Matilda Sanders

ORIGINAL

From: Smith, Debbie N. [ds3504@att.com]
Sent: Thursday, June 28, 2007 11:48 AM
To: Filings@psc.state.fl.us
Cc: Tyler, John; Randa, Johna A; Woods, Vickie; Meza, James; Holland, Robyn P; Sims, Nancy H
Subject: Florida Docket No. 070368-TP
Importance: High
Attachments: 070368-TP.pdf

A. Debbie Smith
Legal Secretary for John T. Tyler
BellSouth Telecommunications, Inc.
c/o Nancy Sims
150 South Monroe, Rm. 400
Tallahassee, FL 32301-1558
(404) 335-0772
debbie.n.smith@bellsouth.com

B. Docket No. 070368-TP: Notice of the 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. dated January 1, 2001.

C. AT&T Southeast
on behalf of John T. Tyler

D. 58 pages total in PDF format

E. AT&T Florida's Motion to Dismiss

<<070368-TP.pdf>>

Debbie N. Smith
AT&T Southeast
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375
(404) 335-0772

*****

ORIGINAL

Legal Department

John T. Tyler
Senior Regulatory Counsel

AT&T Southeast
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0757

June 28, 2006

Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: FL Docket 070368-TP – Notice of the 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. dated January 1, 2001

Dear Ms. Cole:

Enclosed is AT&T Florida's Motion to Dismiss, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

John T. Tyler

cc: All Parties of Record
Jerry Hendrix
James Meza III
E. Earl Edenfield, Jr.

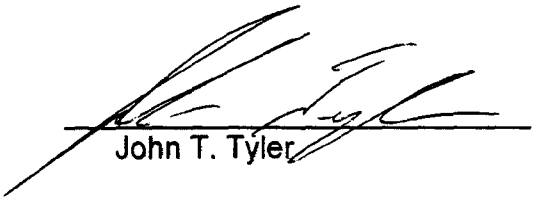
682882

CERTIFICATE OF SERVICE
Docket No. 070368-TP

I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail and First Class U. S. Mail this 28th day of June, 2007 to the following:

Florida Public Service Commission
Thomas Bates
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
jbates@psc.state.fl.us
Tel. No.: (850) 413-6538
Fax No.: (850) 413-6539

Douglas C. Nelson
Sprint Nextel
233 Peachtree Street, N.E.
Suite 2200
Atlanta, Georgia 30303
douglas.c.nelson@sprint.com
Tel. No.: (404) 649-0003
Fax No.: (404) 649-0009



John T. Tyler

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Notice of the 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." dated January 1, 2001	)	Docket No. 070368-TP Filed: June 28th, 2007

AT&T FLORIDA'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") submits the following Motion to Dismiss the Notice of the Adoption by NPCR, Inc. d/b/a Nextel Partners ("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. As explained below, the Florida Public Service Commission ("Commission") should dismiss, as a matter of law, Nextel Partners' attempt to adopt the subject interconnection agreement.

INTRODUCTION

Nextel Partners unilaterally sent a letter to the Commission, dated June 8, 2007, wherein Nextel Partners erroneously claims to have adopted the interconnection agreement between AT&T Florida and Sprint ("Notice of Adoption").[1] However, the basis upon which Nextel Partners relies for its purported "adoption" is misplaced. First, the Commission does not have the authority to interpret and enforce the AT&T merger conditions resulting from the Federal Communications Commission's ("FCC") AT&T Inc. and BellSouth Corp. merger proceeding. Second, Nextel Partners is attempting to adopt an expired agreement and thus the adoption request does not meet the legal timing

[1]The Notice of Adoption is attached hereto as "Exhibit A."

requirement under the Telecommunications Act of 1996 (the "Act"). Third, the Notice of Adoption is premature because Nextel Partners failed to abide by contractual obligations regarding dispute resolution found in its existing interconnection agreement with AT&T Florida.[2] For these reasons, and as further explained below, the Commission should dismiss, as a matter of law, Nextel Partners' Notice of Adoption.

I. Standard For Motion To Dismiss

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *Heekin v. Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI, 1999 WL 521490 *2 (citing to *Varnes*, 624 So. 2d at 350). In determining the sufficiency of a complaint, the Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. *See Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958).

However, a court may take judicial notice of the records in another case in resolving a motion to dismiss, where the judgment (and record) in such case is pleaded. *See generally, Posigran v. American Reliance Ins. Co. of New Jersey,* 549 So. 2d 751, 753 (Fla. 3rd DCA 1988) (citing *Leatherman v. Alta Cliff Co.,* 153 So. 845 (Fla. 1934); *see also*, Section 90.202(6), (11), and (12), Florida Statutes (a court may take judicial

[2] AT&T Florida requests that, in resolving this matter, the Commission take judicial notice of the "existing interconnection agreement between Nextel Partners and AT&T [Florida]," approved by the Commission on Janaury 11, 2002, referred to by Nextel Partners on page 2 of its Notice of Adoption,. Terms and conditions found within that existing interconnection agreement between Nextel Partners and AT&T Florida require Nextel Partners to abide by "FCC rules and regulations regarding" adoption of interconnection agreements. AT&T Florida/Nextel Partners Interconnection Agreement, Article XVI. That interconnection agreement also contains a dispute resolution process by which the parties must abide in resolving disputes. *See Id.*, Article XIX. A true and correct copy of the interconnection agreement can be found at http://cpr.bellsouth.com/clec/docs/all states/800aa291.pdf.

notice of "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States;" "[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court;" and "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.").

Even if the prior proceeding is not pled in the petitioner's complaint, the court can take judicial notice of a related proceeding if the offering party offers the court file or certified portions thereof into evidence in the case then being litigated. *See Abichandani v. Related Homes of Tampa, Inc.*, 696 So. 2d 802, 803 (Fla. 2nd DCA 1997) (citing *Carson v. Gibson*, 595 So. 2d 175, 176-77 (Fla. 2nd DCA 1992).

In its Notice of Adoption, Nextel Partners refers to, and thereby pleads, the existing interconnection agreement between AT&T Florida and Nextel Partners as well as the interconnection agreement between AT&T Florida and Sprint that it seeks to adopt.[3] Those interconnection agreements were approved by this Commission on January 24, 2002 and on June 10, 2002, and both are Commission records. Accordingly, AT&T Florida requests, pursuant to Section 90.202, Florida Statutes, that the Commission take judicial notice of the existing interconnection agreements between AT&T Florida and Nextel Partners and AT&T Florida and Sprint.

II. The Commission Does Not Have Jurisdiction Over AT&T Florida's Merger Commitments.

In a letter to AT&T Florida dated May 18, 2007, and in its Notice of Adoption, Nextel Partners claims to rely upon merger commitments adopted and approved by the FCC in the BellSouth/AT&T merger order *In the Matter of AT&T Inc. and BellSouth*

[3] *See* Notice of Adoption at 1-2.

Corporation Application for Transfer of Control, WC Docket NO. 06-74, adopted December 29, 2006, released March 26, 2007 ("Merger Order"), as the basis for adoption of the ICA.[4] However, the federal merger commitments approved by the FCC cannot support Nextel Partners' claims because the Commission does not have jurisdiction over them.

It is well settled that the Commission has to possess jurisdiction over the parties, as well as the subject matter. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). Accordingly, a complaint or request for relief is properly dismissed if it asks the Commission to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant. *See, e.g. In re: Petition by AT&T Communications of the Southern States, Inc. TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries*. Docket No. 010345-TP, PSC-01-02178-FOF-TP (Nov. 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.").

The Commission, therefore, must determine whether the Legislature has granted it any authority to construe AT&T's federal merger commitments. In that regard,"[t]he

[4] *See* Letter at 1, 2 (attached hereto as "Exhibit B"); Notice of Adoption at 1.

Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and "as a creature of statute," an agency "has no common law jurisdiction or inherent power . . . ."). Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N.R. Co.*, 49 So. 39 (Fla. 1909). Finally, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

While the Commission has authority under the Act in Section 252 arbitrations to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and the FCC regulations prescribed pursuant to Section 251, the Act does not grant the Commission with any general authority to resolve and enforce purported violations of federal law or FCC orders. *See e.g.*, 47 U.S.C. § 251.

The Commission addressed a similar issue in Order No. PSC-03-1892-FOF-TP ("Sunrise Order"). In the Sunrise Order, the Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created." *See* Sunrise Order at 3 (citations omitted). The Commission further noted, however, it can construe and apply

federal law "in order to make sure [its] decision under state law does not conflict" with federal law. *Id.* at 3-4. Accordingly, in the Sunrise Order, the Commission determined that it "cannot provide a remedy (federal or state) for a violation of federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. *Id.* at 5.

The Commission echoed these same principles in Order No. PSC-04-0423-FOF-TP (Docket No. 031125-TP), wherein it dismissed a request by a Competitive Local Exchange Carrier ("CLEC") to find that BellSouth violated federal law. Based on the Sunrise Order, the Commission dismissed the federal law count of the complaint, holding "[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five." *Id.*

Consistent with the above Commission decisions, the United States Supreme Court has held that the interpretation of an agency order, when issued pursuant to the agency's established regulatory authority, falls within the agency's jurisdiction. *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959).

Here, Nextel Partners' claim is not under state law; instead, it is attempting to enforce federal merger commitments via a state proceeding. Consequently, the FCC alone possesses the jurisdiction to interpret and enforce the subject merger commitments.

Indeed, the FCC explicitly reserved jurisdiction over the merger commitments contained in the Merger Order. Specifically, the FCC stated that "[f]or 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." Merger Order (Appendix F), p. 147 (attached hereto as "Exhibit C") (emphasis added). Nowhere in the Merger Order does the FCC provide that the interpretation of merger commitments is to occur outside the FCC.[5]

Further, recognition of the FCC's exclusive authority ensures a uniform regulatory framework and avoids a conflicting and diverse interpretation of FCC requirements. Any other decision results in the potential for conflicting rulings and piece-meal litigation. For these reasons, the Commission should dismiss the Notice of Adoption.

