Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
AT&T ILECs Petition for Declaratory Ruling	)	WC Docket No. 08-23

COMMENTS OF METROPCS COMMUNICATIONS, INC.

Mark A. Stachiw
Executive Vice President,
General Counsel
& Secretary
2250 Lakeside Boulevard
Richardson, TX 75082
Telephone: (214) 265-2550
Facsimile: (866) 685-9618

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Summary

MetroPCS Communications, Inc. ("MetroPCS") respectfully files these Comments in response to the AT&T ILECs Petition for Declaratory Ruling regarding the interpretation of a condition contained in the *AT&T/BellSouth Merger Order*. MetroPCS submits that the Commission should interpret the merger commitment pertaining to the porting of interconnection agreements from one AT&T/BellSouth state to another in a manner consistent with the original purpose and intent of the condition. Analysis reveals that this condition was intended to allow for ease of market entry, advance the best practices of the acquired company, and to reduce the transaction costs associated with such agreements. These goals will be advanced by allowing porting of the agreement which is at issue. The Commission should not allow Petitioners to eviscerate the commitment by shoehorning the broad-based regional agreement, which it previously adopted in nine-states with two Sprint affiliates, into what should be a narrowly-defined "state-specific" pricing exception. In addition, the Commission should clarify that the merger condition in question is broader than Section 252(i) of the Communications Act.

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MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits comments on the Petition for Declaratory Ruling (the "Petition") filed by AT&T ILECs (the "Petitioners") regarding the interpretation of a condition contained in the *AT&T/BellSouth Merger Order*[2] in the above captioned proceeding.[3] MetroPCS supports the Petitioners' request that the Commission "clarify the merger condition that allows carriers to 'port' an interconnection agreement from one AT&T/BellSouth state to another without the need for negotiation and arbitration."[4] However, contrary to the position of AT&T/BellSouth, the

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("*AT&T/BellSouth Merger Order*"); Order on Reconsideration, 22 FCC Rcd 6285 (2007).

[3] Petition of the AT&T ILECs for a Declaratory Ruling, filed February 5, 2008; Public Notice, "Pleading Cycle Established for AT&T ILECs Petition for Declaratory Ruling," WC Docket No. 08-23, DA 08-391 (rel. Feb. 14, 2008).

[4] Petition at 10.

Commission should clarify the condition to allow for the porting of agreements as requested by Sprint and its affiliates, and not restrict it as Petitioners propose.

I. PRELIMINARY STATEMENT

In the *AT&T/BellSouth Merger Order,* the Commission adopted as conditions to its approval of the transaction a number of voluntary commitments made by AT&T and BellSouth. The relevant commitment for the Petition at hand is Commitment 7.1, which states:

> The AT&T/BellSouth ILECs 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 in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, than an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.[5]

As evidenced by the heading for this and other interconnection-related merger commitments - - "Reducing Transaction Costs Associated with Interconnection Agreements" - - Commitment 7.1 was adopted to encourage competition in the telecommunications industry by reducing the costs and delays associated with the establishing an interconnection arrangement between a requesting carrier and the post-merger AT&T. Indeed, Commissioner Copps noted his concern that the merger of AT&T and BellSouth created an entity that could possibly use "its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether."[6] Commissioner Copps proceeded to state that "[t]o mitigate this

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[5] *AT&T/BellSouth Merger Order* at Appendix F.

[6] *Id.* at p. 172 (Commissioner Michael J. Copps, concurring).

concern, the merged entity has agreed to allow the portability of interconnection agreements and to ensure that the process of reaching such agreements is streamlined."[7]

However, despite its voluntary commitment and receiving the fruits of its promises, Petitioners claim that certain broad-based interconnection arrangements that were entered into prior to the merger reflect "state-specific" pricing, and cannot be ported to another state. Specifically, Petitioners claim that a requesting party should not be allowed to port a nine-state "bill-and-keep arrangement, and a provision allowing for the equal sharing of the costs of interconnection facilities (hereinafter, the "Shared Facility Pricing Arrangement"), which were included in interconnection agreements between each of the BellSouth ILECs, on the one hand, and two Sprint affiliates (Sprint CLEC and Sprint PCS), on the other."[8] AT&T/BellSouth claim that this nine-state agreement was based upon the fact that the parties had roughly balanced ingoing and outgoing traffic throughout the BellSouth region. Petitioners argue, as a result, that these particular terms are "pricing arrangements that are specific, not only to the BellSouth states, but to the two Sprint affiliates that were the original parties to the agreement."[9]

