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February 6, 2008

Honorable Eddie Roberson, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp., TRA Docket No. 07-00161

Dear Chairman Roberson:

Enclosed for filing please find an original and thirteen (13) copies of *Nextel South Corp.'s Motion for Summary Judgment*. In response to the Authority's January 30, 2008, letter of inquiry regarding Nextel South Corp.'s current position in this matter in light of the recent action in TRA Docket No. 07-00132, it is Nextel South Corp.'s position that TRA Docket No. 07-00161 is ripe for resolution, consistent with the *Petition*, as a matter of law.

An additional copy of this filing is enclosed to be "file-stamped" for our records.

If you have any questions or require additional information, please let me know.

Respectfully submitted,

Melvin J. Malone

clw
Enclosures

c: Parties of Record

BEFORE THE

TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

IN RE: PETITION REGARDING NOTICE OF ELECTION OF INTERCONNECTION AGREEMENT BY NEXTEL SOUTH CORP.	)	**DOCKET NO. 07-00161**

NEXTEL SOUTH CORP.'s MOTION FOR SUMMARY JUDGMENT

Pursuant to Tennessee Regulatory Authority ("Authority" or "TRA") Rules 1220-1-2-.06 and 1220-1-2-.22, and in response to the Authority's January 30, 2008, letter of inquiry, Nextel South Corp. ("Nextel"), by and through its undersigned counsel, hereby respectfully moves the Authority for Summary Judgment that acknowledges Nextel's adoption of the existing interconnection agreement between BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee ("AT&T")[1] and Sprint[2] (the "Sprint ICA"), and requires AT&T to execute the Adoption Agreement attached hereto as **Exhibit A**.

In support of this Motion, and as further set forth in detail below, Nextel asserts that there is no genuine issue as to any material fact regarding Nextel's adoption of the

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[1] BellSouth Telecommunications, Inc. ("BellSouth") does business in Tennessee as "AT&T Tennessee" and "AT&T Southeast."

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

Sprint ICA and that Nextel is entitled to adopt the Sprint ICA under both AT&T Inc.'s Merger Commitments and 47 U.S.C. § 252(i) as a matter of law.

I. TRAVEL OF THE CASE

On June 22, 2007, Nextel filed its *Petition Regarding Notice of Election of Interconnection Agreement* (the "*Petition*") with the Authority. In the *Petition*, Nextel stated that pursuant to Merger Commitment Nos. 1 and 2, as set forth in the Federal Communications Commission's ("FCC") approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control and 47 U.S.C. § 252(i), Nextel has adopted in its entirety, effective immediately, the Sprint ICA, as amended, which has been filed and approved in each of the legacy BellSouth states, including Tennessee.[3] Nextel asserted that the Sprint ICA is current and effective, but acknowledged that Sprint and AT&T had a dispute regarding the term of the agreement, specifically referring to the pending Sprint-AT&T arbitration in TRA Docket No. 07-00132.[4] Nextel further maintained that it had contacted AT&T regarding Nextel's adoption of the Sprint ICA, but AT&T refused to voluntarily acknowledge and honor Nextel's adoption rights.[5]

On July 17, 2007, AT&T filed its Motion to Dismiss in this matter, asserting three (3) arguments: (1) Nextel's *Petition* is premature because Nextel failed to abide by contractual dispute resolution provisions found in its existing interconnection agreement with AT&T;[6] (2) Nextel is attempting to adopt an expired agreement, therefore the adoption does not meet the legal timing requirement under the Telecommunications Act

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[3] *Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp.*, TRA Docket No. 07-00161 (June 22, 2007) ("*Petition*").
[4] *Id.*
[5] *Id.* at 3-4.
[6] *See AT&T Tennessee's Motion to Dismiss*, TRA Docket No. 07-00161, pp. 3-4 (July 17, 2007) ("*AT&T's Motion to Dismiss*").

of 1996 ("the Act");[7] and (3) the TRA does not have authority to interpret and enforce the AT&T Inc. merger conditions. On July 24, 2007, Nextel filed its response to *AT&T's Motion to Dismiss*, contending, among other things, as follows: (1) *AT&T's Motion to Dismiss* must be decided based on the facts as alleged in Nextel's *Petition*; (2) well-established precedent demonstrates the TRA's authority to acknowledge Nextel's exercise of its rights to adopt the Sprint ICA; and (3) Nextel's *Petition* is timely, particularly in light of the fact that Sprint's exercise of its own rights to a 3-year extension of the Sprint ICA would result in the ICA not being scheduled to expire until March 19, 2010.[8]

On October 5, 2007, the TRA issued its order denying AT&T's Motion to Dismiss in the Sprint arbitration case, TRA Docket No. 07-00132, finding, among other things, that the Authority "possesses concurrent jurisdiction with the FCC to review interconnection issues raised by [the Merger Commitments]."[9]

On November 21, 2007, the Authority issued its *Order Holding Docket in Abeyance* ("*Abeyance Order*") in this matter. In its *Abeyance Order*, the TRA ordered that this matter, Docket No. 07-00161, be held in abeyance until a decision is reached in the arbitration matter, TRA Docket No. 07-00132.[10] Since the issuance of the *Abeyance Order*, the only legitimate fact issue raised by AT&T in this matter, as shown directly below, has been resolved.

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[7] *Id. at* 5-8.
[8] *See Nextel South Corp.'s Response to AT&T Tennessee's Motion to Dismiss*, TRA Docket No. 07-00161 (July 24, 2007) ("*Nextel's Response*").
[9] *Order Denying Motions to Dismiss, Accepting Matter for Arbitration, and Appointing Pre-Arbitration Officer*, TRA Docket No. 07-00132, p. 6 (Dec. 5, 2007) ("*Order Denying AT&T's Motions to Dismiss*").
[10] *Order Holding Docket in Abeyance*, TRA Docket No. 07-00161, pp. 2-3 (Nov. 21, 2007) ("*Abeyance Order*").

On December 7, 2007, Sprint and AT&T filed a Joint Motion in the Sprint arbitration case, TRA Docket No. 07-00132, to approve an amendment to the Sprint ICA that "provides the relief requested by Sprint in its Petition, i.e., to extend the terms of the Parties' existing Interconnection Agreement for a period of three (3) years from the date of Sprint's March 20, 2007 request for such extension."[11] The *Joint Motion* further stated that "[u]pon Authority approval of the three-year term extension Amendment, the issues in the above-styled arbitration proceeding will be resolved."[12]

At its January 14, 2008, Authority Conference, the TRA, pursuant to the *Joint Motion*, unanimously approved the amendment to the Interconnection Agreement, which amendment extends the terms of the parties' existing Interconnection Agreement for a three (3) year period.[13]

Notwithstanding a Kentucky Public Service Commission-ordered 3-year extension[14] to the Sprint ICA and an agreed-to 3-year extension of the Sprint ICA in every other legacy BellSouth state[15] that will resolve all of the various Sprint-AT&T arbitration proceedings, AT&T continues to oppose Nextel's adoptions.

For the reasons stated above and set forth in greater detail below, there simply are no legitimate genuine issues of material fact that remain to be resolved with respect to the

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[11] *See Joint Motion to Approve Amendment*, TRA Docket No. 07-00132, ¶ 2 (Dec. 7, 2007) ("*Joint Motion*").

[12] *Id.* at ¶ 3.

[13] 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).

[14] *In the Matter of: 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 Kentucky d/b/a AT&T Southeast,* Order, KPSC Case No. 2007-00180 (Sept. 18, 2007) (attached hereto as **Exhibit B**).

[15] Outside of Kentucky and Tennessee, Sprint and AT&T have also filed the necessary Sprint ICA Amendment documentation with the appropriate state Commissions to extend the Sprint ICA 3 years in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina and South Carolina. *See, e.g., Joint Motion.*

Petition. Accordingly, the Authority should issue a final Order that acknowledges Nextel's adoption of the Sprint ICA under both AT&T Inc.'s Merger Commitments and 47 U.S.C. § 252(i) as a matter of law and requires AT&T to execute the Adoption Agreement attached hereto as **Exhibit A**.

II. ADDITIONAL BACKGROUND INFORMATION

In response to this Motion, it is anticipated that AT&T will seek to introduce irrelevant arguments that have no legal basis under either the Merger Commitments or § 252(i) of the Act. For instance, AT&T may argue that Nextel is not "similarly situated" to the Sprint entities because Nextel is only providing wireless service and, therefore, cannot adopt the Sprint ICA, even though it contains provisions that enable both wireless and wireline carriers to provide service.

Not only would such an AT&T assertion that the standard for adoption requires a "similarly situated" entity be plainly erroneous, but it would also ignore the painfully obvious - Nextel is a similarity situated entity to Sprint in that it shares the same affiliate relationships and corporate parent as the parties to the Sprint ICA. Further, Nextel has the same CLEC relationship and can add the CLEC as signatory if necessary for the execution of the adoption agreement. If such an argument is made by AT&T, it would clearly be a disguised attempt solely aimed at avoiding its obligations both under the Act and under the Merger Commitments.

Aside from any blatant factual inaccuracies in such a contention in light of the obvious affiliate relationship between Nextel and the Sprint entities, the underlying legal premise of AT&T's argument - that a requesting carrier must be "similarly situated" as the original party to an ICA with respect to either the class of customers the requesting

serves or the services it provides - has been directly raised by AT&T's predecessor, BellSouth, and expressly rejected by the FCC, as contrary to the express terms of 47 C.F.R. § 51.809(a).[16] Any such AT&T attempt to further delay this proceeding would serve no legitimate purpose and would be in direct contravention of not only its Merger Commitments to permit adoption of any negotiated or arbitrated agreement by any carrier, but also its § 51.809(a) obligation that it "shall make available without unreasonable delay" any agreement in its entirety to any carrier.[17]

Nextel anticipates that AT&T will contend, as it has done in other states, without justification or authority, that as a stand-alone wireless provider Nextel is not "similarly situated" to the Sprint entities and thus cannot adopt the Sprint ICA without also bringing a wireline carrier to the table along with it. Such arguments are made by AT&T notwithstanding the fact that the Sprint ICA contains provisions relative to both wireless and wireline carriers and, in order to avoid protracted and unnecessary delay, that Sprint CLEC, a corporate affiliate of Nextel, has always been offered, and stood ready, to execute the Sprint ICA as adopted by Nextel.[18]

III. STANDARD FOR SUMMARY JUDGMENT

Pursuant to Authority rules and well-established Authority precedent, any party may move for summary judgment whenever there is no genuine issue as to any material fact.[19] The purpose of an order granting summary judgment is to avoid the expense and

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[16] *See infra* nn. 55 and 61.

[17] *See infra* nn. 54 and 55. *See also infra* n. 61.

[18] *See* Mark Felton's May 18, 2007, Letter and Enclosures (attached to *AT&T's Motion to Dismiss* as Exhibit A).

[19] *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

delay of a formal administrative hearing when no dispute exists concerning the material facts.[20] In considering a motion for summary judgment, the record is reviewed in the light most favorable to the non-moving party.[21] 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.[22] The standard, however, 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.[23] To decide this question, the applicable substantive law must be determined and then compared with the facts in the record. Finally, a motion for summary judgment may be, but is not required to be, accompanied by supporting affidavits.[24]

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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).

[20] *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.").

[21] *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")).

[22] 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 Collectibility 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)).

[23] *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.'").

[24] *See, e.g., Doe 1 ex rel v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 41 (Tenn. 2005) ("A moving party may accomplish this burden 'with or without supporting affidavits[.]'") (citations omitted).

In resolving this Motion, Nextel respectfully requests that the Authority take official notice of the existing record in this docket, the record in the Sprint-AT&T arbitration proceeding in TRA Docket No. 07-00132, and certain facts set forth herein, the accuracy of which cannot reasonably be questioned.[25]

A. UNDISPUTED MATERIAL FACTS

Nextel submits that the following are the relevant, undisputed material facts necessary for the TRA's resolution of Nextel's requests to adopt the Sprint ICA pursuant to AT&T Inc.'s Merger Commitments and § 252(i):

1. On December 29, 2006, AT&T Inc. and BellSouth Corporation voluntarily proposed "Merger Commitments" that became "Conditions" of approval of the AT&T/BellSouth merger when the FCC authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates (which include AT&T Tennessee), are required to comply with their Merger Commitments.[26]

2. AT&T's interconnection-related Merger Commitment No. 1 imposed upon AT&T an obligation to:

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[25] The TRA can take official notice of the records of the courts in this state or any court of record of the United States or any state, territory, or jurisdiction of the United States; facts that are not subject to dispute because they are generally known within its territorial jurisdiction; and facts that are not in dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Tenn. Code Ann. § 4-5-313(6). *See also, c.f., Albright v. Button*, 155 S.W.3d 110, 116-117 (Tenn. Ct. App. 2004) (Court can take judicial notice of fact are generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.); and *AT&T's Motion to Dismiss*, p. 1, nn. 1 and 6 (AT&T requesting the Authority take judicial notice).

[26] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*FCC BellSouth Merger Order*") ("IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order."). A copy of the Table of Contents and Appendix F to the *FCC BellSouth Merger Order* is attached to *AT&T's Motion to Dismiss* as Exhibit B.

> 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/BellSouth 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.[27]

3. The Sprint ICA is an interconnection agreement previously approved by the TRA; therefore, AT&T is also required by Section 252(i) of the Act to make the Sprint ICA available to Nextel for adoption.[28]

4. On May 18, 2007, Mark G. Felton, of Sprint Nextel, sent a letter to AT&T on behalf of Nextel as a requesting carrier for the stated purpose of exercising Nextel's right to adopt the Sprint ICA pursuant to AT&T Inc.'s Merger Commitments and Section 252(i).[29]

5. Mr. Felton's May 18, 2007, letter specifically advised AT&T that "[a]lthough neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel in order to expeditiously implement Nextel's adoption."[30]

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[27] *See FCC BellSouth Merger Order*, at page 149, Appendix F, Merger Commitment No. 1 under "Reducing Transaction Costs Associated with Interconnection Agreements."

[28] 47 USC § 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

[29] *See* Mark Felton's May 18, 2007, Letter and Enclosures (attached to *AT&T's Motion to Dismiss* as Exhibit A).

[30] *Id.*

6. On May 30, 2007, Eddie A. Reed, Jr., of AT&T, responded to Mr. Felton's May 18, 2007, letter, and a copy of Mr. Reed's letter is attached hereto as **Exhibit C**. The basis asserted by Mr. Reed for AT&T's refusal to grant Nextel's requests to adopt the Sprint ICA was a claimed lack of understanding regarding the applicability of the Merger Commitments to Nextel's requests and an assertion that the Sprint ICA was not available for adoption because it was expired, in arbitration, and not adopted within a reasonable period of time under § 51.809(c).

