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: February 18, 2008

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

NPCR, Inc., d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. (collectively referred to herein as "Nextel"), pursuant to Rule 28-106.204, Florida Administrative Code, files this Motion for Leave to File its Reply to BellSouth Telecommunications, Inc. d/b/a AT&T Florida's ("AT&T") January 21, 2008, Response in Opposition to Motion for Summary Final Order, February 7, 2008, Supplemental Submission in Opposition to Nextel's Motion for Summary Final Order, and February 13, 2008, Submission of Additional Supplemental Authority. In support, Nextel states as follows:

1. On June 28, 2007, Nextel filed Notices of Adoption of an interconnection agreement between AT&T and Sprint (the "Sprint ICA"). AT&T moved to dismiss Nextel's

Notices of Adoption on June 28, 2007, to which Nextel replied on July 9, 2007. Thereafter, the Commission denied AT&T's Motion to Dismiss in Order No. PSC-07-0831-FOF-TP, issued in the instant dockets on October 16, 2007.

2. On December 18, 2007, AT&T filed a Notice of Rule 1.310(b)(6) Deposition seeking to depose a designated Nextel representative on matters related to the corporate structure of Sprint Nextel Corp. and its subsidiaries, the services offered by certain subsidiaries, and other matters. On December 26, 2007, Nextel simultaneously filed its Motion for Summary Final Order, its Motion to Quash Notice of Deposition and for Protective Order, and its Request for Oral Argument on Motion for Summary Final Order and Motion to Quash and for Protective Order. Thereafter, the parties executed a "Stipulations of Fact"[1] in lieu of conducting the deposition, in recognition of which AT&T withdrew its Notice of Deposition on January 18, 2008, and Nextel correspondingly withdrew its Motion to Quash Notice of Deposition and for Protective Order and request for oral argument thereon on January 22, 2008. Nextel's Motion for Summary Final Order and its associated request for oral argument remain pending.

3. AT&T filed its Response in Opposition to Motion for Summary Final Order on January 21, 2008.[2] Thereafter, AT&T filed a Supplemental Submission in Support of Response in Opposition to Motion for Summary Final Order on February 7, 2008, and filed a Submission of Additional Supplemental Authority by letter dated February 13, 2008. AT&T did not seek the Commission's leave to file either supplemental submission.

4. Although the Commission historically has been lenient in granting Motions for Leave to File Supplemental Authority, neither of AT&T's supplemental submissions qualifies as

[1] The "Stipulations of Fact" was filed in the similar South Carolina adoption proceedings, Docket Nos. 2007-225-C and 2007-256-C, on February 8, 2008.

[2] The Commission granted two unopposed motions for extension of time for AT&T to file its Response.

such. AT&T's February 7, 2008 submission addresses a petition – not a ruling – filed by AT&T at the Federal Communications Commission, provides additional argument, and seeks additional affirmative relief not addressed in its initial Response, in that it asks the Commission to defer ruling on this matter while that petition is pending. AT&T's February 13, 2008, submission also includes additional argument regarding the action AT&T urges the Commission to take in these dockets. Accordingly, both of AT&T's supplemental submissions are properly characterized as unauthorized addenda to AT&T's January 21, 2008 Response in that they provide additional argument in support thereof. [3]

5. Nextel seeks leave to file the attached Reply to AT&T's Response and supplemental submissions. The Uniform Rules of Administrative Procedure neither provide for nor prohibit such a reply, and it is well within the Commission's discretion to permit the proposed filing.[4] Nextel believes that its Reply will be of particular assistance to the Commission in connection with its deliberations on Nextel's Motion for Summary Final Order because the procedural and substantive issues in this case are of critical importance and are likely to have an impact well beyond the Nextel's adoption of Sprint ICA. This case not only involves

[3] *In re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation,* Docket No. 930256-WS, Order No. PSC-94-0987-FOF-WS (August 15, 1994)("a notice of supplemental authority drawing our attention to authority newly discovered and devoid of argument would be properly received."); *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-00-1568-PCO-TP (August 31, 2000) (Commission granted BellSouth motion for leave to file supplemental authority, finding that it did not contain argument); *In re: Petition by BellSouth Telecommunications, Inc, for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.,* Docket No. 001305-TP, Order No. PSC-02-2457-PCO-TP (December 17, 2001)(Commission generally considers filing of supplemental authority pursuant to Rule 9.255, Florida Rules of Appellate Procedure, which provides that such notice shall not contain argument); *In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc., d/b/a Covad Communications Company,* Docket No. 020960-TP, Order No. PSC-03-0942-FOF-TP (August 18, 2003)(stating that "submission of new authority, without comment, is appropriate and consistent with [Commission] practices" and striking filing that contains "new post-hearing argument.")

[4] Likewise, the Uniform Rules neither provide for nor prohibit a party from supplementing a previously-filed response to a motion, although Rule 28-106.204, Florida Administrative Code, strongly suggests that one must seek permission to do so by motion.

the issue of the Commission's authority to interpret and apply the BellSouth / AT&T Merger Commitments and the interaction of 47 U.S.C. § 252(e) with such Merger Commitments, but also involves the procedures the Commission may establish when, as here, an incumbent LEC seeks to block the routine adoption of a valid interconnection agreement. [5] The Commission should have the benefit of all relevant information that bears on such issues, including the information set forth in Nextel's proposed Reply.[6] Further, providing this information in writing, rather than at verbally at oral argument, will better enable the Commission and its Staff to evaluate the parties' arguments and the authorities upon which they rely, much the same as if parties had filed briefs.

6. Finally, granting this Motion will not prejudice AT&T nor delay these proceedings. AT&T has already twice supplemented its original response, and if oral argument is granted, AT&T will again have the opportunity to address the Commission. Nor will granting this Motion unduly delay this case, as the Commission has not yet set a schedule.

7. Movant has conferred with counsel for AT&T and states that AT&T Florida opposes this Motion.

WHEREFORE, Nextel respectfully requests that the Commission grant this Motion for Leave to file Amended Petition.

Respectfully submitted this 18th day of February, 2008.

[5] Adoption proceedings are routine, and in fact hundreds of such adoptions have gone into effect over the past several years without official Commission action.

[6] The Commission could certainly strike AT&T's supplemental submissions on its own motion because AT&T failed to seek leave to file supplemental pleadings not specifically authorized by the Uniform Rules. However, Nextel suggests that the Commission instead review and take all filings into consideration, including Nextel's proposed Reply, when deciding Nextel's Motion for Summary Final Order.

/s/ Marsha E. Rule
Marsha E. Rule
Rutledge, Ecenia, Purnell & Hoffman
P.O. Box 551
Tallahassee, FL 32302-0551
(850) 681-6788
Fax: (850) 681-6515
marsha@reuphlaw.com

Douglas C. Nelson
William R. Atkinson
Sprint Nextel
233 Peachtree Street NE, Suite 2200
Atlanta, GA 30339-3166
(404) 649-0003
Fax: (404) 649-0009
Email: douglas.c.nelson@sprint.com
bill.atkinson@sprint.com

Joseph M. Chiarelli
6450 Sprint Parkway
Mailstop: KSOPHN0214-2A671
Overland Park, KS 66251
Voice: 913-315-9223
Fax: 913-523-9623
Email: joe.m.chiarelli@sprint.com

ATTORNEYS FOR
SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP,
AND SPRINT SPECTRUM LIMITED
PARTNERSHIP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail and email to the following parties on this 18th day of February, 2008:

Lee Eng Tan, Esq.
Victor McKay, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us
vmckay@psc.state.fl.us
850.413.6212

E. Edenfield, Jr.
Tracy W. Hatch
Manuel Gurdian
c/o Greg Follensbee
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
greg.follensbee@att.com
850-577-5555

John T. Tyler
AT&T Midtown Center – Suite 4300
675 West Peachtree Street, NE
John.tyler@bellsouth.com
Atlanta, GA 30375
404.335.0757

/s/ Marsha E. Rule
Marsha E. Rule

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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NEXTEL'S REPLY
TO AT&T FLORIDA'S RESPONSE AND SUPPLEMENTAL SUBMISSIONS
IN OPPOSITION TO NEXTEL'S MOTION FOR SUMMARY FINAL ORDER

NPCR, Inc., d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. (collectively referred to herein as "Nextel"), hereby files its Reply to BellSouth Telecommunications, Inc. d/b/a AT&T Florida's ("AT&T") January 21, 2008 Response, February 7, 2008 Supplemental Submission in Opposition to Nextel's Motion for Summary Final Order, and February 13, 2008 Submission of Additional Supplemental Authority (collectively "AT&T's Response").

AT&T is doing its utmost to distract this Commission and convince it to leave this matter languishing at the Federal Communications Commission ("FCC") instead of

acting. The Commission should reject AT&T's transparent attempts to obscure the primary reason Nextel's Motion for Summary Final Order should be granted: now that the extension of the AT&T - Sprint interconnection agreement ("Sprint ICA") [1] has been approved in Docket No. 070249-TP and is in unquestionably in effect, the Commission has the unequivocal authority and obligation to approve such adoption pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, without regard to any Merger Commitments made by BellSouth and AT&T. In fact, this Commission has already determined that "*Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety*." [2] Accordingly, Nextel's Motion for Summary Final Order should be granted because:

1) There is no longer any genuine issue of material fact remaining after the three-year extension of the Sprint ICA in Docket No. 070249-TP;

2) The Commission has jurisdiction under 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 to approve the adoption, and (although the Commission need not invoke or rely upon the Merger Commitments to decide this matter), it has concurrent jurisdiction with the FCC to apply the Merger Commitments and approve the adoption thereunder; and

3) AT&T itself now maintains that this dispute is "eminently suited for expedited resolution"[3] and that there "is no need for extensive evidence-gathering or fact-finding"[4] that requires further proceedings before making a determination on Nextel's adoption of the Sprint ICA.

For the reasons stated herein, Nextel respectfully requests that the Commission

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[1] The "Sprint ICA" is the currently effective interconnection agreement between AT&T and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P dated January 1, 2001, as amended.

[2] Order Denying Motion to Dismiss, Nextel Dockets, Order No. PSC-07-0831-FOF-TP ("Order"), emphasis added. AT&T did not seek reconsideration of this Order.

