

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**May 7, 2008**

**IN RE:**

**PETITION REGARDING NOTICE OF ELECTION  
OF INTERCONNECTION AGREEMENT BY  
NEXTEL SOUTH CORPORATION**

**DOCKET NO.  
07-00161**

**PETITION REGARDING NOTICE OF ELECTION  
OF INTERCONNECTION AGREEMENT BY  
NEXTEL PARTNERS**

**DOCKET NO.  
07-00162**

---

**ORDER DENYING MOTION TO DISMISS**

---

This matter came before Chairman Eddie Roberson, Director Tre Hargett, and Director Sara Kyle of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on March 24, 2008 for consideration of *BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee’s Motion to Dismiss* (“*Motion to Dismiss*”) filed on July 17, 2007.

**BACKGROUND**

On June 22, 2007, Nextel South Corporation (“Nextel”) filed its *Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp.* (“*Petition*”). On the same day, Nextel Partners filed a substantially similar petition seeking identical relief in Docket No. 07-00162.<sup>1</sup> On July 17, 2007, BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T”) filed its *Motion to Dismiss*. Nextel filed its *Response to*

---

<sup>1</sup>At the regularly scheduled Authority Conference held on February 25, 2008, the Authority voted to consolidate Docket Nos. 07-00161 and 07-00162. See *Order Consolidating Dockets and Appointing a Hearing Officer* (March 20, 2008). Because the filings in each docket prior to consolidation are in all material matters identical, any reference to a filing in Docket No. 07-00161 shall be deemed to include a reference to the same filing in Docket No. 07-00162.

*AT&T's Motion to Dismiss ("Nextel Response")* on July 24, 2007.

At its regularly scheduled Authority Conference held on September 24, 2007, the panel voted to hold the docket in abeyance until the status of the interconnection agreement which Nextel sought to adopt in this docket was clarified in a separate pending docket, Docket No. 07-00132.<sup>2</sup> On December 7, 2007, AT&T and Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint") filed an Amendment to the Interconnection Agreement in Docket No. 07-00132. The parties indicated that the amendment resolved the outstanding issues in Docket No. 07-00132. The Authority approved the amendment at its regularly scheduled Authority Conference on January 14, 2008.

On January 31, 2008, the parties were requested to provide an update of their current positions in the instant docket in light of the resolution of Docket No. 07-00132. In response, Nextel filed *Nextel South Corp.'s Motion for Summary Judgment ("Motion for Summary Judgment")* on February 6, 2008. AT&T filed its *Supplemental Submission in Support of AT&T Tennessee's Motion to Dismiss* on February 8, 2008. Nextel filed a response to AT&T's February 8, 2008 filing on February 13, 2008. Also, on February 13, 2008, AT&T filed *Additional Supplemental Authority*. On February 20, 2008, AT&T filed a request asking the Authority to appoint a Hearing Officer and to convene a status conference in the event the Authority exercises jurisdiction over the docket. At its regularly scheduled Authority Conference held on February 25, 2008, the panel voted to appoint the General Counsel or his designee as Hearing Officer to prepare this matter for hearing, including establishing an issues list, setting a briefing schedule and scheduling oral arguments before the panel on the pending motions.

On March 4, 2008, the Hearing Officer filed a *Notice of Briefing Schedule and*

---

<sup>2</sup>See *In re: Petition for Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast*, Docket No. 07-00132.

*Oral Arguments* setting March 11, 2008 as the deadline for briefs and/or additional responsive pleadings to the *Motion to Dismiss* with oral arguments on the *Motion to Dismiss* being set before the panel on March 24, 2008. AT&T filed its additional responsive pleading on March 11, 2008, and Nextel submitted a letter stating that its previous filings fully address its position as to why the *Motion to Dismiss* should be denied.

#### **POSITION OF THE PARTIES**

##### **AT&T**

AT&T's *Motion to Dismiss* asks the Authority to dismiss Nextel's *Petition* for failure to state a claim as provided by Tenn. R. Civil P. 12.02(6). AT&T avers that the *Petition* is premature because Nextel did not follow the dispute resolution process in its existing interconnection agreement.<sup>3</sup> Because Nextel concedes that AT&T disagrees with its attempt to adopt the Sprint ICA, AT&T contends that the disagreement should first be addressed by dispute resolution as required by the current interconnection agreement. AT&T also initially contended that Nextel did not file the *Petition* within a "reasonable amount of time" as required by 47 C.F.R. §51.809(c).<sup>4</sup>

AT&T further maintains that the *Petition* should be dismissed because Nextel claims to rely on the merger commitments in the *Merger Order* as a basis for its attempt to adopt the Sprint ICA. AT&T states that the FCC has exclusive jurisdiction over the merger commitments. In support of this position, AT&T relies on the following language in the *Merger Order* in Appendix F: "...unless otherwise expressly stated to the contrary, all conditions and commitments proposed...are enforceable by the FCC..."<sup>5</sup>

If the TRA determines it has jurisdiction, AT&T urges the TRA to hold the matter

---

<sup>3</sup>*Motion to Dismiss*, pp. 2; 3-4 (July 17, 2007).