As demonstrated further below, Petitioners' proposed reading of Commitment 7.1, if accepted by the Commission, would completely eviscerate the meaning and intent behind the porting condition and misconstrue the narrow exception intended for "state-specific" pricing. The Commission should allow the porting intended by Commitment 7.1 and determine that bill-and-keep arrangements for the transport and termination of telecommunications and the Shared Facility Pricing Arrangement are not "state-specific pricing" and thus are subject to porting under Commitment 7.1 to other states. Allowing porting would ensure that the public enjoys the

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[7] *Id.* at pp. 172-173.

[8] Petition at 1.

[9] *Id.* at 1.

benefits of competition that Commitment 7.1 was extended to provide. In contrast, adopting the narrow interpretation advocated by AT&T/BellSouth will allow them to flaunt the merger condition and undermine the process in which applicants agree to voluntary merger conditions to address potential competitive concerns.

II. THE COMMISSION SHOULD RATIFY THE PURPOSE OF COMMITMENT 7.1

Commitment 7.1 was intended to ease market entry, perpetuate the best practices of the acquired company, and to streamline the overall process for entering into interconnection agreements. When the AT&T/BellSouth transaction arose, concerns were raised that allowing AT&T to acquire BellSouth would make it considerably more difficult for competitors to reach suitable interconnection agreements. Similar concerns had been raised in prior merger transactions which had caused the Commission to impose commitments relating to the porting of agreements. In particular, in its approval of the SBC/Ameritech merger, the Commission noted, in adopting a similar (though distinct, as described further below) condition regarding the porting of interconnection agreements, that the condition was "designed to facilitate market entry . . . as well as the spread of best practices."[10] The Commission was urged by a number of CLECs in the AT&T/BellSouth proceeding to take a similar approach by allowing them to adopt interconnection agreements across state lines in order to "permit CLECs to preserve at least for the duration of the interconnection agreement the best respective practices of either of the merged companies in any state."[11] In addition, a number of cable commenters in the

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[10] *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee,* Memorandum Opinion and Order, 14 FCC Rcd 14712 at para. 388 (rel. Oct. 8, 1999) ("*SBC/Ameritech Merger Order*").

[11] *See Ex Parte Letter*, Access Point, Inc., CAN Communications Services, Inc., Cavalier Telephone, LLC, DeltaCom, Inc., Florida Digital Network Inc d/b/a FDN Communications, Inc., Globalcom Communications, Inc., and Pac-West Telecomm, Inc., WC Docket No. 06-74 (filed Dec. 22, 2006).

AT&T/BellSouth merger proceeding requested the ability to port interconnection agreements in order to "[r]educe the [c]ost and [d]elay of [n]egotiating interconnection agreements."[12] These same cable commenters noted that any "express or implicit strategy by AT&T that creates unnecessary litigation and/or arbitration costs would harm competitors far more than it would harm AT&T."[13]

While Petitioners acknowledge a number of the reasons for the adoption of Commitment 7.1, they conveniently fail to mention the specific bill-and-keep example that was presented by certain cable companies in support of the porting commitment. Specifically, the cable companies noted that "AT&T's affiliate in Connecticut, Southern New England Telephone ("SNET") ... forced Cablevision to arbitrate its request that the carriers exchange traffic on a bill and keep basis, even though SNET previously agreed to a bill and keep arrangement with Cablevision and offered bill and keep to legacy AT&T."[14] They went on to note that "[i]t is because of the types of practices discussed above that the Cable Companies proposed several conditions designed to mitigate AT&T's ability to impose on them the costs of protracted negotiations and arbitrations," including a commitment that competitors be permitted "to opt into any negotiation or arbitrated interconnection agreement approved and effective in any AT&T/Bellsouth in-region state, subject to state-specific pricing or performance plans."[15] It is clear, based on this specific example, that the commenters expressly contemplated the porting of

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[12] *See Ex Parte Presentation*, Advance/Newhouse Communications, Cablevision Systems Corp., Charter Communications, Cox Communications, and Insight Communications Company, WC Docket No. 06-74 at 11 (filed Sept. 27, 2006).

