

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**November 26, 2007**

<b>IN RE:</b>	)	
	)	
<b>PETITION REGARDING NOTICE OF</b>	)	<b>DOCKET NO.</b>
<b>ELECTION OF INTERCONNECTION</b>	)	<b>07-00162</b>
<b>AGREEMENT BY NEXTEL PARTNERS</b>	)	

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**DISSENTING OPINION OF DIRECTOR RON JONES**

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This docket came before a panel of the Tennessee Regulatory Authority (“Authority”) at an Authority Conference held on September 24, 2007 to consider the *Petition Regarding Notice of Election of Interconnection Agreement by Nextel Partners* (“*Nextel Petition*”) filed on June 22, 2007 by NPCR, Inc. d/b/a Nextel Partners (“Nextel”). During the Authority Conference, the majority voted (1) to hold this docket in abeyance pending the outcome of Docket No. 07-00132, *In re: Petition of Sprint Communications Company L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee Southeast* and (2) to request that the Chairman administratively consolidate this docket with Docket Nos. 07-00161 and 07-00132. The majority entered the *Order Holding Docket in Abeyance* memorializing these decisions on November 26, 2007. Because I do not agree with the majority’s decisions, I respectfully dissent and provide this opinion in support of my vote.

**I. RELEVANT PROCEDURAL HISTORY**

**A. Merger Commitments**

On December 29, 2006, the Federal Communications Commission adopted a *Memorandum Opinion and Order*, which it released on March 26, 2007, finding that the

proposed merger between AT&T, Inc. and BellSouth Corporation would serve the public interest convenience and necessity.<sup>1</sup> As part of the proposed merger, AT&T, Inc. and BellSouth Corporation offered certain voluntary commitments, which were attached to the *Memorandum Opinion and Order* as Appendix F. Of relevance to this docket are Merger Commitment Nos. 1, 2, and 4 of the section titled “Reducing Transaction Costs Associated with Interconnection Agreements.” These commitments provide:

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 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.

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.

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4. The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier’s request unless terminated pursuant to the agreement’s “default” provisions.<sup>2</sup>

**B. Docket No. 07-00132**

On May 18, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS (collectively “Sprint”) filed a *Petition for Arbitration of Sprint Communications*

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<sup>1</sup> *In re: AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, FCC 06-189, *Memorandum Opinion and Order*, para. 2 (Mar. 26, 2007).

<sup>2</sup> *Id.* at App. F, pp. 149-50.

*Company L.P. and Sprint Spectrum L.P. ("Sprint Petition")*. The Authority assigned Docket No. 07-00132 to the *Sprint Petition*. Sprint requested arbitration of the following issue: "May AT&T Tennessee effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4?"<sup>3</sup> On June 12, 2007, BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T") filed an answer and motion to dismiss. In the filing, AT&T proposed the issue "[s]hould Attachments 3A and 3B . . . be incorporated into the new interconnection agreement as 'Attachment 3'" as Issue No. 2.<sup>4</sup> On June 19, 2007, Sprint filed a response to the motion to dismiss and answer arguing that AT&T's proposed Issue No. 2 should be dismissed.<sup>5</sup> During the September 10, 2007, Authority Conference, the panel assigned to Docket No. 07-00132 voted to deny the motions to dismiss, to accept the matter for arbitration, and to appoint a pre-arbitration officer.<sup>6</sup>

**C. Docket No. 07-00162**

On June 22, 2007, Nextel filed the *Nextel Petition*. In the *Nextel Petition*, Nextel requested that the TRA,

issue an order acknowledging the adoption of the Sprint [interconnection agreement] by Nextel Partners, approving the adoption and making the Interconnection Agreement effective as of the date of the filing of this *Petition*, and requiring AT&T Southeast to execute the adoption of the agreement previously tendered by Nextel Partners to AT&T Southeast, as reflected in **Exhibit B** attached hereto.<sup>7</sup>

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<sup>3</sup> *In re: Petition of Sprint Communications Company L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee Southeast*, Docket No. 07-00132, *Petition for Arbitration of Sprint Communications Company L.P. and Sprint Spectrum L.P.*, p. 8 (May 18, 2007).