[3] Petition of AT&T ILECs for a Declaratory Ruling, February 5, 2008, p. 17. This document was attached to AT&T's February 7, 2008 Supplemental Submission in Opposition to Nextel's Motion for Summary Final Order.

[4] *See Id.* at page 17.

continue to exercise its jurisdiction over these matters, reject AT&T's requests for further proceedings and delay, and grant Nextel's Motion for Summary Final Order approving Nextel's adoption of the Sprint ICA.

I.
SUPPLEMENTAL CASE BACKGROUND

By its October 16, 2007 Order denying AT&T's Motion to Dismiss in Order No. PSC-07-0831-FOF-TP (the "Order), the Commission recognized that the only plausible "issue of fact" raised by AT&T in this case was whether or not Nextel had sought adoption of the Sprint ICA within a reasonable period of time as required by FCC Rule 47 C.F.R. 51.809(c). Specifically, in its October 16, 2007 Order the Commission found that "whether the Sprint ICA Nextel seeks to adopt has expired is a disputed material fact. … Consequently, whether the Sprint ICA has expired may require further fact finding and policy analysis." The Commission went on to clearly recognize the relationship between the ultimate resolution of the Sprint arbitration case, which involved the issue of whether the Sprint ICA would indeed be extended 3 years, and the Nextel Dockets.[5] Since entry of the Commission's October 16th Order, AT&T has not done anything to demonstrate that the only legitimate fact issue raised by AT&T and recognized in the Commission's Order has been resolved.

As anticipated in Nextel's Motion for Summary Final Order, AT&T's Response argues that the Sprint ICA may not be adopted by Nextel because "the Sprint agreement addresses a unique mix of wireline and wireless items, and Nextel is solely a wireless

[5] Order at footnote 8: "Because Nextel seeks to adopt the existing Sprint ICA, the procedure and ultimate resolution of this docket may rely heavily on the outcome of the Sprint – AT&T Arbitration in Docket No. 070249-TP."

carrier."[6] Specifically, AT&T's Response asserts for the first time the following three *new* objections to Nextel's adoption: 1) that the Merger Commitments are not applicable to Nextel because Nextel is seeking to adopt the Sprint ICA as previously extended by the Commission, as opposed to "porting" an ICA from another state[7]; 2) that Nextel's adoption does not comply with § 252(i) because Nextel is only a wireless provider that does not provide wireline CLEC service and, therefore, it cannot adopt an ICA that contains a "unique mix of wireline and wireless items … that would not have been made if the agreement addressed only wireline or only wireless service"[8] (the "similarly-situated" argument); and, 3) granting the adoption would violate FCC rules by "erroneously suggest[ing] that Nextel could avail itself of provisions in the Agreement that apply only to CLECs" such as the purchase of UNEs by a wireless provider, contrary to the FCC's *Triennial Review Remand Order* ("TRRO").[9] As addressed more fully below, AT&T's arguments in its Response are ill-founded, and fail to demonstrate either the existence of a genuine issue of material fact or that Nextel is not entitled to judgment as a matter of law.

By its two "Supplemental" filings, AT&T has provided the Commission with a copy of a Petition of the AT&T ILECs for a Declaratory Ruling filed by various AT&T entities, including AT&T Florida, at the FCC on February 5, 2008; and, an irrelevant FCC Order concerning a proceeding in which several entities, including Sprint Nextel, opposed AT&T's filing of certain federal tariff revisions to withdraw particular

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[6] AT&T Response in Opposition to Motion for Summary Final Order, p. 8.

[7] *See Id.* at pgs. 6-8.

[8] *See Id.* at pgs. 8-11.

[9] *See Id.* at pgs. 11-12.

broadband transmission services.

At its core, the various filings that comprise AT&T's Response are no more than further attempts to delay implementing the Merger Commitments and exercise of Nextel's basic adoption rights under § 252(i) of the Act. None of AT&T's "new" arguments identify the existence of a genuine issue of material fact, or that Nextel is not entitled to judgment as a matter of law. A simple review of each in the context of the readily available Sprint ICA itself demonstrates that each AT&T argument is deficient as a matter of law. Accordingly, each putative factual issue raised by AT&T can and should be resolved as a matter of law, and Nextel's Motion for Summary Final Order should be granted.

II.
LEGAL STANDARD

Section 120.57(1)(h), Florida Statutes, states that a summary final order "shall be rendered" if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, demonstrate that that there is no genuine issue as to any material fact and the moving party is entitled to entry of a final order as a matter of law.[10] *See also* Rule 1.510(c), Florida Rules of Civil Procedure, which provides an identical standard for summary judgment.[11]

AT&T correctly notes that Nextel must demonstrate the non-existence of any

[10] Rule 28-106.204(1), Florida Administrative Code, similarly states in pertinent part as follows: "[A]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

[11] This Commission has recognized that case law regarding summary judgment under the Florida Rules of Civil Procedure is applicable to motions for summary final order. Order No. PSC-02-1554-FOF-WU, pg. 7, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities Inc.,* July 27, 2001.

material fact and that it is entitled to summary final determination as a matter of law. Nextel shouldered and met that burden in its Motion for Summary Final Order. At that point, however, the burden shifted to AT&T to come forward with evidence demonstrating the existence of a genuine factual issue. *Holl v. Talcott,* 191 So.2d 40 (Fla. 1966). The Commission recognized this shifting burden in Order No. PSC-04-0500-FOF-TP: [12]

> The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable to the party against whom the summary judgment is to be entered. *When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing.* ***If the opponent does not do so, summary judgment is proper and should be affirmed.*** The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See, Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999). (emphasis added)

AT&T asserts vaguely that there are "numerous genuine issues of material fact" [13] in this case, but *fails to identify a single specific factual issue that is at all relevant to this case, much less provide a single shred of evidence that proves any such factual issue actually exists*. Mere allegations of a factual issue are not sufficient to place a fact in dispute. *Landers v. Milton,* 370 So.2d 368 (Fla. 1979), *Almand Construction Co. v.*

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[12] *In re: Complaint and petition by CAT Communications International, Inc. against BellSouth Telecommunications, Inc. for alleged unlawful emergency telephone service charge and telecommunications relay service charges,* Docket No. 040026-TP, May 14, 2004, pg. 2, emphasis added.

[13] AT&T Response, pg. 1.

Evans, 547 So.2d 626 (Fla. 1989). It is incumbent upon AT&T to support any allegations with evidence**.** *Harvey Building, Inc. v. Haley,* 175 So.2d 780, 782 (Fla. 1965) ("A summary judgment motion will be defeated if ***the evidence by affidavit or otherwise*** demonstrates the existence of a material factual issue" (emphasis added)). See also *Johnson v. Gulf Life Ins. Co.*, 429 So.2d 744, 746 (Fla. 3d DCA 1983):

> It is not sufficient for the opposing party merely to assert that an issue does exist, *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla.1965), or to raise paper issues, *Colon v. Lara,* 389 So.2d 1070 (Fla. 3d DCA 1980). When the material facts are undisputed, they form a question of law which the trial court is empowered to decide on a motion for summary judgment. *Richmond v. Florida Power & Light Co.*, 58 So.2d 687 (Fla.1952); *Traveler's Insurance Co. v. Spencer,* 397 So.2d 358 (Fla. 1st DCA 1981); *Stone v. Rosen,* 348 So.2d 387 (Fla. 3d DCA 1977).

AT&T has not met its burden of providing evidence of any genuine issue of fact that is in the least material to the Commission's resolution of this matter.

The Commission should disregard AT&T's argument that it "has not waived its right to fully complete and perfect the evidentiary record." [14] AT&T has not stated, described or alleged any facts that require discovery, it has no discovery pending, and it has made no mention or use of the evidence it has already developed through discovery.[15] Moreover, AT&T need not complete discovery in order to meet its burden of providing evidence in support of factual allegations; it could instead use affidavits to do so, so long

[14] AT&T Response, pg. 7.

[15] On December 18, 2007, AT&T filed a Notice of Rule 1.310(b)(6) Deposition seeking to depose a designated Nextel representative on matters related to the corporate structure of Sprint Nextel Corp. and its subsidiaries, the services offered by certain subsidiaries, and other matters. Nextel moved to quash the deposition on December 26, 2007. Thereafter, the parties agreed upon "Stipulations of Fact" in lieu of conducting the deposition, in recognition of which AT&T withdrew its deposition notice on January 18, 2008, and Nextel correspondingly withdrew its motion to quash on January 22, 2008. On February 8, 2008, AT&T filed the "Stipulations of Fact" in adoption proceedings before the South Carolina Public Service Commission, Docket Nos. 2007-225-C and 2007-256-C, but has not attempted to rely on any factual stipulation in the instant dockets.

as such affidavits "set forth such facts as would be admissible in evidence, and … show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 1.510(c), Fla. R. Civ. P. [16]

AT&T's reliance on Order No. PSC-01-1554-FOF-WU[17] for the apparent proposition that a motion for summary final order is premature until discovery is complete and testimony is filed, is entirely misplaced. First, Rule 1.510(c), Fla. R. Civ. P. specifically provides that a party may move for summary judgment "at any time after the expiration of 20 days from the commencement of the action…." Second, that order simply does not support the interpretation supplied by AT&T.

The language upon which AT&T relies is actually a quotation from Order No. PSC-00-2388-AS-WU, an earlier order issued in the same docket. Accordingly, one must look to Order No. PSC-00-2388-AS-WU to determine the basis for the Commission's ruling. As noted in the earlier order, both the Office of Public Counsel (OPC) and a water utility protested a Proposed Agency Action Order setting interim rates. OPC further asked the Commission to impose a negative acquisition adjustment, promptly served its first discovery requests on the utility less than one month later, and continued actively pursuing discovery thereafter. The utility moved for summary determination of OPC's request less than two months after OPC filed its request for an acquisition adjustment, at which time discovery was still ongoing. In fact, when the Commission ruled on the utility's motion, OPC was awaiting the utility's response to its

[16] AT&T is already providing services to a wireless provider under the Sprint ICA and therefore has sufficient knowledge to provide an affidavit regarding any "facts" it may deem relevant.

