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August 22, 2002

VIA HAND DELIVERY

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Re: Docket No.: 020868-TL

Dear Ms. Bayo:

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

- ▶ Nextel Communications, Inc.'s Petition to Intervene; 08919-02
- ▶ Nextel Communications, Inc.'s Request for Oral Argument; 08920-02
- ▶ Nextel Communications, Inc.'s Motion to Dismiss, or in the Alternative, 08921-0; Hold in Abeyance.

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

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Investigation of Wireless Carriers'
Request for BellSouth Telecommunications, Inc.
To Provide Telecommunications Service
Outside BellSouth's Exchange

Docket No. 020868-TL

Filed: August 22, 2002

NEXTEL COMMUNICATIONS, INC.'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, HOLD IN ABEYANCE

Nextel Communications, Inc. (Nextel), pursuant to rule 28-106.204, Florida Administrative Code, hereby files this Motion to Dismiss and Opposition to the Petition for Investigation and Establishment of Generic Proceeding by BellSouth Telecommunications, Inc. (BellSouth). In the alternative, Nextel requests that BellSouth's petition be Held in Abeyance. In support of its motion, Nextel states:

I. BACKGROUND

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

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

Plainly recognizing that it could not defend its new policy of blocking NPA-NXX code activations, BellSouth subsequently modified it. In a March 20 notification to all carriers, BellSouth stated that “[I]f this arrangement [of routing traffic to or from NPA/NXXs, which are established with a third-party rate center] is utilized, BellSouth will process the code memorandum request, while at the same time raising the issue with the appropriate state commission for determination.”² Thus, while it stated it would no longer block the

¹ See, Comments in Opposition of Nextel Communications, Inc., CC Docket No. 02-35, filed March 4, 2002. (“Nextel Comments”). Another CMRS provider, Triton PCS License Company, LLC, also filed comments opposing BellSouth’s Section 271 application, raising many of the same concerns.

² See BellSouth Carrier Notification (SN91082844), dated March 20, 2002.

implementation of new NXX codes with rating centers in an independent ILEC territory,³ BellSouth at the same time announced that it would challenge the legality of these common CMRS-ILEC interconnection arrangements in state-by-state proceedings.

Citing the complexity of the issue, the FCC declined to rule on the matter in the context of BellSouth's Section 271 applications. However, the FCC did not reject Nextel's concerns because it believed that state commissions were the appropriate forums to consider and resolve these issues. To the contrary, the Commission rejected Nextel's and Triton's complaint "because Nextel and Triton largely raise unresolved intercarrier compensation issues."⁴ Indeed, according to the FCC, the issues Nextel and Triton raised "are open issues before [the] Commission in the Intercarrier Compensation proceeding."⁵ As such, the FCC determined that these issues would be more appropriately resolved in an on-going FCC proceeding.⁶

BellSouth has now made good on its threat to ask individual states to prohibit common CMRS-ILEC interconnection practices. On May 10, 2002, BellSouth filed a petition with the Florida Public Service (Commission) requesting that it determine whether the provision of

³ BellSouth has refused to activate NXX codes for Nextel in South Carolina. From December 2001 through January 2002, for example, BellSouth refused to activate in its tandem switch a Nextel NXX Code for Monks Corner, South Carolina which is in the Home Telephone Company service area, and which subtends the BellSouth tandem. Nextel met all of the requirements for NeuStar to assign Nextel an NXX Code and BellSouth's refusal has resulted in Nextel not being able to sell mobile handsets with a local dialing plan in Monks Corner. Not only did Nextel lose revenue, but more important from a regulatory perspective, BellSouth's actions ensured that there were fewer competitive telecommunications service choices for consumers in Monks Corner.

⁴ Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana, *Memorandum Opinion and Order*, CC Docket No. 02-35, FCC 02-147, ¶ 208 (rel. May 15, 2002).

