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June 27, 2008

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

Re: **Docket No. 070368-TP (Nextel Partners)**
Docket No. 070369-TP (Nextel)

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Brief, which we ask that you file in the captioned dockets. The Brief was filed electronically on June 26, 2008 but was not accepted by the Commission because it was over the 100 page limit established in the electronic filing guidelines.

Copies have been previously served on the parties as shown on the certificate of service accompanying the brief..

Sincerely,

John T. Tyler

CMP ___
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RCA ___
SCR ___
SGA ___
SEC ___
OTH ___

cc: All Parties of Record
Gregory Follensbee
E. Earl Edenfield, Jr.
Lisa S. Foshee

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CERTIFICATE OF SERVICE
Docket Nos. 070368-TP and 070369-TP

I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail and First Class U. S. Mail this 27th day of June, 2008 to the following:

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Sincerely,

John T. Tyler

cc: All Parties of Record
Gregory Follensbee
E. Earl Edenfield, Jr.
Lisa S. Foshee

CERTIFICATE OF SERVICE
Docket Nos. 070368-TP and 070369-TP

I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail and First Class U. S. Mail this 26th day of June, 2008 to the following:

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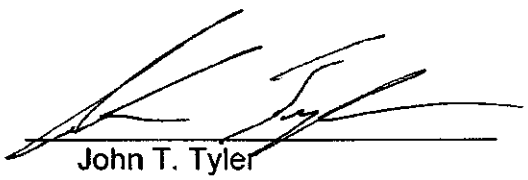

John T. Tyler

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
Notice of the Adoption by Nextel South Corp. And Nextel West Corp. (collectively "Nextel") 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. 070369-TP
	)	Filed: June 26, 2008

BRIEF OF AT&T FLORIDA

In accordance with the Florida Public Service Commission ("Commission") Order Establishing Procedure, dated June 17, 2008, BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Brief addressing the Notices of Adoption of the existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. (collectively "Sprint"), pursuant to AT&T/BellSouth Merger Commitments and Section 252(i) of the Federal Telecommunications Act of 1996, filed by NPCR, Inc. d/b/a Nextel Partners and Nextel South Corp.[1]

[1] As used in this Brief, "Nextel" refers collectively to Nextel South Corp. and NPCR, Inc. d/b/a Nextel Partners, and "Notice" refers collectively to the Notices filed by Nextel South Corp. in Docket No. 070369-TP and by NPCR, Inc. d/b/a Nextel Partners in Docket No. 070368-TP.

SUMMARY OF AT&T FLORIDA'S POSITION

In 2001, AT&T Florida and Sprint began operating under a unique negotiated interconnection agreement ("the Sprint ICA").[2] AT&T Florida, in its capacity as an incumbent local exchange company ("ILEC"), was on one side of the agreement. Both Sprint CLEC (a wireline carrier) *and* Sprint PCS (a wireless carrier) were on the other side of the agreement. If either Sprint CLEC or Sprint PCS had been the only other party to the agreement, AT&T Florida would not have voluntarily entered into the Sprint ICA.

Seven years later, Nextel (a wireless carrier) is seeking to adopt the Sprint ICA. Unlike the wireless party to the Sprint ICA, Nextel is not bringing a wireline carrier or any wireline services to the table. Instead, it seeks to adopt the Sprint ICA as a stand-alone wireless carrier, even though the Sprint ICA contains vast expanses of wireline-specific provisions that Nextel, as a stand-alone wireless carrier, cannot legally invoke.

Nextel seeks such an unorthodox adoption – and one that clearly is not permitted by controlling authority – solely because it is in its own financial interests to do so. As a result of unique negotiation, compromise, and extensive evaluation of costs incurred by each party (wireline and wireless) for the termination of traffic, the Sprint Agreement contains "bill and keep" and "50/50 shared facilities" arrangements that do not appear in AT&T interconnection agreements with stand-alone wireless carriers like Nextel. If Nextel is successful in its attempts to adopt the Sprint Agreement, it and its affiliated companies (collectively "Sprint/Nextel") likely will improperly attempt to use certain AT&T Merger Commitments[3] to "port" the adopted

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[2]The Sprint ICA can be viewed on AT&T Florida's website at http://cpr.bellsouth.com/clec/docs/all_states/index7.htm.

[3] The FCC's Order approving the merger of AT&T Inc. and BellSouth Corporation contains, as Appendix F, a number of commitments the FCC considered in approving the merger. *See* Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)("Merger Order").

agreement into each of the other twenty-one states in which AT&T is an ILEC.[4] Particularly in the thirteen states in which AT&T was an ILEC prior to its merger with BellSouth, this creates the potential for Sprint/Nextel to get a free ride for every one of the millions of minutes of traffic that the AT&T ILEC in those states terminate for Sprint/Nextel that is in excess of the minutes of traffic that Sprint/Nextel terminates for the AT&T ILECs in those states. Likewise, particularly in those 13 states, Sprint/Nextel makes much more relative use of the interconnection facilities between the parties' switches than reflected for Sprint PCS and Sprint CLEC in the Sprint ICA, so that if AT&T were required to share equally with Sprint/Nextel the price of those facilities in those thirteen states, AT&T would be effectively subsidizing Sprint/Nextel's use of those facilities through an economically irrational pricing arrangement.

Issue 1: Can Nextel as a wireless entity avail itself of 47 U.S.C. Section 252(i) to adopt the Sprint ICA?

AT&T Position: Nextel, as a pure wireless carrier, cannot avail itself of the opt-in provisions of Section 252(i). Nextel is improperly attempting to evade its current wireless inter-carrier compensation mechanism by seeking a CLEC provision from the Sprint ICA for bill-and-keep. Nextel is inappropriately attempting to take advantage of a CLEC provision from the Sprint ICA that provides for the equal sharing of facilities.

I. BACKGROUND

A. The Sprint ICA

The Sprint ICA contains negotiated terms and conditions between three parties: AT&T Florida on the one hand, and Sprint CLEC and Sprint PCS collectively on the other hand.[5] Sprint CLEC is a provider of wireline local exchange telecommunications services, and Sprint

[4] Although any such porting attempt would be improper because the "bill and keep" arrangement and the facilities pricing arrangement are state-specific pricing arrangements that are not eligible for porting under AT&T's Merger Commitments, the costs to AT&T of defending itself against these improper attempts would be significant.

[5] *See* Sprint ICA at 1; Stipulations of Fact, dated June 13, 2008, with correction filed on June 17, 2008 ("Stipulations") at pp. 1-4.

PCS is a provider of wireless telecommunications services.[6] When AT&T Florida, Sprint CLEC, and Sprint PCS negotiated and entered into the Sprint ICA, neither Sprint CLEC nor Sprint PCS had any affiliation with Nextel, and Nextel had no affiliation with either Sprint CLEC or Sprint PCS.[7]

Section 6.1 of Attachment 3 to the Sprint ICA governs reciprocal compensation for call transport and termination for: CLEC Local Traffic, ISP-Bound Traffic and Wireless Local Traffic. This provision calls for a "bill and keep" reciprocal compensation arrangement. This means that AT&T Florida on the one hand, and Sprint CLEC and Sprint PCS on the other hand, agreed not to charge one another (or said differently, charge a rate of zero) for the transport and termination functions they perform when they exchange local traffic between their respective customers.[8] As the Federal Communications Commission ("FCC") has recognized, a "bill and keep" arrangement is a rational and appropriate pricing mechanism when the traffic exchanged between the carriers is roughly balanced – that is, when the traffic going from AT&T Florida to Sprint CLEC and Sprint PCS collectively is roughly equal to the traffic going from Sprint CLEC and Sprint PCS collectively to AT&T Florida.[9] When the traffic is imbalanced, however, a "bill and keep" arrangement imposes excessive costs on the carrier that transports and terminates the most traffic (by depriving it of compensation to recover the costs of the transport and termination functions it performs).

AT&T Florida did not enter into the "bill and keep" arrangement with Sprint CLEC and Sprint PCS lightly. Instead, the arrangement was the result of negotiation, compromise, and an

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[6] *See* Stipulations at pp. 1-2.¶¶2-3.
[7] *See* Stipulations at p. 3, ¶¶7. 20.
[8] *See* 47 C.F.R. §51.713(a).
[9] *See Id.* at §51.713(b)("A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so . . . .")(emphasis added).

extensive evaluation of costs incurred by each party for the termination of traffic. Moreover, the "bill and keep" arrangement in the Sprint ICA was specifically contingent upon the agreement by *all three parties* (AT&T Florida, wireline provider Sprint CLEC, and wireless provider Sprint PCS) to adhere to bill and keep. In fact, the Sprint ICA allows AT&T Florida, at its option, to renegotiate or terminate the "bill and keep" arrangement with the remaining party if either Sprint CLEC or Sprint PCS opts into another interconnection arrangement with AT&T Florida pursuant to 252(i) of the Act which calls for reciprocal compensation. All of this is memorialized in the Sprint ICA:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Local Traffic is the result of negotiation and compromise between [AT&T Florida], Sprint CLEC and Sprint PCS. The Parties' agreement to establish a bill and keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic. Specifically, Sprint PCS provided [AT&T Florida] a substantial cost study supporting its costs. As such the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with [AT&T Florida] pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between [AT&T Florida] and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by [AT&T Florida].[10]

Consistent with their treatment of their reciprocal compensation obligations to each other, the three parties to the Sprint ICA also agreed to share equally the cost of interconnection facilities between AT&T Florida switches and Sprint PCS and Sprint CLEC switches within AT&T Florida's service area. Accordingly, the Sprint ICA provides, in pertinent part, as follows for Sprint PCS and for Sprint CLEC, respectively:

> The cost of the interconnection facilities between [AT&T Florida] and Sprint PCS switches within [AT&T Florida's] service area shall be shared on an equal basis.[11]

[10] Sprint ICA, Attachment 3, Section 6.1 (emphasis added).
[11] Sprint ICA, Attachment 3, Section 2.3.2.

> For two-way interconnection trunking that carries the Parties' Local and IntraLATA Toll Traffic only, excluding Transit Traffic, and for the two-way Supergroup interconnection trunk group that carries the Parties' Local and IntraLATA Toll Traffic, plus Sprint CLEC's Transit Traffic, the Parties shall be compensated for the nonrecurring and recurring charges for trunks and facilities at 50% of the applicable contractual or tariff rates for the services provided by each Party.[12]

B. Nextel's Attempt to Adopt the Sprint ICA.

Nextel seeks an Order approving its adoption of the "existing interconnection agreement between AT&T Florida and Sprint dated January 1, 2001. As noted above, there are three parties to the Sprint ICA: AT&T Florida on the one hand, and wireline carrier Sprint CLEC and wireless carrier Sprint PCS collectively on the other hand. Like the Sprint PCS party to the original agreement, Nextel "is licensed by the FCC to provide, and . . . does provide, wireless telecommunications services in the State of Florida.[13] Unlike the Sprint PCS party to the original agreement, however, Nextel is not bringing a wireline carrier to the table. Nor can Nextel itself claim to be bringing wireline services into the agreement it seeks to adopt, because it "is not certificated to provide and does not provide wireline local exchange telecommunications services in the State of Florida."[14] Nextel, therefore, is a stand-alone wireless provider that is seeking to adopt an agreement AT&T Florida entered into with a wireless provider and a wireline provider *collectively.*

II. AT&T FLORIDA'S PRACTICAL CONCERNS WITH NEXTEL'S ATTEMPTS TO ADOPT THE SPRINT ICA

Before explaining why Nextel cannot lawfully adopt the Sprint ICA, AT&T Florida will explain the compelling practical reasons for opposing Nextel's attempts to adopt that agreement. As noted above, the FCC has explained that "bill and keep" may be imposed only when the

[12] Sprint ICA, Attachment 3, Section 2.9.5.1.
[13] *See* Stipulations at p. 2, ¶¶4-5.
[14] *See* Stipulations at p. 2, ¶¶4-5.

traffic exchanged between the parties is (and is expected to remain) roughly balanced. The following testimony of AT&T Florida affiant Scot Ferguson demonstrates that this balance rarely exists between AT&T Florida and stand-alone wireless providers:

> [b]ill-and-keep arrangements are unusual for wireless traffic. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain a bill-and-keep arrangement.[15]

If Nextel is permitted to adopt the Sprint ICA as a stand-alone wireless carrier, other stand-alone wireless carriers presumably could argue that they too should be allowed to adopt the agreement. If such arguments were to prevail, these other stand-alone wireless carriers could avoid providing "a substantial cost study supporting [their] costs" (as the wireless parties to the Sprint ICA did),[16] avoid an examination of the costs associated with a "bill and keep" arrangement (as occurred with regard to the wireless parties to the Sprint ICA), and simply walk into a "bill and keep" arrangement for wireless local traffic despite an imbalance of such traffic. This would make AT&T Florida's costs of providing the Sprint ICA to such adopting carriers greater than AT&T Florida's costs of providing the Sprint ICA to the original parties to that agreement. The same concerns exist with regard to the 50-50 split of the costs of shared facilities in the Sprint ICA.[17]

Prior to the AT&T-BellSouth merger, the direct impact of these concerns, while significant, would have been limited to Florida. Today, however, if Nextel is allowed to adopt the Sprint ICA, Nextel (and possibly other stand-alone wireless carriers) could improperly attempt to use the Merger Commitments upon which Nextel erroneously relies to operate under

[15] Ferguson Affidavit (attached hereto as Attachment A) at 9, ¶25 (a).
[16] Sprint ICA, Attachment 3, Section 6.1
[17] *See* Ferguson Affidavit at 9, ¶25 (b): "This particular [50-50] split is unusual for wireless traffic. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain this particular split."

the adopted agreement in one or more of the other 21 states in which AT&T is an ILEC.[18] The cost of defending such improper attempts is a significant concern in and of itself. The increased costs AT&T would incur for transporting and terminating wireless traffic is an even more significant concern.

Nextel and affiliated companies (collectively Sprint/Nextel) already have attempted to engage in this type of arbitrage. Nextel has filed petitions seeking to adopt the Sprint ICA in each of the nine states in which pre-merger BellSouth was an ILEC. Additionally, as explained in the Declaratory Petition AT&T filed with the FCC on February 5, 2008, Sprint/Nextel has filed pleadings in each of the other thirteen states in which AT&T is an ILEC seeking to "port" the AT&T Kentucky – Sprint ICA (including its bill-and-keep and facility pricing arrangement) to those thirteen states. Moreover, Sprint/Nextel sought not only to port BellSouth-specific pricing arrangements outside the BellSouth area, but to couple that port with a critical substantive change to the Kentucky arrangement, by proposing to drastically change the mix of parties – and thus, the balance of traffic to be exchanged – that would be subject to bill-and-keep and the 50/50 facility pricing arrangement. Although the precise legal entities differ between states, the linchpin of Sprint/Nextel's proposal was its attempt to port the AT&T bill-and-keep arrangement and facility pricing arrangement with Sprint PCS and Sprint CLEC in the southeast to other Sprint affiliates outside the southeast, and to add Nextel to the mix of parties to the arrangement. The Ohio Complaint, for example, sought to add other affiliates, including Nextel, to the combination of one Sprint CLEC and one Sprint CMRS provider on which the Kentucky agreement was founded.

[18] As was the case prior to the AT&T – BellSouth merger, a carrier can "adopt" an in-state interconnection agreement pursuant to 47 U.S.C. §252(i). As a result of the Merger Commitments, a carrier may, under appropriate circumstances, "port" an agreement from one state into another state.

AT&T is concerned that its ILECs in these 13 states terminate much more traffic for the Sprint/Nextel companies in the aggregate than the Sprint/Nextel companies terminate for the AT&T ILECs in these states. As a result, if Sprint/Nextel were permitted to port the bill-and-keep arrangement in the BellSouth agreement pursuant to Commitment 7.1, AT&T is concerned that Sprint/Nextel would be getting a free ride for every one of the millions of minutes of traffic that the AT&T ILECs terminate for Sprint/Nextel that is in excess of the minutes of traffic that Sprint/Nextel terminate for the AT&T ILECs. Likewise, AT&T is concerned that Sprint/Nextel makes much more relative use of the interconnection facilities between the parties' switches than reflected for Sprint PCS and Sprint CLEC in the Sprint ICA, so that if AT&T were required to share equally with Sprint/Nextel the price of those facilities in the legacy AT&T ILEC states, AT&T would be effectively subsidizing Sprint/Nextel's use of those facilities through an economically irrational pricing arrangement.[19]

III. SECTION 252(i) OF THE 1996 ACT DOES NOT ALLOW NEXTEL TO ADOPT THE SPRINT ICA.

Nextel contends that it is entitled to adopt the Sprint ICA by virtue of Section 252(i) of the 1996 Act. This provision states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[20]

For the following reasons, Section 252(i) does not allow Nextel to adopt the Sprint ICA.

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[19] AT&T, of course, believes that the "bill and keep" arrangement and the facilities pricing arrangement in the Sprint ICA are state-specific pricing arrangements that are not eligible for porting under AT&T's Merger Commitments, and as explained below, AT&T has asked the FCC for a declaratory ruling to that effect.

[20] 47 U.S.C. §252(i).

A. None of the relief Nextel seeks constitutes an adoption of the Sprint ICA as contemplated by Section 252(i).

When a requesting telecommunications carrier appropriately adopts an interconnection agreement pursuant to Section 252(i), it does not become a co-party to the original agreement. Instead, it becomes a party to a second and distinct agreement. Assume, for instance, that Carrier B appropriately adopts an existing interconnection agreement between Carrier A and AT&T Florida. Following the adoption, there is not a single agreement with AT&T Florida to which Carrier A and Carrier B are co-parties – if that were the case, a breach of the agreement by Carrier A would allow AT&T Florida to seek redress against both Carrier A and Carrier B, and that simply is not the way adoption works. Instead, after the adoption in the example above, there is an original agreement between AT&T Florida and Carrier A, and there is a separate and distinct agreement between AT&T Florida and Carrier B that contains the same terms and conditions as the agreement between AT&T Florida and Carrier A.[21]

Nextel cannot simply add Nextel as a wireless party to the Sprint-AT&T ICA, as it might suggest. That would not constitute an adoption of the Sprint ICA. Instead, that would be an *amendment* of the Sprint ICA to inject an additional party into the existing agreement, and nothing in Section 252(i) supports, much less requires, such an amendment.

Nextel might also suggest, as it has elsewhere, that matter is as simple as creating adoption papers that have the practical effect of substituting the Nextel entity names throughout the ICA whenever the Sprint PCS name occurs. That, of course, would mean that the Sprint CLEC name would remain throughout the adopted agreement, which apparently is what Nextel intends because it states that "Sprint CLEC stands ready, willing and able to also execute the

[21] *See* Ferguson Affidavit at 10, ¶26 ("Typically, AT&T Florida creates "adoption papers" that have the practical effect of substituting the adopting carrier's name for the original carrier's name throughout the agreement including any amendments, thereby binding the adopting carrier to all the rates, terms and conditions contained in the original agreement. The parties then execute the adoption papers.").

Sprint ICA as adopted by Nextel in order to expeditiously implement Nextel's adoption."[22] If that were done, Sprint CLEC would be a party to three interconnection agreements with AT&T Florida in the same state at the same time. That, however, is not appropriate (even if all three agreements contain the same language) because Sprint CLEC has a finite amount of local traffic, all of which is to be exchanged with AT&T Florida under a single interconnection agreement. AT&T Florida is unaware of any Section 252(i) jurisprudence that either recognizes the concept of an accommodation party as proposed by Nextel or that suggests that a single ILEC can be required to execute multiple interconnection agreements with a single CLEC within a single state. Nothing in Section 252(i) supports, much less requires, this relief that Nextel seeks.