[17] *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, Docket No. 991437-WU (July 27, 2001).

third set of discovery requests. Accordingly, the Commission's ruling was based on the circumstances presented at that time:

> In this case, OPC has pending discovery on the issue of negative acquisition adjustment. OPC asserts that it intends to establish through discovery a change in circumstances sufficient to overcome our previous decision in acquisition adjustment. Therefore, we find that it is premature to decide whether a genuine issue of material fact exists when OPC has not had the opportunity to complete discovery and file testimony.

Order No. PSC-00-2388-AS-WU, pg. 6. The instant case involves none of the factual complexities or policy considerations involved in a full utility rate case. In fact, interconnection agreements have been adopted hundreds of times over the past several years without any official commission action whatsoever.[18]

Nextel set forth 13 undisputed facts in its Motion for Summary Final Order that are clearly sufficient to permit the Commission to resolve the legal questions presented in this docket.[19] *AT&T still has not presented any evidence that either places a single one of these facts in dispute or proves the existence of any additional genuine issue of material fact necessary for the resolution of this case.* This matter has now been pending for over 8 months, which is only a few days less than the entire amount of time necessary to arbitrate a new interconnection agreement under 47 USC § 252(b)(4)(C). As shown above, no genuine issue of material fact exists in this case, and Nextel is entitled to adopt the Sprint ICA as a matter of law.

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[18] Nextel notes that its adoption notice meets all requirements for administrative approval set forth in Section 2.07.C.5.b. of the Commission's Administrative Procedures Manual.

[19] Nextel Motion, paragraphs 1-13, pgs. 8-12. In its Response, AT&T argues that Nextel's adoption of the Sprint ICA does not comply with the Merger Commitments or § 252(i) and that granting the adoption would violate FCC rules, but does not raise (let alone provide evidence of) any genuine issues of material fact in connection with these arguments. These issues raised by AT&T are legal issues, which are well-suited to summary determination.

III.
AT&T'S RESPONSE DOES NOT DEMONSTRATE THE EXISTENCE OF ANY GENUINE ISSUE OF MATERIAL FACT OR RAISE ANY LEGAL ARGUMENT THAT CAN DEFEAT NEXTEL'S RIGHT TO ADOPT THE SPRINT ICA

A. SUMMARY OF ARGUMENT

AT&T's newly-proposed interpretation of Merger Commitment No. 1 to impose a "port-in" requirements would require the Commission to re-write the Commitment to exclude "in-state" adoptions, and also ignore the simple fact that even under AT&T's contorted interpretation, Nextel's request to adopt a region-wide Sprint ICA is broad enough on its face to encompass adoption of the Sprint ICA as a "ported-in" ICA. The Sprint ICA has been approved in 8 other states outside of Florida. It has been extended by Amendment of the parties, which Amendment has already been approved in several states in addition to Florida, and the extension process will soon be completed for the remaining legacy BellSouth states. Accordingly, the Sprint ICA meets AT&T's tortured interpretation – i.e., it is a "ported" agreement from those 8 states into Florida.

AT&T's second new objection as included in its January 21 Response (that Nextel is a wireless carrier that does not offer and therefore cannot use the Sprint ICA provisions that pertain to wireline service) is nothing more than an argument that Nextel cannot adopt the Sprint ICA because it is not "similarly situated" to the original parties to the Sprint ICA. This argument is contrary to the express provisions of § 51.809(a), was also expressly raised by legacy BellSouth and rejected by the FCC when it adopted its "all-or-nothing" interpretation of § 252(i). Further, as explained below, subsequent case law demonstrates that an ILEC cannot avoid making an ICA available for adoption under the "all-or-nothing" rule simply because the ICA includes terms that the ILEC claims a

subsequently adopting carrier is incapable of using.

Finally, both AT&T's second argument (implying that both a wireless carrier and a wireline carrier are necessary under the Sprint ICA) and third argument (that a wireless carrier-only adoption would violate the FCC's TRRO decision regarding the use of UNEs for wireless services) are not only disingenuous but demonstrate a fundamental lack of familiarity with the Sprint ICA. The simple, indisputable facts on these points are that *the Sprint ICA itself does not require both Sprint PCS and Sprint CLEC to remain parties to the Sprint ICA throughout its term but, instead, contains express provisions for either Sprint entity to adopt another ICA while the sole remaining Sprint entity continues to operate under the Sprint ICA; and, the Sprint ICA post-TRRO amendment also expressly addresses the TRRO restriction on the use of UNEs for wireless-only services.*

For the reasons stated above and explained in greater detail below, there is no genuine issue of material fact raised by any of AT&T's "new" objections to Nextel's adoption of the Sprint ICA that necessitate further proceedings, and the Commission should grant Nextel's Motion for Summary Final Order.

B. NEXTEL'S RIGHT TO ADOPT THE SPRINT ICA PURSUANT TO § 252(i) AND RULE 51.809 IS INDEPENDENT OF THE MERGER COMMITMENTS.

As noted above, now that the extension of the Sprint ICA has been approved, Nextel is entitled to adopt it pursuant to § 252(i), without regard to the AT&T Merger Commitments. It is axiomatic that the Merger Commitments do not restrict or negate Nextel's additional rights under federal law, and therefore AT&T's argument that Nextel's adoption "does not comply with the Merger Commitments" cannot possibly

raise a genuine issue of material fact regarding Nextel's adoption rights under 252(i). Nevertheless, Nextel wishes to address AT&T's erroneous assertions regarding the meaning of the Merger Commitments, and will show that adoption is, in fact, absolutely consistent with such requirements.

AT&T's interconnection-related Merger Commitments Nos. 1 and 2 respectively state:

> 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.
>
> 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.[20]

Without citation to any authority, AT&T now states that Merger Commitment No. 1 "applies ***only*** when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state".[21] AT&T's stated rationale for its interpretation is that adoption of any agreement pursuant to Merger Commitment No. 1 is "subject to state-specific pricing and performance plans and technical feasibility" and

[20] *FCC BellSouth Merger Order*, at page 149, Appendix F.

[21] AT&T Response in Opposition to Motion for Summary Final Order at pg. 4 (emphasis added).

must be "consistent with the laws and regulatory requirements of the state for which the request is made." [22] The mere fact that an adoption remains subject to state-specific requirements does not in any way preclude adoption of a given agreement in the same state in which it was originally adopted or created. To reject a Merger Commitment adoption on such a basis would create and impose a non-existent limitation on a requesting carrier's clearly unrestricted Merger Commitment right to adopt "any" agreement that AT&T had entered into in "any" of its 22 states.

The express purpose of the interconnection-related Merger Commitments was to encourage competition by reducing interconnection costs between a requesting carrier such as Nextel *and the new 22-state mega-billion dollar, post-merger AT&T*.[23] Indeed, there was acknowledged FCC concern regarding a merger that created a "consolidated entity – one owning nearly all of the telephone network in roughly half the country – *using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether:*"[24]

> To mitigate this concern, the merged entity has agreed to allow the portability of interconnection agreements ***and to ensure that the process of reaching such agreements is streamlined***. These are important steps

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[22] *Id.*

[23] *See* FCC Order at page 169, "Concurring Statement of Commissioner Michael J. Copps":

> "… we Commissioners were initially asked to approve the merger the very next day ***without a single condition*** to safeguard consumers, businesses, or the freedom of the Internet. This is all the more astonishing when you consider that this $80-some odd billion dollar acquisition would result in a new company with an estimated $100 billion dollars in annual revenue, employing over 300,000 people, owning 100% of Cingular (the nation's largest wireless carrier), covering 22 states, providing service to over 11 million DSL customers, controlling the only choice most companies have for business access services, serving over 67 million access lines, and controlling nearly 23% of this country's broadband facilities."

[24] *Id.* at page 172, emphasis added.

> for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition.[25]

Cognizant of the intent behind the interconnection-related Merger Commitments (and the FCC's approval thereof), and applying the plain and ordinary meaning of the words used to establish such Commitments, it cannot be disputed that:

- Nextel is within the group of "any requesting telecommunications carrier";
- Nextel has requested the Sprint ICA;
- The Sprint ICA is within the group of "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", having been entered into by Sprint and AT&T in all 9 legacy BellSouth states;
- The Sprint ICA already has state-specific pricing and performance plans incorporated into it with respect to each state covered by the agreement;
- There is no issue of technical feasibility; and,
- The Sprint ICA has already been amended to reflect changes of law, i.e. the TRRO requirements.

Thus, Nextel clearly meets all requirements set forth in the Merger Commitments and is entitled to adopt the Sprint ICA. Even under AT&T's semantic game-playing interpretation of its Merger Commitment, AT&T's attempt to prevent Nextel's adoption must fail. To the extent AT&T contends that it does not have to provide the Sprint ICA to Nextel under the Merger Commitments in Florida *simply because the Sprint ICA was previously approved in Florida*, AT&T overlooks a very simple, yet essential and indisputable fact that destroys its own argument: the Sprint ICA itself is a 9-state region-

[25] *Id.*, emphasis added.

wide agreement that was submitted and approved in the same form in 8 other states as well. Nextel's adoption notice specifically made this known to the Commission, while at the same time noting that the Commission had also previously approved the Sprint ICA.[26] Thus, Nextel's adoption request just as easily can be viewed as seeking the "porting" of the Sprint ICA into Florida from the remaining 8 states. [27]

There simply is, however, no logical reason to engage in either AT&T's semantic game-playing or hoop-jumping mental gymnastics driven by AT&T's contorted interpretation of Merger Commitment No. 1 in order to characterize Nextel's adoption of the Sprint ICA as a "ported" ICA. AT&T's argument on its face improperly requires the Commission to both ignore the plain and ordinary meaning of the words used by the FCC and to adopt an express "porting" requirement that simply does not exist, and therefore must be rejected. The Commission should reject AT&T's attempt to carve out massive exceptions to Merger Commitment 1 by claiming that some categories of ICAs not described therein are unavailable for adoption.

C. AT&T'S ARGUMENT THAT NEXTEL MAY NOT ADOPT THE SPRINT ICA BASED ON THE SERVICE PROVIDED BY NEXTEL IS A DISCRIMINATORY PRACTICE THAT HAS BEEN EXPRESSLY REJECTED BY THE FCC AND THUS THE SERVICES TO BE PROVIDED BY NEXTEL DO NOT PRESENT A GENUINE ISSUE OF MATERIAL FACT

Notwithstanding Nextel's stated adoption of the Sprint ICA in its entirety[28] (and

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[26] *See* Notice of Adoption.

