COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of 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	)))))))	Case No. 2007-00256

NEXTEL PARTNERS' RESPONSE TO AT&T KENTUCKY'S MOTION FOR RECONSIDERATION

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners") hereby files its Response to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky's ("AT&T") December 21, 2007 Motion for Reconsideration ("AT&T Motion") of the Kentucky Public Service Commission's ("Commission") December 18, 2007 Order approving Nextel Partners' adoption of the currently effective interconnection agreement between AT&T and Sprint[1] (the "Sprint ICA"). For the reasons set forth herein, Nextel Partners respectfully requests that the Commission deny AT&T's Motion and direct the parties to immediately submit their executed adoption of the Sprint ICA.

INTRODUCTION AND SUMMARY OF PROCEEDING

On June 21, 2007, Nextel Partners filed its Notice of Adoption of the Sprint ICA ("Notice of Adoption") to adopt the Sprint ICA pursuant to Merger Commitment Nos. 1 and 2 as set forth in the Federal Communications Commission's ("FCC") approval of the

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[1]Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P., is referred to both herein and within the Sprint ICA as "Sprint CLEC"; Sprint Spectrum L. P. is referred to as "Sprint PCS"; and, Sprint CLEC and Sprint PCS are collectively referred to as "Sprint".

AT&T Inc. and BellSouth Corporation Application for Transfer of Control and 47 U.S.C. § 252(i). Nextel Partners' Notice of Adoption advised the Commission: that the Sprint ICA had been filed and approved in each of the legacy BellSouth states, including Kentucky; that the Sprint ICA was current and effective, but acknowledged that Sprint and AT&T had a dispute regarding the term of the agreement, specifically referring to the then-pending Sprint – AT&T arbitration Case No. 2007-00180; and, that Nextel Partners had contacted AT&T regarding Nextel's adoption of the Sprint ICA, but AT&T refused to voluntarily acknowledge and honor Nextel's adoption rights.

A copy of AT&T's May 31, 2007 written response from Mr. Eddie A. Reed, Jr. to Nextel Partners' adoption request was attached to the Notice of Adoption as Exhibit C. The only reasons asserted by Mr. Reed for AT&T's refusal to grant Nextel Partners' request to adopt the Sprint ICA were a) a claimed lack of understanding regarding the applicability of the Merger Commitments to Nextel Partners' request, and b) an assertion that the Sprint ICA was "not available for adoption" because it was expired and in arbitration, therefore, "it was not adopted within a reasonable period of time" under the FCC's rule 47 C.F.R. § 51.809(c) which implements § 252(i) of the Telecommunications Act of 1996 ("the Act").

On July 3 2007, AT&T filed its Objection To And Motion To Dismiss Nextel Partner's Notice of Adoption ("Objection and Motion") asserting three arguments: 1) the Commission does not have authority to interpret and enforce the AT&T merger commitments; 2) Nextel Partners is attempting to adopt an expired agreement, therefore the adoption does not meet the legal timing requirement under the Act; and 3) Nextel Partner's Notice was premature because Nextel Partners failed to abide by contractual

dispute resolution provisions found in its pre-adoption interconnection agreement with AT&T.

On July 13, 2007, Nextel Partners filed its response to AT&T's Objection and Motion, which demonstrated: 1) the existence of well-established precedent that supported this Commission's authority to acknowledge Nextel Partners' exercise of its rights to adopt the Sprint ICA; 2) that Nextel Partners' Notice of Adoption was timely under the Act, particularly in light of the fact that Sprint's exercise of its own Merger Commitment rights in the Sprint-AT&T arbitration case No. 2007-00180 would further extend the Sprint ICA 3 years; and 3) under additional existing 252(i) precedent, Nextel Partners was not required to invoke the parties' existing dispute resolution provisions before exercising any right to adopt the Sprint ICA.

