BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 17, 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 GRANTING NEXTEL SOUTH CORP.'s and NEXTEL PARTNER's MOTIONS 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 presiding panel assigned to these consolidated dockets, at a regularly scheduled Authority Conference held on May 19, 2008, for consideration of Nextel South Corp.'s and, NPCR, Inc. d/b/a Nextel Partners' (collectively "Nextel") Motions for Summary Judgment (*"Motion" or "Motion for Summary Judgment"*) filed on February 6, 2008.

BACKGROUND

On June 22, 2007, Nextel South Corp. filed its *Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp.* (*"Petition"*) in Docket No. 07-00161. On the same date, NPCR, Inc. d/b/a Nextel Partners filed a substantially similar petition seeking identical relief in TRA Docket No. 07-00162.[1] In the *Petition*, Nextel

[1]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* (Mar. 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

sought, pursuant to Merger Commitment Nos. 7.1 and 7.2, as established by the Federal Communications Commission ("FCC") as a part of its approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control, and 47 U.S.C. § 252(i), to adopt, in its entirety, the existing interconnection agreement between BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee ("AT&T") and Sprint[2] (the "Sprint ICA"), as amended. On July 17, 2007, AT&T filed its *Motion to Dismiss*. Nextel filed its *Response to 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 Docket Nos. 07-00161 and 07-00162 in abeyance until the status of the interconnection agreement that Nextel sought to adopt was clarified in a separate pending docket, TRA Docket No. 07-00132.[3] On December 7, 2007, AT&T and Sprint filed an Amendment to the Interconnection Agreement in Docket No. 07-00132.[4] 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.[5]

On January 31, 2008, the parties were requested to provide an update of their current positions in these consolidated dockets in light of the resolution of Docket No. 07-00132. In response, Nextel filed its *Motion for Summary Judgment* on February 6, 2008. AT&T filed its *Supplemental Submission in Support of AT&T Tennessee's Motion to*

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the same filing in Docket No. 07-00162.

[2] Sprint Communications Company Limited Partnership, Sprint Communications Company L.P. and Sprint Spectrum L.P. are collectively referred to herein as "Sprint."

[3] *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*, TRA Docket No. 07-00132; and *Order Holding Docket in Abeyance*, TRA Docket No. 07-00161 (Nov. 21, 2007) ("*Abeyance Order*").

[4] *See Joint Motion to Approve Amendment*, TRA Docket No. 07-00132 (Dec. 7, 2007) ("*Joint Motion*").

[5] Order Approving Amendment to the Interconnection Agreement, *In Re: Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast*, TRA Docket No. 07-00132 (Jan. 25, 2008).

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 these consolidated dockets. 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.[6]

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 responsive pleadings to the *Motion to Dismiss*, with oral arguments on the *Motion to Dismiss* 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 in opposition to the *Motion to Dismiss* fully address its positions with respect to the pending *Motion to Dismiss*.

At the Authority's regularly scheduled March 24, 2008, Authority Conference, the panel denied the *Motion to Dismiss* in full and further declined to hold these consolidated dockets in abeyance pending FCC action on AT&T's Petition for Declaratory Ruling.[7] Finally, the panel voted to set the pending *Motion for Summary Judgment* for the April 21, 2008, Authority Conference and instructed the Hearing Officer to determine whether additional briefing was desired on the *Motion for Summary Judgment* and whether to set

[6] Nextel submitted an additional filing on February 26, 2008.
[7] *See Order Denying Motion to Dismiss*, TRA Docket No. 07-00161 (May 7, 2008).

the matter for oral arguments. On March 25, 2008, the Hearing Officer issued a *Notice of Briefing Schedule and Oral Arguments Concerning Motion for Summary Judgment.*

Subsequent to additional briefing by the parties pursuant to the Authority's March 25, 2008, *Notice of Briefing Schedule and Oral Arguments Concerning Motion for Summary Judgment*, the parties presented oral arguments before the panel on April 21, 2008.[8] After oral arguments, the panel made the following preliminary findings and conclusions regarding Nextel's *Motion for Summary Judgment*: (1) the Authority has concurrent jurisdiction over the Merger Commitments and also has jurisdiction over adoptions under 47 U.S.C. § 252(i); (2) Nextel has met its burden of demonstrating that there are no remaining genuine issues of material fact; (3) AT&T has failed to meet its burden to establish the falsity of the undisputed relevant facts; and (4) Merger Commitment No. 7.1 is not limited to a requesting carrier's adoption of out-of-state agreements.[9]

