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July 3, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020415-TZ

Dear Ms. Bayo:

On behalf of Nextel Communications, Inc. (Nextel), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Nextel Communications, Inc.'s Petition to Intervene. **06896-02**
- ▶ Nextel Communications, Inc.'s Motion to Dismiss. **06897-02**

Please acknowledge receipt of the above on the extra copy and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of BellSouth Telecommunications, Inc.
for declaratory statement concerning whether
requested provision of telecommunications
service to Sprint PCS in Macclenny, Florida,
which is not in BellSouth's exchange service,
violates BellSouth's General Subscriber Service
Tariff for the state of Florida.

Docket No. 020415-TZ

Filed: July 3, 2002

MOTION TO DISMISS

Nextel Communications, Inc. ("Nextel"), pursuant to rule 28-106.204, Florida Administrative Code, hereby files this Motion to Dismiss and Opposition to the Petition for Declaratory Statement by BellSouth Telecommunications, Inc. In support of its motion, Nextel states:

I. BACKGROUND

Nextel is a commercial mobile radio service ("CMRS") provider with operations throughout the United States. Like other CMRS carriers, Nextel is licensed to operate by the Federal Communications Commission ("FCC") and Nextel requires interconnection with BellSouth's telephone local exchange operations and the local telephone operations of other incumbent Local Exchange Carriers ("ILECs") to terminate calls originated on Nextel's wireless network to called parties who are landline telephone subscribers. Nextel has an interconnection agreement in effect with BellSouth that provides for the mutual termination of calls presented by each carrier's callers to the other carrier's network. The agreement covers the terms for interconnection with Nextel in all of BellSouth's landline telephone territories, including those in the State of Florida, and throughout BellSouth's nine-state market area. As such, Nextel has a vested interest in the outcome of the present proceeding.

DOCUMENT NUMBER DATE

06897 JUL-3 02

FPSC-COMMISSION CLERK

As described in the Sprint Petition for Declaratory Ruling filed with the FCC¹ and in Sprint's Motion to Dismiss filed in the instant proceeding,² BellSouth recently departed from well-accepted CMRS-landline interconnection conventions by announcing in January 2002 that it would no longer activate NPA-NXX codes where the routing and rating of the call was separate and the rating point was with an independent LEC. As Nextel already has in place a number of these types of arrangements and seeks to serve smaller, more rural communities with the same quality of "local" CMRS service as is available in larger markets, this unilateral BellSouth announcement caused great alarm. When BellSouth shortly followed its announcement with the filing of a Section 271 InterLATA services authorization application for the states of Louisiana and Georgia, Nextel evaluated BellSouth's new interconnection policy against the "competitive checklist" contained in Section 271 and determined that the policy was contrary to the company's basic interconnection obligations under the Communications Act, as amended. Nextel filed an opposition to the Section 271 application, pointing out compliance issues with Section 271 checklist items 1 (interconnection) and 9 (numbering).³

Plainly recognizing that it could not defend its new policy of blocking NPA-NXX code activations, BellSouth subsequently modified it. In a March 20 notification to all carriers, BellSouth stated that "[I]f this arrangement [of routing traffic to or from NPA/NXXs, which are established with a third-party rate center] is utilized, BellSouth will process the code memorandum request, while at the same time raising the issue with the appropriate state

¹ Sprint Petition for Declaratory Ruling, filed May 9, 2002 ("Sprint Petition").

² See Sprint Motion to Dismiss and Opposition to Petition for Declaratory Statement, filed in Docket No. 020415-TL, before the Florida Public Service Commission on June 4, 2002.

³ See Comments in Opposition of Nextel Communications, Inc., CC Docket No. 02-35, filed March 4, 2002. ("Nextel Comments"). Another CMRS provider, Triton PCS License Company, LLC, also filed comments opposing BellSouth's Section 271 application, raising many of the same concerns.

commission for determination.”⁴ Thus, while it stated it would no longer block the implementation of new NXX codes with rating centers in an independent ILEC territory,⁵ BellSouth at the same time announced that it would challenge the legality of these common CMRS-ILEC interconnection arrangements in state-by-state proceedings.

