



COMPETITIVE TELECOM REPORT

TEXALTEL

January 2008

AT&T “Clarifies” Merger Agreement

By: Charles D. Land, Executive Director, TEXALTEL

On November 16, 2007, at&t issued an accessible letter regarding the at&t/BellSouth merger agreement number 7.1, porting of interconnection agreements. All Merger agreements sunset within 42 months of merger approval. Section 7.1 of the merger agreements states:

7.1 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/Bell South 22 state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility and provided, further, that 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.

7.2 The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

If a company is operating under an agreement that expires after January 15, 2008, which includes almost every TEXALTEL member, the company has until the expiration date of the initial term to notify at&t of a request for a 3 year extension.

At&t asserts that for agreements that expire after June 29, 2010 it will not allow the 3 year extension. The CJP agreements expire in September, 2010. But the work around for providers that want to extend the CJP agreement is to opt into the Logix agreement, which has already been extended. In this case, at&t’s position appears to be a stretch, and if someone cared to contest it, they would have a compelling case, but a little cunning is by far the less expensive route.

For providers using another interconnection agreement, such as the CLEC Coalition, TAKE NOTE: your expiration date is this year. If you haven’t done so already, you should be sending at&t your request for the 3 year extension ASAP.

Below is most of the text of the Accessible Letter, without the footnotes. If you wish to view the Accessible Letter in its entirety, please contact Sheri Hicks at

Important Regulatory Deadlines

February 14—Texas Municipal Access Lines Reporting & Remittance due for last quarter 2007.

February 25—Texas USF Report

February 29— Texas 911 report for January

March 1—Federal CPNI Filing Requirement

April 1—Federal USF 499A

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Porting ICAs

Merger Commitment 7.1 allows carriers to port effective interconnection agreements entered into in any state in AT&T's 22-state ILEC operating territory (subject to stated limitations and requirements). Some carriers have inquired why they are not able to port an agreement when the initial term has expired but the agreement itself has not yet been noticed for termination/renegotiation. This letter clarifies that such agreements are, in fact, eligible for porting under Merger Commitment 7.1, and AT&T has consistently implemented the commitment in this manner. However, carriers should be aware that adopted agreements always carry the same expiration date as the underlying agreement that is being adopted. Therefore, if a carrier adopts and ports an ICA whose initial term has expired, subsequent noticing of that ICA for termination and renegotiation will require that the adopted/porting agreement also be renegotiated. Moreover, consistent with federal rules, ICAs that have been noticed for termination/renegotiation are not eligible to be ported because they have already "remain [ed] available for use by telecommunications carriers...for a reasonable period of time." Accordingly, when porting agreements pursuant to Merger Commitment 7.1, carriers should be mindful of whether the ICA, by its terms, is eligible to be noticed for termination/renegotiation or has already been noticed by either party.

Extending ICAs' Terms

Merger Commitment 7.4 allows carriers to extend the terms of their current ICAs for a period of up to three (3) years, subject to amendment to reflect prior and future changes of law. The question has arisen whether ICAs may be extended for three years from the expiration date of the ICA's initial term (as interpreted and implemented by AT&T) or some other date (e.g., the merger close date of December 29, 2006 or the date of a carrier's extension request). While AT&T believes that its interpretation is supported by the plain language of Merger Commitment 7.4, as well as by the *ex parte* documents submitted to the FCC and the negotiations

of the commitment prior to release of the Merger Order, AT&T is modifying its position to allow carriers additional opportunities to extend the terms of their agreements. As such, effective with the date of this Accessible Letter, AT&T will implement Merger Commitment 7.4 as follows:

ICAs Expiring Prior to January 15, 2008

(Option 1): ICAs whose initial terms have already expired, or will expire prior to January 15, 2008, may be extended for up to three years from the date of a carrier's extension request, provided that AT&T receives the carrier's extension request prior to January 15, 2008. An ICA's term may be extended only once pursuant to Merger Commitment 7.4. If no request to extend the ICA's term has been received by AT&T prior to January 15, 2008, the ICA's term may not be extended pursuant to the merger commitment.