[27] Indeed, Nextel's request could be construed to permit it to adopt the North Carolina Sprint ICA which, as now amended, extends 3 years from March 20, 2007 as does the Florida ICA. The North Carolina version also has the Florida-specific provisions within it, so there is no need for it to be further "conformed" to Florida.

[28] Notice of Adoption at page 2 ("Nextel adopts the Sprint ICA in its entirety and as amended").

its offer of a CLEC signatory[29]), and as Nextel anticipated in its Motion for Summary Final Order, AT&T contends that Nextel may not adopt the Sprint ICA because "the Sprint agreement addresses a unique mix of wireline and wireless items, and Nextel is a solely wireless carrier"; "Nextel cannot avail itself of all of the interconnection services and network elements provided within the Sprint agreement"; and the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline services or only wireless services". [30] AT&T's "reasons" amount to nothing more than an argument that Nextel cannot adopt the Sprint ICA because it is not "similarly situated" to the original parties to the Sprint ICA. This argument is not only contrary to the express provisions of Rule 51.809(a), but was raised by AT&T's predecessor BellSouth and rejected by the FCC when it adopted its "all-or-nothing" interpretation of § 252(i). Further, subsequent case law demonstrates that an ILEC cannot avoid making an ICA available for adoption under the "all-or-nothing" rule simply because it includes additional negotiated terms that the ILEC considers cannot be "used" by a subsequent adopting carrier. Accordingly, this argument must be rejected as a matter of law and cannot raise any genuine issue of material fact to defeat summary

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[29] *See* Notice of Adoption Exhibit B, May 18, 2007 letter from Mark G. Felton of Sprint Nextel to AT&T at page 2 ("Nextel is a wholly owned subsidiary of Sprint Nextel Corporation, as are … Sprint CLEC … and … Sprint PCS. Although neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, **Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel in order to expeditiously implement Nextel's adoption.**"). (emphasis added) To the extent AT&T were to contend Sprint CLEC cannot be a signatory to two agreements, as further explained in Section D below , there is nothing in the Sprint ICA that affirmatively requires Sprint CLEC to continue to be a party to the Sprint ICA in order for Sprint PCS to continue to operate under the Sprint ICA. Based on the foregoing, notwithstanding any assertions by AT&T to the contrary, Nextel could in fact bring not only *a CLEC* to the table to adopt the Sprint ICA, but it could bring the *same CLEC* to the table to adopt the Sprint ICA. As also further explained in the current Section C, AT&T has no legitimate legal basis to object to Nextel's adoption of the Sprint ICA without Sprint CLEC as an additional signatory.

[30] AT&T Response in Opposition to Motion for Summary Final Order, pg. 9.

determination.

47 U.S.C. § 252(i) 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.

While the recognized purpose of an ICA adoption pursuant to a Merger Commitment is to "streamline" the creation and implementation of ICAs between carriers and the new 22-state merger entity[31], the historical purpose of a § 252(i) adoption has been to ensure an ILEC does not discriminate in favor of any particular carriers[32]. Section 252(i) only permits "differential treatment" if: a) the LEC's costs of serving a requesting carrier are higher than the cost to serve the carrier that originally negotiated the agreement; or b) serving a requesting carrier is not technically feasible. *AT&T has not even attempted to demonstrate that it actually "costs" more to provide any given service under the Sprint ICA to Nextel than it does to provide that given service to any other carrier under the Sprint ICA.* AT&T simply asserts in a conclusory manner that it will not get the "benefit of the bargain" if Nextel is not in a position to offer both wireless and wireline services. The scope of services that Nextel may or may not be able to provide, however, are legally irrelevant to the inquiry of whether or not it can adopt the Sprint ICA.

The FCC expects that a carrier seeking to adopt an existing ICA under 252(i)

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[31] *Merger Order* at page 172, "Concurring Statement of Commissioner Michael J. Copps":

[32] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd, 15499, 16139 at ¶ 1315 (1996) ("Local Competition Order").

"shall be permitted to obtain its statutory rights on an expedited basis."[33] Where a LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state Commission that that differential treatment is justified, which AT&T has not done and cannot do. The FCC has held that the fact a carrier serves a different class of customers, or provides a different type of service does not bear a direct relationship to the costs incurred by the LEC to interconnect with that carrier or whether interconnection is technically feasible.[34]

As also initially explained in Nextel's Motion for Summary Final Order – and which AT&T does not even attempt to address - in July of 2004 the FCC revisited its interpretation of 252(i) to reconsider what was originally known as its "pick-and-choose" rule which permitted requesting carriers to select only the related terms that they desired from an incumbent LEC's existing filed interconnection agreements, rather than an entire interconnection agreement. The FCC eliminated the pick-and-choose rule and replaced with the "all-or-nothing" rule, which is reflected in the current version of Rule 51.809 above. The FCC concluded that the original purpose of 252(i), protecting requesting carriers from discrimination, continued to be served by the all-or nothing rule:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available

[33] *Id.* at ¶ 1321.

[34] *Id.* at ¶ 1318.

> on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[35]

Thus, the FCC has already rejected AT&T's current tactic of attempting to differentiate a carrier such as Nextel based upon the service it provides in order to delay or deny ICA adoptions. As set forth in the FCC's Second Report and Order, AT&T's pre-merger parent, BellSouth Corporation, specifically contended that incumbent LECs should be permitted to restrict a 252(i) adoption to "similarly situated" carriers.[36] One scenario that BellSouth disclosed in the course of making its argument to the FCC is of particular interest in light of the bill and keep aspects of the Sprint ICA: BellSouth asserted in support of its position that it had sought to "construct contract language [with respect to a specified] situation, [but] *there is still risk that CLECs who are not similarly situated will argue they should be allowed to adopt the language*". The situation to which BellSouth was referring involved a CLEC with a very specific business plan, customer base and bill and keep provisions as to which BellSouth affirmatively stated in "other circumstances … would be extremely costly to BellSouth."[37] The FCC rejected this argument:

> We also reject the contention of at least one commentator that incumbent LECS should be permitted to restrict adoptions to "similarly situated" carriers. We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. Subject to the

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[35] *In the Matter of: 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 at ¶ 19 (2004) ("Second Report and Order"), emphasis added.

[36] *Id.,* at ¶ 30 and footnote 101.

[37] *Id.,* BellSouth Affidavit of Jerry D. Hendrix at ¶ 6, a copy of which is attached to Nextel's Motion as Exhibit F, emphasis added.

> limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety ***that the requesting carrier deems appropriate for its business needs.*** Because the all-or-nothing rule should be more easily administered and enforced than the current rule, we do not believe that further clarifications are warranted at this time.[38]

In this case, AT&T admits that it entered into an agreement that granted preferential bill and keep and facility-sharing treatment to one wireless carrier that it ordinarily would not grant, arguing that it did so based on the inclusion of wireline terms that AT&T claims may not be used by a stand-alone wireless carrier, thus precluding adoption of the entire ICA by a stand-alone wireless carrier. This "similarly situated" argument was also recycled with a slight twist in Texas by AT&T's other predecessor, SBC, in a vain attempt to avoid filing the entire terms of an agreement it had entered into with a CLEC named Sage Telecom.[39]

In *Sage*, SBC and Sage Telecom entered into a "Local Wholesale Complete Agreement" ("LWC") that included not only products and services subject to the requirements of the Act, but also certain products and services that were not governed by either §§ 251 or 252. Following the parties' press release and filing of only that portion of the LWC that SBC and Sage considered to be specifically required under § 251 of the Act, other CLECs filed a petition requiring the filing of the entire LWC. The Texas Commission found the LWC was an integrated agreement, resulting in the entire agreement being an interconnection agreement subject to filing and thereby being made available for adoption by other CLECs pursuant to 252(i). On appeal, SBC argued that "requiring it to make the terms of the entire LWC agreement with Sage available to all

[38] *Id.*, at ¶ 30. (Emphasis added)

[39] *Sage Telecom, L.P. v. Public Utility Commission of Texas*, 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) ("*Sage*"), a copy of which is attached hereto as Exhibit "A".

CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs." In rejecting this argument, the federal district court stated:

> [SBC's] argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.[40]

According to § 252(i), Rule 51.809, the FCC's Second Report and Order and *Sage*, Nextel, not AT&T, is entitled to decide which of the Sprint ICA terms Nextel "deems appropriate for its business needs". Further, AT&T's admission that it entered into an agreement which AT&T contends provides treatment to Sprint PCS that AT&T would not ordinarily have agreed to cuts against, not in favor of AT&T, to compel the approval of Nextel's adoption of the Sprint ICA under the FCC's all-or-nothing rule. The FCC's rejection of AT&T's "similarly situated" argument, the express language of 51.809(a), and the rationale of both the FCC in its Second Report and Order and the *Sage* case demonstrate that the factual issue of what services Nextel may or may not provide under the Agreement is simply immaterial and irrelevant, and can provide no possible basis for the Commission to deny Nextel's Motion for Summary Final Order.

D. AT&T'S SECOND AND THIRD ARGUMENTS OPPOSING ADOPTION ARE INCONSISTENT WITH THE ACTUAL PROVISIONS OF THE SPRINT ICA

[40] *Sage* at page 6.

The linchpin to AT&T's second argument, that Nextel cannot adopt the Sprint ICA under 252(i) because it is a stand-alone wireless carrier, relies upon the apparently *assumed* but unstated premise that the Sprint ICA *requires* both a wireless party and a wireline party in addition to AT&T for the agreement to be effective. AT&T cannot, however, cite to any provision of the agreement that *requires* the presence of both a wireless and wireline entity because no such provision exists. Indeed, AT&T conveniently avoided mentioning that Attachment 3, § 6.1 to the Sprint ICA clearly makes the point that both Sprint entities are *not required to remain as parties to the Sprint ICA for it to remain effective.*

At page 7 of its Response, AT&T asserts that it rarely enters into a combined wireline and wireless agreement and as an example of the gives and takes that occurred in reaching the Sprint ICA, cited a single out of context sentence from "Attachment 3, Section 6.1" which states "[t]he 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." What AT&T failed to reveal, however, is that § 6.1 goes on to make clear that either Sprint entity can actually opt out of the Sprint ICA into another agreement under 252(i) and the Sprint ICA would continue as to the remaining Sprint entity. Additionally, the bill and keep provisions would also continue as long as the Sprint entity that opted out of the Sprint ICA did not opt into another agreement that required AT&T to pay reciprocal compensation. Section 6.1, in its entirety, states:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless 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***. [Emphasis added].