<sup>4</sup> *Id. BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee's Motion to Dismiss and Answer*, p. 11 (Jun. 12, 2007).

<sup>5</sup> *Id. Sprint's Response to AT&T Tennessee's Motion to Dismiss and Answer*, p. 17 (Jun. 19, 2007).

<sup>6</sup> *See id. Order Denying Motions to Dismiss, Accepting Matter for Arbitration, and Appointing Pre-Arbitration Officer*, p. 7 (Oct. 5, 2007).

<sup>7</sup> *Petition Regarding Notice of Election of Interconnection Agreement by Nextel Partners*, p. 2 (Jun. 22, 2007) (emphasis in original).

Nextel explained that it is entitled to the requested relief as it is exercising its rights pursuant to Merger Commitment Nos. 1 and 2 and section 252(i) of Title 47 of the *United States Code*.<sup>8</sup> Nextel acknowledged that the Sprint interconnection agreement that Nextel seeks to adopt is the same interconnection agreement that is the subject of the dispute in Docket No. 07-00132; however, Nextel contends that there is “no legitimate reason for this outstanding dispute [in Docket No. 07-00132] to preclude Authority action on the [Nextel] *Petition*.”<sup>9</sup> AT&T filed a motion to dismiss on July 17, 2007. Nextel filed a response to the motion to dismiss on July 24, 2007.

The panel considered the docket at the September 24, 2007, Authority Conference. A majority of the panel voted to hold the docket in abeyance and to request that the Chairman administratively consolidate Docket Nos. 07-00132, 07-00161, and 07-00162.<sup>10</sup> The panel did not address the motion to dismiss.

## **II. ANALYSIS**

### **A. Abeyance Decision**

The majority determined that this docket should be held in abeyance pending a decision in Docket No. 07-00132.<sup>11</sup> In support of its decision, the majority found that “one of the issues in Docket No. 07-00132 concerns the start and end date of the [Sprint] interconnection agreement and consequently whether the agreement is in force or has expired.”<sup>12</sup> The majority reasoned that this docket should be held in abeyance because the status of the Sprint

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<sup>8</sup> See *id.* at pp. 3-4.

<sup>9</sup> *Id.* at p. 3.

<sup>10</sup> *Order Holding Docket in Abeyance*, pp. 3-4 (Nov. 26, 2007). The panel in Docket No. 07-00161 voted to hold that docket in abeyance for the same reasons offered by the majority in the instant docket. See *In re: Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp.*, Docket No. 07-00161, *Order Holding Docket in Abeyance*, p. 2 (Nov. 21, 2007). I was not on the panel assigned to Docket No. 07-00161; therefore, I did not vote or deliberate on Docket No. 07-00161 during the Authority Conference. On November 8, 2007, the Chairman filed a memorandum in each of the three docket files declining to consolidate the dockets.

<sup>11</sup> *Order Holding Docket in Abeyance*, p. 3 (Nov. 26, 2007).

<sup>12</sup> *Id.* at 2.

interconnection agreement “is in dispute.”<sup>13</sup> It is my opinion that the determinations to be made in Docket Nos. 07-00132 and 07-00162 are not dependant on one another; therefore, there is no reason to hold one docket in abeyance until a decision is made in the other docket.

Docket No. 07-00132 requires a decision with regard to the timing of the extension provided by Merger Commitment No. 4, not whether the Sprint interconnection agreement is a current interconnection agreement that can be extended pursuant to Merger Commitment No. 4.

In the *Sprint Petition*, Sprint alleges:

13. Soon after the FCC-approved Merger Commitments were publicly announced on December 29, 2006, the Parties considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. AT&T Tennessee 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.<sup>14</sup>

AT&T admitted the allegations in paragraph 13 without exception.<sup>15</sup> Thus, the Authority is being called upon in Docket No. 07-00132 to determine the start date of the extension term, not whether the Sprint interconnection agreement has expired or is otherwise not a current interconnection agreement as required by Merger Commitment No. 4.