7. On June 22, 2007, Nextel filed its *Petition* with the Authority.

8. On July 17, 2007, AT&T filed its Motion to Dismiss. The only objections raised by AT&T in its Motion to Dismiss are as follows: (a) the *Petition* is premature because Nextel failed to abide by contractual dispute resolution provisions found in its existing interconnection agreement with AT&T;[31] (b) the Sprint ICA was "expired" and, therefore, Nextel did not request adoption of the Sprint ICA in a timely fashion under the Act;[32] and (c) the TRA did not have jurisdiction over Nextel's adoption requests under the Merger Commitments.

9. On October 5, 2007, the TRA issued its *Order Denying AT&T's Motions to Dismiss* in the Sprint arbitration case, TRA Docket No. 07-00132, finding, among other things, that the Authority "possesses concurrent jurisdiction with the FCC to review interconnection issues raised by [the Merger Commitments]."[33]

10. On November 21, 2007, the TRA issued the *Abeyance Order*. In its *Abeyance Order*, the TRA ordered that this matter, Docket No. 07-00161, be held in

[31] *See AT&T's Motion to Dismiss* at 3-4.
[32] *AT&T's Motion to Dismiss* at 5-8.
[33] *Order Denying AT&T's Motions to Dismiss,* TRA Docket No. 07-00132, p. 6.

abeyance until a decision is reached in the arbitration matter, TRA Docket No. 07-00132.[34]

11. On December 7, 2007, Sprint and AT&T filed a *Joint Motion* in the Sprint arbitration case, TRA Docket No. 07-00132, to approve an amendment to the Sprint ICA that "provides the relief requested by Sprint in its Petition, i.e., to extend the terms of the Parties' existing Interconnection Agreement for a period of three (3) years from the date of Sprint's March 20, 2007 request for such extension."[35] The *Joint Motion* further stated that "[u]pon Authority approval of the three-year term extension Amendment, the issues in the above-styled arbitration proceeding will be resolved."[36]

12. The Sprint-AT&T Amendment to the Sprint ICA has been executed by both parties and expressly states that it "shall be filed with and is subject to approval by the [Authority] and shall be effective upon the date of the last signature of both Parties."[37] The date of the last signature of both parties was AT&T's signature on December 4, 2007.[38]

13. At its January 14, 2008, Authority Conference, the TRA, pursuant to the *Joint Motion*, unanimously approved the amendment to the Interconnection Agreement, which amendment extends the terms of the parties' existing Interconnection Agreement for a three (3) year period.[39]

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[34] *Abeyance Order*, TRA Docket No. 07-00161, pp. 2-3.
[35] *Joint Motion* at ¶ 2.
[36] *Id.* at ¶ 3. As a result of the submission of the *Joint Motion*, the Hearing Officer in Docket No. 07-00132 issued a Notice of Cancellation of Status Conference in the arbitration proceeding. *See Notice of Cancellation of Status Conference*, TRA Docket No. 07-00132 (Dec. 10, 2007).
[37] *Joint Motion*, Exhibit A.
[38] *Id.*
[39] 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).

B. NEXTEL IS ENTITLED TO ADOPT THE SPRINT ICA AS A MATTER OF LAW PURSUANT TO AT&T INC.'S MERGER COMMITMENTS AND 47 U.S.C. § 252(i)

1) ADOPTION OF THE SPRINT ICA PURSUANT TO AT&T INC.'s MERGER COMMITMENTS

AT&T Inc.'s interconnection-related Merger Commitments Nos. 1 and 2 respectively provide as follows :

> 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/BellSouth 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.
>
> 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.[40]

All of the interconnection-related Merger Commitments were intended to encourage competition by reducing interconnection costs between a requesting carrier, such as Nextel, and the new 22-state mega-billion dollar, post-merger AT&T.[41] Indeed,

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[40] *FCC BellSouth Merger Order*, at page 149, Appendix F.

[41] *See* FCC Order, p. 169 (Commissioner Michael J. Copps, concurring):

> "... we Commissioners were initially asked to approve the merger the very next day ***without a single condition*** to safeguard consumers, businesses, or the freedom of the Internet. This is all the more astonishing when you consider that this $80-some odd billion dollar acquisition would result in a new company with an estimated $100 billion dollars in annual revenue, employing over 300,000 people, owning 100% of Cingular (the nation's largest wireless carrier), covering 22 states, providing service to over 11 million DSL customers, controlling the only choice most companies have for business

there was acknowledged FCC concern regarding a merger that created a "consolidated entity – one owning nearly all of the telephone network in roughly half the country – *using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether.*"[42] As shown directly below, the FCC's well-documented concerns led to the interconnection-related Merger Commitments:

> To mitigate this concern, the merged entity has agreed to allow the portability of interconnection agreements ***and to ensure that the process of reaching such agreements is streamlined***. These are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition.[43]

Cognizant of the intent behind the interconnection-related Merger Commitments, and applying the plain and ordinary meaning of the words used to establish such Commitments, it cannot be disputed that:

- Nextel is within the group of "any requesting telecommunications carrier;"[44]
- Nextel has requested the Sprint ICA;[45]
- The Sprint ICA is within the group of "any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory," having been entered into by Sprint and AT&T in all 9 legacy BellSouth states;[46]
- The Sprint ICA already has state-specific pricing and performance plans incorporated into it by the state;[47]
- There is no issue of technical feasibility;[48] and,

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access services, serving over 67 million access lines, and controlling nearly 23% of this country's broadband facilities."

[42] *Id.* at 172 (emphasis added).
[43] *Id.* (emphasis added).
[44] *See Petition.*
[45] *Id.*
[46] *Id.*
[47] *Petition* at 3; and *Nextel's Response* at 3-4 and 9.

- The Sprint ICA has already been amended to reflect changes of law, i.e. the TRRO requirements.[49]

Any AT&T argument that attempts to avoid Nextel's adoption of the Sprint ICA pursuant to the above Merger Commitments will require the TRA to re-write or simply ignore the plain and ordinary meaning of the words used by the FCC and agreed to by AT&T Inc.[50] There simply is no legal basis for AT&T to continue to thwart its commitment to a "streamlined" process by which "any" carrier, including Nextel, can adopt "any" agreement. Having reaped the benefits of the FCC's approval of the merger,[51] AT&T must not now be permitted to blatantly disavow the expressly intended and agreed upon application of the Merger Commitments.

Very recently, the Ohio Public Utilities Commission ("Ohio PUC") issued a *Finding and Order*[52] that allows one wireline Sprint entity and three (3) wireless Sprint entities, including Nextel West Corp. and NPCR, Inc., d/b/a Nextel Partners (collectively referred to in the Ohio proceedings as "Sprint"), to port the Kentucky Sprint-AT&T interconnection agreement into Ohio, subject to the state-specific modifications mentioned in AT&T Merger Commitment 7.1. In its *Finding and Order*, the Ohio PUC denied AT&T Ohio's motion to dismiss Sprint's porting complaint based on AT&T Merger Commitment 7.1, found that it had concurrent jurisdiction with the FCC to

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[48] *See, e.g.,Petition and Nextel's Response.*

[49] *See, e.g., Petition and Nextel's Response.*

[50] The Authority has already determined in TRA Docket No. 07-00132 that it has jurisdiction to interpret the Merger Commitments. *See Order Denying AT&T's Motions to Dismiss*, TRA Docket No. 07-00132, p. 6.

[51] *See supra* n. 41.

[52] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.,* Finding and Order, Ohio PUC Case No.07-1136-TP-CSS (Feb. 5, 2008) ("*Ohio Finding and Order*") (attached hereto as **Exhibit D**).

interpret the Merger Commitments, and ordered AT&T Ohio to permit Sprint "to port to Ohio the BellSouth ICA, subject to state-specific modifications."[53]

2) ADOPTION OF THE SPRINT ICA PURSUANT TO § 252(i)

47 U.S.C. § 252(i) provides:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The FCC's current version of Rule § 51.809, which implements § 252(i) and is entitled "Availability of agreements to other telecommunications carriers under section 252(i) of the Act[,]" further states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable

[53] *Id.* at 15.

> period of time after the approved agreement is available for public inspection under section 252(h) of the Act.[54]

While Commissioner Copps' comments indicate the intended purpose of the interconnection-related Merger Commitments was to streamline the process of reaching agreements with the newly created behemoth ILEC, the primary purpose of the Section 252(i) adoption process has been to ensure that an ILEC does not discriminate in favor of any particular carriers.[55] Nextel clearly satisfies the adoption requirements set forth in the current rule, and clearly does not fall into either of the two (2) exceptions.

Where a LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state Commission that such differential treatment is justified, which AT&T has not done and cannot do. The FCC has held that the fact a carrier serves a different class of customers, or provides a different type of service, does not bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or

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[54] In July of 2004, the FCC revisited its interpretation of 252(i) to reconsider and eliminate what was originally known as its "pick-and-choose" rule, which permitted requesting carriers to select only the related terms that they desired from an incumbent LEC's existing filed interconnection agreements, rather than an entire interconnection agreement. The FCC 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. The FCC concluded that the original purpose of 252(i), protecting requesting carriers from discrimination, continued to be served by the all-or nothing rule:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.

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 at ¶ 19 (2004) (*"Second Report and Order"*).

[55] *See 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, 16139 at ¶ 1315 (1996) (*"Local Competition Order"*).

on whether interconnection is technically feasible.[56] The FCC also concluded that a carrier seeking to adopt an existing ICA under 252(i) "shall be permitted to obtain its statutory rights on an expedited basis."[57] Any attempt by AT&T to introduce an argument that Nextel may not adopt the Sprint ICA because it is providing only wireless service, and is therefore not similarly situated, must fail because the issue has already been considered by the FCC and rejected.

As set forth in the FCC's *Second Report and Order*, AT&T's pre-merger parent, BellSouth Corporation, specifically contended that incumbent LECs should be permitted to restrict 252(i) adoptions to "similarly situated" carriers.[58] To support that position, BellSouth used an example of an interconnection agreement with bill-and-keep compensation terms that it argued should only be available to similarly-situated carriers. BellSouth informed the FCC that it sought to "construct contract language specific to this situation, [but] *there is still risk that CLECs who are not similarly situated will argue they should be allowed to adopt the language*[.]"[59] The situation involved a CLEC with a very specific business plan, customer base and bill and keep provisions that BellSouth contended in "other circumstances ... would be extremely costly to BellSouth."[60] Notwithstanding such assertions, the FCC held:

> We also reject the contention of at least one commentator that incumbent LECS should be permitted to restrict adoptions to "similarly situated" carriers. We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. Subject to the

[56] *Id.* at ¶ 1318.
[57] *Id.* at ¶ 1321.
[58] *Second Report and Order* at ¶ 30 and n. 101.
[59] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No.01-338, BellSouth Affidavit of Jerry D. Hendrix at ¶ 6 (May 11, 2004) (attached hereto as **Exhibit E**).
[60] *Id.*

> limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety *that the requesting carrier deems appropriate for its business needs.* Because the all-or-nothing rule should be more easily administered and enforced than the current rule, we do not believe that further clarifications are warranted at this time.[61]

Nextel anticipates that AT&T will attempt a further spin to the "similarly situated" argument by contending that the Sprint ICA provides for bill and keep and the 50/50 sharing of facilities that *but for the presence of both a wireless and wireline carrier to the deal*, AT&T would not ordinarily have entered into an agreement providing such terms to either type of carrier on a stand-alone basis. Thus, as the argument has gone in other jurisdictions, neither type of carrier can adopt the entire agreement on a stand-alone basis because it includes terms that a stand-alone carrier cannot use. This version of the "similarly situated" argument - i.e. a carrier cannot adopt an ICA that contains terms it is incapable of using - was advanced by AT&T's other predecessor, SBC, in an attempt to avoid filing in its entirety the terms of an agreement it had entered into with a CLEC named Sage Telecom.[62]

In *Sage*, SBC and Sage Telecom entered into a "Local Wholesale Complete Agreement" ("LWC") that included not only products and services subject to the requirements of the Act, but also certain products and services that were not governed by either §§ 251 or 252. Following the parties' press release and filing of only that portion of the LWC that SBC and Sage considered to be specifically required under Section 251 of the Act, other CLECs filed a petition requiring the filing of the entire LWC. The Texas Commission found the LWC was an integrated agreement resulting in the entire

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[61] *Second Report and Order* at ¶ 30.

[62] *Sage Telecom, L.P. v. Public Utility Commission of Texas,* 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) (*"Sage"*) (attached hereto as **Exhibit F**).

agreement being an interconnection agreement subject to filing and thereby being made available for adoption by other CLECs pursuant to 252(i). On appeal, SBC argued that "requiring it to make the terms of the entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs."[63] In rejecting this argument, the federal district court stated:

> [SBC's] argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.[64]

Based on both the FCC's *Second Report and Order* and *Sage*, it is Nextel, not AT&T, that is entitled to decide which of the Sprint ICA terms that Nextel "deems appropriate for its business needs"[65] and can use from all of the terms that are indeed adopted in their entirety. Further, any AT&T contention that it may have entered into an agreement providing treatment to Sprint PCS as a wireless carrier that AT&T would not ordinarily have otherwise agreed to cuts against, not in favor of, AT&T, to compel the approval of Nextel's adoption of the Sprint ICA under the FCC's all-or-nothing rule. With the rejection of AT&T's "similarly situated" argument by the FCC, the express language of 51.809(a), and the rationale of both the FCC in its *Second Report and Order*

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[63] *Id.* at *23.
[64] *Id.* at *6.
[65] *See supra* n. 61.

and the *Sage* decision, there simply is no legal basis for the Authority to permit AT&T to continue to delay Nextel's adoption of the Sprint ICA.

IV. CONCLUSION

The amendment to extend the Sprint ICA three (3) years has been approved by the TRA in Docket No. 07-00132. It is undisputed that the *Joint Motion* in TRA Docket No. 07-00132, coupled with the approval of the same, eliminates the only issue of material fact that remained in that docket.[66]

For all of the reasons stated above, there is no genuine issue as to any material fact regarding Nextel's adoptions of the Sprint ICA, and Nextel is entitled to adopt the Sprint ICA under both AT&T Inc.'s Merger Commitments and 47 U.S.C. § 252(i) as a matter of law.