Citing the complexity of the issue, the FCC declined to rule on the matter in the context of BellSouth’s Section 271 applications. However, the FCC did not reject Nextel’s concerns because it believed that state commissions were the appropriate forums to consider and resolve these issues. To the contrary, the Commission rejected Nextel’s and Triton’s complaint “because Nextel and Triton largely raise unresolved intercarrier compensation issues.”⁶ Indeed, according to the Commission, the issues raised by Nextel and Triton and Triton “are open issues before [the] Commission in the Intercarrier Compensation proceeding.”⁷ As such, the Commission determined that these issues would be more appropriately resolved in an ongoing FCC proceeding.⁸

⁴ See BellSouth Carrier Notification (SN91082844), dated March 20, 2002.

⁵ BellSouth has refused to activate NXX codes for Nextel in South Carolina. From December 2001 through January 2002, for example, BellSouth refused to activate in its tandem switch a Nextel NXX Code for Monks Corner, South Carolina which is in the Home Telephone Company service area, and which subtends the BellSouth tandem. Nextel met all of the requirements for NeuStar to assign Nextel an NXX Code and BellSouth’s refusal has resulted in Nextel not being able to sell mobile handsets with a local dialing plan in Monk’s Corner. Not only did Nextel lose revenue, but, from the Commission’s perspective, BellSouth’s actions ensured that there were fewer competitive telecommunications service choices for consumers in Monk’s Corner.

⁶ Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana, *Memorandum Opinion and Order*, CC Docket No. 02-35, FCC 02-147, ¶ 208 (rel. May 15, 2002).

⁷ *Id.*

⁸ The Commission also noted that Sprint already had filed with it a Petition for Declaratory Ruling on BellSouth’s revised interconnection practice. *Id.*

BellSouth has now made good on its threat to ask states to prohibit common CMRS-ILEC interconnection practices. On May 10, 2002, BellSouth filed a petition with this Commission requesting that the Florida Public Service Commission (“Florida Commission”) determine whether the provision of telecommunications service by BellSouth to Sprint PCS, as requested by Sprint PCS, in McClenney, Florida – an area outside of BellSouth’s exchange area – violates BellSouth’s Virtual NXX tariff for the State of Florida. Because, however, this is an issue within the exclusive purview of FCC authority to consider and resolve, the Florida Commission must dismiss the BellSouth Petition for a Declaratory Statement.

II. DISCUSSION

Simply put, this Commission does not have the authority to grant the relief BellSouth seeks. The subject matter of BellSouth’s Declaratory Statement involve interpretations of questions of federal law that are preempted by the statutory regime adopted by Congress and implemented by the FCC, the agency with exclusive regulatory authority over these matters.⁹ While BellSouth asserts that its Florida proceeding simply involves state resolution of the interconnection obligations between Sprint and BellSouth, this is not the case. Indeed, the BellSouth Petition for a Declaratory Statement raises issues regarding BellSouth’s policies that deprive *all* CMRS carriers of their rights to interconnect with BellSouth at “any technically feasible point” within a LATA.

BellSouth is without question the dominant facilities-based carrier within each LATA it serves. Both independent ILECs and CMRS carriers depend upon BellSouth’s tandem facilities

⁹ On May 9, 2002, Sprint Corporation filed at the FCC on behalf of Sprint PCS a Petition for Declaratory Ruling, seeking confirmation from the FCC that an ILEC may not refuse to load its network telephone numbering resources that an interconnecting carrier acquires in compliance with the FCC’s numbering rules. In addition, Sprint also requested that the FCC confirm that ILECs may not refuse to honor the routing and rating points that an interconnecting carrier designates for its numbering resources. *See* Sprint Petition.

for transit and other routing. Any determination or question over the necessity of BellSouth's tandem facilities for efficient CMRS interconnection is solely a question of federal law. Indeed, the Supreme Court was unambiguous in its determination that it is within the Federal Communications Commission's exclusive purview to examine which ILEC facilities are essential to the establishment of local service competition and to declare those facilities to be available to competitors on an unbundled basis.¹⁰ Contrary state rules, tariffs or policies are preempted.

As demonstrated in Sprint's Petition before the FCC and current Motion to Dismiss before the Florida Commission, BellSouth's revised interconnection policy deprives CMRS carriers of their right to choose a single point of interconnection in a LATA. The FCC's rule in this regard is plain and BellSouth cannot invoke state tariffs for a "virtual NXX" service – which is not what Nextel provides and is thus irrelevant to providing interconnection with CMRS service – in an attempt to trump the uniform federal interconnection policies the FCC has established for CMRS-ILEC interconnection. If there is any question about BellSouth's obligation to provide interconnection, it is the FCC, and not nine separate state commissions, that should make that determination.

