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Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WC Docket No. 08-23, *In the Matter of AT&T ILECs' Petition for Declaratory Ruling*

Dear Ms. Dortch:

On February 5, 2008, AT&T filed the above-referenced Petition for Declaratory Ruling to prevent Sprint Nextel (Sprint) from improperly turning Merger Commitment 7.1 in the *AT&T/BellSouth Merger Order* into an instrument of economically irrational arbitrage, contrary to its express terms and stated purpose. Specifically, AT&T sought a ruling that Commitment 7.1 does not authorize Sprint to port a bill and keep arrangement for the transport and termination of telecommunications from one state to another. I write to update the record and to amplify why Merger Commitment 7.1 does not sanction the porting of bill and keep arrangements from one state to another.

Merger Commitment 7.1 requires AT&T ILECs to allow requesting telecommunications carriers to port effective interconnection agreements from one state in the AT&T/BellSouth ILEC territory to another.[1] That commitment is not unqualified, however, and among its core limitations is the proviso that the ported agreement shall be "subject to state-specific pricing." As we showed in our previous filings and further explain below, a bill-and-keep arrangement is inherently a pricing arrangement, and, under current Commission rules, it is a state-specific pricing arrangement. As such, it cannot be ported from one state to another. Sprint nonetheless maintains that bill-and-keep is a pricing methodology, not a price, and that the particular bill-and-keep arrangement it seeks to port is not state-specific. These arguments are meritless.

To begin with, both the Act and the Commission's rules expressly refer to bill-and-keep as a "charge" or a "rate." The Act describes bill-and-keep in section 252(d)(2), which is titled "CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC." Notably, that subsection establishes a single pricing standard for transport and termination of traffic, irrespective of whether a reciprocal compensation rate or bill-and-keep is established. Either way, the arrangement must provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that

[1] *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, Appendix F, at 149.

originate on the network facilities of the other carrier. This confirms that bill-and-keep is just one particular pricing arrangement for transport and termination and cannot rationally be treated differently from a positive reciprocal compensation rate for purposes of Commitment 7.1. The Commission's rules, as well, characterize bill-and-keep as a price. In particular, section 51.705 of those rules, which is entitled "Incumbent LECs' rates for transport and termination," states: "(a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of … (3) a bill-and-keep arrangement, as provided in § 51.713."

Sprint's only response is to ignore the language of the Act and the Commission's rules and to insist that bill-and-keep is a pricing *methodology*, not a price. But that answer is mere sophistry because there is no meaningful distinction between a pricing methodology and a price when that methodology dictates one and only one price. Thus, regardless of whether bill-and-keep could be considered a pricing methodology, it undeniably must be considered a price -- a price of zero for traffic exchanges.

But beyond the fact that Sprint's purported distinction between methodology and price in the context of bill-and-keep is based on empty semantics, it also flies in the face of the statutory regime. Under that regime, the Commission has broad discretion in its implementation of section 252(d) of the Act to determine the circumstances, if any, in which bill and keep should apply to traffic subject to section 251(b)(5),[2] but it is the *states* that actually give effect to the Commission's rules and impose bill and keep in accordance with them, just as they impose other prices under section 252. Hence section 51.705 of the Commission's rules states that "an incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, *at the election of the state commission*, on the basis of: (1) the forward-looking economic costs of such offerings …; (2) Default proxies …; or (3) A bill-and-keep arrangement, as provided in § 51.713" (emphasis added). Section 51.713(b), in turn, states: "*A state commission* may impose bill-and-keep arrangements if the *state commission* determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b)" (emphasis added). This framework, under which the *states* establish bill-and-keep arrangements in accordance with rules adopted by the Commission, cannot be squared with Sprint's claim that bill-and-keep is not a rate. To the contrary, it is the very same framework that applies to other rates.

Indeed, consistent with this framework, numerous states have issued orders addressing when traffic should be considered balanced, for purposes of the Commission's rules, such that bill-and-keep applies. For example:

- The Kansas Corporation Commission, in a "mega-arbitration" between AT&T Kansas (f/k/a SBC Kansas) and numerous CLECs, adopted a proposal pursuant to

[2] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999) ("We think the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§251 and 252, added by the Telecommunications Act of 1996.")

which two carriers would exchange 251(b)(5) traffic on a bill-and-keep basis if the traffic between those carriers was within 5 percent of equilibrium and the minutes of use differential did not exceed 7,500,000 per month for a three-month period.[3]

- The Public Utilities Commission of Ohio, in establishing an interim bill-and-keep arrangement between two arbitrating carriers, ruled that the parties would revert to reciprocal compensation payments if it were determined that their traffic was out of balance, which the Ohio commission defined as falling outside the 55 percent to 45 percent range.[4]

- The Oklahoma Corporation Commission ruled that bill-and-keep would apply if the amount of traffic exchanged between the parties did not exceed +/- 5% away from equilibrium for three consecutive months, and rejected a proposal to impose an additional threshold based on minutes of use.[5]

These state commission decisions implementing the FCC's directive regarding bill-and-keep confirm, not only that bill and keep is a rate, but that it is a *state-specific* rate. While under current federal rules, bill and keep may be imposed by a state only when traffic is balanced, states have been given the responsibility for determining precisely when traffic is sufficiently balanced to warrant bill-and-keep, and as the above examples demonstrate, the results vary from state to state. The determination of when to impose bill and keep arrangements, pursuant to section 51.713, is thus a state-specific prerogative, and to ignore that prerogative is no different from ignoring a state's pricing decisions in any other context.

