

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 5, 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 DEFERRING DELIBERATIONS ON MOTION FOR SUMMARY
JUDGMENT**

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 April 21, 2008 for consideration of *Nextel’s Motion for Summary Judgment* (“*Motion for Summary Judgment*”) filed on February 6, 2008.

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. 07-00162.¹ 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*

¹At 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 ("Sprint ICA") which Nextel sought to adopt in this docket was clarified in a separate pending docket, Docket No. 07-00132.² 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, 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 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 Oral Arguments* setting March 11, 2008 as the deadline for briefs and/or additional

²See *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.

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.

At the regularly scheduled March 24, 2008 Authority Conference, 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.

The Hearing Officer filed a *Notice of Briefing Schedule and Oral Arguments* on March 25, 2008. AT&T filed its *AT&T Tennessee's Brief in Opposition to Nextel's Motion for Summary Judgment* ("*AT&T's Response*") on April 4, 2008, and Nextel filed its *Nextel's Reply to AT&T Tennessee's Brief in Opposition to Nextel's Motion for Summary Judgment* ("*Nextel's Reply*") on April 10, 2008. AT&T filed the affidavit of P.L. (Scot) Ferguson on April 15, 2008, and Nextel filed a motion to strike the affidavit in its entirety ("*Motion to Strike*") on April 17, 2008.

POSITION OF THE PARTIES

A. Nextel's *Motion for Summary Judgment*

As the basis for its *Motion for Summary Judgment*, Nextel asserts that there is no genuine issue of disputed material fact concerning its adoption of the Sprint ICA. Therefore, Nextel states that it is entitled as a matter of law to adopt the agreement under

Merger Commitments Nos. 1 and 2³ in the *Merger Order* and section 252(i) of the Act.⁴

Nextel states that the standard for granting summary judgment is that there is no genuine issue as to any material fact. In reviewing such a motion, the record is to be reviewed in the light most favorable to the non-moving party. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to the opponent to demonstrate the falsity of the showing. To decide the question, the applicable substantive law must be determined and then compared with the facts in the record.

Nextel asserts that there are a number of relevant, undisputed material facts supporting its motion.⁵ As to the right to summary judgment pursuant to the Merger Commitments, Nextel asserts that the purpose of the interconnection-related Merger Commitments was to encourage competition by reducing interconnection costs and to streamline the interconnection process. Applying the plain and ordinary meaning of the words of Merger Commitment No. 1, Nextel maintains that that there are several undisputed material facts.

As to the right to summary judgment pursuant to Section 252(i), Nextel states that the FCC's implementation rule for this section, CFR Section 51.809, provides in subsection (a) that an ILEC shall make any agreement in its entirety available to any requesting carrier upon the same terms and conditions. The rule specifically provides that an ILEC may not limit the availability of an agreement only to those carriers serving a comparable class of subscribers or providing the same service, i.e. local, access, or interexchange. Subsections (b) and (c) of the rule provide that an ILEC is not required to allow adoption of an agreement where it can prove to the state commission: (1) that the

³ The Merger Commitments are found in Appendix F to the *Merger Order*. Merger Commitment Nos. 1 and 2 refer to the commitments numbered 1 and 2 under the section entitled "Reducing Transaction Costs Associated with Interconnections Agreements."

⁴ *Motion for Summary Judgment*, pp. 1-2.

⁵ *Id.*, pp. 8-11.

cost of providing a particular agreement to the requesting carrier is greater than the cost of providing it to the original carrier, or (2) it is not technically feasible to provide the agreement to the current carrier.⁶

The primary purpose of the Section 252(i) adoption process is to ensure that an ILEC does not discriminate in favor of any particular carriers. Nextel states that it satisfies the adoption requirements to the rule and that AT&T has not proved and can not prove that either the cost or technical feasibility exception exists and thus justifies treating Nextel differently.⁷

B. AT&T's *Brief in Opposition to Nextel's Motion for Summary Judgment*

AT&T states that the standard for summary judgment is particularly stringent and appropriate only when the record shows no genuine issue with regard to any material facts and the moving party is entitled to judgment as a matter of law on the undisputed facts. Summary judgment is appropriate only when the facts and reasonable inferences allow a reasonable person to reach only one conclusion. Nextel possesses a considerable burden in making the required showing. Further, all pleadings and evidence are to be considered in the light most favorable to the nonmoving party, and any doubt as to the existence of disputed material facts must be resolved in favor of the nonmovant.⁸

The stringent standard for summary judgment is to ensure that the non-moving party receives its due process right to a day in court. Because granting such a motion effectively forecloses a nonmovant's opportunity to bring forward its case in chief, such motions are not readily granted. It is designed to ensure that triers of fact err on the side of caution in allowing matters to be fully heard and resolved on the merits and not

⁶ *Id.*, p. 15.

⁷ *Id.*, pp. 16-17.

⁸ *AT&T Response*, pp. 3-4.

prematurely resolved.⁹

AT&T asserts that Nextel's attempted adoptions under the Merger Commitments and Section 252(i) are not proper under federal law. Whether analyzed under the Merger Commitments or Section 252(i), genuine issues of material fact remain in dispute.