ICAs Expiring On or After January 15, 2008

(Option 2): ICAs whose initial terms will expire on or after January 15, 2008, may be extended for up to three years from the expiration date of the ICA's initial term, provided that (i) AT&T receives a carrier's extension request prior to the ICA's expiration date of the initial term, and (ii) the ICA's initial term expires before June 29, 2010, the sunset date of the merger commitment. ICAs whose initial term expires after June 29, 2010 are not eligible for extension. An ICA's term may be extended only once pursuant to Merger Commitment 7.4. If no request to extend the ICA's term has been received by AT&T as of the expiration date of the ICA's initial term, the ICA may not be extended pursuant to the merger commitment.

Important Note for Both Options

Above: The expiration date of an agreement's initial term may be either express (e.g., "January 15, 2008") or a date that requires calculation (e.g., "three years from the Effective Date"). Initial terms may also be a date established by a filed and ap-



proved amendment (e.g., an ICA's initial term expired on January 15, 2001, but an amendment extended the expiration date until January 15, 2003, in which case the latter is still considered the expiration date of the ICA's initial term). For purposes of implementing Merger Commitment 7.4, the expiration date of an agreement's *initial term* will in all cases be used, as described above, to calculate whether the agreement is eligible for extension. Any evergreen term, renewal term or default term (e.g., month-to-month or year-to-year) or any other term that continues the agreement beyond the expiration of its initial term will have no bearing on whether and how the agreement may be extended. This has important implications for the options discussed above, including without limitation:

For Option 1, the initial term of an ICA may have already expired but the ICA may still be in effect (e.g., the ICA expired on June 1, 2007 and it is presently in effect on a month-to-month basis). The required extension notice under Option 1 must be received by AT&T prior to January 15, 2008, regardless of the fact that the ICA remains in effect on a month-to-month or other basis. On January 15, 2008, unless a carrier has submitted the required notice to extend the term, it will be deemed to have waived any extension rights with respect to that ICA.

For Option 2, the required term extension notice must be received by AT&T prior to the expiration date of the ICA's initial term, regardless of whether the ICA continues in effect beyond the expiration date of the initial term. Upon the expiration date of an ICA's initial term, a carrier will be deemed to have waived any extension rights with respect to that ICA.

The options under Merger Commitment 7.4 as de-

scribed in this Accessible Letter are available to carriers regardless of whether they have already submitted an extension request, and regardless of the disposition of that prior request. However, carriers desiring to extend the terms of their ICAs as stated herein must submit another extension request, as AT&T is unable to decide unilaterally what any carrier may want to avail itself of at this point in time. **Carriers may not rely on prior extension requests to avail themselves of the options discussed in this Accessible Letter. Carriers who do not submit an extension request, by the time periods indicated above, may not extend their ICAs pursuant to Merger Commitment 7.4 as described herein.** Extension Request Forms can be found by CLECs on AT&T's CLEC Online website at <https://clec.att.com/clec> and by paging/wireless carriers at <https://primeaccess.att.com/>.

At&t Sues Creative Entrepreneur

By: Charles D. Land, Executive Director, TEXALTEL

A recent case before the Texas PUC involves an act in which At&t provided Pay Telephone Exchange Access Service (PTEAS) lines to Calls For Caring, Inc. (CFC) from 1999 until 2004. Access to directory assistance (DA) is included in the monthly charge on those lines, and thus there is no per-call charge for DA on PTEAS lines. This is a legacy requirement – since at&t does not charge per call for DA calls on its own coin lines it was not allowed to charge for DA on PTEAS lines provided to competing payphone providers.

Some of the lines had as many as 5000 DA calls per month. CFC is a defunct corporation which forfeited its charter in March, 2001, but continued doing business. Dennis Dees is/was the President of CFC.