The determination to be made in this docket centers on the language of Merger Commitments Nos. 1 and 2 that permits Nextel to opt into “any entire effective interconnection agreement.”<sup>16</sup> Thus, with regard to this docket the Authority will likely be called upon to determine whether the Sprint interconnection agreement is effective. This is a different

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<sup>13</sup> *Id.* at 2-3.

<sup>14</sup> *In re: Petition of Sprint Communications Company L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee Southeast*, Docket No. 07-00132, *Petition for Arbitration of Spring Communications Company L.P. and Sprint Spectrum L.P.*, para. 13 (May 18, 2007).

<sup>15</sup> *Id. BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee's Motion to Dismiss and Answer*, para. 17 (Jun. 12, 2007).

<sup>16</sup> *In re: AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, FCC 06-189, *Memorandum Opinion and Order*, App. F, p. 149 (Mar. 26, 2007).

determination than the timing determination the Authority will have to make in Docket No. 07-00132.

Based on the foregoing, it is my opinion that although the Authority may consider the “the start and end dates of the [Sprint] interconnection agreement” when resolving the issue put forth by Sprint in Docket No. 07-00132, the majority incorrectly concluded that this consideration results in a determination of the “whether the agreement is in force or has expired.”<sup>17</sup> The only issue related to the status of the Sprint interconnection agreement that is a dispute in Docket No. 07-00132 is to what date the agreement will continue in the future – an issue unrelated to the Docket No. 07-00162 issue of whether the Sprint interconnection agreement is an effective interconnection agreement for the purposes of Merger Commitment Nos. 1 and 2. In conclusion, I can find no reason why both dockets should not proceed concurrently.

#### **B. Consolidation Decision**

In addition to holding this docket in abeyance, the majority determined that it should request the Chairman to administratively consolidate this docket with Docket Nos. 07-00132 and Docket No. 07-00161. In support of this decision, the majority found that there is “significant overlap of both factual and legal issues” between this docket, Docket No. 07-00132, and Docket No. 07-00161 and that “judicial economy would be served by having the dockets administratively consolidated.”<sup>18</sup>

It is my opinion that these dockets should not be consolidated and that judicial economy would suffer by doing so. As explained herein, the ultimate determinations and relief requested in Docket Nos. 07-00132 and 07-00162 are unique and involve different provisions of federal law. I do not see the overlap, particularly the legal overlap, mentioned by the majority. Given

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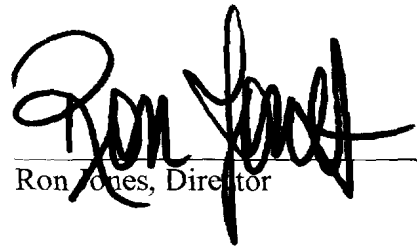
<sup>17</sup> *Order Holding Docket in Abeyance*, p. 2 (Nov. 26, 2007).

<sup>18</sup> *Id.* at 3.

my opinion as to the scope of the issues in Docket Nos. 07-00132 and 07-00162, it follows that consolidating the dockets while simultaneously holding one docket in abeyance pending the decision in the other docket will serve only to delay the final resolution of some, if not all, of the issues.<sup>19</sup>

### III. CONCLUSION

Based on the foregoing analysis, it is my conclusion that Docket 07-00132 should continue to move forward with consideration of the motion to dismiss being scheduled for the next Authority Conference. Because the decision of the majority is contrary to this position, I respectfully dissent from the *Order Holding Docket in Abeyance*.

  
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Ron Jones, Director

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<sup>19</sup> I note also that when requesting that the dockets be consolidated, the majority did not recognize or address the fact that Docket No. 07-00132 was filed as an arbitration and Docket Nos. 07-00161 and 07-00162 were not. Related thereto, the majority did not recognize or address the fact that the three dockets were opened as a result of filings made by three different companies: Nextel South Corp., NPCR, Inc. d/b/a Nextel Partners, and Sprint Communications Company L.P. d/b/a Sprint PCS.