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April 10, 2008

ELECTRONICALLY AND FOR HAND DELIVERY

Hon. Eddie Roberson, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
480 James Robertson Parkway
Nashville, TN 37238

RE: In Re: Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp, TRA Docket No. 07-00161 (consolidated with TRA Docket No. 07-00162)

Dear Chairman Roberson:

Enclosed for filing please find an original and four (4) copies of *Nextel South Corp.'s and Nextel Partners' Reply to AT&T Tennessee's Brief in Opposition to Nextel South Corp.'s and Nextel Partners' Motions for Summary Judgment*. 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

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 (consolidated with Docket No. 07-00162)**

NEXTEL SOUTH CORP.'s AND NEXTEL PARTNERS' REPLY TO AT&T TENNESSEE'S BRIEF IN OPPOSITION TO NEXTEL SOUTH CORP.'s AND NEXTEL PARTNERS' MOTIONS FOR SUMMARY JUDGMENT

Pursuant to the Tennessee Regulatory Authority's ("Authority" or "TRA") March 25, 2008, *Notice of Briefing Schedule and Oral Arguments Concerning Motion for Summary Judgment* in this matter, Nextel South Corp. and NPCR, Inc. d/b/a Nextel Partners (collectively "Nextel"), by and through their undersigned counsel, hereby respectfully submit their reply to *AT&T Tennessee's Brief in Opposition to Nextel South Corp.'s Motion for Summary Judgment* ("*AT&T's Brief*").[1]

In support of their Motions for Summary Judgment, and as further set forth in detail below, Nextel maintains that there is no genuine issue as to any material fact regarding Nextel's adoption of the existing interconnection agreement between BellSouth

[1] Also pending before the Authority in TRA Docket No. 07-00162 is NPCR, Inc. d/b/a Nextel Partners' Motion for Summary Judgment. In its March 20, 2008, *Order Consolidating Dockets and Appointing a Hearing Officer*, the Authority consolidated Docket No. 07-00161 and Docket No. 07-00162.

Telecommunications, Inc., d/b/a AT&T Tennessee ("AT&T")[2] and Sprint[3] (the "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) of the Act[4] as a matter of law.

I. SUMMARY OF ARGUMENTS IN SUPPORT OF NEXTEL'S MOTION FOR SUMMARY JUDGMENT

- Nextel may adopt the Sprint ICA under either AT&T Inc.'s Merger Commitments or Section 252(i).

- Each of the putative factual issues raised in *AT&T's Brief* can and should be resolved as a matter of law.

- The plain language of Merger Commitment No.1,[5] under the heading "Reducing Transaction Costs Associated with Interconnection Agreements" in Appendix F of the AT&T Merger Order, provides that AT&T "shall" make available to "any" requesting carrier "any" effective interconnection agreement.

    - It cannot be disputed that Nextel meets all of the requirements set forth in Merger Commitment No. 1 and is entitled to adopt the Sprint ICA.

    - The plain language of Merger Commitment No. 1 clearly applies to any adoption, whether in-state or out-of-state.

    - The question of whether Merger Commitment No. 1 applies to both in-state and out-of-state adoptions is a legal question.

- As a matter of law, it is well-settled that the class of customers served or services that Nextel offers are legally irrelevant to the inquiry of whether Nextel can adopt the Sprint ICA pursuant to Section 252(i) and the Federal Communications Commissions ("FCC") rule that implements Section 252(i), 47 C.F.R. § 51.809(a).

    - The burden is on AT&T to prove the existence of any exception under 47 C.F.R. §§ 51.809(b)(1), (b)(2) or (c) that could preclude Nextel's adoption of the Sprint ICA pursuant to Section 252(i) and Rule § 51.809(a); and,

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

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

[4] The Communications Act of 1934, as amended, 47 U.S.C. *et. seq.* (the "Act").

[5] For ease of reference, and for consistency with the *Petition*, AT&T, Inc.'s Merger Commitment 7.1 is referred to herein as Merger Commitment No. 1 and AT&T Inc.'s Merger Commitment 7.1 is referred to as Merger Commitment No. 2.

- AT&T has failed to offer any *evidence* to satisfy its burden of proof regarding any exception that could preclude Nextel's Section 252(i)/Rule § 51.809(a)-based adoption of the Sprint ICA.

- As AT&T is well aware, the Sprint ICA has been amended to comply with the FCC's Triennial Review Remand Order ("TRRO").

- There are no genuine issues of any material fact remaining with respect to Nextel's right to adopt the Sprint ICA under either AT&T Inc.'s Merger Commitments or Section 252(i).

- Nextel's adoptions – per the actions of AT&T - have been pending before the Authority for *more than* the 9 months statutorily allotted by Congress for the completion of an arbitration.

II. TRAVEL OF THE CASE[6]

On June 22, 2007, Nextel South Corp. and Nextel Partners filed with the Authority their respective *Petition Regarding Notice of Election of Interconnection Agreement*. In its *Petition Regarding Notice of Election of Interconnection Agreement* ("*Petition*"), Nextel South Corp. states that pursuant to Merger Commitment Nos. 1 and 2, as set forth in the 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.[7] 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.[8]

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[6] A more detailed summary of this matter is set forth in Nextel's Motion for Summary Judgment.
[7] *Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp.*, TRA Docket No. 07-00161 (June 22, 2007) ("*Petition*"). *See also Petition Regarding Notice of Election of Interconnection Agreement by Nextel Partners*, TRA Docket No. 07-00162 (June 22, 2007).
[8] *Petition.*

On July 17, 2007, AT&T filed its Motion to Dismiss the *Petition*. On July 24, 2007, Nextel filed its response to *AT&T's Motion to Dismiss*. 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."[9] At its January 14, 2008, Authority Conference, the TRA, pursuant to the *Joint Motion*, approved the amendment to the Interconnection Agreement, which amendment extends the terms of the parties' existing Interconnection Agreement for a three (3) year period.[10]

At its March 24, 2008, Authority Conference, the TRA ruled upon AT&T's then pending Motion to Dismiss in this matter. First, consistent with its previous ruling in TRA Docket No. 07-00132,[11] the Authority declared that it has jurisdiction over conflicts arising from adoptions under Section 252(i).[12] Next, the Authority found, consistent with other state commissions, that the dispute resolution provision under the existing interconnection agreement between AT&T and Nextel did not defeat or trump Nextel's

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

[10] 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).

[11] *Order Denying Motions to Dismiss, Accepting Matter for Arbitration, and Appointing Pre-Arbitration Officer*, TRA Docket No. 07-00132, p. 6 (Dec. 5, 2007) (The Authority held, among other things, that it "possesses concurrent jurisdiction with the FCC to review interconnection issues raised by [the Merger Commitments].") ("*Order Denying AT&T's Motions to Dismiss*").

[12] *Transcript of Proceedings, Tennessee Regulatory Authority Conference*, TRA Docket No. 07-00161, pp. 21-22 (Mar. 24, 2008) (excerpted version) ("*March 24, 2008, Transcript*"). AT&T appears to be claiming that the Authority is only exercising its Section 252(i) jurisdiction in Docket Nos. 07-00161 and 07-00162. *See AT&T's Brief*, TRA Docket No. 07-00161 at 18. Nonetheless, the Authority has unambiguously declared that it possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the Merger Commitments. *See supra* n. 10. At the heart of Nextel's *Petition* are interconnection issues raised by both the Merger Commitments and Section 252(i) of the Act.

federal statutory right to opt in under Section 252(i).[13] Finally, the Authority denied *AT&T's Motion to Dismiss* and declined AT&T's request to hold the matter in abeyance pending action from the FCC regarding AT&T Inc.'s Merger Commitments.[14]

For the reasons set forth in Nextel's Motion for Summary Judgment, and as even further explained herein, there simply are no legitimate genuine issues of material fact that remain to be resolved with respect to the *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 as Exhibit A to Nextel's Motion for Summary Judgment.

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.[15] The purpose of an order granting summary judgment is to avoid the expense and delay of a formal administrative hearing when no dispute exists concerning the controlling material facts.[16] In considering a motion for summary judgment, the record is

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[13] *March 24, 2008, Transcript* at 22.
[14] *Id.*
[15] *See, e.g.*, Order Granting Consumer Advocate's Motion for Summary Judgment, Denying BellSouth Telecommunications, Inc.'s Motion for Summary Judgment and Denying Tariff, *In Re: Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges – Tariff Number 2004-0055*, p. 6, TRA Docket No. 04-00015 (Dec. 13, 2004) ("Rule 56.04 of the Tennessee Rules of Civil Procedure provides that summary judgment is appropriate when: (1) no genuine issues with regard to the material facts relevant to the claim remain to be tried; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.") (hereinafter "*TRA 04-00015 Order*"). *See also, e.g.*, Order Denying Motion for Partial Summary Judgment Without Prejudice, *In Re: Petition of United Cities Gas for Approval of Various Franchise Agreements*, TRA Docket No. 00-00562, p. 21 (Feb. 15, 2002) ("Summary judgment is an appropriate method of resolving issues in administrative proceedings, and the standard for determining whether summary judgment should be granted generally follows the standard applied in the courts.") (citations omitted).
[16] *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.").

reviewed in the light most favorable to the non-moving party.[17] 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.*[18] 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.[19] 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.[20]

In its Motion for Summary Judgment, Nextel presented a showing that no genuine issue of controlling material fact remains as to those issues upon which Nextel has the burden of proof. Therefore, under Tennessee law and Authority precedent the burden shifted to AT&T to demonstrate the falsity of the showing.[21] Each of the putative factual issues raised in *AT&T's Brief* can and should be resolved as a matter of law. Nextel

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[17] *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")).

[18] 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)).

[19] *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.'") (emphasis added).

[20] *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).

[21] *See supra* n. 18. *See also Byrd*, 847 S.W.2d at 211-212 ("Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party *must* then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial.") (emphasis added).

established thirteen (13) undisputed facts in its Motion for Summary Judgment that are clearly sufficient to permit the Authority to grant the *Petition*.[22] AT&T has not presented any evidence that either places a single one of said 13 undisputed facts in dispute or proves the existence of any additional genuine issue of material fact necessary for the resolution of this matter. Further, as to the issues upon which AT&T shoulders the initial burden of proof, such as the existence of any "exceptions" under 47 C.F.R. § 51.809(b)(1), (b)(2) or (c) to preclude Nextel's adoption of the Sprint ICA pursuant to Section 252(i) and Rule § 51.809(a), AT&T has simply failed to even identify a single *fact* that AT&T would purportedly rely upon to establish and carry its burden regarding the existence of any such potential exceptions.

IV. NEXTEL HAS ASSERTED TWO INDEPENDENT BASES IN SUPPORT OF ADOPTION OF THE SPRINT ICA

In its *Petition*, Nextel set forth two (2) independent bases for adoption of the Sprint ICA: (1) AT&T Inc.'s Merger Commitments; and (2) Section 252(i) of the Act. It is Nextel's position that the Authority may independently order the requested adoptions under either ground. Moreover, it is Nextel's position that there are no genuine issues of any material fact remaining for resolution under either approach. Thus, if the Authority finds that genuine issues of material fact remain herein with respect to a Section 252(i) adoption, the Authority may still approve an adoption under AT&T Inc.'s Merger Commitments, assuming the Authority finds that there are no genuine issues of any material fact remaining with respect to the Merger Commitments. On the other hand, if the Authority finds that genuine issues of material fact remain herein with respect to an

[22] *See, e.g., Nextel South Corp.'s Motion for Summary Judgment*, TRA Docket No. 07-00161, pp. 8-11 (Feb. 6, 2008) ("*Nextel's Motion for Summary Judgment*"). *See also Nextel Partners' Motion for Summary Judgment*, TRA Docket No. 07-00162 (Feb. 6, 2008).

adoption under AT&T Inc.'s Merger Commitments, the Authority may still approve an adoption under Section 252(i), assuming the Authority finds that there are no genuine issues of any material fact remaining with respect to Section 252(i).

A. NEXTEL IS ENTITLED TO ADOPT THE SPRINT ICA AS A MATTER OF LAW 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.[23]

Applying the plain and ordinary meaning of the words used in the Merger Commitments, AT&T cannot, nor has it even attempted to, dispute the following controlling facts that:

- Nextel is within the group of "any requesting telecommunications carrier;"[24]
- Nextel has requested the Sprint ICA;[25]

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[23] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, p. 149, Appendix F, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*FCC BellSouth Merger 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.

[24] *See Petition.*

- 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;[26]

- The Sprint ICA already has state-specific pricing and performance plans incorporated into it by the state – specifically in this case, any necessary Tennessee-specific provisions;[27]

- There is no issue of technical feasibility;[28] and,

- The Sprint ICA has already been amended to reflect changes of law, i.e. the TRRO requirements.[29]

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.[30]

In *AT&T's Brief*, AT&T contends, absent any supporting authority whatsoever, that "The first Merger Commitment applies only when a carrier wants to take an interconnection agreement from one state and operate under the agreement in a different state[.]"[31] AT&T merely cites the language "subject to state-specific pricing and performance plans and technical feasibility" and "consistent with the laws and regulatory requirements of the state for which the request is made" from Merger Commitment No. 1 to support its position that Merger Commitment No. 1 only applies to out-of-state

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[25] *Id.*
[26] *Id.*
[27] *Petition* at 3; and *Nextel South Corp.'s Response to AT&T Tennessee's Motion to Dismiss*, TRA Docket No. 07-00161, pp. 3-4 and 9 (July 24, 2007) ("*Nextel's Response*").
[28] *See, e.g.,Petition and Nextel's Response.*
[29] *See, e.g., Petition and Nextel's Response.*
[30] 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.
[31] *AT&T's Brief at* 15.

adoptions. Still, AT&T offered no credible support in aid of its anti-competitive, restrictive and self-serving interpretation of Merger Commitment No. 1.

The mere fact that an adoption is subject to state-specific requirements does not amount to a prohibition of in-state adoptions under Merger Commitment No. 1.[32] Such an application of Merger Commitment No. 1 would impose a non-existent limitation on a requesting carrier's clearly unrestricted Merger Commitment right to adopt "any" agreement that AT&T had entered in "any" of its twenty-two (22) states.

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.[33] Indeed, 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.*"[34] As shown directly below, the FCC's well-documented concerns led to the interconnection-related Merger Commitments:

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[32] *March 24, 2008, Transcript* at 15 (excerpted version) (Counsel for Nextel: "We're attempting to adopt a Tennessee-specific interconnection agreement, and we're willing to take whatever is in that agreement. . . . When we're attempting to adopt a Tennessee agreement, we're bound by the Tennessee-developed rates in those appendixes. . . . We're attempting to adopt the existing Tennessee-specific agreement and everything in that agreement we'll be bound by in Tennessee.").

[33] *See FCC BellSouth Merger 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 access services, serving over 67 million access lines, and controlling nearly 23% of this country's broadband facilities."

[34] *Id.* at 172 (emphasis added).

> 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.[35]

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 clearly meets all of the requirements set forth in Merger Commitment No. 1 and is entitled to adopt the Sprint ICA.

At this stage, it is not for either AT&T or Nextel to add language to Merger Commitment No. 1. The plain language of Merger Commitment No.1 unambiguously provides that AT&T "shall" make available to "any" requesting carrier "any" effective interconnection agreement. While in hindsight AT&T might now self-servingly wish that there was a distinction in AT&T's voluntarily submitted Merger Commitment No. 1 regarding out-of-state adoptions and in-state adoptions, there is not.

In its filings before the FCC in relation to its petition for a declaratory ruling, AT&T conceded that other similar merger conditions (i.e. Bell Atlantic/GTE Merger; SBC/Ameritech Merger) contained *express* language limiting such conditions to out-of-state adoptions, but offered no credible explanation for why there is no such distinction between in-state adoptions and out-of-state adoptions in Merger Commitment No. 1.[36] AT&T only presented its educated guesses.[37] In its FCC filing in opposition to AT&T's FCC petition for a declaratory ruling, Sprint Nextel Corporation noted that the record

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[35] *Id.* (emphasis added).
[36] *Reply in Support of Petition of the AT&T ILECs for a Declaratory Ruling*, FCC WC Docket No. 08-23, pp. 13-15 (Mar. 3, 2008) (attached to AT&T's March 11, 2008, Letter to the Authority in TRA Docket No. 07-00161).
[37] *Id.*

before the FCC in the AT&T/BellSouth merger demonstrated that competitive carriers did in fact express concerns, related to the AT&T/BellSouth merger and Merger Commitment No. 1, with respect to *both* in-state and out-of-state adoptions.[38] The cable telephony providers expressed concerns in the FCC record do not contain any suggestion that Merger Commitment No. 1 was intended to be limited to the adoption of an out-of-state AT&T interconnection agreement.[39]

There is yet another reason why AT&T's argument here fails under its own weight. As noted in the *Petition*, the Sprint ICA is a nine-state, region-wide agreement that has been submitted to and approved by each state commission in the same form in each of the 9-legacy BellSouth states with state-specific modifications already identified and contained therein for each of the 9-legacy-BellSouth states. Under AT&T's fractured interpretation of Merger Commitment No. 1, Nextel could simply request that its *Petition*, which is broad enough to encompass the same, be treated as a request to adopt the Sprint ICA from one of the other 8 legacy BellSouth states (excluding Tennessee). This scenario would constitute an "out-of-state" adoption with any necessary Tennessee-specific modifications having already been identified and made by the original parties to the Sprint ICA. Notwithstanding the foregoing, AT&T has not articulated a single credible reason for the Authority to conclude that the FCC intended for a requesting carrier to jump through such unnecessary and superfluous hoops.