⁵ *Id.*

⁶ The FCC also noted that Sprint already had filed with it a Petition for Declaratory Ruling on BellSouth's revised interconnection practice. *Id.*

telecommunications service by BellSouth to Sprint PCS, as requested by Sprint PCS, in McClenney, Florida – an area outside of BellSouth’s exchange area – violates BellSouth’s virtual NXX tariff for the State of Florida.⁷ A Staff Recommendation was filed, recommending that BellSouth's petition be denied. In the face of the negative Staff Recommendation, BellSouth withdrew its petition on August 6, 2002, the very day that the Commission was to consider it, and the Commission closed the docket.⁸ On the same day, BellSouth filed the current request for "generic investigation" which makes the same allegations made in its declaratory statement petition. Just as was the case with BellSouth's petition for declaratory statement, the issue BellSouth has attempted to raise in its new filing is within the **exclusive** purview of FCC authority to consider and resolve. Therefore, the Commission must dismiss the BellSouth Petition for Investigation and Establishment of Generic Proceeding. In the alternative, BellSouth's petition should be held in abeyance pending the outcome of the FCC proceeding.

II. DISCUSSION

Simply put, this Commission does not have the authority to grant the relief BellSouth seeks. The subject matter of BellSouth’s petition involves interpretations of questions of federal law that are preempted by the statutory regime adopted by Congress and implemented by the FCC, the agency with exclusive regulatory authority over these matters.⁹ The central issue is

⁷ Docket No. 020415-TL.

⁸ Order No. PSC-02-1063-FOF-TL.

⁹ On May 9, 2002, Sprint Corporation filed at the FCC, on behalf of Sprint PCS, a Petition for Declaratory Ruling, seeking confirmation from the FCC that an ILEC may not refuse to load its network telephone numbering resources that an interconnecting carrier acquires in compliance with the FCC’s numbering rules. In addition, Sprint also requested that the FCC confirm that ILECs may not refuse to honor the routing and rating points that an interconnecting carrier designates for its numbering resources. *See* Sprint Petition, CC Docket No. 99-200.

whether CMRS carriers have the right to interconnect at any technically feasible point on the ILEC network. FCC rules and orders provide an affirmative answer to this question.

FCC rule 47 C.F.R. §51.305(a)(2) provides that an ILEC **must** allow a requesting telecommunications carrier to interconnect at any technically feasible point within the ILEC's network. The FCC has interpreted this rule to mean that the ILEC must permit the requesting carrier to interconnect at a single point of interconnection per LATA. *See, Developing a Unified Inter-carrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rec 9610 ¶ 112 (2001). BellSouth's petition raises issues regarding its interconnection policies that would deprive CMRS carriers of their unfettered right to interconnect with BellSouth at "any technically feasible point" within a LATA pursuant to FCC rule and policy.

In its filing before this Commission, BellSouth has attempted to confuse and distort the very straightforward issue of the interconnection rights of CMRS carriers described above – an issue that is a matter of federal law. Nonetheless, BellSouth's attempt to couch its new filing in terms of state law must fail. The issue is **not** (as BellSouth has framed it) whether the provision of service would violate BellSouth's state tariff regarding "virtual NXX service." Nextel has not requested, and does not use, "virtual NXX" service. BellSouth's characterization of the issue in this manner is simply a red herring. Because Nextel does not order or use "virtual NXX" service, no state tariff or state law is implicated in BellSouth's petition. The issue BellSouth has raised is an interconnection issue only; if there is any question about BellSouth's obligation to provide interconnection, it is the FCC, and not nine separate state commissions, that must make that determination. As demonstrated in Sprint's petition before the FCC and this motion to dismiss, BellSouth's revised interconnection policy deprives CMRS carriers of their absolute right to choose a single point of interconnection in a LATA in violation of federal law and policy.

In addition, BellSouth is without question the dominant facilities-based carrier within each LATA it serves. Both independent ILECs and CMRS carriers depend upon BellSouth's tandem facilities for transit and other routing. Any determination or question over the necessity of BellSouth's tandem facilities for efficient CMRS interconnection is **solely** a question of federal law. Indeed, the Supreme Court was unambiguous in its determination that it is within the FCC's exclusive purview to examine which ILEC facilities are essential to the establishment of local service competition and to declare those facilities to be available to competitors on an unbundled basis.¹⁰ To the extent state rules, tariffs or policies are to the contrary, they are preempted.¹¹

Finally, despite BellSouth's retreat on its policy of outright NXX blocking, there remains a substantial question as to whether BellSouth's "revised" interconnection policy violates the FCC's numbering rules. BellSouth's *ex parte* filings at the FCC, for example, continue to characterize the routine interconnection arrangements it dislikes as "inappropriate." In essence, BellSouth is second-guessing the judgment of NeuStar, the FCC's designated numbering administrator, in assigning numbers to CMRS carriers operating within their geographically