III. Nextel Partners Did Not Request Adoption Within "A Reasonable Period Of Time" As Required By 47 C.F.R. §51.809(c).

However, even if the Commission exerted jurisdiction over this matter, which it should not do, the Commission should nonetheless dismiss the attempted adoption because it is contrary to federal law. This is so because Nextel Partners wants to adopt an expired agreement.[6] Section 252(i) of 47 U.S.C. obligates AT&T Florida to provide competing carriers with "any interconnection, service or network element" on the same terms contained in any approved and publicly-filed AT&T Florida contract. However, this obligation is not unlimited. Particularly, in accordance with federal law, AT&T Florida's obligation to provide the facilities and services to carriers such as Nextel

[5] AT&T Florida recognizes that the FCC stated in the Merger Order that "[i]t 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...." Merger Order at 147. However, the purported source of Nextel Partners' adoption right, at least in part, is pursuant to the Merger Order and not the Act. Thus, the above statement from the FCC does not salvage Nextel Partners' argument.

[6] Pursuant to the authority cited above, AT&T Florida requests that the Commission take judicial notice of the Commission-approved AT&T Florida/Sprint ICA that Nextel Partners seeks to adopt and which is the subject of its Notice of Adoption.

Partners is limited to only a "reasonable period of time" after the original contract is approved.[7]

Although there is no precise definition of a "reasonable period of time," other commissions have found that attempting to adopt an agreement several months *before* expiration of an agreement is not within "a reasonable period of time". For example, in two cases from other jurisdictions, *In Re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (August 5, 1999) ("Global NAPs One") and *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999) ("Global NAPs Two"), a CLEC's request to adopt an interconnection agreement within approximately ten months and seven months, respectively, of each adopted agreement's termination date was found to be beyond the "reasonable period of time" requirement.[8]

For instance, in Global NAPs One, attached hereto as "Exhibit D," Global NAPs requested adoption of an interconnection agreement approved in 1996. Global NAPs sought adoption of the agreement in August 1998, when the agreement was by its terms set to expire on July 1, 1999. The Virginia State Corporation Commission ("Virginia Commission") denied Global NAP's request because of the limited amount of time remaining under the agreement. As a result, Global NAPs petitioned the FCC for an order preempting the Virginia Commission's decision. The FCC denied Global NAP's petition.[9]

---

[7] In limiting the period of time during which an interconnection agreement can be adopted, 47 C.F.R. §51.809(c) asserts: "[i]ndividual 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" (emphasis added).

[8] *See In Re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (August 5, 1999) (attached hereto as "Exhibit D"); *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999) (attached hereto as "Exhibit E").

[9] *See Global NAPs One.*

Likewise, in Global NAPs Two, attached hereto as "Exhibit E," the Maryland Public Service Commission held that it was unreasonable to allow Global NAPs to adopt a three year interconnection agreement approximately two and a half years into its term.[10]

Nextel Partners is erroneously attempting to push the "reasonable period of time" envelope even further as Nextel Partners seeks to adopt an *expired* agreement.[11] It stretches credulity to assert that an attempt to adopt an expired agreement (and in this case, one that has been *expired for over two years*) has been made within a reasonable period of time after the agreement was approved by this Commission and made available for public inspection.

Furthermore, AT&T Florida and Sprint are currently engaged in arbitrating a new interconnection agreement. It would be highly inefficient and impractical to allow Nextel Partners to adopt an antiquated expired agreement when parties to the original agreement are themselves moving to an updated agreement. Clearly such a result was never contemplated under the "reasonable period of time" limitation found in 47 C.F.R. §51.809(c) and would be inconsistent with good commonsense and public policy.

Indeed, the telecommunications industry is highly dynamic and undergoes rapid technological and regulatory changes. To maintain efficiencies and encourage innovation, interconnection agreements must be updated to keep pace with the ever-advancing industry. Allowing carriers to opt into antiquated expired agreements would be inconsistent with that goal. For example, since the ICA Nextel Partners seeks to adopt became effective in 2001, the wireless industry's traffic patterns have continued to evolve. To address proper jurisdictionalization of traffic for billing purposes, AT&T

[10] *See Global NAPs Two.*
[11] The ICA was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004.

Florida has developed a methodology to accurately measure the traffic between Major Trading Areas ("InterMTA traffic") based upon wireless carriers populating a new field found in call detail records. The old ICA Nextel Partners wishes to adopt does not address this issue; however, any new ICA will.

Simply put, Nextel Partners' attempted adoption of the expired ICA falls far beyond the "reasonable period of time" requirement mandated by law and commonsense. Accordingly, the Commission should determine, as a matter of law, that Nextel Partners did not file its adoption of the ICA within a reasonable period of time as prescribed in 47 C.F.R. §51.809(c) and dismiss the Notice of Adoption for failure to state a cause of action.

IV. Nextel Partners Failed To Comply With The Parties' Existing Agreement.

Nextel Partners did not comply with the requisite steps for dispute resolution set forth in the parties' current interconnection agreement, and therefore its Notice of Adoption is improperly before the Commission.[12] Nextel Partners and AT&T Florida entered into an interconnection agreement with an effective date of June 14, 2001. As effectively pled by Nextel Partners, given its statement that the current agreement will terminate when the Notice of Adoption is approved, that agreement is currently operational and its terms and conditions are binding. The agreement contains a provision addressing Nextel Partners' right to adopt interconnection agreements AT&T Florida has entered into with other carriers. Specifically, under Article XVI titled "Modification of

[12] AT&T Florida requests that, in resolving this matter, the Commission take judicial notice of the "existing interconnection agreement between Nextel [Partners] and AT&T [Florida]," referred to by Nextel Partners on page 2 of its Notice of Adoption.

Agreement," the AT&T Florida/Nextel Partners interconnection agreement provides in pertinent part:

> A. [AT&T Florida] shall make available, *pursuant to 47 USC §252 and the FCC rules and regulations regarding such availability*, to Carrier any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC §252. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service, or network element and any other rates, terms and conditions that are interrelated or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement and for the identical term of such other agreement.

(emphasis added).

As conceded by Nextel Partners in its Notice of Adoption, AT&T Florida disagrees with Nextel Partners' position. *See* Notice of Adoption at 2. Nevertheless, Nextel Partners unilaterally filed its "Notice of Adoption" with the Commission on June 8, 2007. However, the AT&T Florida/Nextel Partners agreement contains provisos designed to assist the parties in resolving any and all disputes regarding terms and conditions contained within the agreement. Of particular importance, the dispute resolution clause precludes a party from unilaterally filing a disputed matter with the Commission:

> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the parties will initially refer the issue to the appropriate company representatives. If the issue is not resolved within 30 days, either party may petition the Commission for a resolution of the dispute. However, each party reserves the right to seek judicial review of any ruling made by the Commission concerning this Agreement.

Here, because Nextel Partners disagreed with AT&T Florida, Nextel Partners was contractually bound to follow the dispute resolution process contained in the parties' agreement which it did not do. Accordingly, Nextel Partners' Notice of Adoption is improperly before the Commission and should be dismissed.

CONCLUSION

For the foregoing reasons, AT&T Florida respectfully requests the Commission to dismiss the Notice of Adoption filed by Nextel Partners in this Docket.

Respectfully submitted, this 28th day of June, 2007.

AT&T Florida

JAMES MEZA III[13]
MANUEL GURDIAN
c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
james.meza@bellsouth.com
nancy.sims@bellsouth.com
(305) 347-5558
(850) 222-8640

E. EARL EDENFIELD JR.
JOHN T. TYLER
AT&T Florida Midtown Center – Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0757
ATTORNEYS FOR AT&T Florida

681195

[13] The undersigned is licensed in Louisiana only, is certified by the Florida Bar as Authorized House Counsel (No. 464260) per Rule 17 of the Rules Regulating the Florida Bar, and has been granted qualified representative status by the Commission in Order No. PSC-07-0211-FOF-OT.

Exhibit A

[redacted]

June 8, 2007

By Electronic Filing

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Notice of the 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." dated January 1, 2001.

Dear Ms. Cole:

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners") hereby provides notice to the Florida Public Service Commission that effective immediately Nextel Partners has adopted in its entirety, the "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P[1]." dated January 1, 2001 ("Sprint ICA") as amended.[2] The agreement has been filed and approved in each of the 9-legacy BellSouth states, including Florida[3]. Nextel Partners has exercised its right pursuant to the Federal Communications Commission approved Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" as ordered by ("Merger Commitments") in the BellSouth – AT&T merger, WC Docket No. 06-74[4], and 47 U.S.C. § 252(i).

---

[1] Sprint Communications Company Limited Partnership, Sprint Communications Company L.P. and Sprint Spectrum L.P. are collectively referred to herein as "Sprint".

[2] BellSouth Telecommunications, Inc. is now registered in Florida as BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and is referred to herein as "AT&T Southeast."

[3] For the purposes of this letter, the 9 legacy BellSouth states means: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. The Sprint ICA was initially approved by the Florida Public Service Commission in Dockets No. 000828-TP and 000761-TP. A true and correct copy of the 1,169 page Interconnection Agreement, as amended, can be viewed at: http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf., and is incorporated fully herein by reference. Due to the size of the file and its general availability, we are not providing a copy of the agreement with this letter, but will provide paper or electronic copies upon request.

[4] Merger Commitment No. 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." (Emphasis added).

Merger Commitment No. 2 states:

> 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.

All relevant state-specific differences among the 9 legacy BellSouth states are already contained within the Sprint ICA, including Florida. Since the same state-specific terms are applicable to Nextel Partners on a state-by-state basis, there are no "state-specific pricing and performance plans and technical feasibility" issues pursuant to Merger Commitment No. 1. Likewise, since the Sprint ICA is already TRRO compliant and has an otherwise effective change of law provision, there is no issue preventing Nextel Partners from adopting the Sprint ICA in each applicable state, including Florida, pursuant to Merger Commitment No. 2.

The Sprint ICA is current and effective, although Sprint and AT&T Southeast have a dispute regarding the term of the agreement.[5] Sprint believes the term of the agreement ends March 19, 2010 while AT&T Southeast has maintained, among other things, that the term may end no later than December 31, 2007.

Nextel Partners has contacted AT&T Southeast regarding Nextel Partners' adoption of the Sprint ICA, but AT&T Southeast refuses to voluntarily acknowledge and honor Nextel Partners' rights regarding such adoption.

The Sprint ICA adopted today replaces in its entirety the existing interconnection agreement between Nextel Partners and AT&T Southeast.