On September 18, 2007 the Commission entered an Order in the Sprint-AT&T arbitration Case No. 2007-00180 that denied the same "lack of jurisdiction" arguments in that case which AT&T was also asserting in this case, and further found that the Sprint ICA was subject to a new 3-year fixed term commencing December 29, 2006. On November 7, 2007 the Commission entered a further Order in the Sprint-AT&T arbitration case to approve the amendment that actually extended the Sprint ICA for 3-years.[2] Recognizing that the extension of the Sprint ICA eliminated the only plausible

[2]Neither Sprint nor AT&T have appealed the Commission's order approving the amendment to extend the Sprint ICA 3 additional years. Further, AT&T has since conceded to the industry that carriers may obtain a 3-year extension of their existing ICAs from the date of the requesting carrier's request. Outside of Kentucky, Sprint and AT&T have filed the necessary Sprint ICA Amendment documentation to extend the Sprint ICA 3 years from the date of Sprint's request for such extension, March 20, 2007, in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, and approval orders for such amendments starting to be received. *See e.g. In the Matter of Petition of Sprint Communications Company, L.P., d/b/a Sprint PCS for Arbitration with BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, d/b/a AT&T Southeast,* North Carolina Utilities Commission Docket No. P-294, Sub 31, Order Approving Amendment, Dismissing Arbitration, and Closing Docket, December 10, 2007.

question of fact that AT&T had even attempted to raise by either its May 31 written response to Nextel Partners' original May 18th adoption request or its "Objection" in this case, on December 18, 2007, the Commission entered its Order in this matter to similarly reject AT&T's jurisdictional argument and, in light of the 3-year extension of the Sprint ICA, expressly find that a reasonable period of time was left to the Sprint ICA to thereby render Nextel Partners' adoption of the Sprint ICA lawful ("December 18 Order").

On December 21, 2007 AT&T filed its Motion for reconsideration of the Commission's December 18 Order. AT&T's Motion asserts for the first time the following three *new* objections: 1) that the Merger Commitments are not applicable to Nextel Partners because Nextel Partners is seeking to adopt the Sprint ICA as previously approved by the Commission, as opposed to "porting" an ICA from another state[3]; 2) that Nextel Partners' adoption does not comply with § 252(i) because Nextel Partners 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"[4]; 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").[5]

At its core, AT&T's Motion is no more than an attempt to delay implementation of the Commission's December 18 Order granting Nextel Partners' adoption of the Sprint

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[3] *See* Motion at pages 3-6.

[4] *See* Motion at pages 6-8.

[5] *See* Motion at pages 8-10.

ICA. None of AT&T's "new" objections warrant the presentation of any new facts. 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.

SUMMARY OF ARGUMENT

AT&T's newly proposed interpretation of Merger Commitment No. 1 would not only require the Commission to re-write AT&T's Merger Commitment No. 1 to include an affirmative "porting" requirement, but ignores the simple fact that even under AT&T's interpretation, Nextel Partners' adoption request of a region-wide Sprint ICA is broad enough on its face to encompass the adoption of the Sprint ICA. The Sprint ICA is an ICA that has been approved in 8 other states outside of Kentucky. It has now been extended by written agreement of the parties outside of Kentucky in several states and this will soon be completed for all 8 remaining legacy BellSouth states. It is an agreement that meets AT&T's tortured interpretation – i.e., as a "ported" agreement from those 8 states into Kentucky. AT&T's second new objection that Nextel Partners 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 Partners 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), and subsequent case law demonstrates that an ILEC cannot avoid making an ICA available for adoption under the "all-or-nothing" rule based on the inclusion of 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) demonstrates 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 that affirmatively contemplate that either Sprint entity can adopt another ICA and the remaining Sprint entity can continue 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 legally recognized basis under any of AT&T's "new" objections for reconsideration of the Commission's December 18 Order. Accordingly, the Commission should deny AT&T's Motion in its entirety and direct the parties to immediately comply with the Commission's December 18 Order.