Notwithstanding said preliminary findings and conclusions, the panel directed the parties to submit additional briefs on the following legal issues:

a) interpret the language in Rule 51.809 regarding adoption of the "entire" agreement as it relates to the parties and this agreement;

b) interpret the language in Merger Commitment No. 1 regarding adoption of the "entire" agreement as it relates to the parties and this agreement; and,

c) address or distinguish the agreement in TRA Docket No. 04-00311 (ALLTEL).

Both parties submitted the requested legal briefs, and this matter was scheduled for deliberations by the panel at the May 19, 2008, Authority Conference.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Authority rules and well-established Authority precedent, any party

[8] *See Transcript of Proceeding, April 21, 2008, Authority Conference*, TRA Consolidated Docket Nos. 07-00161 and 07-00162, pp. 14-74 ("*April 21, 2008, Transcript*").
[9] *Id.* at 70-72.

may move for summary judgment whenever there is no genuine issue as to any material fact.[10] The purpose of an order granting summary judgment is to avoid the expense and delay of a formal administrative hearing when no dispute exists concerning the material facts.[11] In considering a motion for summary judgment, the record is reviewed in the light most favorable to the non-moving party.[12] When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing.[13] The standard is not the absence of all factual disputes; rather, it is the absence of disputed material facts under the substantive law applicable to the action.[14]

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[10] *See, e.g.*, Order Granting Consumer Advocate's Motion for Summary Judgment, Denying BellSouth Telecommunications, Inc.'s Motion for Summary Judgment and Denying Tariff, *In Re: Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges – Tariff Number 2004-0055*, p. 6, TRA Docket No. 04-00015 (Dec. 13, 2004) ("Rule 56.04 of the Tennessee Rules of Civil Procedure provides that summary judgment is appropriate when: (1) no genuine issues with regard to the material facts relevant to the claim remain to be tried; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.") (hereinafter "*TRA 04-00015 Order*"). *See also, e.g.*, Order Denying Motion for Partial Summary Judgment Without Prejudice, *In Re: Petition of United Cities Gas for Approval of Various Franchise Agreements*, TRA Docket No. 00-00562, p. 21 (Feb. 15, 2002) ("Summary judgment is an appropriate method of resolving issues in administrative proceedings, and the standard for determining whether summary judgment should be granted generally follows the standard applied in the courts.") (citations omitted).

[11] *Byrd v. Hall*, 847 S.W.2d 208, 216 (Tenn. 1993) ("[T]here can be no doubt that summary judgment is a helpful device, in appropriate cases, for the just, speedy, and inexpensive resolution of litigation.").

[12] *See TRA 04-00015 Order* at 6 ("In reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the non-moving party."). *See also, e.g.*, Order Granting In Part and Denying In Part Motion for Summary Judgment and Denying Alternative Motion for Declaratory Ruling, *In Re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, TRA Docket No. 04-00381, p. 7, n. 32 (June 6, 2006) ("The pleadings and evidence must be considered in the light most favorable to the opposing party.") (*citing Biscan v. Brown*, 160 S.W.3d 462, 476-477 (Tenn. 2005) ("examine the evidence and all reasonable inferences from the evidence in a light most favorable to the nonmoving party")).

[13] Order Denying Consumer Advocate's Motion for Summary Judgment, Granting, In Part, and Denying, In Part, Petitioners' Motion for Summary Judgment, Denying Petition for a Declaratory Ruling and Modifying Refund Adjustment Formula, *In Re: Petition of Chattanooga Gas Company, Nashville Gas Company, and United Cities Gas Company for a Declaratory Ruling Regarding the Collectability of the Gas Cost Portion of Uncollectible Accounts Under the Purchased Gas Adjustment (PGA) Rules*, TRA Docket No. 03-00209, p. 6 (Feb. 9, 2005) ("After a properly supported motion for summary judgment is asserted, the burden shifts to the nonmovant to respond with evidence establishing the existence of specific, disputed, material facts which must be resolved by the trier of fact.") (*citing Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). *See also Byrd*, 847 S.W.2d at 211-212 ("Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial."); and *Byrd*, 847 S.W.2d at 211 ("[T]he nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.").