The foregoing demonstrates two things. First, AT&T (i.e., then BellSouth) entered into the bill and keep arrangement out of concern *over additional Sprint PCS cost study-supported charges to terminate AT&T originated traffic*, not any increase in AT&T's cost to provide termination services to Sprint PCS or Sprint CLEC. AT&T has not contended, because it cannot, that AT&T will incur any additional costs to provide the exact same AT&T services to Nextel than it costs to provide such services to Sprint PCS. Second, either Sprint entity is clearly free to opt out of the Sprint ICA and into any other AT&T agreement under § 252(i) at any time, and the remaining Sprint entity can continue to operate under the Sprint ICA. Additionally, if for example, it happened to be Sprint CLEC that opted into a stand-alone AT&T CLEC agreement (under which the compensation is indeed typically bill and keep), the existing bill and keep arrangement with Sprint PCS would continue under the Sprint ICA. Thus, there simply is no affirmative requirement that both a wireline and wireless Sprint entity remain joint parties to the Sprint ICA throughout the entirety of the agreement. With the removal of that otherwise erroneously assumed linchpin, AT&T's argument that the Sprint ICA requires both a wireline and wireless carrier at the table is just plain wrong and nothing can

change that simple indisputable fact. [41]

The existing provisions of the Sprint ICA also disprove the unsubstantiated assertions in AT&T's third new argument to the effect that Nextel's adoption of the Sprint ICA would violate the FCC's TRRO prohibition against using UNEs for the exclusive provision of mobile wireless service. This is incorrect. The Sprint ICA has been amended to comply with the TRRO. Sprint and AT&T completely replaced Attachment 2 in its entirety regarding the provisioning of UNEs (which are short-hand referred to in Attachment 2 as "Network Elements", *see* Attachment 2, § 1.1). As a result of the post-TRRO 9th Amendment to the Sprint ICA, Attachment 2, § 1.5 specifically states that "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." Thus, consistent with the TRRO, the Sprint ICA as adopted by Nextel precludes Nextel from obtaining UNEs for such purposes, just as the Sprint ICA already precludes Sprint from obtaining UNEs for the exclusive use of Sprint PCS.

The unsupportable premises of AT&T's second and third new arguments are diametrically inconsistent with the specific terms and provisions of the existing Sprint ICA. There simply is no legal or factual basis for AT&T's arguments, and AT&T failed to demonstrate a genuine issue of material fact. Nextel is entitled to adopt the Sprint ICA as a matter of law and an evidentiary hearing would be a futile waste of time and resources.

IV.
AT&T'S SUPPLEMENTAL SUBMISSION IN OPPOSITION

[41] Further, as noted above, Nextel offered to provide a CLEC signatory to the Sprint ICA. Had this issue truly been of concern to AT&T (or presented a genuine issue of material fact that required resolution), the addition of a CLEC party would have resolved the matter.

TO MOTION FOR SUMMARY FINAL ORDER IDENTIFIES NO GENUINE ISSUES OF MATERIAL FACT OR RELEVANT LEGAL ARGUMENTS

AT&T's February 7, 2008, supplemental filing to provide the Commission with a copy of its FCC Petition and requesting the Commission to "defer ruling" is nothing more than another delay tactic in a long line of such tactics employed by AT&T to avoid complying with the Merger Commitments and its obligations under § 252(i) of the Act.

Nextel requests the Commission pay particular attention to inconsistencies between assertions in the AT&T Petition and assertions made by AT&T in prior filings before this Commission, notably in AT&T's Response in Opposition to Motion for Summary Final Order discussed above. Specifically, AT&T is now arguing before the FCC precisely what Nextel has argued in this proceeding and before other state commissions: that there "is no need for extensive evidence-gathering or fact-finding"[42] that requires further proceedings before making a determination on Nextel's adoption of the Sprint ICA.

This Commission should not permit AT&T's filing at the FCC to distract it from holding oral argument in these dockets and granting Nextel's Motion for Summary Final Order without an evidentiary proceeding, particularly given the AT&T Petition itself argues that there are is no need for further determinations of fact. Nextel urges the Commission to continue to exercise its jurisdiction and grant Nextel's Motion for Summary Final Order. There is no legal or logical reason for the Commission to defer final action on Nextel's adoption request while the matter is pending for an indefinite period at the FCC.

[42] AT&T Petition at page 17.

Even assuming a valid basis to the allegations set forth in AT&T' Petition at the FCC, which Nextel specifically denies, the allegations are not only irrelevant to the proceedings pending in the nine-state legacy BellSouth region, but are unsupported by any evidence. The AT&T Petition does not and cannot alter this Commission's deliberations with respect to the adoption of the Sprint ICA under § 252(i) of the Act, regardless of how the FCC ultimately treats the AT&T Petition.[43]

AT&T could have sought FCC intervention earlier; however, by waiting until state Commissions such as this Commission are already deciding these issues, AT&T is attempting to reap the benefit of yet further delay. By waiting to this juncture in the proceedings to interpose its filing with the FCC in the pending matter AT&T is demonstrating a callous disregard for the efforts and resources of the Commission and the Commission staff as well as the Nextel entities.

A. AT&T'S ASSERTION TO THE FCC THAT THE DISPUTE "IS EMINENTLY SUITED FOR EXPEDITED RESOLUTION" IS CONTRARY TO ITS POSITIONS IN THIS CASE

In its Response in Opposition to Motion for Summary Final Order, filed on January 21, 2008, AT&T argued the "existence of numerous genuine issues of material facts" and told the Commission that additional evidence and fact-gathering is likely needed ("AT&T Florida has not waived its right to fully complete and perfect the evidentiary record"[44] and the Commission "should adopt a procedural and scheduling

[43] Although there is a section of the AT&T Petition in which AT&T attempts to rewrite the merger commitments by imposing its interpretation of the requirements set forth in Section 252(i) of the Act into the merger commitments this does not affect the applicability of Section 252(i) to the present case.

[44] AT&T Response, p. 3.

order allowing submission of evidence…"[45]). These arguments made by AT&T to this Commission fly in the face of the arguments now made in AT&T's Petition before the FCC. AT&T argues to the FCC that "the dispute here is eminently suited for expedited resolution …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."[46] Thus, at the same time AT&T insists that the Commission should hold an evidentiary hearing in the instant dockets, AT&T expressly states to the FCC that "[t]here is no need for extensive evidence-gathering or fact-finding" regarding the very same issues.[47]

This stark difference in AT&T's differing characterizations of what is needed to decide the dispute lays bare its main goal: impeding and delaying competing carriers from realizing the benefits of the Merger Commitments and their basic 252(i) statutory right to adopt an interconnection agreement. In Florida, where the Commission is considering Nextel's Motion for Summary Final Order, the tactic is to delay by arguing more proceedings are needed, including a hearing and further evidence. At the FCC, where declaratory ruling requests may well take months or years to resolve, AT&T is happy to inform the FCC that the issue is ripe for decision without extensive evidence gathering or fact-finding. The questions that jump to mind most readily are: "Why did AT&T not go to the FCC sooner?", and "Why did AT&T wait to raise the need for hearing and further evidence with this Commission?" The only answer is that AT&T's main objective is to delay and avoid adoption decisions that may be construed as being

[45] AT&T Response, p. 13.

[46] *See* AT&T Petition, p. 19.

[47] *Id.*

adverse to AT&T.

Now that state Commissions, including this one, are determining that they have clear authority to enforce the Merger Commitments, AT&T is turning to its next strategy – asserting that the FCC should decide these questions. Of course, AT&T also suggests to state Commissions that they need not act while this matter is pending before the FCC, which would delay Nextel's requested relief even longer.

This Commission should take AT&T up on its assertion that this matter is eminently suited for expedited resolution, by holding oral argument and granting Nextel's Motion for Summary final Order.

B. THE COMMISSION SHOULD RESOLVE THIS MATTER WITHOUT FURTHER DELAY AND MAY REEXAMINE ITS DETERMINATION IF NECESSARY AFTER THE FCC'S DECISION

i. <u>The Commission should avoid needless delay while the FCC Petition is pending.</u>

AT&T fervently wishes this Commission to delay final disposition of this matter while AT&T's Petition is pending at the FCC. As the Commission is aware, however, there is no guarantee of prompt FCC action, nor that the FCC would reverse any of the state commission decisions that have already been made. Further, nothing prevents this Commission from reexamining its determinations regarding Nextel's adoptions, if necessary, should the FCC issue a future ruling on AT&T's Petition that might be contrary to this Commission's determination. Delay directly harms Nextel because AT&T will undoubtedly argue that the 42-month "clock" on the effectiveness of the AT&T Merger Commitments pursuant to Appendix F of the AT&T Merger Order is

running all the while that AT&T's Petition is pending before the FCC. If this Commission defers to the FCC, then time will most definitely be on AT&T's side, and Nextel may never in practical terms get the benefit of what AT&T promised in the Merger Commitments or to which Nextel is independently entitled under § 252(i).

ii. As the Ohio Commission recently found, it would be contrary to the FCC's policy aims to defer this matter to the FCC

The same day AT&T filed its FCC Petition, the Ohio Public Utilities Commission ("Ohio PUC") issued a Finding and Order that allows one wireline Sprint entity and three wireless Sprint entities, including Nextel West Corp. and NPCR, Inc., d/b/a Nextel Partners (collectively "Sprint") to port and adopt in Ohio the same Sprint ICA (referred to in Ohio as the "BellSouth ICA") that this Commission extended for 3 years in Docket No. 070249-TP, subject to Ohio-specific modifications consistent with AT&T Merger Commitment 1. In its Finding and Order, the Ohio PUC denied AT&T Ohio's Motion to dismiss Sprint's complaint based on AT&T Merger Commitment 1, found that it had concurrent jurisdiction with the FCC to interpret the Merger Commitments, and ordered AT&T Ohio to permit Sprint "to port to Ohio the BellSouth ICA, subject to state-specific modifications." Further, the Ohio PUC specifically found:

> Concluding that the FCC has specifically carved out a place for state jurisdiction in the enforcement of merger commitments, it would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do.