B. Nextel is not seeking to adopt the Sprint ICA upon the same terms and conditions as those provided in the agreement.

Section 252(i) provides that a carrier adopting an existing interconnection agreement must do so "upon the same terms and conditions as those provided in the agreement." Under the FCC's current "all-or-nothing" rule implementing this provision, "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms and conditions of the adopted agreement."[23] In these dockets, Nextel is seeking to adopt an interconnection agreement that would allow it to: purchase transport and termination services from AT&T Florida on a "bill and keep" basis; and purchase interconnection facilities from AT&T Florida on the basis of a 50/50 split. As explained below, the evidence of record conclusively shows that Sprint PCS was able to purchase these services at these prices solely because it brought a wireline carrier (Sprint CLEC) to the table as a co-party to the negotiated agreement.

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[22] *See* Notice of Adoption Exhibit B, May 18,2007 letter from Mark G. Felton of Sprint Nextel to AT&T at p 2.

[23] Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494 at ¶10 (Rel. July 13, 2004) (emphasis added).

The Sprint ICA contains negotiated terms and conditions between three parties: AT&T Florida on the one hand, and Sprint CLEC and Sprint PCS collectively on the other hand. Sprint CLEC is a provider of wireline local exchange services, and Sprint PCS is a provider of wireless telecommunications services.[24] Thus, as AT&T Florida affiant Scot Ferguson testified, the Sprint ICA "addresses a unique mix of wireline and wireless items (such as traffic volume, traffic types, and facility types), and it reflects the outcome of gives and takes that would not have been made if the agreement addressed only wireline services or only wireless services."[25] Mr. Ferguson went on to provide specific examples of terms and conditions that appear in the Sprint ICA to which AT&T would not have agreed if only a stand-alone wireless company like Nextel had been involved:

> Section 6.1.1 establishes a "bill-and-keep" arrangement for usage on CLEC local traffic, ISP-bound traffic, and wireless local traffic. Bill-and-keep arrangements are unusual for wireless traffic. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain a bill-and-keep arrangement.[26]

> Section 2.3.2 establishes a 50/50 split for the cost of interconnection facilities for wireless traffic, or as the agreement states, "[t]he cost of the interconnection facilities...shall be shared on an equal basis." This particular split is unusual for wireless traffic. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain this particular split.[27]

If Nextel wishes to rely on Section 252(i) to receive the benefits of the wireless provisions of this agreement "upon the same terms and conditions as those provided in the agreement," it must bring wireline interests to the table comparable to those brought by the original wireless party to the agreement (Sprint PCS).

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[24] *See* Stipulations at p. 1-2, ¶¶2-3 .
[25] Ferguson Affidavit at 6- 7, ¶17 (emphasis added).
[26] Ferguson Affidavit at 9, ¶25 (a).
[27] Ferguson Affidavit at 9-10, ¶25(b).

Nextel indisputably is not doing so. Nextel is not providing wireline services in Florida.[28] Beyond that, Nextel cannot lawfully provide wireline services in Florida because it is not certificated to provide such services in this State.[29] Nextel, therefore, is seeking to adopt the Sprint ICA as a stand-alone wireless provider, which is not an adoption "upon the same terms and conditions as those provided in the agreement."

Nextel may seek to gloss over this dispositive shortcoming by claiming, that as a result of the Sprint-Nextel merger, Nextel enjoys the same corporate relationship with Sprint CLEC as does Sprint PCS – they are all affiliate sister companies under the same overarching Sprint Nextel corporate umbrella. However, such a "sisters-by-merger" argument adds no merit whatsoever to Nextel's position. If XYZ Stand-Alone Wireless Company attempted to adopt the Sprint ICA, it clearly could not satisfy the "same terms and conditions" requirement by glomming onto the wireline traffic Sprint CLEC already is exchanging with AT&T Florida pursuant to the existing Sprint ICA. The same is true of Nextel because both before and after the Sprint-Nextel merger, Nextel, Sprint CLEC, and Sprint PCS were and still are separate and distinct legal entities.[30] Nextel, therefore, cannot use the traffic its "sister corporation" Sprint CLEC already is exchanging with AT&T Florida to satisfy the "same terms and conditions" requirement, just as an applicant for admission to a university cannot use her sister's academic record to qualify for admission.

C. Nextel's desired adoption would violate the FCC's "all-or-nothing" adoption rule.

As explained by AT&T Florida affiant Scot Ferguson, adoptions typically are implemented by way of "adoption papers" that have the practical effect of "substituting the

[28] Ferguson Affidavit at 7, ¶20; Stipulations at p. 2, ¶¶4, 5.
[29] Ferguson Affidavit at 7, ¶20; Stipulation at p. 2, ¶¶4-5.
[30] Stipulations at p.3, ¶¶7, 10, 12.

adopting carrier's name for the original carrier's name throughout the agreement including any amendments, thereby binding the adopting carrier to all the rates, terms and conditions contained in the original agreement."[31] Applying this industry-standard adoption process to these dockets further highlights the infirmities of Nextel's attempts to adopt the Sprint ICA.

If Nextel's name were substituted for both Sprint CLEC and Sprint PCS, portions of the adopted agreement could appear to erroneously suggest that Nextel could avail itself of provisions that apply only to CLECs. To cite but one example, Attachment 2 of the Sprint ICA allows Sprint CLEC to purchase unbundled network elements ("UNEs") from AT&T Florida. Substituting Nextel for Sprint CLEC would result in language that could appear to erroneously suggest that Nextel can purchase UNEs from AT&T Florida.[32] Nextel, however, only provides mobile wireless services in Florida,[33] and in its Triennial Review Remand Order, the FCC ruled that:

> Consistent with [the D.C. Circuit Court of Appeal's opinion in] USTA II, we deny access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling. In particular, we deny access to UNEs for the exclusive provision of mobile wireless services . . . .[34]

Nextel, therefore, cannot purchase UNEs from AT&T Florida, and it would be improper for the adopted agreement to suggest otherwise.[35]

Nextel might suggest that this problem could be solved by substituting Nextel for Sprint PCS while leaving all references to Sprint CLEC unchanged in the adopted agreement. This

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[31] Ferguson Affidavit at 10, ¶26.
[32] Ferguson Affidavit at 11, ¶29.
[33] Stipulations at 2, ¶¶4-5.
[34] *See* Order On Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 at ¶34 (February 4, 2005)(emphasis added).
[35] Attachment B to this Brief is a summary of other provisions of the Sprint ICA that Nextel, as a stand-alone wireless provider, cannot legally avail itself.

purported "solution," of course, merely highlights the fact that Nextel is attempting to use the traffic its "sister corporation" Sprint CLEC already is exchanging with AT&T Florida to satisfy the "same terms and conditions" requirement of Section 251(i) which, as explained above, it cannot do. Additionally, this purported solution would effectively require a single ILEC to execute multiple interconnection agreements with a single CLEC within a single state which, again, cannot be required.

Finally, Nextel might suggest that this problem could be solved by allowing Nextel to adopt only the same wireless-applicable provisions of the Sprint-AT&T ICA that are utilized by Sprint PCS. The problem with this approach, of course, is that the FCC has ruled that a carrier is no longer permitted to "pick and choose" the provisions in an approved agreement that it wants to adopt. Instead, the FCC has adopted "an "all-or-nothing rule" that requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement."[36] Allowing Nextel to "adopt" the Sprint interconnection agreement after revising the agreement to clarify which provisions Nextel can and cannot use clearly is contrary to this FCC ruling.[37]

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

[37] Nextel's attempt to paint the affidavit of Jerry Hendrix, filed with the FCC over four years ago on **May 11, 2004**, as somehow contrary to AT&T Florida's position in this Docket regarding the all-or-nothing rule (*See, e.g.*, Nextel's Motion For Leave To File Reply To AT&T's Response In Opposition To Motion For Summary Final Order And Supplementary Submissions Thereto at pp. 19-20) is entirely misplaced. On the contrary, in the Hendrix Affidavit, attached hereto as Attachment C, Mr. Hendrix makes clear that BellSouth was in full support of the FCC moving from the pick and choose rule in effect at that time to the currently effective all-or-nothing rule. Moreover, any reference within the affidavit to "similarly situated CLECs" has absolutely no bearing on the present dispute. AT&T Florida's objection to Nextel's adoption is not based upon any similarly situated argument, and the subject of this dispute is clearly not a CLEC. Instead, as is fully explained herein, AT&T Florida objects to the adoption in large part because Nextel is not certificated to provide, and does not provide, any CLEC services in Florida. Therefore, Nextel cannot legally avail itself of all of the terms and conditions (many of which are CLEC-specific) contained in the Sprint agreement it seeks to adopt. An adoption by Nextel, under these circumstances, would violate the all or nothing rule because Nextel would have to **pick** out and essentially discard terms

Issue 2(A): Does the Commission have jurisdiction over AT&T's FCC Merger Commitments?

AT&T Position: The Commission does not have the jurisdiction under state law to interpret or enforce the AT&T/BellSouth Merger Commitments. The FCC has exclusive jurisdiction over AT&T's Merger Commitments.

Nextel claims to rely on the first two AT&T Merger Commitments under the heading "Reducing Transaction Costs Associated with Interconnection Agreements" as the basis for its request to adopt the Sprint ICA. These commitments provide that:

> [7.]1. The AT&T/BellSouth ILEC 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.
>
> [7.]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.

As explained below, Nextel's reliance on these Merger Commitments in these dockets is misplaced for several reasons.

First, the Commission should dismiss Nextel's request to the extent that it is based on these Merger Commitments because the FCC has exclusive jurisdiction over those Commitments. In fact, the Commission already reached that sound conclusion last year in an

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and conditions within the agreement to which it cannot legally avail itself as a standalone wireless carrier, **and choose** only the few remaining wireless terms and conditions.

analogous situation in Docket No. 070249-TP.[38] In that docket, Sprint sought to rely upon AT&T Florida's FCC Merger Commitments to extend its interconnection agreement. The Commission found such reliance misplaced and stated: "we do not have jurisdiction to enforce Sprint's putative right to certain extension under the Merger Commitments through arbitration as though it were an "open issue" within the meaning of Section 252(b)."[39] Likewise, in a companion docket to the instant adoption case, the Mississippi Public Service Commission correctly found "that the FCC has exclusive jurisdiction over the enforcement of FCC Merger Commitments contained in the FCC's Merger Order..."[40] Furthermore, the Missouri Public Service Commission also recently found that it did not possess jurisdiction and therefore entered an order denying Sprint Nextel's attempt to rely upon the Merger Commitments to port the AT&T/Sprint agreement into that state.[41] Consistent with its own prior well-reasoned ruling, the Commission should decline to exercise jurisdiction over this matter.

The question of whether these federal Merger Commitments (that were presented to and approved by the FCC) support Nextel's claims is a question that is within the exclusive jurisdiction of the FCC. The Commission, therefore, should dismiss the Notices to the extent that they are based on the Merger Commitments, because Nextel cannot properly bring its claims before the Commission.

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[38] *See, Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunication, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast*, Docket No. 070249-TP, Order No. PSC-07-0680-FOF-TP, Issued: August 21, 2007 (attached hereto as Attachment D).

[39] *See* Attachment D at p. 5.

[40] *See* Order dated October 30, 2007 *In re: Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.* Docket No. 2007-UA-316 (Ms. Pub. Serv. Comm'n filed June 28, 2007); *Nextel South Corp. ("Nextel") Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. 2007-UA-317 (Ms. Pub. Serv. Comm'n filed June 28, 2007) (attached hereto as Attachment E).

[41] *See* Order dated June 24, 2008 *In Re: Sprint Commun's Co. v. Sw. Bell Tel. Co. d/b/a AT&T Missouri*, Case No. TC-2008-0182 (Mo. Pub. Serv. Comm'n filed Dec. 10, 2007 (attached hereto as Attachment F).

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 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's 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 (emphasis added). Nowhere in the Merger Order does the FCC provide that the interpretation of merger commitments is to occur outside the FCC.[42]

In these dockets, Nextel's claims regarding the merger commitments are not based on state law. Instead, Nextel is asking a state agency to enforce Nextel's erroneous interpretation of federal merger commitments that are embodied in a federal agency's order. Consequently, the FCC alone possesses the jurisdiction to interpret and enforce the subject merger commitments. [43]

[42] 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's 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's argument.

[43] While a state Commission may have certain enforcement authority regarding interconnection agreements that it approves pursuant to the federal Act, that is not the case in this proceeding. The merger commitments Nextel presents were not (and could not be) negotiated or arbitrated pursuant to

Further, recognition of the FCC's exclusive authority ensures a uniform regulatory framework and avoids conflicting and diverse interpretations of FCC requirements. Any other decision results in the potential for conflicting rulings and piece-meal litigation. For these reasons, to the extent that Nextel's Notices are based on FCC Merger Commitments, the Commission should dismiss the Notices.

Issue 2(B): If so, do the Merger Commitments allow Nextel to adopt the Sprint ICA?

AT&T Position: If the Commission has jurisdiction to interpret and enforce the merger commitments, the merger commitments do not allow Nextel to adopt the Sprint ICA.

I. Even if the Commission had concurrent jurisdiction over these Merger Commitments, it would be prudent to decline to address them until after the FCC rules on AT&T's pending Petition for a Declaratory Ruling regarding these Commitments.

On February 5, 2008, AT&T Inc. filed a Petition for Declaratory Ruling with the FCC that asks the FCC to resolve several issues that are directly or indirectly related to positions Nextel has taken in these dockets.[44] Nextel, for instance, purports to rely on Merger Commitment 7.1 even though it is seeking to adopt a Florida agreement that has been approved by this Commission. AT&T has asked the FCC to rule that "Commitment 7.1 does not apply to in-state adoptions of interconnection agreements or in any way supersede [FCC] rules governing such adoptions."[45] Nextel asserts that the restrictions that exist with respect to a traditional adoption under Section 252(i) somehow do not apply to its purported adoption under Commitment 7.1. AT&T has asked the FCC to rule that "Commitment 7.1 does not give a carrier the right to port an agreement from one state to another if that carrier would be barred by

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Section 251 or 252 of the federal Act, and they are not found in an interconnection agreement that has been approved by the Commission. Instead, the merger commitments on which Nextel relies are a wholly independent voluntary commitments that are separate and apart from any Section 251 or 252 matter and are therefore not subject to state interpretation or enforcement.

[44] Attachment G to this Brief is a copy of this Petition.

[45] Attachment G at p. 2.

[FCC] rules implementing Section 252(i) of the Telecommunications Act of 1996 from adopting that agreement within the same state."[46] Nextel claims that it is now entitled to port into Florida and adopt the same Sprint-AT&T ICA which, effective with AT&T's execution on October 30, 2007, was extended for 3 years from December 29, 2006 pursuant to the parties' Kentucky amendment."[47] AT&T has asked the FCC to rule that "bill-and-keep arrangements for the transport and termination of telecommunications and facility pricing arrangements are 'state-specific pricing' terms that are not subject to porting under Commitment 7.1 to other states."[48]

The FCC has taken swift action on AT&T's Petition. On February 14, 2008 (a mere nine days after AT&T filed its Petition), the FCC issued a Public Notice that established a February 25, 2008 deadline for interested parties to file comments on AT&T's Petition.[49] Reply comments were due March 3, 2008.

Accordingly, even if the Commission believes it has concurrent jurisdiction regarding the Merger Commitments, AT&T Florida respectfully submits that the Commission should not attempt to exercise any such jurisdiction until the FCC has ruled on AT&T's pending Petition. At a minimum, the FCC's ruling on the Petition will provide useful guidance to the parties and the Commission in determining what role, if any, the Merger Commitments play in these dockets.

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[46] Attachment G at p. 2.

[47] While AT&T Florida denies that Nextel is entitled to port the Kentucky Agreement into Florida "as is," that issue simply is not before the Commission. Nextel's Petition does not seek to port any agreement from any other state into Florida. Instead, Nextel seeks an Order approving its adoption of the existing interconnection agreement between AT&T Florida and Sprint dated January 1, 2001 and initially approved by the Commission in Docket No. 000828-TP and 000761-TP. *See* Notices at p. 1.

[48] Declaratory Petition at p. 2.

[49] *See* Public Notice, *AT&T ILECs Petition for Declaratory Ruling*, FCC Docket No. 08-23 (Released February 14, 2008).

II. In any event, the Merger Commitments do not allow Nextel to adopt the Sprint ICA.

Nextel is seeking to adopt the very interconnection agreement that has already been approved by this Commission, and it contends that Merger Commitment 7.1 applies to this in-state adoption request. When AT&T made this Commitment, however, carriers operating in Florida already had the right to adopt agreements that had been approved in Florida consistent with the provisions of 47 U.S.C. § 252(i) and the FCC's rules implementing those provisions. Clearly, Commitment 7.1 does not in any way address the in-state adoption rights carriers already had, or diminish the all or nothing rule.[50]

Instead, Commitment 7.1 gives carriers certain rights they did not have before AT&T made the Commitment. Prior to this Commitment, a carrier did not have the right to port an interconnection agreement from another state into Florida, and Commitment 7.1 now provides carriers certain state-to-state porting rights that they previously did not have. This Commitment, therefore, applies only when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state (which often is referred to as "porting" an agreement from one state into another state). That is why the commitment contains language such as "subject to state-specific pricing and performance plans and technical feasibility," and "consistent with the laws and regulatory requirements of the state for which the request is made." This language is necessary only when an agreement that was approved in one state is ported into another state. Moreover, no party to the FCC's merger proceedings suggested that this

[50] The Kansas Corporation Commission agrees with AT&T Florida's position in this regard and found that "[b]ecause the FCC noted that the Merger Commitments were not general statements of FCC policy and did not alter FCC procedures, its Rule 51.809 was not diminished by Merger Conditions." *See* Order dated June 9, 2008, *in re Sprint Commun's Co. v. Sw. Bell Tel. Co. d/b/a AT&T Kansas*, Docket No. 08-SWBT-602-COM (Kan. Corp. Comm'n filed Dec. 26, 2007) at p. 5-7.

Commitment related in any manner whatsoever to in-state adoptions of interconnection agreements by telecommunications carriers.

While Commitment 7.2 does apply to in-state adoption requests, it simply has no bearing on Nextel's request. Commitment 7.2 simply states that under specified conditions, AT&T Florida "shall not refuse a request . . . to opt into an [interconnection] agreement on the ground that the agreement has not been amended to reflect changes of law." AT&T Florida does not dispute that the Sprint ICA has been amended to reflect changes of law, and AT&T Florida's denial of Nextel's opt-in request is not based on any "change of law" issues.

Nextel, however, contends that these Commitments apply to its in-state adoption request. Beyond that, Nextel contends that these Commitments permit an in-state adoption even when the very same in-state adoption would not be permitted by Section 252(i) of the Act. As noted above, AT&T has asked the FCC for a declaratory ruling addressing both of these contentions, and AT&T respectfully submits that this Commission should not address these contentions until the FCC rules on AT&T's Petition.

Without waiving the foregoing, a brief exploration of Nextel's contentions demonstrates their folly. While AT&T Florida has a general obligation under Section 252(i) of the Telecommunications Act of 1996 to make available to any requesting carrier any interconnection agreement to which it is a party,[51] the FCC has ruled that the obligation:

[51] Section 252(i) of the 1996 Act provides, "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this 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). Although Section 252(i) speaks in terms of making available "any interconnection, service, or network element," the FCC has ruled that a requesting carrier that seeks to make an adoption under Section 252(i) may not adopt part of an interconnection agreement, but instead must make an adoption on an "all or nothing" basis. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (rel. July 13, 2004).