Should you have any questions regarding Nextel Partners' adoption of the Sprint ICA, please do not hesitate to call.

Sincerely,

Douglas C. Nelson

CC by email unless otherwise noted:
Mr. Eddie A. Reed, Jr., AT&T Director-Contract Management (by US mail)
Ms. Kay Lyon, Lead Negotiator, AT&T Wholesale
Mr. Randy Ham, Assistant Director, AT&T Wholesale
Ms. Lynn Allen-Flood, AT&T Wholesale – Contract Negotiations
Mr. Joseph M. Chiarelli, Counsel for Nextel Partners
Mr. William R. Atkinson, Counsel for Nextel Partners
Mr. Jim Kite, Sprint Nextel Interconnection Solutions

[5] See Docket No. 070249-TP.

Exhibit B

Sprint
Together with NEXTEL

Sprint Nextel Access Solutions
Mailstop KSOPHA0310-3B372
6330 Sprint Parkway
Overland Park, KS 66251
Office: (913) 762-4133 Fax: (913) 523-0608
Mark.G.Felton@sprint.com

Mark G. Felton
Interconnection Solutions

May 18, 2007

Electronic and Overnight Mail

Ms. Kay Lyon, Lead Negotiator
AT&T Wholesale
4 AT&T Plaza, 311 S. Akard
Room 2040.03
Dallas, Texas 75202

Mr. Randy Ham, Assistant Director
AT&T Wholesale
8th Floor
600 North 19th Street
Birmingham, Alabama 35203

Ms. Lynn Allen-Flood
AT&T Wholesale – Contract Negotiations
675 W. Peachtree St. N.E.
34S91
Atlanta, GA 30375

Re: NPCR, Inc. d/b/a Nextel Partners adoption of "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001.

Dear Kay, Randy and Lynn:

The purpose of this letter is to notify BellSouth Telecommunications, Inc., d/b/a AT&T Southeast ("AT&T") that NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners') is exercising its right to adopt the "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001 ("Sprint ICA") as amended, filed and approved in each of the 9-legacy BellSouth states[1]. Nextel Partners is exercising its right pursuant to the

[1] For the purposes of this letter, the 9 legacy BellSouth states means: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

FCC approved Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" as ordered by ("Merger Commitments") in the BellSouth – AT&T merger, WC Docket No. 06-74[2], and 47 U.S.C. § 252(i).

Nextel Partners is a wholly owned subsidiary of Sprint Nextel Corporation, as are Sprint Communications Company L.P. ("Sprint CLEC") and Sprint Spectrum L.P. ("Sprint PCS"). Although neither Nextel Partners nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel Partner's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel Partners in order to expeditiously implement Nextel Partners' adoption.

As AT&T is aware, all relevant state-specific differences among the 9 legacy BellSouth states are already contained within the Sprint ICA. Since the same state-specific terms are applicable to Nextel Partners on a state by state basis, there are no "state-specific pricing and performance plans and technical feasibility" issues to prevent AT&T from immediately making the Sprint ICA available within each applicable state to Nextel Partners pursuant to Merger Commitment No. 1. Likewise, since the Sprint ICA is already TRRO compliant and has an otherwise effective change of law provision, there is no issue to prevent AT&T from also making the Sprint ICA available to Nextel Partners in each applicable state pursuant to Merger Commitment No. 2.

---

[2] Merger Commitment No. 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." (Emphasis added).

Merger Commitment No. 2 states:

> The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the aground 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.

Enclosed are Nextel Partners' completed AT&T forms with respect to Merger Commitment Nos. 1 and 2, with any language within such forms stricken to the extent such language is not contained within the Merger Commitments.

Also enclosed for AT&T's execution are two copies of an adoption document to implement Nextel Partner's adoption of the Sprint ICA. Please sign and return both executed documents for receipt by me no later than Tuesday, May 29, 2007. Upon receipt I will have both documents executed on behalf of Nextel Partners and return one fully executed adoption document to you. I will also cause to be filed with each of the 9 state commissions a copy of the fully executed adoption document along with a copy of the current 1,169 page Sprint ICA, as amended, which I will print off from your website at:

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

To the extent notice may be deemed necessary pursuant to the existing interconnection agreements between Nextel Partners and AT&T, please also consider this letter as Nextel Partners' conditional notice to terminate the existing interconnection agreements between Nextel Partners and AT&T in a given state upon acknowledgement by such state's commission that Nextel Partners has adopted the Sprint ICA. Upon such acknowledgement, the existing interconnection agreement between Nextel Partners and BellSouth Telecommunications, Inc. will then be considered terminated and superseded by the adopted Sprint ICA.

Should AT&T have any questions regarding Nextel Partners' adoption of the Sprint ICA, please do not hesitate to call.

Thank you in advance for your prompt attention to this matter.

Sincerely,

Mark G. Felton

Enclosures

CC: Mr. Joseph M. Chiarelli, Counsel for Nextel Partners
Mr. William R. Atkinson, Counsel for Nextel Partners
Mr. Jim Kite, Interconnection Solutions

TO: Contract Management
311 S Akard
Four AT&T Plaza, 9th floor
Dallas, TX 75202
Fax: 1-800-404-4548

May 18, 2007

RE: ~~Request~~ Notice to Port Interconnection Agreement

Director – Contract Management:

Pursuant to ICA Merger Commitment 7.1 under "Reducing Transaction Costs Associated with Interconnection Agreements," effective December 29, 2006, associated with the merger of AT&T Inc. and BellSouth Corp. ("ICA Merger Commitment 7.1"), NPCR, Inc. d/b/a Nextel Partners ("Carrier") ~~desires to~~ exercise its right to port the existing Interconnection Agreement between BellSouth Telecom. Inc. ("AT&T") and Sprint Compnua. CO, L.P. & Sprint Spectrum L.P. in the state of AL, FL, GA, KY, LA to the state of MS, NC, SC & TN and, by this notice, requests AT&T to ~~initiate a review to~~ support this ~~request~~ exercised right. Carrier understands that pursuant to ICA Merger Commitment 7.1, porting of the Interconnection Agreement is subject to a variety of conditions including (without limitation) technical feasibility, ~~and~~ state-specific pricing, ~~terms and conditions~~ and performance plans. Carrier understands AT&T will reply in writing when its review of this porting ~~request~~ notice has been completed.

	CARRIER NOTICE CONTACT INFO*
NOTICE CONTACT NAME	
NOTICE CONTACT TITLE	Please see attached
STREET ADDRESS	
ROOM OR SUITE	
CITY, STATE, ZIP CODE	
E-MAIL ADDRESS	
TELEPHONE NUMBER	
FACSIMILE NUMBER	
STATE OF INCORPORATION	Delaware
TYPE OF ENTITY (corporation, limited liability company, etc.)	Corporation

~~Enclose proof of certification for state requested.~~

~~Enclose documentation from Telcordia as confirmation of ACNA.~~

~~Enclose documentation from NECA as confirmation of OCN(s).~~

~~Enclose verification of type of entity and registration with Secretary of State.~~

AT&T already has any necessary, applicable information in its systems.

Form completed and submitted by: Nextel Partners

Contact number: Jim Kite @ 913-762-4281

*All requested carrier notice contact information and documentation are required. Be aware that the failure to provide accurate and complete information may result in return of this form to you and a delay in processing your request.

Nextel South Corp. and Nextel West Corp. (collectively "Nextel"), and NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners")
Carrier Contact Notice Information Attachment

All AT&T notices to Nextel or Nextel Partners are to be sent to the same person(s) at the same addresses as identified in the interconnection agreement between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P. a/k/a Sprint Communications Company Limited Partnership and Sprint Spectrum L.P. (collectively "Sprint") dated January 1, 2001 ("the Sprint ICA"). Nextel and Nextel Partners understand Sprint is in the process of preparing a separate written notice to likewise provide AT&T the following updated information regarding the sending of any notices pursuant to the Sprint ICA:

For Sprint, Nextel or Nextel Partners:

Manager, ICA Solutions
Sprint
P. O. Box 7954
Shawnee Mission, Kansas 66207-0954

or

Manager, ICA Solutions
Sprint
KSOPHA0310-3B268
6330 Sprint Parkway
Overland Park, KS 66251
(913) 762-4847 (overnight mail only)

With a copy to:

Legal/Telecom Mgmt Privacy Group
P O Box 7966
Overland Park, KS 66207-0966

or

Legal/Telecom Mgmnt Privacy Group
Mailstop: KSOPKN0214-2A568
6450 Sprint Parkway
Overland Park, KS 66251
913-315-9348 (overnight mail only)

By and Between

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

And

NPCR, Inc. d/b/a Nextel Partners

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., d/b/a AT&T Southeast ("AT&T"), a Georgia Corporation, having offices at 675 W. Peachtree Street, Atlanta, Georgia, 30375, on behalf of itself and its successors and assigns, and NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners") a Delaware Corporation and shall be deemed effective in the respective states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee as of the date it is filed with each state Commission or applicable Authority in such states ("the Effective Date").

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

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

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

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

WHEREAS, Nextel Partners is a wholly owned subsidiary of Sprint Nextel Corporation, as are Sprint CLEC and Sprint PCS and, although neither Nextel Partners nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel Partner's adoption of the Sprint ICA, Sprint CLEC is ready, willing and able to also execute this Agreement as an accommodation party.

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

1. Nextel Partners and AT&T shall adopt in its entirety the 1,166 page Sprint ICA, a copy of which is attached hereto as Exhibit A, and is also available for public view on the AT&T website at:

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

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

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

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

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

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

By: _____

Name: _____

Title: _____

Date: _____

NPCR, Inc. d/b/a Nextel Partners

By: _____

Name: _____

Title: _____

Date: _____

Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P. Sprint Spectrum L.P., as an Accommodating Party

By: _____

Name: _____

Title: _____

Date: _____

Exhibit C

APPENDIX F

Conditions

The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them. Unless otherwise specified herein, the commitments described herein shall become effective on the Merger Closing Date. The commitments described herein shall be null and void if AT&T and BellSouth do not merge and there is no Merger Closing Date.

It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.

MERGER COMMITMENTS

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.

Repatriation of Jobs to the U.S.

