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April 17, 2008

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

filed electronically in docket office 4/17/2008

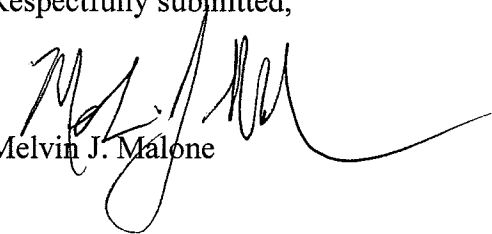
**RE: In Re: Petition Regarding Notice of Election of Interconnection Agreement by
Nextel South Corp, TRA Docket No. 07-00161 (consolidated with TRA Docket No.
07-00162)**

Dear Chairman Roberson:

Enclosed for filing please find an original and four (4) copies of *Nextel South Corp.'s and Nextel Partners' Motion to Strike AT&T Tennessee Inc.'s Affidavit of P. L. (Scot) Ferguson in the Entirety*. 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

Nashville, Tennessee

DOCKET NO. 07-00161
(consolidated with Docket No. 07-
00162)

In response to AT&T Tennessee, Inc.’s procedurally and statutorily infirm April 15, 2008, filing of the *Affidavit of P. L. (Scot) Ferguson on Behalf of AT&T Tennessee, Inc.* before the Tennessee Regulatory Authority’s (“Authority” or “TRA”) in the above-captioned matter, Nextel South Corp. and NPCR, Inc. d/b/a Nextel Partners (collectively “Nextel”), by and through their undersigned counsel, hereby respectfully submit this *Motion to Strike AT&T Tennessee, Inc.’s Affidavit of P. L. (Scot) Ferguson in the Entirety* (“*Motion*”) and move that AT&T Tennessee, Inc.’s (“AT&T”) Affidavit of P. L. (Scot) Ferguson (the “*Affidavit*”) be stricken from the record in this proceeding in the entirety. For its cause and in support of the *Motion*, Nextel submits the arguments set forth below.

I. SUMMARY OF ARGUMENTS IN SUPPORT OF NEXTEL's MOTION TO STRIKE

- The late, unauthorized filing of the *Affidavit* by AT&T violates the Hearing Officer's March 25, 2008, *Notice of Briefing Schedule and Oral Arguments Concerning Motion for Summary Judgment*.
- The late, unauthorized filing of the *Affidavit* by AT&T violates Authority Rule 1220-1-2-.06(3).
- The late, unauthorized filing of the *Affidavit* by AT&T violates Tenn. Code Ann. § 4-5-313.
- AT&T's dilatory tactics are aimed at eliminating or substantially curtailing the effect of the 42-month clock under the Merger Commitments.¹
- AT&T's well-timed delays are inconsistent with the expedited, streamlined adoption process envisioned by the FCC under Section 252(i).²
- 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.³

II. RELEVANT BACKGROUND⁴

On June 22, 2007, Nextel South Corp. and Nextel Partners filed with the Authority their respective *Petition Regarding Notice of Election of Interconnection Agreement* (the "*Petition*") based upon Merger Commitment Nos. 1 and 2,⁵ 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). On July 17, 2007, AT&T filed its Motion to Dismiss the *Petition*, and Nextel filed its response to *AT&T's Motion to Dismiss* on July 24, 2007.

¹ See *Nextel South Corp.'s and Nextel Partners' Reply to AT&T Tennessee's Brief in Opposition to Nextel South Corp.'s and Nextel Partners' Motion for Summary Judgment*, TRA Docket No. 07-00161, pp. 25-27 (April 10, 2008) ("*Nextel's Reply Brief*").

² *Id.* at 28.

³ *Id.* at 3 and 29.

⁴ A more detailed summary of this matter is set forth in Nextel's Motion for Summary Judgment.