Nextel correctly notes that CFR Section 51.809 is the FCC's rule implementing Section 252(i) and that it contains two sections limiting a carrier's adoption rights. It is certainly not clear that Nextel satisfies the exceptions which are based upon factual issues. AT&T can present evidence demonstrating the relevant difference in costs. Such clearly material and disputed facts render summary judgment legally impermissible.¹⁰

Section 252(i) does not support Nextel's attempted adoption because it is not seeking to adopt the Sprint ICA upon the same terms and conditions provided in the agreement. That is because the agreement addresses a unique mix of wireline and wireless items, and the facts will show that Nextel is a solely wireless carrier to whom the same terms and agreements cannot be applied.¹¹ The Sprint ICA gives AT&T the option to renegotiate or terminate the bill and keep arrangement if either Sprint entity opts into another interconnection agreement. Thus, it is clear that Nextel as a wireless carrier can not adopt the agreement on the same terms and conditions.¹²

AT&T states it is not objecting to the adoption under a "similarly situated" argument. It objects to the agreement because, among other reasons, granting it would violate FCC rules. Specifically, AT&T states that if Nextel were allowed to adopt the agreement it would permit Nextel to avail itself of provisions that can only be provided to certificated CLECs. The Sprint ICA allows the Sprint CLEC entities to purchase

⁹ *Id.*, p. 4.

¹⁰ *Id.*, pp. 5-7.

¹¹ *Id.*, pp. 7-8.

¹² *Id.*, pp. 8-9.

unbundled network elements (“UNEs”) from AT&T Tennessee, but it would not be legal for Nextel to purchase UNEs from AT&T because the FCC has denied access to UNEs for the exclusive provision of mobile wireless services.¹³

Further, AT&T states that the agreement cannot be revised to address this issue because the FCC has ruled that a carrier is no longer permitted to “pick and choose” the provisions of an agreement that it wants to adopt. Instead the FCC has adopted an “all-or-nothing rule” that requires a requesting carrier to adopt an agreement in its entirety.

AT&T asserts that Nextel’s attempted adoption does not comply with the Merger Commitments. As a preliminary matter, AT&T notes that in denying AT&T’s *Motion to Dismiss* the Authority expressly found jurisdiction to be vested in Section 252(i). Nonetheless, AT&T provides additional evidence evincing genuine issues of material fact as to why the adoptions are improper under the Merger Commitments.¹⁴

AT&T states that the first Merger Commitment applies only when a carrier wants to take an agreement to a different state. It states that this practice is often referred to as “porting” an agreement from one state into another. AAT&T further states that this is precisely why the Merger Commitment contains language regarding the agreement being subject to state-specific pricing and needing to be consistent with the regulations of the state for which the request is made. Prior to the Merger Commitment, carriers did not have the right to port an agreement from one state to another; they only had the right to adopt approved agreements within a given state consistent with Section 252(i). That fact further demonstrates that this Merger Commitment does not address in-state adoption rights carriers already had.¹⁵

¹³ *Id.*, pp. 11-12.

¹⁴ *Id.*, Footnote 19.

¹⁵ *Id.*, pp. 15-16.

AT&T asserts that while the second Merger Commitment applies to in-state agreements, it has absolutely no bearing on Nextel's request because there is no issue regarding changes of law since the Sprint ICA has already been amended to reflect change of law. This Merger Commitment is entirely inapplicable to the dispute.¹⁶

C. Nextel's Reply

Nextel states that it has set forth two independent bases for adoption of the Sprint ICA. While it maintains that there are no genuine issues of material fact remaining under either basis, Nextel states that if the Authority were to find genuine issues of material fact under only one of the bases, the Authority could still grant its motion under the other basis for which the Authority found no remaining genuine issues of material fact.¹⁷

AT&T's contention that Merger Commitment No. 1 applies to out of state adoptions is not supported by any authority. AT&T cites the language "subject to state-specific pricing and performance plans and technical feasibility" and "consistent with the laws and regulatory requirements of the state for which the request is made" for the basis of its position. The plain language of the Merger Commitment No. 1 unambiguously provides that AT&T "shall" make available to "any" requesting carrier "any" effective interconnection agreement.¹⁸

AT&T claims that it should be provided the opportunity to show whether the costs would be greater to provide the Sprint ICA to Nextel. The burden to prove any exception to an adoption is imposed upon AT&T as the ILEC that is seeking to raise the exception. In the context for a motion of summary judgment, AT&T's mere allegation that it can present evidence relevant to greater costs is insufficient. AT&T should have come forward in its response to Nextel's motion with something, such as an affidavit, to support its claim

¹⁶ *Id.*, p. 16.

¹⁷ *Nextel's Reply*, pp. 7-8.