AT&T/BellSouth[1] is committed to providing high quality employment opportunities in the U.S. In order to further this commitment, AT&T/BellSouth will repatriate 3,000 jobs that are currently outsourced by BellSouth outside of the U.S. This repatriation will be completed by December 31, 2008. At least 200 of the repatriated jobs will be physically located within the New Orleans, Louisiana MSA.

Promoting Accessibility of Broadband Service

1. By December 31, 2007, AT&T/BellSouth will offer broadband Internet access service (*i.e.*, Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory.[2] To meet this commitment, AT&T/BellSouth will offer broadband Internet access services to at least 85 percent of such living units using wireline technologies (the "Wireline Buildout Area"). AT&T/BellSouth will make available broadband Internet access service to the remaining living units using alternative technologies

[1] AT&T/BellSouth refers to AT&T Inc., BellSouth Corporation, and their affiliates that provide domestic wireline or Wi-Max fixed wireless services.

[2] As used herein, the "AT&T/BellSouth in-region territory" means the areas in which an AT&T or BellSouth operating company is the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i). "AT&T in-region territory" means the area in which an AT&T operating company is the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i), and "BellSouth in-region territory" means the area in which a BellSouth operating company is the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i).

and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies. AT&T/BellSouth further commits that at least 30 percent of the incremental deployment after the Merger Closing Date necessary to achieve the Wireline Buildout Area commitment will be to rural areas or low income living units.[3]

2. AT&T/BellSouth will provide an ADSL modem without charge (except for shipping and handling) to residential subscribers within the Wireline Buildout Area who, between July 1, 2007, and June 30, 2008, replace their AT&T/BellSouth dial-up Internet access service with AT&T/BellSouth's ADSL service and elect a term plan for their ADSL service of twelve months or greater.

3. Within six months of the Merger Closing Date, and continuing for at least 30 months from the inception of the offer, AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area, who have not previously subscribed to AT&T's or BellSouth's ADSL service, a broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of $10 per month.

Statement of Video Roll-Out Intentions

AT&T is committed to providing, and has expended substantial resources to provide, a broad array of advanced video programming services in the AT&T in-region territory. These advanced video services include Uverse, on an integrated IP platform, and HomeZone, which integrates advanced broadband and satellite services. Subject to obtaining all necessary authorizations to do so, AT&T/BellSouth intends to bring such services to the BellSouth in-region territory in a manner reasonably consistent with AT&T's roll-out of such services within the AT&T in-region territory. In order to facilitate the provision of such advanced video services in the BellSouth in-region territory, AT&T /BellSouth will continue to deploy fiber-based facilities and intends to have the capability to reach at least 1.5 million homes in the BellSouth in-region territory by the end of 2007. AT&T/BellSouth agrees to provide a written report to the Commission by December 31, 2007, describing progress made in obtaining necessary authorizations to roll-out, and the actual roll-out of, such advanced video services in the BellSouth in-region territory.

Public Safety, Disaster Recovery

1. By June 1, 2007, AT&T will complete the steps necessary to allow it to make its disaster recovery capabilities available to facilitate restoration of service in BellSouth's in-region territory in the event of an extended service outage caused by a hurricane or other disaster.

2. In order to further promote public safety, within thirty days of the Merger Closing Date, AT&T/BellSouth will donate $1 million to a section 501(c)(3) foundation or public entities for the purpose of promoting public safety.

[3] For purposes of this commitment, a low income living unit shall mean a living unit in AT&T/BellSouth's in-region territory with an average annual income of less than $35,000, determined consistent with Census Bureau data, *see* California Public Utilities Code section 5890(j)(2) (as added by AB 2987) (defining low income households as those with annual incomes below $35,000), and a rural area shall consist of the zones in AT&T/BellSouth's in-region territory with the highest deaveraged UNE loop rates as established by the state commission consistent with the procedures set forth in section 51.507 of the Commission's rules. 47 C.F.R. § 51.507.

Service to Customers with Disabilities

AT&T/BellSouth has a long and distinguished history of serving customers with disabilities. AT&T/BellSouth commits to provide the Commission, within 12 months of the Merger Closing Date, a report describing its efforts to provide high quality service to customers with disabilities.

UNEs

1. The AT&T and BellSouth ILECs shall continue to offer and shall not seek any increase in state-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date. For purposes of this commitment, an increase includes an increased existing surcharge or a new surcharge unless such new or increased surcharge is authorized by (i) the applicable interconnection agreement or tariff, as applicable, and (ii) by the relevant state commission. This commitment shall not limit the ability of the AT&T and BellSouth ILECs and any other telecommunications carrier to agree voluntarily to any different UNE or collocation rates.

2. AT&T/BellSouth shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 CFR §§ 51.319(a) and (e), provide appropriate loop and transport access. In identifying wire centers in which there is no impairment pursuant to 47 CFR §§ 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.

3. AT&T/BellSouth shall cease all ongoing or threatened audits of compliance with the Commission's EELs eligibility criteria (as set forth in the *Supplemental Order Clarification*'s significant local use requirement and related safe harbors, and the *Triennial Review Order*'s high capacity EEL eligibility criteria), and shall not initiate any new EELs audits.

Reducing Transaction Costs Associated with Interconnection Agreements

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.

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.

3. The AT&T/BellSouth ILECs shall allow a requesting telecommunications carrier to use its pre-existing interconnection agreement as the starting point for negotiating a new agreement.

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.

Special Access

Each of the following special access commitments shall remain in effect until 48 months from the Merger Closing Date.

1. AT&T/BellSouth affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act ("AT&T/BellSouth BOCs")[4] will implement, in the AT&T and BellSouth Service Areas,[5] the Service Quality Measurement Plan for Interstate Special Access Services ("the Plan"), similar to that set forth in the SBC/AT&T Merger Conditions, as described herein and in Attachment A to this Appendix F. The AT&T/BellSouth BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed therein. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the AT&T/BellSouth BOCs' monthly performance in delivering interstate special access services within each of the states in the AT&T and BellSouth Service Areas. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) AT&T and BellSouth section 272(a) affiliates, (ii) their BOC and other affiliates, and (iii) non-affiliates.[6] The AT&T/BellSouth BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter. The AT&T/BellSouth BOCs shall implement the Plan for the first full quarter following the Merger Closing Date. This commitment shall terminate on the earlier of (i) 48 months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when AT&T/BellSouth files its 16th quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.

2. AT&T/BellSouth shall not increase the rates paid by existing customers (as of the Merger Closing Date) of DS1 and DS3 local private line services that it provides in the AT&T/BellSouth in-region territory pursuant to, or referenced in, TCG FCC Tariff No. 2 above their level as of the Merger Closing Date.

3. AT&T/BellSouth will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.

4. To ensure that AT&T/BellSouth may not provide special access offerings to its affiliates that are not available to other special access customers, before AT&T/BellSouth provides a new or modified contract tariffed service under section 69.727(a) of the Commission's rules to its own section 272(a)

[4] For purposes of clarity, the special access commitments set forth herein do not apply to AT&T Advanced Solutions, Inc. and the Ameritech Advanced Data Services Companies, doing business collectively as "ASI."

[5] For purposes of this commitment, "AT&T and BellSouth Service Areas" means the areas within AT&T/BellSouth's in-region territory in which the AT&T and BellSouth ILECs are Bell operating companies as defined in 47 U.S.C. § 153(4)(A).

[6] BOC data shall not include retail data.

affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates. AT&T/BellSouth also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.[7]

5. No AT&T/BellSouth ILEC may increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T/BellSouth in-region territory, as set forth in tariffs on file at the Commission on the Merger Closing Date, and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments.

6. In areas within the AT&T/BellSouth in-region territory where an AT&T/BellSouth ILEC has obtained Phase II pricing flexibility for price cap services ("Phase II areas"), such ILEC will offer DS1 and DS3 channel termination services, DS1 and DS3 mileage services, and Ethernet services,[8] that currently are offered pursuant to the Phase II Pricing Flexibility Provisions of its special access tariffs,[9] at rates that are no higher than, and on the same terms and conditions as, its tariffed rates, terms, and conditions as of the Merger Closing Date for such services in areas within its in-region territory where it has not obtained Phase II pricing flexibility. In Phase II areas, AT&T/BellSouth also will reduce by 15% the rates in its interstate tariffs as of the Merger Closing Date for Ethernet services that are not at that time subject to price cap regulation. The foregoing commitments shall not apply to DS1, DS3, or Ethernet services provided by an AT&T/BellSouth ILEC to any other price cap ILEC, including any affiliate of such other price cap ILEC,[10] unless such other price cap ILEC offers DS1 and DS3 channel termination and mileage services, and price cap Ethernet services in all areas in which it has obtained Phase II pricing flexibility relief for such services (hereinafter "Reciprocal Price Cap Services") at rates, and on the terms and conditions, applicable to such services in areas in which it has not obtained Phase II pricing flexibility for such services, nor shall AT&T/BellSouth provide the aforementioned 15% discount to such price cap ILEC or affiliate thereof unless such ILEC makes generally available a reciprocal discount for any Ethernet service it offers outside of price cap regulation (hereinafter "Reciprocal Non-Price Cap Services"). Within 14 days of the Merger Closing Date, AT&T/BellSouth will provide notice of this commitment to each price cap ILEC that purchases, or that has an affiliate that purchases, services subject to this commitment from an AT&T/BellSouth ILEC. If within 30 days thereafter, such price cap ILEC does not: (i) affirmatively inform AT&T/BellSouth and the Commission of its intent to sell Reciprocal Price Cap Services in areas where it has received Phase II pricing flexibility for such services at the rates, terms, and conditions that apply in areas where it has

[7] Neither this merger commitment nor any other merger commitment herein shall be construed to require AT&T/BellSouth to provide any service through a separate affiliate if AT&T/BellSouth is not otherwise required by law to establish or maintain such separate affiliate.

[8] The Ethernet services subject to this commitment are AT&T's interstate OPT-E-MAN, GigaMAN and DecaMAN services and BellSouth's interstate Metro Ethernet Service.

[9] The Phase II Pricing Flexibility Provisions for DS1 and DS3 services are those set forth in Ameritech Tariff FCC No. 2, Section 21; Pacific Bell Tariff FCC No. 1, Section 31; Nevada Bell Tariff FCC No. 1, Section 22; Southwestern Bell Telephone Company Tariff FCC No. 73, Section 39; Southern New England Telephone Tariff FCC No. 39, Section 24; and BellSouth Telecommunications Tariff FCC No. 1, Section 23.