On its face, Merger Commitment No. 1 clearly applies to any adoption, whether in-state or out-of-state. AT&T's post-merger, late-developing theories and competition-thwarting posturing cannot change this fact. AT&T's attempted imposition of an "out-of-

[38] *Opposition of Sprint Nextel Corporation*, FCC WC Docket No. 08-23, pp. 22-24 (Feb. 25, 2008) (attached to Sprint's February 26, 2008, Letter to the Authority in TRA Docket No. 07-00161).
[39] *Id.* at 24.

state-only" adoption upon Merger Commitment No. 1 would require the Authority to ignore the plain and ordinary meaning of the words employed by the FCC, and agreed to by AT&T, Inc., and to fashion an "out-of-state-only" requirement that simply does not exist. *If the FCC had intended to limit the application of Merger Commitment No. 1 to out-of-state adoptions, it could have easily accomplished the same with a few additional words.*[40] Having gained the significant benefits of the AT&T/BellSouth merger, it is inappropriate – to say the least – for AT&T to now argue before the Authority for what amounts to a re-write of Merger Commitment No. 1.

In any event, the question of whether Merger Commitment No. 1 applies to both in-state and out-of-state adoptions is a legal question.

B. NEXTEL IS ENTITLED TO ADOPT THE SPRINT ICA AS A MATTER OF LAW PURSUANT TO § 252(i) OF THE ACT

AT&T asserts that summary judgment is inappropriate under Section 252(i) for the following reasons: (1) AT&T can demonstrate that the costs of providing the Sprint ICA to Nextel are greater than the costs of providing it to the original carriers to the agreement; and (2) Nextel is not seeking to adopt the Sprint ICA upon the same terms and conditions contained with the Sprint ICA. As demonstrated in Nextel's Motion for Summary Judgment, and as shown below, these arguments are clearly without merit.

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[40] *See, e.g., Consumer Advocate Division, Office of the Attorney General v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) ("If the Legislature had intended to mandate a contested hearing upon the filing of a written complaint, *it easily could have utilized precise language to accomplish that* mandate.") (emphasis added); and *State of Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) ("Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory text believing that the General Assembly chose its words deliberately, and that the General Assembly meant what it said.").

1. AT&T's Argument that Nextel Cannot Adopt the Sprint ICA Because Nextel Is a Wireless Carrier, and Its Mere Assertions of An Intent to Prove Higher Costs, Must Be Rejected As A Matter of Law

AT&T claims that Nextel is precluded from adopting the Sprint ICA under Section 252(i) because Nextel is not seeking to adopt upon the same terms and conditions set forth in the Sprint ICA.[41] The premise of AT&T's position is that since the Sprint ICA addresses a unique mix of wireline (Sprint CLEC) and wireless (Sprint PCS) items, the terms and conditions of the Sprint ICA cannot be applied to Nextel, a wireless carrier.[42] Further, AT&T asserts that the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline services or only wireless services."[43] AT&T even goes so far as to imply that Nextel must disprove the existence of any ILEC greater-costs or technical feasibility exceptions for which the FCC's Rule § 51.809(b)(1) and (2) clearly places the burden upon AT&T if AT&T intends to rely upon such exceptions to avoid Nextel's Section 252(i)-based adoption.[44] As shown below, none of these contentions raise a genuine issue of material fact necessary to defeat the motion for summary judgment.

In sum, AT&T's assertions, outlined directly above, amount to an argument that Nextel cannot adopt the Sprint ICA because it is not "similarly situated" to the original parties to the Sprint ICA, and attempts to improperly impose a burden upon Nextel that does not exist under the FCC's Rules.

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

[41] *AT&T's Brief* at 7.
[42] *Id.* at 8.
[43] *Id.*
[44] *Id.* at 6.

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 Section 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 period of time after the approved agreement is available for public inspection under section 252(h) of the Act.[45] (emphasis added).

[45] 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*

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.[46] Section 252(i) only permits differential treatment if one of the two foregoing exceptions apply. AT&T claims that it should be provided the opportunity to show "whether the costs of providing the adoption are greater than the costs of providing it to the telecommunications carriers that originally negotiated the [Sprint ICA]."[47] 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 on whether interconnection is technically feasible.[48] Further, pursuant to Tennessee law, Authority precedent and Rule § 51.809(b), the burden to prove any exception to an adoption based upon the existence of purportedly "greater costs" is imposed upon AT&T as the LEC that is seeking to raise the exception. Hence, in the context of a motion for summary judgment, AT&T's mere allegation that it "can present evidence demonstrating the relevant difference in costs"[49] is insufficient[50] – more is required.[51]

> *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"*).

[46] *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"*).

[47] *AT&T's Brief* at 7. *But see Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 455 (D.C. Tenn. 1984) ("It is generally accepted that the *mere hope* by a party opposing summary judgment that evidence might turn up to support its position is not sufficient ground for its denial.") (emphasis added).

[48] *Local Competition Order* at ¶ 1318.

[49] *AT&T's Brief* at 7.

As under Tennessee law and Authority precedent the burden is clearly imposed upon AT&T to establish the applicability of any "exception," AT&T should have come forward in its response to Nextel's Motion for Summary Judgment with some credible minimum showing at the least, such as an affidavit, to support its mere claim that it is entitled to one of the exceptions under Rule § 51.809.[52] Under similar circumstances, including a mere "greater costs" claim without support, the Kentucky Public Service Commission found AT&T's Section 51.809(b)(1) objection "not specific enough to establish a colorable claim, much less warrant a hearing."[53] Concluding as it did with respect to AT&T's unsupported Section 51.809(b)(1) objection, the Kentucky

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[50] Order Denying Consumer Advocate's Motion for Summary Judgment, Granting, In Part, and Denying, In Part, Petitioners' Motion for Summary Judgment, Denying Petition for a Declaratory Ruling and Modifying Refund Adjustment Formula, *In Re: Petition of Chattanooga Gas Company, Nashville Gas Company, and United Cities Gas Company for a Declaratory Ruling Regarding the Collectability of the Gas Cost Portion of Uncollectible Accounts Under the Purchased Gas Adjustment (PGA) Rules*, TRA Docket No. 03-00209, p. 6 (Feb. 9, 2005) ("After a properly supported motion for summary judgment is asserted, the burden *shifts* to the nonmovant to *respond with evidence* establishing the existence of specific, disputed, material facts which must be resolved by the trier of fact.").

[51] As outlined in Sprint Nextel's comments opposing AT&T's FCC petition for declaratory ruling, BellSouth did not enter into the Sprint ICA's bill and keep arrangement due to any increase in AT&T's costs to provide termination services to Sprint CLEC and Sprint PCS. Rather, BellSouth entered into the arrangement out of concern over additional Sprint PCS cost study-supported charges to terminate AT&T originated traffic. *See Opposition of Sprint Nextel Corporation*, FCC WC Docket No. 08-23 (Feb. 25, 2008) (attached to Sprint's February 26, 2008, Letter to the Authority in TRA Docket No. 07-00161).

[52] *See also Byrd*, 847 S.W.2d at 211 ("[T]he nonmoving party *cannot simply rely upon his pleadings* but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.") (emphasis added).

[53] *In the Matter of Adoption by Nextel West Corp. of the Existing Interconnection Agreement by and Between BellSouth Telecommunications, Inc and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.*, KENTUCKY PUB. SERV. COMM'N, Order, Case No. 2007-00255, p. 16 (Feb. 18, 2008) ("*Kentucky Commission Order*") (attached hereto as **EXHIBIT A**). *See also, c.f., In the Matter of the Complaint of Sprint Communications L.P., Sprint Spectrum L.P., Nextel West Corp. and NPCR, Inc. vs. Southwestern Bell Telephone Company d/b/a AT&T Kansas,* Order of Presiding Officer Determining Commission Has Jurisdiction to Enforce Merger Commitments, Denying SWBT Motion to Dismiss and Ordering SWBT to Port In Kentucky ICA, KANSAS STATE CORPORATION COMM'N, Docket No. 08-SWBT-602-COM (Mar. 12, 2008) (Kansas Commission found that its possesses the requisite jurisdiction to enforce the AT&T/BellSouth Merger Commitments and ordered SWBT to port in the Kentucky agreement as requested.) (attached hereto as **EXHIBIT B**); *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 to *Nextel's Motion for Summary Judgment* as Exhibit D).

Commission affirmed its decision granting Nextel's adoption request and denied AT&T's request for a hearing.[54]

Moreover, Nextel's experience with AT&T in Georgia demonstrates how AT&T's mere claim that it is entitled to a hearing, *without actually making even a threshold factual showing of the "evidence" it can purportedly present at such a hearing*, is no more than another tactic in a long line of delay tactics. Before the Georgia Public Service Commission, AT&T asked for and received the "opportunity" to show that the costs of providing the adoption to Nextel would be greater than the costs of providing it to the telecommunications carriers that originally negotiated the Sprint ICA.[55] After the Georgia Commission granted this opportunity, the parties submitted pre-filed testimony on the costs issues and a hearing was scheduled. Nextel submitted extensive testimony addressing the difference under various case law regarding what constituted "greater costs," as opposed to AT&T's misplaced "lost revenue" theory, and on the eve of the highly sought after costs hearing, AT&T voluntarily withdrew its requests for such an opportunity.[56] The result – more unnecessary delay in a simple adoption proceeding. In this matter before the Authority, AT&T has not even attempted to present any factual information in support of its claimed "lost revenue = greater costs" position.[57]

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[54] *Kentucky Commission Order* at 16.

[55] *In Re: Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Southeast*, Order Denying Motion to Dismiss and Procedural and Scheduling Order, GEORGIA PUB. SERV. COMM'N, Docket No. 25430, pp. 7-8 (Mar. 4, 2008) (attached hereto as **EXHIBIT C**) (This order also applies in GEORGIA PUB. SERV. COMM'N Docket No. 25431, Nextel South Corp.'s Georgia Adoption Petition.) ("*Georgia Commission Order*").

[56] *AT&T's March 14, 2008, Letter to the Georgia Public Service Commission*, GEORGIA PUB. SERV. COMM'N, Docket Nos. 25430-U and 25431-U.

[57] *See Wachovia Bank & Trust Company, N. A. v. Glass*, 575 S.W.2d 950, 956 (Tenn. App. 1978), *cert. denied* (Dec. 11, 1978) ("[O]n motion for a summary judgment, disputes as to material facts must be evidenced by affidavits or other sworn evidence of facts, and *not merely by unsworn generalized assertions in pleadings*.") (emphasis added).

AT&T claims that Nextel is precluded from adopting the Sprint ICA because it is providing only wireless service, is not similarly situated to the original requesting carriers to the Sprint ICA and, therefore, Nextel cannot *use* all of the interconnection services and network elements provided in the Sprint ICA. As shown below, these arguments have already been considered and rejected by the FCC.

It is well-settled that the class of customers served or services that a requesting carrier may or may not be providing[58] are legally irrelevant to the inquiry of whether it can adopt an interconnection agreement. 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.[59] 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*[.]"[60] 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."[61] 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"

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[58] *See* Rule § 51.809(a) ("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.").
[59] *Second Report and Order* at ¶ 30 and n. 101.
[60] *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 to *Nextel's Motion for Summary Judgment* as Exhibit E).
[61] *Id.*

> 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 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.[62]

In a twist to its "similarly situated" argument, AT&T also contends 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. Under this argument, neither type of carrier, according to AT&T, 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.[63]

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

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[62] *Second Report and Order* at ¶ 30 (emphasis added).

[63] *Sage Telecom, L.P. v. Public Utility Commission of Texas,* 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) (*"Sage"*) (attached to *Nextel's Motion for Summary Judgment* as Exhibit F).

Texas Commission found the LWC was an integrated agreement resulting in the entire 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."[64] 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.[65]

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"[66] 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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[64] *Id.* at *23.
[65] *Id.* at *6.
[66] *See supra* n. 62.

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.

2. AT&T's Assertion that the Sprint ICA Requires the Presence of Both a Wireless Carrier and a Wireline Carrier Is Without Merit

Despite its arguments, AT&T has not cited a single provision in the Sprint ICA that mandates the presence of both a wireless and a wireline party. The reason for the failure of such a citation is because no such requirement exist in the Sprint ICA.

Section 6.1 of the Sprint ICA provides, in the entirety, as follows:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Traffic is the result of negotiation and compromise between Bell South, Sprint CLEC and Sprint PCS. The Parties' agreement to establish a bill and keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic. Specifically, Sprint PCS provided BellSouth a substantial cost study supporting its costs. As such the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. ***Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.*** (emphasis added).

The Sprint ICA citation provided by AT&T, Section 6.1, does not support AT&T's proposition. In fact, under the plain and ordinary terms of Section 6.1 of the Sprint ICA, either Sprint CLEC or Sprint PCS may opt out of the Sprint ICA and into another agreement under Section 252(i), and the Sprint ICA will continue in effect with respect to the remaining Sprint entity. The scenario under which such a departure may require termination or renegotiation only occurs if the departing Sprint entity "opts into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act *which calls for reciprocal compensation*[.]" In sum, if one of the Sprint entities opts out of the Sprint ICA, the Sprint ICA, including the bill and keep provisions, remains effective as to the

remaining Sprint entity, unless the foregoing triggering event occurs. Contrary to AT&T's claims, the triggering event for "termination or renegotiation" of the bill and keep arrangement (as opposed to the entire agreement), by the plain and ordinary terms of Section 6.1 of the Sprint ICA, is not the departure of either Sprint CLEC or Sprint PCS; rather, it is the departing entity's opting into another ICA that *requires the payment of reciprocal compensation by AT&T to that Sprint entity.* Simply put, the Sprint ICA does not require that both Sprint entities remain as parties to the Sprint ICA for it to remain effective.[67]

As there is not a requirement in the Sprint ICA that both a wireline and a wireless Sprint entity remain joint parties to the Sprint ICA during the entirety of the agreement, AT&T's argument that the adoption of a Sprint ICA requires both a wireline and wireless carrier at the table unravels.[68]

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[67] To the extent AT&T contends that certain terms of the Sprint ICA, namely the bill and keep and the 50/50 facility sharing arrangements, were based upon balanced traffic flow, this claim is also unsupported by the plain language of the Sprint ICA. Section 6.1 does not contain a requirement for a balance of traffic nor does Section 6.1 contain language that permits the parties to undo either the bill and keep or the facility sharing arrangements if traffic becomes unbalanced. If the balance of traffic was critical, the Sprint ICA would certainly expressly outline and define with some specificity what constitutes being in-balance and would contain a provision under which the parties would revert to the billing and payment of reciprocal compensation if the traffic becomes out-of-balance. *See Opposition of Sprint Nextel Corporation*, FCC WC Docket No. 08-23, pp. 15-16 (Feb. 25, 2008) (attached to Sprint's February 26, 2008, Letter to the Authority in TRA Docket No. 07-00161).

[68] It should be noted that although Nextel did not – and still does not - consider it necessary, in order to avoid delay Nextel offered to add Sprint CLEC as a signatory to the adoption. *See Nextel's Motion for Summary Judgment* at 9. To the extent AT&T contends that Sprint CLEC cannot be a signatory to two (2) agreements, as demonstrated above, there is nothing in the Sprint ICA that affirmatively requires Sprint CLEC to continue to be a party to the "original" Sprint ICA in order for Sprint PCS to continue to operate under the Sprint ICA. Based on the foregoing, notwithstanding any assertions by AT&T to the contrary, Nextel could in fact bring not only a CLEC to the table to adopt the Sprint ICA, but it could bring the *same CLEC* to the table to adopt the Sprint ICA. Still, AT&T has no legitimate legal basis to object to Nextel's adoption of the Sprint ICA without Sprint CLEC as an additional signatory.