This finding was based on the Ohio PUC's conclusion that "the FCC clarified that states have jurisdiction over matters arising under the [AT&T] commitments", and that

"[e]ven more, states are granted authority to adopt rules, regulations, programs, and policies respecting the commitments."[48] Nextel urges this Commission to follow the same reasoning and reject AT&T's attempt to do an "end run" around state Commissions' authority to interpret and enforce Merger Commitments.

iii. Nextel has the clear and independent right under Section 252(i) of the Act to adopt the Sprint ICA

Nextel has already extensively addressed its rights and obligations under § 252(i). In its October 16, 2007 Order Denying Motion to Dismiss in this matter, the Commission specifically held that § 252(i) obligates incumbents such as AT&T to enable Nextel and other CLECs to operate under the same terms and conditions as those provided in a valid and existing interconnection agreement but noted there is a "valid argument as to what constitutes a reasonable period of time under 47 C.F.R. § 51.809(c) in this proceeding" due to the dispute over the term of the Sprint ICA.[49] As discussed above, the Sprint ICA has now been extended for 3 additional years pursuant to Merger Commitment No. 4, and therefore that fact dispute has been resolved. The Commission should take note of the fact that it may simply approve the adoption pursuant to § 252(i). Nothing in the AT&T Petition alters this Commission's jurisdiction under § 252(i) or the rules it applies in determining what constitutes a "reasonable period of time" under 47 C.F.R. § 51.809(c).

V.
AT&T'S ADDITIONAL SUPPLEMENTAL SUBMISSION

[48] Ohio PUC Case No.07-1136-TP-CSS, *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.*, Finding and Order (issued February 5, 2008), at 13-14.

[49] *See* Order Denying Motion to Dismiss, p. 6.

FAILS TO IDENTIFY A GENUINE ISSUE OF MATERIAL FACT OR LEGAL ARGUMENT THAT COULD DEFEAT NEXTEL'S RIGHT TO ADOPT THE SPRINT ICA

AT&T's February 13, 2008, supplemental filing suggests that the FCC is the proper forum based on language in an order released February 7, 2008 by the FCC in *In Re Ameritech Operating Companies Tariff FCC. No 2 et al.,* Transmittal No. 1666 ("Ameritech Tariff Order"). In this Order the FCC denied petitions by Sprint Nextel, Time Warner Telecom Inc. and COMPTEL to reject or suspend AT&T tariff revisions withdrawing from its operating companies' interstate access tariffs certain broadband transmission services, including Frame Relay, ATM, Ethernet, Remote Network Access, SONET, Optical Network and Wave-Based services, with the exception of certain Frame Relay and ATM services operating below 200 Kbps in each direction. This matter concerns the FCC's previous order in the *Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services and Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007). This proceeding has nothing to do with the matters currently in front of this Commission in the instant proceedings. This is yet another attempt by AT&T to obfuscate the clear issue to be decided – approval of Nextel's adoption of the Sprint ICA within a reasonable period of time - and does not support AT&T's contention that this Commission "should allow the FCC to decide the potentially dispositive questions AT&T has asked it to decide before conducting any further proceedings in this docket."

The Ameritech Tariff Order concerns changes to *interstate* access tariffs that are

administered exclusively by the FCC. Conversely, the interconnection issues subject to the Merger Commitments and Section 252(i) of the Telecommunications Act of 1996 that are presented in the present proceedings are squarely within this Commission's jurisdiction. The Commission should dismiss out of hand AT&T's attempt to present the Ameritech Tariff Order as relevant in any respect to the issues in this docket or the Commission's jurisdiction over those issues.

VI.
CONCLUSION

Nextel is entitled to adopt the Sprint ICA as a matter of law. AT&T has completely failed to identify (let alone demonstrate) a single genuine issue of material fact that must be resolved in order for the Commission to decide this case, or a single legal argument that could defeat Nextel's right. Therefore, for the reasons stated herein, Nextel respectfully requests that the Commission continue to exercise its jurisdiction over these matters, reject AT&T's requests for further proceedings and delay, and after oral argument, grant Nextel's Motion for Summary Final Order.

Respectfully submitted this 18th day of February, 2008.

/s/ Marsha E. Rule
Marsha E. Rule
Rutledge, Ecenia, Purnell & Hoffman
P.O. Box 551
Tallahassee, FL 32302-0551
(850) 681-6788
Fax: (850) 681-6515
marsha@reuphlaw.com

Douglas C. Nelson
William R. Atkinson
Sprint Nextel
233 Peachtree Street NE, Suite 2200
Atlanta, GA 30339-3166
(404) 649-0003
Fax: (404) 649-0009
douglas.c.nelson@sprint.com

Joseph M. Chiarelli
Sprint Nextel
6450 Sprint Parkway
Mailstop: KSOPHN0214-2A671
Overland Park, KS 66251
(913) 315-9223
Fax: (913) 523-9623
joe.m.chiarelli@sprint.com
Attorneys for Nextel

Attorneys for Nextel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. mail on February 18, 2008 to the following parties:

Lee Eng Tan, Esq.
Victor McKay, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us
vmckay@psc.state.fl.us
850.413.6212

E. Edenfield, Jr.
Tracy W. Hatch
Manuel Gurdian
c/o Greg Follensbee
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
greg.follensbee@att.com
850-577-5555

/s/ Marsha E. Rule
Marsha E. Rule

LEXSEE 2004 U.S. DIST. LEXIS 28357

SAGE TELECOM, LP, Plaintiff, -vs- PUBLIC UTILITY COMMISSION OF TEXAS, Defendant.

Case No. A-04-CA-364-SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

2004 U.S. Dist. LEXIS 28357

October 7, 2004, Decided
October 7, 2004, Filed

COUNSEL: [*1] For SAGE TELECOM, LP, plaintiff: John K. Schwartz, John K. Arnold, Locke Liddell & Sapp L.L.P., Austin, TX.

For SOUTHWESTERN BELL TELEPHONE, L.P. dba SBC Texas, intervenor-plaintiff: Robert J. Hearon, Jr., Graves, Dougherty, Hearon & Moody, Austin, TX; Mary A. Keeney, Graves, Dougherty, Hearon Etal, Austin, TX; Jose F. Varela, Cynthia Mahowald, Southwestern Bell Telephone Co., Austin, TX.

For PUBLIC UTILITY COMMISSION OF TEXAS, defendant: Steven Baron, Attorney General's Office, Austin, TX; Kristen L. Worman, Texas Attorney General's Office, Natural Resources Division, Austin, TX.

For AT&T COMMUNICATIONS OF TEXAS, L.P., intervenor-defendant: Thomas K. Anson, Strasburger & Price, LLP, Austin, TX; Kevin K. Zarling, AT&T Communications of Texas, Austin, TX.

For BIRCH TELECOM OF TEXAS, LTD, LLP, ICG COMMUNICATIONS, XSPEDIUS COMMUNICATIONS, LLC, NII COMMUNICATIONS, LTD., INC., intervenor-defendants: Bill Magness, Casey, Gentz & Magness, LLP, Austin, TX.

JUDGES: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: SAM SPARKS

OPINION

ORDER

BE IT REMEMBERED that on the 10th day of September 2004, the Court called the above-styled cause for a hearing, and the parties appeared through [*2] counsel. Before the Court were Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15], Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16], the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23], and Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [925]. Having considered the motions and responses, the arguments of counsel at the hearing, and the applicable law, the Court now enters the following opinion and orders.

Background

This case involves a dispute between the Public Utility Commission of Texas ("the PUC") and two telecommunications companies, Southwestern Bell, Telephone, L.P. d/b/a SBC Texas ("SBC") and Sage Telecom, L.P. ("Sage") over the public filing requirements of the Telecommunications Act of 1996 ("the Act"). Pub. L. 104-104, 110 Stat. 56. SBC and Sage seek an injunction that would prevent the PUC from requiring them to publicly file certain provisions of an agreement under which SBC would provide Sage services and access to elements of its local telephone network. The PUC, joined by the Intervenor-Defendants, [*3] AT&T Communications of Texas, L.P., Birch Telecom of Texas, LTD, LLP, ICG Communications, nii Communications, Ltd., and Xspedius Communications, LLC, seek an order requiring SBC and Sage to publicly file the agreement in its entirety. In order to understand either party's position with respect to the public filing provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Exhibit "A"

Until the time of the Act's passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers ("LECs"), which acted as the exclusive service providers in the regions they served. *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitor local exchange carriers ("CLECs"), which now compete with the incumbent local exchange carriers ("WCs") such as SBC in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a [*4] number of duties upon ILECs, the most significant of which is the ILEC's duty to share its network with the CLECs. *Id; 47 U.S.C. § 251*. Under the Act's requirements, when a CLEC seeks to gain access to the ILEC's network, it may negotiate an "interconnection agreement" directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. *§ 252(a), (b)*. In either case, the interconnection agreement must ultimately be publicly filed with the state commission for final approval. *§ 252(e)*.

Pursuant to the Act, Sage and SBC entered into what they have referred to as a Local Wholesale Complete Agreement ("LWC"), a voluntary agreement by which SBC will provide Sage products and services subject to the requirements of the Act, as well as certain products and services not governed by either *§ 251* or *§ 252*. Sage and SBC, concerned that portions of the LWC consist of trade secrets, have sought to gain the required PUC approval without the public filing of those portions of the agreement they contend are outside the scope of the Act's coverage.

[*5] On April 3, 2004, SBC and Sage issued a press release announcing the existence of their LWC agreement. Later that month, a number of CLECs filed a petition with the PUG seeking an order requiring Sage and SBC to publicly file the entire LWC. Sage and SBC urged the PUC not to require the public filing of the whole agreement, and on May 13, 2004, the PUC ordered Sage and SBC to file the entire LWC under seal, designating the portions of the agreement it deemed confidential, so the rest of it could be immediately publicly filed.