> shall not apply where the incumbent LEC proves to the state commission that . . . [t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.[52]

The rationale of this ruling is obvious: a general provision that allows requesting carriers to adopt an existing agreement, rather than negotiating and arbitrating an agreement of their own, cannot properly be applied to contract provisions that, if adopted, would impose costs on the ILEC in excess of the costs the ILEC incurs to perform the original agreement.

Merger Commitment 7.1 does not nullify this limitation on interconnection agreement adoptions. Indeed, to read the Commitment otherwise would result in the absurd situation in which a carrier in, for example, Ohio could port an interconnection agreement approved in, for example, Florida, even though a carrier in Florida could not adopt the agreement under Section 252(i). Alternatively, this reading could effectively eviscerate Rule 809(b) altogether – even for in-state adoptions – by permitting carriers to end-run around that rule through a two-step process.

To use the previous example, for instance, a carrier in Ohio with an affiliate in Florida could port a Florida agreement not available for adoption in Florida under FCC rules from Florida to its affiliate in Ohio and then back to Florida. This would accomplish through two steps what the FCC's rules prohibit that carrier from accomplishing in one step. Merger Commitment 7.1 cannot be read to allow such absurd results.

Issue 3: If the answer to Issue 1 or Issue 2B is "yes," what should be the effective date of Nextel's adoption of the Sprint ICA?

AT&T Position: If an adoption is granted, the effective date should be thirty calendar days after the final party executes the adoption agreement.

[52] 47 C.F.R. § 51.809(b).

First and foremost, AT&T Florida maintains that the adoption Nextel seeks is unlawful and should therefore be denied. However, in the event the Commission ultimately decides to approve the adoption, consistent with existing practice, the effective date of the adoption should be thirty (30) calendar days after the final party executes the adoption document, and as is further explained below, in no event should the adoption become effective prior to the effective date of a final Commission order granting such adoption.

Nextel's faulty justification for an effective date of June 8, 2007 is that it requested the adoption on that date.[53] That rationalization simply makes no sense. At the time of that request, June 8, 2007, the underlying agreement was not available for adoption and the request was untimely.[54] This is so because, in accordance with federal law, AT&T Florida's obligation to provide an adoption is limited to a "reasonable period of time" after the original contract is approved,[55] and the interconnection agreement was, at that time, by its express terms expired. AT&T Florida and Sprint were only operating under the terms and conditions of the agreement on a month-to-month basis as the parties labored towards a new agreement. A party attempting to adopt an expired agreement cannot rationally be said to have requested the adoption within the required "reasonable period of time."

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 is not within "a reasonable period of time". For example, in two cases from other jurisdictions,

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[53] *See* Nextel Issue Position Statements.

[54] AT&T Florida and Sprint subsequently entered into an amendment of the interconnection agreement on December 7, 2007 and thereby amended the term of the agreement. However, that amendment is of no consequence to this analysis because at the time of Nextel's request, June 8, 2007, the agreement was by its express terms expired and the parties were involved in arbitrating a new agreement.

[55] 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 § 252(h) of the Act" (emphasis added).

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.[56]

For instance, in *Global NAPs One*, 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.[57]

Likewise, in *Global NAPs Two*, 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.[58]

At the time of Nextel's request it was erroneously attempting to push the "reasonable period of time" envelope even further as Nextel sought to adopt an *expired* agreement.[59] It stretches credulity to assert that an attempt to adopt an expired agreement (and in this case, one that had been *expired for over two years*) was made within a reasonable period of time after the agreement was approved by the Authority and made available for public inspection.

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[56] *See In Re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (August 5, 1999) *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999).
[57] *See Global NAPs One.*
[58] *See Global NAPs Two.*
[59] The interconnection agreement was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004.

Furthermore, imposing a retroactive effective date would be contrary to basic rules of contract formation (requiring a meeting of the minds and agreement on terms before a contract is formed) and to the 1996 Act, which requires state commission approval of an interconnection agreement before it becomes binding. 47 U.S.C. § 252(e). Indeed, even when parties to an interconnection agreement have *agreed to* an effective date, an interconnection agreement still cannot lawfully take effect until the Commission approves the interconnection agreement under § 252(e) of the 1996 Act.

As for the merger commitment, it plainly does not contemplate that a ported agreement will be effective as of the day of the request. It certainly says no such thing, and since it requires the ported agreement to be modified in light of the "subject to" conditions, which requires a review of the requested agreement against pricing, performance measure, technical feasibility, OSS and network attributes and limitations, and legal and regulatory considerations of the port-to state, the commitment did not contemplate agreements somehow instantaneously becoming effective. If the FCC did not require ported agreements to be effective on the day of the request, which it plainly did not, it is illogical to assume that the FCC contemplated that adoptions would become effective on the date of the request.[60]

Nextel evidently seeks a retroactive effective date to penalize AT&T Florida for allegedly having delayed the process. To be clear, Nextel's proposal to back-date the interconnection agreement is tied to its positions on the bill-and-keep and facility sharing provision. If Nextel prevails, its proposal for a retroactive effective date is, in effect, a contention that AT&T Florida should be penalized in an amount equal to reciprocal compensation payments and/or interconnection facility payments for AT&T Florida's alleged delay.

[60] As previously asserted, AT&T Florida continues to maintain that neither of the Merger Commitments Nextel relies on support the adoption that Nextel is seeking.

For example, Nextel wants a retroactive rate of ***zero*** under bill and keep for traffic AT&T Florida terminated on Nextel's behalf. But there is no legal or factual basis for any such penalty. AT&T Florida did not delay the process, wrongfully or otherwise. There can be no serious contention that AT&T Florida's positions on why the adoption is unlawful constitute bona fide, defensible positions. And as with any disputed matter, reaching resolution requires time and effort.

Moreover, retroactive ratemaking is prohibited in Florida. For example, the Florida Supreme Court has long held that "the Commission would have no authority to make retroactive ratemaking orders." *City of Miami v. Florida Public Service Commission*, 73 P.U.R. 3d 369, 208 So.2d 249, 259 (1968) (citing F.S.A. Section 364.14); *See also, Southern Bell Telephone v. Florida Public Service Commission*, 453 So.2d 780 (1984).

Finally, the Commission is well aware that, in the context of interconnection agreements, the parties are routinely required by the terms of such agreements to renegotiate a new agreement or term to conform to regulatory changes - rather than simply alter the agreements retroactively to reflect such changes. This is still further indication of the well-accepted practice of avoiding any type of retroactive effective date.

In addition to the potential impact on current subscribers of imposing new costs on carriers retroactively (and encouraging carriers in turn to recoup those costs for old services on new customers), the concept of retroactive rate-making is fundamentally unfair and raises due process concerns. Retroactive rate-making, like prohibited *ex post facto* laws, changes the rules after the fact and alters the legal impact of conduct after that conduct has occurred.

If the Commission were to ultimately approve the adoption, which it should not do, there is no valid justification for applying a retroactive effective date. Thus, the only lawful course

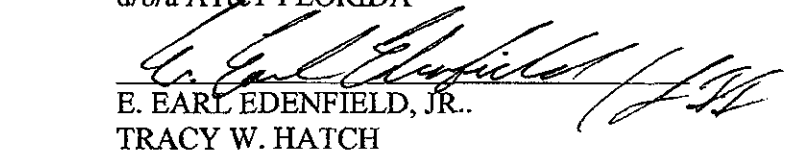
under the 1996 Act and established practice is to have newly approved interconnection agreements take effect only subsequent to Commission approval. Therefore, should the Commission approve the adoption then, subsequent to such approval, and consistent with long-established practice, the effective date should be thirty (30) days after execution by the final party.

CONCLUSION

For all of the reasons set forth above, AT&T Florida respectfully requests that the Commission enter an order denying Nextel's attempted adoptions in their entirety.[61]

Respectfully submitted, this 26th day of June, 2008.

BELLSOUTH TELECOMMUNICATIONS, INC.
d/b/a AT&T FLORIDA



E. EARL EDENFIELD, JR..
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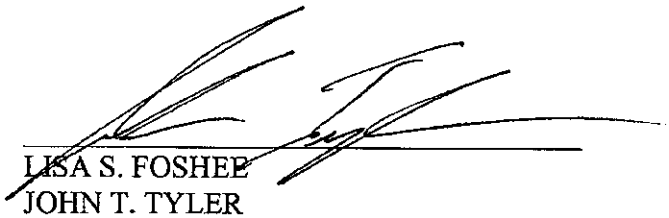
[61] As explained throughout this Brief, Nextel is not entitled to adopt the Sprint ICA. If, however, the Commission disagrees and decides to allow the requested adoption, AT&T Florida respectfully requests that the Commission specify in its Order that: (1) AT&T Florida is entitled to terminate the bill and keep arrangement in the adopted agreement; (2) if AT&T Florida terminates the bill and keep arrangement in the adopted agreement, Nextel and AT&T Florida must negotiate new reciprocal compensation arrangements; (3) any new reciprocal compensation arrangements, whether resulting from mutual agreement of the parties or from a ruling by the Commission or the FCC, shall apply as of the effective date of the adoption. These provisions are consistent with the language of the Sprint ICA, which allows AT&T to terminate or renegotiate these provisions if the Sprint CLEC opts into another agreement and leaves Sprint PCS as the sole remaining party to the original agreement. *See* Sprint ICA, Attachment 3, Section 6.1 ("Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with [AT&T Florida] pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between [AT&T Florida] and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by [AT&T Florida].")(emphasis added); and (4) the effective date of the agreement should be subsequent to a final order granting adoption—specifically, thirty (30) days after final execution of the adoption documents.



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714403

ATTACHMENT A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
Tallahassee, Florida

IN RE: Notice of Adoption of Interconnection Agreement by Nextel South, Inc. and NPCR, Inc. d/b/a Nextel Partners, Inc.

Dockets No. 070368-TP and 070369-TP

AFFIDAVIT OF P. L. (SCOT) FERGUSON
ON BEHALF OF AT&T FLORIDA

STATE OF FLORIDA
COUNTY OF LEON

COMES NOW Scot Ferguson and states as follows:

1. My name is Scot Ferguson. I am an Associate Director in AT&T Operations' Wholesale organization. As such, I am responsible for certain issues related to wholesale policy, primarily related to the general terms and conditions of Interconnection Agreements throughout AT&T's operating regions, including Florida. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

2. I graduated from the University of Georgia in 1973, with a Bachelor of Journalism degree. My career spans 34 years with Southern Bell, BellSouth Corporation, BellSouth Telecommunications, Inc., and AT&T. During that time, I have held positions in sales and marketing, customer system design, product management, training, public relations, wholesale customer support, regulatory support, and my current position as a corporate witness on wholesale policy issues.

Overview

3. Nextel[1] is seeking an Order approving its requests for adoption of the existing Interconnection Agreement between AT&T Florida, Sprint CLEC and Sprint PCS ("AT&T-Sprint Agreement" or "Agreement") dated January 1, 2001 and initially approved by the Florida Public Service Commission ("Commission") in Dockets No. 000828-TP and 000761-TP, and the amendment to that Agreement approved on January 29, 2008 in Docket No. 070249-TP.

4. AT&T Florida's position is that Nextel is not entitled to the relief it seeks. The facts I will provide show, among other things, that Nextel's attempt to adopt the Agreement is not consistent with FCC Rule 47 C.F.R. § 51.809, which implements Section 252(i). This FCC Rule requires a carrier adopting an agreement to take that agreement in its entirety

5. My affidavit is organized into four sections. First, I will address the status of the AT&T-Sprint Agreement that Nextel seeks to adopt. Second, I will discuss facts that support AT&T's legal position regarding the AT&T/BellSouth Merger Commitments upon which Nextel erroneously relies. Third, I will discuss facts that support AT&T's legal position that Section 252(i) of the federal Telecommunications Act of 1996 ("the 1996 Act") does not allow Nextel to adopt the AT&T-Sprint Agreement. Fourth, I will provide information regarding the negative impact caused to AT&T if Nextel's adoptions were to occur.

[1] As used in this Affidavit, "Nextel" refers collectively to Nextel South Corporation and NPCR, Inc., d/b/a Nextel Partners.

6. I am not an attorney, and my affidavit on these issues is provided with respect only to facts and policy. Therefore, my affidavit should not be construed as a waiver of any legal arguments.

I. STATUS OF THE AT&T-SPRINT INTERCONNECTION AGREEMENT

7. AT&T Florida and Sprint signed an amendment extending the parties' Florida Agreement for three (3) years until March 2010. The Interconnection Agreement is effective, and, under applicable qualifying conditions, is portable by a carrier to another state in AT&T's ILEC service region under the terms of the Merger Commitments, or adoptable by a carrier within Florida under Section 252(i) of the 1996 Act. However, for reasons that I will provide later in my affidavit, Nextel's request for adoption in this docket should not be granted.

II. THE MERGER COMMITMENTS

8. I will summarize the Merger Commitments. The FCC's Order approving the merger of AT&T, Inc. and BellSouth Corporation contains, as Appendix F, a number of commitments the FCC considered in approving the merger.[2]

9. In a letter to AT&T Florida dated May 18, 2007, and in its Petition, Nextel claims to rely on two of these Merger Commitments as the basis for its request to adopt the AT&T-Sprint Agreement.

[2] *See* Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)("Merger Order").

10. Nextel relies on the first two Merger Commitments under the heading "Reducing Transaction Costs Associated with Interconnection Agreements."[3] These commitments provide that:

> 1. The AT&T/BellSouth ILEC 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.

11. The first Merger Commitment does not support the relief requested by Nextel. The first Merger Commitment applies only when a carrier wants to take an Interconnection Agreement from one state and operate under that agreement in a different state (which often is referred to as "porting" an agreement from one state into another state). That is why the commitment contains language such as "subject to state-specific pricing and performance plans and technical feasibility," and "consistent with the laws and regulatory requirements of the state for which

[3] AT&T Florida does not believe it is appropriate for Nextel to raise these merger commitments in this docket. As explained in AT&T Florida's filings with the Commission, AT&T Florida believes that the FCC can best address the meaning of these Merger Commitments.

the request is made." This language is necessary only when an agreement that was approved in one state is ported into another state.

12. Prior to this Merger Commitment, carriers did not have the right to port an agreement from another state into Florida. Rather, carriers had the right to adopt agreements that had been approved in Florida consistent with the provisions of 47 U.S.C. § 252(i) and the FCC's rules implementing that provision. This is significant because, purely from a layman's perspective, it further demonstrates that this Merger Commitment does not address the in-state adoption rights carriers already had. Instead, this Merger Commitment provides carriers certain state-to-state porting rights that they previously did not have.

13. Nextel is not seeking at this time to port an agreement from another state into Florida. Instead, Nextel is seeking to adopt the amended AT&T-Sprint Agreement approved by this Commission on January 29, 2008 in Docket No. 070249-TP.

14. The second Merger Commitment does not support the relief requested by Nextel. While the second Merger Commitment (unlike the first) applies to in-state adoption requests, it has no bearing on Nextel's request. This Merger Commitment simply states that under specified conditions, AT&T Florida "shall not refuse a request . . . to opt into an [interconnection] agreement on the ground that the agreement has not been amended to reflect changes of law." AT&T does not dispute that the AT&T-Sprint agreement has been amended to reflect changes of

law, and as explained below, AT&T's denial of Nextel's opt-in request is not based on any "change of law" issues.[4]

III. SECTION 252(i)

15. Nextel does not base its request for relief solely on the two Merger Commitments just addressed. Nextel also bases its request on Section 252(i) of the 1996 Act, which provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

16. This provision does not support Nextel's request for relief for several reasons. First, Nextel is not seeking to adopt the amended AT&T-Sprint Agreement "upon the same terms and conditions as provided in the agreement" because the AT&T-Sprint Agreement addresses a unique mix of wireline and wireless items. Nextel, however, provides only wireless service and, in fact, is not even certificated to provide wireline services in Florida. Second, allowing Nextel to adopt the AT&T-Sprint Agreement would result in an agreement that would appear to be contrary to FCC policy and internally inconsistent.

17. Next, I will address the types of interconnection service, or network elements that are provided under the AT&T-Sprint Agreement. The AT&T-Sprint Agreement contains negotiated terms and conditions between AT&T Florida and

[4] The Merger Commitments that Nextel relies on are inextricably intertwined with arguments pending in FCC Docket 08-23 regarding the interplay between such Merger Commitments and Section 252 (i) and Federal Rule 51.809 (b).

the following Sprint entities: wireline providers Sprint Communications Company Limited Partnership and Sprint Communications Company L.P. (collectively referred to as "Sprint CLEC"); and wireless providers Sprint Spectrum L.P. and SprintCom, Inc. (collectively "Sprint PCS"). The AT&T-Sprint Agreement, therefore, addresses a unique mix of wireline and wireless items (such as traffic volume, traffic types, and facility types), and it reflects the outcome of gives and takes between those specific parties that would not have been made if the agreement addressed only wireline services or only wireless services.

18. Nextel is not seeking to adopt the AT&T-Sprint Agreement "upon the same terms and conditions as provided in the agreement". The terms and conditions of the AT&T-Sprint Agreement clearly apply only when the non-ILEC parties to the agreement are providing both wireline and wireless services. Nextel, however, does not provide both services in Florida.

19. Nextel provides wireless service in Florida.

20. Nextel does not provide wireline service in Florida and is not even certificated to provide wireline service in Florida.

21. AT&T Florida's Interconnection Agreements typically do not address both wireline and wireless services. In fact, it is extremely rare for a single AT&T Florida Interconnection Agreement to address both wireline and wireless services and, as noted above, the AT&T-Sprint Agreement reflects the outcome of gives and takes between those specific parties that would not have been made if the agreement addressed only wireline services or only wireless services. Attachment

3, Section 6.1 of the AT&T-Sprint Agreement, for instance, expressly states that "The Parties' agreement to establish a bill-and-keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic."

22. To allow Nextel to adopt the AT&T-Sprint Agreement, therefore, would disrupt the dynamics of the terms and conditions negotiated between AT&T Florida and the Sprint parties to the AT&T-Sprint Agreement and, in this case, AT&T would lose the benefits of the bargain negotiated with those parties.

23. The AT&T-Sprint Agreement addresses circumstances whereby one of the Parties may opt out of the Agreement. Additional language in Attachment 3, Section 6.1 states that:

> ...the bill-and-keep arrangement is contingent upon the agreement by all three Parties to adhere to bill-and-keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with [AT&T] pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill-and-keep arrangement between [AT&T] and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by [AT&T].

24. From that negotiated language, it is apparent that the express combination of the three parties to the agreement drove the establishment of bill-and-keep between the three parties. Clearly, it was AT&T's concern that the balance of traffic would be skewed unfavorably in Sprint's favor in the event that one of the Sprint entities elected to pull out of the Agreement, and that AT&T would no longer realize any benefits of the original bargain as a result.

25. There are examples of the benefits of the bargain that AT&T would lose if Nextel were allowed to adopt the AT&T-Sprint Agreement. The examples I will provide generally pertain to Interconnection Attachment 3 (entitled "Network Interconnection: Call Transport and Termination") of the AT&T-Sprint Agreement with respect to Interconnection Compensation.