[14] *Byrd*, 847 S.W.2d at 214-215 ("[W]hen there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is an appropriate means of deciding that issue." . . . . . [T]o preclude summary judgment, a disputed fact must be 'material.'").

POSITIONS OF THE PARTIES[15]

Nextel – ***Additional three (3) Legal Issues Raised by the Panel***

I. Interpret the language in Rule 51.809 regarding adoption of the "entire" agreement as it relates to the parties and this agreement.

The "any agreement in its entirety" clause that is contained within Rule 51.809(a) came into existence as the result of the FCC's *Second Report and Order*.[16] In July of 2004, the FCC revisited its interpretation of Section 252(i), eliminated the "pick-and-choose" rule and replaced it with the "all-or-nothing" rule, which is reflected in the current version of Rule 51.809(a). The FCC's adoption of the "all-or-nothing" rule did not change the fact that the only two (2) express, limited narrow exceptions that an ILEC could prospectively rely upon to preclude a timely adoption under 51.809(b) continued to be increased costs or technical feasibility; and, the express prohibition also remained in the second sentence of 51.809(a) against limiting an adoption based upon the type of service provided by a requesting carrier.

The FCC specifically cited to a portion of the record developed for its consideration in the *Second Report and Order* NPRM that makes it clear the FCC recognized that carriers not only can, but in fact do, adopt an entire (i.e., intact) existing agreement pursuant to Section 252(i) without any intent of using the entire agreement. The FCC stated that "[t]he current record … demonstrates that in practice competitive LECs frequently adopt agreements in their entirety" and cited to the "PAETEC Comments at 2."[17] The referenced PAETEC Comments provide:

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[15] The various positions of the parties with respect to Nextel's *Motion for Summary Judgment* are summarized in the Authority's Order from the April 21, 2008 Authority Conference.

[16] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No.01-338, Second Report and Order, 19 FCC Rcd, 13494 (2004) (*"Second Report and Order"*).

[17] *Second Report and Order* at ¶ 18 and n. 64.

> For those carriers who are willing to adopt an existing agreement whole, or accept the model terms that the ILEC proposes, the process of negotiating an interconnection agreement has become virtually a ministerial process that can be conducted with an exchange of emails over a period of a few days or weeks. Consequently, carriers that are anxious to enter a market are typically satisfied with a model agreement or an adoption. Moreover, since the duty of performance in a typical interconnection agreement falls almost exclusively on the ILEC, it is the rare competitor that is concerned about its overall obligations under the agreement. *It is not uncommon to see a carrier adopt a 600 page agreement with the intention of using only a few provisions.* Alternative negotiated terms based on a pick-and-choose right are the exception rather than the rule.[18]

As long as Nextel is willing to adopt the Sprint ICA in its entirety, i.e. intact without modification, it is free to use less than all of it.

By its express terms, all of the Sprint ICA Attachments are available to the Sprint CLEC wireline entity and, pursuant to General Term and Condition ("GTC") § 35 Application of Attachments, the Sprint PCS wireless entity initially elected the Attachments that it wanted to use and retained the express right to elect to use any remaining Attachments at a later date. Specifically, GTC § 35 provides:

> Application of Attachments
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> This Agreement was negotiated between BellSouth, Sprint CLEC and Sprint PCS for the purpose of creating a single interconnection arrangement between BellSouth and Sprint. At the date of signing this Agreement, Sprint PCS has elected not to opt into the terms and conditions of the following Attachments: 1 Resale, 5 Access to Numbers, 6 Ordering and Provisioning, 9 Performance Measurements and 11 Disaster Recovery. Should Sprint PCS desire to operate under the terms and conditions of those Attachments, prior to the expiration of the term of this Agreement, Sprint PCS and BellSouth shall negotiate an amendment to this Agreement.[19]

The Attachments that Sprint PCS elected not to opt into are Attachments that Sprint PCS did not (nor does Nextel) consider being particularly necessary or applicable to its

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[18] Comments of PAETEC Communications, Inc. at 2, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No.01-338 (Oct. 16, 2003) (emphasis added).