[10] For purposes of this commitment, the term "price cap ILEC" refers to an incumbent local exchange carrier that is subject to price cap regulation and all of its affiliates that are subject to price cap regulation. The term "affiliate" means an affiliate as defined in 47 U.S.C. § 153(1) and is not limited to affiliates that are subject to price cap regulation.

not received such flexibility, and to provide a 15% discount on Reciprocal Non-Price Cap Services; and (ii) file tariff revisions that would implement such changes within 90 days of the Merger Closing Date (a "Non-Reciprocating Carrier"), the AT&T/BellSouth ILECs shall be deemed by the FCC to have substantial cause to make any necessary revisions to the tariffs under which they provide the services subject to this commitment to such Non-Reciprocating Carrier, including any affiliates, to prevent or offset any change in the effective rate charged such entities for such services. The AT&T/BellSouth ILECs will file all tariff revisions necessary to effectuate this commitment, including any provisions addressing Non-Reciprocating Carriers and their affiliates, within 90 days from the Merger Closing Date.

7. AT&T/BellSouth will not oppose any request by a purchaser of interstate special access services for mediation by Commission staff of disputes relating to AT&T/BellSouth's compliance with the rates, terms, and conditions set forth in its interstate special access tariffs and pricing flexibility contracts or to the lawfulness of the rates, terms, and conditions in such tariffs and contracts, nor shall AT&T/BellSouth oppose any request that such disputes be accepted by the Commission onto the Accelerated Docket.

8. The AT&T/BellSouth ILECs will not include in any pricing flexibility contract or tariff filed with the Commission after the Merger Closing Date access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs, rather than special access services.

9. Within 60 days after the Merger Closing Date, the AT&T/BellSouth ILECs will file one or more interstate tariffs that make available to customers of DS1, DS3, and Ethernet service reasonable volume and term discounts without minimum annual revenue commitments (MARCs) or growth discounts. To the extent an AT&T/BellSouth ILEC files an interstate tariff for DS1, DS3, or Ethernet services with a varying MARC, it will at the same time file an interstate tariff for such services with a fixed MARC. For purposes of these commitments, a MARC is a requirement that the customer maintain a minimum specified level of spending for specified services per year.

10. If, during the course of any negotiation for an interstate pricing flexibility contract, AT&T/BellSouth offers a proposal that includes a MARC, AT&T/BellSouth will offer an alternative proposal that gives the customer the option of obtaining a volume and/or term discount(s) without a MARC. If, during the course of any negotiation for an interstate pricing flexibility contract, AT&T/BellSouth offers a proposal that includes a MARC that varies over the life of the contract, AT&T/BellSouth will offer an alternative proposal that includes a fixed MARC.

11. Within 14 days of the Merger Closing Date, the AT&T/BellSouth ILECs will give notice to customers of AT&T/BellSouth with interstate pricing flexibility contracts that provide for a MARC that varies over the life of the contract that, within 45 days of such notice, customers may elect to freeze, for the remaining term of such pricing flexibility contract, the MARC in effect as of the Merger Closing Date, provided that the customer also freezes, for the remaining term of such pricing flexibility contract, the contract discount rate (or specified rate if the contract sets forth specific rates rather than discounts off of referenced tariffed rates) in effect as of the Merger Closing Date.

Transit Service

The AT&T and BellSouth ILECs will not increase the rates paid by existing customers for their existing tandem transit service arrangements that the AT&T and BellSouth ILECs provide in the AT&T/BellSouth in-region territory.[11]

ADSL Service[12]

1. Within twelve months of the Merger Closing Date, AT&T/BellSouth will deploy and offer within the BellSouth in-region territory ADSL service to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service. AT&T/BellSouth will continue to offer this service in each state for thirty months after the "Implementation Date" in that state. For purposes of this commitment, the "Implementation Date" for a state shall be the date on which AT&T/BellSouth can offer this service to eighty percent of the ADSL-capable premises in BellSouth's in-region territory in that state.[13] Within twenty days after meeting the Implementation Date in a state, AT&T/BellSouth will file a letter with the Commission certifying to that effect. In all events, this commitment will terminate no later than forty-two months after the Merger Closing Date.

2. AT&T/BellSouth will extend until thirty months after the Merger Closing Date the availability within AT&T's in-region territory of ADSL service, as described in the ADSL Service Merger Condition, set forth in Appendix F of the *SBC/AT&T Merger Order* (FCC 05-183).

3. Within twelve months of the Merger Closing Date, AT&T/BellSouth will make available in its in-region territory an ADSL service capable of speeds up to 768 Kbps to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service ("Stand Alone 768 Kbps service"). AT&T/BellSouth will continue to offer the 768 Kbps service in a state for thirty months after the "Stand Alone 768 Kbps Implementation Date" for that state. For purposes of this commitment, the "Stand Alone 768 Kbps Implementation Date" for a state shall be the date on which AT&T/BellSouth can offer the Stand Alone 768 Kbps service to eighty percent of the ADSL-capable premises in AT&T/BellSouth's in-region territory in that state. The Stand Alone 768 Kbps service will be offered at a rate of not more than $19.95 per month (exclusive of regulatory fees and taxes). AT&T/BellSouth may make available such services at other speeds at prices that are competitive with the broadband market taken as a whole.

ADSL Transmission Service

AT&T/BellSouth will offer to Internet service providers, for their provision of broadband Internet access service to ADSL-capable retail customer premises, ADSL transmission service in the combined

[11] Tandem transit service means tandem-switched transport service provided to an originating carrier in order to indirectly send intraLATA traffic subject to § 251(b)(5) of the Communications Act of 1934, as amended, to a terminating carrier, and includes tandem switching functionality and tandem switched transport functionality between an AT&T/BellSouth tandem switch location and the terminating carrier.

[12] The commitments set forth under the heading "ADSL Service" are, by their terms, available to retail customers only. Wholesale commitments are addressed separately under the heading "ADSL Transmission Service."

[13] After meeting the implementation date in each state, AT&T/BellSouth will continue deployment so that it can offer the service to all ADSL-capable premises in its in-region territory within twelve months of the Merger Closing Date.

AT&T/BellSouth territory that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date.[14] Such wholesale offering will be at a price not greater than the retail price in a state for ADSL service that is separately purchased by customers who also subscribe to AT&T/BellSouth local telephone service.

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151).

2. AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service.[15] This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination.

This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment does not apply to AT&T/BellSouth's enterprise managed IP services, defined as services available only to enterprise customers[16] that are separate services from, and can be purchased without, AT&T/BellSouth's wireline broadband Internet access service, including, but not limited to, virtual private network (VPN) services provided to enterprise customers. This commitment also does not apply to AT&T/BellSouth's Internet Protocol television (IPTV) service. These exclusions shall not result in the privileging, degradation, or prioritization of packets transmitted or received by AT&T/BellSouth's non-enterprise customers' wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, as defined above.

---

[14] An ADSL transmission service shall be considered "functionally the same" as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date if the ADSL transmission service relies on ATM transport from the DSLAM (or equivalent device) to the interface with the Internet service provider, and provides a maximum asymmetrical downstream speed of 1.5Mbps or 3.0Mbps, or a maximum symmetrical upstream/downstream speed of 384Kbps or 416Kbps, where each respective speed is available (the "Broadband ADSL Transmission Service"). Nothing in this commitment shall require AT&T/BellSouth to serve any geographic areas it currently does not serve with Broadband ADSL Transmission Service or to provide Internet service providers with broadband Internet access transmission technology that was not offered by AT&T to such providers in its in-region territory as of the Merger Closing Date.

[15] For purposes of this commitment, AT&T/BellSouth's wireline broadband Internet access service and its Wi-Max fixed wireless broadband Internet access service are, collectively, AT&T/BellSouth's "wireline broadband Internet access service."

[16] "Enterprise customers" refers to that class of customer identified as enterprise customers on AT&T's website (http://www.att.com) as of December 28, 2006.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to, any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.

Internet Backbone

1. For a period of three years after the Merger Closing Date, AT&T/BellSouth will maintain at least as many discrete settlement-free peering arrangements for Internet backbone services with domestic operating entities within the United States as they did on the Merger Closing Date, provided that the number of settlement-free peering arrangements that AT&T/BellSouth is required to maintain hereunder shall be adjusted downward to account for any mergers, acquisitions, or bankruptcies by existing peering entities or the voluntary election by a peering entity to discontinue its peering arrangement. If on the Merger Closing Date, AT&T and BellSouth both maintain a settlement free peering arrangement for Internet backbone services with the same entity (or an affiliate thereof), the separate arrangements shall count as one settlement-free peering arrangement for purposes of determining the number of discrete peering entities with whom AT&T/BellSouth must peer pursuant to this commitment. AT&T/BellSouth may waive terms of its published peering policy to the extent necessary to maintain the number of peering arrangements required by this commitment. Notwithstanding the above, if within three years after the Merger Closing Date, one of the ten largest entities with which AT&T/BellSouth engages in settlement free peering for Internet backbone services (as measured by traffic volume delivered to AT&T/BellSouth's backbone network facilities by such entity) terminates its peering arrangement with AT&T/BellSouth for any reason (including bankruptcy, acquisition, or merger), AT&T/BellSouth will replace that peering arrangement with another settlement free peering arrangement and shall not adjust its total number of settlement free peers downward as a result.

2. Within thirty days after the Merger Closing Date, and continuing for three years thereafter, AT&T/BellSouth will post its peering policy on a publicly accessible website. During this three-year period, AT&T/BellSouth will post any revisions to its peering policy on a timely basis as they occur.

Forbearance

1. AT&T/BellSouth will not seek or give effect to a ruling, including through a forbearance petition under section 10 of the Communications Act (the "Act") 47 U.S.C. 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

2. AT&T/BellSouth will not seek or give effect to any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities under these merger commitments during the period in which those obligations are in effect.

Wireless

1. AT&T/BellSouth shall assign and/or transfer to an unaffiliated third party all of the 2.5 GHz spectrum (broadband radio service (BRS)/educational broadband service (EBS)) currently licensed to or leased by BellSouth within one year of the Merger Closing Date.