3. AT&T's Claim that An Adoption by Nextel Would Violate FCC Rules is Without Merit

AT&T contends that Nextel's adoption of the Sprint ICA would violate the FCC's TRRO prohibition against using UNEs for the exclusive provision of mobile wireless service. This red-herring[69] can be disposed of in short order.

As AT&T is well aware, the Sprint ICA has been amended to comply with the TRRO.[70] As a result of the post-TRRO 9th Amendment to the Sprint ICA, Attachment 2 § 1.5 specifically provides that "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services."[71] Therefore, consistent with the TRRO, the Sprint ICA, as adopted by Nextel, precludes Nextel from obtaining UNEs for such purposes, just as the Sprint ICA already precludes Sprint from obtaining UNEs for the exclusive use of Sprint PCS.

Nextel is entitled to adopt the Sprint ICA pursuant to Section 252(i) without regard to the AT&T Merger Commitments. It is axiomatic that the Merger Commitments do not restrict or negate Nextel's existing rights under federal law. Hence, as there are no genuine issues of any material fact with respect to Nextel's right to adopt the Sprint ICA under Section 252(i), Nextel's request for summary judgment should be granted without delay.

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[69] AT&T's "argument" that "If the TRA were to permit the adoption, it would be permitting (and officially approving) a non-certificated company engaging in activities that are proper only for a certificated CLEC to perform[]" (*AT&T's Brief* at 9) cannot be taken seriously and flies in the face of *Sage*.

[70] *Petition* at 3.

[71] *See* **EXHIBIT D** attached hereto (representative pages of the post-TRRO 9th Amendment to the Sprint ICA, Attachment 2 § 1.5).

V. THE OPERATION OF THE MERGER COMMITMENTS' 42-MONTH TIME PERIOD

The Authority has directed the parties to address the question of whether the Merger Commitments' period of forty-two (42) months is running during the current time period in which AT&T is refusing to permit Nextel to adopt the Sprint ICA. Like AT&T, Nextel responds in the affirmative – yes, the 42-month clock is running. AT&T accurately notes that the Merger Commitments apply for a period of 42 months from the Merger Closing Date.[72] AT&T's bold assertion that the 42-month period has no relevance to Nextel's adoption, however, is wholly incorrect.

Soon after the FCC-approved Merger Commitments were announced on December 29, 2006, Sprint and AT&T considered the impact of the Merger Commitments upon their pending interconnection agreement negotiations.[73] AT&T acknowledged that, pursuant to the Merger Commitments, Sprint could extend its current interconnection agreement for three (3) years.[74] After much posturing and delay by AT&T, on December 7, 2007, Sprint and AT&T filed the *Joint Motion* in the Sprint arbitration case, TRA Docket No. 07-00132, for the approval an amendment to the Sprint ICA that extended 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. More than eight (8) months passed between Sprint's March 20, 2007, request and the filing of the *Joint Motion* granting the request.

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[72] *AT&T's Brief* at 18.
[73] *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, p. 6 (May 18, 2007).
[74] *Id.*

By letter dated May 18, 2007, Nextel notified AT&T that Nextel was exercising its rights, pursuant to Merger Commitments Nos. 1 and 2 and Section 252(i), to adopt the Sprint ICA.[75] As noted earlier herein, Nextel is entitled to adopt the Sprint ICA under Merger Commitments Nos. 1 and 2 as a matter of law.[76] Absent the 8-month delay related to the extension of the Sprint ICA for three (3) years pursuant to the Merger Commitments and the now almost 10-month delay associated with Nextel's adoption of the Sprint ICA, Nextel, pursuant to the Merger Commitments, could have been operating under the Sprint ICA sometime shortly after May 18, 2007. In sum, if AT&T would have acted consistent with the Merger Commitments at the outset without the repeated maneuvers apparently designed for the sole purposes of delay, Nextel would have been able to operate under the Sprint ICA for a substantially longer portion of the 42-month period.

AT&T did not concede at the March 24, 2008, Oral Arguments, and still does not concede in *AT&T's Brief*, that should the Authority permit Nextel's adoption under the Merger Commitments, AT&T would agree, as it should, that Nextel's adoption would apply as of May 18, 2007, the date of Nextel's adoption request, or as of June 22, 2007, the date on which Nextel filed the *Petition*.[77] Therefore, even if the Authority finds, as did the Georgia Commission, that Nextel may adopt the Sprint ICA under the Merger Commitments, it appears – as shown directly above - that AT&T will likely self-servingly contend that the adoption would be effective upon the date of such Authority

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[75] *Petition* at 4.

[76] *See, e.g., Georgia Commission Order* at 6 ("[T]he Commission concludes that Nextel's proposed adoption complies with the merger condition.") (attached hereto as **EXHIBIT C**).

[77] *See March 24, 2008, Transcript* at 18 (excerpted version) (Counsel for AT&T: "I'm not in a position to make that announcement to the Authority today."); and *AT&T's Brief* at 17 ("[T]he forty-two month period during which Merger Commitments apply began on December 29, 2006, is currently proceeding and has not been tolled.").

determination. If so, AT&T's approach would, contrary to its assertions, result in Nextel receiving much less than the benefit of a substantial portion of the 42-month period.[78]

Should the Authority grant Nextel's adoption under the Merger Commitments, the Authority should order that Nextel's adoption applies as of May 18, 2007, the date of Nextel's adoption request. Such a ruling would be consistent with the FCC's vision of a streamlined adoption process under the Merger Commitments - which cannot even be delayed on the grounds that the agreement being adopted may logically be subject to amendment to reflect changes of law since its original creation.[79] Clearly, under no stretch of the imagination can it be considered "inconsistent" with the Merger Commitments for the Authority, as a matter of sound public policy to encourage competition and fair dealing amongst telecommunications carriers, to simply hold AT&T to its *public word* by enforcing AT&T's Merger Commitments from the date that a requesting carrier made a reasonable request for the very benefits that AT&T *publicly promised* to provide pursuant to such Commitments.

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[78] AT&T correctly notes that under an adoption, whether pursuant to the Merger Commitments or Section 252(i), the expiration date contained in the adopted interconnection agreement controls when an adopted agreement expires. *AT&T's Brief* at 18-19. Still, AT&T conveniently omits the obvious relevance of the date on which the adoption becomes effective. The earlier the adoption becomes effective, the longer the requesting carrier has to operate under the adopted agreement.

[79] *See FCC BellSouth Merger Order*, Appendix F at 147 ("It is not the intent of these commitments to ... limit state authority to adopt rules, regulations, performance monitoring programs, *or other policies that are not inconsistent with these commitments.*") (emphasis added); and *FCC BellSouth Merger Order* at 172 ("[AT&T, Inc.] 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.*") (emphasis added); and *AT&T Inc.'s Merger Commitment No. 2* (AT&T "shall not refuse a request ... 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 in law immediately after it has opted into the agreement"). Indeed, this is why Nextel made it explicitly clear that the Sprint ICA has already been amended to reflect the changes required by the TRRO. *Petition* at 3.

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As a condition of the AT&T/BellSouth merger, the FCC imposed various commitments upon AT&T to, among other things, lessen any anti-competitive impact of the merger and to enhance the opportunity for continued, robust competition. The forty-two (42) month period is a material component of the Merger Commitments. Even assuming that the Authority only approved the adoption under Section 252(i), there is no credible reason, as AT&T suggests, for the Authority to turn a blind eye to the FCC's pro-competition and pro-consumer-oriented 42-month period.[80] This is especially so since FCC Rule § 51.809(c) mandates that a Section 252(i) adoption be made available by the incumbent LEC "without unreasonable delay" and since the FCC expects that a requesting carrier seeking to adopt an existing interconnection agreement under Section 252(i) "shall be permitted to obtain its statutory rights on an expedited basis."[81]

Should the Authority grant Nextel's adoption under Section 252(i), the Authority should order that Nextel's adoption applies as of June 22, 2007, the date on which Nextel filed the *Petition*. Such a ruling would be consistent with Rule § 51.809(c)'s "without unreasonable delay" requirement and the FCC's "expedited basis" directive, both of which are noted directly above.

Therefore, whether Nextel's adoption request is granted under either the Merger Commitments or Section 252(i), time is of the essence, and the Authority should eliminate any further delay.

VI. CONCLUSION

For the reasons set forth above, and in Nextel's Motion for Summary Judgment, there simply are no legitimate genuine issues of material fact that remain to be resolved

[80] *See supra* n. 79.
[81] *Local Competition Order* at ¶ 1321.

with respect to the *Petition.* AT&T has not carried its burden to demonstrate the existence of a genuine issue of material fact.[82] 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" AT&T agreement within AT&T's 22-state territory. Having reaped the benefits of the FCC's approval of the merger,[83] AT&T must not now be permitted to blatantly disavow the expressly intended and agreed upon application of the Merger Commitments or to delay the streamlined, pro-competition process intended under Section 252(i) adoptions. The Act prescribes a 9-month period to conclude a Section 252 arbitration. Although adoptions under the Act are "straightforward" and "simple,"[84] and the FCC envisioned a streamlined process under both Merger Commitment No. 1 and Section 252(i), Nextel's adoptions – per the actions of AT&T - have now been pending before the Authority for *more than* the amount of time statutorily allotted by Congress for the completion of an arbitration – nine (9) months.[85]

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

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[82] *See Wachovia Bank & Trust Company, N. A. v. Glass*, 575 S.W.2d at 956 (In affirming lower courts grant of summary judgment, the Tennessee Court of Appeals noted that the "[d]efendant has not offered a single sworn word to support the elaborate rhetoric[.]")."

[83] *See supra* n. 33.

[84] *See, .e.g., Kentucky Commission Order* at 10 ("The adoption of an existing interconnection agreement, under most circumstances, is a straightforward and quick proceeding."); and *id.* at 13 ("The method for adopting an existing interconnection agreement is simple and expedient.").

[85] According to the Kentucky Commission, a period of ten (10) months for Nextel to adopt the Sprint ICA would be "an unreasonable result." *Kentucky Commission Order* at 16.

attached as Exhibit A to Nextel's Motion for Summary Judgment.

Respectfully submitted this 10th day of April, 2008.

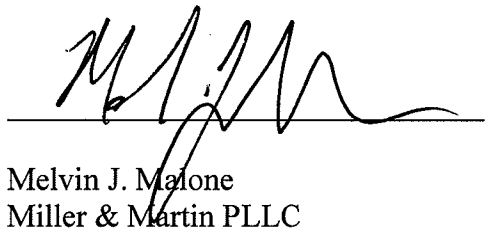

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EXHIBIT A

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION BY NEXTEL WEST CORP. OF THE EXISTING INTERCONNECTION AGREEMENT BY AND BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P.	)))))))	CASE NO. 2007-00255

O R D E R

On December 21, 2007, BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky")[1] filed a motion to reconsider the Commission's final Order entered on December 18, 2007. As grounds for its motion, AT&T Kentucky states that because the Commission's Order "not only denied the Motion to Dismiss filed by AT&T Kentucky. . .but also granted the adoption by Nextel West Corp. ["Nextel"][2] of the interconnection agreement. . .,"[3] the Order is procedurally flawed. AT&T Kentucky asserts that "[r]esolution of AT&T Kentucky's Motion to Dismiss was a threshold matter in this Docket, and did not address the underlying substantive issues."[4] AT&T argues

[1] AT&T Kentucky is an incumbent local exchange carrier ("ILEC") and provides local exchange service in large portions of Kentucky.

[2] Nextel is a commercial mobile radio service ("CMRS") and is licensed to provide wireless service in Kentucky

[3] AT&T Kentucky's Motion for Reconsideration at 1.

[4] Id.

that should the Commission not dismiss the case for lack of jurisdiction, "proper resolution requires a hearing on the merits and AT&T [sic] should not be precluded from bringing its case-in-chief to the Commission for final resolution."[5] On January 10, 2008, the Commission issued an Order stating that AT&T Kentucky's motion for reconsideration is granted for the purpose of allowing the Commission additional time in which to address the parties' arguments. As discussed below, the Commission finds that AT&T Kentucky's motion for reconsideration and its motion for a procedural schedule should be denied.

PROCEDURAL BACKGROUND

On June 21, 2007, Nextel filed with the Commission a notice of adoption of the interconnection agreement ("Sprint ICA") between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P. ("Sprint"). In the notice of adoption, Nextel asserted that it was exercising its right pursuant to Merger Commitments 1 and 2 of the Federal Communications Commission's ("FCC") merger proceeding[6] between AT&T and BellSouth as well as under 47 U.S.C. § 251(i). At the time Nextel filed its notice with the Commission, Sprint and AT&T Kentucky were in the middle of a dispute

[5] Id. at 2.

[6] In the Matter of AT&T Inc. and BellSouth Corporation Application to Transfer of Control, FCC WC Docket No. 06-74, Appendix F, Order dated March 26, 2007 ("Merger").

regarding the effective date of the Sprint ICA and the effect of the merger commitments on the effective date.[7]

On July 3, 2007, AT&T Kentucky filed with the Commission an objection to the notice of adoption of the interconnection agreement and moved the Commission to dismiss the complaint. As grounds for its motion to dismiss, AT&T Kentucky argued that: (1) the Commission did not have the authority to interpret and enforce the AT&T merger commitments; (2) Nextel was attempting to adopt an expired agreement and, therefore, did not satisfy the timing requirements of 47 C.F.R. § 59.801; and (3) the notice of adoption was premature because Nextel had failed to abide by the dispute resolutions provisions of its then existing interconnection agreement with AT&T Kentucky.

On September 18, 2007, while this case was still pending, the Commission entered an Order in Case No. 2007-00180. The primary issues in Case No. 2007-00180 were whether or not the Commission had the authority to interpret and apply merger commitments from the FCC's merger proceeding to disputes involving interconnection agreements in Kentucky and, if so, what was the effective date of the Sprint ICA. AT&T Kentucky argued that the Commission lacked the jurisdiction to enforce merger commitments (just as it does in the case at bar). The Commission found that it had the authority to resolve post-merger or merger-related disputes and then found that the Sprint ICA had an effective date of December 29, 2006.

[7] Case No. 2007-00180, 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 (Ky. PSC Sep. 18, 2007).

On December 18, 2007, the Commission issued an Order in the case at bar. In the Order, the Commission, citing its rationale in Case No. 2007-00180, found that "[f]or reasons set forth in the Commission's September 18, 2007 Order in Case No. 2007-00180, the Commission finds that AT&T's motion must be denied."[8] The Commission found that, because of its decision in Case No 2007-00180, the Sprint ICA extended to December 29, 2009 and a reasonable time remained for Nextel to adopt the agreement. The Commission granted Nextel's request to adopt the Sprint ICA, denied AT&T Kentucky's motion to dismiss, and ordered the parties, within 20 days of the date of the Order, to submit their executed adoption of the Sprint ICA.

On December 21, 2007, AT&T Kentucky filed its motion for reconsideration. Nextel filed its response to AT&T Kentucky's motion for reconsideration on January 3, 2008. On January 10, 2008, the Commission entered an Order granting AT&T Kentucky's motion for reconsideration "for the purpose of allowing the Commission additional time in which to address the parties' arguments."[9] On January 24, 2008, AT&T Kentucky submitted a filing titled "AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing." This filing contains arguments virtually identical to those AT&T Kentucky raised in its motion for reconsideration except that, for the first time, AT&T Kentucky raised the argument that the adoption might result in higher costs in its provision of the agreement.

AT&T Kentucky, in both of its motions, argues that Nextel's attempted adoption does not comply with the merger commitments and, accordingly, the adoption should be

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[8] December 18, 2007 Order at 2 (footnote omitted).

[9] January 10, 2008 Order at 2.

denied. AT&T Kentucky asserts that Merger Commitment 1 applies only "when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state. . . ."[10] AT&T Kentucky argues that because Nextel is not seeking to adopt an interconnection agreement from a state outside of Kentucky, such an adoption was not contemplated under the merger commitment and, therefore, the Commission should deny the adoption request. AT&T Kentucky, additionally, argues that Merger Commitment 2 merely requires AT&T Kentucky, under certain conditions, not to refuse an adoption request on the ground that the interconnection agreement had not been amended to reflect changes of law. AT&T Kentucky asserts that because its objection to Nextel's adoption is not based on any change of law issues, Merger Commitment 2 is not applicable to this dispute. Therefore, AT&T Kentucky argues, because neither of the merger commitments relied upon by Nextel for adoption of the Sprint ICA is applicable, the Commission should reconsider the adoption and deny it.