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[66] *See Joint Motion* at 2 ("Upon Authority approval of the three-year term extension Amendment, the issues in the above-styled arbitration proceeding will be resolved."). *See also Joint Motion*, Exhibit A ("This Amendment shall be filed with and is subject to approval by the [Authority] and shall be effective upon the date of the last signature of both Parties."). There are no disputed issues of material fact associated with AT&T's arguments that the Authority does not have jurisdiction to consider the Merger Commitments and that Nextel's adoption should be denied as premature because Nextel did not follow the dispute resolution provision in its existing interconnection agreement. The Authority has determined that it does have jurisdiction over the Merger Commitments in TRA Docket No. 07-00132. *See supra* n. 50. The Authority should rule, as the Florida PSC did, that AT&T's "dispute resolution process argument" fails for the reasons set for in *Nextel's Response*. *See Order Denying Motion to Dismiss*, Florida PSC Docket Nos. 070368-TP, 070369-TP, p. 6 (Oct. 16, 2007) ("Finally, consistent with our findings in the Z-Tel Order, we find that Section 252(i) obligates incumbents, such as AT&T, to enable Nextel and other CLECs to operate upon the same terms and conditions as those provided in a valid existing interconnection agreement. We do not find that Nextel is obligated to invoke the parties' existing dispute resolution provisions. Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety."). In its *Order Denying Motion to Dismiss*, the Florida Commission referred to NPCR, Inc. d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. collectively as "Nextel."

WHEREFORE, Nextel respectfully requests that the Authority:

a) Issue an Order granting Nextel's requests for summary judgment, which acknowledges Nextel's adoptions of the Sprint ICA and requires AT&T to execute the Adoption Agreement attached hereto as **Exhibit A**;

b) Retain jurisdiction of this matter and the parties hereto as necessary to enforce the adopted Nextel-AT&T Interconnection Agreements; and

c) Grant such other and further relief as the TRA deems just and proper.

Respectfully submitted this 6 day of February, 2008.

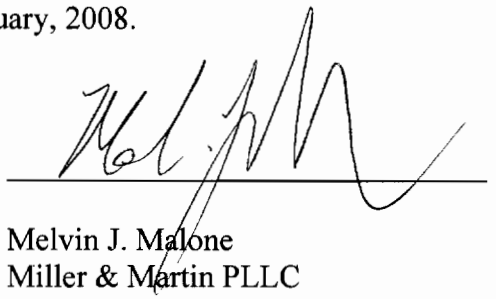

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EXHIBIT A

By and Between

BellSouth Telecommunications, Inc. d/b/a
AT&T Tennessee d/b/a
AT&T Southeast

And

Nextel South Corp.

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee d/b/a AT&T Southeast ("AT&T"), a Georgia Corporation, having offices at 675 W. Peachtree Street, Atlanta, Georgia, 30375, on behalf of itself and its successors and assigns, and Nextel South Corp., a Georgia Corporation ("Nextel"), and shall be deemed effective in the state of Tennessee as of _____ ("the Effective Date").

WHEREAS, the Telecommunications Act of 1996 (the "Act") was signed into law on February 8, 1996; and

WHEREAS, pursuant to section 252(i) of the Act, AT&T is required to make available any interconnection agreement filed and approved pursuant to 47 U.S.C. § 252; and

WHEREAS, pursuant to Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" as required by the Federal Communications Commission in its AT&T, Inc. – BellSouth Corporation Order, i.e., *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112 and Appendix F at page 149, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007), AT&T is also required to make available any entire effective interconnection agreement that an AT&T/BellSouth ILEC has entered in any state in the AT&T/BellSouth 22-state operating territory; and

WHEREAS, Nextel has exercised its right to adopt in its entirety the effective interconnection agreement between Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P. ("Sprint CLEC") Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS") and BellSouth Telecommunications, Inc. Dated January 1, 2001 for the state of Tennessee ("the Sprint ICA").

NOW THEREFORE, in consideration of the promises and mutual covenants of this Agreement, Nextel and AT&T hereby agree as follows:

1. Nextel and AT&T shall adopt in its entirety the Sprint ICA, which is incorporated by this reference herein, and is also available for public view on the AT&T website at:

http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf

2. The term of this Agreement shall be from the Effective Date as set forth above and shall coincide with any expiration or extension of the Sprint ICA.

3. Nextel and AT&T shall accept and incorporate into this Agreement any amendments to the Sprint ICA executed as a result of any final judicial, regulatory, or legislative action.

4. Every notice, consent or approval of a legal nature, required or permitted by this Agreement shall be in writing and shall be delivered either by hand, by overnight courier or by US mail postage prepaid (and email to the extent an email has been provided for notice purposes) to the same person(s) at the same addresses as identified in the Sprint ICA, including any revisions to such notice information as may be provided by Sprint CLEC and Sprint PCS from time to time, and will be deemed to equally apply to Nextel unless specifically indicated otherwise in writing.

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc. **d/b/a AT&T Tennessee d/b/a AT&T Southeast**	**Nextel South Corp.**
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

EXHIBIT B

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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 KENTUCKY D/B/A AT&T SOUTHEAST	)))))))	CASE NO. 2007-00180

O R D E R

On May 7, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS (collectively, "Sprint") filed a petition for arbitration pursuant to 47 U.S.C. § 252(b) seeking resolution of one issue. In its petition, Sprint requests that the Commission determine the commencement date of the 3-year extension of its interconnection agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast ("AT&T").

On June 1, 2007, AT&T filed its response to Sprint's petition. In conjunction with its answer to the petition, AT&T moved for dismissal of the commencement date issue but also submitted an additional arbitration issue to the Commission concerning the adoption of certain portions of the interconnection agreement.

The parties have participated in an informal conference, and oral arguments were held in this matter on August 23, 2007. Briefs were filed by the parties. To date, the parties have not reached an agreement on the questions presented in this arbitration. Therefore, there are 3 issues to be decided by the Commission: (1) the

commencement date for the Sprint-AT&T agreement; (2) AT&T's motion to dismiss the Sprint petition; and (3) AT&T's request that the Commission adopt portions of the agreement.

The Commission is obligated to resolve each issue that is raised within a petition for arbitration and the responses thereto. Pursuant to the schedule outlined in 47 U.S.C. § 252, the Commission's decision on these matters is due no later than September 18, 2007.

BACKGROUND

Sprint operates as a telecommunications carrier, offering both competitive local exchange carrier ("CLEC") and commercial mobile radio service ("CMRS"). AT&T serves as an incumbent local exchange carrier ("ILEC"). This background section contains details on the recent commercial history between the two carriers and a recent Federal Communications Commission ("FCC") order affecting the Sprint-AT&T interconnection relationship.

Interconnection Agreement

Sprint and AT&T previously entered into an interconnection agreement that was approved by the Commission in Case No. 2000-00480.[1] By agreement, the parties amended that agreement at various times. On July 1, 2004, Sprint sent AT&T a request for negotiation of an extension of the parties' interconnection agreement pursuant to

[1] Case No. 2000-00480, The Petition of Sprint Communications Company, L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996. The interconnection agreement was approved by Order dated June 25, 2002.

Sections 251, 252, and 332 of the Telecommunications Act of 1996.[2] Since that date, the parties have conducted negotiations toward the goal of developing a comprehensive subsequent agreement. However, no agreement was reached prior to the expiration date of the existing contract on December 31, 2004. Pursuant to the terms of the original agreement, and to prevent the disruption of service to consumers while allowing the parties to continue negotiating the terms of a new agreement, Sprint and AT&T have operated on a month-to-month basis since January 1, 2005.

AT&T and BellSouth Corporation Merger

On December 29, 2006, the FCC approved the merger of AT&T, Inc. and BellSouth Corporation ("BellSouth").[3] AT&T and BellSouth also closed their corporate merger on December 29, 2006.[4] On March 26, 2007, the FCC issued its final Order authorizing the merger. This Order contained certain voluntary merger commitments to be followed by the new AT&T-BellSouth corporate entity.[5] As an express condition of its merger authorization, the FCC ordered that the companies comply with the conditions set out in Appendix F of the FCC Order.

After the December 29, 2006 announcement of the FCC's approval of the merger, Sprint and AT&T deliberated the impact of the merger commitments upon their

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[2] 47 U.S.C. §§ 251, 252, 332.

[3] FCC WC Docket No. 06-74, Order dated March 26, 2007.

[4] This Commission also issued an Order approving the merger of AT&T and BellSouth Corporation, pursuant to KRS 278.020. Case No. 2006-00136, Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T, Inc. and BellSouth Corporation, final Order dated July 25, 2006.

[5] FCC WC Docket 06-74, Appendix F at 147, Order dated March 26, 2007.

negotiations of their interconnection agreement. The parties agree that during the course of the deliberations, AT&T acknowledged that, pursuant to the merger commitments, Sprint could extend its current agreement for 3 years. However, despite this agreement on the right to extend the contract, the parties have not reached a consensus as to the exact date of commencing the extension.

The specific merger commitment that is the subject of Sprint's petition is titled "Reducing Transaction Costs Associated with Interconnection Agreements." Paragraph 4 of this commitment[6] states:

> 4. The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.[7]

On March 20, 2007, by letter, Sprint informed AT&T that it considered the merger commitment to equal AT&T's latest offer for consideration within the Sprint-AT&T current interconnection agreement negotiations. Pursuant to Merger Commitment No. 4, Sprint requested that the current month-to-month status of the interconnection agreement be converted to a 3-year term, commencing on March 20, 2007 and terminating on March 19, 2010, in addition to other terms and considerations. Although AT&T acknowledged receipt of Sprint's March 20, 2007 letter request, AT&T provided no response and did not execute the proposed amendment outlining the

[6] Hereinafter, Paragraph 4 will be referred to as "Merger Commitment No. 4."

[7] FCC WC Docket No. 06-74, Appendix F at 150, Order dated March 26, 2007.

commencement date for the new 3-year interconnection agreement. Sprint then filed its petition for arbitration on May 7, 2007.

This matter is currently before the Commission, as the parties cannot reach an agreement as to the commencement date for the 3-year extension. AT&T has moved to dismiss the issue, arguing that this Commission is without jurisdiction to decide this matter. Additionally, AT&T has submitted a second issue for arbitration. The second issue, which AT&T contends does fall within this Commission's jurisdiction to decide, concerns the adoption of certain portions of the proposed Sprint-AT&T interconnection agreement, titled "Attachments 3A and 3B." The Commission shall first address AT&T's motion to dismiss.

MOTION TO DISMISS

In conjunction with its response to Sprint's petition, AT&T included a motion to dismiss the arbitration issue. AT&T argues that Sprint is improperly seeking to arbitrate the interpretation of a merger commitment, which lies within the exclusive jurisdiction of the FCC. AT&T contends that, since the FCC was the agency that issued the Order approving the national AT&T-BellSouth merger and issued the appendix adopting the voluntary commitments to be followed by the companies after merger, it is the only agency with the authority to "interpret, clarify, or enforce any issues involving merger conditions. . . ."[8] AT&T admits that it agreed to extend the interconnection agreement with Sprint, but claims that the merger commitment which is the subject of Sprint's

[8] AT&T's Motion to Dismiss and Answer at 3.

petition is "separate and distinct from any obligations set forth in Section 251 of the Telecommunications Act of 1996"[9] and, therefore, results in a non-arbitrable issue.

The petition, as filed by Sprint, concerns the issue of determining the commencement date for an interconnection agreement. Interconnection agreements establish the rates, terms, and conditions concerning the services and facilities to be provided between utilities operating in states such as Kentucky. This Commission is charged by statute with overseeing the rates, terms, and conditions of service provided by and between utilities operating in Kentucky.[10]

The Telecommunications Act of 1996 has been interpreted to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements they approve.[11] 47 U.S.C. § 251 defines the specific interconnection duties of carriers. Under that statute, each carrier has the duty to interconnect directly or indirectly with the facilities or equipment of other carriers. Pursuant to 47 U.S.C. § 252, any party negotiating the terms of an interconnection agreement has the right, in the course of negotiations, to ask a state commission to mediate any differences arising during negotiations. When presented with a petition for arbitration, Section 252 requires that state commissions ensure that the resolution of disputed issues meets the requirements of Section 251, in addition to establishing rates for interconnection, services, or network elements and providing a schedule for the implementation of the terms and conditions of the agreements. Section 251(c)(2)(D)

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[9] Id.

[10] KRS 278.040.

[11] Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997).

requires an ILEC to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Section 252(b)(4)(B) gives each state commission the power to arrive at its best decision based upon the information provided during the arbitration process. The 1996 Telecommunications Act gives suitable room for the promulgation and enforcement of state regulations, orders, and requirements of state commissions as long as they do not prevent the implementation of federal statutory requirements.[12]

In its March 26, 2007 Order approving the merger between AT&T and BellSouth, the FCC made no statement or ruling that state commissions would be without jurisdiction to address interconnection agreement questions stemming from the merger commitments.[13] Therefore, both federal and state laws unequivocally empower this Commission to hear this case.[14] Laws existing at the time that an agreement is made become part of that agreement.[15]

The Commission finds that AT&T's argument that the FCC is the sole and exclusive agency with the authority to arbitrate the commencement date issue lacks merit. The Commission reviewed the FCC's Order approving merger, as well as the arguments presented by AT&T regarding the FCC's alleged jurisdiction over interconnection commencement dates. However, no argument or evidence has been

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[12] BellSouth Telecommunications, Inc. v. Cinergy Communications, Co., 297 F. Supp. 2d 946, 952 (E.D. Ky., 2003).

[13] FCC WC Docket 06-07, Order dated March 26, 2007.

[14] Pursuant to KRS Chapter 278 et seq., the Commission is vested with the authority to regulate telephone companies providing service within this state.

[15] *See generally* Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (1954).

presented that is so compelling as to convince the Commission that simply because AT&T and BellSouth chose to submit voluntary commitments to the FCC in conjunction with the request for merger approval, this serves as an affirmative demonstration that the Commission would suddenly lose jurisdiction over intrastate interconnection matters, including the commencement date of an agreement. AT&T has not presented a sufficient argument or evidence to establish the presumption that a federal order was intended to supersede the exercise of power of the state. For this to be true, AT&T needed to present evidence of a clear manifestation of the FCC's intention to do so. The exercise of federal supremacy cannot be and should not be lightly presumed.[16] The FCC stated that "all conditions and commitments. . .are enforceable by the FCC."[17] However, even under the most liberal interpretation, the phrase "are enforceable" in reference to the merger commitments is not synonymous with the word "exclusive." Simply because the Commission has to refer to a federal agency's Order to resolve a dispute does not mean that the Commission is completely preempted from using its statutorily bestowed power of arbitration. The FCC may have created and issued its merger Order, but it did not restrict the rights of state commissions to review, interpret, and apply the meaning of that document.

The Commission believes it maintains concurrent jurisdiction with the FCC to resolve such post-merger or merger-related disputes, unless clearly and unequivocally told otherwise pursuant to an FCC Order or regulation. The Commission has primary

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[16] See BellSouth Telecommunications, Inc. v. Cinergy Communications, supra, 297 F. Supp. 2d 946 at 953.