[19] *See Nextel South Corp.'s and Nextel Partners' Additional Brief in Support of Nextel South Corp.'s and Nextel Partners' Motions for Summary Judgment*, TRA Consolidated Docket Nos. 07-00161 and 07-00162, Exhibit A (April 30, 2008) (A copy of the Sprint ICA GTC § 35 is attached to the April 30th brief as Exhibit A).

interconnection arrangements with AT&T. Thus, even within the four (4) corners of the Sprint ICA itself, there are provisions that the Sprint PCS wireless carrier affirmatively identified at the inception of the Sprint ICA that it would not be using on a going-forward basis. If an original party to an interconnection agreement can enter into an agreement that, in one provision affirmatively acknowledges that other provisions will not be used by one of the parties, Nextel can certainly adopt the exact same agreement, notwithstanding the fact that Nextel also does not anticipate needing to use 100% of the agreement. Indeed, for AT&T to expressly contract with Sprint to permit Sprint PCS to select only that part of the Sprint ICA that Sprint PCS apparently believed it has a need to use, yet attempt to preclude Nextel's adoption of the exact same contract because Nextel also does not intend to use 100% of the Sprint ICA, is per se discrimination.

Further, with regard to all of the remaining provisions of the Sprint ICA that are unquestionably subject to Sprint PCS's use, all of those provisions have already been written in a way that restricts a wireless carrier from improperly using such terms and conditions that, as a matter of law, may only be appropriate for use by a wireline CLEC (e.g., the express UNE restriction in amended Attachment 2 – *an Attachment that Sprint PCS did elect to use* - that states "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services").[20]

AT&T's current rendition of the all-or-nothing concept would effectively result in most, if not all, of existing AT&T ICAs not being subject to adoption. AT&T has submitted no federal authority for its proposition that it can preclude an adoption based upon a requesting carrier's purported inability "to avail" itself of some portion of the requested agreement.

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[20] *See Nextel South Corp.'s and Nextel Partners' Reply to AT&T Tennessee's Brief in Opposition to Nextel South Corp.'s*, TRA Consolidated Docket Nos. 07-00161 and 07-00162 (April 10, 2008) ("*Nextel's Reply Brief*") (A copy of amended Attachment 2 is attached to *Nextel's Reply Brief* as Exhibit D).

II. Interpret the language in Merger Commitment No. 7.1 regarding adoption of the "entire" agreement as it relates to the parties and this agreement.

Nextel asserts that there is nothing in the plain language of AT&T Inc.'s interconnection-related Merger Commitment No. 7.1 to suggest that the entire effective agreement clause may be interpreted in any reasonable manner to prohibit any carrier from adopting any agreement within AT&T's 22-state territory. To the contrary, Merger Commitment No. 7.1 expressly contemplates the occurrence of any adoption by any carrier. Under the plain language of this Commitment, the adopted agreement is "subject to" certain specified modification, as applicable. Further, Merger Commitment No. 7.1 expressly incorporates a technical feasibility concept as well. But, the commitment does not contain a "greater cost" exception similar to that found in Section 252(i).

The FCC considers Section 252(i) to be "a primary tool of the 1996 Act for preventing discrimination under section 251[,]"[21] and recognizes that "the primary purpose of section 252(i) [is] preventing discrimination[.]"[22] In paragraph 1317 of the *Local Competition Order*, the FCC clearly and unequivocally established that the only grounds upon which an ILEC can prevent a requesting carrier from timely adopting an existing ILEC agreement under Section 252(i) are if the request increases the ILEC's cost or is not technically feasible. Application of this same federal anti-discrimination policy to Merger Commitment No. 7.1 prohibits any interpretation of the Commitment that would deny Nextel's right to adopt the Sprint ICA based upon any restriction other than those expressly identified in the Commitment. As for the expressly identified restrictions in Merger Commitment No. 7.1, it is evident on their face that they are inapplicable, and AT&T has not even attempted to make any credible showing to the contrary.