At&t noticed the high usage per line, served notice, and disconnected the PTEAS lines in 2004. Then at&t filed suit in district court against CFC and Dennis Dees seeking \$762,506 in restitution for 686,936 directory assistance calls, claiming that Dennis Dees had committed fraud, breach of contract, quantum merit and conspiracy. At&t stated in its



petition that it was naming Dennis Dees as a defendant personally because the corporate charter of CFC has been revoked and he continued doing business without a corporate charter.

The PTEAS lines ordered by CFC were provided to many different addresses. Counts of DA calls made on each line were shown on each bill each month, but with a zero rate (which is as it should be, but shows at&t was aware of the calling volume all along). At&t appears to allege that CFC ordered these lines for third parties who used them to make DA calls. At&t stated that it has no regular monitoring of PTEAS lines for DA abuse.

At&t's tariff states:

"No person, business, government or entity of any type will be permitted to subscribe to PTEASS where such service is being used primarily for the purpose of placing directory assistance calls. If such PTEASS is installed, and is subsequently discovered by the Telephone Company, by whatever means, that such service is being used primarily for the purpose of placing directory assistance calls, such service will be disconnected after giving the customer a written 20-day notice of violation and disconnection."

CFC's defense is that at&t's sole remedy is to refuse to provide or to disconnect the service if it determines that the service is used primarily to call DA. CFC contends that at&t is violating its own tariffs if it attempts to back bill and to collect charges that are prohibited in its tariff. CFC characterizes this as the "Filed rate doctrine" – which essentially says that the tariff is the contract between at&t and the customer. CFC also appears to be claiming some ignorance as to the use its customers make of the lines. And CFC complains that at&t is engaging in "cramming" by assessing unauthorized charges

At&t states that CFC breached its contract by violating the tariff prohibition against using the PTEAS line primarily for directory assistance. At&t also alleges fraud in that CFC failed to disclose how it intended to use the services (although at&t never asked), and that at&t would have refused to provide the services had CFC been forthcoming. At&t stated

that they had not sued or taken any action against any other PTEAS customers for using excessive DA.

Staff filed a motion to dismiss, stating that the petition was a duplication of litigation (since the lawsuit was already in district court) and that the complainant had not requested any relief that the Commission could grant. CFC changed counsel and hired Lambeth Townsend (former PUC General Counsel) as its attorney and revised its complaint to request that the Commission enter an order declaring that:

- (a) SWBT is required to apply the terms of the tariff to the services provided to CFC between 1999-2004;
- (b) SWBT's PTEASS tariff provides that termination of services is the exclusive remedy for excessive directory assistance usage over lines provided under the tariff;
- (c) SWBT is prohibited from charging any party for local DA calls made on pay phones;
- (d) SWBT is prohibited from seeking payment from CFC or Mr. Dees for local DA calls made over PTEASS lines provided by CFC; and,
- (e) SWBT's demand for payment by CFC for DA calls violates PURA.

After some wrangling, the Commission agreed that it would decide on the following issue:

"Does AT&T Texas's general exchange tariff preclude AT&T Texas from pursuing remedies in court for directory assistance calls under theories of fraud, breach of contract and/or quantum merit?"

After briefing, staff proposes that the answer be "yes".

The Commission denied the request. A memo written by Commissioner Parsley (quoted below) explains the theory. Her view is that the filed rate doctrine protects the utility from civil suits that its tariffed rates, which have been set by a regulator, are unfair or unreasonable, and that this doctrine does not protect customers from a utility's allegation of fraud. She goes on to state that if the legal issue to be determined was whether a tariff violation had occurred, jurisdiction would lie with the PUC. If the legal issue is breach of contract, then it is the courts,



not the PUC, that have jurisdiction. In breach cases, there is usually an issue of damages, and the PUC does not have authority to award damages.

Commissioner Parsley stated:

With respect to the certified issue before us in this matter, there appears to be no case on point as to whether the filed rate doctrine bars a utility from seeking damages from its customer based on the customer's allegedly fraudulent actions.⁷ It is clear that the tariff itself does not address fraudulent conduct. While the filed rate doctrine has been used to shield a utility from allegations of tortious conduct or breach of contract: I do not believe that, in this instance, the filed rate doctrine works to shield a utility's customer from the utility's claims of fraud.