[17] FCC WC Docket No. 06-74, supra, Appendix F at 147 (emphasis added).

jurisdiction over general issues regarding the interpretation and implementation of interconnection agreements[18] and has affirmatively maintained jurisdiction over previous arbitration matters concerning the commencement and termination dates of carrier-to-carrier contracts.[19] Therefore, the Commission finds that it has jurisdiction and it is appropriate for the Commission to review and adjudicate this petition and the issue

[18] *See* Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F. 3d 1270, 1275 (11th Cir., 2003).

[19] *See generally* Case No. 2001-00224, Petition of Brandenburg Telecom LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Verizon South Inc. Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Order dated November 15, 2001; and Case No. 2004-00044, Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Order dated March 14, 2006.

contained therein.[20] For these reasons, AT&T's motion to dismiss the commencement date issue in the petition on the ground that this state lacks jurisdiction is denied.[21]

COMMENCEMENT DATE

Sprint argues that there are two potential dates the Commission could determine as the date by which the 3-year extension of the current interconnection agreement would commence. Sprint first proposes March 20, 2007 as a potential commencement date, as it is the date on which Sprint notified AT&T in writing that the merger commitments, as outlined in the FCC's merger approval Order, qualified as AT&T's most recent offer for consideration within the parties' negotiations to extend the current interconnection agreement.[22] As stated previously in this Order, although AT&T acknowledged receipt of this letter, it provided no response by the due date outlined in the letter. In the alternative, Sprint also proposes a commencement date of December

[20] Specifically, the Commission has previously retained jurisdiction to determine the termination date of an interconnection agreement. *See* Case No. 1996-00478, Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order dated February 14, 1997.

[21] The case currently before the Commission is one of 9 identical actions that have been filed by Sprint against AT&T in every state within the former BellSouth service territory. The actions are identical and concern exactly the same issues that are presented in this action. On August 10, 2007, Commission Staff for the Louisiana PSC moved to hold Sprint's petition in abeyance. Louisiana Docket No. U-30179. If the motion is granted by their PSC, the Louisiana staff intends to seek a declaratory ruling from the FCC to clarify when the 3-year period for interconnection agreements was intended to commence. *See* Letter from AT&T to Beth O'Donnell, August 17, 2007, and letter from Sprint to Beth O'Donnell, August 22, 2007. As of the date of this Order, this Commission is not aware if the Louisiana petition has been filed with the FCC or the likely date the FCC would issue a ruling after the petition is filed. This Commission shall go forward in ruling upon the issues that have been presented before it in this matter.

[22] Petition for Arbitration at 6.

29, 2006, which is the date of the AT&T-BellSouth merger and the effective date of the FCC merger Order and merger commitments.[23] Sprint contends this date is the absolute earliest date by which the commencement of the 3-year extension could occur.[24]

AT&T's primary argument in regard to this petition issue is that the Commission lacks the jurisdiction to adjudicate the commencement date issue. However, in addition to arguing for dismissal by alleging that the merger commitments are beyond the scope of an arbitration under 47 U.S.C. § 251, AT&T alternatively contends that December 31, 2004 is the only conceivable commencement date for the extension of the interconnection agreement.[25] December 31, 2004 is the date on which the most recent Sprint-AT&T agreement concluded under a fixed term and converted to a month-to-month operation.

In light of evidence and arguments presented, the Commission finds that the date of December 29, 2006 is the proper commencement date of the extension of the

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[23] Petition for Arbitration at 8, 9.

[24] *See* North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294, Sub 31, dated May 1, 2007. Pre-Filed Testimony of Felton at 16,17,18. Filed in the record of the Commission on August 22, 2007. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission has given the appropriate weight to the North Carolina Commission's record, as it felt was necessary and due.

[25] AT&T's Pre-Argument Brief at 3. AT&T contends that December 31, 2004 was the amended expiration date of the last 3-year agreement between the parties. Based on this date, AT&T states that the 3-year agreement would expire on December 31, 2007.

interconnection agreement between the parties. This is the effective date of the FCC Order and the merger commitments, including Merger Commitment No. 4, which compels AT&T to extend the life of a current interconnection agreement at the request of a connecting carrier, regardless of whether the initial term has expired. In the preamble of Appendix F of the Memorandum Opinion and Order approving merger, the FCC stated:

> The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them. Unless otherwise specified herein, the commitments described herein shall become effective on the Merger Closing Date. . . .
>
> It 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, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.[26]

AT&T's assertion that the interconnection agreement should be extended for 3 years from the initial expiration date of December 31, 2004 is wholly inconsistent with the FCC merger commitment directive and would create an unreasonable result. The Commission finds that within the terms of its merger order, the FCC clearly contemplated situations where interconnection agreements would be extended and effective beyond the initial term of the agreement. Again, the FCC stated in Merger Commitment No. 4 that "[t]he AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial terms has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law." AT&T and Sprint have been,

[26] FCC WC Docket No. 06-74, Appendix F, p. 147 (emphasis added).

and are currently, operating under the interconnection agreement, as amended, originally established in Case No. 2000-00480.[27] In fact, the agreement has been repeatedly amended by both parties at various times well after the initial expiration date of December 31, 2004 specified in the original agreement.[28] If this Commission followed AT&T's reasoning and chose a commencement date of December 31, 2004, this would result in the extension of the interconnection agreement being applied in a retroactive manner prior to existence of the newly merged AT&T-BellSouth entity which is the subject of the FCC order. The FCC's merger commitments in question did not exist until December 29, 2006, and its only purpose was to direct the commercial behavior, in part, of this brand new entity collectively known as "AT&T." The Commission has found no portion of the FCC's merger order dictating that it should be applied retroactively. The Commission finds that the FCC's merger order was intended to be applied on a going-forward basis so as to address competitive concerns and other commercial issues resulting from the unification of AT&T and BellSouth. It is for these reasons that the Commission finds that the date of December 29, 2006 is to serve as the date for the commencement of the extension of the AT&T-Sprint interconnection agreement.

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[27] *See* n. 1.

[28] *See* North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294 Sub 31, dated July 31, 2007. Testimony of Felton at pages 21-24. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission will examine and give the appropriate weight to the North Carolina Commission's record, as it feels is necessary and due.

ATTACHMENTS 3A AND 3B

In responding to a petition for arbitration, under 47 U.S.C. § 252(b), the non-petitioning party may also provide additional information. Pursuant to this section, AT&T, in combination with its motion to dismiss the commencement date issue, responded by submitting to the Commission a request for approval of a proposed section of the Sprint-AT&T interconnection agreement.

AT&T contends that, during the course of interconnection extension negotiations with Sprint, the companies had reached a point of consensus, in principle, on every issue within the proposed agreement when Sprint allegedly withdrew from negotiations and filed the petition for arbitration.[29] AT&T argues that, prior to Sprint's withdrawal, the only issues under discussion and to be subsequently finalized were the terms to be enumerated in Attachment 3A, which concern wireless interconnection services, and Attachment 3B, which concern wireline interconnection services. AT&T is requesting that the Commission approve the adoption of these "generic" attachments"[30] so that they may be included in the General Terms and Conditions and all other attachments of the Sprint-AT&T interconnection agreement.

In response to this issue, Sprint denies that the parties reached any final agreement, in principle or otherwise, and no such agreement was ever reduced to

[29] Attached as Exhibit B to its response to the petition, AT&T provided what it categorized as the final agreement the parties had reached through negotiations for the General Terms and Conditions and attachments. *See* AT&T Answer to Petition at 10 and Exhibit B.

[30] AT&T Pre-Argument Brief at 14.

writing or signed by the parties.[31] Additionally, Sprint states that the terms outlined within Attachments 3A and 3B were not part of any discussion between the parties.[32]

The Commission finds that the generic language for Attachments 3A and 3B as proposed by AT&T should not be adopted for the extension of the Sprint-AT&T interconnection agreement. The Commission declines to approve the adoption, as there is no evidence that the parties adhered to the single most important and basic rule of contract law, which is a "meeting of the minds." As stated in previous parts of this Order, the parties are currently functioning on month-to-month contract terms and have not agreed upon final terms of the 3-year extension. Because of this fact, the Commission cannot approve the proposed Attachments 3A and 3B, as submitted by AT&T, when Sprint has not approved one word of their terms. To constitute a binding contract, or any portion thereof, the minds of the parties must meet, and one party cannot be bound to uncommunicated terms without consent.[33] For these reasons, this issue, as submitted by AT&T, is dismissed as a matter of law.

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[31] Sprint's Response to AT&T's Motion to Dismiss and Answer at 15.

[32] Sprint Pre-Argument Brief at 21.

[33] Oakwood Mobile Homes, Inc. v. Sprowls, 82 S.W.3d 193 (Ky. 2002), citing Harlan Public Service Co. v. Eastern Construction Co., 71 S.W.2d 24 (Ky. App. 1934).

CONCLUSION

The Commission, having considered the petition of Sprint, AT&T's response and motion, and the evidence of the record in this proceeding and other sufficient advice, HEREBY ORDERS that:

1. AT&T's motion to dismiss is denied.

2. The commencement date for the new Sprint-AT&T interconnection agreement is December 29, 2006 for a fixed 3-year term.

3. AT&T's petition to adopt Attachments 3A and 3B is dismissed.

4. This Order is final and appealable.

Done at Frankfort, Kentucky, this 18th day of September, 2007.

By the Commission

ATTEST:

Executive Director

EXHIBIT C

Eddie A. Reed, Jr.
Director-Contract Management
AT&T Wholesale Customer Care

AT&T Inc.
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at&t

May 30, 2007

Mark G. Felton
Interconnection Solutions
Sprint Nextel Access Solutions
Mailstop KSOPHA0310-3B372
6330 Sprint Parkway
Overland Park, KS 66251

Re: Nextel South Corp., Nextel West Corp. and NPCR, Inc. d/b/a Nextel Partners' Section 252(i) adoption request

Dear Mr. Felton:

Your letters dated May 18, 2007, on behalf of Nextel South Corp., Nextel West Corp. and NPCR, Inc. d/b/a Nextel Partners (collectively "Nextel") were received via FedEx on May 21, 2007. The aforementioned letters state that, pursuant to Merger Commitments 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements," effective December 29, 2006, and associated with the merger of AT&T Inc. and BellSouth Corp. ("Commitment 7.1 and Commitment 7.2")," as well as pursuant to 47 U.S.C. Section 252(i), Nextel is exercising its right to adopt the Interconnection Agreement ("ICA") between BellSouth Telecommunications, Inc.[1] and Sprint Communications Company L.P., Sprint Spectrum L.P. in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. The letters are also to be considered Nextel South Corp., Nextel West Corp. and NPCR, Inc. d/b/a Nextel Partners' conditional notice to terminate their existing ICAs with BellSouth Telecommunications, Inc. upon approval of the adopted ICAs.

First, it is unclear how Nextel's request implicates Commitment 7.1. As the requested ICA has been filed and approved in each of the states where requested, Nextel's adoption request appears to be based solely on Section 252(i).

As you know, the purpose of the merger commitments related to "Reducing Transaction Costs Associated with Interconnection Agreements" is to allow carriers to reduce transaction costs associated with the allegedly "continuous" cycle of ICA renegotiations and arbitrations.[2] Pursuant to Commitment 7.2, rather than negotiating and possibly arbitrating a successor ICA, a carrier can avoid such costs by adopting another carrier's ICA without the need to amend the ICA prior to adoption to bring it into compliance with changes in law. Commitment 7.2 does not expand a carrier's rights generally pursuant to Section 252(i) of the Telecommunications Act of 1996, but merely adds the provision that during the period in which the merger commitments are in effect, the adoption cannot be delayed while negotiating a change of law amendment.

The Sprint ICA was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004. Since the expiration date, the parties have been operating under the Sprint ICA while the parties have been negotiating a successor ICA. As that ICA is expired and is currently in arbitration at the relevant state commissions, it is not available for adoption, as it was not adopted within a reasonable period of time as required by 47 C.F.R. § 51. 809(c).

Randy Ham will continue to be the AT&T Lead Negotiator assigned to Nextel for the 9-state region. He may be contacted at (205) 321-7795. Please direct any questions or concerns you may have to Randy.

If you would like to have further discussions regarding this matter, AT&T would be happy to participate in order to bring these issues to a quick and amicable resolution.

Sincerely,

Eddie A. Reed, Jr.

[1] BellSouth Telecommunications, Inc. is now doing business in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee as AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and/or AT&T Tennessee, and will be referred to herein as "AT&T".

[2] *See, e.g., Comments of Cable Companies*, WC Docket No. 06-74 at pp. 9-10 (Oct. 24, 2006).

EXHIBIT D

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc.,	)	
Complainants,	)	
v.	)	Case No. 07-1136-TP-CSS
The Ohio Bell Telephone Company dba AT&T Ohio,	)	
Respondent,	)	
Relative to the Adoption of an Interconnection Agreement.	)	

FINDING AND ORDER

The Commission finds:

(1) On October 26, 2007, Sprint Communications Company L.P. (Sprint CLEC),[1] Sprint Spectrum L.P.[2] (Sprint Spectrum), Nextel West Corp.,[3] and NPCR, Inc.[4] (collectively Sprint) filed a complaint against AT&T Ohio (AT&T). In the complaint, Sprint alleges that it wishes to adopt the interconnection agreement between, on the one hand, BellSouth Telecommunications, Inc. dba AT&T Kentucky dba AT&T Southeast and, on the other hand, Sprint CLEC and Sprint Spectrum. Sprint contends that AT&T must permit the adoption of the interconnection agreement pursuant to federal

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1 Sprint CLEC is authorized to provide local and interexchange telecommunication services in Ohio under certificate number 90-9015.

2 Sprint Spectrum is an agent and general partner of WirelessCo, L.P. and SprintCom, Inc. The companies provide commercial mobile radio services in Ohio and conduct business under the name Sprint PCS.

3 Sprint states in its application that Nextel West Corp. is authorized by the Federal Communications Commission to provide wireless services in Ohio.

4 Sprint states in its application that NPCR, Inc. is authorized by the FCC to provide wireless services in Ohio.

merger commitments made by AT&T Inc. and BellSouth Corporation as approved by the FCC in *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, FCC 06-189 (released March 26, 2007) (FCC Merger Order).[5] Sprint also requests that the Commission issue an expedited ruling.

(2) Sprint alleges and AT&T agrees that, effective January 1, 2001, Sprint CLEC and Sprint PCS entered into an interconnection agreement with BellSouth Telecommunications, Inc. The agreement covered nine states, including the State of Kentucky (BellSouth ICA). The parties have amended the agreement various times subsequent to its execution.

(3) By letter dated August 21, 2007, AT&T notified Sprint that it intended to terminate its existing interconnection agreements with Sprint in various states, including Ohio. Sprint CLEC and Sprint PCS responded to the notification on August 31, 2007, and agreed to establish an arbitration window beginning on January 12, 2008. Nonetheless, Sprint alleges that it reserved the right to enforce a merger commitment that would permit it to port an interconnection agreement from another state.