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 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. 07-00132,⁶ the Authority declared that it has jurisdiction over conflicts arising from adoptions under Section 252(i) and that AT&T's argument regarding the timeliness of Nextel's proposed adoptions is moot.⁷ 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 federal statutory right to opt in under Section 252(i).⁸ 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.⁹

As directed by the Presiding Panel in TRA Docket No. 07-00161 (and consolidated Docket No. 07-00162),¹⁰ a Status Conference was held in this matter immediately after the Authority's March 24, 2008, Conference. At this Status Conference, the Hearing Officer, with comments from the parties, established a briefing schedule in relation to Nextel's pending Motion for Summary Judgment, which motion was filed with the Authority on February 6, 2008.¹¹ Subsequent to the Status Conference,

⁶ *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").

⁷ *Transcript of Proceedings, Tennessee Regulatory Authority Conference*, TRA Docket No. 07-00161, pp. 21-22 (Mar. 24, 2008) (excerpted version) ("*March 24, 2008, Transcript*"). The Authority previously declared that it possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the Merger Commitments. *See supra* n. 6. Interconnection issues raised by both the Merger Commitments and Section 252(i) of the Act are at the heart of the *Petition*.

⁸ *March 24, 2008, Transcript* at 22.

⁹ *Id.*

¹⁰ 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.

¹¹ *See Transcript of Status Conference*, TRA Docket Nos. 07-00161 and 07-00162 (Mar. 24, 2008) ("*Transcript of Status Conference*").

the Hearing Officer issued the March 25, 2008, *Notice of Briefing Schedule and Oral Arguments Concerning Motion for Summary Judgment* (the “*Notice*”) in this matter.¹²

Consistent with the *Notice*, AT&T filed *AT&T Tennessee’s Brief in Opposition to Nextel South Corp.’s Motion for Summary Judgment* (“*AT&T’s Brief in Opposition*”) on April 4, 2008, and Nextel filed its *Reply to AT&T Tennessee’s Brief in Opposition to Nextel South Corp.’s and Nextel Partners’ Motion for Summary Judgment* (“*Nextel’s Reply Brief*”) on April 10, 2008. On April 15, 2008, AT&T filed the *Affidavit*.

III. DISCUSSION AND ARGUMENTS

As noted earlier, Nextel’s Motion for Summary Judgment was filed with the Authority, and served upon AT&T, on February 6, 2008. Rather than respond to the Motion for Summary Judgment within seven (7) days pursuant to Authority Rule 1220-1-2-.06(2)¹³ or seek leave for an extension of time within which to respond, AT&T, in keeping with its well-choreographed efforts to delay this proceeding as long as possible, made an internal decision not to respond to the Motion for Summary Judgment at all, until expressly directed to do so by the Authority.

As shown below, AT&T’s submission of the *Affidavit* violates the *Notice*, Authority rules and an applicable state statute. The Authority should not, directly or indirectly, condone, sanction or overlook AT&T’s conduct.

¹² A copy of the *Notice* is attached hereto as **EXHIBIT A**.

¹³ Authority Rule 1220-1-2-.06(2) provides as follows: “Any party opposing a motion shall file and serve a response within seven (7) days after service of the motion. The Authority or Hearing Officer may shorten or extend the time for responding to any motion.” In fact, Nextel filed its response to *AT&T’s Motion to Dismiss* in this matter within 7 days of service. While AT&T self-servingly contends, without any authority, that Authority Rule 1220-1-2-.06(2) only applies to “non-dispositive” motions, the plain language of the rule applies to “[a]ny request for an action or ruling prior to a hearing on the merits in a contested case[,]” which plain language covers a motion for summary judgment. *See, e.g., In Re: Petition of Getco, a Tennessee General Partnership, and W. Isaac Luboti, Individually for Enforcement of Operating Agreement and Sale of Financial Rights, Order Denying Petitioners’ Motion to Late File Response and Dismissing Petition, TRA Docket No. 05-00304, pp. 4-5 (Aug. 2, 2006) (Authority applying Rule 1220-1-2-.06(2)’s 7-day requirement in relation to a motion to dismiss, a dispositive motion.)*

A. **AT&T's Filing of the Affidavit Is A Violation of the TRA's Rules of Practice and Procedure**

Authority Rule 1220-1-2-.06(3) provides as follows:

No reply to a response shall be filed except upon leave given or upon the order of the Authority or Hearing Officer. (emphasis added).