On May 27, 2004, the PUC declared the entire, unredacted LWC to be an interconnection agreement subject to the public filing requirement of the Act and ordered SBC and Sage to publicly file it by June 21, 2004. Instead of filing the agreement on that date, SBC and Sage filed suit in a Travis County district court challenging the PUC's order as exceeding the scope of its authority under the Act and alleging Texas trade secret law protected its confidential business information. The parties entered into an agreed temporary restraining order ("TRO") enjoining the PUC order as well as Sage and SBC's plans to begin operating under the agreement. The PUC removed [*6] the case to this Court on the basis of the federal question it raises with respect to the scope of the Act's coverage, and the parties subsequently agreed to extend the TRO to allow the Court time to decide the issues raised in the case. SBC and Sage seek a preliminary as well as a permanent injunction barring the PUC from enforcing its May 27, 2004 order.

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a de novo standard of review. *Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475, 482 (5th Cir. 2000)*. Additionally, all parties have stipulated summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. *FED. R. CIV. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

Analysis

As an initial matter, the Court notes its agreement with the PUC's contention that it need not consider whether the items identified in the LWC are entitled to trade secret protection under Texas law. The PUC concedes it relies exclusively [*7] on the Act for its position the LWC must be filed in its entirety, and accordingly, were this Court to determine the PUC's interpretation of the statute was erroneous, the PUC would have no authority on which to order Sage and SBC to file the whole agreement. Likewise, SBC and Sage do not deny the obvious fact that any trade secret protections afforded by state law must give way to the requirements of federal law. Therefore, this Court's resolution of the dispute over the scope of the Act's public filing requirement entirely disposes of the case.

Section 251 establishes a number of duties on ILECs, including "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," *§ 251(c)(2)*; "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications," *§ 251(b)(5)*; "the duty to negotiate in good faith in accordance with *section 252* of this title the particular terms and conditions of agreements to fulfill the duties [described in subsections (b) and (c)]," *§ 251 (c)(1)*; and "the duty to provide, to any requesting telecommunications carrier [*8] for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," *§ 251(c)(3)*. [1]

1 Only certain network elements must be provided on an unbundled basis under *§ 251*. The statute gives the FCC the authority to promulgate regulations setting forth which unbundled network elements must be offered by the ILEC. *§ 251(d)*.

Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by *§ 251*. An ILEC may reach an agreement with a CLEC to fulfill its *§ 251* duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. *Section 252(a)(1)* describes the voluntary negotiations procedure: "Upon receiving a request for interconnection, services, or network elements pursuant to *section 251* of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth [*9] in subsections (b) and (c) of *section 251* of this title.... The agreement ... shall be submitted to the State commission under subsection (e) of this section."

Whether the agreement is reached by means of voluntary negotiations or arbitration, it "shall be submitted for approval to the State commission." *§ 252(e)(1)*. The State commission may reject an agreement reached by means of voluntary negotiations, or any portion thereof, only if it finds the agreement or any portion "discriminates against a telecommunications carrier not a party to the agreement" or "is not consistent with the public interest, convenience, and necessity." *§ 252(e)(2)(A)*. On the other hand, the State commission may reject an agreement adopted by arbitration, or any portion thereof only "if it finds that the agreement does not meet the requirements of" *§ 251*, the regulations promulgated by the FCC pursuant to *§ 251*, or the standards in *§ 252(d)*. *§ 252(e)(2)(B)*.

Upon approval by the State commission, the agreement must be publicly filed: "A state commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement [*10] ... is approved." *§ 252(h)*. The public filing requirement facilitates the fulfillment of another one of the ILEC's significant duties under the Act-to 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 provided in the agreement." *§ 252(i)*.

Turning now to the facts of this case, Sage and SBC do not dispute the LWC is an agreement fulfilling at least two of SBC's duties under *§ 251*: the duty "to establish reciprocal compensation arrangements" under *(b)(5)* and the duty to provide access on an unbundled basis to its local loop, which is the telephone line that runs from its central office to individual customers' premises, on an unbundled basis. *See 47 C.F.R. § 51.319(a)* (identifying the local loop as one of the unbundled network elements that must be provided under *47 U.S.C. § 251 (c)(3)*). In support of their position the LWC need not be filed despite the fact it clearly fulfills *§ 251* obligations, Sage and SBC advance two theories.

First, Sage contends the LWC need not [*11] be approved and filed because "the LWC Agreement did not result from a 'request' by Sage for regulated interconnection 'pursuant to *section 251*,' as required by the statute." P1. Sage's Resp. to Cross-Mots. Summ. J. at 2 (quoting *§ 252 (a)(1)*). Sage's argument is essentially that *§ 252(a)(1)* contemplates two types of voluntarily negotiated agreements in which an ILEC would provide interconnection, services, or elements pursuant to its *§ 251* duties: those in which the CLEC consciously invokes its right to demand the ILEC's performance of its *§ 251* duties and those in which it does not. There are two problems with Sage's argument.

First, there is nothing in the statute to suggest the phrase "request ... pursuant to *section 251*" is meant to imply the existence of a threshold requirement, the satisfaction of which is necessary to trigger the operation of the statute. Although such a reading is not foreclosed by the somewhat ambiguous language of *§ 252(a)(1)*, other language in the statute makes clear such a triggering request is not a prerequisite for the operation of its filing and approval provisions. For instance, *§ 252(e)(1)* states, "any interconnection agreement adopted by [*12] negotiation or arbitration shall be submitted" to the State commission for approval. Although *§ 252(a)(1)* is linked to *§ 252 (e)(1)* by the language in its last sentence ("The agreement ... shall be submitted ... under subsection (e)", one cannot reasonably conclude the types of agreements subject to the State commission approval requirements of *§ 252(e)(1)* are limited to agreements made pursuant to the *§ 252(a)(1)* scheme. After all, *§ 252(e)(1)* requires the submission not only of voluntarily negotiated *§ 252(a)(1)* agreements, but also arbitrated *§ 252(b)* agreements.

The second deficiency in Sage's argument is that its proposed "triggering request" requirement would allow the policy goals of the Act to be circumvented too easily. The Act's provisions serve the goal of increasing competition by creating two mechanisms for preventing discrimination by ILECs against less favored CLECS. First, the State-commission-approval requirement provides an administrative review of interconnection agreements to ensure they do not discriminate against non-party CLECs. Second, the public-filing requirement gives

CLECs an independent opportunity to resist discrimination by allowing them to get [*13] the benefit of any deal procured by a favored CLEC with a request for "any interconnection, services, or network element" under a filed interconnection agreement on the same terms and conditions as the CLEC with the agreement. *§ 252(e), (i).* If the public filing scheme could be evaded entirely by a CLEC's election not to make a formal "request ... pursuant to *section 251*," the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs. Under Sage's interpretation of the statute, other CLECs would be able to obtain preferential treatment from ILECs with respect to *§ 251* services and network elements without fear the State commission or other CLECs would detect the parties' unlawful conduct. The CLEC would have to do nothing more than forego the triggering request and it would be free to enter secret negotiations over the federally regulated subject matter. [2]

> 2 SBC argues for a different threshold requirement, which would avoid this particular evasion problem *See* SBC's Resp. to Cross-Mots. Summ. J. at 2. SBC contends the "interconnection agreement" referred to in *§ 252(e)(1)* should be limited to agreements that, at least in part, address an ILEC's *§ 251(b)* and *(c)* duties. *Id.* The PUC argues for a more expansive definition of the phrase, which would include all agreements for "interconnection, services, or network elements" regardless of whether the agreement provided for the fulfillment of any *§ 251* duties. The Court need not address this dispute, however, because the parties agree the LWC does, in fact, address at least two sets of *§ 251* duties - those involving "reciprocal compensation arrangements" and those involving access to SBC's local loop.

[*14] Likely recognizing the problems with its contention the LWC does not trigger the filing and approval process at all, Sage retreats from this position in other parts of its briefing on these issues conceding, like SBC, that at least certain parts of the LWC must be approved and publicly filed under the Act. *See* Sage's Resp. to Cross-Mots. Summ. J. at 9; SBC's Resp. to Cross-Mots. Summ. J. at 6. Both SBC and Sage argue, however, the only portions of the LWC which must be publicly filed are those provisions specifically pertaining to SBC's *§ 251* duties. These arguments are ultimately unavailing.

Most importantly, SBC and Sage's position is not supported by the text of the Act itself. None of the Act's provisions suggest the filing and approval requirements apply only to select portions of an agreement reached under *§ 252(a)* and *(b)*. Rather, each of the Act's provisions refer only to the "agreement" itself, not to individual portions of an agreement. *Section 252(e)*, for example, requires the submission of "any interconnection agreement" reached by negotiation or arbitration for approval by the State commission. *Section 252(a)(1)* provides "the agreement," which is to be negotiated [*15] and entered "without regard to the standards set forth in *[§ 251(b)* and *(c)*]," shall be submitted to the State commission.

In contrast, *§ 252(e)(2)* gives the State commission discretion to reject a voluntarily negotiated "agreement (or any portion thereat)" upon a finding that the agreement is discriminatory or is otherwise inconsistent with the public interest, convenience, and necessity. The State commission's power to reject a portion of the agreement does not suggest, however, that its review is in any way limited to certain portions of the agreement. If Congress intended the filing and approval requirements to be limited to select "portions" of an agreement, it clearly possessed the vocabulary to say so.

Alternatively, Sage and SBC argue the provisions in the LWC addressing SBC's *§ 251* duties are also, in fact, "agreements," which in themselves may satisfy the PUC-approval and public filing requirements. In taking this position, SBC and Sage publicly filed with the PUC an amendment to their previously existing interconnection agreement setting forth those provisions of the LWC Sage and SBC deem relevant to the requirements of *§ 251*.

There are two problems with Sage's [*16] and SBC's position. First, *§ 252(e)(1)* plainly requires the filing of any interconnection agreement. The fact one agreement may be entirely duplicative of a subset of another agreement's provisions does not mean only one of them has to be filed. As long as both qualify as interconnection agreements within the meaning of the Act, both must be filed. Even if the Court ruled in SBC's favor that only agreements which, at least in part, address *§ 251* duties are "interconnection agreements" for the purposes of *§ 252 (e)(1),* [3] it would not change the fact the LWC is such an agreement since it addresses the same *§ 251* duties addressed by the publicly filed amendment.

> 3 As noted above, the Court need not reach this issue.