2. By July 21, 2010, AT&T/BellSouth agrees to: (1) offer service in the 2.3 GHz band to 25% of the population in the service area of AT&T/BellSouth's wireless communications services (WCS) licenses,

for mobile or fixed point-to-multi-point services, or (2) construct at least five permanent links per one million people in the service area of AT&T/BellSouth's WCS licenses, for fixed point-to-point services. In the event AT&T/BellSouth fails to meet either of these service requirements, AT&T/BellSouth will forfeit the unconstructed portion of the individual WCS licenses for which it did not meet either of these service requirements as of July 21, 2010; provided, however, that in the event the Commission extends the July 21, 2010, buildout date for 2.3GHz service for the WCS industry at large ("Extended Date"), the July 21, 2010 buildout date specified herein shall be modified to conform to the Extended Date. The wireless commitments set forth above do not apply to any 2.3 GHz wireless spectrum held by AT&T/BellSouth in the state of Alaska.

Divestiture of Facilities

Within twelve months of the Merger Closing Date, AT&T/BellSouth will sell to an unaffiliated third party(ies) an indefeasible right of use ("IRU") to fiber strands within the existing "Lateral Connections," as that term is defined in the *SBC/AT&T Consent Decree*,[17] to the buildings listed in Attachment B to this Appendix F ("BellSouth Divestiture Assets"). These divestitures will be effected in a manner consistent with the divestiture framework agreed to in the *SBC/AT&T Consent Decree*, provided that such divestitures will be subject to approval by the FCC, rather than the Department of Justice.

Tunney Act

AT&T is a party to a Consent Decree entered into following the merger of SBC and AT&T (the "Consent Decree"). The Consent Decree documents the terms under which AT&T agreed to divest special access facilities serving 383 buildings within the former SBC in-region ILEC territory (the "SBC Divestiture Assets"). In its Order approving the AT&T/SBC merger, the Commission also required the divestiture of these same facilities on the terms and conditions contained in the Consent Decree. The Consent Decree is currently under review pursuant to the Tunney Act in the U.S. District Court for the District of Columbia (the "Court") in U.S. v. SBC Communications, Inc. and AT&T Corp., Civil Action No. 1:05CV02102 (EGS) (D.D.C.), where the Court is reviewing the adequacy of the remedy contained in the Consent Decree to address the competitive concerns described in the Complaint filed by the Department of Justice (DOJ).

If it is found in a final, non-appealable order, that the remedy in the Consent Decree is not adequate to address the concerns raised in the Complaint and AT&T and the DOJ agree to a modification of the Consent Decree (the "Modified Consent Decree"), then AT&T agrees that (1) AT&T/BellSouth will conform its divestiture of the BellSouth Divestiture Assets to the terms of the Modified Consent Decree; and (2) AT&T/BellSouth will negotiate in good faith with the Commission to determine whether the conditions imposed on AT&T/BellSouth in the Commission order approving the merger of AT&T and BellSouth satisfies, with respect to the BellSouth territory, the concerns addressed in the Modified Consent Decree.

Certification

AT&T/BellSouth shall annually file a declaration by an officer of the corporation attesting that AT&T/BellSouth has substantially complied with the terms of these commitments in all material

[17] *See United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Final Judgment (D.D.C. filed Oct. 27, 2005).

respects. The first declaration shall be filed 45 days following the one-year anniversary of the Merger Closing Date, and the second, third, and fourth declarations shall be filed one, two, and three years thereafter, respectively.

Exhibit D

Found Document Rank 1 of 1 Database FCOM-FCC

1999 WL 587307 (F.C.C.), 15 F.C.C.R. 23,318, 15 FCC Rcd. 23,318
(Cite as: 15 F.C.C.R. 23318)

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF GLOBAL NAPS SOUTH, INC. PETITION FOR PREEMPTION OF JURISDICTION OF THE VIRGINIA STATE CORPORATION COMMISSION REGARDING INTERCONNECTION DISPUTE WITH BELL ATLANTIC-VIRGINIA, INC.
CC Docket No. 99-198

DA 99-1552
Adopted: August 5, 1999
Released: August 5, 1999

*23318 By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the petition of Global NAPs South, Inc. (GNAPs) for preemption of jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to an arbitration proceeding involving GNAPs and Bell Atlantic-Virginia, Inc. (Bell Atlantic). [FN1] The Commission placed GNAPs' preemption petition on public notice on May 24, 1999. [FN2] Ameritech, Bell Atlantic, Connect!, Cox Communications, Inc., and the Virginia Commission filed comments, and GNAPs filed a reply.

2. GNAPs seeks preemption of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended. [FN3] Section 252(e)(5) authorizes the *23319 Commission to preempt a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. [FN4] Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier (LEC). [FN5] For the reasons discussed below, we find that the Virginia Commission has not "failed to act" within the meaning of our rules implementing section 252(e)(5). [FN6] We therefore deny GNAPs' petition and do not preempt the Virginia Commission.

II. BACKGROUND

A. Statutory Provisions

3. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide requesting telecommunications

carriers interconnection, unbundled network elements, and services for resale. [FN7] Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251. [FN8] Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations between the *23320 carriers, (2) mediation by state commissions, or (3) arbitration by state commissions. [FN9] These interconnection agreements must then be submitted for approval to the appropriate state commission. [FN10]

4. In addition, section 252(i) provides another means for establishing interconnection. Pursuant to section 252(i), local exchange carriers must "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." [FN11] Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement. Although there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve, [FN12] states may adopt "procedures for making agreements available to requesting carriers on an expedited basis." [FN13] As the Commission observed three years ago, a party seeking interconnection pursuant to section 252(i) "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." [FN14] Otherwise, the "non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251." [FN15]

5. *Section 252(e)(5) directs the Commission to assume responsibility for any* proceeding in which the state commission "fails to act to carry out its responsibility" under section 252:

> (5) COMMISSION TO ACT IF STATE WILL NOT ACT.-If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an *23321 order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission. [FN16]

B. Commission's Rules

6. The Local Competition Order adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission...." [FN17] The Local Competition Order concluded that the Commission would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5). [FN18] Rather, the Local Competition Order interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner. The Local Competition Order limited the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to "when a state

commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(c)." [FN19] Under the Commission's rules, "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act." [FN20]

C. Procedural History

7. On July 2, 1998, GNAPs asked Bell Atlantic to commence negotiations for interconnection. [FN21] The parties subsequently attempted to negotiate the terms of an interconnection agreement. [FN22] In August 1998, GNAPs concluded that it could meet its ***23322** interconnection needs by opting-into a 1996 agreement between Bell Atlantic and MFS Intelenet (MFS) pursuant to section 252(i). [FN23] As a result, GNAPs advised Bell Atlantic that GNAPs wanted to interconnect with Bell Atlantic on the same terms as contained in Bell Atlantic's 1996 agreement with MFS (1996 MFS Agreement). [FN24] According to GNAPs, Bell Atlantic refused to honor GNAPs' right to opt-into the 1996 MFS Agreement without modifications. [FN25]

8. On November 16, 1998, GNAPs filed a petition for arbitration with the Virginia Commission, [FN26] pursuant to section 252(b) of the Act. [FN27] On November 25, 1998, GNAPs filed a motion requesting expedited treatment of its petition and further requesting that Bell Atlantic ***23323** provide GNAPs interconnection on an interim basis. [FN28] On December 11, 1998, Bell Atlantic filed its response to the GNAPs arbitration petition and motion. [FN29]

9. In a January 29, 1999 order, the Virginia Commission determined that there was no need to hold an evidentiary hearing in the GNAPs/Bell Atlantic arbitration proceeding, having found that the issues raised by the parties presented only legal questions. [FN30] In the same order, however, the Virginia Commission encouraged the parties to supplement their pleadings in order to further clarify their positions on the issues, and to address how the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board might impact the arbitration of unresolved issues between GNAPs and Bell Atlantic. [FN31]

10. On February 10, 1999, Bell Atlantic filed a supplemental brief in response to the January 29, 1999 order. [FN32] According to the Virginia Commission's April 2, 1999 final order, Bell Atlantic argued in its supplemental brief that the Supreme Court's reinstatement of section 51.809 of the Commission's rules did not entitle GNAPs to adopt Bell Atlantic's 1996 MFS Agreement. [FN33] On February 10, 1999, GNAPs also filed a supplemental brief in response to the January 29, 1999 order. [FN34] According to the Virginia Commission's April 2, 1999 final order, GNAPs argued in its supplemental brief that it was entitled to reciprocal compensation for terminating Internet Service Provider (ISP) traffic; that it should be able to opt-into the 1996 MFS Agreement for a full three-year term; and that section 51.809 of the Commission's rules did not prevent GNAPs from adopting Bell Atlantic's 1996 MFS Agreement. [FN35] GNAPs further asserted that Bell Atlantic acted in bad faith by not permitting it to opt-into the 1996 MFS Agreement in August 1998. [FN36]

***23324** 11. On February 26, 1999, the Commission released its ISP Compensation Ruling and NPRM. [FN37] On March 11, 1999, the Virginia Commission released an

order scheduling oral argument so that the parties could address what effect, if any, the Commission's ISP Compensation Ruling and NPRM and the Supreme Court's decision might have on the resolution of the GNAPs/Bell Atlantic arbitration proceeding. [FN38] Oral argument was held on March 25, 1999. [FN39]

12. On April 2, 1999, the Virginia Commission issued its final order in the GNAPs/Bell Atlantic arbitration proceeding. In its final order, the Virginia Commission acknowledged that the 1996 MFS Agreement would terminate on July 1, 1999 and that any carrier opting-into this agreement would necessarily find themselves bound by this termination date, unless otherwise negotiated. [FN40] The Virginia Commission noted that in light of the very limited time remaining under the 1996 MFS Agreement, there would likely be only thirty days, at most, from the time an adopted GNAPs/Bell Atlantic agreement based on the 1996 MFS Agreement would be approved until Bell Atlantic could terminate the agreement pursuant to the contract terms. [FN41] Thus, citing both the maxim "equity will not do a vain or useless thing," and the "reasonable time" language in section 51.809(c) of the Commission's rules, the Virginia Commission denied GNAPs' petition to adopt the 1996 MFS Agreement and dismissed the GNAPs/Bell Atlantic arbitration proceeding. [FN42]