<sup>4</sup> During oral argument at the March 24, 2008 Authority Conference, counsel for AT&T conceded that this argument was moot in light of the extension of the Sprint ICA in Docket No. 07-00132. Transcript, p. 10 (March 24, 2008).

<sup>5</sup>*Motion to Dismiss*, pp. 8-11 (July 17, 2007).

in abeyance in light of its February 8, 2007 filing of a petition for declaratory ruling with the FCC. AT&T maintains that its FCC petition resolves the substantive issues involved in this docket. It also maintains that it has requested that the FCC resolve the petition on an expedited basis. AT&T states that the short comment cycle established by the FCC may indicate that the FCC intends to resolve the matter promptly.<sup>6</sup>

### **Nextel**

It is Nextel's position that the TRA has authority to acknowledge Nextel's adoption of the Sprint ICA, and the merger commitments do nothing to alter that jurisdiction. Nextel relies on language in Appendix F of the *Merger Order*, which states that "[i]t 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 . . .*".<sup>7</sup> Nextel also notes that both the Kentucky and Ohio state commissions have recently held that they have concurrent jurisdiction with the FCC over the merger commitments in the *Merger Order*.<sup>8</sup>

Nextel maintains that it was not required to invoke the dispute resolution provisions of its existing agreement. Nextel maintains that AT&T provides no legal authority to support its position in this regard. Nextel relies on a Florida Public Service Commission order to support its position. In that case, in attempting to avoid a unilateral adoption by Z-Tel of a Florida AT&T/Network Telephone Corporation agreement, Florida AT&T claimed that Z-Tel's attempted adoption should be denied because Z-Tel failed to comply with its current, existing agreement. The Florida PSC disagreed and accepted the adoption.<sup>9</sup>

---

<sup>6</sup>Correspondence from Guy Hicks, February 20, 2008.

<sup>7</sup>*Nextel Response*, pp. 10-19 (July 24, 2007).

<sup>8</sup>Correspondence from Melvin Malone, February 13, 2008; February 26, 2008.

<sup>9</sup>*Nextel Response*, pp. 24-25 (July 24, 2007).

## FINDINGS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on March 24, 2008, the panel heard oral arguments on the *Motion to Dismiss*. Based upon argument of counsel and the record as a whole, the panel made the following findings.

1. The Authority has jurisdiction over conflicts arising from adoption of interconnection agreements under Section 252(i) of the Act based upon the language of 47 C.F.R. § 51.809, the rule which implements Section 252(i). Under the plain language of the rule, the FCC clearly intended for state commissions to have concurrent jurisdiction over Section 252(i) adoptions.<sup>10</sup>

2. AT&T's argument regarding timeliness is moot because it is undisputed that the interconnection agreement at issue has been extended until March 19, 2010.

3. Finding decisions of other state commissions persuasive on the issue, the panel found that the dispute resolution provision under the current interconnection agreement does not defeat or supersede Nextel's federal statutory right to adopt an interconnection agreement under Section 252(i) of the Act.

In light of these findings, the panel voted unanimously to deny the *Motion to Dismiss* and to decline to hold the matter in abeyance pending FCC action on AT&T's petition for declaratory ruling. The panel further voted to set the pending *Motion for Summary Judgment* for the April 21, 2008 Authority Conference and instructed the Hearing Officer to determine if additional briefing is desired on the *Motion for Summary Judgment* and to determine the details regarding oral argument, if such is requested.

---

<sup>10</sup> Subsection (a) of the rule sets out the obligations of an ILEC to make approved agreements available for adoption by other carriers. Subsection (b) of the rule provides that "... paragraph (a) of this section shall not apply where the incumbent LEC proves to the *state commission* . . ." (*emphasis added*) one of the limited exceptions enumerated in the rule.

**IT IS THEREFORE ORDERED THAT:**

1. BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee *Motion to Dismiss* is denied.

2. The pending *Motion for Summary Judgment* is set for the April 21, 2008 Authority Conference. The Hearing Officer shall determine if additional briefing is desired on the *Motion for Summary Judgment* and determine the details regarding oral argument, if such is requested



Eddie Roberson, Chairman



Tre Hargett, Director



Sara Kyle, Director