[13] *Id.* at 11-12.

[14] *See* Comments on AT&T's Proposed Conditions filed by Advance/Newhouse Communications, Cablevision Systems Corporation, Charter Communications, Cox Communications, and Insight Communications Company, WC Docket No. 06-74 at 8 (filed Oct. 24, 2006).

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

bill-and-keep arrangements and did not intend such arrangements to be automatically excluded pursuant to the state-specific exception of the merger commitment. Significantly, Commitment 7.1 closely tracks the cable companies' proposal, thus providing compelling evidence that the state-specific pricing exception was not intended to automatically prohibit the porting of bill and keep arrangements.

Accepting Petitioners overly broad definition of "state-specific" pricing to effectively exclude bill and keep pricing arrangements and facility pricing arrangements would countermand the stated purposes for reaching Commitment 7.1. Having to renegotiate pricing arrangements that do not infringe upon state-specific rules or regulations certainly would not reduce transaction costs and streamline the process of negotiating interconnection arrangements. To the contrary, imposing such a broad exception to Commitment 7.1 would grant Petitioners a broad veto right over a broad range of interconnection agreements, and enable them to preclude further market entry.[16] Having to renegotiate a rate for each state would avoid the benefits of having such a merger commitment in the first place.

It is not surprising that Petitioners are attempting to avoid adhering to their merger commitments. Petitioners have a history of avoiding and trying to get out of particular merger commitments after the fact, and this situation is no different. However, as noted above, it is apparent that the purpose and intent of Commitment 7.1 was not to specifically exclude bill and keep arrangements - and Petitioners should not be able to avoid its prior commitments post-merger.

[16] Indeed, MetroPCS understands that AT&T has resisted complying with other commitments as well – such as allowing carriers to extend the term of an existing interconnection agreement by three years.

III. THE AGREEMENT TO BE PORTED IS A BROAD-BASED REGIONAL AGREEMENT THAT CANNOT BE SHOEHORNED BY AT&T INTO THE STATE-SPECIFIC EXCEPTION

Petitioners' argument is completely undermined by the fact that the interconnection agreement that Sprint is seeking to port is not specific to a particular state. Rather, it was negotiated on a regional basis. Petitioners note that "[t]he Kentucky ICA is the Kentucky version of a nine-state agreement entered in 2001 between the former BellSouth ILECs, Sprint CLEC and Sprint PCS to govern the three parties' relationships in the nine southeastern states in the former BellSouth region."[17] A regional, broad-based agreement of this nature is precisely the sort of agreement to which the porting requirement should apply. This certainly is not an atypical, "one-off" state-specific agreement closely tied to local conditions that Sprint is trying to take advantage of and cram unfairly down Petitioners' throat in other states.

Petitioners' state-specific exception argument must be predicated on a showing that the bill and keep arrangement and the Shared Facility Pricing Arrangement at issue were negotiated on a state-specific basis. Here, however, Petitioners themselves undermine any such claim. For example, Petitioners claim that the traffic mix underlying the agreement "was roughly balanced throughout the nine-state BellSouth region, as was the balance of compensation payments for such traffic."[18] Indeed, Petitioners note that the "arrangement was premised on a BellSouth study of the balance of traffic and payments among the contracting entities *within the nine BellSouth states*."[19] Petitioners further admit that the Shared Facility Pricing Arrangement was

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[17] Petition at 4-5.

[18] *Id.* at 5 (emphasis added). Notably, Petitioners provide no evidence supporting the claim that the bill-and-keep arrangement and shared facility pricing arrangements were expressly premised on balanced traffic findings.

[19] *Id.* at 11 (emphasis in the original).

also "premised on a BellSouth study of the flow of interconnection traffic *within the nine BellSouth states*."[20]

Thus, even if Petitioners' overly broad characterization of state-specific pricing was correct, which it is not, Petitioners' reliance on this type of regional evidence demonstrates that the state-specific exception would not apply here. Simply stated, Commitment 7.1 creates no region-specific pricing exception. Petitioners cannot be allowed to avoid their Commitment 7.1 obligations when, by their own admission, the agreement to be ported is a regionally-negotiated agreement.