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[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd, 15499 at ¶ 1296 (1996) ("*Local Competition Order*").

[22] *Id.* at ¶ 1315.

In large measure, AT&T's interpretation of Merger Commitment No. 7.1 says nothing more than AT&T believes the Merger Commitment should be interpreted the same way that AT&T interprets Rule 51.809. Without so much as an acknowledgement that two (2) different Commissioners expressed their opinions in the *FCC BellSouth Merger Order* regarding the specific additional purpose behind the Merger Commitments - *i.e.*, to keep the new AT&T from using its increased market power from reversing the inroads that new entrants have made – AT&T contends that there is nothing contained within the Merger Commitments or the Merger Order suggesting that the commitments should be read to confer broader rights than were sanctioned under existing FCC rules. If that were the case, then there is no reason for the existence of Merger Commitment No. 7.1 at all.

The FCC clearly contemplated a broader application of Merger Commitment No. 7.1 to the adoption of an existing AT&T agreement than a traditional 252(i)/Rule 51.809 adoption of a LEC's existing agreement outside of the context of the AT&T merger.[23] For example, Merger Commitment No. 7.1 is, by its express terms, applicable throughout AT&T's 22-state territory (as opposed to the 252(i) restriction that an adoption is state-specific), and does not, by its plain language, include the cost-based limitation to an adoption as contemplated by 51.809(b)(1).

In sum, Nextel asserts that there is nothing in the plain language of AT&T Inc.'s interconnection-related Merger Commitment No. 7.1 language to suggest that the entire effective agreement clause may be interpreted in any credible manner to prohibit any carrier from adopting any agreement within AT&T's 22-state territory.

[23] *See Nextel South Corp.'s and Nextel Partners' Additional Brief*, TRA Consolidated Docket Nos. 07-00161 and 07-00162, Section III B., pp. 22-24 (April 30, 2008).

III. Address or distinguish the agreement in TRA Docket No. 04-00311 (ALLTEL).

ALLTEL's use of the bill-and-keep provisions of the ALLTEL ICA after it became a wireless only carrier merely serve to demonstrate the discriminatory nature of AT&T's position in this case to oppose Nextel's adoption of the Sprint ICA because Nextel is only providing wireless service. The public facts reveal that with actual prior knowledge that ALLTEL had ceased its CLEC operations in Tennessee,[24] AT&T continued to allow ALLTEL to operate as a wireless-only carrier under the ALLTEL ICA and extended the 9-state ALLTEL ICA in November 2007 an additional three (3) years to August, 2010, for the benefit of ALLTEL as a wireless-only carrier.[25] The known, public facts are inconsistent with AT&T's current assertions in this case to oppose Nextel's efforts to adopt the Sprint ICA. There has been no credible showing by AT&T to legitimize its discriminatory conduct.

It is undisputed that ALLTEL is currently continuing to operate under the ALLTEL ICA on a wireless-only basis. The public records of several state commissions evidence that well before November, 2007, AT&T knew that ALLTEL was substantially a wireless-only carrier,[26] yet AT&T extended the ALLTEL ICA for the entire 9-state legacy-

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[24] *TRA's May 21, 2007, Letter to BellSouth Telecommunications, Inc.*, TRA Docket No. 99-00149 (The TRA sent BellSouth notice regarding ALLTEL's request to cancel its CCN and its lack of CLEC or IXC customers in Tennessee, and requested AT&T to verify by May 30, 2007, that AT&T "is not providing any facilities, UNEs or resold lines to Alltel Communications, Inc. at this time.") (May 21, 2007); *BellSouth's Motion for Withdrawal of Right of Way Agreement*, TRA Docket No. 07-00123 (July 17, 2007) ("It has been brought to BellSouth's attention that Alltel's Certificate of Convenience and Necessity has been cancelled and that Alltel is no longer operating in the State of Tennessee."); and *Order Granting Cancellation of Authority to Provide Telecommunications Services*, TRA Docket No. 99-00149 (July 16, 2007).