Nextel first argues that its adoption of the Sprint ICA is consistent with the merger commitments. Nextel argues that it was properly "porting" the Sprint ICA from other states when it invoked Merger Commitment 1 as one of the grounds for its adoption of the Sprint ICA. Nextel asserts that, plainly put, Merger Commitment 1 gives a requesting telecommunications carrier, such as Nextel, the right to adopt any interconnection agreement in AT&T Kentucky's 22-state service area.

Nextel asserts that Merger Commitments 1 and 2 apply because: (1) Nextel is a "requesting telecommunications carrier"; (2) Nextel has requested the Sprint ICA; (3) the Sprint ICA is an interconnection agreement entered into in "any state in the

[10] Id. at 4.

AT&T/BellSouth ILEC operating territory," and Sprint and AT&T Kentucky have entered into the same agreement in BellSouth's 9 "legacy" states; (4) the Sprint ICA already has state-specific pricing and performance plans incorporated into it; (5) there are no issues of technical feasibility; and (6) the Sprint ICA has already been amended to reflect changes in law. Nextel argues that it could just as easily have adopted a similar agreement from North Carolina and "ported" it over as it could have adopted the Sprint ICA in Kentucky.

AT&T Kentucky also argues that the adoption does not comply with 47 U.S.C. § 252(i). In support of this argument, AT&T Kentucky asserts that the Sprint ICA addresses a "unique mix of wireline and wireless items, and Nextel is a solely wireless carrier"[11] and that allowing Nextel to adopt the Sprint ICA would be contrary to FCC rulings and be "internally inconsistent."[12]

AT&T Kentucky first argues that Nextel, because it is only a wireless carrier, could not avail itself of the network elements provided within the Sprint ICA because when AT&T Kentucky negotiated the Sprint ICA, it was with both Sprint's wireless and local exchange entities. AT&T Kentucky asserts that because of this "unique" mix, the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline service or wireless service."[13] AT&T Kentucky asserts that the terms and agreements of the Sprint ICA clearly apply only to an entity that provides both wireless and wireline service. AT&T Kentucky also asserts

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[11] Id. at 5.

[12] Id.

[13] Id. at 7.

that it rarely enters into an interconnection agreement addressing both wireline and wireless services.

AT&T Kentucky asserts that to allow Nextel to adopt the Sprint ICA would "disrupt the dynamics of the terms and conditions negotiated between AT&T Kentucky and the parties to the Sprint interconnection agreement and, in this case, AT&T Kentucky would lose the benefits of the bargain negotiated with those parties."[14] AT&T Kentucky, as an example, points to Attachment 3, Section 6.1.1 of the Sprint ICA, providing for "bill and keep" arrangements. AT&T Kentucky states that it never would enter a bill-and-keep arrangement "with a strictly wireless carrier such as Nextel."[15]

AT&T Kentucky also argues that granting the adoption would violate FCC rules. AT&T Kentucky lists one instance where it alleges the adoption would erroneously allow Nextel to avail itself of unbundled network elements ("UNEs"), something prohibited by the FCC to wireless carriers. AT&T Kentucky then states that this is "but one example of why granting the adoption would violate the FCC rules."[16] AT&T Kentucky asserts that there are various terms and conditions in the Sprint ICA that cannot be applied to Nextel, but it "will refrain from discussing each at length within this pleading."[17]

AT&T Kentucky argues that the agreement cannot be revised to address these issues because the FCC has prohibited the "pick and choose" adoptions of provisions of

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[14] Id. at 7-8.

[15] Id.

[16] Id. at 9.

[17] Id.

an agreement and requires a carrier to adopt "all or nothing" of the agreement.[18] AT&T Kentucky argues that allowing Nextel to adopt the Sprint ICA after revising the agreement to clarify what is applicable to Nextel would be contrary to the FCC's ruling.

In its Brief in Support of Request for Procedural Schedule and Hearing, AT&T Kentucky advances the arguments discussed above and advances one new argument. AT&T Kentucky now argues that if certain of its costs increase as a result of Nextel's adoption, the adoption would violate the FCC's rules.[19] AT&T Kentucky further asserts that the applicable regulation, 47 C.F.R. § 51.809(b), requires AT&T Kentucky to have "an opportunity to 'prove'"[20] that the adoption would result in higher costs to it and, therefore, the Commission should schedule a hearing to do just that.

Nextel claims that AT&T Kentucky's attempt to prevent the adoption of the Sprint ICA is a discriminatory practice that was expressly rejected by the FCC. Nextel argues that AT&T Kentucky cannot "avoid making an ICA available for adoption under the 'all-or-nothing' rule based on the inclusion of what the ILEC considers additional negotiated terms that cannot be 'used' by a subsequent adopting carrier."[21] Nextel argues that both 47 U.S.C. § 251(i) and 47 C.F.R. § 51.809 prohibit AT&T Kentucky from refusing to make available interconnection agreements that are in effect. Nextel argues that

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[18] See Second Report and Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 F.C.C.R. 13494 at Section 1 (July 13, 2004) ("Second Report and Order").

[19] AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 8-9.

[20] Id. at 9.

[21] Nextel's Response to AT&T Kentucky's Motion for Reconsideration at 11.

47 C.F.R. § 51.809 specifically prohibits an ILEC from limiting the availability of the agreement "only to those requesting carriers serving a comparable class of subscribers or providing the same service. . . ."[22]

Nextel also asserts that adoption of the Sprint ICA is not barred by either 47 C.F.R. § 51.809(b)(1) or (2) because AT&T Kentucky did not initially argue that the costs of providing the services in the Sprint ICA to Nextel are higher than the cost of providing the same services to Sprint and still does not argue that the interconnection is technically infeasible.

Nextel argues that the FCC, in adopting the "all-or-nothing" rule, was attempting to protect carriers such as Nextel. Moreover, Nextel argues that the "all-or-nothing" rule specifically prohibits AT&T Kentucky's refusal to allow the agreement to be adopted. Additionally, under the "all-or-nothing" rule, it is Nextel, not AT&T Kentucky, that gets to decide what portions of the Sprint ICA are applicable.

Nextel notes that the Sprint ICA allows either Sprint entity to opt out of the agreement, while the other entity can still operate under the Sprint ICA. Nextel also notes that, referencing AT&T Kentucky's concern that Nextel could obtain UNEs under the Sprint ICA, the Sprint ICA specifically provides that Sprint "shall not obtain a Network Element for the exclusive provision of mobile wireless services. . . ."[23]

Nextel also argues that the Commission should strike AT&T Kentucky's brief in support of its hearing request because no procedure allows for the filing of such a document. Nextel argues that the brief is merely a rehash of AT&T Kentucky's previous

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[22] Id. at 12, quoting 47 C.F.R. § 51.809.

[23] Id. at 19, quoting 9th Amendment, Attachment 2, Section 1.5 of the Sprint ICA.

arguments and the only purpose for the filing is to interject "confusion and delay"[24] into this proceeding. Nextel also objects to AT&T Kentucky's filing of Additional Supplemental Authority, claiming that it is merely devised to create further delay.

DISCUSSION

The adoption of an existing interconnection agreement, under most circumstances, is a straightforward and quick proceeding. At the time Nextel filed its notice of adoption of the Sprint ICA, the status and effective date of the Sprint ICA were not known, and that impeded the typically automatic adoption of an interconnection. However, as discussed below and in the Commission's December 18, 2007 Order, upon resolution of the status of the Sprint ICA, any existing obstacles to its adoption were removed.

JURISDICTION OVER MERGER COMMITMENTS

The Commission found in its December 18, 2007 Order that by the reasoning in its previous decision in Case No. 2007-00180, the Commission had jurisdiction to interpret and apply merger commitments and adjudicate disputes arising out of the commitments. We find the reasoning in Case No. 2007-00180 still persuasive and incorporate by reference our reasoning in that case regarding our jurisdiction over disputes arising from the merger and merger commitments. Although Nextel can adopt the Sprint ICA pursuant to the merger commitments, as discussed below, Nextel can adopt the Sprint ICA pursuant to 47 U.S.C. § 252(i), independently of the merger commitments, and, therefore, any objections pertaining to adoption under the merger

[24] Nextel's Response and Motion to Strike AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 1.

commitments is moot. Moreover, because, as discussed below, we find that Nextel may adopt the agreement pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, and need not invoke the merger commitments, we find no reason to suspend this proceeding pending resolution of AT&T Kentucky's recent petition to the FCC requesting clarification regarding the merger commitments.[25]

THE SPRINT ICA IS ADOPTABLE UNDER 47 U.S.C. § 252(i) AND 47 C.F.R. § 51.809.

The Commission, as noted in its December 18, 2007 Order, had found in Case No. 2007-00180 that the Sprint ICA was extended by 3 years from December 29, 2006. When Nextel originally filed its petition for adoption on June 21, 2007, it relied, in part, on its rights "pursuant to the Federal Communications Commission approved Merger Commitments Nos. 1 and 2. . .and 47 U.S.C. § 252(i)."[26] At the time of the filing of the notice of adoption, however, the status of the Sprint ICA was unclear, as the Commission had not ruled on that matter in Case No. 2007-00180. The Commission has since resolved these issues, and the Sprint ICA is effective and adoptable under 47 U.S.C. § 252(i).

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[25] AT&T ILECs' Petition for Declaratory Ruling That Sprint Nextel Corporation, Its Affiliates, and Other Requesting Carriers May Not Impose a Bill-and-Keep Arrangement of a Facility Pricing Arrangement Under the Commitments Approved By the Commission in Approving the AT&T-BellSouth Merger. WC Docket No. _____. (Filed February 5, 2008.) Similarly, we find AT&T Kentucky's February 13, 2008 letter to the Commission's Executive Director to be equally unpersuasive. In the letter, AT&T Kentucky urges the Commission to hold this proceeding in abeyance pending the outcome of its petition to the FCC. As discussed herein, 47 U.S.C. § 251(i) provides an independent basis for the adoption of the Agreement, and the FCC's ruling will not affect our decision.

[26] Nextel's Notice of Adoption of Interconnection Agreement at 1.

47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

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.

47 C.F.R. § 51.809 provides that:

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

The method for adopting an existing interconnection agreement is simple and expedient. 47 C.F.R. § 51.809 contains the only prohibitions by which an ILEC could refuse adoption of an interconnection agreement. Here, AT&T Kentucky did not allege (until its brief in support of request for a procedural schedule) that providing the Sprint ICA to Nextel would cost it more than offering the same ICA to Sprint, nor did AT&T Kentucky allege that providing the Sprint ICA to Nextel is technically infeasible. AT&T Kentucky argues that providing the Sprint ICA to Nextel results in AT&T Kentucky not being able to negotiate possible higher prices for services than it charges to Sprint Wireless. However, this argument is a far cry from alleging that providing the Sprint ICA to Nextel would cost it more than providing it to Sprint Wireless. In fact, AT&T Kentucky's argument is antithetical to the very purpose of 47 U.S.C. § 252(i), which is to allow telecommunications providers to enter into interconnection agreements on the same footing as each other. The FCC, in promulgating the "all-or-nothing" rule, clearly recognized that it would prohibit this type of discrimination:

> 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 benefit of the incumbent LEC's discriminatory bargain. Because the 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.[27]

[27] Second Report and Order at ¶ 19.

By allowing this sort of adoption, the FCC and the 1996 Telecommunications Act ensure that an ILEC, such as AT&T Kentucky, cannot play favorites in a market and determine which businesses succeed and which fail by offering more advantageous terms to one party and lesser terms to another. If AT&T Kentucky can prevent Nextel, or any requesting carrier, from adopting the Sprint ICA or any other interconnection agreement by simply asserting that some of the provisions of the interconnection agreement cannot apply to the requesting carrier, then the very purpose of the all-or-nothing rule is thwarted. Most requesting carriers' business plans or structures differ from one another, and, therefore, it would be difficult to comprehend a situation in which any requesting carrier could adopt an interconnection agreement and have all the provisions apply to it. If AT&T Kentucky's argument is to be believed, then it would result in changing almost every adoption proceeding into an arbitration.

Because the Sprint ICA is effective, Nextel's rights under 47 U.S.C. § 251(i) and 47 C.F.R § 51.809 are sufficient, by themselves, to allow it to adopt the Sprint ICA. If Nextel had not filed its notice of adoption on June 21, 2007, and were to file it today, it would only have to invoke its rights under 47 U.S.C. § 252(i) to adopt the agreement and need not rely on any merger commitments.

AT&T Kentucky states that it has been denied its opportunity to present its substantive case, but does not give a very detailed discussion of what evidence it would present at hearing, nor how the evidence would prove to the Commission that the Sprint ICA would not have to be made available to Nextel for adoption. However, as discussed above, it can only refuse to make available an interconnection agreement if it can convince the Commission that one of two situations exists. Prior to its January 24,

2008 filing, AT&T Kentucky did not allege that it intended to attempt to prove that either of those two situations exist and, therefore, no evidence it presented, or even offered to present prior to January 24, 2008, could have lead the Commission to deny the adoption.

47 C.F.R. § 51.809(a) requires that an incumbent LEC shall make available "without unreasonable delay" any agreement to a requesting carrier. Although no law is directly on point regarding what constitutes an "unreasonable delay" in this context, we find that raising an objection pursuant to 47 C.F.R. § 51.809 to a petition for adoption of an interconnection agreement over 7 months after the petition was filed is unreasonable delay. AT&T Kentucky raised numerous objections to the petition for adoption in both its original objection to the petition, filed on July 3, 2007, and in its petition for reconsideration filed on December 24, 2007. As discussed above, however, an ILEC can only deny adoption of an interconnection agreement if an ILEC can prove one of two situations exists. AT&T Kentucky, until the eleventh hour, did not even raise the specter of any such objections, objecting only on grounds not contemplated in 47 C.F.R. § 51.809(b).

47 C.F.R. § 51.809(b)(1) does provide that an ILEC can refuse the adoption of an interconnection agreement if it can prove to the state commission that the cost of providing the interconnection to the requesting carrier exceeds that of providing it to the original negotiating carrier. This right of refusal cannot be limitless; otherwise, an ILEC could seek to get out from under any interconnection agreement at any time a cost allegedly rises, even after the agreement has been adopted. Here, AT&T Kentucky not only files an untimely request arguing about potential raised costs, but its supposition

that entering into the interconnection agreement would produce higher costs is merely hypothetical. AT&T Kentucky has raised no colorable argument or proof for the existence of different costs.

To the Commission's knowledge, since the enactment of the 1996 Telecommunications Act, no ILEC has objected to the adoption in Kentucky of an interconnection agreement based on the exception found in 47 C.F.R. § 51.809(b)(1). Therefore, AT&T Kentucky's objection is a matter of first impression to the Commission and is a matter of uncharted procedural territory. However, we find that the objection is raised untimely, and moreover, even if it were timely raised, it is not specific enough to establish a colorable claim, much less warrant a hearing. If the Commission were to grant AT&T Kentucky's request for a hearing,[28] at the minimum this proceeding would drag out for another 3 months, which would result in an application for an adoption of an interconnection agreement taking over 10 months to resolve. This would be an unreasonable result. In the future, AT&T Kentucky, or any carrier raising an objection under 47 C.F.R. § 51.809(b) or (c) should raise such objections ex ante, upon the filing of the notice of adoption, and not 7 months after the initial filing. Conceivably, if this is not done, a carrier could continue to raise objections at any time during an adoption

[28] Requests for a hearing made pursuant to 807 KAR 5:001, Section 4(1)(b) are not granted automatically. 807 KAR 5:001, Section 4(1) provides that "[e]xcept as otherwise determined in specific cases," the Commission shall grant a hearing upon application for a hearing or in the event that a defendant has not satisfied a complaint. AT&T Kentucky's request for a hearing is one of the "specific cases" in which the Commission has determined that a hearing should not be held.

proceeding, delaying the adoption until the adoption could be denied pursuant to 47 C.F.R. § 51.809(c).[29]

CONCLUSION

The adoption of an interconnection agreement pursuant to 47 U.S.C. § 252(i) generally is a straightforward procedure and should occur without much delay unless adoption of the agreement falls under the exceptions in 47 C.F.R. § 51.809. These exceptions must be raised as early as practicably possible in a contested proceeding. The practical effect of AT&T Kentucky's untimely and incomplete objections is to attempt to turn a simple adoption proceeding into an arbitration proceeding, possibly exceeding over a year in length, a result that could have been avoided had AT&T Kentucky raised its objections when the petition was filed. Such a result is not only unfair, but it is also prohibited, as it is provided for in neither law nor regulation. Had AT&T Kentucky raised its objections under 47 C.F.R. § 51.809 when the petition was filed, the Commission could have addressed all objections to the petition at the same time and this proceeding would already be complete.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky's Motion for Reconsideration is denied.