(a) Section 6.1.1 establishes a "bill-and-keep" arrangement for usage on CLEC local traffic, ISP-bound traffic, and wireless local traffic. Bill-and-keep arrangements are unusual for wireless traffic. Bill-and-keep means the rate for terminating certain traffic is zero. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain a bill-and-keep arrangement.

(b) Section 2.3.2 establishes a 50/50 split for the cost of interconnection facilities for wireless traffic, or as the agreement states, "[t]he cost of the interconnection facilities...shall be shared on an equal basis." This particular split is unusual for wireless traffic. In fact, I am not aware of any AT&T agreements with stand-alone wireless providers like Nextel that contain this particular split.

(c) Similarly, Section 2.9.5.1 establishes a 50/50 split for the cost of interconnection facilities for handling transit traffic, ISP-bound traffic and intraLATA toll traffic for the Sprint CLEC. This particular split is unusual for CLEC traffic. In fact, I am not aware of any AT&T agreements with stand-alone CLEC providers that contain this particular split.

26. As a practical matter, when AT&T Florida implements a carrier's adoption of an approved Interconnection Agreement, typically, AT&T Florida creates "adoption papers" that have the practical effect of substituting the adopting carrier's name for the original carrier's name throughout the agreement including any amendments, thereby binding the adopting carrier to all the rates, terms and conditions contained in the original agreement. The parties then execute the adoption papers.

27. Substituting Nextel for Sprint results in an agreement that would appear to be contrary to FCC policy. As explained above, both wireless and wireline carriers are parties to the AT&T-Sprint Agreement. If the wireless company Nextel alone were substituted for the original parties to the agreement (Sprint CLEC and Sprint PCS), portions of the adopted agreement would appear to erroneously suggest that Nextel could avail itself of provisions in the agreement that apply only to CLECs. To cite but one example, Attachment 2 of the AT&T-Sprint Agreement allows the Sprint CLEC entities to purchase unbundled network elements ("UNEs") from AT&T Florida. Substituting Nextel for the parties to the AT&T-Sprint agreement would result in language that would appear to erroneously suggest that Nextel can purchase UNEs from AT&T Florida.

28. Nextel, however, only provides mobile wireless services in Florida, and in its Triennial Review Remand Order, the FCC ruled that:

> Consistent with [the D.C. Circuit Court of Appeal's opinion in] *USTA II*, we deny access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of

> unbundling. ***In particular, we deny access to UNEs for the exclusive provision of mobile wireless services***....[5]

Nextel, therefore, cannot purchase UNEs from AT&T Florida.

29. Substituting Nextel for Sprint would also result in an agreement that would appear to be internally inconsistent. To cite but one example, the AT&T-Sprint agreement was amended to bring it into compliance with the FCC's Triennial Review Order and Triennial Review Remand Order. That amendment provides that, as of March 11, 2006, "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." If Nextel were allowed to adopt the AT&T-Sprint Agreement, some portions of the adopted Agreement would erroneously appear to allow Nextel to purchase UNEs from AT&T Florida, while this amendment provision prohibits it from doing so. The Agreement, therefore, would be internally inconsistent.

30. The adopted Agreement could not be revised to address these issues in the context in which Nextel is seeking to adopt the AT&T-Sprint Agreement. As our attorneys can explain in more detail, the FCC has ruled that a carrier is no longer permitted to "pick and choose" the provisions in an approved Interconnection Agreement that it wants to adopt. Instead, the FCC has adopted an "all-or-nothing rule" that requires a requesting carrier seeking to avail itself of

[5] *See* Order On Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 at ¶34 (February 4, 2005)(emphasis added).

terms in an Interconnection Agreement to adopt the agreement ***in its entirety***, taking ***all*** rates, terms, and conditions from the adopted agreement.[6]

31. Allowing Nextel to "adopt" the AT&T-Sprint Agreement after revising the agreement to clarify which provisions Nextel can and cannot use is contrary to this FCC ruling, and confusing.

32. There are twenty-nine pages in the nine-state AT&T-Nextel Wireless Interconnection Agreement. In contrast, there are approximately 1,170 pages in the current AT&T-Sprint Agreement, including all approved amendments,[7] that Nextel seeks to adopt – generally, about the same number of pages that comprise a number of the older Interconnection Agreements between AT&T and stand-alone CLECs in AT&T's Southeast service region.[8]

33. The significance of the huge difference between the sizes of the two agreements is clear: an Interconnection Agreement between AT&T and a CLEC (in this case, an agreement with a CLEC that also includes one of the CLEC's wireless entities) contains a vast number of provisions that pertain strictly to the relationship between AT&T and a CLEC. An overwhelming majority of those provisions do not and cannot apply to a wireless provider, and, therefore, are not included in the Interconnection Agreement between AT&T and a wireless-only

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

[7] The amendments referenced above and approved by the FL PSC, were approved in dockets 030488-TP, 040191-TP, 040570-TP, 041005-TP, 050074-TP, 050134-TP, 060413-TP.

[8] More recently, general language and change-of-law revisions have reduced standard interconnection agreements to fewer than 500 pages.

provider.[9] Stated another way, Nextel could not possibly comply with the terms of the AT&T-Sprint Agreement because Nextel is not a CLEC.

IV. HARM TO AT&T IF NEXTEL IS ALLOWED TO ADOPT

34. The potential harmful impacts extend beyond Florida and AT&T's Southeastern region. The potential damage is exponential with respect to the states outside of AT&T's Southeastern region. In addition to their filings in the Southeast, Sprint and Nextel are also attempting to port the Southeast AT&T-Sprint Agreement outside of AT&T's Southeastern region.

35. The impacts are significantly increased by the fact that neither Sprint, Sprint PCS, nor the Nextel entities currently have benefit of bill-and-keep and/or the 50/50 facilities pricing in any of the 13 states. Moreover, each has a separate Interconnection Agreement with AT&T in all 13 states – unlike their combined Southeast agreement. If Sprint and Nextel succeed in porting the Southeast agreement without proper modification to any or all of the 13 states across all of their subsidiaries – and, therefore, the bill-and-keep and 50/50 facilities pricing provisions – all of the Sprint/Nextel subsidiaries will unfairly benefit from a bargain developed through negotiation of the unique mix of considerations represented by only AT&T, Sprint and Sprint PCS in the Southeast.

36. Another major issue with respect to the potential harm caused AT&T should Nextel be allowed to adopt the AT&T-Sprint Agreement is the issue of adoptability itself. If a wireless-only entity such as Nextel is allowed to adopt an

[9] Attachment B to the AT&T Florida's brief provides a summary of provisions in the Sprint ICA that Nextel, as a stand-alone wireless provider, cannot legally avail itself.

Interconnection Agreement like the one between AT&T, Sprint and Sprint PCS, with Nextel neither being certificated as a CLEC nor being combined with a wireline provider, then such a ruling may set a precedent for other wireless-only entities to likewise adopt the AT&T-Sprint Agreement with, potentially, similar financial detriment to AT&T. Assuming that other major unaffiliated wireless carriers were to adopt the Sprint/Nextel agreement, the potential costs to AT&T are magnified even further.

37. Finally, there are additional reasons why allowing the adoptions would have a negative impact on the industry. For example AT&T's data does not reveal how the balance of traffic is likely to change over time.

38. As carriers' businesses change, so, too, may the means by which they deliver their traffic. Already, Nextel Partners has shifted traffic from its trunks so that its traffic is delivered via Nextel South's trunks, and that traffic is counted with Nextel South's minutes of use. It is also possible for a carrier to use a third party to aggregate and deliver traffic on its behalf. Thus, even if it were determined that a bill-and-keep arrangement is suitable today between specific carriers because the traffic they exchange is roughly in balance, such a traffic pattern may change and may change drastically. If carriers are allowed to maintain bill-and-keep compensation arrangements in instances where traffic is not in balance, it would afford them another mechanism for arbitrage.

39. Unscrupulous carriers may "game the system" in order to avoid paying their fair share of the costs associated with carrying and terminating their end

users' traffic. Such a result runs counter to good public policy. Therefore, it is important that procedures remain available to ensure that carriers appropriately compensate each other for the facilities and services they utilize, and that enforcement of bill-and-keep arrangements is limited to instances in which traffic remains in balance.

CONCLUSION

40. I respectfully request the opportunity to present the facts summarized in this affidavit to the Commission. These facts will demonstrate that the adoptions requested by Nextel should not be granted.

FURTHER AFFIANT SAITH NOT.

Signed this 26th day of June, 2008

P L Ferguson

P. L. (Scot) Ferguson

STATE OF GEORGIA

COUNTY OF FULTON

Sworn to and subscribed before me, this 26th day of June 2008.

My Commission Expires:

Notary Public

TERRI L. ROCKWELL NOTARY PUBLIC GWINNETT COUNTY GEORGIA EXPIRES OCTOBER 28, 2009

ATTACHMENT B

SUMMARY OF CONTRACT LANGUAGE THAT WOULD NOT APPLY TO A CMRS PROVIDER
IN THE INTERCONNECTION AGREEMENT
BETWEEN
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P AND SPRINT SPRECTRUM L.P
AND
AT&T FLORIDA
DATED JANUARY 1, 2001

Prepared 2/20/08

MAJOR SECTION NAME	SUB-SECTION	PDF PAGE NUMBER	DESCRIPTION
General Terms and Conditions – Part A	4. Ordering Procedures	8	Reference to ordering procedures in Attachment 6 for Sprint CLEC
	5. Parity 5.1 and 5.2	8	Resale services at parity with that provided to AT&T's own affiliates, subsidiaries, and end users. Quality of Network Element and access to same shall be at least equal to that which AT&T provides itself or such access as would provide efficient carrier meaningful opportunity to compete.
	6. White Pages Listings 6.1 – 6.10	9	White pages listings
	7. Bona Fide Request/New Business Request for Further Unbundling Subsection of 7.1	10	Products and services made available to other CLECs shall be made available to Sprint on same rates, terms and conditions through an amendment.
	24. Network Security 24.2.1 24.2.2 24.2.2.1 24.2.3	28	Fraud protection available for resold AT&T services and AT&T's ports used by Sprint will be available to Sprint. Parties will cooperatively work together in fraud situations. Liability for provisioning, maintenance, signal network routing errors, accidental or malicious alternation of software underlying Network Elements or subtending operational support systems causing financial loss. AT&T responsibility from unauthorized attachment to loop facilities from Main Distribution Frame to Network Interface Device.

SUMMARY OF CONTRACT LANGUAGE THAT WOULD NOT APPLY TO A CMRS PROVIDER
IN THE INTERCONNECTION AGREEMENT
BETWEEN
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P AND SPRINT SPRECTRUM L.P
AND
AT&T FLORIDA
DATED JANUARY 1, 2001

MAJOR SECTION NAME	SUB-SECTION	PDF PAGE NUMBER	DESCRIPTION
Resale – Attachment 1	Entire Resale Document	46 - 77	Provides rates, terms and conditions for the resale of AT&T telecommunications services provided at a discount off the retail rates and associated services.
Network Elements and Other Services – Attachment 2	Entire Document - Network Elements and Other Services	78 - 502	Provides rates, terms an conditions for offered Network Elements used in the provision of telecommunications services
Network Interconnection – Attachment 3	1. Definitions CLEC Local Traffic Transit Traffic Virtual Point of Interconnection	506, 507	Definition of terms used in Network Interconnection
	2. Network Interconnection 2.2.1 2.6 Interconnection via Leased Dedicated Transport Facilities 2.6.1, 2.6.1.1, 2.6.1.2 2.7 Fiber Meet Interconnection 2.7.1, 2.7.2 2.7.3 2.7.3.1, 2.7.3.2	508 510 510 511	Interconnection of respective Sprint CLEC and AT&T networks -Call transport and termination facilities and threshold to utilize dedicated transport facilities; determination of facilities utilized for Local Traffic determined based upon Percent Local Facility Factor. -Occurs at mutually agreeable, economically and technically feasible point between Sprint CLEC premise and AT&T Tandem or End Office within LATA. -Joint engineering and Synchronous Optical Network transmission system. -Two Fiber Meet design options.

SUMMARY OF CONTRACT LANGUAGE THAT WOULD NOT APPLY TO A CMRS PROVIDER
IN THE INTERCONNECTION AGREEMENT
BETWEEN
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P AND SPRINT SPRECTRUM L.P
AND
AT&T FLORIDA
DATED JANUARY 1, 2001

MAJOR SECTION NAME	SUB-SECTION	PDF PAGE NUMBER	DESCRIPTION
	2.7.4, 2.7.5		-Each parties' responsibilities with respect to SONET equipment.
	2.7.6		-Point of Interconnection for Fiber Meet point.
	2.7.7	512	-Responsibility of maintenance of fiber optic facility.
	2.7.8		-Establishment of timing sources
	2.7.9		-Mutual agreement on capacity of the FOT, optical frequency and wavelength, methods for capacity planning and management of facilities.
	2.7.10		-Coordination and maintenance of SONET.
	2.7.11		-Responsibility of providing respective transport facilities to Fiber Meet and cost to build-out.
	2.7.12		-Responsibility for costs of respective portions of Fiber Meet facility used for non transit Local Traffic.
	2.8 Points of Interconnection	512	Number, location and selection of Physical
	2.8.1, 2.8.1.1, 2.8.1.2	513	Point of Interconnection and criteria for additional points of interconnection within a LATA.
	2.9 Interconnection Trunking	513	Interconnection Trunking
	2.9.1, 2.9.2	514	-Establishment of most efficient trunking network; Bona Fide Request/New Business Request
	2.9.3		-Signaling System 7 capable provisioning
	2.9.4		-Trunk group configuration
	2.9.5		-Rate references
	2.9.5.1		-Two-way trunking carrying Local and

SUMMARY OF CONTRACT LANGUAGE THAT WOULD NOT APPLY TO A CMRS PROVIDER
IN THE INTERCONNECTION AGREEMENT
BETWEEN
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P AND SPRINT SPRECTRUM L.P
AND
AT&T FLORIDA
DATED JANUARY 1, 2001

MAJOR SECTION NAME	SUB-SECTION	PDF PAGE NUMBER	DESCRIPTION
			IntraLATA Toll Traffic, excluding Transit Traffic and for two-way Supergroup carrying Local and IntraLATA Toll Traffic and Sprint CLEC Transit Traffic, compensation for trunks and facilities will be 50%.
	2.9.6 One-way and Two-way Trunking	514	
	2.9.6.1, 2.9.6.1.1, 2.9.6.1.2, 2.9.6.1.3, 2.9.6.1.4	515	-One-way trunking
	2.9.6.2, 2,9.6.2.1, 2.9.6.2.1.1, 2.9.6.2.1.1.1, 2.9.6.2.1.1.2, 2.9.6.2.1.1.3, 2.9.6.2.1.2, 2.9.6.2.1.2.1, 2.9.6.2.1.2.2, 2.9.6.2.1.2.3, 2.9.6.2.2, 2.9.6.2.3, 2.9.6.2.4, 2.9.6.2.4.1, 2.9.6.3	516	-Two-way
	2.9.7 Transit Trunk Groups 2.9.7.1, 2.9.7.2		-Transit Trunk Groups
	2.9.7.3 Toll Free Traffic 2.9.7.3.1, 2.9.7.3.2, 2.9.7.3.3, 2.9.7.3.4	517	-Toll Free Traffic
	2.9.8 Access Tandem Interconnection Trunking 2.9.8.1		-Access Tandem Interconnection Trunking
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Amendment Effective May 7, 2003 Affecting Network Elements and Other Services – Attachment 2	2.1.1, 2.1.1.1, 2.1.1.2, 2.1.1.3, 2.1.1.4	810	Provides for AT&T to provide new UNE loops without local usage restrictions under certain conditions
Amendment Effective September 1, 2003 Adding Network Elements and Other Services Rates – Attachment 2, Exhibit B	GA and NC Network Elements Rates	812	Added port and combination rates in GA and NC
Amendment Effective December 3, 2003 adding and replacing language/exhibits In Resale, Attachment 1, Network Elements and Other Services,	Resale - Attachment 1 4.4 Service Jointly Provisioned with an Independent Company or Competitive Local Exchange Company Areas	816	Service jointly provisioned

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	Network Elements and Other Services - Attachment 2 Delete 1.4.1, 1.4.2 Add 8.6 Replace 13.2.1, 13.2.2, 13.2.4, 13.2.5 Replace 13.6 Rates for EELs Add 13.7 Other UNE Combinations Replace 14.1, 14.2		 -Line Splitting -Currently Combined, Ordinarily Combined, Not Typically Combined -Rates for EELs -Other UNE Combinations -Combinations of port and Loop UNEs
	Billing – Attachment 7 Replace 1.15 Deposit Policy		 Deposit Policy
Amendment Effective August 23, 2004 Deleting Certain Rates and Adding Language in Network Elements and Other Services, Attachment 2	Attachment 2, Exhibit A Delete Local Number Portability USOCs and Charges Add 9.9 – Local Number Portability Add 14.4	836	Deleted USOCs and Rates for Local Number Portability References Local Number Portability Charges in AT&T FCC Tariff
Amendment Effective February 10, 2005 Affecting Rates in Network Elements and Other Services, Attachment 2, Exhibit A	Incorporated QuickServe Rates into Attachment 2, Exhibit A, Network Elements and Other Services	841	QuickServe Rates in Attachment 2, Exhibit A
Amendment Effective March 3, 2005 Adding Language and Rates to Network Elements and Other Services, Attachment 2	Add to Attachment 2 11.1.1 Melded Tandem Switching Add Melded Tandem Switching Rates	862	Melded Tandem Switching Language and Rates
Amendment Effective March 11, 2006 Modifying Provisions Pursuant to the	General Terms and Conditions Replace 17 Adoption of Agreements	873	Replace Adoption of Agreements Language

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FCC TRRO Released February 4, 2005 and Effective March 11, 2005 and Incorporating Other Provisions Affecting General Terms and Conditions and Network Elements and Other Services, Attachment 2	Move 20 and 21 and associated rates from Network Elements and Other Services, Attachment 2, to Become New Sections 8 and 9 and new rates in Local Interconnection, Attachment 3 Replace Network Elements and Other Services Ordering, Attachment 6 Replace First Sentence of 1.1		-Move SS7 Network Interconnection language and rates from Network Elements and Other Services, Attachment 2, to Local Interconnection, Attachment 3 -Move Basic 911 and E911 language and rates from Network Elements and Other Services, Attachment 2, to Local Interconnection, Attachment 3 -Replace Network Elements and Other Services, Attachment 2 -Nondiscriminatory access to AT&T's OSS
Amendment Effective November 15, 2006 Modifying Factors in Local Interconnection, Attachment 3	Local Interconnection Modifies 6.2, 6.3, 6.4	1166	Modifies PIU/PLU/PLF language in Local Interconnection, Attachment 3

ATTACHMENT C

BELLSOUTH

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May 11, 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: Pick & Choose NPRM; CC Dkts 01-338, 96-98, and 98-147; Review of Sec. 251 Unbundling obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch,

BellSouth is submitting for the record in the above proceedings the attached affidavit of Jerry D. Hendrix, Assistant Vice President-Interconnection Services Marketing for BellSouth. Mr. Hendrix describes in detail how the FCC's current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

This notice is being filed pursuant to Sec. 1.1206(b)(2) of the Commission's rules. If you have any questions regarding this filing please do not hesitate to contact me.