I. NEXTEL PARTNERS' ADOPTION OF THE SPRINT ICA IS CONSISTENT WITH AT&T'S MERGER COMMITMENTS

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.
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> 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.[6]

Without citation to any authority, AT&T 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".[7] The stated rationale for this interpretation is the fact that Merger Commitment No. 1 requires any adoption of any agreement to remain "subject to state-specific pricing and performance plans and technical feasibility" and be "consistent with the laws and regulatory requirements of the state for which the request is made." [8] The mere fact that an adoption remains subject to state-specific requirements does not, however, in any way preclude the adoption of a given agreement in the same state in which it was originally adopted. To reject a Merger Commitment adoption on such a basis would create and impose a non-existent limitation on a requesting carrier's otherwise clearly unrestricted Merger Commitment right to

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

[7] Motion at page 4 (emphasis added). AT&T also requests that the Commission reconsider its determination that it has jurisdiction to interpret the Merger Commitments "for all of the reasons set forth in [its] Objection to and Motion to Dismiss Nextel's Notice of Adoption" (Motion at page 2). AT&T has simply incorporated it prior arguments by reference and has not alleged any "additional evidence that could not with reasonable diligence" have previously been offered as required pursuant to KRS § 278.400. Indeed, AT&T proffers no new explanation whatsoever as to why the Commission's resolution of the exact same jurisdictional issues in the Sprint-AT&T arbitration is not equally applicable in this matter. Nothing has changed, and for the same reasons the Commission rejected AT&T's "lack of jurisdiction" claims in the Sprint-AT&T arbitration case, the Commission is correct in rejecting such claims under AT&T's Motion.

[8] *Id.*

adopt "any" agreement that AT&T had entered into in "any" of its 22 states.

The purpose of the interconnection-related Merger Commitments was to encourage competition by reducing interconnection costs between a requesting carrier such as Nextel Partners *and the new 22-state mega-billion dollar, post-merger AT&T.*[9] 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:*"[10]

> 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 for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition.[11]

Cognizant of the intent behind the interconnection-related Merger Commitments, 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";

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[9]*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."

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

[11]*Id.*, emphasis added.

- 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.

Even under AT&T's semantic game-playing interpretation, AT&T's argument would fail. To the extent AT&T contends that it does not have to provide the Sprint ICA to Nextel Partners under the Merger Commitments in Kentucky *simply because the Sprint ICA was previously approved in Kentucky,* AT&T overlooks a very simple, yet essential indisputable fact that destroys its own argument: as a 9-state region wide agreement, the Sprint ICA was submitted and approved in the same form in 8 other states as well. Nextel Partners' adoption notice specifically made this known to the Commission, while at the same time referring the Commission to the fact that the Commission had also previously approved the Sprint ICA.[12] Thus, Nextel Partners' adoption request just as easily covers the "porting" of the Sprint ICA into Kentucky from the remaining 8 states.

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[12] Notice of Adoption at page 2 ("The Sprint ICA that Nextel Partners adopts was initially approved by the Commission in Case No. 2000-480. Nextel Partners adopts the Sprint ICA in its entirety and as amended. ... The Sprint ICA has been filed and approved in each of the 9-legacy BellSouth states. A true and correct copy of the agreement, as amended, can be viewed on AT&T Southeast's website at http://cpr.bellsouthc.com/clec/docs/all_states/800aa291.pdf and is incorporated by reference herein. Due to the size of the file and its general availability, we are not providing a copy of the agreement with this letter, but will provided paper or electronic copies upon request.")

Indeed, Nextel Partners' request could be construed to permit it to adopt the Sprint ICA which as now amended in North Carolina to extend the ICA 3 years from March 20, 2007 rather than December 29, 2006. The North Carolina version also has the Kentucky-specific provisions within it, resulting in no need for it to be further "conformed" to Kentucky.