Petitioners' claim that the subject agreement is a state-specific agreement premised on balanced traffic flows is further undermined by the fact that Petitioners have not presented any "state-specific" factual evidence about the traffic mix. As a consequence, Petitioners' argument must fail even using its own broad characterization of the state-specific exception – as it has not presented any evidence demonstrating state-specific facts. Petitioners also have not pointed to any state-specific pricing rule or regulation that would prevent it from porting the agreement at issue to additional states.

IV. PETITIONERS' DEFINITION OF STATE-SPECIFIC PRICING IS TOO BROAD AND WOULD EVISCERATE THE PURPOSE AND INTENT OF COMMITMENT 7.1

Petitioners' argument against porting is predicated on the claim that both the bill-and-keep arrangement and the Shared Facility Pricing Arrangement were based on "specific assumptions by BellSouth about the balance of traffic between the BellSouth ILECs and the two Sprint entities within the BellSouth region."[21] Petitioners claim that these pricing arrangements are "specific, not only to the BellSouth states, but to the two Sprint affiliates that were the

[20] *Id.* at 12 (emphases in the original).

[21] *Id.* at 1.

original parties to the agreement."[22] The line of argument, if accepted by the Commission, would allow Petitioners to resist porting virtually any agreement that they do not like.

The reality is that every interconnection agreement is based to a certain extent on the particular facts and circumstances in which the parties to the agreement find themselves. If individualized circumstances were intended to prevent the adoption of agreements across states, then the Commission would never have imposed the broad porting condition in the first place. The purpose of allowing porting on a broad scale was to avoid forcing carriers seeking interconnection from having to wade around in the infinite details that can forestall agreements. The effort of AT&T to defend against the porting request on the ground that the subject agreement was specific to the original parties represents an unacceptable retreat to the case-by-case approach that the Commission purposefully sought to avoid. Adopting Petitioners' reading of Commitment 7.1 would require the Commission to look into the details and intent of each and every interconnection provision to see if a particular term was predicted on a particular set of facts that would not pertain elsewhere. Such an approach would allow Petitioners to erect the very barriers to adoption that Commitment 7.1 was intended to eliminate, simply by claiming a pricing factor was due to a state-specific fact or assumption. This cannot be what was intended.

V. THE STATE-SPECIFIC PRICING EXEMPTION REFERS TO THE STATE TO WHICH AN AGREEMENT IS BEING PORTED

Throughout the Petition, Petitioners claim that the bill-and-keep agreement and the Shared Facility Pricing Arrangement should be deemed specific to the states <u>from which</u> they are being ported, and it uses this argument in an effort to invoke the state-specific pricing exception. In the view of MetroPCS, this approach misconstrues the language in Commitment 7.1. The

[22] *Id.*

proper inquiry is whether the agreement to be ported would violate any state-specific pricing requirements in the state to which it is being ported.

For example, an arbitrated interconnection agreement in State A could be based on TELRIC pricing principles, and the actual rates set forth in the agreement would then be the TELRIC rates approved by the public utility commission in State A. An effort to port that agreement into State B could be "subject to state-specific pricing" in State B, if State B had adopted different TELRIC rates for the same categories of service. Viewed in this manner, the underlying purpose of this "state-specific pricing" exception is to prevent the porting requirement from undermining the local rate setting authority of individual states.

Unfortunately for Petitioners, this view of the state-specific pricing exception can give it no comfort in this instance. The nine-state agreement that underlies the dispute is a voluntary agreement, not an arbitrated agreement. Thus, the appropriate inquiry when a requesting party seeks to port this agreement from State A to State B is whether State B prohibits carriers from entering into voluntary bill and keep arrangements. If there is no such prohibition, porting the agreement will not violate any state-specific pricing requirement, and must be permitted.