Sincerely,

Mary L. Henze

Mary L. Henze

cc: J. Minkoff
C. Shewman

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services of Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

AFFIDAVIT OF JERRY D. HENDRIX
ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS INC. ("BELLSOUTH")

The undersigned being of lawful age and duly sworn, does hereby state as follows:

QUALIFICATIONS

1. My name is Jerry D. Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. My title is Assistant Vice President - Interconnection Services Marketing for BellSouth. I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers ("CLECs"). Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Pricing and Regulatory Organizations. I have been employed with BellSouth since 1979.

PURPOSE OF AFFIDAVIT

2. The purpose of this affidavit is to follow up on questions raised by the Commission during a recent BellSouth *ex parte* presentation, notice of which was subsequently filed in this proceeding, Letter from Mary L. Henze to Marlene Dortch (April 27, 2004), and to specifically provide additional record evidence that the current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

THE PICK AND CHOOSE RULES AFFECT INTERCONNECTION NEGOTIATIONS IN INEFFICIENT AND NON-PRODUCTIVE WAYS:

3. For example, in an effort to incorporate into its existing Interconnection Agreements ("IAs") the changes of law that resulted from the FCC's *Triennial Review Order* ("*TRO*"), BellSouth forwarded to each CLEC an amendment to its specific IA. The amendment contained all changes that the *TRO* specified, regardless of whether BellSouth viewed the change as beneficial to BellSouth or to the CLEC. Also, in the majority of its states, BellSouth filed new SGATs reflecting the current state of the law, which included the changes from the *TRO*. Before BellSouth could get the new SGAT filed in the remainder of its states, the D.C. Circuit Court of Appeals issued its Opinion and stayed significant sections of the *TRO*; therefore, BellSouth chose not to proceed with the rest of its SGAT filings until the situation stabilized. In one of the states where BellSouth filed a new SGAT, CLEC A submitted to that state commission a request to adopt only the commingling language from the SGAT. Apparently, CLEC A was attempting to avoid incorporating into its IA the remaining provisions of the *TRO*, wanting instead to incorporate into its IA only those provisions from the *TRO* that CLEC A deemed beneficial to it.

4. CLEC B, apparently in an effort to eliminate specific provisions of its negotiated IA that it now views as not being beneficial, has requested to adopt specific provisions from another carrier's agreement, even though the other carrier's agreement is actually silent on the provisions at issue. In other words, CLEC B seeks to adopt the absence of a provision.

5. A CLEC affiliate of a large, established CLEC has requested to adopt the established CLEC's IA (and, where the established CLEC has no adoptable agreement, the CLEC affiliate has requested to adopt the IA of another large, unaffiliated CLEC). The requested IAs, in most cases, were filed with and approved by the state commissions more than two years ago and do not reflect changes in law that have occurred since the agreements were signed and approved. Further, the CLEC affiliate did not request the adoption until a matter of days before the DC Circuit Court of Appeals released its March 2, 2004, Opinion regarding the TRO. The CLEC affiliate is new, has no customers, and has not even completed the certification process in at least one of BellSouth's states in which the CLEC affiliate has requested adoption of an existing IA. Nonetheless, the CLEC affiliate is requesting to adopt agreements that are no longer compliant with law, presumably in an attempt to perpetuate those portions of the agreement that it finds beneficial but that are not compliant with law. BellSouth's response to the CLEC affiliate was that it could adopt the requested IAs, but only if it agreed to amend the IAs so that they would be compliant with current law. The CLEC affiliate has, thus far, refused to amend the IAs as a condition of adoption.

6. CLEC C has a very specific business plan and customer base, and seeks certain bill and keep arrangements in connection with its interconnection with BellSouth. In this specific instance, both parties would benefit from such an arrangement. However, in other circumstances, this particular arrangement would be extremely costly to BellSouth. Rather than being able simply to agree to the arrangement with CLEC C, BellSouth's negotiator and the negotiating attorney have spent many hours consulting with BellSouth's network engineers, sales teams and billing personnel to attempt to identify and discuss all potential risks. Due to the pick and choose option, such caution is necessary in order to craft the language addressing the specific interconnection arrangement so that another CLEC cannot adopt it unless that CLEC also meets the same qualifications as CLEC C. Under the specter of pick and choose, what should be a simple negotiation that could be handled in a matter of days turns into a series of meetings with numerous people, and takes significantly longer to negotiate. Furthermore, even if BellSouth agrees to CLEC C's request and does its best to construct contract language specific to this situation, there is still the risk that CLECs who are not similarly situated will argue that they should be allowed to adopt the language, or parts thereof. Most likely, protracted litigation would occur, and if the CLEC prevailed, the result would be financial harm to BellSouth.

7. The pick and choose rules cause BellSouth to incur costs in litigation not only to defend against adoption where BellSouth believes the adopting CLEC is not similarly situated, but also to arbitrate issues with a particular carrier that could be successfully negotiated if the pick and choose rules did not exist. In a true negotiation, unrelated contract provisions left to be resolved are often "horse-traded." For example, BellSouth may agree to a CLEC's requested provision in exchange for the CLEC's agreement to an unrelated provision. Two problems can occur where BellSouth agrees to such exchanges. First, in situations where such trades are made, it is difficult, if not impossible, to track the exchanges. Thus, adopting CLECs can pick and choose certain language that includes the beneficial provision without taking the other provision that was part of the bargain (and that was beneficial to BellSouth). Second, if BellSouth insists that the CLEC also adopt the other provision that was part of the exchange, the CLEC will likely consider the other provision as being unrelated to the provision the CLEC wants to adopt, and the parties may spend months attempting to resolve the issue. Where BellSouth does not agree to the exchange for the reasons discussed above, the parties are forced to arbitrate issues that neither party truly has the inclination to fight.

8. Larger CLECs often request specialized services, such as downloads of databases, development of specialized systems or other costly endeavors, and these CLECs often want to negotiate those requests in connection with an IA. In some cases, BellSouth may be willing to agree to the request, provided that it can collect appropriate compensation. Because most of these negotiated items are not actually developed unless and until the CLEC makes a request, some such items are never actually developed and implemented. The large requesting CLEC

prefers to make a request, obtain the specialized service, system or database from BellSouth, and then reimburse BellSouth for the costs incurred. However, BellSouth cannot agree to anything other than advance payment. Otherwise, a CLEC without the financial means to pay for the development of the service could adopt the language, request development, obtain the benefit of the service and then be unable to pay for it. The large CLEC may ultimately arbitrate the issue in an effort to avoid advance payment or other terms that, for that particular CLEC and its financial capability and business plan, may actually be acceptable to BellSouth, but that BellSouth cannot agree to because the terms would then be available for adoption by other CLECs.

9. A CLEC may have a novel approach to a particular problem that BellSouth has not operationalized. That CLEC desires to include the terms and conditions of this proposed solution in its IA, and BellSouth generally would be willing to do so in order to test the concept on a small scale with that one CLEC or with a small subset of CLECs. Obviously, if the concept were successful, BellSouth would be willing to offer the same arrangement to additional CLECs. BellSouth, however, is unable to include such untested concepts in an IA, because if the solution proves to be operationally problematic, too costly or otherwise unworkable for BellSouth, adoption perpetuates the problem and causes it to grow. Thus, BellSouth generally cannot agree to incorporate innovative but untested solutions for a single carrier into an IA.

10. During 1998 and 1999, BellSouth participated in multiple arbitrations relating to the treatment of ISP-bound traffic in each of the nine states in which it provides local exchange and exchange access services. BellSouth considered attempting to settle these disputes with some CLECs with a going-forward remedy proposal. The settlement decision would have been based on each arbitrating CLEC's specific situation. Due to the uncertainty caused by the current pick and choose rules, however, BellSouth was unable to proceed in a timely manner with these settlement proposals due to the risk that CLECs that were not similarly situated to the arbitrating CLECs would attempt to obtain, and would indeed ultimately obtain, the same provisions.

11. Generally, BellSouth's Interconnection Services contract negotiators, product managers and upper management, along with BellSouth's network and billing personnel and its counsel, expend substantial resources in assessing risk of adoption, trying to develop contract language that limits adoption to similarly situated CLECs, and handling disputes involving adoption requests. Each and every issue must be considered carefully in regards to pick and choose and the potential results of including provisions in the agreement that can be adopted by other carriers. While BellSouth can attempt to craft language that would restrict the provisions only to similarly situated CLECs, such an exercise is time consuming, and often the CLEC has no inclination to expend time and resources to negotiate or agree to such language, even if the language is not problematic for the negotiating CLEC. Further, BellSouth has no assurance of prevailing at the

state commissions if the CLEC argues that it should not be required to adopt all of the restrictions along with the language it desires to adopt. The following are examples of adoption requests that BellSouth has received from multiple CLECs that impede negotiations and require a great amount of time and resources to resolve:

- Requests to adopt provisions that are beyond the scope of 252(i), such as requests to adopt dispute resolution provisions, governing law provisions, and deposit provisions that are based on the original negotiating CLEC's financial status.

- Requests to adopt specific provisions without accepting other legitimately related provisions, such as a request to adopt a "bill and keep" provision without accepting the associated network interconnection arrangements provision.

- Requests to adopt provisions to which the CLEC is not legally entitled, such as a request to adopt reciprocal compensation for ISP traffic provisions from an existing IA when the adopting CLEC did not exchange traffic with BellSouth in 2001, as is required by law to entitle that CLEC to compensation for ISP traffic.

- Requests to adopt a specific provision in order to avoid change of law provisions, such as a request to adopt specific provisions from the *TRO*, but refusing to accept all of the provisions, especially those that are more beneficial to the ILEC.

12. This concludes my affidavit.

Jerry D. Hendrix

Sworn to and subscribed before me
A Notary Public, this 10th
day of May, 2004.

Notary Public

RUDINE J. DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006

ATTACHMENT D

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.	DOCKET NO. 070249-TP ORDER NO. PSC-07-0680-FOF-TP ISSUED: August 21, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Case Background

On April 6, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint) filed a Petition for Arbitration (Petition) of a single issue in its Interconnection Agreement (ICA) with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act). Section 252 (b)(1) of the Act sets forth the procedures for petitioning a state commission to arbitrate "any open issues." Section 251 provides the framework for negotiation or arbitration of ICAs.

In its Petition, Sprint stated that the single issue, a three-year extension of its ICA, involves the voluntary Merger Commitments filed with the Federal Communications Commission (FCC) that were incorporated into the FCC's approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control. The merger closed on December 29, 2006. On March 26, 2007, the FCC released its Order, FCC 06-189, authorizing the merger.

On May 1, 2007, AT&T filed a Motion To Dismiss and Answer (Motion to Dismiss). In its Motion to Dismiss, AT&T argued that the matter in dispute between it and Sprint was not one that arose as an issue subject to arbitration under Section 252 and that the FCC has sole jurisdiction over the Merger Commitments.

On May 2, 2007, Sprint filed an unopposed request for an extension of time to file its response to the Motion to Dismiss. The request was granted by Order No. PSC-07-0401-PCO-TP, issued May 8, 2007. On May 15, 2007, Sprint timely filed its Response to AT&T's Motion to Dismiss (Response). Sprint opined that we have concurrent jurisdiction under the Act and Section 364.162, Florida Statutes, to arbitrate the commencement date of the three-year extension.

This matter now is before us solely for purpose of resolving AT&T's Motion to Dismiss. AT&T's Motion to Dismiss and Answer also plead denials, an affirmative defense, and alternative issues to be determined by we. These aspects of the pleading are not germane to the Motion to Dismiss and are not addressed in this order.

Discussion

In this order, we grant AT&T's Motion to Dismiss because Sprint is requesting that we enforce an allegedly known right (the Merger Commitments as interpreted by Sprint) under an FCC order as opposed to arbitrating an "open" issue concerning Section 251 obligations.

Analysis and Discussion:

I. STANDARD OF REVIEW

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

In its motion, AT&T argues that we lack subject matter jurisdiction to arbitrate because the Merger Commitment at issue is not a "Section 251 Arbitration Issue." Lack of subject matter jurisdiction may be properly asserted in a motion to dismiss. See Fla. R. Civ. P. 1.140(b). Florida courts regularly review arguments concerning subject matter jurisdiction on motions to dismiss. See, e.g., Bradshaw v. Ultra-Tech Enters., Inc., 747 So. 2d 1008, 1009 (Fla. 2d DCA 1999) (affirming dismissal of complaint based on ERISA preemption of state law); Doe v. Am. Online, Inc., 718 So. 2d 385, 388 (Fla. 4th DCA 1998) (rejecting the argument that a federal preemption defense constituted an affirmative defense that should have been raised in an answer, not on a motion to dismiss); Bankers, 697 So. 2d at 160 (addressing an issue raised in defendant's motion to dismiss regarding federal preemption of plaintiff's claims).

AT&T argues that interpretation and enforcement of the Merger Commitments are within the exclusive purview of the FCC. This is a preemption argument. We note that Florida courts, including the Florida Supreme Court, have held that the issue of federal preemption is a question of subject matter jurisdiction. Boca Burger, Inc. v. Richard Forum, 2005 Fla. LEXIS 1449; 30 Fla. Law Weekly S 539 (Fla. July 7, 2005); citing Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So. 2d 1333, 1335 (Fla. 1993); Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2d DCA 1997); Fla. Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1183 (Fla. 1st DCA 1992).

In sum, in ruling on the Motion to Dismiss we do have jurisdiction to determine whether we have subject matter jurisdiction, and this may include a review of the Merger Commitments as established by the FCC Order.

II. ARGUMENTS

A. Sprint's Argument

Sprint's Petition identifies the issue to be arbitrated as follows:

> ISSUE 1: May AT&T Southeast effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007, pursuant to Interconnection Merger Commitment No. 4? [Petition, p. 8.]

Sprint's Response provides a useful summary of its Petition and the elements of the claim for relief.

> Sprint's Petition seeks to implement an amendment to convert and extend its current month-to-month Interconnection Agreement ("ICA") with AT&T to a fixed 3-year term. The amendment arises from Sprint's acceptance of an AT&T, Inc. and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. [Response, pp. 1, 2].

Sprint further argues that,

> The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. The specific condition at issue here is that AT&T "shall permit a requesting telecommunications carrier to extend its current interconnection agreement . . . for a period of up to three years." . . . This is the offer that AT&T was required to make as a matter of law and this is the offer that was accepted by Sprint during the parties' statutory 251-252 negotiations for a new agreement. Sprint's Petition makes it clear that the single issue pertaining to the amendment is establishment

of essential ICA terms related to the 3-year extension, with the specific disputed term being when the 3-year extension commences. [Response, pp. 2, 3]

B. AT&T's Argument

AT&T argues that "(t) he merger commitment is not a requirement of Section 251." [Motion to Dismiss, p. 2] Consequently, the issue raised by Sprint is "not a Section 251 Arbitration Issue." AT&T also argues that the "merger commitment" issue "was not discussed in the context of the parties' negotiations of a new interconnection agreement." AT&T states that "Sprint's attempt to frame the merger commitment as an arbitrable issue is an affront to the plain, clear, and unambiguous language contained in the Act. Given that Sprint's Petition contains solely this one non-arbitrable issue, Sprint's issue should be dismissed."

AT&T also contends that the petition should be dismissed because we allegedly have no jurisdiction to address the meaning of the Merger Commitment. According to AT&T, "(t)he FCC has the sole authority to interpret, clarify or enforce any issue involving Merger Commitments set forth in its Merger Order." [Motion to Dismiss, p. 2] AT&T adds that this approach ensures a "uniform regulatory framework" for handling post-merger issues.

III. ANALYSIS

Section 251 of the Telecommunications Act, *inter alia*, imposes upon ILECs certain duties of interconnection and resale. Section 252(a) provides for establishing interconnection agreements through negotiation. Section 252(b) provides the framework for establishing interconnection agreements through compulsory arbitration, as opposed to negotiation. Simplifying, under Section 252(b)(1) a carrier "may petition a State commission to arbitrate any ***open issues***" (emphasis added) while under Section 252(c). We must ensure, inter alia, that our decisions "meet the requirements of Section 251" and regulations prescribed pursuant to that Section. Thus, our jurisdiction to arbitrate any open issues properly brought before it relating to the interconnection agreements created under Section 252 to meet the duties of ILECs under Section 251.

The dispositive question placed before us in the instant dispute is whether the issue Sprint seeks to arbitrate is an "open issue" arising out of the negotiations within the framework of Sections 251 and 252. If so, our jurisdiction under Section 252 is properly invoked; if not, our jurisdiction is not properly invoked and the petition must be dismissed.

The nature of the remedy sought in an action often reveals the nature of the issue presented and the jurisdiction invoked. In this case, the remedy sought by Sprint is the enforcement of an FCC order as Sprint interprets it. Specifically, Sprint seeks to enforce through arbitration one of the Merger Commitments. By analogy to civil suit, Sprint is like a third-party beneficiary seeking to enforce a contract between AT&T and the FCC as memorialized in the FCC's order. Thus, the nature of the remedy is an enforcement of an allegedly *known right*, not a determination of an *open issue* to comport with the requirements of Section 251. For this

reason, Sprint is not seeking arbitration of an open Section 251 issue, and thus its petition should be dismissed.

Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward. Sprint argues as follows:

> The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. [Response, p. 2]

Sprint, however, offers no legal support for why the Merger Commitments "must" be viewed as a "standing offer" that automatically became inserted into Sprint's negotiations with AT&T. As suggested above, one could see the Merger Commitments as establishing a third-party's rights to an extension, which is different than establishing a negotiable offer under Section 251. Moreover, even if one treats the Merger Commitments as an offer, AT&T counters that it offered something different than Sprint accepted. This is a classic "meeting-of-the-minds" contract formation problem, which as presented is not a Section 251 issue either.

In rejecting Sprint's attempt to arbitrate the Merger Commitments as pled, we do not suggest that interpreting and enforcing the Merger Commitments are off limits to us in all circumstances. There may be situations in which such interpretation and enforcement are inextricably intertwined with open issues being arbitrated under either Section 252 or Section 364.162, Florida Statutes, or both. In those situations it would be within our subject matter jurisdiction to arbitrate the conflicting views. Moreover, we also stress that we make no ruling with respect to the merits of the competing interpretations of the particular Merger Commitments. Our ruling is simply that Sprint's petition must be dismissed because it seeks to enforce the particular Merger Commitments as a known right, not arbitrate it as an open, Section 251 issue.

IV. CONCLUSION

For the reasons provided above, Sprint's petition is dismissed for failure to state a claim for which we may grant relief. More specifically, as pled by Sprint, we do not have jurisdiction to enforce Sprint's putative right to a certain extension under the Merger Commitments through arbitration as though it were an "open issue" within the meaning of Section 252(b) of the Telecommunications Act. We acknowledge that under some circumstances, enforcement of an FCC order or regulations may be inextricably intertwined with determining matters normally subject to our jurisdiction and thus permissible. Moreover, we reiterate that we express no opinion on the merits of the competing interpretations of the particular Merger Commitment.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Arbitration of a single issue in its Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act) filed by Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint), is hereby ***dismissed;***

ORDERED that the findings made in the body of this Order are hereby approved in every respect. It is further

ORDERED, that this docket shall remain open pending resolution of any motions for reconsideration or other post-decision pleadings that may be filed by the parties.

By ORDER of the Florida Public Service Commission this 21st day of August, 2007.