(4) Sprint states that on July 10, 2007, it notified AT&T of its intent to adopt and port the BellSouth ICA to Ohio. On September 18, 2007, the Kentucky Public Service Commission issued an order extending the BellSouth ICA for a fixed three-year term

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5 There are four merger commitments. They appear in Appendix F attached to the FCC Merger Order under the title "Reducing Transaction Costs Associated with Interconnection Agreements." Merger Commitments 1 and 2 appear as follows:

Merger Commitment 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/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provide, 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.

Merger Commitment 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 telecommunication carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

beginning on December 29, 2006.[6] On October 9, 2007, AT&T notified Sprint that the BellSouth ICA had expired and that the agreement was not eligible for adoption.

(5) Sprint states that negotiations for a new interconnection agreement with AT&T have failed. Instead of initiating an arbitration proceeding, Sprint has opted to file a carrier-to-carrier complaint. Ultimately, Sprint seeks to adopt the BellSouth ICA and port it to Ohio.

(6) Sprint states that there are no factual issues and that there is only one legal issue: whether Sprint may port the BellSouth ICA, as extended three years from December 29, 2006, into Ohio pursuant to Merger Commitment 1. Noting the absence of material factual disputes, the Commission shall forego a hearing in this matter and shall decide the issue based on the law and the arguments asserted by the parties.

(7) On November 2, 2007, AT&T filed an answer to the complaint and a separately filed motion to dismiss. In summary, AT&T argues that the Commission has no jurisdiction over the complaint. Even assuming that the Commission has jurisdiction over the complaint, AT&T contends that it would be better for the Commission to defer to the FCC. In addition, AT&T asserts that the complaint is premature. Problematic, according to AT&T, is that the interconnection agreement that Sprint seeks to port cannot be ported "as is" because the agreement requires Ohio-specific modifications. Procedurally, AT&T opposes Sprint's request for streamline treatment of the complaint. AT&T believes that the complaint is not legally eligible for streamlined treatment. Similarly, AT&T opposes Sprint's request for expedited treatment because such treatment is unavailable under the Commission's rules.

(8) Sprint filed a memorandum contra AT&T's motion to dismiss on November 19, 2007. In its memorandum contra, Sprint proclaims that the Commission has concurrent jurisdiction with the FCC and may interpret and apply federal law to resolve interconnection disputes and to enforce the merger commitments. Moreover, Sprint believes that it would be more

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6 *Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. dba Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. dba AT&T Kentucky dba AT&T Southeast*, Case No. 2007-00180 (Order issued September 18, 2007).

appropriate for the Commission to exercise its jurisdiction rather than defer to the FCC. Further challenging AT&T's assertions, Sprint contends that the complaint is not premature, that it may be ported "as is," and that this matter is eligible for a streamlined procedure. Sprint urges the Commission to exercise jurisdiction, deny AT&T's motion to dismiss, and order AT&T to port Sprint's Kentucky interconnection agreement.

(9) Factually, AT&T explains that in the spring of 2007 Sprint sought to extend the BellSouth ICA for three years in each of the nine states in which the BellSouth ICA had been in effect. On September 18, 2007, the Kentucky Commission granted the extension. AT&T believes that the September 18, 2007, decision is unlawful because it misinterprets Merger Commitment 4.[7] AT&T discloses that it may appeal the Kentucky Commission's September 18, 2007, ruling.[8] Thus, if the Ohio Commission were to approve Sprint's application and AT&T were to prevail in overturning the Kentucky Commission's decision, AT&T argues that it would have a basis to invalidate the BellSouth ICA through the change in law provision in the agreement.

(10) As a basis for dismissing the complaint, AT&T believes that the Kentucky Commission's September 18, 2007, decision is unlawful because it encroaches upon the exclusive jurisdiction of the FCC over the merger and the merger commitments. To support its position, AT&T points out that the FCC in its merger order did not contemplate any other forum but itself to interpret, clarify, or enforce the merger commitments. To AT&T, it makes sense that the FCC would retain exclusive jurisdiction to ensure a uniform regulatory framework without conflicting interpretations. Even if the Ohio Commission were to find that it has concurrent jurisdiction, AT&T contends that the Commission should exercise restraint to avoid conflicting results within AT&T's 22-state region.

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7 Merger Commitment 4: The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.

8 In its November 29, 2007, reply, AT&T noted that it has decided not to appeal the Kentucky Commission's order and that there is no further need to discuss this issue.

As additional support for its position, AT&T points out that the public service commissions in the states of Mississippi and Florida have recognized that the FCC has exclusive jurisdiction. Similarly, the states of South Carolina and Louisiana have deferred to the FCC.

(11) Disagreeing with AT&T's assertion that the FCC has exclusive jurisdiction over the enforcement of merger issues, Sprint, in its memorandum contra, points to Appendix F of the FCC Merger Order to support its contention that the Commission has concurrent jurisdiction. Focusing on language in Appendix F, Sprint highlights that the merger commitments "may" be enforced by the FCC. From this, Sprint concludes that the FCC is not the exclusive forum to enforce merger commitments. Taking into consideration other passages in Appendix F, Sprint further concludes that the FCC intended dual jurisdiction for the states and the FCC, with the FCC playing a secondary role. For statutory support, Sprint refers to Section 4905.04(B), Revised Code, and 47 U.S.C. §153[9] as grounds to support a state commission's assertion of jurisdiction.

Looking to other cases for guidance, Sprint argues that the FCC has a long-standing practice of establishing concurrent jurisdiction in merger, interconnection, and arbitration proceedings. Sprint raises as an example the "cooperative federalism" that grants states the authority to adjudicate interconnection disputes under Sections 251 and 252 of the Telecommunications Act of 1996 (the 1996 Act).

Looking outside of Ohio, Sprint finds that other states claim jurisdiction. According to Sprint, of the nine states that have addressed the enforcement of merger commitments, only Mississippi has decided that it does not have jurisdiction to enforce merger commitments.

(12) Going beyond mere recognition of jurisdiction, Sprint urges the Commission to exercise its jurisdiction. In so urging, Sprint argues that the Commission should not defer the matter to the FCC. Sprint contends that there is no concern for conflicting

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9 Chapter 47 U.S.C. §153 contains the definitions for the Communications Act of 1934. In particular, Sprint refers to 47 U.S.C. §153(41) which defines "state commission" as a "commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers."

and diverse results, as AT&T suggests. According to Sprint, AT&T already abides by state-specific requirements for interconnection. Citing a pending case in Louisiana, Sprint relates that the administrative law judge has recognized that holding the matter in abeyance has begun to cause problems and may lead to "collateral problems."

(13) Sprint states that it is not the only carrier to file for the enforcement of AT&T's merger commitments. In Michigan, XO Communications Services, Inc. has filed an application against AT&T Michigan. In Missouri, Verizon Wireless filed a complaint against Southwestern Bell Telephone Company dba AT&T Missouri. Sprint finds it to be an appropriate matter for state commissions when merger commitments are inextricably intertwined with interconnection matters.

(14) AT&T filed a reply in support of its motion to dismiss on November 29, 2007. AT&T maintains its position that the FCC has exclusive jurisdiction over the enforcement of merger commitments. AT&T asserts that Sprint mistakenly confuses the enforcement of Sections 251 and 252 of the Act with jurisdiction to enforce the FCC merger commitments. AT&T states that the FCC's Merger Order has no relation to the 1996 Act. While recognizing a scheme of implicit cooperative federalism in the realm of interconnection agreements, AT&T emphasizes that nothing in the Act implies that state commissions have authority to enforce merger commitments. The FCC's authority to approve mergers and enforce commitments, AT&T declares, arises from Sections 214 and 303(r) of the Communications Act of 1934 (the 1934 Act), not the 1996 Act. Moreover, argues AT&T, Sprint can point to no statute that grants a state commission authority to enforce merger commitments.

AT&T strongly rejects Sprint's assertion that Section 4905.04(B), Revised Code, grants the Commission authority to enforce merger commitments. AT&T states that Section 4905.04(B), Revised Code, is limited by 47 U.S.C. §153, which does not include enforcement of merger commitments. That Section 4905.04(B), Revised Code, was enacted the same year as 47 U.S.C. §153 makes the limitation clear. AT&T emphasizes that 47 U.S.C. §153(41) only encompasses arbitration, approval and enforcement of interconnection agreements, approval of

statements of generally available terms (SGATs), and consultation with the FCC concerning Bell operating companies' (BOCs) Section 271 applications. Consequently, AT&T concludes that Section 4905.04(B), Revised Code, does not authorize the Commission to enforce merger commitments. Without an authorizing statute, AT&T argues that Sprint's complaint must be dismissed. AT&T notes that other states, unlike Ohio, may have authorizing statutes.

Even if the Commission were to conclude that it has jurisdiction to enforce merger commitments, AT&T believes that the Commission should defer to the FCC. AT&T emphasizes that the issue in this case is not whether the Commission is better positioned than the FCC to determine appropriate interconnection arrangements in Ohio. Instead, the issue is about the interpretation of Merger Commitment 1. To AT&T, the FCC is the most appropriate forum. To avoid conflicting results, AT&T argues that the Commission must defer to the FCC. If 22 state commissions interpret and enforce the merger commitments, AT&T predicts that there will be conflicting and diverse opinions.

(15) In its motion to dismiss, AT&T argues that Sprint's complaint must be dismissed because it is premature. AT&T notes that the complaint is its first notice of Sprint's desire to port the agreement between AT&T Kentucky and Sprint. In support of its argument that the complaint is premature, AT&T explains that Sprint filed its complaint on October 26, 2007. On October 30, 2007, AT&T and Sprint filed the amendment that constitutes the contract extension that Sprint seeks to port. Consequently, AT&T argues that the agreement Sprint seeks to port did not come into existence until four days after Sprint filed its complaint. The filing of the complaint before the existence of the subject agreement, according to AT&T, makes the complaint premature. Moreover, AT&T points out that the agreement has yet to be approved by the Kentucky Commission. AT&T, therefore, concludes that the agreement is not legally effective.

(16) In its memorandum contra, Sprint rejects AT&T's assertion that its complaint is premature. Sprint points out that by letter dated July 10, 2007, it requested that AT&T port to Ohio the Kentucky version of a multi-state agreement between BellSouth

and Sprint. AT&T Kentucky and Sprint were parties to the Kentucky interconnection agreement. In a letter dated October 9, 2007, AT&T acknowledged receipt of the request to port the agreement between BellSouth and Sprint. Sprint notes that the BellSouth ICA is, effectively, the same as the Kentucky interconnection agreement. BellSouth conducts business in Kentucky as AT&T Kentucky.

Sprint also rejects that its complaint is premature because of AT&T's right to appeal the Kentucky Commission's order that extended the BellSouth ICA. AT&T argues that a court could overturn the commission's decision, rendering the agreement ineffective for porting. It is Sprint's contention that the agreement is effective until or unless AT&T obtains a preliminary injunction blocking the enforcement of the Kentucky decision. Sprint notes that AT&T has neither sought an appeal nor filed for injunctive relief.[10]

In its reply, AT&T maintains that the complaint is premature because the interconnection agreement that Sprint wants to port did not exist prior to the filing of the complaint in this matter. AT&T explains that Sprint filed its complaint on October 26, 2007. On October 30, 2007, Sprint and AT&T filed the amendment that extended the contract that Sprint seeks to port. The Kentucky Commission did not approve the amendment until November 7, 2007, rendering the amendment "effective." AT&T emphasizes that Merger Commitment 1 only allows the porting of "effective" agreements. AT&T, therefore, concludes that it was not required to port the agreement at that time. Making a distinction between the multi-state BellSouth agreement and the AT&T Kentucky agreement, AT&T points out that Sprint did not request to port the Kentucky version of the multi-state agreement nor the current form of the Kentucky agreement. Because there was no effective agreement to port at the time Sprint filed the complaint, AT&T concludes that the complaint must be dismissed.

(17) AT&T emphasizes, in its motion to dismiss, that the BellSouth ICA cannot lawfully be ported to Ohio "as is." Focusing on language in Merger Commitment 1, AT&T highlights that

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10 *Supra* note 8.

when an agreement is determined to be eligible for porting it must be reviewed against Ohio pricing and performance plans, technical feasibility in Ohio, and for consistency with Ohio laws and regulatory requirements. Recognizing these requirements, AT&T argues that the most the Commission can do, if it were to decide that it has jurisdiction, is rule that an agreement may be ported to Ohio subject to modifications.

(18) Rejecting AT&T's assertion, Sprint believes the AT&T Kentucky interconnection agreement with Sprint may be ported "as is." Sprint contends that AT&T never raised issues concerning Ohio-specific pricing, technical feasibility, or consistency of laws and regulatory requirements. If such issues exist, Sprint believes that AT&T should have raised the issues months ago in response to Sprint's July 10, 2007, request to port the agreement.

Sprint claims that the AT&T Kentucky interconnection agreement already identifies state-specific provisions within itself. Nevertheless, even in those circumstances where Ohio law impacts the agreement, Sprint states that the agreement could be modified quickly. For example, the agreement identifies state-specific interconnection rates for some of the BellSouth states. As a solution, the parties could insert a table containing the Ohio-specific rates.

In reply, AT&T declares that the AT&T Kentucky agreement cannot be ported "as is." According to AT&T, Merger Commitment 1 requires state-specific modification. Moreover, AT&T points out that Sprint admits that the AT&T Kentucky agreement would need to be modified by adding a table of Ohio-specific rates.

(19) AT&T asserts that this matter is not eligible for streamlined treatment or an expedited ruling. Guideline XVIII.C.2 of the Commission's Local Service Guidelines (Guidelines)[11] provide for a streamlined procedure for certain complaint cases. AT&T contends that the streamlined procedure is not available here. AT&T highlights that Guideline XVIII.C.2 only applies to complaints involving implementation of interconnection

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11 *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Entry on Rehearing issued February 20, 1997, Appendix A).

agreements filed pursuant to Section 4905.26, Revised Code. To AT&T's understanding, the provision only applies to existing interconnection agreements. By contrast, Sprint's complaint seeks to replace an agreement. The underlying intent of Guideline XVIII.C.2, according to AT&T, is to avoid undue delay in putting an interconnection agreement into place and to expedite competition. AT&T declares that no such considerations are at issue in this complaint proceeding. AT&T advises the Commission to be reluctant to adopt a schedule that forecloses the parties' ability to identify and resolve disagreements.