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

¹¹ Thus, the Commission may not interpret its rules, regulations or tariffs in any manner that is inconsistent with federal law or policy and that would be the result of the ruling BellSouth seeks through this proceeding.

broad service territories.¹² Thus, the interconnection policy issues presented in the BellSouth petition implicate significant federal interconnection and numbering rules and policies. Further, BellSouth already has tried to make good on its threat to force concerned CMRS carriers to litigate the same issues over and over before numerous state commissions. BellSouth is unapologetic in its attempt to force CMRS carriers to make the case in multiple forums that common interconnection arrangements that traditionally have been used are reasonable and should continue.¹³

This is a case of history repeating itself – BellSouth threatens to put carriers through a painful and unnecessary state-by-state process and unilaterally change the scope of the responsibilities it committed to when it signed interconnection agreements with competitive CMRS carriers. And, it is doing so for a specific reason – BellSouth wants to hamstring the one type of competitive carrier that can match its service offerings after it receives interLATA authority by raising its CMRS competitors’ overall interconnection costs without any justification or public benefit. The Commission must dismiss the BellSouth petition for Investigation and Establishment of Generic Proceeding and find that the issues presented therein are exclusively a matter of federal interpretation.¹⁴

¹² Indeed, CMRS carriers that are assigned numbers in independent ILEC territories use them to provide “local” service in areas the CMRS provider also offers its services. This is not a “virtual” situation, because the CMRS carrier is not requesting nor is it using numbering resources outside of its service area.

¹³ Indeed, BellSouth inconsistently argues that state commissions are the place to resolve interconnection and numbering matters, while at the same time arguing to the FCC in the context of its Section 271 applications that the FCC should consider any transit traffic and other interconnection policy matters raised by BellSouth’s interconnection policies to ongoing FCC proceedings addressing intercarrier compensation matters. BellSouth *Ex Parte* at 3-4.

¹⁴ See, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Alternatively, if the Commission declines to find that it does not have jurisdiction, a position with which Nextel would strongly disagree, it should, as a matter of comity¹⁵ and administrative efficiency, accede to FCC resolution of the Sprint Petition for Declaratory Ruling already pending before the FCC. Sprint's FCC petition raises the **identical issues** that BellSouth has attempted to raise before this Commission. It would be a wasteful and inefficient use of both this Commission's and carriers' time and limited resources¹⁶ to proceed simultaneously in both state and federal forums.¹⁷

III. CONCLUSION

For the foregoing reasons, the Florida Public Service Commission should dismiss BellSouth's Petition for an Investigation and Establishment of Generic Proceeding for lack of jurisdiction. Alternatively, pursuant to principles of comity and the efficient administration of justice, the Commission should refrain from entertaining BellSouth's request for a generic proceeding at this time.

¹⁵ See, i.e., *Shooster v. BT Orlando Limited Partnership*, 766 So.2d 1114, 1115 (Fla. 5th DCA 2000) (citations omitted) (. . . as a matter of comity, one state court will not ordinarily determine a controversy of which another state court has previously obtained jurisdiction").

¹⁶ As this Commission is well aware, a generic proceeding will encompass an enormous amount of time, energy and resources. Such a proceeding would be duplicate and wasteful of the proceeding currently on-going at the FCC.

¹⁷ In analogous situations, the Commission has declined to proceed where duplicate proceedings were pending at the FCC. See, *In re: Petition for waiver of required method of dialaround compensation to allow implementation of a per-call based method for intrastate calls to nonlocal exchange company telephone (NPAT) providers by Florida Public Telecommunications Association, Inc.*, Docket No. 950769-TP, Order No. PSC-96-0478-PCO-TP (April 5, 1996) ("Further action by the Commission in this docket will only duplicate proceedings at the FCC."); *In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services*, Docket No. 000475-TP, Order No. PSC-01-2309-PCO-TP (Nov. 21, 2001) (proceedings held in abeyance pending FCC ruling on Thrifty Call's petition for declaratory ruling).

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CERTIFICATE OF SERVICE

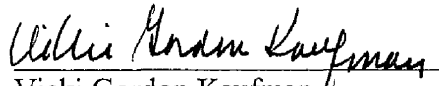
I **HEREBY CERTIFY** that a true and correct copy of the foregoing Nextel Communications, Inc.'s Motion to Dismiss, or in the Alternative, Hold in Abeyance has been furnished by U.S. Mail this 22nd day of August 2002 to the following:

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