ANN COLE
Commission Clerk

(SEAL)

PKW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT E

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

In the Matter of NPCR, Inc. ("Nextel Partners") Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P., Sprint Spectrum L.P.	)	Docket No. 2007-UA-316
In the Matter of Nextel South Corp. ("Nextel") Petition for Adoption of the Existing Interconnection Agreement by and Between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P., Sprint Spectrum L.P.	)	Docket No. 2007-UA-317

FINAL ORDER

PROCEDURAL BACKGROUND

On June 28, 2007, NPCR, Inc. d/b/a Nextel Partners filed a Petition for Adoption of the Existing Interconnection Agreement by and Between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P., Sprint Spectrum L.P. (collectively "Sprint"). On the same date, Nextel South Corp. filed an identical petition. The Petitioners are referred to herein jointly as "Nextel."

In the Petitions, Nextel stated that it was exercising the right to make the adoption pursuant to the Merger Commitments contained within the Federal Communications Commission's ("FCC") order approving the *AT&T Inc. and BellSouth Corporation Application for Transfer and Control*, WC Docket No. 06-74, adopted December 29, 2006, released March 26, 2007 ("FCC Merger Order").

On July 3, 2007, this Commission granted BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi ("AT&T Mississippi") leave to intervene in both dockets. On

July 5, 2007, AT&T Mississippi filed a Motion to Dismiss ("Motion to Dismiss") both Petitions asserting that the FCC has sole jurisdiction to interpret and enforce the Merger Commitments contained in the FCC's Merger Order, and that the Petitions were not filed within a "reasonable period of time" as required by 47 C.F.R. §51.809(c).

On July 23, 2007, Nextel filed a Response to AT&T Mississippi's Motion to Dismiss disputing AT&T Mississippi's assertion that the FCC possesses sole jurisdiction over the interpretation and enforcement of the FCC's Merger Commitments. Nextel asserts that the AT&T Mississippi/Sprint agreement is operating on a month-to-month basis, and that AT&T Mississippi admits that the agreement can be extended 3 years pursuant to Merger Commitment No. 4. Finally, Nextel argues that the "reasonable period of time" requirement found in 47 C.F.R. §51.809(c) is inapplicable to an adoption under Merger Commitment No. 1.

On August 9, 2007, Nextel filed a Motion for Oral Argument, and on August 17, 2007, AT&T Mississippi filed an Opposition to the Motion for Oral Argument.

By means of a letter dated September 12, 2007, the Commission stated that it did not believe that oral argument was necessary to rule upon AT&T's Motion to Dismiss, and stated that the FCC has jurisdiction over the enforcement of the Merger Commitments contained in the FCC's Merger Order as related to the facts of the Nextel dockets. The letter also offered all parties the opportunity to submit proposed orders in this proceeding.

FINDINGS AND CONCLUSIONS

In its Petitions, Nextel requests that the Commission approve its adoptions of the Sprint/AT&T Mississippi agreement based upon commitments AT&T, Inc. and

BellSouth Corp. made to the FCC in the merger of the two companies. Specifically, Merger Commitments Nos. 1 and 2 set forth below:

> Merger Commitment No. 1:
>
> The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

Merger Order at 147, Appendix F.

> Merger Commitment No. 2:
>
> The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

Id. at 149, Appendix F.

Nextel also claims that the adoptions are being made pursuant to 47 U.S.C. § 252(i)[1] which provides:

> A local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunication carrier upon the same terms and conditions as those provided in the agreement.

[1] NPCR, Inc. d/b/a Nextel Partners Petition for Adoption, p. 4; Sprint Communications Company L.P., Sprint Spectrum L.P. Petition for Adoption, p. 4.

In its Motion to Dismiss, filed in both dockets on July 5, 2007, AT&T Mississippi argues that the Petitions should be dismissed because the Commission does not have jurisdiction to interpret the Merger Commitments contained in the FCC's Merger Order. AT&T Mississippi points out that the FCC stated in its order 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 at 147, Appendix F.*

Furthermore, AT&T Mississippi argues that Nextel did not file the Petitions within "a reasonable period of time" after the original contract was approved as required by 47 C.F.R. §51.809(c). 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." AT&T Mississippi also argues that the Petitions were not filed within "a reasonable period of time" because, the AT&T Mississippi/Sprint contract Nextel seeks to adopt is expired,[2] and that AT&T Mississippi and Sprint are currently engaged in arbitrating a new contract. AT&T Mississippi asserts that it would be inefficient and impractical to allow Nextel to make such an adoption when the parties to the original agreement are themselves arbitrating towards a new agreement.

AT&T Mississippi also argues that in filing the Petitions, Nextel failed to abide by the dispute resolution process contained in the parties' existing agreement and

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[2] AT&T Mississippi points out that the AT&T Mississippi/Sprint interconnection agreement was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004, and as a result the agreement has been expired for over two years.

therefore the Petitions should be dismissed. Specifically, AT&T Mississippi asserts that the dispute resolution clause found in the parties existing agreement precludes Nextel from unilaterally filing its Petitions. The dispute resolution clause provides:

> 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.

In its Responses to both Motions, filed on July 23, 2007, Nextel argues that the FCC Merger Order does not restrict, supersede or otherwise alter the Commission's authority to acknowledge Nextel's adoption of the AT&T Mississippi/Sprint agreement. Nextel asserts that the FCC and the Commission have concurrent jurisdiction over the FCC's Merger Commitments. Nextel further argues that it is not required to adopt the contract in compliance with the reasonable period of time requirement found in 47 C.F.R. §51.809(c), because the requirement is inapplicable to an adoption under FCC Merger Commitment No. 1.[3] Finally, Nextel asserts that, in making adoptions pursuant to an FCC merger commitment, it was not bound to follow the dispute resolution process found within the parties' existing agreement.

On August 9, 2007, Nextel filed dual Motions For Oral Argument. In those filings, Nextel requested a continuance of each docket to allow for oral argument on the issues presented in AT&T Mississippi's Motion to Dismiss. The Commission decided that oral argument was not necessary to rule upon AT&T Mississippi's Motion to

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[3] Nextel makes this assertion despite the fact that in its Petitions it claims to rely, in part, upon 47 U.S.C. §252(i), and, as AT&T Mississippi pointed out, adoptions pursuant to 47 U.S.C. §252(i) are limited by 47 C.F.R. §51.809(c) to being made within a "reasonable period of time." *See*, Petitions p. 4.

Dismiss and notified the Parties by means of the aforementioned letter dated September 12, 2007.

The Commission finds that the FCC has exclusive jurisdiction over the enforcement of the FCC Merger Commitments contained in the FCC's Merger Order as related to the facts of these two cases. The Commission does not suggest that interpreting and enforcing the Merger Commitments are off limits to us in all circumstances as there may be situations in which such interpretation and enforcement would be subject to our jurisdiction. The Commission further finds that Nextel's Petitions were not filed within a reasonable period of time, and that it would be inefficient and impractical to allow Nextel to adopt the agreement when the original parties to the agreement, AT&T Mississippi and Sprint, are currently engaged in arbitrating a new agreement. The Commission further finds that Nextel can not adopt an interconnection agreement that has expired. Therefore, the Commission grants AT&T Mississippi's Motion to Dismiss both proceedings.

IT IS THEREFORE ORDERED that AT&T Mississippi's Motion to Dismiss is hereby granted.

IT IS FURTHER ORDERED that this Order is effective immediately.

This Order shall be deemed issued on the day it is served upon the parties herein by the Executive Secretary of this Commission who shall note the service date in the file of this Docket.

Chairman Nielsen Cochran voted aye; Vice Chairman Leonard Bentz voted Aye; and Commissioner Bo Robinson voted Aye.

SO ORDERED on this the 30th day of October, 2007.

MISSISSIPPI PUBLIC SERVICE COMMISSION

NIELSEN COCHRAN, CHAIRMAN

LEONARD BENTZ, VICE CHAIRMAN

BO ROBINSON, COMMISSIONER

ATTEST: A True Copy

Brian U. Ray
Executive Secretary

Effective this the 30th day of October, 2007.

ATTACHMENT F

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 24th day of June, 2008.

Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.,	)	
Complainants,	)	
v.	)	**Case No. TC-2008-0182**
Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	
Respondent.	)	

ORDER GRANTING MOTION TO DISMISS

Issue Date: June 24, 2008 Effective Date: July 4, 2008

On November 28, 2007, Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc., ("Sprint") filed a complaint against Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri"). The gist of the complaint is that AT&T Missouri has failed to comply with merger commitments it made to the FCC in the BellSouth merger case.[1] According to Sprint, the AT&T/BellSouth Order requires AT&T Missouri to allow Sprint to port in a Kentucky interconnection agreement between BellSouth, Sprint Spectrum, LP, and Sprint Communications Company L.P. into

[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 6285 (March 26, 2007)(hereafter the AT&T/BellSouth Order).

Missouri ("the Kentucky ICA"). After the parties attempted mediation and were unable to resolve their disputes, AT&T Missouri filed a Motion to Dismiss on April 14, 2008.

Arguments

AT&T Missouri

AT&T Missouri argues that Congress allows the Commission to arbitrate interconnection agreements, and also to approve or reject them.[2] Further, federal courts also now hold that the Commission has authority to interpret agreements they approve.[3]

What Sprint requests is something other than arbitration, approval, rejection, or interpretation of a Commission approved agreement. Therefore, the Commission does not have jurisdiction.

Further, AT&T Missouri asserts that the FCC has reserved jurisdiction over the merger commitments AT&T Missouri made in the BellSouth merger case.[4] Such a statement from the FCC is hardly surprising in light of the FCC's authority for evaluating and approving telecommunications mergers.[5]

Finally, AT&T Missouri states that even if the Commission believes it has jurisdiction, it should defer it to the FCC. AT&T Missouri points out that the exact issue Sprint brings to the Commission is currently pending before the FCC.[6] AT&T Missouri argues that other state commissions have concluded that either they do not have jurisdiction, or that they have deferred ruling while awaiting the FCC's order.

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[2] 47 U.S.C. § 252(b), (e).

[3] *See, e.g., S.W. Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 79 (5th Cir. 2000).

[4] *Supra* at note 1, Appendix F at p. 147 (stating 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 . . .)

[5] See 47 U.S.C. §§ 214(a), 310(d).

[6] *Petition of the AT&T ILECs for a Declaratory Ruling*, WC Docket No. 08-23 (filed Feb. 5, 2008)

Sprint

Sprint opposes AT&T Missouri's motion, claiming that the Commission has general authority over AT&T Missouri because of its status as a regulated telecommunications company.[7] Moreover, Sprint points to language in the FCC order approving the AT&T/BellSouth merger and claims that the FCC intended for the Commission to have jurisdiction to hear this dispute.[8] Sprint further argues that every federal appellate court to consider the issue has ruled that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements.[9] In support of its argument, Sprint lists the state commissions that have found jurisdiction in this situation.

Staff

Staff commented on recent decisions made by other state commissions that found jurisdiction over this Sprint/AT&T Missouri dispute. Nevertheless, Staff's analysis was that Congress allows this Commission to arbitrate and approve (or reject) interconnection agreements and that federal courts have expanded state's authority to include interpreting agreements approved by the state commissions. Because Sprint does not request the Commission to interpret or enforce any provision from an interconnection agreement that

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[7] Section 386.250(2), .390.1, RSMo.

[8] *Supra* at note 4, p. 149 (stating 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, 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.")

[9] *See Core Comm., Inc. v. Verizon Penn, Inc.*, 493 F3d 333, 344 at fn 7 (3d Cir. 2007)(citing *Puerto Rico Tel Co v. Telecommunications Red Bd.*, 189 F.3d 1, 10-13 (1st Cir. 1999); *Bell Atlantic Md., Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir. 2001), *vacated on other grounds, Verizon Maryland, Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002); *Southwestern Bell Tel. Co. v. Public Util. Comm.*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Illinois Bell Tel. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999); *Iowa Utils Bd. V. FCC*, 120 F.3d 753, 804 (8th Cir. 1999), *rev'd in part on other grounds, Iowa Util. Bd.*, 525 U.S. at 385; *Southwestern Bell Tel Co v. Brooks Fiber Comm. of Ok. Inc.*, 235-F.3d 493, 497 (10th Cir 2000); *BellSouth Telecomm., Inc., v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003)(en banc).

this Commission has approved, Staff argues that the Commission lacks jurisdiction to hear Sprint's complaint.

Analysis

The Commission finds AT&T Missouri's and Staff's arguments more persuasive than Sprint's arguments, and will therefore grant AT&T Missouri's motion. Neither state nor federal law gives the Commission jurisdiction to hear Sprint's complaint.

State law

Sprint argues that under Section 386.250 the Commission has authority to review AT&T Missouri's failure to abide by the commitments it made in the BellSouth merger case. But even a case Sprint cites states otherwise.

Sprint argues that The Eighth Circuit has ruled that state commissions have authority to attain jurisdiction over this complaint.[10] But that very opinion states that

> (t)he new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.[11]

Thus, the Commission has no authority to resolve this dispute unless Congress has granted the Commission that authority.

Federal law

The Commission has authority to approve, reject, or arbitrate interconnection agreements.[12] In addition, it has authority to interpret interconnection agreements.[13] Sprint relies on language from the AT&T/BellSouth Order that states that nothing in the order was

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[10] *See Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000)

[11] See id. at 947.

[12] 47 U.S.C. § 252.

[13] *Supra* at note 9. *See also SW Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000).

intended to "restrict, supersede, or otherwise alter state or local jurisdiction."[14] However, as Staff aptly put it, "what jurisdiction does a state possess that is not being restricted, superseded, or altered?"[15]

Sprint and AT&T Missouri have not submitted a negotiated interconnection agreement for the Commission's approval in this case, and also have not asked the Commission to arbitrate any open issues between them. Therefore, only if the Commission is interpreting an interconnection agreement does the Commission have jurisdiction to hear this case.

Sprint, however, is not asking the Commission to interpret an agreement that the Commission has approved. Instead, Sprint is asking the Commission to order AT&T Missouri to allow Sprint to port the Kentucky ICA to Missouri.

Each case that Sprint cites involves a state commission interpreting an interconnection that it approved.[16] Not one case discussed a commission from State A interpreting an agreement approved by State B. But this is what Sprint asks for.

Sprint's efforts to gloss over this distinction by vaguely claiming that state commissions can interpret interconnection agreements, or by referring to this case as an "interconnection agreement related dispute",[17] are unconvincing. The *Verizon* court stated that "(p)ursuant to the FCC's guidance, we hold that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be

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[14] Supra at note 8.

[15] *See* Staff's Brief Regarding Jurisdiction in Response to Commission's Order Directing Filing, ¶ 32 (filed May 9, 2008).

[16] Supra at note 9.

[17] *See* Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. Response in Opposition to Staff's Brief Regarding Jurisdiction in Response to Commission's Order Directing Filing, p. 4 (filed May 27, 2008).

litigated in the first instance before **the relevant state commission.**"[18] That same court concluded that the "relevant state commission" to interpret an interconnection agreement is the commission that approved it, stating

> [a] state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. A court might ascribe to the agreement a meaning that differs from what the state commission believed it was approving-indeed, the agreement as interpreted by the court may be one the state commission would never have approved in the first place. **To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.**[19]

Thus, the Commission has no authority to interpret the Kentucky ICA.

Decision

Any jurisdiction the Commission has to resolve this dispute is found in federal law, not state law. Federal law allows the Commission to arbitrate open interconnection issues, to approve interconnection agreements, to reject interconnection agreements, and to interpret and enforce interconnection agreements it has approved. Sprint's complaint does not ask the Commission to arbitrate open interconnection issues, to approve an interconnection agreement, to reject an interconnection agreement, or to interpret or enforce an interconnection agreement it has approved. Therefore, the Commission has no jurisdiction, and the Commission will grant AT&T Missouri's Motion to Dismiss.

IT IS ORDERED THAT:

1. AT&T Missouri's Motion to Dismiss Complaint, filed by Southwestern Bell Telephone Company, d/b/a AT&T Missouri, is granted.

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[18] *Supra* at note 9, 493 F.3d at 344 (emphasis supplied)

[19] *See id.*, 493 F3d at 343 (citing *BellSouth Telcomms., Inc. v. MCImetro Access Transmission Servs. Inc.*, 317 F.3d 1270, 1278 at fn. 9 (11th Cir. 2003) (emphasis supplied).

2. All other pending motions are denied.

3. This order shall be effective on July 4, 2008.

4. This case shall be closed on July 5, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, and
Jarrett, CC., concur.
Clayton and Gunn, CC., dissent,
with separate dissenting opinion(s)
to follow.

Pridgin, Senior Regulatory Law Judge

ATTACHMENT G

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Declaratory Ruling That Sprint Nextel Corporation, Its Affiliates, And Other Requesting Carriers May Not Impose A Bill-and-Keep Arrangement Or A Facility Pricing Arrangement Under The Commitments Approved By The Commission In Approving The AT&T-BellSouth Merger	)	WC Docket No. _____

PETITION OF THE AT&T ILECS FOR A DECLARATORY RULING

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February 5, 2008

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INTRODUCTION AND SUMMARY

Among the many commitments adopted in the *AT&T/BellSouth Merger Order* was a group of four commitments that were intended to reduce transaction costs associated with the negotiation and execution of interconnection agreements. One of those commitments, Commitment 7.1, allows CLECs to port interconnection agreements from one AT&T state to another, subject to, *inter alia,* state-specific pricing and consistency with the laws and regulatory requirements of the state to which the agreement is to be ported.

This petition for declaratory ruling is necessary because Sprint Nextel, in defiance of the express terms and stated purpose of Commitment 7.1, is attempting to turn that commitment into a vehicle for reciprocal compensation arbitrage and other unwarranted subsidies, including economically irrational pricing of shared interconnection facilities. Sprint Nextel's ploy is an attempt to "port" to each of the 13 legacy AT&T ILEC states a bill-and-keep arrangement and a provision allowing for the equal sharing of the costs of interconnection facilities (facility pricing arrangement), which were included in interconnection agreements between each of the BellSouth ILECs, on the one hand, and two Sprint affiliates (Sprint CLEC and Sprint PCS), on the other.[1] Both the bill-and-keep arrangement and the facility pricing arrangement were predicated on specific assumptions by BellSouth about the balance of traffic between the BellSouth ILECs and the two Sprint entities within the BellSouth region. They are thus pricing arrangements that are specific, not only to the BellSouth states, but to the two Sprint affiliates that were the original parties to the agreement. For example, the bill-and-keep provision was based on an analysis showing that traffic flows between the BellSouth ILECs and the two Sprint affiliates were roughly in balance. The provision even includes language stating that the arrangement shall be

[1] Although substantially the same agreement is in place in each of the former BellSouth ILEC states, Sprint Nextel's efforts have focused on the ICA between AT&T Kentucky and the two Sprint affiliates.

terminated if one of the two Sprint entities opts into another agreement, since that would upset the balance of traffic between the contracting parties.

Sprint Nextel nonetheless claims that Commitment 7.1 allows it to port these BellSouth-specific pricing arrangements to other states where the traffic exchanged by Sprint Nextel and AT&T is decidedly *out of balance* or otherwise inconsistent with the traffic flows on which the original agreements were premised. Indeed, Sprint Nextel goes so far as to claim that Commitment 7.1 wipes out all substantive Commission rules governing adoptions *even within a state,* and, based on that misreading of Commitment 7.1, is seeking to extend the two pricing provisions to other Sprint Nextel affiliates within each of the BellSouth states via in-state adoptions.

The Commission has devoted considerable effort to eliminating opportunities for reciprocal compensation and other arbitrage. It would be an affront to the spirit and the letter of Merger Commitment 7.1 if that commitment were allowed to become a vehicle for circumventing the Commission's substantive rules and creating yet another arbitrage.

