission in the Borderland case.

THEREFORE, IT IS ORDERED that the complaint filed by Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. against AT&T Michigan is dismissed with prejudice.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of August 12, 2008.

Mary Jo Kunkle, Executive Secretary