This rule is simple. A party in a pending matter before the Authority is *prohibited* from submitting a reply to a response without obtaining the permission to do so from the Authority. A party cannot circumvent the plain language or intent of this rule by how it styles the reply. The reply, whether in the form of, or styled as, a brief, letter, response, affidavit or reply, is *prohibited* except by leave given or order rendered.

Regarding what AT&T desired at the Status Conference, in responding to the status of the pending Motion for Summary Judgment, AT&T stated that “we would just want to set a firm date to respond to the motion.”¹⁴ Moreover, AT&T was well aware of the importance of its response to the pending Motion for Summary Judgment at the Status Conference when the briefing schedule was being established, as counsel for AT&T noted that “it’s a potentially dispositive motion. It’s a motion that’s important[.]”¹⁵

Even given AT&T’s request for a “firm date,” Nextel, anticipating AT&T’s motives to delay this proceeding for as long as possible, and recognizing that AT&T might attempt a ploy such as a late, unauthorized “sur-reply” after all its pleadings were due, asked the Hearing Officer at the Status Conference to clarify unambiguously and in advance that all responsive filings requested by the Presiding Panel from AT&T in relation to the pending Motion for Summary Judgment were due on April 4, 2008, and from Nextel on April 10, 2008, to which the Hearing Officer responded in the

¹⁴ *Transcript of Status Conference* at 4 (Counsel for AT&T).

¹⁵ *Id.*

affirmative.¹⁶ Moreover, AT&T agreed by acknowledging “that’s what we were directed to do and that’s what we intended.”¹⁷

In the *Notice*, the Hearing Officer declared that “AT&T’s responsive brief regarding the pending *Motion for Summary Judgment* shall be filed no later than 4:00 p.m. on Friday, April 4, 2008.” The *Notice* made no provision for AT&T to submit any further filings in relation to the pending Motion for Summary Judgment after April 4, 2008, nor for Nextel to submit any filing in relation to the pending Motion for Summary Judgment after April 10, 2008.¹⁸

Not only did AT&T view its April 4th response as very important, but AT&T acknowledged that the arguments contemplated in its April 4th response/reply to the Motion for Summary Judgment had been made in other states.¹⁹ So, AT&T had from February 6, 2008, the date the Motion for Summary Judgment was filed, until April 4, 2008, the date its responsive filing was due - nearly 60 days - to formulate and prepare its response to the Motion for Summary Judgment. Further, AT&T was well-familiar with what its response was going to be from its work in other states.²⁰

Notwithstanding the foregoing, after reviewing *Nextel’s Reply Brief*, and the applicable case law cited therein, AT&T found *AT&T’s Brief in Opposition* lacking. Not wishing to fail in its attempt to defeat Nextel’s Motion for Summary Judgment and to further prolong this proceeding, AT&T filed the *Affidavit* without seeking permission to do as is required under the rule.

¹⁶ *Id.* at 9

¹⁷ *Id.*

¹⁸ See **EXHIBIT A**.

¹⁹ *Transcript of Status Conference* at 6 (“This is - - Sprint has filed its motion and the reply should be - - I think they understand the arguments and know what the arguments are going to be from their work in the other states[.]” (Counsel for AT&T)).