13. On April 21, 1999, GNAPs filed a petition for reconsideration of the April 2, 1999 final order with the Virginia Commission. [FN43] Under the Virginia Commission's rules, an order becomes final within 21 days after entry, unless modified or vacated in a response to a petition for reconsideration or on the Virginia Commission's own motion. [FN44] The Virginia Commission ***23325** elected not to act in response to GNAPs' petition for reconsideration and therefore allowed its April 2, 1999 order to become final. [FN45]

D. GNAPs' Petition for Preemption of Jurisdiction

14. GNAPs requests in its petition that the Commission "preempt the jurisdiction" of the arbitration proceeding it requested before the Virginia Commission, pursuant to section 252(e)(5). [FN46] GNAPs alleges that the April 2, 1999 final order is a "plain failure of the [Virginia Commission] to fulfill its responsibilities under the Act." [FN47] GNAPs does not allege, however, that the Virginia Commission "failed to act" upon its arbitration request in a timely manner, nor that the April 2, 1999 final order was untimely rendered. [FN48]

15. GNAPs alleges that, without identifying any provision of the 1996 MFS Agreement that was technically infeasible or impractical, or any rate in that agreement that was based on outdated cost analyses, the Virginia Commission found that the 1996 MFS Agreement was too old to be opted-into and denied and dismissed GNAPs' arbitration petition. [FN49] GNAPs maintains that it does not know whether the Virginia Commission's April 2, 1999 final order is the product of confusion regarding whether or not its efforts to opt-into the 1996 MFS Agreement were subject to arbitration; confusion regarding the jurisdictional status of ISP-bound calls; uncertainty following the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board; or some other misunderstanding. [FN50] GNAPs argues, however, that the effect of the April 2, 1999 final order is to put them "back at ground zero" and leave them without an interconnection agreement nearly a year after their negotiations with Bell Atlantic began. [FN51] In light of this outcome, GNAPs alleges that the Virginia Commission has "failed to act to carry

out its responsibilities under section 252 of the Act." [FN52]

*23326 III. DISCUSSION

16. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]." [FN53] Here, the Virginia Commission has not "failed to act" under Commission rules implementing section 252(e)(5) solely because it has issued a decision denying GNAPs the terms and conditions on which it sought to interconnect with Bell Atlantic. [FN54] As noted above, in the Local Competition Order, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's failure to act, noting its belief that "states [would] meet their responsibilities and obligations under the 1996 Act." [FN55] Therefore, the Commission determined that it would preempt a state commission's jurisdiction for "failure to act" under section 252(e)(5) only in those "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)." [FN56] Thus, under the Commission's current rules, a state commission does not "fail to act" when it responds to a request for arbitration but subsequently dismisses or denies an arbitration within the nine month time limit in section 252(b)(4)(C).

17. Applying the Commission's rules in this instance, we find that the Virginia Commission responded to GNAPs' request for arbitration by quickly initiating proceedings. The Virginia Commission established a series of pleading cycles and afforded the parties opportunities to address the impact of the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board and the Commission's ISP Compensation Ruling and NPRM. In addition, an oral argument was held on March 25, 1999.

18. Moreover, GNAPs does not claim that the Virginia Commission acted outside of any statutory time frame. [FN57] Although GNAPs contends that the Commission "failed to act to carry out its responsibilities under section 252 of the Act," we note that the Virginia Commission issued its April 2, 1999 final order within nine months after Bell Atlantic received GNAPs' request for interconnection, consistent with the requirements of section 252(b)(4)(C). According to the Virginia Commission, GNAPs presented no evidence regarding terms for an *23327 interconnection agreement with Bell Atlantic in the event the Virginia Commission determined it was not reasonable to require Bell Atlantic to offer the soon to expire 1996 MFS Agreement to GNAPs. [FN58] Because section 51.801 of the Commission's rules does not focus on the validity of state commission decisions, we do not see a basis for examining the underlying reasoning of the Virginia Commission. While we recognize the frustration GNAPs has experienced in its efforts to obtain interconnection with Bell Atlantic, we cannot conclude that the Virginia Commission has "failed to act" under the Commission's rules implementing section 252(e)(5).

19. Commission precedent supports our conclusion that there is no basis for preemption here. In the Low Tech Order, the Commission denied three preemption petitions filed by Low Tech Designs, Inc. (Low Tech), pursuant to section 252(e)(5). [FN59] The three state commission arbitration proceedings at issue

dismissed or denied Low Tech's arbitration petition on the basis that Low Tech was not yet a certified carrier in the relevant state. [FN60] The Commission held that a state commission has not "failed to act" when it issues a decision that dismisses or denies an arbitration petition on grounds that prevent it from resolving the substantive issues in the arbitration petition. [FN61] There, as here, the petitioner essentially argued that there was a failure to act because the state commission had erroneously applied the law and our rules in rendering its decision. The Commission concluded that there was no basis to examine the substantive validity of the state commission's decision under section 51.801 of its rules. Accordingly, we do not preempt the Virginia Commission's jurisdiction and do not assume responsibility for this arbitration.

20. Finally, we note that the Commission's decision not to preempt the jurisdiction of the Virginia Commission does not leave GNAPs without a remedy. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court. [FN62] Thus, GNAPs may still challenge the Virginia Commission determination in federal district court pursuant to section 252(e)(6).

21. In sum, we conclude that GNAPs has not met its burden of demonstrating that the Virginia Commission has "failed to act" within the meaning of the Commission's rules implementing section 252(e)(5). Rather, the Virginia Commission has met the requirements of ***23328** the statute and our rules by responding to GNAPs' request for arbitration and rendering a final decision in the arbitration within nine months after Bell Atlantic received GNAPs' request for interconnection. We therefore do not preempt the jurisdiction of the Virginia Commission pursuant to the authority granted the Commission in section 252(e)(5).

IV. CONCLUSION

22. For the foregoing reasons, we deny GNAPs' petition for Commission preemption of jurisdiction of GNAPs' arbitration proceeding with Bell Atlantic in Virginia.

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), the petition for Commission preemption of jurisdiction filed by Global NAPs South, Inc. on May 19, 1999 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert C. Atkinson
Deputy Chief
Common Carrier Bureau

FN1. Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 99-198, filed with the Commission on May 19, 1999 (Virginia Petition).

FN2. Pleading Cycle Established for Comments on Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic - Virginia, Public Notice, CC Docket No. 99-198, DA 99-984 (rel. May 24, 1999) (Public Notice). The Public Notice established a deadline for comment of June 8, 1999, and a deadline for reply comments of June 17, 1999. On May 26, 1999, GNAPs requested that the Commission extend the comment and reply dates by one week because the Virginia Commission was not served with the Virginia Petition until May 26, 1999. On June 3, 1999, the Common Carrier Bureau released an order extending the deadline for comment to June 15, 1999, and the deadline for reply comments to June 24, 1999. *In the Matter of Global NAPs South, Inc. Petition for Preemption of the* Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Order, CC Docket No. 99-198, DA 99-1090 (rel. Jun. 3, 1999).

FN3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. §§ 151 et seq. Hereafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

FN4. 47 U.S.C. § 252(e)(5).

FN5. See generally 47 U.S.C. § 252.

FN6. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16122-16132 (1996) (Local Competition Order), aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) and Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8 th Cir. 1997), petition for cert. granted, Nos. 97-829, 97-830, 97-831, 97-1097, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively Iowa Utils. Bd. v. FCC), aff'd in part and remanded, AT&T Corp., et al. v. Iowa Utils. Bd. et al., 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), further recons. pending; see also 47 C.F.R. §§ 51.801(b), 51.803(b).

FN7. See generally 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as "interconnection."

FN8. See generally 47 U.S.C. § 252.

FN9. See 47 U.S.C. § 252(a), (b).

FN10. 47 U.S.C. § 252(e)(1).

FN11. 47 U.S.C. § 251(i).

FN12. 47 U.S.C. § 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission"); see also Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321 (indicating that carriers "seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 252 requests").

FN13. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321.

FN14. Id. An expedited process for section 252(i) opt-ins would necessarily be substantially quicker than the time frame for negotiation, and approval, of a new interconnection agreement since the underlying agreement has already been subject to state review under section 252(e).

FN15. Id.

FN16. 47 U.S.C. § 252(e)(5).

FN17. Local Competition Order, 11 FCC Rcd at 16127, ¶ 1283.

FN18. Id. at 16128, ¶ 1285.

FN19. Id. at 16128, ¶ 1285. See also 47 C.F.R. § 51.801(b); In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina, Order, 13 FCC Rcd 1755, 1758-1759, ¶ 5 (1997) (Low Tech Order), recon. denied, CC Docket Nos. 97-163, 97-164, 97-165, FCC 99-71 (rel. Apr. 13, 1999). The Commission has indicated that there is no "failure to act" when an interconnection agreement is "deemed approved" under section 252(e)(4) as a result of state commission inaction. Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285; 47 U.S.C. § 252(e)(4).

FN20. 47 C.F.R. § 51.803(b); see also Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

FN21. Virginia Petition at 1.

FN22. Id.

FN23. Id. Section 252(i) provides that: "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under [section 252] 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 U.S.C. § 252(i). At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's

interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt-into an existing contract as a whole rather than "pick and choose" different elements from different existing contracts. Iowa Utils. Bd., 120 F.3d at 800-801. The Supreme Court since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. AT&T Corp., 119 S.Ct. at 738; see generally 47 C.F.R. § 51.809.

FN24. Virginia Petition at 1.

FN25. Id. at 2. If a local exchange carrier fails to recognize the rights of an opt-in carrier, that carrier may seek expedited relief from this Commission pursuant to section 208. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321; 47 U.S.C. § 208. In this case, GNAPs decided to pursue arbitration pursuant to section 252(b) and during the arbitration proceeding that followed, sought to enter into an interconnection agreement with Bell Atlantic identical to the 1996 MFS Agreement. Bell Atlantic asserts in this proceeding that GNAPs has no right to opt-into provisions relating to reciprocal compensation, arguing that section 252(i) only permits carriers to opt-into provisions of interconnection agreements that are based on the requirements of section 251. Bell Atlantic Comments at 4. We reject Bell Atlantic's argument, as our rules establish only two limited exceptions to the right of carriers to opt-into an interconnection agreement. See 47 C.F.R. § 51.809(b).