¹⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (finding that Section 2(b) and 201 of the Act provide the Commission with jurisdiction to prescribe the rules and regulations necessary to carry out the provisions of the Act, including the establishment of interconnection obligations on incumbent LECs. Because the Congress expressly directed that the Telecommunications Act of 1996, along with its local-competition and interconnection provisions, be inserted into the Communications Act of 1934, the Commission's rulemaking authority extends to implementation of the local-competition provisions, including the interconnection and ILEC network unbundling requirements of Section 251); *United States Telecom Association, et al., Petitioners v. Federal Communications Commission, et al.*, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 00-1015, Consolidated with 00-1025, 2002 U.S. App. LEXIS 9834 at *16-17 (May 24, 2002) (noting that the Commission is charged with the task of identifying the ILECs' network elements that must be made available.).

Finally, despite BellSouth's retreat on its policy of outright NXX blocking, there remains a substantial question as to whether BellSouth's "revised" interconnection policy violates the FCC's numbering rules. BellSouth's *ex parte* filings at the FCC for example, continue to characterize the routine interconnection arrangements it dislikes as "inappropriate." In essence, BellSouth is second-guessing the judgment of NeuStar, the FCC's designated numbering administrator, in assigning numbers to CMRS carriers operating within their geographically broad service territories.¹¹ Thus, the interconnection policy issues presented in the BellSouth Petition for a Declaratory Statement implicate significant federal interconnection and numbering rules and policies, and BellSouth already has tried to make good on its threat to force concerned CMRS carriers to run the gauntlet of a variety of state commission proceedings. BellSouth is unapologetic that it seeks to force CMRS carriers to make the case in multiple forums that common interconnection arrangements that traditionally have been used are reasonable and should continue.¹²

This is a case of history repeating itself – with BellSouth threatening to put carriers through a painful and unnecessary state-by-state process and unilaterally changing the scope of its responsibilities that it committed to in signing interconnection agreements with competitive CMRS carriers. And, it is doing so for a specific reason – BellSouth wants to hamstring the one type of competitive carrier that can match its service offerings after it receives interLATA

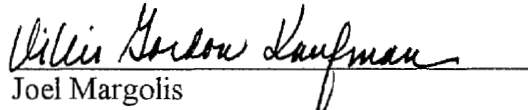
¹¹ Indeed, CMRS carriers that are assigned numbers in independent ILEC territories use them to provide "local" service in areas the CMRS provider also offers its services. This is not a "virtual" situation, because the CMRS carrier is not requesting nor is it using numbering resources outside of its service area.

¹² Indeed, BellSouth inconsistently argues that state commissions are the place to resolve interconnection and numbering matters, while at the same time arguing to the FCC in the context of its Section 271 applications that the FCC should punt any transit traffic and other interconnection policy matters raised by BellSouth's interconnection policies to ongoing FCC proceedings addressing intercarrier compensation matters. BellSouth *Ex Parte* at 3-4.

authority by raising its CMRS competitors' overall interconnection costs without any public benefit. As such, the Florida Commission must dismiss the BellSouth Petition for a Declaratory Statement and find that the issues presented therein are exclusively a matter of federal interpretation.¹³ Even if the Florida Commission determines not to rule on this issue it should, as a matter of comity, accede to FCC resolution of the Sprint Petition for Declaratory Ruling already filed at the FCC. It would be wasteful of state commission resources to have nine proceedings to resolve this issue already under consideration at the FCC.

III. CONCLUSION

For the foregoing reasons, the Florida Public Service Commission should dismiss BellSouth's Petition for a Declaratory Statement for lack of jurisdiction.



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¹³ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

CERTIFICATE OF SERVICE

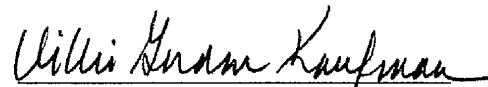
I HEREBY CERTIFY that a true and exact copy of the foregoing Motion to Dismiss has been furnished by (*) Hand Delivery or U. S. Mail this 3rd day of July, 2002, to the following:

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