There simply is, however, no logical reason to engage in either AT&T's semantic game-playing or the hoop-jumping mental gymnastics that would be driven by AT&T's interpretation of Merger Commitment No. 1 to reach the same end result - - Nextel Partners' adoption of the Sprint ICA as a "ported" ICA. AT&T's argument on its face improperly requires the Commission to ignore the plain and ordinary meaning of the words used by the FCC and recognize an express "porting" requirement that does not otherwise exist, and therefore, must be rejected. The Commission was correct in approving Nextel Partners' adoption under AT&T's Merger Commitments and there is no legitimate basis to reconsider that decision.

II. AT&T'S EFFORT TO PREVENT NEXTEL PARTNERS' ADOPTION OF THE SPRINT ICA UNDER 252(i) BASED UPON THE SERVICE PROVIDED BY NEXTEL PARTNERS IS A DISCRIMINATORY PRACTICE THAT HAS BEEN EXPRESSLY REJECTED BY THE FCC

Notwithstanding Nextel Partners' stated adoption of the Sprint ICA in its entirety[13] (and having even offered a CLEC signatory[14]), AT&T contends that Nextel

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

[14]*See* Notice of Adoption Exhibit B, May 18, 2007 letter from Mark G. Felton of Sprint Nextel to AT&T at page 2 ("Nextel Partners is a wholly owned subsidiary of Sprint Nextel Corporation, as are ... Sprint CLEC ... and ... Sprint PCS. Although neither Nextel Partners nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel Partners' right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel Partners in order to expeditiously implement Nextel Partners' adoption."). To the extent AT&T

Partners cannot do so 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". [15] AT&T's "reasons" amount to nothing more than an argument that Nextel Partners 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 § 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 based on the inclusion of what the ILEC considers additional negotiated terms that cannot be "used" by a subsequent adopting carrier.

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.

The FCC's current version of Rule § 51.809, which implements § 252(i) and is entitled

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were to contend Sprint CLEC cannot be a signatory to two agreements, as further explained in Section III of this response, 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 Partners 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 II, AT&T has no legitimate legal basis to object to Nextel Partners adoption of the Sprint ICA without Sprint CLEC as an additional signatory.

[15] AT&T Motion at pages 5-7.

"Availability of agreements to other telecommunications carriers under section 252(i) of the Act", further states:

> ***(a)*** An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. ***An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.*** [Emphasis added]
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> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
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> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
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> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.
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> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

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[16], the historical purpose of a section 252(i) adoption has been to ensure an ILEC does not discriminate in favor of any particular carriers[17].

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[16] *See* FCC Order at page 172, "Concurring Statement of Commissioner Michael J. Copps":

[17] *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

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 does not contend, nor could it, that it actually "costs" more to provide any given service under the Sprint ICA to Nextel Partners than it does to provide a 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 Partners is not in a position to offer both wireless and wireline services. The scope of services that Nextel Partners 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) "shall be permitted to obtain its statutory rights on an expedited basis."[18] 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 with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible.[19]

In July of 2004 the FCC revisited its interpretation of 252(i) to reconsider what

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Competition Order").

[18] *Id.* at ¶ 1321.

[19] *Id.* at ¶ 1318.

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 on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[20]

Based on the foregoing, the FCC has already rejected AT&T's current tactic of attempting to differentiate a carrier such as Nextel Partners 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, it was AT&T's pre-merger parent, BellSouth Corporation that specifically contended that incumbent LECs should be permitted to restrict a 252(i) adoption to "similarly situated" carriers.[21] In light of the bill and keep aspects of the

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[20] *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.

[21] *Id.,* at ¶ 30 and footnote 101.

Sprint ICA, one scenario that BellSouth disclosed in the course of making its argument to the FCC is of particular interest: 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."[22] In response to such assertions, the FCC held:

> 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 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.[23]

In this case, AT&T is admitting 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, and it did so on the basis that the ICA contains wireline terms that AT&T claims may not be used by a stand alone wireless carrier and, therefore, precludes adoption of the entire ICA by a stand-alone wireless carrier. This "similarly situated" argument was recycled yet again by AT&T's other predecessor, SBC, in an

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[22] *Id.*, BellSouth Affidavit of Jerry D. Hendrix at ¶ 6, a copy of which is attached hereto as Exhibit A.