(20) Disagreeing with AT&T, Sprint affirms that this matter is eligible for a streamlined procedure. Sprint concedes that Rule 4901:1-7-28, Ohio Administrative Code (O.A.C.), was not effective at the time it filed its motion and has decided that there is no reason to discuss its applicability to this proceeding. Sprint, nevertheless, reserves its right to petition for application of the rule after it becomes effective. According to AT&T's interpretation, Guideline XVIII.C.2 provides for a streamlined complaint process to resolve disputes concerning the terms of an existing interconnection agreement. Sprint rejects this interpretation. First, Sprint points out that the Local Service Guidelines do not define the term "interconnection arrangement." In some circumstances, Sprint finds that the term does not connote an interconnection "agreement." According to Sprint, the streamlined complaint procedure is available to parties that have identified how to interconnect their networks but cannot reach an agreement to implement the arrangements. Sprint claims this conclusion comes from the plain reading of the Guidelines.

AT&T rejects Sprint's assertion that the streamlined procedure is available when parties have determined how to interconnect their networks but encounter disagreement in implementing arrangements. If Sprint's assertion were true, argues AT&T, then arbitrations under Section 252(b) of the 1996 Act would be subject to the streamlined procedure.

(21) AT&T urges the Commission to reject Sprint's request for an expedited ruling. First, AT&T notes that Rule 4901:1-7-28, O.A.C., which provides for expedited treatment, has been adopted but was not in effect when Sprint filed its complaint.

Even if the rule were in effect, AT&T proclaims that it would not be applicable. AT&T states that the rule applies only when the "dispute directly affects the ability of a telephone company to provide uninterrupted service to its customers or precludes the provisioning of any service, functionality or network element under an interconnection agreement." By virtue of Sprint operating under existing agreements, AT&T concludes that Sprint is barred from invoking Rule 4901:1-7-28, O.A.C. Moreover, AT&T contends that Sprint has failed to state specific circumstances that affect its ability to provide uninterrupted service, thereby justifying an expedited ruling.

(22) In its memorandum contra, Sprint conceded that Rule 4901:1-7-28, O.A.C., was not yet effective, rendering a discussion of its applicability unnecessary. Moreover, Sprint concluded that a further discussion of Rule 4901:1-7-28, O.A.C., would be unnecessary because the streamlined complaint procedure is available. Nevertheless, Sprint claimed a right to petition for the application of Rule 4901:1-7-28, O.A.C., after it becomes effective.

Noting that Sprint conceded that an expedited ruling is not available under Rule 4901:1-7-28, O.A.C., AT&T addresses the issue of whether the streamlined procedure in Guideline XVIII.C.2 is applicable. AT&T asserts that the streamlined procedure is not available. AT&T stresses that Guideline XVIIIC.2 applies only to complaints filed under 4905.26, Revised Code, involving the implementation of interconnection arrangements. AT&T emphasizes the distinction between the "implementation" of an interconnection arrangement and the "making" of an interconnection arrangement. Arguing plain meaning, AT&T contends that an arrangement must exist prior to implementation. Sprint's complaint, argues AT&T, involves the making of an interconnection arrangement, not an implementation.

(23) On November 20, 2007, the Commission issued an entry in the following cases: *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, *In the Matter of the Review of Chapter 4901:1-5, Ohio Administrative Code*, Case No. 05-1102-TP-ORD, and *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD. The entry

vacated the Local Service Guidelines and replaced them with new carrier-to-carrier rules that are set forth in Chapters 4901:1-6 and 4901:1-7 of the Ohio Administrative Code. Because the instant case was filed while the Local Service Guidelines were in effect, this case shall be governed by the Local Service Guidelines.

(24) A threshold issue in this proceeding is whether this case involves the implementation of an interconnection arrangement. Guideline XVIIIC.1. governs carrier-to-carrier complaints that do not involve the implementation of interconnection arrangements. Local Service Guideline XVIIIC.1. reads as follows:

> Under its authority pursuant to Section 4905.26, Revised Code, the Commission will consider carrier-to-carrier complaints. In carrier-to-carrier complaints concerning issues other than implementation of interconnection arrangements, the Commission will issue a procedural entry in these cases within 30 calendar days of the filing of the complaint, and will endeavor to conclude the case within 180 calendar days.

The parties, to this point, have adhered to Guideline XVIIIC.2. Guideline XVIIIC.2. sets forth the streamlined procedure for carrier-to-carrier complaints involving the implementation of interconnection agreements filed pursuant to Section 4905.26, Revised Code. This matter does not involve the implementation of an interconnection arrangement. There is no dispute concerning the terms or conditions of a negotiated, arbitrated, or existing interconnection agreement. Instead, at issue is whether a particular interconnection agreement is available for adoption and porting pursuant to a merger commitment approved by the FCC. Upon consideration of the facts and the arguments asserted by the parties, the Commission finds that this proceeding should be conducted pursuant to the provisions in Guideline XVIIIC.1.

(25) The parties agree that a key issue is whether this Commission has jurisdiction to enforce merger commitments. In *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Memorandum

Opinion and Order released March 26, 2007), the FCC promulgated the Merger Commitments in Appendix F of the Memorandum Opinion and Order. At the outset, the FCC stated the following:

> It 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, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.

From this language, we conclude that the FCC clarified that the states have jurisdiction over matters arising under the commitments. Even more, states are granted authority to adopt rules, regulations, programs, and policies respecting the commitments.

Immediately after, and before setting forth the commitments, the FCC states the following: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC...." From this, we gather that the FCC sought to make clear that it retains jurisdiction over matters that could otherwise be considered exclusively within the jurisdiction of the states. In other words, the FCC, at first, establishes that states retain jurisdiction. To remove any doubt about its own jurisdiction, the FCC specifically states that it retains concurrent authority to enforce all conditions and commitments.

To shed additional light on the issue of jurisdiction, it is noteworthy that in Merger Commitment 1 the FCC mandated that interconnection agreements be subject to state-specific pricing, performance plans, and technical feasibility. To us, the existence of state-specific standards suggests that the states would be better qualified than the FCC to determine whether interconnection agreements adhere to unique state standards. Concluding that the FCC has specifically carved out a place for state jurisdiction in the enforcement of merger commitments, it

would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do.

(26) AT&T argues that Sprint's complaint is premature, having been filed prior to the time that the interconnection agreement sought to be ported became "effective." AT&T draws a distinction between the AT&T Kentucky interconnection agreement with Sprint and the BellSouth ICA. AT&T emphasizes that the AT&T Kentucky interconnection agreement became effective after the complaint. Sprint, on the other hand, considers the BellSouth ICA and the AT&T Kentucky interconnection agreement to be the same.

In Sprint's July 10, 2007, letter, Sprint specifies that it wishes to port to the State of Ohio the agreement between BellSouth Telecom, Inc. (AT&T) and Sprint Communication Co., L.P. and Sprint Spectrum L.P. in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. AT&T responded to the port request by letter dated October 9, 2007. In a footnote, AT&T states that BellSouth Telecommunications, Inc. does business in Kentucky as "AT&T Kentucky."

AT&T's distinction between the two agreements appears to be an emphasis of form over substance. Based on AT&T's correspondence and Sprint's arguments, we agree with Sprint that the BellSouth ICA and the AT&T Kentucky agreement are the same. Hence, AT&T received notice of Sprint's intent to port the agreement when AT&T received Sprint's July 10, 2007, letter, not when AT&T received Sprint's October 26, 2007, complaint.

AT&T argues that the interconnection agreement that Sprint seeks to port was not legally effective when Sprint filed the complaint. Because Sprint filed the complaint during the absence of a contract extension, AT&T concludes that the complaint is premature. The flaw that AT&T points to is addressed by Merger Commitment 4.[12]

This provision would allow Sprint to extend its ported agreement notwithstanding that the agreement had expired

12 *Supra* note 7.

within a prior three-year period. During such three-year period, assuming that neither party notified the other to terminate or renegotiate, the interconnection agreement should be regarded as "effective." Owing to the extended "effective" period, Sprint's complaint is not premature.

(27) The parties dispute whether the Kentucky interconnection agreement may be ported "as is." We agree with AT&T that Sprint effectively concedes that the agreement may require a modification of rates to suit Ohio standards. Such a modification, however, is contemplated by merger commitment 1. That an agreement may be subject to state-specific pricing is not a bar to its portability.

(28) Based on our findings and conclusions, AT&T's motion to dismiss should be denied. Moreover, we find that we have concurrent jurisdiction with the FCC over this matter and that we have authority to interpret the FCC's Merger Commitments. In reviewing the facts of this matter along with the Merger Commitments, we conclude that it is consistent with the FCC's Merger Commitments that Sprint be allowed to port the interconnection agreement subject to state-specific modifications.

It is, therefore,

ORDERED, That Sprint shall be permitted to port to Ohio the BellSouth ICA, subject to state-specific modifications. It is, further,

ORDERED, That AT&T's motion to dismiss is denied. It is, further,

ORDERED, That a copy of this Finding and Order be served upon the parties, their respective counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

LDJ/vrm

Entered in the Journal

FEB 05 2008

Reneé J. Jenkins
Secretary

EXHIBIT E

BELLSOUTH

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May 11, 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: Pick & Choose NPRM; CC Dkts 01-338, 96-98, and 98-147; Review of Sec. 251 Unbundling obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch,

BellSouth is submitting for the record in the above proceedings the attached affidavit of Jerry D. Hendrix, Assistant Vice President-Interconnection Services Marketing for BellSouth. Mr. Hendrix describes in detail how the FCC's current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

This notice is being filed pursuant to Sec. 1.1206(b)(2) of the Commission's rules. If you have any questions regarding this filing please do not hesitate to contact me.

Sincerely,

Mary L. Henze

Mary L. Henze

cc: J. Minkoff
C. Shewman

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services of Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

AFFIDAVIT OF JERRY D. HENDRIX
ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS INC. ("BELLSOUTH")

The undersigned being of lawful age and duly sworn, does hereby state as follows:

QUALIFICATIONS

1. My name is Jerry D. Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. My title is Assistant Vice President - Interconnection Services Marketing for BellSouth. I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers ("CLECs"). Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Pricing and Regulatory Organizations. I have been employed with BellSouth since 1979.

PURPOSE OF AFFIDAVIT

2. The purpose of this affidavit is to follow up on questions raised by the Commission during a recent BellSouth *ex parte* presentation, notice of which was subsequently filed in this proceeding, Letter from Mary L. Henze to Marlene Dortch (April 27, 2004), and to specifically provide additional record evidence that the current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

THE PICK AND CHOOSE RULES AFFECT INTERCONNECTION NEGOTIATIONS IN INEFFICIENT AND NON-PRODUCTIVE WAYS:

3. For example, in an effort to incorporate into its existing Interconnection Agreements ("IAs") the changes of law that resulted from the FCC's *Triennial Review Order* ("*TRO*"), BellSouth forwarded to each CLEC an amendment to its specific IA. The amendment contained all changes that the *TRO* specified, regardless of whether BellSouth viewed the change as beneficial to BellSouth or to the CLEC. Also, in the majority of its states, BellSouth filed new SGATs reflecting the current state of the law, which included the changes from the *TRO*. Before BellSouth could get the new SGAT filed in the remainder of its states, the D.C. Circuit Court of Appeals issued its Opinion and stayed significant sections of the *TRO*; therefore, BellSouth chose not to proceed with the rest of its SGAT filings until the situation stabilized. In one of the states where BellSouth filed a new SGAT, CLEC A submitted to that state commission a request to adopt only the commingling language from the SGAT. Apparently, CLEC A was attempting to avoid incorporating into its IA the remaining provisions of the *TRO*, wanting instead to incorporate into its IA only those provisions from the *TRO* that CLEC A deemed beneficial to it.

4. CLEC B, apparently in an effort to eliminate specific provisions of its negotiated IA that it now views as not being beneficial, has requested to adopt specific provisions from another carrier's agreement, even though the other carrier's agreement is actually silent on the provisions at issue. In other words, CLEC B seeks to adopt the absence of a provision.

5. A CLEC affiliate of a large, established CLEC has requested to adopt the established CLEC's IA (and, where the established CLEC has no adoptable agreement, the CLEC affiliate has requested to adopt the IA of another large, unaffiliated CLEC). The requested IAs, in most cases, were filed with and approved by the state commissions more than two years ago and do not reflect changes in law that have occurred since the agreements were signed and approved. Further, the CLEC affiliate did not request the adoption until a matter of days before the DC Circuit Court of Appeals released its March 2, 2004, Opinion regarding the TRO. The CLEC affiliate is new, has no customers, and has not even completed the certification process in at least one of BellSouth's states in which the CLEC affiliate has requested adoption of an existing IA. Nonetheless, the CLEC affiliate is requesting to adopt agreements that are no longer compliant with law, presumably in an attempt to perpetuate those portions of the agreement that it finds beneficial but that are not compliant with law. BellSouth's response to the CLEC affiliate was that it could adopt the requested IAs, but only if it agreed to amend the IAs so that they would be compliant with current law. The CLEC affiliate has, thus far, refused to amend the IAs as a condition of adoption.

6. CLEC C has a very specific business plan and customer base, and seeks certain bill and keep arrangements in connection with its interconnection with BellSouth. In this specific instance, both parties would benefit from such an arrangement. However, in other circumstances, this particular arrangement would be extremely costly to BellSouth. Rather than being able simply to agree to the arrangement with CLEC C, BellSouth's negotiator and the negotiating attorney have spent many hours consulting with BellSouth's network engineers, sales teams and billing personnel to attempt to identify and discuss all potential risks. Due to the pick and choose option, such caution is necessary in order to craft the language addressing the specific interconnection arrangement so that another CLEC cannot adopt it unless that CLEC also meets the same qualifications as CLEC C. Under the specter of pick and choose, what should be a simple negotiation that could be handled in a matter of days turns into a series of meetings with numerous people, and takes significantly longer to negotiate. Furthermore, even if BellSouth agrees to CLEC C's request and does its best to construct contract language specific to this situation, there is still the risk that CLECs who are not similarly situated will argue that they should be allowed to adopt the language, or parts thereof. Most likely, protracted litigation would occur, and if the CLEC prevailed, the result would be financial harm to BellSouth.

7. The pick and choose rules cause BellSouth to incur costs in litigation not only to defend against adoption where BellSouth believes the adopting CLEC is not similarly situated, but also to arbitrate issues with a particular carrier that could be successfully negotiated if the pick and choose rules did not exist. In a true negotiation, unrelated contract provisions left to be resolved are often "horse-traded." For example, BellSouth may agree to a CLEC's requested provision in exchange for the CLEC's agreement to an unrelated provision. Two problems can occur where BellSouth agrees to such exchanges. First, in situations where such trades are made, it is difficult, if not impossible, to track the exchanges. Thus, adopting CLECs can pick and choose certain language that includes the beneficial provision without taking the other provision that was part of the bargain (and that was beneficial to BellSouth). Second, if BellSouth insists that the CLEC also adopt the other provision that was part of the exchange, the CLEC will likely consider the other provision as being unrelated to the provision the CLEC wants to adopt, and the parties may spend months attempting to resolve the issue. Where BellSouth does not agree to the exchange for the reasons discussed above, the parties are forced to arbitrate issues that neither party truly has the inclination to fight.