[25] February 5, 2008, Filing, *In Re: Approval of an Amendment to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. d/b/a AT&T Alabama and ALLTEL Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, ALABAMA PUBLIC SERVICE COMMISSION Docket U-4155 (Filing of 9-state Amendment to ALLTEL ICA, including Tennessee, with an execution date of November 2007).

[26] *See supra* n. 24. *See also, e.g., In Re: Joint Application of Alltel Holding Corporate Services, Incorporated (AHCSI) and Alltel Communications, Incorporated (ACI) to Approve the Transfer of ACI's Authority to Provide Local Exchange Services to AHCSI, Grant AHCSI Certification to Provide Long Distance Services in South Carolina*, Order Granting Expedited Review and Approving Application, SOUTH CAROLINA PUB. SERV. COMM'N Docket No. 2005-399-C – Order No. 2006-186 (Mar. 28, 2006); and *In Re:*

BellSouth territory pursuant to Merger Commitment No. 7.4 for 3-years to August 29, 2010.[27]

The ultimate inconsistency with regard to AT&T's position in this case as to Nextel adopting and operating under the Sprint ICA, versus AT&T's position with respect to ALLTEL and the ALLTEL ICA, is simple. Notwithstanding the fact that AT&T's action is, standing by itself, a blatant and express violation of the second sentence of Rule 51.809(a), as compared to how AT&T has treated ALLTEL, AT&T's action is also patently discriminatory treatment as to two (2) different carriers in analogous circumstances.

AT&T – ***Additional three (3) Legal Issues Raised by the Panel***

I. Interpret the language in Rule 51.809 regarding adoption of the "entire" agreement as it relates to the parties and this agreement.

AT&T maintains that Rule 51.809 establishes a clear duty for ILECs to make "complete agreements" available for adoption. The Rule, however, does not require incumbent LECs to make "portions" of agreements available. In sum, the Rule does not require incumbent LECs to allow carriers to pick apart interconnection agreements and choose certain portions of the agreement while leaving other parts out. In obligating incumbents to make entire agreements available, Rule 51.809 is the result of the FCC's determination to change from the "Pick and Choose rule" to the "All or Nothing rule."[28] The all-or-nothing rule requires "a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement."[29]

In this matter, Rule 51.809, in concert with the FCC's determinations in moving to

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Application for Approval of the Transfer of Control of ALLTEL Kentucky, Inc. and Kentucky ALLTEL, Inc., Order, KY. PUB. SERV. COMM'N Case No. 2005-00534 (May 23, 2006).

[27] *See supra* n. 25.

[28] *Second Report and Order* at ¶ 1.

[29] *Id.*

the all-or-nothing rule, makes it clear that Nextel is not entitled to the adoption. AT&T does not have a legal obligation to make the agreement Nextel seeks to adopt, containing both wireless and wireline provisions, available to Nextel because Nextel is admittedly not certificated to provide wireline services in Tennessee.

Given these FCC parameters, to effectively adopt an agreement in its entirety, a party must have a legal right to avail itself of all of the terms and conditions contained in the agreement it seeks to adopt. If a requesting carrier cannot legally avail itself of portions of the agreement, but is nonetheless allowed to adopt and operate under the terms and conditions in the agreement that are legally available, it could not legitimately be said to have taken the agreement in its entirety.

The Sprint ICA contains terms and conditions available only to a wireline CLEC (i.e. Sprint CLEC). Therefore, Nextel, which is not a certificated CLEC in Tennessee, cannot avail itself of all of the interconnection services and network elements provided within the Sprint ICA. Nextel only provides wireless services in Tennessee. If Nextel were allowed to adopt the Sprint ICA, such adoption would erroneously suggest that Nextel could avail itself of provisions in the agreement that apply only to CLECs. For example, allowing Nextel to adopt the agreement would result in erroneously suggesting that Nextel can purchase UNEs from AT&T, which is prohibited under the FCC's Triennial Review Remand Order.[30]

Nextel's interpretation of Rule 51.809, as it relates to an entire agreement, would leave that language superfluous and of no force and effect. Nextel's argument that it can take the entire agreement but choose not to use those certain terms and conditions that are not legally available to Nextel would completely eviscerate Rule 51.809, which is the all-

[30] *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 at ¶ 34 (Feb. 4, 2005).

or-nothing rule and the FCC's order adopting the same. The dispositive issue is not whether a party adopts an agreement without any intent of using the entire agreement but rather whether an adopting party has the legal right and ability to utilize the entire agreement.