[23] *Id.*, at ¶ 30. (Emphasis added)

attempt to avoid filing the entire terms of an agreement it had entered into with a CLEC named Sage Telecom.[24]

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 Section 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 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.[25]

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[24]*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 as Exhibit B.

[25]*Sage* at page 6.

Based on both the FCC's Second Report and Order and *Sage*, it is Nextel Partners, not AT&T, that is entitled to decide which of the Sprint ICA terms that Nextel Partners "deems appropriate for its business needs". Further, AT&T's admission that it entered into an agreement providing favorable 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 Partners' adoption of the Sprint ICA under the FCC's all-or-nothing rule. With the rejection of AT&T's "similarly situated" argument by the FCC, the express language of 51.809(a), and the rationale of both the FCC in its Second Report and Order and the Sage case, there simply is no legal basis for the Commission to grant rehearing to permit AT&T Kentucky to go fishing for irrelevant factual evidence and, therefore, AT&T's Motion should be denied.

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

The linchpin to AT&T's second argument, that Nextel Partners 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 in addition to AT&T the Sprint ICA *requires* both a wireless party and a wireline party to the agreement for it to be an effective agreement. 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 pointing the Commission to the very language in Attachment 3, § 6.1 that clearly makes the point that both Sprint entities are not required to remain as parties to the Sprint ICA for it to remain an effective agreement.

At page 7 of its Motion, 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 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 the balance of Section 6.1 goes on to make clear, however, is 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 cost to AT&T 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 Partners than it cost 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.

The existing provisions of the Sprint ICA also disprove the unsubstantiated assertions in AT&T's third argument to the effect that Nextel Partner's adoption of the Sprint ICA would violate the FCC's TRRO prohibition against using UNEs for the exclusive provision of mobile wireless service. Again, it is simply indisputable that by virtue of the post-TRRO 9th amendment to the Sprint ICA, 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 9th Amendment, Attachment 2, § 1.5 specifically provides that "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." Thus, consistent with the TRRO, just as the Sprint

ICA already precludes Sprint from obtaining UNEs for the exclusive use of Sprint PCS, the Sprint ICA as adopted by Nextel Partners likewise precludes Nextel Partners from obtaining UNES for such purposes.

The unsupportable factual premises of AT&T's second and third arguments are diametrically inconsistent with the already known terms and provisions of the existing Sprint ICA. Under such circumstances, granting AT&T's Motion would be a futile waste of time and resources because there simply is no legal or factual basis for AT&T's arguments under the existing Sprint ICA.

IV. THE COMMISSION'S ORDER IS NOT "PROCEDURALLY FLAWED"

AT&T maintains that the Commission's December 18, 2007 Order granting Nextel Partner's adoption of the Sprint ICA is "procedurally flawed" because resolution of AT&T's Motion to Dismiss was a "threshold matter...and did not address all the underlying substantive issues." Thus, according to AT&T, "proper resolution requires a hearing on the merits, and AT&T should not be precluded from bringing its case-in-chief" to the Commission for final resolution."[26]

The Commission's Order and granting Nextel's Notice of Adoption of the Sprint ICA are not procedurally flawed. On May 31, 2007 AT&T responded in writing to Nextel Partner's original May 18 adoption request. After Nextel Partners filed its formal Notice of Adoption on June 21, AT&T filed its July 3, 2007 Objection and Motion that not only raised the same "reasonable period of time" argument that it made in its May 31 response to Nextel Partner's original adoption request, but asserted yet additional

[26] *See* Motion at page 1 - 2.

arguments to Nextel Partners' adoption efforts. Despite having more than five months since filing its initial response, and 3 months following the Commission's September 18 Order authorizing the 3-year extension of the Sprint ICA that effectively eliminated its "reasonable period of time" argument, AT&T could have supplemented its response but never did so. Now, only after having each of its *timely* arguments rejected, AT&T seeks to return with yet additional *untimely* arguments that, as also demonstrated above, do not warrant the presentation of any new facts and are deficient as a matter of law.