²⁰ *Id.*

The Authority's rules serve an essential purpose, as they govern the proceedings and the parties before it, including AT&T. It would be unfair, and even unconscionable, to require one party to comply with Authority orders, notices and rules, while another party plays by its own, separate set of rules. In TRA Docket No. 05-00304, the Authority denied Petitioners' Motion for Late Filed Response for failure to comply with Authority Rule 1220-1-2-.06(2), which provides that a party opposing a motion "shall file and serve a response within seven (7) days after service of the motion."²¹ AT&T, like other parties before the Authority, must abide by the Authority's rules and notices – particularly when the very issue of delay was clearly raised and discussed by the Authority and the Parties, as it was in this case at the hearing on *AT&T's Motion to Dismiss* with respect to the continued running of the 42-month Merger Commitment timeline.²²

Though it surprisingly attempted to do so in its April 15, 2008, letter, AT&T cannot credibly come before the Authority at this stage and say that it did not expect that it would need to file something akin to the *Affidavit*, much less that AT&T has any legitimate basis for doing so in a tactically untimely fashion. Such a claim would be openly disrespectful of the agency. First, Nextel's Motion for Summary Judgment placed AT&T on notice that AT&T would have to respond with particularity to defeat a properly supported motion.²³ Next, AT&T conceded at the Status Conference that the arguments

²¹ See *In Re: Petition of Getco, a Tennessee General Partnership, and W. Isaac Luboti, Individually for Enforcement of Operating Agreement and Sale of Financial Rights*, Order Denying Petitioners' Motion to Late File Response and Dismissing Petition, TRA Docket No. 05-00304, pp. 4-5 (Aug. 2, 2006).

²² March 24, 2008, Transcript at 18-21 (excerpted version).

²³ See *Nextel's Motion for Summary Judgment*, TRA Docket No. 07-00161 at 7, n. 22 (citing 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

to be set forth within its *own* response were not new and unknown to it.²⁴ Third, *AT&T's Brief in Opposition* noted what AT&T would have to do under Tennessee law to address a properly supported motion for summary judgment.²⁵ Finally, and perhaps most notably, AT&T submitted the *Pre-filed Testimony of P. L. (Scot) Ferguson* before the Georgia Public Service Commission on or about March 7, 2008, long before its Tennessee deadline of April 4, 2008, in relation to the Rule § 51.809 cost hearing that AT&T sought and then withdrew from in Georgia.²⁶ Hence, if AT&T wanted to file something like the *Affidavit* in opposition to the Motion for Summary Judgment, AT&T clearly could have and should have done so on or before April 4, 2008.

Finally, AT&T is very familiar with summary judgment motions before the Authority.²⁷ Moreover, AT&T has previously recognized the applicability of Authority Rule 1220-1-2-.06(3) in the context of a pending motion for summary judgment. In TRA Docket No. 04-00381, BellSouth submitted *BellSouth's Motion for Leave to File Reply to CompSouth's Response to Motion for Summary Judgment*.²⁸ In its motion, BellSouth accurately and appropriately noted that "TRA Rule 1220-1-2-.06(3) states that '[n]o reply

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.") (emphasis added) (*citing Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993))).

²⁴ See *supra* n. 19.

²⁵ *AT&T's Brief in Opposition* at 3 ("Furthermore, all pleadings and evidence are to be considered in the light most favorable to the nonmoving party[.]").

²⁶ See *Nextel's Reply Brief* at 18 ("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.").

²⁷ See, e.g., *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling*, TRA Docket No. 04-00381 (June 1, 2005).

²⁸ See *BellSouth Telecommunications, Inc.'s Motion for Leave to File Reply to CompSouth's Response to Motion for Summary Judgment*, TRA Docket No. 04-00381 (July 14, 2005).

to response shall be filed except upon leave given upon the order of the Authority or Hearing Officer.”²⁹

For the foregoing reasons, the submission of the *Affidavit* more than ten (10) days after the date on which AT&T’s responsive pleading was due constitutes a clear violation of Authority Rule 1220-1-2-.06(3) and Nextel’s Motion to Strike should be granted in the entirety.