FN26. Petition of Global NAPs South, Inc. for Arbitration of Unresolved Issues from Interconnection Negotiations with Bell Atlantic-Virginia, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996, Final Order, No. PUC980173 (Virginia Commission Apr. 2, 1999) at 1 (Virginia Final Order) (filed as an attachment to Virginia Petition).

FN27. The procedural history of this proceeding is complex because it involves both opt-in and arbitration attempts by GNAPs. GNAPs should have been able to exercise its opt-in right under section 252(i) on an expedited basis. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321. Thus, for example, a carrier should be able to notify the local exchange carrier that it is exercising this right by submitting a letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communication should be sent. In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date.

FN28. Virginia Final Order at 2.

FN29. Id. at 1.

FN30. Id. at 2.

FN31. Id. See generally AT&T Corp., 119 S.Ct. at 738.

FN32. Virginia Final Order at 2.

FN33. Id. at 2-3. See also 119 S.Ct. at 738. Section 51.809 of the Commission's rules describes the availability of provisions of existing interconnection agreements to other telecommunications carriers under section 252(i) of the Act. 47 C.F.R. § 51.809.

FN34. Virginia Final Order at 2.

FN35. Id. at 3-4.

FN36. Id. at 3.

FN37. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (rel. Feb. 26, 1999) (ISP Compensation Ruling and NPRM).

FN38. Virginia Final Order at 4-5.

FN39. Id. at 5.

FN40. Id.

FN41. Id. at 5-6.

FN42. Id. Section 51.809(c) of the Commission's rules provides that "[I]ndividual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers ... for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act." 47 C.F.R. § 51.809(c).

FN43. Virginia Petition at 6.

FN44. Id.

FN45. Id.

FN46. Id. at 1.

FN47. Id. at 6.

FN48. State commissions are required to respond to a request for arbitration within a "reasonable time," Local Competition Order, 11 FCC Rcd 16128, ¶ 1285; 47 C.F.R. § 51.801(b), and to conclude an arbitration no later than nine months after the date on which the incumbent LEC receives a request for negotiation under section 252. 47 U.S.C. § 252(b)(4)(C).

FN49. Virginia Petition at 5.

FN50. Id. at 6.

FN51. Id.

FN52. Id. at 7. See also 47 C.F.R. § 51.803(b).

FN53. 47 U.S.C. § 252(e)(5).

FN54. See Virginia Commission Comments at 1.

FN55. Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

FN56. 47 C.F.R. § 51.801(b). See also Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285; Bell Atlantic Comments at 3.

FN57. See Bell Atlantic Comments at 3.

FN58. Virginia Commission Comments at 1-3.

FN59. Low Tech Order, 13 FCC Rcd at 1759-1768.

FN60. Id.

FN61. Low Tech argued that a state commission has not acted until it has ruled on the merits of the issues raised in the arbitration petition. Id. at 1733- 1774, ¶ 33 n.122. The Commission rejected Low Tech's argument and held that under its current rules, a state commission does not "fail to act" when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner slacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding. Id. at 1774, ¶ 33.

FN62. 47 U.S.C. § 252(e)(6); Local Competition Order, 11 FCC Rcd 15563, ¶ 124; Bell Atlantic Comments at 2.

1999 WL 587307 (F.C.C.), 15 F.C.C.R. 23,318, 15 FCC Rcd. 23,318

END OF DOCUMENT

Exhibit E

ORDER NO. 75360

IN THE MATTER OF THE PETITIONS FOR APPROVAL OF AGREEMENTS AND ARBITRATION OF UNRESOLVED ISSUES ARISING UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996.	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
PETITION OF GLOBAL NAPS SOUTH, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS AND RELATED RELIEF.	*	CASE NO. 8731

I. **Procedural History**

On December 7, 1998, Global Naps South, Inc. ("GNAPS") filed its Petition for Arbitration with the Commission.[1] GNAPS requested arbitration of rates, terms and conditions and related arrangements for interconnection concerning a proposed interconnection agreement between GNAPS and Bell Atlantic – Maryland, Inc. ("BA-MD") pursuant to §§252(b) and 252(i) of the Telecommunications Act of 1996 ("1996 Act"). BA-MD filed a response to the Petition on February 9, 1999. The Commission Staff filed comments on March 9, 1999.

II. **Discussion**

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. The Telecommunications Act of 1996 ("1996 Act") was designed, in part, to facilitate the entry of competing companies into local telephone service markets. The 1996 Act

requires incumbent local exchange carriers ("ILECs") to allow new entrants access to their networks in three different ways. Specifically, an ILEC must: (1) permit requesting competitors to interconnect with the ILECs local network; (2) provide competitors with access to individual elements of its network on an unbundled basis; and (3) allow competitors to purchase its telecommunications services for resale. 47 USCA §251(c)(2)-(4) (West Supp. 1997). Together these duties regarding interconnection, unbundled network elements, and resale are intended to provide would-be competitors with realistic opportunities to enter the market for local exchange service. Through these three duties, and the 1996 Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2]

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between ILECs and competing carriers to implement the 1996 Act's substantive requirements. When a competing carrier asks an ILEC to provide interconnection, unbundled network elements, or resale, both the ILEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the 1996 Act's goals. 47 USCA §§251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. 47 USCA

[1] Due to some confusion regarding the service of process, the parties agreed that Bell Atlantic – Maryland, Inc. would respond to the Petition within twenty-five days after January 15, 1999.
[2] Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

§252(b). The final agreement, whether accomplished through negotiation or arbitration, must be approved by the state commission. 47 USCA §252(e)(1).

The key provision of the 1996 Act at issue here is §252(i). Under this subsection, a competitive local exchange carrier ("CLEC") may "opt in" to the terms of any other existing interconnection agreement between the incumbent local exchange carrier ("ILEC") and another CLEC. Specifically, §252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved [by a state commission] 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.

GNAPS has sought to "opt in" to the terms of BA-MD's approved interconnection agreement with MFS Intelenet of Maryland, Inc. ("MFS"). GNAPS claims, however, that BA-MD seeks to impose conditions on GNAPS to which MFS is not subject, in violation of §252(i). Specifically, GNAPS requested to "opt in" to the MFS interconnection agreement but requested a three-year contract term, rather than the date certain which actually appears in the MFS agreement.[3] In contrast, BA-MD argued that GNAPS can only "opt in", if at all, under the exact terms of the MFS agreement. We find that under the Federal Communications Commission's ("FCC") interconnection rules, GNAPS is not entitled to the relief it seeks.

In its First Report and Order implementing the local competition provisions of the 1996 Act, the FCC interpreted §252(i) as permitting CLECs to "pick and choose" among

[3] GNAPS also requested that we order BA-MD to provide interconnection on an interim basis on terms consistent with the MFS agreement. We rejected this request on June 14, 1999.

the provisions of existing interconnection agreements.[4] This interpretation is reflected in the FCC's rule at 47 CFR §51.809 which provides:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it 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 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.
>
> (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 interconnection, service, or element 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 interconnection, service or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements 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(f) of the Act.

Although Rule 51.809 generally requires ILECs to make individual interconnection arrangements from existing contracts available to requesting carriers,

[4] *In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("First Report & Order").

contrary to GNAPS interpretation, this requirement is not without limitations. The rule limits the amount of time during which ILECs must make the terms of existing agreements available to a "reasonable period of time." Thus, under the FCC's reinstated interpretation of §252(i),[5] BA-MD is not required to make the terms and conditions of an existing agreement available to requesting carriers indefinitely, but only for a "reasonable period."

While we decline to set forth the full parameters of a "reasonable period of time" in this proceeding, we do find that GNAPS request, occurring approximately two and a half years after the MFS agreement was available for public inspection, exceeded the bounds of "reasonable period of time." MFS requested interconnection with BA-MD on February 8, 1996. The parties signed the agreement at issue here on July 16, 1996 and filed a joint petition for approval of the agreement on the following day, July 17, 1996. We approved the agreement on October 9, 1996. Unlike most interconnection agreements, the MFS agreement contains a specific termination date. Thus, the MFS agreement ends on July 1, 1999.

According to GNAPS, it first requested terms contained in the MFS agreement in September, 1998. This request occurred nearly two years after the MFS agreement had been approved by this Commission and only ten months before the agreement was to expire. More importantly, GNAPS did not request arbitration of the "opt in" issue until December, 1998. At this point, the MFS agreement was scheduled to expire in

---

[5] The Eighth Circuit vacated Rule 51.809 on the ground that it would deter the "voluntarily negotiated agreements" favored by the 1996 Act. *Iowa Utilities Board v. FCC*, 120F.3d 753, 801 (8th Cir. 1998). The Supreme Court subsequently disagreed and reinstated the rule. *AT&T v. Iowa Utilities Board*, ___U.S. ____ (Jan. 25, 1999).

approximately six months. We find that GNAPS request for arbitration did not occur within the reasonable period of time called for by the FCC rules.

Furthermore, we find that even if it were reasonable to permit GNAPS to "opt in" to the MFS agreement at this late date, GNAPS would be entitled to the terms of the MFS agreement only until the termination date of July 1, 1999. GNAPS cannot avoid the fact that the language of the agreement says that its term ends on a stated dated, not "three years from the date hereof." This term was negotiated and agreed upon by both MFS and BA-MD and there is no support for the argument that the length of the contract is not an integral part of the agreement. GNAPS seeks not only to "opt in" to the MFS agreement, but also to change one of its terms. There is nothing in the 1996 Act nor the FCC rules which would permit a CLEC to choose to opt in to an agreement while at the same time changing the terms of that agreement. Opting into contracts must occur upon the same terms and conditions as those which appear in the original agreement.[6]

IT IS THEREFORE, this 15th day of July in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: 1) That the request of Global NAPS South, Inc. to opt in to the MFS agreement pursuant to §252(i) of the Telecommunications Act of 1996 is hereby denied.

2) That motions not granted by the actions taken herein are denied.

[6] Given our resolution of this matter, we find that it is unnecessary for us to address the other issues raised in the Petition.

SIGNATURE PAGE

_____

_____

_____

_____

_____

Commissioners