8. Larger CLECs often request specialized services, such as downloads of databases, development of specialized systems or other costly endeavors, and these CLECs often want to negotiate those requests in connection with an IA. In some cases, BellSouth may be willing to agree to the request, provided that it can collect appropriate compensation. Because most of these negotiated items are not actually developed unless and until the CLEC makes a request, some such items are never actually developed and implemented. The large requesting CLEC

prefers to make a request, obtain the specialized service, system or database from BellSouth, and then reimburse BellSouth for the costs incurred. However, BellSouth cannot agree to anything other than advance payment. Otherwise, a CLEC without the financial means to pay for the development of the service could adopt the language, request development, obtain the benefit of the service and then be unable to pay for it. The large CLEC may ultimately arbitrate the issue in an effort to avoid advance payment or other terms that, for that particular CLEC and its financial capability and business plan, may actually be acceptable to BellSouth, but that BellSouth cannot agree to because the terms would then be available for adoption by other CLECs.

9. A CLEC may have a novel approach to a particular problem that BellSouth has not operationalized. That CLEC desires to include the terms and conditions of this proposed solution in its IA, and BellSouth generally would be willing to do so in order to test the concept on a small scale with that one CLEC or with a small subset of CLECs. Obviously, if the concept were successful, BellSouth would be willing to offer the same arrangement to additional CLECs. BellSouth, however, is unable to include such untested concepts in an IA, because if the solution proves to be operationally problematic, too costly or otherwise unworkable for BellSouth, adoption perpetuates the problem and causes it to grow. Thus, BellSouth generally cannot agree to incorporate innovative but untested solutions for a single carrier into an IA.

10. During 1998 and 1999, BellSouth participated in multiple arbitrations relating to the treatment of ISP-bound traffic in each of the nine states in which it provides local exchange and exchange access services. BellSouth considered attempting to settle these disputes with some CLECs with a going-forward remedy proposal. The settlement decision would have been based on each arbitrating CLEC's specific situation. Due to the uncertainty caused by the current pick and choose rules, however, BellSouth was unable to proceed in a timely manner with these settlement proposals due to the risk that CLECs that were not similarly situated to the arbitrating CLECs would attempt to obtain, and would indeed ultimately obtain, the same provisions.

11. Generally, BellSouth's Interconnection Services contract negotiators, product managers and upper management, along with BellSouth's network and billing personnel and its counsel, expend substantial resources in assessing risk of adoption, trying to develop contract language that limits adoption to similarly situated CLECs, and handling disputes involving adoption requests. Each and every issue must be considered carefully in regards to pick and choose and the potential results of including provisions in the agreement that can be adopted by other carriers. While BellSouth can attempt to craft language that would restrict the provisions only to similarly situated CLECs, such an exercise is time consuming, and often the CLEC has no inclination to expend time and resources to negotiate or agree to such language, even if the language is not problematic for the negotiating CLEC. Further, BellSouth has no assurance of prevailing at the

state commissions if the CLEC argues that it should not be required to adopt all of the restrictions along with the language it desires to adopt. The following are examples of adoption requests that BellSouth has received from multiple CLECs that impede negotiations and require a great amount of time and resources to resolve:

- Requests to adopt provisions that are beyond the scope of 252(i), such as requests to adopt dispute resolution provisions, governing law provisions, and deposit provisions that are based on the original negotiating CLEC's financial status.

- Requests to adopt specific provisions without accepting other legitimately related provisions, such as a request to adopt a "bill and keep" provision without accepting the associated network interconnection arrangements provision.

- Requests to adopt provisions to which the CLEC is not legally entitled, such as a request to adopt reciprocal compensation for ISP traffic provisions from an existing IA when the adopting CLEC did not exchange traffic with BellSouth in 2001, as is required by law to entitle that CLEC to compensation for ISP traffic.

- Requests to adopt a specific provision in order to avoid change of law provisions, such as a request to adopt specific provisions from the *TRO*, but refusing to accept all of the provisions, especially those that are more beneficial to the ILEC.

12. This concludes my affidavit.

Jerry D. Hendrix

Sworn to and subscribed before me
A Notary Public, this 10th
day of May, 2004.

Notary Public

RUDINE J. DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006

EXHIBIT F

8 of 30 DOCUMENTS

SAGE TELECOM, LP, Plaintiff, -vs- PUBLIC UTILITY COMMISSION OF TEXAS, Defendant.

Case No. A-04-CA-364-SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

2004 U.S. Dist. LEXIS 28357

October 7, 2004, Decided
October 7, 2004, Filed

COUNSEL: [*1] For SAGE TELECOM, LP, plaintiff: John K. Schwartz, John K. Arnold, Locke Liddell & Sapp L.L.P., Austin, TX.

For SOUTHWESTERN BELL TELEPHONE, L.P. dba SBC Texas, intervenor-plaintiff: Robert J. Hearon, Jr., Graves, Dougherty, Hearon & Moody, Austin, TX; Mary A. Keeney, Graves, Dougherty, Hearon Etal, Austin, TX; Jose F. Varela, Cynthia Mahowald, Southwestern Bell Telephone Co., Austin, TX.

For PUBLIC UTILITY COMMISSION OF TEXAS, defendant: Steven Baron, Attorney General's Office, Austin, TX; Kristen L. Worman, Texas Attorney General's Office, Natural Resources Division, Austin, TX.

For AT&T COMMUNICATIONS OF TEXAS, L.P., intervenor-defendant: Thomas K. Anson, Strasburger & Price, LLP, Austin, TX; Kevin K. Zarling, AT&T Communications of Texas, Austin, TX.

For BIRCH TELECOM OF TEXAS, LTD, LLP, ICG COMMUNICATIONS, XSPEDIUS COMMUNICATIONS, LLC, NII COMMUNICATIONS, LTD., INC., intervenor-defendants: Bill Magness, Casey, Gentz & Magness, LLP, Austin, TX.

JUDGES: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: SAM SPARKS

OPINION

ORDER

BE IT REMEMBERED that on the 10th day of September 2004, the Court called the above-styled cause for a hearing, and the parties appeared through [*2] counsel. Before the Court were Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15], Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16], the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23], and Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [925]. Having considered the motions and responses, the arguments of counsel at the hearing, and the applicable law, the Court now enters the following opinion and orders.

Background

This case involves a dispute between the Public Utility Commission of Texas ("the PUC") and two telecommunications companies, Southwestern Bell, Telephone, L.P. d/b/a SBC Texas ("SBC") and Sage Telecom, L.P. ("Sage") over the public filing requirements of the Telecommunications Act of 1996 ("the Act"). Pub. L. 104-104, 110 Stat. 56. SBC and Sage seek an injunction that would prevent the PUC from requiring them to publicly file certain provisions of an agreement under which SBC would provide Sage services and access to elements of its local telephone network. The PUC, joined by the Intervenor-Defendants, [*3] AT&T Communications of Texas, L.P., Birch Telecom of Texas, LTD, LLP, ICG Communications, nii Communications, Ltd., and Xspedius Communications, LLC, seek an order requiring SBC and Sage to publicly file the agreement in its entirety. In order to understand either party's position with respect to the public filing provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Until the time of the Act's passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers ("LECs"), which acted as the exclusive service providers in the regions they served. *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitor local exchange carriers ("CLECs"), which now compete with the incumbent local exchange carriers ("WCs") such as SBC in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a **[*4]** number of duties upon ILECs, the most significant of which is the ILEC's duty to share its network with the CLECs. *Id; 47 U.S.C. § 251*. Under the Act's requirements, when a CLEC seeks to gain access to the ILEC's network, it may negotiate an "interconnection agreement" directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. *§ 252(a), (b)*. In either case, the interconnection agreement must ultimately be publicly filed with the state commission for final approval. *§ 252(e)*.

Pursuant to the Act, Sage and SBC entered into what they have referred to as a Local Wholesale Complete Agreement ("LWC"), a voluntary agreement by which SBC will provide Sage products and services subject to the requirements of the Act, as well as certain products and services not governed by either *§ 251* or *§ 252*. Sage and SBC, concerned that portions of the LWC consist of trade secrets, have sought to gain the required PUC approval without the public filing of those portions of the agreement they contend are outside the scope of the Act's coverage.

[*5] On April 3, 2004, SBC and Sage issued a press release announcing the existence of their LWC agreement. Later that month, a number of CLECs filed a petition with the PUG seeking an order requiring Sage and SBC to publicly file the entire LWC. Sage and SBC urged the PUC not to require the public filing of the whole agreement, and on May 13, 2004, the PUC ordered Sage and SBC to file the entire LWC under seal, designating the portions of the agreement it deemed confidential, so the rest of it could be immediately publicly filed.

On May 27, 2004, the PUC declared the entire, unredacted LWC to be an interconnection agreement subject to the public filing requirement of the Act and ordered SBC and Sage to publicly file it by June 21, 2004. Instead of filing the agreement on that date, SBC and Sage filed suit in a Travis County district court challenging the PUC's order as exceeding the scope of its authority under the Act and alleging Texas trade secret law protected its confidential business information. The parties entered into an agreed temporary restraining order ("TRO") enjoining the PUC order as well as Sage and SBC's plans to begin operating under the agreement. The PUC removed **[*6]** the case to this Court on the basis of the federal question it raises with respect to the scope of the Act's coverage, and the parties subsequently agreed to extend the TRO to allow the Court time to decide the issues raised in the case. SBC and Sage seek a preliminary as well as a permanent injunction barring the PUC from enforcing its May 27, 2004 order.

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a de novo standard of review. *Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475, 482 (5th Cir. 2000)*. Additionally, all parties have stipulated summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. *FED. R. CIV. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

Analysis

As an initial matter, the Court notes its agreement with the PUC's contention that it need not consider whether the items identified in the LWC are entitled to trade secret protection under Texas law. The PUC concedes it relies exclusively **[*7]** on the Act for its position the LWC must be filed in its entirety, and accordingly, were this Court to determine the PUC's interpretation of the statute was erroneous, the PUC would have no authority on which to order Sage and SBC to file the whole agreement. Likewise, SBC and Sage do not deny the obvious fact that any trade secret protections afforded by state law must give way to the requirements of federal law. Therefore, this Court's resolution of the dispute over the scope of the Act's public filing requirement entirely disposes of the case.

Section 251 establishes a number of duties on ILECs, including "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," *§ 251(c)(2)*; "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications," *§ 251(b)(5)*; "the duty to negotiate in good faith in accordance with *section 252* of this title the particular terms and conditions of agreements to fulfill the duties [described in subsections (b) and (c)]," *§ 251 (c)(1)*; and "the duty to provide, to any requesting telecommunications carrier **[*8]** for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," *§ 251(c)(3)*. [1]

1 Only certain network elements must be provided on an unbundled basis under *§ 251*. The statute gives the FCC the authority to promulgate regulations setting forth which unbundled network elements must be offered by the ILEC. *§ 251(d)*.

Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by *§ 251*. An ILEC may reach an agreement with a CLEC to fulfill its *§ 251* duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. *Section 252(a)(1)* describes the voluntary negotiations procedure: "Upon receiving a request for interconnection, services, or network elements pursuant to *section 251* of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth **[*9]** in subsections (b) and (c) of *section 251* of this title.... The agreement ... shall be submitted to the State commission under subsection (e) of this section."

Whether the agreement is reached by means of voluntary negotiations or arbitration, it "shall be submitted for approval to the State commission." *§ 252(e)(1)*. The State commission may reject an agreement reached by means of voluntary negotiations, or any portion thereof, only if it finds the agreement or any portion "discriminates against a telecommunications carrier not a party to the agreement" or "is not consistent with the public interest, convenience, and necessity." *§ 252(e)(2)(A)*. On the other hand, the State commission may reject an agreement adopted by arbitration, or any portion thereof only "if it finds that the agreement does not meet the requirements of" *§ 251*, the regulations promulgated by the FCC pursuant to *§ 251*, or the standards in *§ 252(d)*. *§ 252(e)(2)(B)*.

Upon approval by the State commission, the agreement must be publicly filed: "A state commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement **[*10]** ... is approved." *§ 252(h)*. The public filing requirement facilitates the fulfillment of another one of the ILEC's significant duties under the Act-to make available "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions provided in the agreement." *§ 252(i)*.

Turning now to the facts of this case, Sage and SBC do not dispute the LWC is an agreement fulfilling at least two of SBC's duties under *§ 251*: the duty "to establish reciprocal compensation arrangements" under *(b)(5)* and the duty to provide access on an unbundled basis to its local loop, which is the telephone line that runs from its central office to individual customers' premises, on an unbundled basis. *See 47 C.F.R. § 51.319(a)* (identifying the local loop as one of the unbundled network elements that must be provided under *47 U.S.C. § 251 (c)(3)*). In support of their position the LWC need not be filed despite the fact it clearly fulfills *§ 251* obligations, Sage and SBC advance two theories.

First, Sage contends the LWC need not **[*11]** be approved and filed because "the LWC Agreement did not result from a 'request' by Sage for regulated interconnection 'pursuant to *section 251*,' as required by the statute." Pl. Sage's Resp. to Cross-Mots. Summ. J. at 2 (quoting *§ 252 (a)(1)*). Sage's argument is essentially that *§ 252(a)(1)* contemplates two types of voluntarily negotiated agreements in which an ILEC would provide interconnection, services, or elements pursuant to its *§ 251* duties: those in which the CLEC consciously invokes its right to demand the ILEC's performance of its *§ 251* duties and those in which it does not. There are two problems with Sage's argument.

First, there is nothing in the statute to suggest the phrase "request ... pursuant to *section 251*" is meant to imply the existence of a threshold requirement, the satisfaction of which is necessary to trigger the operation of the statute. Although such a reading is not foreclosed by the somewhat ambiguous language of *§ 252(a)(1)*, other language in the statute makes clear such a triggering request is not a prerequisite for the operation of its filing and approval provisions. For instance, *§ 252(e)(1)* states, "any interconnection agreement adopted by **[*12]** negotiation or arbitration shall be submitted" to the State commission for approval. Although *§ 252(a)(1)* is linked to *§ 252 (e)(1)* by the language in its last sentence ("The agreement ... shall be submitted ... under subsection (e)", one cannot reasonably conclude the types of agreements subject to the State commission approval requirements of *§ 252(e)(1)* are limited to agreements made pursuant to the *§ 252(a)(1)* scheme. After all, *§ 252(e)(1)* requires the submission not only of voluntarily negotiated *§ 252(a)(1)* agreements, but also arbitrated *§ 252(b)* agreements.