The primary purpose of the filed rate doctrine is to protect a regulated entity from judicial claims that the entity's "filed" or tariffed rates are unfair or too high, thereby leaving the determination of the reasonableness of the rates to the regulatory body charged by law with setting and reviewing those rates.³ As best I can tell, the filed rate doctrine has not been extended to protect the *customer* of a regulated entity from a fraud claim brought by the regulated entity. Nor would extending that doctrine to this fact scenario further the stated goal of the doctrine—to ensure that a utility does not have to face judicial claims based on the correctness of their rates when a different, regulatory body is responsible by law for the US. Supreme Court has expressly declined to determine whether the filed rate doctrine applies to bar claims of fraud against a utility's ratepayer. ⁴ setting or reviewing those rates. Therefore, I do not believe that the filed rate doctrine bars AT&T's claims of fraud.

As to the breach of contract claims, this Commission has historically determined that our jurisdiction does not permit us to adjudicate a true breach of contract claim.⁴ While I agree that a tariff violation is not just a con-

tract, but the law: under these circumstances it is for the district court to determine whether the allegations put forth by AT&T are true breach of contract claims or, instead, tariff violations.⁶ If the allegations amount to tariff violations, then jurisdiction resides here. If not, the district court properly has jurisdiction over those claims.

Other than the entertainment value, the question is – what is the relevance of this proceeding to TEXALTEL members? The relevance is whether at&t can sue, a long time after the fact, for alleged misuse of at&t services. Competitors, in order to survive, have to be adept at finding the lowest cost tariff when purchasing from at&t. At&t does its best to make that difficult by posting obscure tariffs and by having contracts and off tariff terms and prices that are not published. By alleging fraud at&t has tried to position itself to avoid dismissal because of statute of limitations. While the fact situation in this case is rare, it could be ugly if at&t were allowed to make up charges and retroactively bill every time a competitor or customer used a service in some way that at&t did not intend. This isn't an exact quote, but Ron Henriksen once said "You'll never make money if you do business the way that at&t wants you to."

The Commission's decision just punts the issue back to the courts, where it started. While we would have preferred to have the Commission that at&t's remedy is limited by its tariffs – to disconnect service (and not to back bill or sue for damages), the PUC has left it to the courts as to whether at&t has a proper claim for damages.

FCC Pretexting CPNI Rules Effective

December 8, 2007

Filing Deadline March 1, 2008

In April 2007, the FCC released new rules regulating Customer Proprietary Network Information, also known as CPNI, to address a new issue called "pretexting" where a third party calls a carrier and pretends to be the customer of record to obtain



call detail information and other customer proprietary information. These new rules apply only to customer initiated calls but they cover all telecommunications and interconnected VoIP carriers.

CPNI is defined in the Federal Telecom Act of 1996 as the quantity or configuration of a service, location of a service or customer, amount of serviced used by the customer, or information contained in bills pertaining to telephone exchange or other toll services other than subscriber list information. The typical subscriber list information includes name, phone number and address.

In 2004 a new business popped up wherein third-party vendors such as private investigators or data brokers contacted telecom companies with the purpose of obtaining unauthorized access to certain call detail information to provide to clients for a fee. The brokers called on the pretext of being the customer of record, set up online accounts for the customer and obtained the proprietary information. In 2006, these brokers came under intense scrutiny from the US House Commerce Committee Oversight and Investigations Committee, the Federal Trade Commission and civil action lawsuits by the customers involved. In 2006, Congress passed the Telephone Records and Privacy Protection act criminalizing pretexting, prohibiting the sale, purchase or receipt of confidential phone records information through fraudulent means. Upon adoption of the law, the FCC got serious about protecting customer privacy by adopting these sweeping changes.