Nextel cannot adopt the Sprint ICA in its entirety consistent with the FCC's rules because certain terms and conditions contained in the agreement are legally off limits to Nextel.

II. Interpret the language in Merger Commitment No. 7.1 regarding adoption of the "entire" agreement as it relates to the parties and this agreement.

The language in the Merger Commitment should be afforded its plain and ordinary meaning. Hence, the reference to an "entire" agreement means just that: the agreement is to be made available in its entirety. As outlined by AT&T with respect to Rule 51.809, such an interpretation of the Merger Commitment would be consistent with the FCC's all-or-nothing rule.

Nextel asserts that the Merger Commitment provides an almost unfettered right to adoption – limited only by the restrictions expressly identified in the Commitment. Nextel is wrong, and did not and cannot point to any language contained in either the Merger Commitment or the Merger Order where the FCC stated that the Merger Commitment somehow rendered pre-existing rules and regulations null and void. The Merger Commitment does not abrogate or otherwise alter these pre-existing FCC rules. There is nothing contained within the Merger Commitments or the Merger Order suggesting that the commitments should be read to confer broader rights than were sanctioned under existing FCC rules. On the contrary, the reference to an "entire agreement" contained within the Merger Commitment should be interpreted as in conformance with Rule 51.809 and the all-or-nothing rule.

The limitation on adoptions that the FCC established in Rule 51.809 must apply under Merger Commitment No. 7.1 and therefore, consistent with the Rule and the "entire effective interconnection agreement" language contained within the Merger Commitment, Nextel's adoption should be denied because what Nextel seeks to adopt is less than the entire effective agreement.

III. Address or distinguish the agreement in TRA Docket No. 04-00311 (ALLTEL).

AT&T's position regarding the ALLTEL ICA at issue in TRA Docket No. 04-00311 is consistent with AT&T's assertion in the present docket that stand alone CMRS providers, such as Nextel, that are not certificated to provide wireline services in Tennessee should not be allowed to adopt contracts containing wireline provisions.

Originally, the ALLTEL ICA was between an ILEC, a CLEC and a CMRS (wireless) provider. When the agreement became effective, ALLTEL was certificated to provide wireline services in Tennessee, and provided wireline services in Tennessee. ALLTEL subsequently withdrew its CLEC certificate in Tennessee, but failed to properly notify the appropriate AT&T contacts as required under the specific terms and conditions of the ALLTEL ICA.[31] Since discovering that fact, AT&T Southeast has begun the process of negotiating a new stand alone CMRS contract with ALLTEL. AT&T has not agreed that ALLTEL may maintain the interconnection agreement as a stand alone CMRS agreement.

In approximately 2006, ALLTEL Corporation embarked upon a separation of its wireless and wireline businesses. At that time, AT&T Southeast (then BellSouth) inquired

[31] Pursuant to Section 9.2 of the ALLTEL ICA, ALLTEL has a contractual duty to inform AT&T in the manner specified in the agreement as soon as it changes its structure and/or is no longer certificated as a CLEC. *See AT&T Tennessee's Brief in Accordance with Hearing Officer's April 22, 2008, Notice*, TRA Consolidated Docket Nos. 07-00161 and 07-00162, p. 9 (April 30, 2008) ("*AT&T's April 22 Brief*"). AT&T Southeast (then BellSouth) suggested this language because changes to ALLTEL's name or changes to its company structure could require amendments to the interconnection agreement. *Id.*

whether the ALLTEL parties to the ALLTEL ICA had the same legal association as represented in the agreement.[32] Given ALLTEL's then response[33] and based upon the absence of any contractually required notification to the contrary by ALLTEL, until recently the AT&T Southeast negotiators believed that ALLTEL remained a certificated CLEC in Tennessee. AT&T Southeast subsequently learned that these representations were not accurate when they were made. In fact, on July 16, 2007, the Authority entered an Order granting ALLTEL Communications, Inc.'s request to cancel its CCN.[34]