2. AT&T Kentucky's Request for Procedural Schedule and Hearing is denied.

[29] We do not agree with Nextel's assertion in its response to AT&T Kentucky's supplemental submission that AT&T Kentucky's petition with the FCC is made in bad faith or to cause intentional delay in resolution of this proceeding. However, such a filing is a clear example of how an ILEC could continually raise objections to an adoption, stringing the proceeding out for months, if not years. Any objections must be raised ex ante, not post hoc.

3. Within 20 days of the date of this Order, Nextel and AT&T Kentucky shall submit their executed adoption of the Sprint ICA.

4. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 18th day of February, 2008.

By the Commission

ATTEST:

Executive Director

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION BY NPCR, INC. D/B/A NEXTEL PARTNERS OF THE EXISTING INTERCONNECTION AGREEMENT BY AND BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P.	)	CASE NO. 2007-00256

O R D E R

On December 21, 2007, BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky")[1] filed a motion to reconsider the Commission's final Order entered on December 18, 2007. As grounds for its motion, AT&T Kentucky states that because the Commission's Order "not only denied the Motion to Dismiss filed by AT&T Kentucky. . .but also granted the adoption by NPCR, Inc., d/b/a Nextel Partners ["Nextel Partners"][2] of the interconnection agreement. . .,"[3] the Order is procedurally flawed. AT&T Kentucky asserts that "[r]esolution of AT&T Kentucky's Motion to Dismiss was a threshold matter in this Docket, and did not address the underlying substantive issues."[4]

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[1] AT&T Kentucky is an incumbent local exchange carrier ("ILEC") and provides local exchange service in large portions of Kentucky.

[2] Nextel Partners is a commercial mobile radio service ("CMRS") and is licensed to provide wireless service in Kentucky

[3] AT&T Kentucky's Motion for Reconsideration at 1.

[4] Id.

AT&T argues that should the Commission not dismiss the case for lack of jurisdiction, "proper resolution requires a hearing on the merits and AT&T [sic] should not be precluded from bringing its case-in-chief to the Commission for final resolution."[5] On January 10, 2008, the Commission issued an Order stating that AT&T Kentucky's motion for reconsideration is granted for the purpose of allowing the Commission additional time in which to address the parties' arguments. As discussed below, the Commission finds that AT&T Kentucky's motion for reconsideration and its motion for a procedural schedule should be denied.

PROCEDURAL BACKGROUND

On June 21, 2007, Nextel Partners filed with the Commission a notice of adoption of the interconnection agreement ("Sprint ICA") between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P. ("Sprint"). In the notice of adoption, Nextel Partners asserted that it was exercising its right pursuant to Merger Commitments 1 and 2 of the Federal Communications Commission's ("FCC") merger proceeding[6] between AT&T and BellSouth as well as under 47 U.S.C. § 251(i). At the time Nextel Partners filed its notice with the Commission, Sprint and AT&T Kentucky

[5] Id. at 2.

[6] In the Matter of AT&T Inc. and BellSouth Corporation Application to Transfer of Control, FCC WC Docket No. 06-74, Appendix F, Order dated March 26, 2007 ("Merger").

were in the middle of a dispute regarding the effective date of the Sprint ICA and the effect of the merger commitments on the effective date.[7]

On July 3, 2007, AT&T Kentucky filed with the Commission an objection to the notice of adoption of the interconnection agreement and moved the Commission to dismiss the complaint. As grounds for its motion to dismiss, AT&T Kentucky argued that: (1) the Commission did not have the authority to interpret and enforce the AT&T merger commitments; (2) Nextel Partners was attempting to adopt an expired agreement and, therefore, did not satisfy the timing requirements of 47 C.F.R. § 59.801; and (3) the notice of adoption was premature because Nextel Partners had failed to abide by the dispute resolutions provisions of its then existing interconnection agreement with AT&T Kentucky.

On September 18, 2007, while this case was still pending, the Commission entered an Order in Case No. 2007-00180. The primary issues in Case No. 2007-00180 were whether or not the Commission had the authority to interpret and apply merger commitments from the FCC's merger proceeding to disputes involving interconnection agreements in Kentucky and, if so, what was the effective date of the Sprint ICA. AT&T Kentucky argued that the Commission lacked the jurisdiction to enforce merger commitments (just as it does in the case at bar). The Commission found that it had the authority to resolve post-merger or merger-related disputes and then found that the Sprint ICA had an effective date of December 29, 2006.

[7] Case No. 2007-00180, 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 (Ky. PSC Sep. 18, 2007).

On December 18, 2007, the Commission issued an Order in the case at bar. In the Order, the Commission, citing its rationale in Case No. 2007-00180, found that "[f]or reasons set forth in the Commission's September 18, 2007 Order in Case No. 2007-00180, the Commission finds that AT&T's motion must be denied."[8] The Commission found that, because of its decision in Case No 2007-00180, the Sprint ICA extended to December 29, 2009 and a reasonable time remained for Nextel Partners to adopt the agreement. The Commission granted Nextel Partners' request to adopt the Sprint ICA, denied AT&T Kentucky's motion to dismiss, and ordered the parties, within 20 days of the date of the Order, to submit their executed adoption of the Sprint ICA.

On December 21, 2007, AT&T Kentucky filed its motion for reconsideration. Nextel Partners filed its response to AT&T Kentucky's motion for reconsideration on January 3, 2008. On January 10, 2008, the Commission entered an Order granting AT&T Kentucky's motion for reconsideration "for the purpose of allowing the Commission additional time in which to address the parties' arguments."[9] On January 24, 2008, AT&T Kentucky submitted a filing titled "AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing." This filing contains arguments virtually identical to those AT&T Kentucky raised in its motion for reconsideration except that, for the first time, AT&T Kentucky raised the argument that the adoption might result in higher costs in its provision of the agreement.

AT&T Kentucky, in both of its motions, argues that Nextel Partners' attempted adoption does not comply with the merger commitments and, accordingly, the adoption

[8] December 18, 2007 Order at 2 (footnote omitted).

[9] January 10, 2008 Order at 2.

should be denied. AT&T Kentucky asserts that Merger Commitment 1 applies only "when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state. . . ."[10] AT&T Kentucky argues that because Nextel Partners is not seeking to adopt an interconnection agreement from a state outside of Kentucky, such an adoption was not contemplated under the merger commitment and, therefore, the Commission should deny the adoption request. AT&T Kentucky, additionally, argues that Merger Commitment 2 merely requires AT&T Kentucky, under certain conditions, not to refuse an adoption request on the ground that the interconnection agreement had not been amended to reflect changes of law. AT&T Kentucky asserts that because its objection to Nextel Partners' adoption is not based on any change of law issues, Merger Commitment 2 is not applicable to this dispute. Therefore, AT&T Kentucky argues, because neither of the merger commitments relied upon by Nextel Partners for adoption of the Sprint ICA is applicable, the Commission should reconsider the adoption and deny it.

Nextel Partners first argues that its adoption of the Sprint ICA is consistent with the merger commitments. Nextel Partners argues that it was properly "porting" the Sprint ICA from other states when it invoked Merger Commitment 1 as one of the grounds for its adoption of the Sprint ICA. Nextel Partners asserts that, plainly put, Merger Commitment 1 gives a requesting telecommunications carrier, such as Nextel Partners, the right to adopt any interconnection agreement in AT&T Kentucky's 22-state service area.

[10] Id. at 4.

Nextel Partners asserts that Merger Commitments 1 and 2 apply because: (1) Nextel Partners is a "requesting telecommunications carrier"; (2) Nextel Partners has requested the Sprint ICA; (3) the Sprint ICA is an interconnection agreement entered into in "any state in the AT&T/BellSouth ILEC operating territory," and Sprint and AT&T Kentucky have entered into the same agreement in BellSouth's 9 "legacy" states; (4) the Sprint ICA already has state-specific pricing and performance plans incorporated into it; (5) there are no issues of technical feasibility; and (6) the Sprint ICA has already been amended to reflect changes in law. Nextel Partners argues that it could just as easily have adopted a similar agreement from North Carolina and "ported" it over as it could have adopted the Sprint ICA in Kentucky.

AT&T Kentucky also argues that the adoption does not comply with 47 U.S.C. § 252(i). In support of this argument, AT&T Kentucky asserts that the Sprint ICA addresses a "unique mix of wireline and wireless items, and Nextel Partners is a solely wireless carrier"[11] and that allowing Nextel Partners to adopt the Sprint ICA would be contrary to FCC rulings and be "internally inconsistent."[12]

AT&T Kentucky first argues that Nextel Partners, because it is only a wireless carrier, could not avail itself of the network elements provided within the Sprint ICA because when AT&T Kentucky negotiated the Sprint ICA, it was with both Sprint's wireless and local exchange entities. AT&T Kentucky asserts that because of this "unique" mix, the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline service or wireless

[11] Id. at 5.

[12] Id.

service."[13] AT&T Kentucky asserts that the terms and agreements of the Sprint ICA clearly apply only to an entity that provides both wireless and wireline service. AT&T Kentucky also asserts that it rarely enters into an interconnection agreement addressing both wireline and wireless services.

AT&T Kentucky asserts that to allow Nextel Partners to adopt the Sprint ICA would "disrupt the dynamics of the terms and conditions negotiated between AT&T Kentucky and the parties to the Sprint interconnection agreement and, in this case, AT&T Kentucky would lose the benefits of the bargain negotiated with those parties."[14] AT&T Kentucky, as an example, points to Attachment 3, Section 6.1.1 of the Sprint ICA, providing for "bill and keep" arrangements. AT&T Kentucky states that it never would enter a bill-and-keep arrangement "with a strictly wireless carrier such as Nextel Partners."[15]

AT&T Kentucky also argues that granting the adoption would violate FCC rules. AT&T Kentucky lists one instance where it alleges the adoption would erroneously allow Nextel Partners to avail itself of unbundled network elements ("UNEs"), something prohibited by the FCC to wireless carriers. AT&T Kentucky then states that this is "but one example of why granting the adoption would violate the FCC rules."[16] AT&T Kentucky asserts that there are various terms and conditions in the Sprint ICA that

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[13] Id. at 7.

[14] Id. at 7-8.

[15] Id.

[16] Id. at 9.

cannot be applied to Nextel Partners, but it "will refrain from discussing each at length within this pleading."[17]

AT&T Kentucky argues that the agreement cannot be revised to address these issues because the FCC has prohibited the "pick and choose" adoptions of provisions of an agreement and requires a carrier to adopt "all or nothing" of the agreement.[18] AT&T Kentucky argues that allowing Nextel Partners to adopt the Sprint ICA after revising the agreement to clarify what is applicable to Nextel Partners would be contrary to the FCC's ruling.

In its Brief in Support of Request for Procedural Schedule and Hearing, AT&T Kentucky advances the arguments discussed above and advances one new argument. AT&T Kentucky now argues that if certain of its costs increase as a result of Nextel Partners' adoption, the adoption would violate the FCC's rules.[19] AT&T Kentucky further asserts that the applicable regulation, 47 C.F.R. § 51.809(b), requires AT&T Kentucky to have "an opportunity to 'prove'"[20] that the adoption would result in higher costs to it and, therefore, the Commission should schedule a hearing to do just that.

Nextel Partners claims that AT&T Kentucky's attempt to prevent the adoption of the Sprint ICA is a discriminatory practice that was expressly rejected by the FCC.

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[17] Id.

[18] See Second Report and Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 F.C.C.R. 13494 at Section 1 (July 13, 2004) ("Second Report and Order").

[19] AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 8-9.

[20] Id. at 9.

Nextel Partners argues that AT&T Kentucky cannot "avoid making an ICA available for adoption under the 'all-or-nothing' rule based on the inclusion of what the ILEC considers additional negotiated terms that cannot be 'used' by a subsequent adopting carrier."[21] Nextel Partners argues that both 47 U.S.C. § 251(i) and 47 C.F.R. § 51.809 prohibit AT&T Kentucky from refusing to make available interconnection agreements that are in effect. Nextel Partners argues that 47 C.F.R. § 51.809 specifically prohibits an ILEC from limiting the availability of the agreement "only to those requesting carriers serving a comparable class of subscribers or providing the same service. . . ."[22]

Nextel Partners also asserts that adoption of the Sprint ICA is not barred by either 47 C.F.R. § 51.809(b)(1) or (2) because AT&T Kentucky did not initially argue that the costs of providing the services in the Sprint ICA to Nextel Partners are higher than the cost of providing the same services to Sprint and still does not argue that the interconnection is technically infeasible.

Nextel Partners argues that the FCC, in adopting the "all-or-nothing" rule, was attempting to protect carriers such as Nextel Partners. Moreover, Nextel Partners argues that the "all-or-nothing" rule specifically prohibits AT&T Kentucky's refusal to allow the agreement to be adopted. Additionally, under the "all-or-nothing" rule, it is Nextel Partners, not AT&T Kentucky, that gets to decide what portions of the Sprint ICA are applicable.

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[21] Nextel Partners' Response to AT&T Kentucky's Motion for Reconsideration at 11.

[22] Id. at 12, quoting 47 C.F.R. § 51.809.

Nextel Partners notes that the Sprint ICA allows either Sprint entity to opt out of the agreement, while the other entity can still operate under the Sprint ICA. Nextel Partners also notes that, referencing AT&T Kentucky's concern that Nextel Partners could obtain UNEs under the Sprint ICA, the Sprint ICA specifically provides that Sprint "shall not obtain a Network Element for the exclusive provision of mobile wireless services. . . ."[23]

Nextel Partners also argues that the Commission should strike AT&T Kentucky's brief in support of its hearing request because no procedure allows for the filing of such a document. Nextel Partners argues that the brief is merely a rehash of AT&T Kentucky's previous arguments and the only purpose for the filing is to interject "confusion and delay"[24] into this proceeding. Nextel Partners also objects to AT&T Kentucky's filing of Additional Supplemental Authority, claiming that it is merely devised to create further delay.

DISCUSSION

The adoption of an existing interconnection agreement, under most circumstances, is a straightforward and quick proceeding. At the time Nextel Partners filed its notice of adoption of the Sprint ICA, the status and effective date of the Sprint ICA were not known, and that impeded the typically automatic adoption of an interconnection. However, as discussed below and in the Commission's December 18,

[23] Id. at 19, quoting 9th Amendment, Attachment 2, Section 1.5 of the Sprint ICA.

[24] Nextel Partners' Response and Motion to Strike AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 1.

2007 Order, upon resolution of the status of the Sprint ICA, any existing obstacles to its adoption were removed.

JURISDICTION OVER MERGER COMMITMENTS

The Commission found in its December 18, 2007 Order that by the reasoning in its previous decision in Case No. 2007-00180, the Commission had jurisdiction to interpret and apply merger commitments and adjudicate disputes arising out of the commitments. We find the reasoning in Case No. 2007-00180 still persuasive and incorporate by reference our reasoning in that case regarding our jurisdiction over disputes arising from the merger and merger commitments. Although Nextel Partners can adopt the Sprint ICA pursuant to the merger commitments, as discussed below, Nextel Partners can adopt the Sprint ICA pursuant to 47 U.S.C. § 252(i), independently of the merger commitments, and, therefore, any objections pertaining to adoption under the merger commitments is moot. Moreover, because, as discussed below, we find that Nextel Partners may adopt the agreement pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, and need not invoke the merger commitments, we find no reason to suspend this proceeding pending resolution of AT&T Kentucky's recent petition to the FCC requesting clarification regarding the merger commitments.[25]

[25] AT&T ILECs' Petition for Declaratory Ruling That Sprint Nextel Corporation, Its Affiliates, and Other Requesting Carriers May Not Impose a Bill-and-Keep Arrangement of a Facility Pricing Arrangement Under the Commitments Approved By the Commission in Approving the AT&T-BellSouth Merger. WC Docket No. _____ (filed February 5, 2008.) Similarly, we find AT&T Kentucky's February 13, 2008 letter to the Commission's Executive Director to be equally unpersuasive. In the letter, AT&T Kentucky urges the Commission to hold this proceeding in abeyance pending the outcome of its petition to the FCC. As discussed herein, 47 U.S.C. § 251(i) provides an independent basis for the adoption of the Agreement, and the FCC's ruling will not affect our decision.

THE SPRINT ICA IS ADOPTABLE UNDER 47 U.S.C. § 252(i) AND 47 C.F.R. § 51.809.