The FCC Merger Commitments and Section 252(i) of the Act are intended to reduce transaction costs and encourage competition by expediting the interconnection process and preventing ILEC discrimination in the provision of service to requesting carriers. If AT&T is permitted to prolong the adoption process as it seeks to do in this case by advancing and litigating additional, baseless claims *seriatim,* it will effectively defeat the purpose and objectives of § 252(i) and the Merger Commitments through such delaying tactics..

The Commission's December 18th Order granting Nextel Partners' adoption of the Sprint ICA is consistent with its longstanding policy of ensuring prompt access to adoption of existing interconnection agreements by requesting carriers. Under the circumstances of this case, the granting of AT&T's unsubstantiated Motion that would serve no purpose other than unwarranted delay would, in fact, create a procedurally flawed outcome for not just this case but also future adoption cases. If the Commission were to adopt such a precedent AT&T, and any other ILEC, would have the ability to delay indefinitely any 252(i) request by simply continuing the adoption process through the process of serial objections, *ad infinitum.*

V. Conclusion

For the reasons stated herein, the Commission should deny AT&T's Motion for Reconsideration in its entirety, deny AT&T's request that the Commission enter a procedural schedule and schedule a hearing, and affirmatively direct the parties to submit their executed adoption of the Sprint ICA according to the deadline set in the Commission's December 18, 2007 Order in this matter.

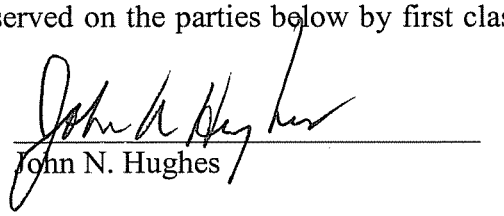
Respectfully submitted this 3rd day of January, 2008.

John N. Hughes
124 West Todd Street
Frankfort, Kentucky 40601

Counsel for Nextel Partners

Certificate of service:

I certify that a copy of this Response was served on the parties below by first class mail the 3rd day of January, 2008.



John N. Hughes

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E. Earl Edenfield, Jr.
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Exhibit A

BELLSOUTH

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Washington, D.C. 20036-3351

mary.henze@bellsouth.com

Mary L. Henze
Assistant Vice President
Federal Regulatory

202 463 4109
Fax 202 463 4631

May 11, 2004

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

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

Dear Ms. Dortch,

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

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

Sincerely,

Mary L. Henze

Mary L. Henze

cc: J. Minkoff
C. Shewman

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

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

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

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

QUALIFICATIONS

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

PURPOSE OF AFFIDAVIT

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

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

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

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

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

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

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

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

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

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

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

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

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

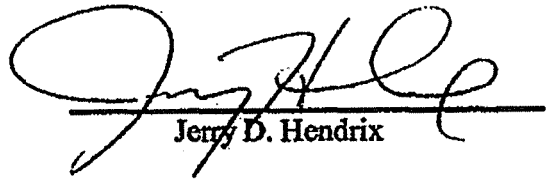
- Requests to adopt provisions that are beyond the scope of 252(i), such as requests to adopt dispute resolution provisions, governing law provisions, and deposit provisions that are based on the original negotiating CLEC's financial status.

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

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

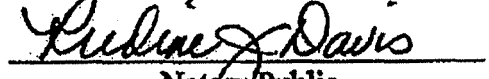
- Requests to adopt a specific provision in order to avoid change of law provisions, such as a request to adopt specific provisions from the *TRO*, but refusing to accept all of the provisions, especially those that are more beneficial to the ILEC.

12. This concludes my affidavit.



Jerry D. Hendrix

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



Notary Public

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

Exhibit B

8 of 30 DOCUMENTS

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.

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." Pl. 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