B. AT&T’s Filing of the Affidavit Is A Violation of the Hearing Officer’s Notice

In its April 15, 2008, letter, AT&T presents the *Affidavit* as a purely fact-oriented filing. Under closer scrutiny, however, the *Affidavit* is revealed for what it really is – an unauthorized reply in violation of the Authority’s rules and the Hearing Officer’s *Notice*.

Most portions of the *Affidavit* have been previously submitted by AT&T in TRA Docket Nos. 07-00161 and 07-00161 as a part of its many letters and legal pleadings. Below is a brief outline that demonstrates how the *Affidavit* is, in large measure, a poorly disguised attempt of “a second bite of the apple.”

- Paragraphs 10-14 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 14-16 of *AT&T’s Brief in Opposition*.
- Paragraphs 15-24 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 7-11 of *AT&T’s Brief in Opposition*.
- Paragraphs 25-26 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 8-11 and 13-14 of *AT&T’s Brief in Opposition*.
- Paragraphs 27-29 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 11-12 of *AT&T’s Brief in Opposition*.
- Paragraphs 30-31 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 12-13 of *AT&T’s Brief in Opposition*.

²⁹ *Id.* at 1.

- Paragraphs 32-33 of the *Affidavit* also appear, in the same or substantially similar manner, on pages 12, n. 16 of *AT&T's Brief in Opposition*.

The outline above, which is meant to be representative but not exhaustive, shows, among others, two (2) primary things. First, the *Affidavit* does not attempt – as represented by AT&T - to only address purported factual matters. Second, the *Affidavit* is, in large part, a poorly camouflaged and inappropriate attempt to simply file a “sur-reply” to *Nextel's Reply Brief*, contrary to both Authority rules and the *Notice*.

For the foregoing reasons, the filing of the *Affidavit* after the submission of *Nextel's Reply Brief* is a clear and flagrant violation of both Authority Rule 1220-1-2-.06(3) and the Hearing Officer's *Notice*, and Nextel's Motion to Strike should be granted in the entirety.

C. AT&T's Filing of the Affidavit Is A Violation of Tenn. Code Ann. § 4-5-313

Tenn. Code Ann. § 4-5-313(2) provides in part as follows:

At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit such party proposes to introduce in evidence, together with a notice in the form provided in subdivision (4). (emphasis added).

AT&T failed to comply with the plain language of the foregoing statute. First, pursuant to the *Notice*, the hearing on Nextel's Motion for Summary Judgment is set for April 21, 2008. AT&T's *Affidavit* was filed with the Authority and served upon Nextel on April 15, 2008, which is less than ten (10) prior to April 21, 2008. Hence, AT&T failed to comply with the plain language of Tenn. Code Ann. § 4-5-313(2). Second, AT&T failed to comply with Tenn. Code Ann. § 4-5-313(2) because AT&T did not provide the “notice” required under the statute.

In TRA Docket No. 06-00193, the Authority denied the untimely petitions to intervene filed by Aeneas Communications, LLC and the Tennessee Cable Telecommunications Association for failure to comply with Tenn. Code Ann. § 4-5-310(a) or Authority Rule 1220-1-2-.08, which require intervention seven (7) days prior to the start of the hearing.³⁰ AT&T, like other parties before the Authority, must abide by Authority rules and applicable statutes, particularly under the circumstances presented herein.

Therefore, the Authority should grant Nextel's Motion to Strike for AT&T's failure to comply with the plain language of Tenn. Code Ann. § 4-5-313(2).

IV. CONCLUSION

For the reasons set forth above, Nextel's Motion to Strike should be granted in the entirety. If AT&T wished to submit the *Affidavit*, it should have done so on or before April 4, 2008. AT&T should not be permitted, under any circumstances, to further supplement its response to a Motion for Summary Judgment that was served upon AT&T on February 6, 2008. With the aid of the parties, and without any objections, the Authority reasonably set the dates for all final responsive pleadings to the pending Motion for Summary Judgment as April 4 and 10, 2008. These dates should stand.