To prevent this from occurring, the Commission should issue declaratory rulings that:

(1) bill-and-keep arrangements for the transport and termination of telecommunications and facility pricing arrangements are "state-specific pricing" terms that are not subject to porting under Commitment 7.1 to other states;

(2) Commitment 7.1 does not give a carrier the right to port an agreement from one state to another if that carrier would be barred by Commission rules implementing Section 252(i) of the Telecommunications Act of 1996 from adopting that agreement within the same state; and

(3) Commitment 7.1 does not apply to in-state adoptions of interconnection agreements or in any way supersede Commission rules governing such adoptions.

BACKGROUND

A. Merger Commitment 7.1

As a condition to its December 29, 2006, approval of the merger between AT&T Inc. and BellSouth Corporation, this Commission accepted certain commitments offered by AT&T Inc. and BellSouth. *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, ¶ 222 (2007). One of those commitments, Commitment 7.1, is among a group of commitments set forth under the bold-face heading "**Reducing Transaction Costs Associated with Interconnection Agreements.**" *Id.* Appendix F, at 149.[2] The text of that commitment provides (*id.*):

> 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.

This commitment was derived from a package of proposals submitted by a collaboration of cable operators seeking to "[r]educe the [c]ost and [d]elay of [n]egotiating interconnection agreements."[3] The cable operators claimed that they experienced delays and increased costs associated with negotiating interconnection agreements and argued that allowing them, *inter*

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[2] The merger commitments are grouped into several categories. Merger Commitment 7.1 is item 1 in the seventh category.

[3] *See Ex Parte Presentation* - WC Docket No. 06-74, AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, filed by Michael Pryor, Mintz Levin (Sept. 27, 2006) at p. 11. *See also* Notice of Oral *Ex Parte* Presentation - WC Docket No. 06-74, AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, filed by Michael H. Pryor, Mintz Levin (October 3, 2006) at p. 2; Comments On AT&T's Proposed Conditions, filed by Advance/Newhouse Communications, Cablevision Systems Corporation, Charter Communications, Cox Communications, and Insight Communications Company (October 24, 2006) at pp. 8-11.

alia, to port interconnection agreements across state boundaries, subject to technical feasibility and state-specific pricing and performance plans, would allow them to enter the market more quickly.[4] Some CLECs also supported this proposal, repeating the cable operators' argument that it would reduce the burdens associated with negotiating interconnection agreements.[5] Notably all proponents of this commitment recognized that it should not apply to state-specific pricing, and the commitment on its face specifically excludes state-specific pricing from its scope.

B. The Kentucky Bill-and-Keep Arrangement and Facility Pricing Arrangement.

The dispute here centers on whether the porting commitment set forth above applies to pricing provisions contained in an interconnection agreement between AT&T Kentucky (f/k/a BellSouth) and two Sprint-affiliated entities: a competing local exchange carrier (identified in the agreement as "Sprint CLEC") and a commercial mobile radio service ("CMRS") provider (identified in the agreement as "Sprint PCS"). The Kentucky ICA is the Kentucky version of a nine-state agreement entered in 2001 between the former BellSouth ILECs, Sprint CLEC and Sprint PCS to govern the three parties' relationships in the nine southeastern states in the former

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[4] *Ex Parte Presentation* - WC Docket No. 06-74, AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, filed by Michael Pryor, Mintz Levin (Sept. 27, 2006) at p. 12.

[5] Some CLECs also argued that the proposal would help address the ostensible loss of benchmarking capabilities that would result from the merger. They claimed that allowing CLECs to adopt interconnection agreements across state lines "would permit CLECs to preserve at least for the duration of the interconnection agreement the best respective practices of either of the merged companies in any state." *See, e.g,* December 22, 2006 *ex parte* letter submitted jointly by Access Point, Inc., CAN Communications Services, Inc., Cavalier Telephone, LLC, DeltaCom, Inc., Florida Digital Network Inc. d/b/a FDN Communications, Inc., Globalcom Communications, Inc., and Pac-West Telecomm, Inc. In so arguing, CLECs pointed to analogous merger conditions from the Ameritech/SBC and Bell Atlantic/GTE mergers as justification and precedent for the proposed porting request. *See* Comments of CompTel, Oct. 25, 2006 at 25-26 ("In prior BOC to BOC mergers, the loss of the competitive benchmarking tool has been partially offset by enabling CLECs to "port" interconnection agreements from the region of one of the merging parties to the region of the other merging party.").

BellSouth region. Although that agreement expired in 2004, and although Sprint Nextel and AT&T had all but finalized a successor agreement as of the closing date of the AT&T/BellSouth merger, Sprint Nextel was able to take advantage of another merger commitment (Commitment 7.4) to obtain a three-year extension of that seven-year old agreement. On November 7, 2007, the Kentucky Public Service Commission approved this extension.

The bill-and-keep provision at issue appears in Kentucky ICA Attachment 3, Section 6.1, which governs reciprocal compensation for call transport and termination for: CLEC Local Traffic, ISP-Bound Traffic and Wireless Local Traffic. When BellSouth, Sprint PCS and Sprint CLEC entered into that agreement, their traffic was roughly balanced throughout the nine-state BellSouth region, as was the balance of compensation payments for such traffic. In light of that balance, the three parties agreed that the reciprocal compensation arrangement in the BellSouth states would be bill-and-keep. Indeed, Section 6.1 expressly states that the bill-and-keep arrangement set forth therein would be subject to termination if either Sprint PCS or Sprint CLEC opted into another interconnection arrangement that provides for reciprocal compensation insofar as that would upset the balance on which the agreement was premised.

> 6.1 Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Local Traffic is the result of negotiation and compromise between BellSouth, Sprint CLEC and Sprint PCS. The Parties' agreement to establish a bill and keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic. Specifically, Sprint PCS provided BellSouth a substantial cost study supporting its costs. As such the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.

Consistent with the parties' treatment of their reciprocal compensation obligations to each other as a wash in light of the balance of traffic, the parties also agreed to share equally the

cost of interconnection facilities between BellSouth and Sprint PCS switches within BellSouth's service area. Accordingly, the Kentucky ICA provides, in pertinent part, as follows for Sprint PCS and for Sprint CLEC, respectively:

> The cost of the interconnection facilities between BellSouth and Sprint PCS switches within BellSouth's service area shall be shared on an equal basis. (Section 2.3.2)
>
> For two-way interconnection trunking that carries the Parties' Local and IntraLATA Toll Traffic only, excluding Transit Traffic, and for the two-way Supergroup interconnection trunk group that carries the Parties' Local and IntraLATA Toll Traffic, plus Sprint CLEC's Transit Traffic, the Parties shall be compensated for the nonrecurring and recurring charges for trunks and facilities at 50% of the applicable contractual or tariff rates for the services provided by each Party. (Section 2.9.5.1)

C. Sprint's Attempt To Transplant The Kentucky Arrangement Out Of Its Highly Fact-Specific Context.

In 2005, Sprint acquired Nextel (another wireless carrier) and became Sprint Nextel. On October 26, 2007, Sprint Nextel filed a Complaint and Request for Expedited Ruling in the Public Utilities Commission of Ohio, seeking to "port" the Kentucky ICA (including its bill-and-keep and facility pricing arrangement) to Ohio.[6] Sprint Nextel sought, moreover, not only to port BellSouth-specific pricing arrangements outside the BellSouth area, but to couple that port with a critical substantive change to the Kentucky arrangement, by proposing to drastically change the mix of parties – and thus, the balance of traffic to be exchanged – that would be subject to bill-and-keep and the 50/50 facility pricing arrangement. Specifically, the Ohio Complaint sought to add other affiliates, including Nextel, to the combination of one Sprint CLEC and one Sprint CMRS provider on which the Kentucky agreement was founded.

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[6] *In re Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Commun's Co. v. Ohio Bell Tel. Co. d/b/a AT&T of Ohio, Relative to the Adoption of an Interconnection Agreement*, Case No. 07-1136-TP-CSS (Ohio Pub. Util. Comm'n filed Oct. 26, 2007)(Ohio Complaint).

On November 20, 2007, Sprint Nextel sent AT&T a letter indicating that Sprint Nextel affiliates wished to "port" the Kentucky ICA to other states served by AT&T ILECs.[7] Although the precise legal entities differ between states, the linchpin of Sprint's proposal was its attempt to port the BellSouth bill-and-keep arrangement and facility pricing arrangement with Sprint PCS and Sprint CLEC to other Sprint affiliates in non-BellSouth states, and to add Nextel to the mix of parties to the arrangement. Sprint Nextel's transparent purpose was arbitrage. On December 13, 2007, AT&T sent Sprint Nextel a letter indicating that Sprint Nextel's November 20 request was improper and asking Sprint Nextel to identify the one CMRS provider that would be the party to the port in order for AT&T to process the request.[8]

Notwithstanding AT&T's response, in December 2007 and early January 2008 Sprint Nextel initiated proceedings mirroring Sprint Nextel's Ohio Complaint (described above) in the 12 other legacy AT&T states.[9] Together with Ohio, those proceedings are now ongoing in all of

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[7] See Exhibit 1.

[8] See Exhibit 2. Although Commitment 7.1 does not permit Sprint Nextel to port any state-specific pricing arrangement – even to the same entities – AT&T was particularly concerned, as a practical matter, with Sprint Nextel's attempt to add affiliates whose traffic was out of balance with AT&T. AT&T's response accordingly focused on this aspect of Sprint Nextel's proposal.

[9] See *Sprint Commun's Co. v. Sw. Bell Tel. Co. d/b/a AT&T Arkansas*, Docket No. 07-161-C (Ark. Pub. Serv. Comm'n filed Dec. 20, 2007); *Application of Sprint Commun's Co. et al. for Comm'n Approval of an Interconnection Agreement with Pacific Bell Tel. Co. d/b/a AT&T California pursuant to the "Port-In Process" Voluntarily Created and Accepted by AT&T Inc. as a Condition of Securing Federal Commun's Comm'n Approval of AT&T Inc.'s Merger with BellSouth Corp.*, Application No. 07-12-017 (Cal. Pub. Util. Comm'n filed Dec. 20, 2007); *Application of Sprint Commun's Co. et al. for An Order Compelling The Southern New England Bell Tel. Co. d/b/a AT&T Connecticut to Enter an Interconnection Agreement on Terms Consistent with Federal Commun's Comm'n Orders*, Docket No. 07-12-19 (Conn. Dep't of Pub. Util. Control filed Dec. 14, 2007); *Sprint Commun's Co. v. Illinois Bell Tel. Co. d/b/a AT&T Illinois*, Docket No. 07-0629 (Ill. Comm. Comm'n filed Dec. 28, 2007); *Sprint Commun's Co. v. Indiana Bell Tel. Co. d/b/a AT&T Indiana*, Cause No. 43408 (Ind. Util. Reg. Comm'n filed Dec. 19, 2007); *Sprint Commun's Co. v. Sw. Bell Tel. Co. d/b/a AT&T Kansas*, Docket No. 08-SWBT-602-COM (Kan. Corp. Comm'n filed Dec. 26, 2007); *Complaint of Sprint Commun's Co. et al. against Michigan Bell Tel. Co. d/b/a AT&T Michigan*, Case No. U-15491 (Mich. Pub. Serv. Comm'n filed Dec. 21, 2007); *Sprint Commun's Co. v. Sw. Bell Tel. Co. d/b/a AT&T Missouri*, Case No. TC-2008-0182 (Mo. Pub. Serv. Comm'n filed Dec. 10, 2007); *Sprint Commun's Co. v. Nevada Bell Tel. Co. d/b/a AT&T Nevada*, Docket No. 08-01001 (Nev. Pub. Util. Comm'n filed Jan. 2, 2008); *Application of Sprint Commun's Co. et al. for Approval of Interconnection Agreement with AT&T Oklahoma*, Cause No.

the states that were served by AT&T ILECs prior to the merger between AT&T Inc. and BellSouth Corp. In addition, Nextel, which is not a party to the BellSouth agreement, has initiated proceedings in all nine AT&T ILEC states in the former BellSouth region, seeking to adopt the agreement in each state pursuant to Commitment 7.1.[10] In those proceedings, Nextel

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PUD 200700454 (Okla. Corp. Comm'n filed Dec. 14, 2007); *Sprint's Complaint for Post-Interconnection Dispute Resolution with Sw. Bell Tel. Co., d/b/a AT&T Texas, Regarding Adoption of Interconnection Agreement Pursuant to Merger Conditions*, Docket No. 35112 (Tex. Pub. Util. Comm'n filed Dec. 12, 2007); *Sprint Commun's Co. v. Wisconsin Bell, Inc. d/b/a AT&T Wisconsin*, Docket No. 6720-TI-211 (Wisc. Pub. Serv. Comm'n filed Dec. 19, 2007).

[10] See *Nextel South Corp. Notice of Adoption of Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. TBD (Al. Pub. Serv. Comm'n filed June 26, 2007); *NPCR, Inc. Notice of Adoption of Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. TBD (Al. Pub. Serv. Comm'n filed June 26, 2007); *Notice of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Docket No. 070368-TP (Fl. Pub. Serv. Comm'n filed June 8, 2007); *Notice of Adoption by Nextel South Corp and Nextel West Corp., (collectively "Nextel") of the Existing "Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Docket No. 070369-TP (Fl. Pub. Serv. Comm'n filed June 8, 2007); *Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement between Sprint Commun's Co. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast*, Docket No. 25430-U (Ga. Pub. Serv. Comm'n filed June 21, 2007); *Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement between Sprint Commun's Co. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast*, Docket No. 25431-U (Ga. Pub. Serv. Comm'n filed June 21, 2007); *Notice of Adoption by Nextel West Corp. ("Nextel") of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Case No. 2007-00255 (Ky. Pub. Serv. Comm'n filed June 21, 2007); *Notice of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Case No. 2007-00256 (Ky. Pub. Serv. Comm'n filed June 21, 2007); *Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement between Sprint Commun's Co. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T Louisiana d/b/a AT&T Southeast* Docket No. U-30185 (La. Pub. Serv. Comm'n filed June 26, 2007); *Petition for Approval of Nextel Partners' Adoption of the Interconnection Agreement between Sprint Commun's Co. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T Louisiana d/b/a AT&T Southeast* Docket No. U-30186 (La. Pub. Serv. Comm'n filed June 26, 2007); *NPCR, Inc. ("Nextel Partners") Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.* Docket No. 2007-UA-316 (Ms. Pub. Serv. Comm'n filed June 28, 2007); *Nextel South Corp. ("Nextel") Petition for Adoption of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. 2007-UA-317 (Ms. Pub. Serv. Comm'n filed June 28, 2007); *Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Commun's Co. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T North Carolina d/b/a AT&T Southeast* Docket No. P-55, Sub 1710 (NC Pub. Util. Comm'n filed June 22, 2007); *Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Commun's L.P. et al. and BellSouth Telecommun's, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast* Docket No. 2007-255-C (SC Pub.

maintains that even if it would not be permitted to adopt the BellSouth agreement pursuant to Section 252(i) of the Telecommunications Act of 1996 (which it would not, because AT&T's cost of providing the agreement to Nextel would be greater than AT&T's cost of providing the agreement to the original parties[11]) it can nonetheless adopt the agreement pursuant to Commitment 7.1, because Commitment 7.1 is, in Nextel's view, not subject to the limitations the Commission has applied to Section 252(i).[12]

In contrast with the rough balance of traffic and compensation payments that prevailed between BellSouth and Sprint CLEC and Sprint PCS under the BellSouth agreement, the AT&T ILECs in the 13 legacy AT&T states terminate much more traffic for the Sprint Nextel companies in the aggregate than the Sprint Nextel companies terminate for the AT&T ILECs in those states. As a result, if Sprint Nextel were permitted to port the bill-and-keep arrangement in the BellSouth agreement pursuant to Commitment 7.1, Sprint Nextel would be getting a free ride for every one of the millions of minutes of traffic that the AT&T ILECs terminate for Sprint/Nextel that is in excess of the minutes of traffic that Sprint Nextel terminate for the AT&T ILECs. Likewise, Sprint Nextel make much more relative use of the interconnection facilities

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Serv. Comm'n. filed June 28, 2007); *Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement Between Sprint Commun's L.P. et al., and BellSouth Telecommun's, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast* Docket No. 2007-256-C (SC Pub. Serv. Comm'n. filed June 28, 2007); *Nextel South Corp.'s Notice of Election of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. 07-00161 (Tn. Reg. Auth. filed June 21, 2007). *NPCR, Inc. d/b/a Nextel Partners' Notice of Election of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. 07-00162 (Tn. Reg. Auth. filed June 21, 2007).

[11] 47 C.F.R. § 809(b) provides that an incumbent LEC's obligation to make available to any requesting telecommunications carrier any agreement to which the incumbent LEC is a party that is approved by a state commission pursuant to Section 252 of the 1996 Act "shall not apply where the incumbent LEC proves to the state commission that . . . [t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement."

[12] In the proceedings in the former BellSouth region, Nextel is also seeking, in the alternative, to adopt the BellSouth agreement pursuant to Section 252(i).

between the parties' switches than did Sprint PCS and Sprint CLEC, so that if AT&T were required to share equally with Sprint Nextel the price of those facilities in the legacy AT&T ILEC states, AT&T would be effectively subsidizing Sprint Nextel's use of those facilities through an economically irrational pricing arrangement.

DISCUSSION

I. THE COMMISSION SHOULD DECLARE THAT THE KENTUCKY BILL-AND-KEEP ARRANGEMENT AND THE KENTUCKY FACILITY PRICING ARRANGEMENT ARE STATE-SPECIFIC PRICING ARRANGEMENTS THAT ARE NOT ELIGIBLE FOR PORTING UNDER MERGER COMMITMENT 7.1.

As is clear from its heading (*see supra* at p. 3), Commitment 7.1 was intended as a procedural mechanism to "Reduc[e] Transaction Costs Associated with Interconnection Agreements" by allowing carriers to "port" an interconnection agreement from one AT&T/BellSouth state to another without the need for a new negotiation and arbitration. It was never intended to allow CLECs to impose pricing arrangements that apply in one state on the incumbent of another state. In fact, although AT&T's competitors (and other parties) were not shy about asking for the moon and the stars in the AT&T/BellSouth merger proceeding, and although the record of that proceeding reflects a host of requests for merger conditions, *no* party even *asked* for the scheme that Sprint Nextel seeks to impose now, and for good reason: to allow the porting of bill-and-keep arrangements and pricing formulas for interconnection facilities would turn Commitment 7.1 into a vehicle for economically irrational pricing and arbitrage. Unfortunately, that is exactly what Sprint has in mind.

A. Bill-and-Keep Is A State-Specific Pricing Plan That Is Not Subject To Porting Under Merger Commitment 7.1.

The plain language of Commitment 7.1 bars Sprint's scheme. It expressly excludes "state-specific pricing . . . plans" from the porting commitment. The bill-and-keep arrangement at issue is a state-specific "pricing plan." It sets a price – zero – for the transport and termination

of traffic by each party. Likewise, the 1996 Act classifies bill-and-keep arrangements as a form of pricing plan, as one of the "*Pricing* Standards" governed by Section 252(d). 47 U.S.C. § 252(d) (emphasis added). Subsection (2) of that Section addresses "*Charges* for transport and termination of traffic."[13] Subsection 252(d)(2)(A)(i) provides that such charges are to "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[14] Subsection 252(d)(2)(B)(i) then adds that the general provisions regarding reciprocal compensation charges do not preclude "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations," a category that "include[es] arrangements that waive mutual recovery (*such as bill-and-keep arrangements*)."[15] Simply put, the Act recognizes that bill-and-keep is simply one method to address "charges" for the "recovery of costs," just like any other pricing plan governed by the Act's "Pricing Standards."