The Commission, as noted in its December 18, 2007 Order, had found in Case No. 2007-00180 that the Sprint ICA was extended by 3 years from December 29, 2006. When Nextel Partners originally filed its petition for adoption on June 21, 2007, it relied, in part, on its rights "pursuant to the Federal Communications Commission approved Merger Commitments Nos. 1 and 2. . .and 47 U.S.C. § 252(i)."[26] At the time of the filing of the notice of adoption, however, the status of the Sprint ICA was unclear, as the Commission had not ruled on that matter in Case No. 2007-00180. The Commission has since resolved these issues, and the Sprint ICA is effective and adoptable under 47 U.S.C. § 252(i).

47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

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.

47 C.F.R. § 51.809 provides that:

> (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

[26] Nextel Partners' Notice of Adoption of Interconnection Agreement at 1.

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

The method for adopting an existing interconnection agreement is simple and expedient. 47 C.F.R. § 51.809 contains the only prohibitions by which an ILEC could refuse adoption of an interconnection agreement. Here, AT&T Kentucky did not allege (until its brief in support of request for a procedural schedule) that providing the Sprint ICA to Nextel Partners would cost it more than offering the same ICA to Sprint, nor did AT&T Kentucky allege that providing the Sprint ICA to Nextel Partners is technically infeasible. AT&T Kentucky argues that providing the Sprint ICA to Nextel Partners results in AT&T Kentucky not being able to negotiate possible higher prices for services than it charges to Sprint Wireless. However, this argument is a far cry from alleging that providing the Sprint ICA to Nextel Partners would cost it more than providing it to Sprint Wireless. In fact, AT&T Kentucky's argument is antithetical to the very purpose of 47 U.S.C. § 252(i), which is to allow telecommunications providers to enter into

interconnection agreements on the same footing as each other. The FCC, in promulgating the "all-or-nothing" rule, clearly recognized that it would prohibit this type of discrimination:

> 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 benefit of the incumbent LEC's discriminatory bargain. Because the 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.[27]

By allowing this sort of adoption, the FCC and the 1996 Telecommunications Act ensure that an ILEC, such as AT&T Kentucky, cannot play favorites in a market and determine which businesses succeed and which fail by offering more advantageous terms to one party and lesser terms to another. If AT&T Kentucky can prevent Nextel Partners, or any requesting carrier, from adopting the Sprint ICA or any other interconnection agreement by simply asserting that some of the provisions of the interconnection agreement cannot apply to the requesting carrier, then the very purpose of the all-or-nothing rule is thwarted. Most requesting carriers' business plans or structures differ from one another, and, therefore, it would be difficult to comprehend a situation in which any requesting carrier could adopt an interconnection agreement and

[27] Second Report and Order at ¶ 19.

have all the provisions apply to it. If AT&T Kentucky's argument is to be believed, then it would result in changing almost every adoption proceeding into an arbitration.

Because the Sprint ICA is effective, Nextel Partners' rights under 47 U.S.C. § 251(i) and 47 C.F.R § 51.809 are sufficient, by themselves, to allow it to adopt the Sprint ICA. If Nextel Partners had not filed its notice of adoption on June 21, 2007, and were to file it today, it would only have to invoke its rights under 47 U.S.C. § 252(i) to adopt the agreement and need not rely on any merger commitments.

AT&T Kentucky states that it has been denied its opportunity to present its substantive case, but does not give a very detailed discussion of what evidence it would present at hearing, nor how the evidence would prove to the Commission that the Sprint ICA would not have to be made available to Nextel Partners for adoption. However, as discussed above, it can only refuse to make available an interconnection agreement if it can convince the Commission that one of two situations exists. Prior to its January 24, 2008 filing, AT&T Kentucky did not allege that it intended to attempt to prove that either of those two situations exist and, therefore, no evidence it presented, or even offered to present prior to January 24, 2008, could have lead the Commission to deny the adoption.

47 C.F.R. § 51.809(a) requires that an incumbent LEC shall make available "without unreasonable delay" any agreement to a requesting carrier. Although no law is directly on point regarding what constitutes an "unreasonable delay" in this context, we find that raising an objection pursuant to 47 C.F.R. § 51.809 to a petition for adoption of an interconnection agreement over 7 months after the petition was filed is unreasonable delay. AT&T Kentucky raised numerous objections to the petition for adoption in both

its original objection to the petition, filed on July 3, 2007, and in its petition for reconsideration filed on December 24, 2007. As discussed above, however, an ILEC can only deny adoption of an interconnection agreement if an ILEC can prove one of two situations exists. AT&T Kentucky, until the eleventh hour, did not even raise the specter of any such objections, objecting only on grounds not contemplated in 47 C.F.R. § 51.809(b).

47 C.F.R. § 51.809(b)(1) does provide that an ILEC can refuse the adoption of an interconnection agreement if it can prove to the state commission that the cost of providing the interconnection to the requesting carrier exceeds that of providing it to the original negotiating carrier. This right of refusal cannot be limitless; otherwise, an ILEC could seek to get out from under any interconnection agreement at any time a cost allegedly rises, even after the agreement has been adopted. Here, AT&T Kentucky not only files an untimely request arguing about potential raised costs, but its supposition that entering into the interconnection agreement would produce higher costs is merely hypothetical. AT&T Kentucky has raised no colorable argument or proof for the existence of different costs.

To the Commission's knowledge, since the enactment of the 1996 Telecommunications Act, no ILEC has objected to the adoption in Kentucky of an interconnection agreement based on the exception found in 47 C.F.R. § 51.809(b)(1). Therefore, AT&T Kentucky's objection is a matter of first impression to the Commission and is a matter of uncharted procedural territory. However, we find that the objection is raised untimely, and moreover, even if it were timely raised, it is not specific enough to establish a colorable claim, much less warrant a hearing. If the Commission were to

grant AT&T Kentucky's request for a hearing,[28] at the minimum this proceeding would drag out for another 3 months, which would result in an application for an adoption of an interconnection agreement taking over 10 months to resolve. This would be an unreasonable result. In the future, AT&T Kentucky, or any carrier raising an objection under 47 C.F.R. § 51.809(b) or (c), should raise such objections ex ante, upon the filing of the notice of adoption, and not 7 months after the initial filing. Conceivably, if this is not done, a carrier could continue to raise objections at any time during an adoption proceeding, delaying the adoption until the adoption could be denied pursuant to 47 C.F.R. § 51.809(c).[29]

CONCLUSION

The adoption of an interconnection agreement pursuant to 47 U.S.C. § 252(i) generally is a straightforward procedure and should occur without much delay unless adoption of the agreement falls under the exceptions in 47 C.F.R. § 51.809. These exceptions must be raised as early as practicably possible in a contested proceeding. The practical effect of AT&T Kentucky's untimely and incomplete objections is to attempt to turn a simple adoption proceeding into an arbitration proceeding, possibly

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[28] Requests for a hearing made pursuant to 807 KAR 5:001, Section 4(1)(b) are not granted automatically. 807 KAR 5:001, Section 4(1) provides that "[e]xcept as otherwise determined in specific cases," the Commission shall grant a hearing upon application for a hearing or in the event that a defendant has not satisfied a complaint. AT&T Kentucky's request for a hearing is one of the "specific cases" in which the Commission has determined that a hearing should not be held.

[29] We do not agree with Nextel Partners' assertion in its response to AT&T Kentucky's supplemental submission that AT&T Kentucky's petition with the FCC is made in bad faith or to cause intentional delay in resolution of this proceeding. However, such a filing is a clear example of how an ILEC could continually raise objections to an adoption, stringing the proceeding out for months, if not years. Any objections must be raised ex ante, not post hoc.

exceeding over a year in length, a result that could have been avoided had AT&T Kentucky raised its objections when the petition was filed. Such a result is not only unfair, but it is also prohibited, as it is provided for in neither law nor regulation. Had AT&T Kentucky raised its objections under 47 C.F.R. § 51.809 when the petition was filed, the Commission could have addressed all objections to the petition at the same time and this proceeding would already be complete.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky's Motion for Reconsideration is denied.

2. AT&T Kentucky's Request for Procedural Schedule and Hearing is denied.

3. Within 20 days of the date of this Order, Nextel Partners and AT&T Kentucky shall submit their executed adoption of the Sprint ICA.

4. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 18th day of February, 2008.

By the Commission

ATTEST:

Executive Director

EXHIBIT B

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Presiding Officer: Robert L. Lehr

In the Matter of the Complaint of Sprint Communications L.P., Sprint Spectrum L.P., Nextel West Corp and NPCR, Inc., Complainants vs. Southwestern Bell Telephone Company d/b/a AT&T Kansas, Respondent.	)))))	Docket No. 08-SWBT-602-COM

ORDER OF PRESIDING OFFICER DETERMINING COMMISSION HAS JURISDICTION TO ENFORCE MERGER COMMITMENTS, DENYING SWBT MOTION TO DISMISS AND ORDERING SWBT TO PORT IN KENTUCKY ICA

NOW, the above-captioned matter comes before the Presiding Officer for consideration and determination. Having examined his files, and being duly advised in the premises, the Presiding Officer concludes that the State Corporation Commission of the State of Kansas (Commission) possesses the requisite jurisdiction to enforce AT&T/BellSouth Merger Commitments as they are related to Kansas, denies the Motion to Dismiss of Southwestern Bell Telephone Company (SWBT) and orders SWBT to port in Kentucky interconnection agreement as requested by Sprint, consistent with Kansas laws and regulatory requirements.

Findings of Fact

Sprint Complaint

1. Sprint Communications Company L.P., Sprint Spectrum L.P. and Nextel West Corp. (collectively Sprint) filed their joint Complaint on December 26, 2007, against SWBT. Sprint sought resolution of disputes that had arisen out of the interconnection agreement (ICA) by and between the parties and SWBT's violation of the conditions imposed by the Federal Communications Commission (FCC) on the merger between

AT&T and BellSouth (Complaint). Sprint requested an order from the Commission to force SWBT to "execute an adoption amendment to port in and adopt the interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Southeast and Sprint Spectrum L.P., as extended and approved in Kentucky (Kentucky ICA), for all Sprint entities in accordance with merger commitments made by AT&T." Complaint, p. 1.

2. Sprint contended that the Commission had jurisdiction to take up its complaint pursuant to 47 U.S.C. 252—Procedures for Negotiation, Arbitration and Approval of [Interconnection] Agreements. Sprint also claimed that the Commission had jurisdiction to resolve complaints. Complaint, ¶ 1.

3. Sprint also contended that at issue here are the Merger Commitments ordered by the FCC in its approval of the AT&T/BellSouth merger[1]. In particular, Sprint requested that the Commission force SWBT to comply with Merger Commitment 7.1 which reads:

> 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 operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, than 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.

4. According to Sprint, it notified AT&T on November 20, 2007, that it intended to exercise its right under the Merger Commitments to port and adopt the Kentucky ICA

[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, FCC 06-189, Appendix F (released March 26, 2007) (Merger Commitments).

in Kansas. Complaint, Ex. E. However, AT&T advised Sprint on December 13, 2007, that it would allow certain Sprint entities to adopt the Kentucky ICA but it would not allow all Sprint entities to do so because of a Merger Commitment 7.1 restriction. Complaint, Ex. F. Sprint contended that there was no such restriction to be found in Merger Commitment 7.1. Complaint, ¶ 11.

Commission Review

5. Pursuant to K.A.R. 82-1-221, the Commission reviewed the Complaint and ascertained that the allegations, if true, would establish a *prima facie* case for action by the Commission. Consequently, the Commission filed the Complaint on SWBT, thereby obtaining jurisdiction over the Complaint.

SWBT Answer/Motion to Dismiss

6. SWBT claimed that the FCC explicitly reserved jurisdiction over the AT&T/BellSouth Merger Commitments in Appendix F to the Merger Order, citing the FCC's statement: "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. . ." SWBT noted that the Mississippi Public Service Commission agreed by stating, "The Commission finds that the FCC has exclusive jurisdiction over the enforcement of the FCC merger commitments contained in the FCC's Merger Order. . ." SWBT contended that exclusive FCC jurisdiction was sound policy, to avoid conflicting and diverse interpretation of FCC requirements. Motion to Dismiss, ¶¶ 9 – 10.

7. To the extent that the Commission determined that it had jurisdiction concurrent with the FCC concerning the interpretation and enforcement of Merger

Commitments, SWBT claimed the Commission should defer to the FCC. Motion to Dismiss, ¶ 12.

Sprint Response to Motion to Dismiss

8. Sprint criticized SWBT's proposition that the FCC had exclusive jurisdiction of Merger Commitments, contending that the FCC pronouncements made it abundantly clear that the states could enforce Merger Commitments:

> 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.

Merger Order, Appendix F, at 147. Sprint advised the Commission that the FCC added this language to SWBT's filed proposed language for the purpose of recognizing that the Merger Order would be subject to state commissions' primary jurisdiction over interconnection disputes. Response, p. 4, n. 10.

9. In support of its criticism, Sprint quoted an order of the Public Utility Commission of Ohio, denying AT&T's motion to dismiss:

> [W]e 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.

Ohio Order[2], p. 13.[3] In addition, according to Sprint, eight of the former BellSouth state commissions confronted with the jurisdictional question determined that state commissions did have the authority to enforce Merger Commitments. Response, p. 11.

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[2] *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. v. the Ohio Bell Telephone Company d/b/a AT&T Ohio*, Case No. 07-1136-TP-CSS, Finding and Order, Feb 5, 2008.

10. Sprint also described a merger condition argument in the Bell Atlantic, Corp./ NYNEX merger allegedly similar to the dispute here. MCI, believing that the 6th Merger Condition was not being met, petitioned the FCC for relief. However, according to Sprint, the FCC determined that its merger order depended upon state commissions as primary forums of interconnection disputes. Upon appeal, MCI was told by the federal Court of Appeals for the District of Columbia that:

> At issue are prices for complex network elements and inputs—and each category would have to be calculated for each of the *seven* jurisdictions, taking into account the unique circumstances in each location. The Commission's task adjudicating the merits of MCI's complaint thus would be larger than the task confronting any individual state commission. Contrary to MCI's assertion, there is no great streamlining to be gained should the FCC adjudicate the issue, as it would have to consider the relevant facts on a state-by-state basis too. The FCC is reasonable in its conclusion that these disputes are as readily resolved in the *section 252* process as in a *section 208* complaint.[4]

Sprint Response to Motion to Dismiss, p. 14.

11. Sprint also noted that the language prefatory to the Conditions in the Verizon/MCI merger order and the language prefatory to the Commitments in AT&T/BellSouth's merger order are virtually identical:

> It is not the intent of these Conditions 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 Conditions, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these Conditions.[5]

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[3] The Presiding Officer would provide the reader with a more concise citation, but Sprint, contrary to Commission rules, failed to number paragraphs in its Response to Motion to Dismiss.

[4] *MCI Worldcom Network Services et al. v. FCC*, 274 F.3d 542 (D.C. Cir.) (emphasis in original).

[5] *Verizon Communications, Inc. and MCI, Inc. Applications for Approval and Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005).

The only difference is that the Verizon/MCI order used "Conditions" while the AT&T/BellSouth order used "Commitments". The significance of the virtually identical language, according to Sprint, is that upon appeal by MCI with regard to additional merger conditions imposed by the Virginia State Corporation Commission, the U.S. Virginia District Court, Eastern District, said:

> [T]he FCC's use of the disjunctive "or" in the above-quoted clause means that it intended the states to have authority over all matters reserved to the states by the Communications Act, as amended, as well as over matters which are not reserved to the states by the Act, but which do appear in the Conditions.[6]

SWBT Reply

12. In its Reply, SWBT insisted that there is nothing in §252 of the federal Telecommunications Act of 1996 (Act) that remotely contemplates that state commissions will resolve disputes about the meaning or application of FCC merger commitments. Reply, ¶ 5. SWBT also noted that the MCI/Verizon merger order did not contain the "for avoidance of doubt" provision contained in the AT&T/BellSouth merger order.

13. SWBT concluded with the proposition that it did not contend that the FCC should interpret questions of state law in connection with the porting ICAs; rather, it did contend that only the FCC should decide the meaning of the FCC Merger Commitments, including, for example, what is and what is not "state-specific pricing" within the meaning of that commitment. Response, ¶ 19.

Sprint Supplement to Response to Motion to Dismiss

14. On February 27, Sprint filed its Supplement in Response to Motion to

[6] *MCIMetro Access Transmission Services of Virginia Inc. v. Christie*, Civil Action No. 3:06CV7490, 2007 U.S. Dist. Lexis 21708 (E.D. Va. March 27, 2007). Sprint failed to advise the Commission that this decision was not published.