In order to avoid any misunderstanding or miscommunication, Nextel notes, in the abundance of caution, that in moving to strike the *Affidavit*, Nextel is not conceding in any respect that the *Affidavit* evidences that there are genuine issues of material fact that remain to be resolved with respect to the *Petition*. As it did before the inappropriate

³⁰ See *In Re: Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services*, Order, TRA Docket No. 06-00193, p. 7 (Aug. 23, 2007). The Authority further found that the petition of Aeneas Communications, LLC also failed to meet the criteria set forth in TRA Rule 1220-1-2-.08(2). *Id.*

and untimely submission of the *Affidavit*, Nextel maintains that there are simply no legitimate genuine issues of material fact remaining and that this case can and should be resolved as a matter of law.³¹ AT&T's "lost revenues = increased costs" (apples to oranges) theory, the same theory that it made and then abandoned in Georgia,³² does not create a genuine issue of material fact. It is undisputed that as a matter of law, in order for the exception set forth in Rule § 51.809(b)(1) to apply, it must be shown that 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[.]" (emphasis added). This AT&T has not attempted to do. AT&T's failure to make *any* showing of a "per-unit" increase in its costs to provide the exact same transport and termination functions or facilities to Nextel, as compared to that provided to the Sprint entities, eliminates the applicability of Rule § 51.809(b)(1) to this proceeding as a matter of law.³³

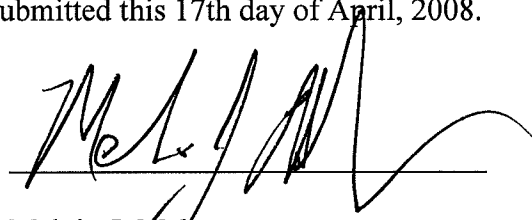
³¹ See *Nextel's Reply Brief*.

³² See *supra* n. 26.

³³ See, e.g., *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.*, Order, KEN. PUB. SERV. COMM'N Case No. 2007-00255 pp. 10-13 (Feb. 18, 2008) ("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[.] . . . 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."); *Eschelon Telecom of Colorado, Inc. v. Qwest Corporation*, COLO. PUB. UTIL. COMM'N, Colo. PUC LEXIS 1295 (Dec. 1, 2004) (In reviewing a § 51.809(b)(1) claim, Commission found assertions of Qwest to be unpersuasive, conclusory and lacking relevant supporting data.); *In the Matter of the Application and Request of Roseville Telephone Company (U-1015-C) for Arbitration of an Interconnection Agreement with Electric Lightwave, Inc.* (U-5377-C), CAL. PUB. UTIL. COMM'N, Cal. PUC LEXIS 154 (Feb. 22, 2001) (In ruling upon a § 51.809(b)(1) claim, the Commission rejected an increase in aggregate costs argument and held that the LEC's assertion "that its costs, cumulatively, will increase" does not conform to the plain language of § 51.809(b)(1), "[e]ven granting that [the LEC] will experience a general increase in costs of this nature, such a claim regarding its costs of compliance is not grounds for application of § 51.809(b)(1)[.]"); *Petition of NPCR, Inc. d/b/a/Nextel Partners for the Adoption of an Interconnection Agreement Approved by the Order of the*

The Authority should neither countenance the late, unauthorized filing of the *Affidavit* nor grant its stamp of approval upon AT&T's blatant disregard for the Authority's notices, rules and state law. The well-grounded Motion to Strike should be granted in the entirety.

Respectfully submitted this 17th day of April, 2008.