Despite spinning off its CLEC business and thereby changing its corporate structures, ALLTEL failed to provide the contractually required notification to the four (4) specific employment positions and addresses listed in Section 23 of the ALLTEL ICA. The lack of notification, coupled with ALLTEL's above-mentioned representation that it was retaining its CLEC certification, led AT&T Southeast to believe that ALLTEL was still both a CLEC and a CMRS provider, capable of operating under the ALLTEL ICA. Since discovering otherwise, AT&T Southeast, in March 2008, began negotiating with ALLTEL for a new stand alone CMRS agreement.

Nextel's assertion that it simply will not avail itself of the terms and conditions applicable to CLECs is as meaningless as any non-certificated carrier adopting a CLEC agreement and assuring AT&T and this Authority that it doesn't plan to order services under the agreement.

AT&T's position regarding the ALLTEL ICA at issue in TRA Docket No. 04-00311 is consistent with AT&T's assertion in the present docket that stand alone CMRS providers, such as Nextel, that are not certificated to provide wireline services in

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[32] AT&T Southeast, not AT&T Tennessee, has responsibility for negotiating interconnection agreements. *Id.* at 7, n. 9.
[33] *Id.* at Exhibit 1.
[34] *See supra* n. 24.

Tennessee should not be allowed to adopt contracts containing wireline provisions.

FINDINGS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on May 19, 2008, the panel deliberated on the pending *Motion for Summary Judgment* in these consolidated dockets. Based upon arguments of counsel, the record as a whole and existing law, the panel made the following findings and conclusions:

1. To adopt an entire agreement, a carrier does not have to avail nor have the legal right to utilize the entire agreement so long as the services and products purchased by the adopting party use the same rates, terms and conditions as those contained in the adopted agreement.

2. The prohibition in 47 C.F.R. § 51.809 against limiting adoptions based on class of customer and type of service clearly indicates that a carrier does not have to be technically capable of using all the provisions in an agreement to adopt the entire agreement.

3. The express terms of the Sprint ICA allows both the use of select portions and stand-alone use by a wireless-only carrier.

In light of these findings and the findings made at the April 21, 2008 Authority Conference,[35, 36] the panel voted unanimously to grant the *Motions for Summary Judgment.* The panel further voted to make the requested adoptions effective May 19, 2008.

[35] See Footnote 9 above.

[36] Director Hargett noted that while he found that there was no genuine issues of material fact in dispute [at the April 21, 2008 Authority Conference] he had some lingering concerns that his agreement with that decision was based on a record that was not as fully as developed as he would have liked. Further, Director Hargett found that he was unable from the record to distinguish any differences with the instant docket and Docket No. 04-00311 (Alltel) relative to the issues before the Authority.

IT IS THEREFORE ORDERED THAT:

1. Nextel South Corp.'s *Motion for Summary Judgment* is granted in full.

2. NPCR, Inc. d/b/a Nextel Partners' *Motion for Summary Judgment* is granted in full.

3. Consistent with this Order and the action taken by the Authority in TRA Docket No. 07-00132, Nextel South Corp. and BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee are hereby directed to submit to the Authority an executed Adoption Agreement, substantially similar to Exhibit A to the *Motion for Summary Judgment* in Docket No. 07-00161,[37] within ten (10) days from the date of this Order with an effective date of May 19, 2008.

4. Consistent with this Order and the action taken by the Authority in TRA Docket No. 07-00132, NPCR, Inc. d/b/a Nextel Partners and BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee are hereby directed to submit to the Authority an executed Adoption Agreement, substantially similar to Exhibit A to the *Motion for Summary Judgment* in Docket No. 07-00162, within ten (10) days from the date of this Order with an effective date of May 19, 2008.

5. The Authority hereby retains jurisdiction of these consolidated dockets as is necessary to enforce the respective Adoption Agreements.

Eddie Roberson, Chairman

Tre Hargett, Director

Sara Kyle, Director

[37] The executed Adoption Agreements in both consolidated dockets should be substantially similar to Exhibit A to the respective motions for summary judgment unless otherwise agreed by the parties.