How to Keep Your CPNI Nose Clean

Do not release customer call detail information or customer proprietary network information to anyone that initiates the call to the carrier without obtaining the pre-established customer password for the account, the customer requests the information be sent to the address on record or the carrier calls the customer back at the number on record.

Customers must be notified immediately of any account activity, including change in password, address of record or change of online account information.

Online accounts must be password protected and customers seeking CPNI information at retail locations must show photo identification.

Customer must opt into sharing CPNI information with third parties for marketing purposes, including joint venture partners and partners.

Contract Business Customers are exempt from these particular rules if the customer is serviced by a designated account representative.

What to Do In Case of Breach

You are required to notify the US Secret Service and the FBI within seven days of a breach.

Customers must be notified within seven more business days unless there is immediate danger or harm to the customer which triggers immediate notification.

An electronic notification department for FBI and Secret Service reporting has been established at the following website and it looks to be limited in operation at this point - www.cpnireporting.gov. It looks like carriers need to pre-establish an account and a password however there is no indication on the website how to establish an account.

Annual Filing Requirement

Carriers are required to annually file CPNI certification with the FCC by March 1 that includes an affidavit by an officer of the company stating that procedures have been implemented to prevent CPNI breaches, summary of all customer complaints within the previous year concerning unauthorized disclosure of CPNI, and officer affidavit that all carrier procedures are sufficient to ensure compliance with CPNI rules. The certification must be filed in EB Docket 06-36.

FCC Enforcement

The FCC does not allow a safe harbor for CPNI breaches. If a breach occurs, they will presume the carrier did not have adequate procedures in place to protect CPNI data. The burden is on the carrier to prove that it took reasonable steps to protect the data in the event of a breach. The FCC will initiate enforcement actions and administer penalties to any carrier not adequately safeguarding their customer's



CPNI data.

What Can You Do to Protect Yourself?

The best thing a carrier can do to protect itself from enforcement actions regarding unauthorized disclosure of CPNI data is to take CPNI and its protection seriously. Make sure your business customer contracts are written effectively, implement written policies and procedures for CPNI disclosure and train employees how to properly disclose CPNI and when to be cautious. Finally, have your CPNI certifications available and make sure to file compliance reports annually.

Most importantly, stay tuned. TEXALTEL is preparing a business aid to keep members informed of CPNI changes and requirements.

Sprint Files for Arbitration over Interconnection Agreement Porting

By: Charles D. Land, Executive Director, TEXALTEL

On December 12, 2007, Sprint filed at the Texas PUC for arbitration. Sprint had requested to port its Kentucky agreement to Texas pursuant to the Section 7.1 of the at&t/Bell South merger commitments. Sprint had been informed that at&t was not going to permit Sprint to port its Kentucky agreement to Texas.

Merger agreement section 7.1 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/Bell South 22 state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility and provided, further, that 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.”

7.2 The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

It has been interesting to see all of the excuses that at&t has been able to dream up to avoid honoring this commitment. At&t first argues jurisdiction – that regardless of whether it is keeping its promises or not, that the Texas Commission does not have jurisdiction to arbitrate the issue. Second, at&t argues that the complaint, which is couched as dispute resolution, is not based on any existing Interconnection Agreement and thus is fatally defective. Third, at&t complains that there is not any Texas law which specifically authorized the Commission to undertake arbitration. One of the more comical excuses is that since the parties to the Kentucky agreement are one CLEC and one wireless provider, that to port the agreement to Texas, there must be one CLEC and one wireless provider in Texas that are parties to it. There are 3 wireless providers and one CLEC in the Sprint family that are complainants and who want to port in the agreement. At&t has provided copies of rulings from 3 states (Mississippi, South Carolina and Louisiana – not exactly leaders in regulatory intellectuality) where the states denied Sprint’s request to port in the Kentucky agreement. The prevailing reasons give were that the FCC should be making the decision and enforcing the merger agreements.