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*Commission Between GTE North, Inc. and Nextel West, Inc., Pursuant to Section 252(i) of the Telecommunications Act of 1996, In Order to Establish an Interconnection Agreement with GTE North, Inc., IND. UTIL. REG. COMM'N, Ind. PUC LEXIS 354 (May 25, 2000)(In ruling upon a § 51.809(b)(1) claim, the Commission rejected GTE's increase in aggregate costs contention, as GTE "failed to submit comprehensive cost studies to the Commission[.]"); Application of NewPath Holdings, Inc. for the Adoption of an Interconnection Agreement Approved by the Order of the Commission Between GTE North, Incorporated and Contel of the South, Inc. and AT&T Communications of Indiana, Inc., Pursuant to Section 252(i) of the Telecommunications Act of 1996, In Order to Establish an Interconnection Agreement with GTE North, Incorporated and Contel of the South, Inc., IND. UTIL. REG. COMM'N, Ind. PUC LEXIS 260 (June 7, 2000) (In relation to a § 51.809(b)(1) claim, the Commission rejected GTE's aggregate costs argument.); Petition of E.Com Technology, LLC for the Adoption of an Interconnection Agreement Approved by the Order of the Commission Between GTE North, Incorporated, Contel of the South Inc. and US Xchange LLC Pursuant to Section 252(i) of the Telecommunications Act of 1996, In Order to Establish an Interconnection Agreement with GTE North Incorporated and Contel of the South Inc., IND. UTIL. REG. COMM'N, Ind. PUC LEXIS 329 (April 26, 2000) (same); In the Matter of the Petition Global NAPS South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic – Delaware, Inc., DEL. PUB. SERV. COMM'N, Del. PSC LEXIS 97 (Mar. 9, 1999), rev. oth'r grds (In ruling upon a § 51.809(b)(1) claim, the Commission rejected Bell Atlantic's increase in aggregate costs contention and held that Bell Atlantic's "expectation" was "insufficient to establish that it will actually incur more unit costs[.]"); Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Relief, PENN. PUB. UTIL. COMM'N, Pa. PUC LEXIS 58, *33-34 (Aug. 17, 1999) (In relation to a § 51.809(b)(1) claim, the requesting carrier argued that the unit cost was the relevant cost at issue, the Commission rejected Bell Atlantic's "aggregate costs" assertion based upon the ratio of traffic, and the Commission concluded that a showing of "increased unit cost" was necessary.).*

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*Attorneys for Nextel South Corp. and
NPCR, Inc. d/b/a Nextel Partners*

EXHIBIT A

TENNESSEE REGULATORY AUTHORITY

Eddie Roberson, Chairman
Tre Hargett, Director
Sara Kyle, Director
Ron Jones, Director



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NOTICE OF BRIEFING SCHEDULE AND ORAL ARGUMENTS CONCERNING MOTION FOR SUMMARY JUDGMENT

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

**Petition Regarding Notice of Election of Interconnection Agreement
by Nextel Partners
Docket No. 07-00162**

DATE: **March 25, 2008**

On March 24, 2008, the panel assigned to these consolidated dockets voted to hear Nextel's motion for summary judgment at the April 21, 2008 Authority Conference. At a status conference held later on March 24, 2008, the parties agreed to the following briefing schedule and parameters of oral argument:

- AT&T's responsive brief regarding the pending *Motion for Summary Judgment* shall be filed no later than 4:00 p.m. on Friday, April 4, 2008.
- Nextel's reply brief shall be filed no later than 4:00 p.m. on Thursday, April 10, 2008.
- Both parties are directed to include in their briefs their respective position on whether the 42-month clock on the merger commitments is running.
- Both parties shall timely send an electronic copy of their briefs upon filing with the Authority to the Hearing Officer at gary.hotvedt@state.tn.us.
- Oral arguments before the panel shall occur during the Authority Conference on **Monday, April 21, 2008**, and be limited to twenty minutes per side.
- Deliberations shall occur when determined by the panel. If the panel deliberates the day of oral arguments, the parties shall be prepared to participate in a Status Conference, if one should be necessary, immediately following the Authority Conference.

FOR THE TENNESSEE REGULATORY AUTHORITY:

Gary Hotvedt, Hearing Officer

c: Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that on April 17th, 2008, a true and correct copy of the foregoing has been served on the parties set forth below, via the method(s) indicated below:

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