Dismiss. After the filing of a complaint and an answer, the Commission customarily permits the complainant to respond to the answer and the respondent to reply to plaintiff's response only, subject to an order permitting otherwise. Sprint did not file for Commission approval to file additional pleadings. Sprint's supplement filing exceeds the customary filing bounds, is duplicative in its narrative and not relevant as to its FCC filing. Therefore, the Presiding Officer will not consider Sprint's supplement filing.

SWBT Response to Sprint Supplemental Pleading

15. In like manner, the Presiding Officer will not consider SWBT's Response to Sprint's Supplemental Pleading.

Discussion and Conclusions of Law

16. Sprint overstated the significance of the AT&T and MCI complaints to the FCC and the subsequent MCI appeal in the Bell Atlantic/NYNEX merger. The FCC did impose nine conditions in the approval of the merger. The sixth condition, the performance of which was disputed by MCI, dealt with pricing requirements:

> 6. To the extent Bell Atlantic/NYNEX proposes rates, including in interconnection negotiations and arbitrations, for interconnection, transport and termination, or unbundled network elements, including both recurring and non-recurring charges, any such proposal shall be based upon the forward-looking, economic cost to provide those items.[7]

The FCC dismissed the AT&T and MCI complaints because each of the state commissions in the Bell Atlantic/NYNEX jurisdictions at issue followed pricing

[7] *In the Application of NYNEX Corporation, Transferor and Bell Atlantic Corporation Transferee for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, FCC 97-286, 12 FCC Rcd 19985 (released August 14, 1997).

standards consistent with the theory of forward-looking cost methodology.[8] In its dismissal of the complaints, the FCC never hinted, let alone "made clear" (Sprint Response, p. 13), that "its merger order intended to, and in fact did, rely on the state commissions' statutorily prescribed role as the primary forum for resolution of interconnection disputes." *Id.* The complaints dealt solely with forward-looking, economic-cost pricing which, according to the FCC, the states successfully adopted:

> Put another way, the substance of the pricing methodology that the state commissions have employed (and must continue to employ) in section 252 proceedings wholly subsumes the substance of the merger condition at issue here.[9]

17. Sprint similarly overstated the significance of the U.S. D.C. District Court of Appeals' determination of MCI's appeal[10]. Sprint contended that, from the following pronouncement of the Court, it was evident that the appropriate process for addressing the multi-jurisdictional effects of a merger order is for each state commission to resolve the effects of the order specific to its own state:

> At issue are prices for complex network elements and inputs—and each category would have to be calculated for each of the *seven* jurisdictions, taking into account the unique circumstances in each location. . .The FCC is reasonable in its conclusion that these disputes are as readily resolved in the section 252 process as in a section 208 complaint.

Sprint Response, at pp. 13 -14. It is difficult for the Presiding Officer to share Sprint's enthusiasm for the D.C. Court's observation because it dealt solely with the lawfulness of

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[8] *In the Matter of AT&T Communications Corporation and MCIMetro Access Transmissions Services, Inc. Complainants, v. Bell Atlantic Corporation, Defendant*, FCC 00-303. 15 FCC Rcd 17066, 17069-70 (released August 18, 2000).

[9] *Id*, at 17071.

[10] *MCI Worldcom Network Services et al. v. FCC*, 274 F.3d 542 (D.C. Cir. 2001) (MCI).

the FCC's dismissal of the AT&T and MCI complaints.

18. Although *MCIMetro*[11] is important in another application, the Presiding Officer believes that it is not on point in Sprint's discussion relative to virtually identical language prefatory to the list of "Conditions" (Verizon/MCI Merger Order) and "Commitments" (AT&T/BellSouth Merger Order). There was no "for avoidance of doubt" provision in the Verizon/MCI Merger Order. Thus, the *MCIMetro* court did not address conflicting provisions in the Verizon/MCI Merger Order as they exist in the AT&T/BellSouth Merger Order.

19. In fact, the "for avoidance of doubt" provision has never been used in any prior major telecommunications merger order where the merging entities offered additional conditions or commitments.[12] There are two obvious inferences that the Presiding Officer may draw from this first-time use of the provision. One, the FCC determined to end the parallel jurisdiction and comity that had existed for years between the FCC and the states in major telecommunications mergers. Two, because the provision first appeared in the Commitment attachment to AT&T's e-mail dated December 28, 2006, to the FCC offering the Commitments[13], it is possible that the FCC inadvertently cut and pasted AT&T's entire Commitment attachment page, leaving the controversial AT&T-authored provision in the Merger Commitment list without

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[11] *MCIMetro Access Transmision Services of Virginia, Inc. v. Christie*, Civil Action No. 3:06CV740, 2007, WL 951853 (E.D. Va. Mar. 27, 2007) (unpublished) (*MCIMetro*).

[12] *See,* Verizon/MCI, WC Docket No 05-75, Nov. 17, 2005; SBC/AT&T, WC Docket No. 05-65, Nov. 17, 2005; GTE/Bell Atlantic, CC Docket No. 98-184, June 16, 2000; Ameritech/SBC, CC Docket No. 98-141, Oct. 8, 1999.

[13] Attachment to FCC News Release, December 29, 2006. AT&T advised the FCC in its submission that it offered the additional Commitments in the interest of facilitating the speediest possible approval of the merger by the FCC.

intending to establish exclusive jurisdiction in the enforcement of the AT&T/BellSouth Merger Commitments. The Presiding Officer finds that it is highly unlikely that the FCC would undertake the extraordinary action of taking exclusive jurisdiction over a major telecommunications merger, for the first time, without any explanation whatsoever. It makes more sense that the "for the avoidance of doubt" provision was left in by error. The Presiding Officer, therefore, concludes that the FCC did not intend to reserve exclusive jurisdiction over the merger to itself. This conclusion is buttressed by the fact that the AT&T-authored "for the avoidance of doubt" provision includes: "all conditions and commitments proposed *in this letter*" (emphasis added). There is no letter within Appendix F. The FCC would not have referenced a non-existent letter. "This letter" is the e-mail sent to the FCC by AT&T, with the Commitment page attached. Clearly the AT&T-authored "for the avoidance of doubt" provision was inadvertently included with the Merger Commitments.

20. The Presiding Officer believes that the opinion of the Public Utilities Commission of Ohio (Ohio PUC) cited by Sprint, although certainly not binding on the Commission, is worth noting with respect to the authority of state commissions to enforce the AT&T/BellSouth Merger Commitments:

> [T]he 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.[14]

The Ohio PUC continued, finding the provision "for the avoidance of doubt" provision as a means by which the FCC removed any doubt about its own jurisdiction by specifically stating that it retained concurrent authority to enforce all conditions and commitments.[15]

21. SWBT disparaged the Ohio PUC's determination on two counts—misreading of the FCC's intent not to change or alter state jurisdiction and ignoring the axiom that an order by an agency is always within the jurisdiction of that agency. SWBT Reply, ¶ 15. SWBT contended that, contrary to the Ohio PUC's analysis, the FCC preserved state jurisdiction over the subject matters addressed in the Merger Commitments but not to interpret or enforce the Merger Commitments themselves. SWBT's position is at odds with *MCIMetro*. In that case, the State Corporation Commission of Virginia imposed additional conditions on the merged entity in the Verizon/MCI merger. Upon appeal by MCI, the Court found:

> The FCC's use of the disjunctive "or" in the above-quoted clause means that it intended the states to have authority over all matters reserved to the states by the Communications Act, as amended, as well as over matters which are not reserved to the states by the Act, but which do appear in the Conditions.

MCIMetro, at *6.[16] Thus, contrary to SWBT's contentions, the Court determined that the states did have the authority to interpret and enforce the conditions or commitments

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[14] *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. The Ohio Bell Telephone Company dba AT&T Ohio, Respondent, Relative to the Adoption of an Interconnection Agreement,* Finding and Order, entered Feb. 5, 2008, ¶ 25.

[15] *Id.*

contained in merger orders. With respect to SWBT's axiom, and as discussed above, it would be exceeding strange that the FCC would add the AT&T-authored "for avoidance of doubt" provision, unless it was erroneously included with the Commitments. The Presiding Officer finds SWBT's arguments unavailing.

22. The Presiding Officer is charged with construing FCC provisions *in pari materia*, to reconcile the different provisions so as to make them consistent, harmonious and sensible.[17] The AT&T/BellSouth Merger Order, Appendix F first acknowledges the AT&T-offered voluntary Merger Commitments and then reads:

> 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.

Then, the Merger Commitments are listed, prefaced by the AT&T-authored provision that reads:

> 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 and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter.

The AT&T-authored "for the avoidance of doubt" provision that followed is contradictory to the first provision. In order to make these provisions consistent,

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[16] *MCIMetro* is not reported in F.Supp.2d, 2007 WL 951853 (E.D. Va.). Unpublished decisions are not precedential, but may be cited for their persuasive value. 10th Cur. R. 32.1. *MCIMetro* is particularly persuasive because it is a federal court interpreting the intent of the FCC with respect to the Merger Conditions.

[17] *State, ex rel. Morrison v. Oshman Sporting Goods for Kansas*, 275 Kan. 763. *syl.* #2, 69 P.3d 1087 (2003).

harmonious and sensible, the Presiding Officer concludes that the FCC did not take exclusive jurisdiction over the Merger Commitments. Rather, if the "for the avoidance of doubt" provision was not erroneously placed with the Merger Commitments by the FCC, then the FCC meant only to advise the readers that it stood prepared to enforce the Commitments along with the states.

23. The Presiding Officer, therefore, concludes that the Commission may enforce Merger Commitment 7.1 and order SWBT to port the Kentucky ICA into Kansas, subject to Kansas law and regulatory requirements.

24. SWBT requested that, if the Commission determined it could enforce the Merger Commitments, the Commission defer action until the FCC had ruled upon the AT&T ILECs' expedited Petition for Declaratory Ruling. Because there is no estimation of when the FCC action would become final in this regard, the Presiding officer concludes that the request should be denied.

IT IS, THEREFORE, ORDERED BY THE PRESIDING OFFICER THAT:

A. Sprint's request that SWBT port in and adopt the ICA between BellSouth and Sprint Communications Company L.P. and Sprint Spectrum, as extended and approved in Kentucky, for all Sprint entities, subject to the feasibility to do so, consistent with the laws and regulatory requirements of Kansas, is granted.

B. The parties have fifteen days within which to file a petition for reconsideration by the Commission from the service of this Order. If this Order is mailed, service is complete upon mailing and the parties may add three days to the 15-day suspense period. All petitions for reconsideration must be served on the Commission's Executive Director.

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of issuing such additional orders as it deems necessary.

BY THE PRESIDING OFFICER IT IS SO ORDERED.

Dated: MAR 12 2008

Robert L. Lehr, Presiding Officer

ORDER MAILED

MAR 13 2008

Executive Director

EXHIBIT C

Georgia Public Service Commission

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Docket No. 25430

In Re: Petition for Approval of NPCR, Inc., d/b/a Nextel Partners' Adoption of the Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast

Docket No. 25431

In Re: Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast

ORDER DENYING MOTION TO DISMISS AND PROCEDURAL AND SCHEDULING ORDER

I. Background

On June 21, 2007, NPCR, Inc. d/b/a Nextel Partners filed its Petition for Approval of Adoption of the Interconnection Agreement ("ICA") between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS (jointly, "Sprint") and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast ("AT&T"). On the same date, Nextel South Corp. filed an identical petition (Nextel Partners and Nextel South Corp. shall be referred to jointly as "Nextel" and both Petitions for Approval of Adoption of the Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and AT&T Georgia, shall be referred to jointly as the "Petitions").

In the Petitions, Nextel requests that the Commission approve its adoption of the agreement between Sprint and AT&T and require AT&T to execute the adoption agreement attached to the Petitions. (Petitions, p. 2). Nextel relies in part upon the following commitments made by AT&T, Inc. and BellSouth Corp. to the Federal Communications Commission ("FCC") in the merger of the two companies:

Merger Commitment No. 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 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.

FCC Order at 147, appendix F

Merger Commitment No. 2:

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

Id. at 149, appendix F

Nextel also points out that Section 252(i) of the Telecommunications Act of 1996 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 telecommunication carrier upon the same terms and conditions as those provided in the agreement.

Finally, Nextel states that, in its arbitration with Sprint, AT&T admitted:

> Soon after the FCC approved Merger Commitments were publicly announced on December 29, 2006, the Parties [Sprint and AT&T] considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. AT&T Georgia acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such three-year extension.

On July 16, 2007, AT&T filed a Motion to Dismiss and, in the Alternative, Answer in both dockets ("Motion to Dismiss"). On July 17, 2007, AT&T filed exhibits to its Motions to Dismiss that were inadvertently omitted from the July 16 filing. AT&T argues that the Petitions

should be dismissed because the Commission does not have the authority to interpret the merger conditions. AT&T asserts that the FCC stated in its order that, "[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 and would apply in the AT&T/ BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter." *FCC Order at 147, appendix F.* AT&T further argues that Nextel did not file the Petitions within "a reasonable period of time" after the original contract is approved as required by 47 C.F.R. §51.809(c). Essentially, AT&T asserts that the agreement is expired and is therefore not available for adoption, despite the fact that AT&T and Sprint are currently operating under the agreement on a month to month basis.

Nextel filed its Responses to both Motions on August 7, 2007. In response to AT&T's suggestion that the adoption request was filed after the expiration date of the agreement, Nextel claimed that whether AT&T is correct that the Sprint agreement can only be extended to three years from the original expiration date, or, as Sprint argued, that the agreement should be extended from the date of the FCC's merger order, the earliest possible expiration date of the Sprint Agreement would be December 31, 2007. Nextel points out that the Commission established a "bright line" test in Docket No. 18808 when it determined that an agreement with six months or more remaining in its term was suitable for adoption. Nextel filed its Petitions on June 21, 2007, which is slightly more than six months from the December 31, 2007 expiration date that Nextel alleges is the earliest possible expiration date.

The Commission adopted Staff's recommendation to hold the Petitions filed by NPCR, Inc. d/b/a Nextel Partners and Nextel South Corp. in abeyance until the Commission resolved the issues in the arbitration between AT&T and Sprint. On January 8, 2008, the Commission issued its Order Granting Joint Motion, in which it approved the amendment to the interconnection agreement between AT&T and Sprint. The Joint Motion stated that the amendment provides the relief requested by Sprint in its Petition, i.e., to extend the term 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.

On January 8, 2008, in response to this item being placed on the Telecommunications Committee Agenda, AT&T filed an Expedited Motion to Modify Telecommunications Committee Schedule and, in the Alternative, for Procedural Schedule. On January 17, 2008, Nextel filed its Response. Finally, on February 8, 2008, AT&T filed a Supplemental Submission in Support of Motion to Dismiss.

II. AT&T's Motion to Dismiss

AT&T raises two issues in its Motion to Dismiss.

A. Commission Authority to Enforce Merger Conditions

AT&T argued that the Commission does not have the authority to enforce FCC merger conditions. The Commission has the authority to ensure compliance with Section 251 and the

FCC regulations prescribed pursuant to Section 251, but it does not have the authority to resolve and enforce purported violations of federal law or FCC orders. AT&T has filed a petition with the FCC to resolve these issues on an expedited basis and requests that the Commission defer ruling until after the FCC resolves the Petition.

Nextel responded that state commissions have the authority to acknowledge a carrier's adoption rights. The fact that those rights have been enhanced by the Merger Commitments does not divest the Commission of its authority to oversee the exercise of such adoption rights. State commissions often must apply federal rules in reaching their decisions. The cooperative federalism scheme provided for in the Telecommunications Act applies to matters relating to interconnection pursuant to Sections 251 and 252 of the Act. The Commission has authority under state law to employ procedures consistent with the Act. 46-5-222(b)(3). State law also prohibits unreasonable discrimination. 46-5-164(b) and (c). The merger conditions expanded the adoption rights under Section 252(i), but the Commission is authorized to construe federal law in reaching its decision.

Staff recommended that the Commission conclude that it has the authority to rule on Nextel's petition. The FCC made clear that state commissions did not lose any jurisdiction as a result of the Merger Order. State commissions have previously ruled upon requests to adopt the terms and conditions of another carrier's interconnection agreement. The Merger conditions enhanced adoption rights, but the FCC did not demonstrate any intent to curtail state commission jurisdiction on this issue. To the contrary, the FCC expressly preserved state commission jurisdiction.

The Merger Order states that:

> 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.

The Commission finds Staff's recommendation reasonable and concludes that it has the authority to rule upon Nextel's request.

B. Timing of Request for Adoption

AT&T states that Nextel did not file its petition within a reasonable period of time because Nextel wants to adopt an expired agreement. Nextel argued that the agreement is not expired.