The above reading of Commitment 7.1 is bolstered by the language used by the Commission for a similar merger commitment in its consideration of the SBC/Ameritech merger. In SBC/Ameritech, the Commission imposed a condition on the merging parties such that "where it is feasible given technical limitations, SBC/Ameritech will make available to any requesting telecommunications carrier in any of its 13 states any interconnection arrangement or UNE in any other of the same 13 states that was negotiated by an affiliate of SBC, subject to state-specific pricing."[23] This in-region commitment was deemed by the Commission to be "exclusive of price" and it was noted that "[t]he price(s) for such interconnection arrangement or

[23] *SBC/Ameritech Merger Order* at para. 388.

UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable."[24] This language clearly indicated that the "state-specific pricing" language was intended to refer to the state to which the agreement is being ported. Significantly, however, the porting commitment to which AT&T/BellSouth voluntarily subjected itself has not been deemed by the Commission to be "exclusive of price." Thus, parties must be allowed to port the pricing from the nine-state agreement into another state as long as the bill and keep and Shared Facility Pricing Arrangement do not violate any state-specific pricing restrictions.

VI. THE MERGER CONDITION IS BROADER THAN SECTION 252(i)

Petitioners also argue that a carrier cannot adopt an agreement pursuant to Commitment 7.1 if the interconnection agreement could not otherwise be adopted pursuant to Section 252(i).[25] This is an incorrect and nonsensical reading of Commitment 7.1. If Petitioners were correct, then the merger condition would not have been necessary or would have been drafted in a considerably different way. Specifically, if the Commission had wanted to limit the scope of Commitment 7.1 as Petitioners suggest solely to those situations where a carrier could adopt under Section 252(i) it would have placed such limiting language in Commitment 7.1, or would have used language similar to Section 51.809(b) of the Commission's rules.[26] Instead, Commitment 7.1 was broadly drafted with no reference to Section 252(i) and no broad qualifying language. Clearly, under these circumstances, Commitment 7.1 was meant to allow carriers a tool *in addition* to Section 252(i) to allow them to avoid time consuming and costly arbitrations before entering the market.

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[24] *Id.* at Appendix C, para. 43.

[25] Petition at 15.

[26] 47 C.F.R. § 51.809(b) implements Section 252(i) of the Communications Act.

The Commission limited adoption under Commitment 7.1 solely to those situations where adoption under Commitment 7.1 would be inconsistent "with the laws and regulatory requirements of, the state for which the request is made."[27] This is in marked contrast to what Petitioners are trying to read into Commitment 7.1 through Section 252(i). Section 51.809, which implements Section 252(i), allows ILECs to refuse an interconnection agreement only where they have proven to the state commission where the agreement is trying to be adopted that the costs of providing a particular agreement are greater than the costs to provide the agreement to the original carrier, or the provision of interconnection in the way contemplated by the agreement is not technically feasible.[28] As MetroPCS understands, Petitioners are not claiming that the nine-state agreement is technically infeasible in the states where Sprint is trying to port it, nor have Petitioners objected that it costs more. Rather, Petitioners are basing their argument on the fact that it finds bill and keep a form of rate. As explained above, that argument does not hold water based on the history of Commitment 7.1.

Lastly, Petitioners' position is inconsistent with the position that AT&T has taken at the state level - where it has argued that only the Commission has the authority to interpret Commitment 7.1 and the state commissions have no meaningful role. If the Section 252(i) limitations are read into Commitment 7.1, each state commission would be obligated to make the determination whether the exceptions in 51.809(b) apply. Petitioners cannot have it both ways. Since Commitment 7.1 was designed to permit carriers to avoid time consuming and costly state by state arbitrations, MetroPCS believes that the proper reading is that the only limitations on adoption of agreements under Commitment 7.1 are those strictly contained within the Commitment itself and the exceptions of 51.809(b) should not be read into Commitment 7.1.

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[27] *AT&T/BellSouth Merger Order* at Appendix F.

[28] 47 C.F.R. § 51.809(b).

VII. CONCLUSION

For the foregoing reasons, the Commission should clarify Merger Commitment 7.1 as described above.

Respectfully submitted,

MetroPCS Communications, Inc.

By: /s/ Mark A. Stachiw
Executive Vice President, General Counsel
& Secretary
MetroPCS Communications, Inc.
2250 Lakeside Blvd.
Richardson, Texas 75082
Telephone: (214) 265-2550
Facsimile: (866) 685-9618

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