It is equally plain that the pricing arrangement here is "state-specific." The arrangement was premised on a BellSouth study of the balance of traffic and payments among the contracting entities *within the nine BellSouth states*. This pricing arrangement is thus ineligible for porting outside those states under the plain terms of Commitment 7.1.

That bill-and-keep arrangements are inherently state-specific pricing arrangements, and thus ineligible for porting under Commitment 7.1 is further underscored by the 1996 Act and the Commission's rules implementing the Act. The Act requires that reciprocal compensation arrangements "provide for the mutual and reciprocal recovery" of costs "by *each* carrier" and it contemplates bill-and-keep only as an arrangement to "afford the *mutual* recovery of costs

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13 *Id.* at § 252(d)(2) (emphasis added).

14 *Id.* at § 252(d)(2)(A)(i).

15 *Id.* at § 252(d)(2)(B)(i) (emphasis added).

through the *offsetting* of *reciprocal* obligations."[16] The Act thus prevents a requesting carrier (or a state commission) from forcing an incumbent LEC to participate in a highly unbalanced exchange of traffic where it does not recover its costs and where the parties' obligations are neither truly "reciprocal" nor "offsetting." Likewise, this Commission's rules implementing the 1996 Act limit the imposition of bill-and-keep arrangements to the context where "the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so."[17] Because a state may require bill-and-keep only for traffic that is roughly balanced, bill-and-keep is *necessarily* a state-specific pricing arrangement. Traffic that is balanced in one state may not be balanced in another. It is up to each state to weigh the evidence.

B. The Facility Pricing Arrangement in the Kentucky ICA Is Also A State-Specific Pricing Plan That Is Not Subject To Porting Under Merger Commitment 7.1.

Facility pricing arrangements, no less than bill and keep arrangements, also are state specific pricing arrangements that are not subject to porting under Commitment 7.1. A facility pricing arrangement is, like bill and keep, a formula for determining the price that each party pays for interconnection facilities. And, just as plainly, the facility pricing arrangement in the Kentucky ICA is "state-specific." As one would expect, the arrangement was premised on a Bellsouth study of the flow of interconnection traffic *within the nine BellSouth states*. It thus represents a state-specific pricing formula that is ineligible for porting outside those states under the plain terms of Commitment 7.1.

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[16] 47 U.S.C. § 252(d)(2)(A)(i), (B)(1) (emphasis added).

[17] 47 C.F.R. § 51.713(b).

Indeed, it would be completely antithetical to the purpose of Commitment 7.1 to treat facility pricing arrangements as anything other than state-specific pricing. The facility pricing arrangements were incorporated into the Kentucky ICA because, based on traffic flows between the BellSouth ILECs, on the one hand, and Sprint PCS and Sprint CLEC, on the other, that arrangement was economically rational and efficient. Forcing BellSouth to agree to the same arrangement elsewhere and/or with other Sprint Nextel affiliates with different traffic mixes, however, necessarily leads to economically *irrational and inefficient* pricing. Surely Commitment 7.1 was not intended to require such absurd results.

The Commission should make clear that Merger Commitment 7.1 cannot be used to obtain the illicit subsidy that Sprint Nextel seeks.

C. Merger Commitment 7.1 Does Not Entitle a Carrier to Port an Agreement to Another State When it Would be Ineligible Under Commission Rules to Adopt that Agreement in the Same State.

Each of the AT&T ILECs has a general obligation under Section 252(i) of the Telecommunications Act of 1996 to make available to any requesting carrier any interconnection agreement to which it is a party.[18] This Commission has ruled that the obligation

> shall not apply where the incumbent LEC proves to the state commission that . . . [t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.

47 C.F.R. § 51.809(b). The rationale of Rule 809(b) is obvious: A general provision that allows requesting carriers to adopt an existing agreement, rather than negotiating and arbitrating an

[18] Section 252(i) of the 1996 Act provides, "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this 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). Although Section 252(i) speaks in terms of making available "any interconnection, service, or network element," the Commission has ruled that a requesting carrier that seeks to make an adoption under Section 252(i) may not adopt part of an interconnection agreement, but instead must make an adoption on an "all or nothing" basis. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (rel. July 13, 2004).

agreement of their own, cannot properly be applied to contract provisions that, if adopted, would impose costs on the ILEC in excess of the costs the ILEC incurs to perform the original agreement.

Merger Commitment 7.1 does not nullify this limitation on interconnection agreement adoptions. Indeed, to read the commitment otherwise would result in the absurd situation in which a carrier in, for example, Ohio could port an interconnection agreement approved in, for example, Florida, even though a carrier in Florida could not adopt the agreement under Section 252(i). Alternatively, this reading could effectively eviscerate Rule 809(b) altogether – even for in-state adoptions – by permitting carriers to end-run around that rule through a two-step process: specifically, and to use the previous example, a carrier in Ohio with an affiliate in Florida could port a Florida agreement not available for adoption in Florida under Commission rules from Florida to its affiliate in Ohio and then back to Florida, thereby accomplishing through two steps what Commission rules prohibit that carrier from accomplishing in one step. Merger Commitment 7.1 should not be read to allow such absurd results. Indeed, those who proposed or advocated for Commitment 7.1 failed even to mention the substantive limits in Rule 809(b) in their advocacy, much less present a case that those limits were a barrier to competition or should otherwise be superseded. To the contrary, the proponents of Commitment 7.1, *which did not include Sprint,* consistently presented this commitment as a means of extending in-state porting rights to out-of-state agreements. Some of them argued that the commitment would thereby reduce administrative costs by expanding the number of agreements available for adoption; a few argued that the commitment would also ameliorate the ostensible loss of benchmarking opportunities. No one suggested that the commitment should be read to confer broader out-of-state adoptions right than were sanctioned under Commission rules

for in-state adoptions. Sprint Nextel's claim that Commitment 7.1 repealed those rules *sub silentio* should thus be rejected.

Under section 51.809(b) of the Commission's rules, a local exchange carrier is not obligated to make available to a requesting telecommunications carrier an interconnection agreement if the costs of providing that agreement to the requesting carrier exceed the costs of providing that agreement to the carrier with which it was originally negotiated. Here, Sprint Nextel seeks to port an interconnection agreement under circumstances that would result in a significant increase in costs to AT&T, both interconnection costs, by virtue of the uncompensated costs of terminating for free Sprint Nextel traffic that is in excess of the traffic Sprint Nextel terminates for AT&T, and interconnection facility costs, by virtue of a 50/50 allocation of costs that, if rationally allocated in accordance with the parties' actual usage of the facilities, would be borne predominantly by Sprint Nextel. Under section 51.809(b), which must necessarily apply to out-of-state ports, just as it applies to in-state adoptions under Section 252(i), Sprint Nextel may not effect that result.

D. Merger Commitment 7.1 Does Not Entitle a Carrier to "Port" an Agreement In-State That it Cannot Adopt Under Section 252(i) Pursuant to The Commission's Rules.

Finally, Nextel cannot properly be permitted to avoid section 51.809(b) of the Commission's rules by "porting" pursuant to Commitment 7.1 an in-state interconnection agreement. As explained above, Nextel has initiated proceedings in the nine former BellSouth ILEC states, seeking to opt into the BellSouth agreement between the AT&T ILECs and Sprint CLEC and Sprint PCS. In those proceedings, Nextel contends it should be permitted to adopt those agreements in-state pursuant to Section 252(i), but also contends, in case adoption under Section 252(i) is prohibited by section 51.809(b) (as it should be), that Merger Commitment 7.1 permits it to make an in-state adoption without regard to the limitations the Commission has

recognized for Section 252(i). This would be a truly absurd result. Plainly, no one – not AT&T, not the Commission, and not the CLEC and cable operator proponents of the commitment, intended for Merger Commitment 7.1 to override or displace Section 252(i) for in-state adoptions. Certainly, no commenter proposed such a thing. The intent was to permit adoptions, which are available only in-state under Section 252(i), to cross state lines – not to change the rules for in-state adoptions.

II. EXPEDITED RESOLUTION OF THESE ISSUES IS ESSENTIAL TO PREVENT STATE COMMISSIONS FROM USURPING THIS COMMISSION'S JURISDICTION TO INTERPRET AND ENFORCE THE MERGER COMMITMENT.

The foregoing discussion makes clear that the Commission should reject any interpretation of Merger Commitment 7.1 that would allow Sprint Nextel to port the Kentucky bill-and-keep arrangement and facility pricing arrangement out of the states – and the specific three-carrier factual context – for which those provisions were developed. The need for a prompt Commission ruling is equally clear.

Even now, Sprint Nextel is pressing the state commissions in the 13 legacy AT&T ILEC states to resolve this issue, and Nextel is pressing the state commissions in the nine legacy BellSouth ILEC states to resolve Nextel's related request to adopt the AT&T/Sprint CLEC/Sprint PCS agreement within each state under Merger Commitment 7.1. Absent prompt action by this Commission, there is a substantial risk that some or all of the states that now have the dispute before them will decide to step into this Commission's shoes and try to resolve the parties' dispute for themselves. But *this* Commission is the one that should be resolving disputes about the meaning and intent of the merger commitment that it approved. The states are not as well suited to resolve those disputes, and the intervention of state commissions runs the risk that states will issue conflicting decisions that would take a great deal of time and judicial resources

to untangle. That result would, in and of itself, conflict with the 22-state nature of the merger commitment, and its true intent of reducing transaction costs of negotiation and arbitration.

Worse, there is always the risk that one or more states could issue decisions that conflict with this Commission's intent. The result would be a new scheme of regulatory arbitrage – after this Commission has gone to a great deal of trouble to eliminate such schemes, and at a time when this Commission is attempting to develop comprehensive reform. Other carriers may attempt to further spread that scheme. The Commission should act now to nip Sprint Nextel's attempted arbitrage in the bud.

Dovetailing with the need for prompt action, the dispute here is also eminently suited for expedited resolution. As demonstrated above, the issues between the parties can be resolved from the plain and express terms of a single merger commitment and of the specific contractual pricing arrangements that Sprint Nextel is trying to port. And of course, this Commission can quickly decide what *it* intended in approving the merger just over a year ago. There is no need for extensive evidence-gathering or fact-finding. Accordingly, the Commission can and should resolve this Petition on an expedited basis.

CONCLUSION

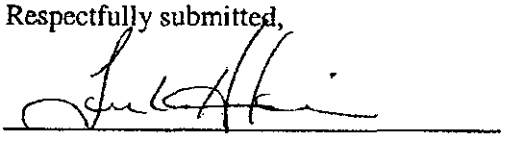
For the reasons set forth above, the Commission should grant the AT&T ILECs' request for expedited resolution, and declare that

(1) bill-and-keep arrangements for the transport and termination of telecommunications and facility pricing arrangements are "state-specific pricing" terms, not subject to porting under Commitment 7.1 to other states;

(2) Commitment 7.1 does not give a carrier the right to port an agreement from one state to another if that carrier would be barred by Commission rules implementing Section 252(i) of the Telecommunications Act of 1996 from adopting that agreement within the same state; and

(3) Commitment 7.1 does not apply to in-state adoptions of interconnection agreements or in any way supersede Commission rules governing such adoptions.

Respectfully submitted,



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Washington, D.C. 20036
(202) 457-3810

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MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Counsel for the AT&T ILECs

February 5, 2008

EXHIBIT 1

Sprint
Together with NEXTEL

Sprint Nextel
6330 Sprint Parkway - KSOPHA0310
Overland Park, KS 66251
Office: (913) 762-4200 Fax: (913) 762-0104
Keith.kassien@sprint.com

Keith Kassien
Manager - Access Solutions

November 20, 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: Adoption of the Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P. and Sprint Spectrum L.P. dated January 1, 2001.

Dear Kay, Randy and Lynn:

The purpose of this letter is to notify the AT&T Corporation incumbent local exchange entities operating in the former SBC legacy territory ("AT&T) that the wireless and CLEC subsidiaries of Sprint Nextel Corporation ("Sprint Nextel") are exercising their 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 the 9 legacy BellSouth states and extended in Kentucky. Sprint Nextel exercises this right pursuant to the FCC approved Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" ("Merger Commitments") as ordered in the AT&T/BellSouth merger, WC Docket No. 06-74. The Sprint ICA is available online at AT&T's website at:

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

The impacted AT&T incumbent local exchange companies, Sprint CLEC and wireless entities are identified by state in the attached Exhibit 1. The Sprint Nextel entities are wholly owned subsidiaries of Sprint Nextel Corporation. Enclosed is Sprint Nextel's completed AT&T form with

respect to the Merger Commitments, with any language within such forms stricken to the extent such language is not contained within the Merger Commitments.

As AT&T is aware, all relevant state-specific sections are already identified in the Sprint ICA (the "state-specific sections"). 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 Sprint Nextel in the states listed on Exhibit 1 pursuant to Merger Commitment No. 2. By correspondence dated July 10, 2007, Sprint Nextel previously notified AT&T in connection with Sprint Nextel's intention to adopt the Sprint ICA in Ohio. We indicated in that letter that we recognized that within these state-specific sections "state-specific pricing and performance plans and technical feasibility" issues may need to be negotiated. We requested you to identify any state orders that AT&T believed constituted "state-specific pricing and performance plans and technical feasibility" issues that affected these state specific sections. We have also verbally indicated to AT&T that we intended to adopt the Sprint ICA in additional states beyond Ohio.

We have heard nothing from you on any proposed contract sections to be modified to address the state-specific sections or any state-specific orders regarding pricing, performance plans or other issues. Rather than address the issues presented, AT&T responded with cancellation letters of not only the existing agreement in Ohio but all of the existing agreements in all of the legacy 13 SBC states.

As you are aware we have filed a complaint in Ohio regarding the substance of our July 10th letter. AT&T recently filed its motion to dismiss. In light of these circumstances, it is apparent to us that AT&T simply is not interested in discussions regarding state-specific issues associated with the adoption of the Sprint ICA in other states. However, if AT&T is willing to discuss negotiations to address state-specific issues, please let us know by November 28, 2007. We understand that these negotiations would not prevent the adoption of the Sprint ICA pursuant to Merger Commitment No. 1 while those negotiations proceed.

Sprint Nextel hereby requests that AT&T provide, upon receipt of this letter, but no later than November 28, 2007, written acknowledgement of adoption of the Sprint ICA within the states listed on Exhibit 1.

Sprint's exercise of its rights under the Merger Commitments is in response to AT&T's termination of the Sprint Nextel interconnection agreements in the referenced states. This letter constitutes the notice we indicated that we would provide in our correspondence dated November 12, 2007. Should AT&T have any questions regarding Sprint Nextel's exercise of these rights under the Merger Commitments, please do not hesitate to call. Thank you in advance for your prompt attention to this matter.

Sincerely,

Keith L. Kassien

Keith L. Kassien

Enclosures

Cc: Mr. Jeffrey M. Pfaff, Counsel for Sprint Nextel
Mr. Fred Broughton, Interconnection Solutions

Carrier Contact Notice Information Attachment

All AT&T notices to Sprint Nextel should be sent to the same person(s) at the following addresses as an update to the addresses 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") ("the Sprint ICA").

For Sprint Nextel:

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)

Exhibit 1

State	AT&T Entity	Sprint Entities
AR	Southwestern Bell Telephone d/b/a AT&T Arkansas	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel South Corp., NPCR, Inc.
CA	Pacific Bell Telephone d/b/a AT&T California	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel of California, Inc.
CT	The Southern New England Bell Telephone d/b/a AT&T Connecticut	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel Communications of the Mid-Atlantic, Inc.
KS	Southwestern Bell Telephone Company d/b/a AT&T Kansas	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp.
IL	Illinois Bell Telephone d/b/a AT&T Illinois	Sprint Communications L.P. d/b/a Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., NPCR, Inc.
IN	Indiana Bell Telephone d/b/a AT&T Indiana	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp, NPCR, Inc.
MI	Michigan Bell Telephone Company d/b/a AT&T Michigan	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp.
MO	Southwestern Bell Telephone Company d/b/a AT&T Missouri	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp.
NV	Nevada Bell Telephone Company d/b/a AT&T Nevada	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel of California, Inc.
OK	Southwestern Bell Telephone Company d/b/a AT&T Oklahoma	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp.
TX	Southwestern Bell Telephone Company d/b/a AT&T Texas	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel of Texas, Inc., NPCR, Inc.
WI	Wisconsin Bell Incorporated d/b/a AT&T Wisconsin	Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., NPCR, Inc.

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

November 20, 2007

RE: Request 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"), Sprint Nextel Corporation, through its wholly-owned subsidiaries (jointly "Sprint Nextel"), exercises its right to port the existing Interconnection Agreement between BellSouth Telecom, Inc. and Sprint Communication Company L.P. and Sprint Spectrum L.P. in the state of Kentucky to the states of Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Oklahoma, Texas and Wisconsin and, by this notice, requests AT&T, through its incumbent local exchange carriers, to support this exercised right. Sprint Nextel understands that pursuant to ICA Merger Commitment 7.1, porting of the Interconnection Agreement is subject to state-specific pricing and performance plans.

	CARRIER NOTICE CONTACT INFO*
NOTICE CONTACT NAME	(see Attached)
NOTICE CONTACT TITLE	
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

AT&T already possesses appropriate proof of certification for state requested.

Form completed and submitted by: Fred Broughton

Contact number: 913-762-4070

*** 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.**

EXHIBIT 2

Eddie A. Reed, Jr.
Director-Contract Management
AT&T Wholesale Customer Care

AT&T Inc.
311 S. Akard, Room 940.01
Dallas, TX 75202
Fax 214 464-2006

at&t

December 13, 2007

Fred Broughton
Contract Negotiator
Sprint Nextel Access Solutions
6330 Sprint Parkway
KSOPHA0310-3B320
Overland Park, KS 66251

Re: Sprint Nextel's Requests to Port Interconnection Agreement

Dear Mr. Broughton:

Your letter and Exhibit 1 dated November 20, 2007 on behalf of Sprint Nextel Corporation ("Sprint Nextel") were received via e-mail on November 20, 2007. The aforementioned letter states that Sprint Nextel, through its wholly-owned subsidiaries listed on Exhibit 1, desires to port the existing three-way Interconnection Agreement (" Kentucky ICA") between BellSouth Communications, Inc. d/b/a AT&T Kentucky, Sprint Communications Company, L.P., and Sprint Spectrum, L.P. in the state of Kentucky to the states of Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Oklahoma, Texas and Wisconsin, pursuant to 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. ("Merger Commitment 7.1").

Merger Commitment 7.1 does not permit all the entities listed on Exhibit 1 of your November 20th letter (one (1) CLEC and two (2) or more CMRS providers per state) to port into another state the Kentucky ICA, which is a three-way agreement between an ILEC, one (1) CLEC and one (1) CMRS provider. Merger Commitment 7.1 would permit one (1) CLEC and one (1) CMRS provider per state to port the Kentucky ICA.

To that end, please notify AT&T in writing which CMRS provider will be the porting CMRS provider for each state in which Sprint Nextel requests to port the Kentucky ICA. As soon as AT&T has been notified in writing of Sprint Nextel's election, AT&T will process Sprint Nextel's request and identify the state-specific modifications and modifications for technical feasibility and for technical, network and OSS attributes and limitations, and any other modifications required or permitted in accordance with Merger Commitment 7.1.

Sincerely,

Eddie A. Reed, Jr.