Second, the publicly filed amendment, taken out of the context of the LWC, simply does not reflect the "interconnection agreement" actually reached by Sage and SBC. Rather, as the LWC demonstrates, the amendment is only one part of the total package that ultimately constitutes the entire agreement. [*17] Sage's Mot. Summ. J., Ex. B at § 5.5 ("The Parties have concurrently negotiated an ICA amendment(s) to effectuate certain provisions of this Agreement."). The portions of the LWC covering the matters addressed in the publicly filed

amendment are neither severable from nor immaterial to the rest of the LWC. As the PUC points out, the LWC's plain language demonstrates it is a completely integrated, non-severable agreement. It recites that both SBC and Sage agree and understand the following:

> 5.3.1 this Agreement, including LWC is offered as a complete, integrated, non-severable packaged offering only;
>
> 5.3.2 the provisions of this Agreement have been negotiated as part of an entire, indivisible agreement and integrated with each other in such a manner that each provision is material to every other provision;
>
> 5.3.3 that each and every term and condition, including pricing, of this Agreement is conditioned on, and in consideration for, every other term and condition, including pricing, in this Agreement. The Parties agree that they would not have agreed to this Agreement except for the fact that it was entered into on a 13-State basis and included the totality of terms [*18] and conditions, including pricing, listed herein[.]

Id. at 15.3.

It is clear from the excerpted material the publicly filed amendment, which itself excerpts the LWC's provisions regarding *§ 251* duties, is not representative of the actual agreement reached by the parties. Rather, paragraph 5.3 reveals the parties regarded every one of the LWC's terms and conditions as consideration for every other term and condition. Since, as Sage and SBC concede, some of those terms and conditions go towards the fulfillment of *§ 251* duties, every other term and condition in the LWC must be approved and filed under the Act. Each term and condition relates to SBC's provision of access to its local loop, for example, in the exact same way a cash price relates to a service under a simple cash-for-services contract.

That the LWC is a fully integrated agreement means each term of the entire agreement relates to the *§ 251* terms in more than a purely academic sense. If the parties were permitted to file for approval on only those portions of the integrated agreement they deem relevant to *§ 251* obligations, the disclosed terms of the filed sub-agreements might fundamentally misrepresent [*19] the negotiated understanding of what the parties agreed, for instance, during the give-and-take process of a negotiation for an integrated agreement, an ILEC might offer *§ 251* unbundled network elements at a higher or lower price depending on the price it obtained for providing non- *§ 251* services. Similarly, the parties might agree that either of them would make a balloon payment which, although not tied to the provision of any particular service or element in the comprehensive agreement, would necessarily impact the real price allocable to any one of the elements or services under the contract.

Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling *§ 251* duties are discriminatory or otherwise not in the public interest. For example, while the stated terms of a publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of [*20] taking enforcement action to prevent such discrimination.

The fact a filed agreement is part of a larger integrated agreement is significant for CLECs in ways that go beyond their monitoring role. *Section 252(i)* explicitly gives CLECs the right to access "any interconnection, service, or network element provided under an agreement [filed and approved under *§ 252*] upon the same terms and conditions provided in the agreement." Until recently, FCC regulations permitted a CLEC to "pick and choose" from an interconnection agreement filed and approved by the State commission "any individual interconnection, service, or network element" contained therein for inclusion in its own interconnection agreement with the ILEC. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order (released July 13, 2004) at P1 & n.2.

Less than three months ago, however, the FCC reversed course and promulgated a new, all-or-nothing rule, in which "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement." *Id.* at P10. Significantly, [*21] the FCC stated its decision to abandon the pick-and-choose rule was based in large part on the fact that it served as "a disincentive to give and take in interconnection agreements." *Id.* at P11. The FCC concluded "the pick-and-choose rule 'makes interconnection agreement negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs' under the Act." *Id.* at P13.

The FCC's Order demonstrates its awareness that no single term or condition of an integrated agreement can be evaluated outside the context of the entire agreement, which is why the pick-and-choose rule was an obstacle to give-and-take negotiations. In addition, the Order also demonstrates the FCC's position that an interconnection agreement available for adoption under the all-or-nothing rule may include "provisions other than those necessary to implement what [ILECs] are legally obligated to provide CLECs under the Act." The FCC, in adopting the new rule, not only proceeded on an understanding that such provisions were part of "interconnection agreements," but actively encouraged their incorporation [*22] as part of the give-and-take process.

Sage and SBC argue to require them to file their LWC in its entirety, despite the fact only a portion of it gives effect to SBC's *§ 251* obligations, would elevate form over substance. This contention is unfounded. Had the PUC ordered the public filing of each and every one of the LWC provisions solely on the basis they were contained together in the same document, Sage and SBC's argument might be correct. Here, however, the PUC determined all the LWC provisions were sufficiently related not by virtue of a coincidental, physical connection, but rather because of the explicit agreement reached by Sage and SBC. It was the determination of the parties themselves that each and every element of the LWC agreement was so significant that neither was willing to accept any one element without the adoption of them all.

SBC carries the form-over-substance argument one step further arguing the PUC's approach to the statute penalizes it for putting the LWC in writing and filing it. Its argument presupposes the PUC's approach would not prohibit unfiled, under-the-table agreements that integrate filed agreements containing *§ 251* obligations. This argument [*23] is disingenuous. Nothing in the text of the Act's filing requirements suggests the existence of an exemption for unwritten or secret agreements and nothing about the PUC's argument implies such an exemption. Moreover, SBC and Sage did not file their LWC in its entirety until the Intervenor-Defendants in this case urged the PUC to compel its filing. That they intend to keep portions of it secret is their entire basis for filing this lawsuit. However, neither the PUC's position nor the statute itself authorizes secret, unfiled agreements and those telecommunications carriers seeking to operate under them are subject to forfeiture penalties. *47 U.S.C. § 503(b)*; *In re Qwest Corp.; Apparent Liab. for Forfeiture, Notice of Apparent Liab. for Forfeiture, 19 FCC Rcd 5169 at P16 (2004).*

SBC also argues a rule requiring it to make the terms of its entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs. Its argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement [*24] to any requesting CLEC follows plainly from *§ 252(i)* and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.

In addition to the text-based and policy arguments favoring the PUC's position that the entire LWC must be filed, the Court notes its approach is in step with FCC guidance and Fifth Circuit case law. In its *Qwest Order*, although the FCC declined to create "an exhaustive, all-encompassing 'interconnection agreement' standard," it did set forth some guidelines for determining what qualifies as an "interconnection agreement" for the purposes of the filing and approval process. In re *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual* [*25] *Arrangements under Section 252(a)(1), Memorandum Opinion and Order, 17 FCC Rcd 19337 at P10.* Specifically, it found "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to *section 252(a)(1)*." *Id. at P8.* The FCC specifically rejected the contention "the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply." *Id.*

The PUC's position also finds support in the Fifth Circuit's holding in *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co., 350 F.3d 482 (5th Cir. 2003)*. There, the Fifth Circuit was asked to determine the scope of issues subject to an arbitration held by a State commission under *§ 252(b)* of the Act. The court held, "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by *§ 251(b)* and *(c)*, those issues are subject to compulsory arbitration under [*26] *§ 252(b)(1)*." SBC and Sage argue *Coserv* is inapplicable because it did not deal with the scope of the voluntary negotiation process, under which their LWC was formed. However, the statutory scheme, viewed on the whole, does not support distinguishing *Coserv* from this case in the way they propose. As the court there noted, the entire *§ 252* framework contemplates non- *§ 251* terms may play a role in inter-

connection agreements: "by including an open-ended voluntary negotiations provision in *§ 252(a)(1)*, Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the *§ 252* framework." *Coserv, 350 F.3d at 487*. The arbitration provision at issue in *Coserv* is intertwined with the Act's voluntary negotiations provision since arbitration is only available after an initial request for negotiation is made, *§ 252(b)(1)*. Furthermore, because the statute makes arbitrated and negotiated agreements equally subject to the requirements for filing and commission approval, *§ 252(e)(1)*, this Court [*27] finds no basis on which to distinguish them for the purposes of determining the scope of the issues they may embrace.

SBC's concern that this reading of *Coserv* would subject any agreement between telecommunications carriers to commission approval is also unjustified. The Fifth Circuit made clear that in order to keep items off the table for arbitration-and under this Court's reading of *Coserv*, to keep them out of the filing and approval process-the ILEC need only refuse at the time of the initial request for negotiations under the Act to negotiate issues outside the scope of its *§ 251* duties: "An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to *§§ 251* and *252." Id. at 488*. However, where an ILEC makes the decision to make such non- *§ 251* terms not only part of the negotiations but also non-severable parts of the interconnection agreement which is ultimately negotiated, it and the CLEC with whom it makes the agreement must publicly file all such terms for approval by the State commission.

Conclusion

In accordance with the foregoing: [*28]

IT IS ORDERED that Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15] is DENIED;

IT IS FURTHER ORDERED that Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16] is DENIED;

IT IS FURTHER ORDERED that Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [# 25] is GRANTED;

IT IS FURTHER ORDERED that the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23] is GRANTED;

IT IS FURTHER ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is WITHDRAWN; and

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT. [4]

4 The Court declines to order SBC and Sage to publicly file the LWC. Neither the PUC nor the Intervenor-Defendants have pointed to any authority on which the Court could order such an action, and both the FCC and the PUC have sufficient enforcement authority under the Act to compel a public filing without the intervention of this Court.

[*29] SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

JUDGMENT

BE IT REMEMBERED on the 7th day of October 2004 the Court entered its order denying Southwestern Bell, Telephone, L.P.'s ("SBC") and Sage Telecom, L.P.'s ("Sage") motions for summary judgment and applications for injunctive relief against the Public Utility Commission of Texas ("the PUC") and granting the latter's motion for summary judgment. Accordingly, the Court enters the following final judgment in this case:

IT IS ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is DISSOLVED;

IT IS FURTHER ORDERED that all pending motions are DISMISSED AS MOOT; and

IT IS FINALLY ORDERED, ADJUDGED, and DECREED that Plaintiff Sage and Intervenor-Plaintiff SBC take nothing in this case against Defendant PUC and all costs are taxed to Sage and SBC, for which let execution issue.

SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

Exhibit "A"