The second deficiency in Sage's argument is that its proposed "triggering request" requirement would allow the policy goals of the Act to be circumvented too easily. The Act's provisions serve the goal of increasing competition by creating two mechanisms for preventing discrimination by ILECs against less favored CLECS. First, the State-commission-approval requirement provides an administrative review of interconnection agreements to ensure they do not discriminate against non-party CLECs. Second, the public-filing requirement gives

CLECs an independent opportunity to resist discrimination by allowing them to get **[*13]** the benefit of any deal procured by a favored CLEC with a request for "any interconnection, services, or network element" under a filed interconnection agreement on the same terms and conditions as the CLEC with the agreement. *§ 252(e), (i)*. If the public filing scheme could be evaded entirely by a CLEC's election not to make a formal "request ... pursuant to *section 251*," the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs. Under Sage's interpretation of the statute, other CLECs would be able to obtain preferential treatment from ILECs with respect to *§ 251* services and network elements without fear the State commission or other CLECs would detect the parties' unlawful conduct. The CLEC would have to do nothing more than forego the triggering request and it would be free to enter secret negotiations over the federally regulated subject matter. [2]

2 SBC argues for a different threshold requirement, which would avoid this particular evasion problem *See* SBC's Resp. to Cross-Mots. Summ. J. at 2. SBC contends the "interconnection agreement" referred to in *§ 252(e)(1)* should be limited to agreements that, at least in part, address an ILEC's *§ 251(b)* and *(c)* duties. *Id.* The PUC argues for a more expansive definition of the phrase, which would include all agreements for "interconnection, services, or network elements" regardless of whether the agreement provided for the fulfillment of any *§ 251* duties. The Court need not address this dispute, however, because the parties agree the LWC does, in fact, address at least two sets of *§ 251* duties - those involving "reciprocal compensation arrangements" and those involving access to SBC's local loop.

[*14] Likely recognizing the problems with its contention the LWC does not trigger the filing and approval process at all, Sage retreats from this position in other parts of its briefing on these issues conceding, like SBC, that at least certain parts of the LWC must be approved and publicly filed under the Act. *See* Sage's Resp. to Cross-Mots. Summ. J. at 9; SBC's Resp. to Cross-Mots. Summ. J. at 6. Both SBC and Sage argue, however, the only portions of the LWC which must be publicly filed are those provisions specifically pertaining to SBC's *§ 251* duties. These arguments are ultimately unavailing.

Most importantly, SBC and Sage's position is not supported by the text of the Act itself. None of the Act's provisions suggest the filing and approval requirements apply only to select portions of an agreement reached under *§ 252(a)* and *(b)*. Rather, each of the Act's provisions refer only to the "agreement" itself, not to individual portions of an agreement. *Section 252(e)*, for example, requires the submission of "any interconnection agreement" reached by negotiation or arbitration for approval by the State commission. *Section 252(a)(1)* provides "the agreement," which is to be negotiated **[*15]** and entered "without regard to the standards set forth in *[§ 251(b)* and *(c)]*," shall be submitted to the State commission.

In contrast, *§ 252(e)(2)* gives the State commission discretion to reject a voluntarily negotiated "agreement (or any portion thereat)" upon a finding that the agreement is discriminatory or is otherwise inconsistent with the public interest, convenience, and necessity. The State commission's power to reject a portion of the agreement does not suggest, however, that its review is in any way limited to certain portions of the agreement. If Congress intended the filing and approval requirements to be limited to select "portions" of an agreement, it clearly possessed the vocabulary to say so.

Alternatively, Sage and SBC argue the provisions in the LWC addressing SBC's *§ 251* duties are also, in fact, "agreements," which in themselves may satisfy the PUC-approval and public filing requirements. In taking this position, SBC and Sage publicly filed with the PUC an amendment to their previously existing interconnection agreement setting forth those provisions of the LWC Sage and SBC deem relevant to the requirements of *§ 251*.

There are two problems with Sage's **[*16]** and SBC's position. First, *§ 252(e)(1)* plainly requires the filing of any interconnection agreement. The fact one agreement may be entirely duplicative of a subset of another agreement's provisions does not mean only one of them has to be filed. As long as both qualify as interconnection agreements within the meaning of the Act, both must be filed. Even if the Court ruled in SBC's favor that only agreements which, at least in part, address *§ 251* duties are "interconnection agreements" for the purposes of *§ 252 (e)(1)*, [3] it would not change the fact the LWC is such an agreement since it addresses the same *§ 251* duties addressed by the publicly filed amendment.

3 As noted above, the Court need not reach this issue.

Second, the publicly filed amendment, taken out of the context of the LWC, simply does not reflect the "interconnection agreement" actually reached by Sage and SBC. Rather, as the LWC demonstrates, the amendment is only one part of the total package that ultimately constitutes the entire agreement. **[*17]** Sage's Mot. Summ. J., Ex. B at § 5.5 ("The Parties have concurrently negotiated an ICA amendment(s) to effectuate certain provisions of this Agreement."). The portions of the LWC covering the matters addressed in the publicly filed

amendment are neither severable from nor immaterial to the rest of the LWC. As the PUC points out, the LWC's plain language demonstrates it is a completely integrated, non-severable agreement. It recites that both SBC and Sage agree and understand the following:

> 5.3.1 this Agreement, including LWC is offered as a complete, integrated, non-severable packaged offering only;
>
> 5.3.2 the provisions of this Agreement have been negotiated as part of an entire, indivisible agreement and integrated with each other in such a manner that each provision is material to every other provision;
>
> 5.3.3 that each and every term and condition, including pricing, of this Agreement is conditioned on, and in consideration for, every other term and condition, including pricing, in this Agreement. The Parties agree that they would not have agreed to this Agreement except for the fact that it was entered into on a 13-State basis and included the totality of terms **[*18]** and conditions, including pricing, listed herein[.]

Id. at 15.3.

It is clear from the excerpted material the publicly filed amendment, which itself excerpts the LWC's provisions regarding *§ 251* duties, is not representative of the actual agreement reached by the parties. Rather, paragraph 5.3 reveals the parties regarded every one of the LWC's terms and conditions as consideration for every other term and condition. Since, as Sage and SBC concede, some of those terms and conditions go towards the fulfillment of *§ 251* duties, every other term and condition in the LWC must be approved and filed under the Act. Each term and condition relates to SBC's provision of access to its local loop, for example, in the exact same way a cash price relates to a service under a simple cash-for-services contract.

That the LWC is a fully integrated agreement means each term of the entire agreement relates to the *§ 251* terms in more than a purely academic sense. If the parties were permitted to file for approval on only those portions of the integrated agreement they deem relevant to *§ 251* obligations, the disclosed terms of the filed sub-agreements might fundamentally misrepresent **[*19]** the negotiated understanding of what the parties agreed, for instance, during the give-and-take process of a negotiation for an integrated agreement, an ILEC might offer *§ 251* unbundled network elements at a higher or lower price depending on the price it obtained for providing non- *§ 251* services. Similarly, the parties might agree that either of them would make a balloon payment which, although not tied to the provision of any particular service or element in the comprehensive agreement, would necessarily impact the real price allocable to any one of the elements or services under the contract.

Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling *§ 251* duties are discriminatory or otherwise not in the public interest. For example, while the stated terms of a publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of **[*20]** taking enforcement action to prevent such discrimination.

The fact a filed agreement is part of a larger integrated agreement is significant for CLECs in ways that go beyond their monitoring role. *Section 252(i)* explicitly gives CLECs the right to access "any interconnection, service, or network element provided under an agreement [filed and approved under *§ 252*] upon the same terms and conditions provided in the agreement." Until recently, FCC regulations permitted a CLEC to "pick and choose" from an interconnection agreement filed and approved by the State commission "any individual interconnection, service, or network element" contained therein for inclusion in its own interconnection agreement with the ILEC. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, Second Report and Order (released July 13, 2004) at P1 & n.2.

Less than three months ago, however, the FCC reversed course and promulgated a new, all-or-nothing rule, in which "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement." *Id.* at P10. Significantly, **[*21]** the FCC stated its decision to abandon the pick-and-choose rule was based in large part on the fact that it served as "a disincentive to give and take in interconnection agreements." *Id.* at P11. The FCC concluded "the pick-and-choose rule 'makes interconnection agreement negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs' under the Act." *Id.* at P13.

The FCC's Order demonstrates its awareness that no single term or condition of an integrated agreement can be evaluated outside the context of the entire agreement, which is why the pick-and-choose rule was an obstacle to give-and-take negotiations. In addition, the Order also demonstrates the FCC's position that an interconnection agreement available for adoption under the all-or-nothing rule may include "provisions other than those necessary to implement what [ILECs] are legally obligated to provide CLECs under the Act." The FCC, in adopting the new rule, not only proceeded on an understanding that such provisions were part of "interconnection agreements," but actively encouraged their incorporation **[*22]** as part of the give-and-take process.

Sage and SBC argue to require them to file their LWC in its entirety, despite the fact only a portion of it gives effect to SBC's *§ 251* obligations, would elevate form over substance. This contention is unfounded. Had the PUC ordered the public filing of each and every one of the LWC provisions solely on the basis they were contained together in the same document, Sage and SBC's argument might be correct. Here, however, the PUC determined all the LWC provisions were sufficiently related not by virtue of a coincidental, physical connection, but rather because of the explicit agreement reached by Sage and SBC. It was the determination of the parties themselves that each and every element of the LWC agreement was so significant that neither was willing to accept any one element without the adoption of them all.

SBC carries the form-over-substance argument one step further arguing the PUC's approach to the statute penalizes it for putting the LWC in writing and filing it. Its argument presupposes the PUC's approach would not prohibit unfiled, under-the-table agreements that integrate filed agreements containing *§ 251* obligations. This argument **[*23]** is disingenuous. Nothing in the text of the Act's filing requirements suggests the existence of an exemption for unwritten or secret agreements and nothing about the PUC's argument implies such an exemption. Moreover, SBC and Sage did not file their LWC in its entirety until the Intervenor-Defendants in this case urged the PUC to compel its filing. That they intend to keep portions of it secret is their entire basis for filing this lawsuit. However, neither the PUC's position nor the statute itself authorizes secret, unfiled agreements and those telecommunications carriers seeking to operate under them are subject to forfeiture penalties. *47 U.S.C. § 503(b)*; *In re Qwest Corp.; Apparent Liab. for Forfeiture, Notice of Apparent Liab. for Forfeiture, 19 FCC Rcd 5169 at P16 (2004).*

SBC also argues a rule requiring it to make the terms of its entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs. Its argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement **[*24]** to any requesting CLEC follows plainly from *§ 252(i)* and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.

In addition to the text-based and policy arguments favoring the PUC's position that the entire LWC must be filed, the Court notes its approach is in step with FCC guidance and Fifth Circuit case law. In its *Qwest Order,* although the FCC declined to create "an exhaustive, all-encompassing 'interconnection agreement' standard," it did set forth some guidelines for determining what qualifies as an "interconnection agreement" for the purposes of the filing and approval process. In re *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual* **[*25]** *Arrangements under Section 252(a)(1), Memorandum Opinion and Order, 17 FCC Rcd 19337 at P10.* Specifically, it found "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to *section 252(a)(1)*." *Id. at P8.* The FCC specifically rejected the contention "the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply." *Id.*

The PUC's position also finds support in the Fifth Circuit's holding in *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co., 350 F.3d 482 (5th Cir. 2003).* There, the Fifth Circuit was asked to determine the scope of issues subject to an arbitration held by a State commission under *§ 252(b)* of the Act. The court held, "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by *§ 251(b)* and *(c)*, those issues are subject to compulsory arbitration under **[*26]** *§ 252(b)(1)*." SBC and Sage argue *Coserv* is inapplicable because it did not deal with the scope of the voluntary negotiation process, under which their LWC was formed. However, the statutory scheme, viewed on the whole, does not support distinguishing *Coserv* from this case in the way they propose. As the court there noted, the entire *§ 252* framework contemplates non- *§ 251* terms may play a role in inter-

connection agreements: "by including an open-ended voluntary negotiations provision in *§ 252(a)(1)*, Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the *§ 252* framework." *Coserv, 350 F.3d at 487*. The arbitration provision at issue in *Coserv* is intertwined with the Act's voluntary negotiations provision since arbitration is only available after an initial request for negotiation is made, *§ 252(b)(1)*. Furthermore, because the statute makes arbitrated and negotiated agreements equally subject to the requirements for filing and commission approval, *§ 252(e)(1)*, this Court **[*27]** finds no basis on which to distinguish them for the purposes of determining the scope of the issues they may embrace.

SBC's concern that this reading of *Coserv* would subject any agreement between telecommunications carriers to commission approval is also unjustified. The Fifth Circuit made clear that in order to keep items off the table for arbitration-and under this Court's reading of *Coserv,* to keep them out of the filing and approval process-the ILEC need only refuse at the time of the initial request for negotiations under the Act to negotiate issues outside the scope of its *§ 251* duties: "An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to *§§ 251* and *252." Id. at 488*. However, where an ILEC makes the decision to make such non- *§ 251* terms not only part of the negotiations but also non-severable parts of the interconnection agreement which is ultimately negotiated, it and the CLEC with whom it makes the agreement must publicly file all such terms for approval by the State commission.

Conclusion

In accordance with the foregoing: **[*28]**

> IT IS ORDERED that Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15] is DENIED;
>
> IT IS FURTHER ORDERED that Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16] is DENIED;
>
> IT IS FURTHER ORDERED that Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [# 25] is GRANTED;
>
> IT IS FURTHER ORDERED that the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23] is GRANTED;
>
> IT IS FURTHER ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is WITHDRAWN; and
>
> IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT. [4]

4 The Court declines to order SBC and Sage to publicly file the LWC. Neither the PUC nor the Intervenor-Defendants have pointed to any authority on which the Court could order such an action, and both the FCC and the PUC have sufficient enforcement authority under the Act to compel a public filing without the intervention of this Court.

[*29] SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

JUDGMENT

BE IT REMEMBERED on the 7th day of October 2004 the Court entered its order denying Southwestern Bell, Telephone, L.P.'s ("SBC") and Sage Telecom, L.P.'s ("Sage") motions for summary judgment and applications for injunctive relief against the Public Utility Commission of Texas ("the PUC") and granting the latter's motion for summary judgment. Accordingly, the Court enters the following final judgment in this case:

> IT IS ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is DISSOLVED;
>
> IT IS FURTHER ORDERED that all pending motions are DISMISSED AS MOOT; and
>
> IT IS FINALLY ORDERED, ADJUDGED, and DECREED that Plaintiff Sage and Intervenor-Plaintiff SBC take nothing in this case against Defendant PUC and all costs are taxed to Sage and SBC, for which let execution issue.

SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2008, a true and correct copy of the foregoing has been served on the parties set forth below, via the method(s) indicated below:

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