At a prehearing conference, the parties agreed to exchange red lined versions of the Kentucky agreement. AT&T is to provide its mark up on February 12th. Sprint is to return its red line to at&t on February 22nd. There will be another prehearing conference on March 14, 2008. The Commission has not ruled on at&t’s various motions to dismiss, but the fact that work has started on red



lines is encouraging. We don't know if the Commission will rule soon on the motions or wait until the end of the proceeding.

At&t Pensioners Removed From at&t Arbitration Cases in Texas

In an unprecedented move, the Executive Director of the Public Utility Commissioner of Texas instructed that PUC staffers who receive pensions from former employers who are parties to arbitration proceedings may not serve as arbitrators in cases in which their former employer is a party. Utex has been in a prolonged arbitration case and has been requesting removal of one of the arbitrators, Larry Barnes, (a former director of TEXALTEL) on the basis that Larry is a pensioner and that he has a conflict of interest. In the past, it has been the view that since a pension is a fixed obligation that the pensioner is entitled to regardless of what action he or she takes, that there was not a conflict of interest. The Executive Director's memo is silent on the reasons – whether this change of policy is a change of view of the law or whether it is more of an appearance issue – looks bad to some even if it is legal.

This ruling also affects Gary Mann, a SWBT retiree, and a former TEXALTEL director, President, and friend to us all. We assume that there are a few others who may be affected, but no information has been released.

FCC Adopts, and then Suspends, Rules Limiting Porting Information

By: Charles D. Land, Executive Director, TEXALTEL

On November 8, 2007 the FCC adopted an order which dealt with a number of telephone number portability issues. This order extends to VOIP providers the requirements that have been in place for wireline and wireless carriers to allow numbers to be ported. The FCC recognized that many VOIP providers are not Local Exchange Carriers (LECs) as they are not certificated by the states. Since prior orders requiring LECs to facilitate number porting and to pay

LNP cost recovery fees were only applicable to LECs, VOIP providers had slipped through the cracks. The FCC recognized that many VOIP providers were able to assign numbers and to port in numbers by participating with "partnering LECs".

This order also limited the information that a porting out provider could require a porting in provider to provide for validation of a port on simple ports. Only 4 items can be required: (1) 10-digit telephone number; (2) customer account number; (3) 5-digit zip code; and (4) pass code (if applicable). The justification was that many customers were having their ports blocked or delayed because of the mismatch in records between the porting in and the porting out companies, and that requirements for excessive validation information were making the problem worse. The FCC cited an agreement amongst the cellular providers to only require 3 fields for porting validation.

And last, this order decreed that VOIP providers pay cost recovery fees for number portability on the same basis that Local Exchange Carriers have been required to pay in the past.

This order was issued on November 8th. It is effective 30 days after publication in the Federal Register. The limitation on portability validation is effective 90 days after the release of the FCC order which is February 6, 2008.

On February 5th, the FCC released an order deferring the effective date of the validation limitation until September 30, 2008 for Embarq and until July 31, 2008 for all other providers.



ILEC Quality of Service on the Decline

On February 1, 2008, the FCC released its annual *Quality of Service of Incumbent Local Exchange Carriers*. The report tracks trends in the quality of service of the ILECs to assist consumers and regulators with identifying issues within the industry. The report reflected an interesting overall six-year trend in degradation of service. The trends include that over the past six years, while the percentage of switches with outages is decreasing, actual trouble reports per thousands of lines are increasing by 2.1% annually and repair intervals are increasing by 5.5% annually. The report reflects retail and IXC access customer data for the calendar year 2006.

ILEC Pulls Plug on FBI Wiretaps

A recent government audit revealed several instances that an Incumbent Local Exchange Company disconnected FBI wiretapping for non-payment. The audit revealed agency financial mismanagement that placed the FBI's international wiretapping program in jeopardy because of late payment or non-payment of bills; including disruptions of eavesdropping under the much criticized warrantless tapping under the Foreign Intelligence Surveillance Act responsible for monitoring terroristic threats to the U.S. According to the FBI, there were several instances where late payment led to disruption of services but assured the auditors that the instances were temporary and not significant to American security.



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