Staff recommended that the Commission find that Nextel made its request for adoption within a reasonable time. Since the original pleadings were filed in this case, AT&T and Sprint extended their agreement for three years. There can no longer be any contention that the

agreement is expired. Nextel has adopted the agreement within a reasonable time. Staff recommends denying the Motion to Dismiss.

The Commission agrees and adopts Staff's recommendation. The Commission, therefore, denies AT&T's Motion to Dismiss.

III. AT&T Expedited Motion to Modify Telecommunications Committee Schedule and, in the Alternative, for Procedural Schedule

A. Compliance with Merger Conditions

AT&T argues that Nextel's adoption does not comply with the merger commitments because the first merger condition only applies when a carrier is porting an agreement from one state to another. Prior to the merger condition, carriers did not have the right to port an agreement from one state to another. AT&T states that the merger condition does not apply to Nextel's request because Nextel is not seeking to port an agreement, but it is attempting to use the merger commitment to adopt the AT&T/Sprint agreement.

Nextel rebuts AT&T's position by arguing that nothing in the language of the Merger condition supports this reading of the merger condition.

Staff recommended that the Commission find that Nextel's adoption complies with the merger condition. Merger Condition 1 states:

> The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/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.

Nextel is a "requesting telecommunications carrier." Nextel has requested the entire Sprint ICA. The Sprint ICA is an effective agreement entered into in AT&T's 22-state ILEC operating territory. The Sprint ICA has state-specific pricing and performance plans incorporated into it for each state covered by the agreement. There is no issue of technical feasibility. The Sprint ICA has been amended to reflect changes in law. The fact that the adoption may apply to the porting of agreements does not mean that it is restricted to the porting of agreements. Nextel's adoption complies with the Merger commitment.

The Commission finds Staff's recommendation reasonable. For the reasons identified by the Staff and set forth above, the Commission concludes that Nextel's proposed adoption complies with the merger condition.

B. Compliance with Section 252(i)

AT&T argues that Nextel's adoption does not comply with Section 252(i). AT&T states that the Sprint ICA addresses a unique mix of wireline and wireless items and Nextel is solely a wireless provider.

Nextel cannot avail itself of all of the interconnection services and network elements provided within the Sprint agreement. The terms and conditions of the Sprint interconnection apply only when the non-ILEC parties to the agreement are providing both wireline and wireless services. Nextel does not provide both services in Georgia. Allowing Nextel to adopt the Sprint interconnection agreement would disrupt the dynamics of the terms and conditions negotiated between AT&T Georgia and the parties to the Sprint interconnection agreement, and AT&T would lose the benefits of the bargain negotiated with those parties. In addition, AT&T would not have agreed to an even split for interconnection costs for only wireless traffic.

Nextel argues that AT&T is discriminating by not agreeing to allow Nextel to adopt the Sprint ICA under 252(i). AT&T's reasons boil down to stating that Nextel is not "similarly situated" to the original parties to the agreement. However, FCC Rule 51.809 states that "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."

The exception to this requirement is where 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. Nextel claims that AT&T does not argue that it would cost more; instead, it only argues that it would not receive the benefit of the bargain. Nextel relies on Paragraph 1318 from the Local Competition Order, which states:

> We conclude, however, that section 252(i) does not permit LECs to limit the availability of any individual interconnection, service, or network element 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. In our view, the class of customers, or the type of service provided by a carrier, does not necessarily bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible. Accordingly, we conclude that an interpretation of section 252(i) that attempts to limit availability by class of customer served or type of service provided would be at odds with the language and structure of the statute, which contains no such limitation.

AT&T cannot discriminate because Nextel is not similarly situated or doesn't provide the same types of services.

Staff recommended that the Commission schedule hearings for the purpose of determining whether Nextel's request complies with Section 252(i). AT&T cannot refuse the requested adoption simply because Nextel provides wireless service exclusively. AT&T can refuse the adoption if it can demonstrate that the costs of providing a particular agreement to Nextel are greater than the costs to provide the agreement to Sprint. FCC Rule 51.809(a) provides for the obligation of incumbent local exchange carriers to make interconnection agreements available in their entirety to requesting carriers. FCC Rule 51.809(b) states:

> (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.

Therefore, the FCC rule creates limited exceptions to an ILEC's general obligation to allow parties to opt into agreements. The exception at issue in this case is set forth in paragraph (b)(1). The Commission adopts Staff's recommendation to schedule an evidentiary hearing to determine whether the costs to AT&T of providing the interconnection agreement to Nextel are greater than the costs to AT&T of providing the agreement to Sprint. In examining this issue, it will be necessary to determine what constitutes greater costs to the provider as contemplated by FCC Rule 51.807(b).

IV. AT&T's Supplemental Submission

AT&T notified the Commission that it filed a petition with the FCC requesting a declaratory ruling on the issues raised by Nextel's adoption petition. AT&T requests that the Commission defer ruling on this matter until the FCC rules on its petition. Staff recommended that the Commission deny AT&T's request. AT&T has not stated any deadline for a response from the FCC. It would not be fair to Nextel to hold this matter in abeyance indefinitely.

For the reasons stated by Staff, the Commission denies AT&T's request to defer ruling until the FCC rules on AT&T's petition.

V. Procedure and Schedule for Hearing

The Commission will hold a hearing in the Commission's Hearing Room located at 244 Washington Street, Room 110, Atlanta, Georgia 30334, commencing at 11:00 a.m. on March 19,

2008 and continuing such further days as the Commission deems necessary until completed, to determine whether the costs to AT&T of providing the interconnection agreement to Nextel are greater than the costs to AT&T of providing the agreement to Sprint. In examining this issue, it will be necessary to determine what constitutes greater costs to the provider as contemplated by FCC Rule 51.807(b).

A. Legal Authority for Hearing

As discussed in the prior sections of this order, the Commission has the authority to rule upon petitions under Section 252(i) for adoption of an interconnection agreement, and the conditions imposed upon the merger of AT&T and BellSouth do not curtail that authority. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

This hearing will be held in accordance with the Georgia Administrative Procedure Act, O.C.G.A. § Ch.13, Title 50, and the Rules and Regulations of the Commission.

B. Hearing Schedule, Filing Dates and Procedures

March 7, 2008

The parties shall pre-file with the Executive Secretary's Office by 4:00 p.m. an original and fifteen (15) copies of direct testimony. Accompanied therewith shall be an electronic version of the party's filing, which shall be made on a 3 ½ inch diskette or a CD ROM containing an electronic version of its filing in Microsoft Word® for text documents or Excel® for spread sheets. This filing shall be made at the office of the Executive Secretary, Georgia Public Service Commission, 244 Washington Street, S.W., Atlanta, Georgia 30334-5701.

March 19, 2008

The Commission will commence its hearing at 11:00 a.m. for Docket Nos. 25430 and 25431 beginning with the testimony of any public witnesses pursuant to O.C.G.A. § 46-2-59(g), and the hearing of any appropriate motions. After these preliminary matters, the Commission will conduct hearings on the testimony filed by interested parties.

C. Intervention and Hearing Procedures

1. Procedures

The following are procedures to which any party to this hearing should adhere with respect to this docket:

2. Intervention

(a) Any person or party upon whom a statute does not confer an unconditional right to intervene must file an application to intervene within thirty (30) days following the first published notice of the proceedings.

(b) Applications must clearly specify the docket in which the applicant seeks to intervene. In addition to the requirements prescribed in O.C.G.A. § 46-2-59 for applications for leave to intervene, the applicant must: (1) identify other intervening parties or intervening party applicants whose interest is similar to that of the applicant along with an explanation of why the identified intervening parties or intervening party applicant will not adequately represent the applicant's interest: and (2) state the applicant's present intention to submit direct testimony and by whom and on what subject. The requirements identified herein shall constitute a continuing obligation of the applicant or intervening party. Any objections to applications must be filed in accordance with O.C.G.A. § 46-2-59(d).

(c) Any application for leave to intervene that is filed late must state the reason why such application was not filed within thirty (30) days of the first published notice. Objections to later intervention application must be filed in conformity with the requirements of O.C.G.A. § 46-2-59(d).

(d) The Commission will take up and rule on applications for leave to intervene at the first hearing date scheduled in this docket.

3. Service

In addition to filing either an original and fifteen (15) copies of documents with the Commission's Executive Secretary, electronic version of the party's filing, which shall be made on a 3 ½ inch diskette or a CD ROM containing an electronic version of its filing in Microsoft Word® format for text documents and Excel® for spreadsheets. All spreadsheets shall contain live or active formulas with formulas intact. Copies of all pleadings, filings, correspondence, and any other documents related to and submitted in the course of this docketed matter should be served upon the following individuals, in their capacities as indicated below, and all other intervenors recognized by the Commission in this docket:

Daniel Walsh
Assistant Attorney General
Department of Law
State of Georgia
40 Capitol Square SW
Atlanta, Georgia 30334-1300

Consumers' Utility Counsel Division
Governor's Office of Consumer Affairs
2 Martin Luther King Jr. Drive
Suite 356
Atlanta, Georgia 30334

Prefiled testimony shall be filed in conformity with Commission Rule 515-2-1-.04(4).

4. Testimony of Witnesses

(a) Summations of direct testimony will take no longer than ten (10) minutes, unless the Commission, in its discretion, allows for a longer period of time.

(b) In the absence of a valid objection being made and sustained, the pre-filed testimony and exhibits, with corrections, will be admitted into the record as if given orally prior to the summation made by witnesses subject to a motion to strike after admission or other relevant objection.

(c) Where the testimony of a panel of witnesses is presented, cross-examination may be addressed either to the panel, in which case any member of the panel may respond, or to any individual panel member, in which case that panel member shall respond to the question.

5. Hearing Exhibits

It shall be the responsibility of the party sponsoring any hearing exhibits to see that the court reporter and all parties of record, in addition to the individual Commissioners, receive copies of all exhibits at the time of their introduction at the hearing. [Note: Exhibits included with pre-filed testimony should already have been provided in the requisite number of copies filed with the Commission in accordance with Rule 515-2-1-.04(4).]

6. Discovery

The Commission hereby declares this matter to be complex litigation and authorizes the Staff to take depositions and to otherwise obtain discovery in this matter.

WHEREFORE, it is

ORDERED, that AT&T's Motion to Dismiss is hereby denied.

ORDERED FURTHER, that AT&T's request to defer ruling upon Nextel's Petition pending the outcome of AT&T's petition with the FCC is hereby denied.

ORDERED FURTHER, that the Commission hereby adopts the procedures, schedule, and statements regarding the issues set forth within the Procedural and Scheduling Order.

ORDERED FURTHER, that a motion for reconsideration, rehearing, oral argument, or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matte is expressly retained for the purpose of entering such further Order(s) as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of February, 2008.

Reece McAlister
Executive Secretary

3-3-08
Date

Chuck Eaton
Chairman

3/4/08
Date

EXHIBIT D

Amendment to the Agreement
Between
Sprint Communications Company Limited Partnership
Sprint Communications Company L.P.
Sprint Spectrum L.P.
and
BellSouth Telecommunications, Inc.
Dated January 1, 2001

Pursuant to this Amendment, (the "Amendment"), Sprint Communications Company Limited Partnership and Sprint Communications Company L.P., (collectively referred to as "Sprint CLEC"), a Delaware Limited Partnership and Sprint Spectrum L.P., a Delaware limited partnership, and SprintCom, Inc., a Kansas corporation, all foregoing entities jointly d/b/a Sprint PCS (Sprint PCS), hereinafter collectively referred to as Sprint, and BellSouth Telecommunications, Inc. (BellSouth), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated January 1, 2001 (Agreement) to be effective March 11, 2006 (Effective Date).

WHEREAS, BellSouth and Sprint entered into the Agreement on January 1, 2001, and;

WHEREAS, BellSouth and Sprint desire to amend the Agreement to modify provisions pursuant to the Federal Communications Commission's (FCC) Order on Remand (Triennial Review Remand Order), WC Docket No. 04-313, released February 4, 2005 and effective March 11, 2005;

WHEREAS, the Parties desire to amend the Agreement to reflect other changes as agreed upon by the parties;

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The Parties agree to delete Section 17 of the General Terms and Conditions and replace it with the following:

   17. **Adoption of Agreements**

   17.1 BellSouth shall make agreements available to Sprint in accordance with 47 USC § 252(i) and 47 C.F.R. § 51.809.

2. The Parties agree to transfer from existing Attachment 2, in their entirety, Sections "20. SS7 Network Interconnection" and "21. Basic 911 and E911" to Attachment 3 and to be identified as Sections "8. SS7 Network Interconnection" and "9. Basic 911 and E911", respectively.

3. The Parties agree to delete Attachment 2, Network Elements and Other Services, in its entirety and replace with Attachment 2 reflected as Exhibit 1, attached hereto and by reference incorporated into this Amendment.

4. The Parties agree to add the rates for SS7 Interconnection to Exhibit A of Attachment 3, attached hereto as Exhibit 2 and by reference incorporated into this Amendment.

5. The Parties agree to delete the first sentence of Section 1.1 of Attachment 6 and replace with the following:

> BellSouth shall provide Sprint with nondiscriminatory access to BellSouth's operation support systems on an unbundled basis, in accordance with section 251(c)(3) of the Act and the FCC Rules. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by BellSouth's databases and information. BellSouth, as part of its duty to provide access to the pre-ordering function, shall provide, at a minimum, Sprint with nondiscriminatory access to the same detailed information about the loop that is available to BellSouth.

6. All of the other provisions of the Agreement dated January 1, 2001 shall remain unchanged and in full force and effect.

7. Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

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

BellSouth Telecommunications, Inc.

By: Kristen E. Shore

Name: Kristen E. Shore

Title: Director

Date: 4/27/06

Sprint Communications Company Limited Partnership

By:

Name: Virgil A. Stites

Title: V.P. - Access Management

Date: April 26, 2006

Sprint Spectrum L. P.

By:

Name: Virgil A. Stites

Title: V.P. - Access Management

Date: April 26, 2006

[CCCS Amendment 3 of 293]

Attachment 2

Network Elements and Other Services

TABLE OF CONTENTS

ACCESS TO NETWORK ELEMENTS AND OTHER SERVICES

1 Introduction

1.1 This Attachment is subject to the General Terms and Conditions of this Agreement and sets forth rates, terms and conditions for unbundled network elements (Network Elements) and combinations of Network Elements (Combinations) that BellSouth offers to Sprint for Sprint's provision of Telecommunications Services. BellSouth shall offer Sprint access to Network Elements and Combinations in accordance with its obligations under Section 251(c)(3) of the Act and the orders, rules and regulations promulgated thereunder by the FCC(47 C.F.R. Part 51) and the Commission as interpreted by a court of competent jurisdiction. Additionally, this Attachment sets forth the rates, terms and conditions for other facilities and services BellSouth makes available to Sprint (Other Services). Additionally, the provision of a particular Network Element or Other Service may require Sprint to purchase other Network Elements or services. In the event of a conflict between this Attachment and any other section or provision of this Agreement, the provisions of this Attachment shall control.

1.2 The rates for each Network Element, Combinations and Other Services are set forth in Exhibits A and B. Where a Commission has adopted rates for network elements or services provided pursuant to this Attachment as of the Effective Date of the Amendment, it is the intent of the Parties that the rate exhibits incorporated into this Agreement will be those Commission adopted rates. If no rate is identified in this Agreement, the rate will be as set forth in the applicable BellSouth tariff or as negotiated by the Parties upon request by either Party. If Sprint purchases service(s) from a tariff, all terms and conditions and rates as set forth in such tariff shall apply. A one-month minimum billing period shall apply to all Network Elements, Combinations and Other Services.

1.3 Sprint may purchase and use Network Elements and Other Services from BellSouth in accordance with 47 C.F.R § 51.309.

1.4 The Parties shall comply with the requirements as set forth in the technical references within this Attachment 2.

1.5 Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services.

1.6 Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services. Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is available to Sprint pursuant to Section 251 of the Act and under this Agreement or convert a Network Element or Combination that is available to Sprint pursuant to Section 251 of the Act and under this Agreement to an

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2008, a true and correct copy of the foregoing has been served on the parties set forth below, via the method(s) indicated below:

Guy M. Hicks
Joelle Phillips
BellSouth Telecommunications, Inc.
d/b/a AT&T Tennessee
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
gh1402@att.com
jp3881@att.com

US Mail and Electronically

E. Earl Edenfield, Jr.
John T. Tyler
675 West Peachtree Street, N.E., #4300
Atlanta, GA 30375

U.S. Mail

Melvin J. Malone