¹⁸ *Id.*, pp. 9-11.

that it is entitled to one of the exceptions.¹⁹

AT&T's claim that Nextel cannot adopt the Sprint ICA because it is only providing wireless service and cannot use all of the services and network elements in the Sprint ICA has been rejected by the FCC who has declined to limit Section 252(i) adoptions to carriers that are similarly situated. AT&T has not cited a single provision in the Sprint ICA which mandates the presence of both a wireline and wireless carrier. Nextel states that the provision of the agreement relied upon by AT&T does not support its proposition. Under the plain language of the agreement, only if one of the Sprint entities opts into another agreement with AT&T which calls for reciprocal compensation does AT&T have the option to terminate or renegotiate the agreement. Thus, if one of the entities opted out of the Sprint ICA, the agreement would stay in effect unless the entity opted into an agreement calling for reciprocal compensation. Finally, as to AT&T's position that adoption would violate FCC rules because it would allow a wireless carrier to use UNEs, Nextel states that an amendment to the Sprint ICA to make the agreement compliant with the TRRO specifically states that Sprint shall not obtain a UNE for the exclusive provision of mobile wireless services or interexchange services.²⁰

D. AT&T's Affidavit and Nextel's Motion to Strike

On April 15, 2008, AT&T filed the affidavit of P.L. (Scot) Ferguson. AT&T stated that Nextel had argued that its *Motion for Summary Judgment* should be granted because AT&T had failed to submit an affidavit demonstrating the existence of material facts in dispute. AT&T stated that while it vigorously disagrees with Nextel's characterization of the proper standard for summary judgment, it submitted the affidavit in order to lay Nextel's procedural claim to rest. The substance of the affidavit provided facts related to

¹⁹ *Id.*, pp. 16-17.

²⁰ *Id.*, pp. 19; 22-24.

the increased cost AT&T would experience if Nextel was allowed to adopt the Sprint ICA.

On April 17, 2008, Nextel filed a motion to strike the Ferguson affidavit. Nextel argued that the filing of the affidavit was a late and unauthorized filing and should therefore be stricken. Among other things, Nextel argued that the filing violated the Hearing Officer's March 25, 2008 briefing schedule, TRA Rule 1220-1-2-.06(3), and Tenn. Code Ann. § 4-5-313.

FINDINGS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on April 21, 2008, the panel heard oral arguments on the *Motion for Summary Judgment* and the *Motion to Strike*. The panel first heard and considered the *Motion to Strike*.

Based upon arguments of counsel and the record as a whole, the panel found that the affidavit of Scot Ferguson was filed after the deadline set by the Hearing Officer in the procedural schedule. The panel noted that AT&T had been given additional time to respond to the *Motion for Summary Judgment* and was aware of the potential dispositive nature of the *Motion for Summary Judgment*. The panel found that the due process rights of Nextel may be infringed by accepting the affidavit after the deadline. In light of these findings, the panel voted unanimously to grant Nextel's motion to strike Scot Ferguson's affidavit.

The panel next considered the *Motion for Summary Judgment*. Based upon the arguments of counsel and the record as a whole, the panel made the following findings. Consistent with the Authority's decision in Docket No. 07-00132, the panel found that the Authority has jurisdiction over the Merger Commitments concurrent with the FCC. In addition, consistent with previous rulings in this docket, the panel found that the Authority has jurisdiction pursuant to Section 252(i).

The panel further found that Nextel has met its burden in showing that there are no remaining genuine issues of material fact and that AT&T has failed to meet its burden to establish the falsity of the undisputed, relevant facts set out by Nextel. Although AT&T attempted to cure this deficiency at least in regard to Section 252(i), by its late-filed affidavit, the granting of the *Motion to Strike* has resulted in AT&T's failing to provide actual evidence that it would incur greater costs in providing the Sprint ICA to Nextel than it does in providing the agreement to the original parties.

Upon review of the plain language of Merger Commitment No. 1, the panel did not agree with AT&T that the Commitment only applies to out of state agreements. The panel further found that because the Sprint ICA has been amended to reflect changes of law, Merger Commitment No. 2 is not of particular relevance and has no bearing on this matter.

The panel next considered whether Nextel was entitled to summary judgment as a matter of law. A majority of the panel found that it was not prepared to find that Nextel is entitled to summary judgment as a matter of law under either 252(i) or Merger Commitment No. 1. The majority noted that it was still unclear about how to interpret the language in Rule 51.809 and in Merger Commitment No. 1 regarding adoption of the "entire" agreement as it relates to the parties and this agreement. The majority found that additional briefing not only on this issue but also to address or distinguish the agreement in TRA Docket No. 04-00311 would be beneficial to deliberations. Therefore, a majority of the panel voted to defer consideration of the *Motion for Summary Judgment* until the May 19, 2008 Authority Conference and directed the Hearing Officer to issue a schedule for additional briefs consistent with the findings of the majority of the panel.

IT IS THEREFORE ORDERED THAT:

1. *Nextel's Motion to Strike AT&T Tennessee, Inc.'s Affidavit of P.L. (Scot) Ferguson in the Entirety* is granted.

2. Deliberations on *Nextel's Motion for Summary Judgment* is deferred until the May 19, 2008 Authority Conference.

3. The Hearing Officer shall issue a schedule for additional briefs consistent with the findings of the majority of the panel.



Eddie Roberson, Chairman



Tre Hargett, Director

* * *

Sara Kyle, Director²¹

²¹ Director Kyle found that additional briefing was not necessary and voted to grant Nextel's *Motion for Summary Judgment*.