To be sure, if the FCC decides in the future to change its rules regarding bill-and-keep and to require that all traffic subject to section 251(b)(5) be exchanged on a bill-and-keep basis, an argument could be made at that time that bill-and-keep is no longer state-specific pricing. But that is not the case today. Today, Commission rules provide that bill-and-keep may be imposed only under certain circumstances – circumstances that may be present in some states (and as between some carriers) but not others – and it is left to each state to determine whether the requisite traffic balance exists.

Sprint attempts to confuse matters by pointing to the fact that the bill-and-keep provision it wishes to port was the product of a multi-state negotiation. That argument, however, is nothing more than a red herring. The merger commitment plainly states that a ported agreement is subject

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[3] *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996*, No. 05-BTKT-365-ARB, 2005 Kan. PUC LEXIS 689, at ¶¶ 46, 49 (Kan. Corp. Comm'n June 6, 2005).

[4] *In re Petition of Sprint Communications Company L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with The Chillicothe Telephone Company*, No. 06-1257-TP-ARB, 2007 Ohio PUC LEXIS 174, at *41-*45 (Ohio Pub. Utils. Comm'n Apr. 11, 2007).

[5] *Petition of Navigator Telecommunications, LLC for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, No. PUD 200400499, 2006 Okla. PUC LEXIS 63, at *90-92 (Okla. Pub. Utils. Comm'n Mar. 24, 2006).

to state-specific pricing. Thus, when Sprint ports the Kentucky ICA to another state, that ICA must be conformed to reflect the pricing that would apply in the port-to state. This means that if traffic is balanced under the rules of the port-to state, bill-and-keep should apply; if not, it does not apply.

In this respect, the application of the merger commitment to bill-and-keep is consistent with its application to any other pricing term. The Kentucky ICA includes pricing provisions for hundreds of products and services aside from transport and termination. Notably, with respect to each of these, Sprint agrees that the "state-specific pricing" condition in Merger Commitment 7.1 requires that those provisions be converted to pricing provisions specific to each state to which the ICA is to be ported. Sprint agrees, for example, that the prices in the Kentucky ICA for 2-wire analog loops should be converted to state-specific prices in the port-to state; that the fees in the Kentucky ICA for per foot conduit occupancy should be converted to state-specific fees in the port-to state; and that the resale discounts in the Kentucky ICA should be converted to state-specific resale discounts in the port-to state. It is only with respect to bill-and-keep that Sprint embarks on a different course – claiming that "state-specific pricing" references pricing in the "port-from" state, not the "port-to" state. But this is at war with the plain language of Merger Commitment 7.1. The commitment does not say, as Sprint would have it, that "state-specific pricing terms may not be ported." If that were the case, the focus would properly be on whether the bill-and-keep provision in the Kentucky ICA was state-specific.[6] Instead, the commitment states that the ported agreement shall be *subject to* state-specific pricing. The only sensible construction of that language is that the rates (including any bill-and-keep arrangement) contained in a ported agreement must be conformed to the pricing rules of the port-to state.

Indeed, that is precisely what the Staff of the Illinois Commerce Commission just concluded, in an ongoing proceeding concerning Sprint Nextel's proposed port of the Kentucky ICA to Illinois. In pre-filed testimony in that proceeding, Staff's witness testified:

> **Q. In your opinion, is a reciprocal compensation rate "state specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Rates for the transport and termination of local traffic transmitted by one carrier to another have been established in Illinois Commerce Commission tariffs, as well as approved by this Commission in interconnection agreements between carriers. These are state-specific rates. . . .
>
> **Q. In your opinion, is a bill-and-keep reciprocal compensation regime "state-specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Under bill-and-keep, each carrier's reciprocal compensation rate is set at zero (for application by both parties to the traffic exchange), rather

[6] AT&T has previously shown that, in all events, that the bill-and-keep provision that Sprint seeks to port is specific to the port-from state (Kentucky). *See* AT&T Reply at 2-8.

> than a positive value for that rate. Each carrier thus provides transport and termination services for the other carrier's local traffic at no charge.
> . . .
>
> **Q. In your opinion, are "traffic balance" considerations, as a component of (or potential condition for) bill and keep reciprocal compensation, "state-specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Relative traffic flows, and whether these flows are approximately "balanced" (i.e. roughly equal between the two carriers involved), has been and remains central to any consideration of bill-and-keep reciprocal compensation. This is true generally, and is true specifically in Illinois.[7]

The ICC Staff has it exactly right. In fact, any other conclusion would be absurd. The very point of the "state-specific pricing" limitation in Merger Commitment 7.1 is to preclude requesting carriers from demanding a "foolish consistency" in the rates charged from one state to the next. In some cases, the pricing differences among states will relate to matters such as population density or differences in terrain. Here the difference has to do with the balance of traffic. For purposes of applying this merger commitment, it makes no difference whether state pricing varies because of divergent population densities or different traffic balances, because in either context, the policy considerations are identical. Just as it would make no sense to allow a requesting carrier to port New York's UNE rates to Wyoming, it would also be nonsensical to import a bill-and-keep arrangement to a state where traffic is out-of-balance. Sprint's proposed construction of Merger Commitment 7.1 is thus, not only inconsistent with its express terms, but its core purpose. The Commission should promptly so conclude.

Sincerely,

/s/ Gary L. Phillips

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[7] Direct Testimony of Jeffrey H. Hoagg, Principal Policy Advisor, Telecommunications Division, Illinois Commerce Commission, *Sprint Comm. L.P. v. Illinois Bell Tel. Co.*, Ill. Comm. Comm'n Docket No. 07-0629 (March 25, 2008).