BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Mary.Keyer@BellSouth.com

Mary K. Keyer
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

July 3, 2007

RECEIVED
JUL 05 2007
PUBLIC SERVICE COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Adoption by Nextel West Corp. ("Nextel") of the Existing Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001
PSC 2007-00255

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Objection to and Motion to Dismiss Nextel West Corp.'s Notice of Adoption.

Sincerely,

Mary K. Keyer

Enclosures

cc: Party of record

683394

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Adoption by Nextel West Corp. ("*Nextel*")	)	
Of the Existing Interconnection Agreement	)	
By and Between BellSouth	)	CASE NO.
Telecommunications, Inc. and Sprint	)	2007-00255
Communications Company Limited Partnership,	)	
Sprint Communications Company L.P.,	)	
Sprint Spectrum L.P." dated January 1, 2001	)	

AT&T KENTUCKY'S OBJECTION TO AND MOTION TO DISMISS NEXTEL WEST CORP.'S NOTICE OF ADOPTION

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), submits the following Objection to and Motion to Dismiss the Notice of Adoption by Nextel West Corp. ("Nextel West") 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 2, 2001. As explained below, the Kentucky Public Service Commission ("Commission") should dismiss, as a matter of law, Nextel West's attempt to adopt the subject interconnection agreement.

INTRODUCTION

Nextel West unilaterally sent a letter to the Commission, dated June 21, 2007, wherein Nextel West erroneously claims to have adopted the interconnection agreement between AT&T Kentucky and Sprint ("*Notice of*

Adoption") and requests that the Commission approve the purported adoption. Nextel West relies upon the merger commitment of AT&T Inc. set forth in the FCC's order approving the AT&T/BellSouth merger as its basis for its purported "adoption." Such reliance, however, is misplaced for several reasons.

First, the Commission does not have the authority to interpret and enforce the AT&T merger conditions resulting from the Federal Communications Commission's ("FCC") AT&T Inc. and BellSouth Corporation merger proceeding. Second, Nextel West is attempting to adopt an expired agreement and thus the adoption request does not meet the legal timing requirement under the Telecommunications Act of 1996 (the "Act"). Third, the *Notice of Adoption* is premature because Nextel West failed to abide by contractual obligations regarding dispute resolution found in its own existing interconnection agreement with AT&T Kentucky.[1] For these reasons, and as further explained below, the Commission should dismiss, as a matter of law, Nextel West's Notice of Adoption.

I. Standard For Motion To Dismiss

A motion to dismiss is properly granted when a complainant is not entitled to relief under any facts that could be proven. *Kellerman v. Vaughan,* Ky., 408 S.W. 2d 415 (1966). *See also*, Kentucky Rules of Civil Procedure, Rule 12.02(f) (motion to dismiss permitted for "failure to state a claim upon which relief can be

[1] AT&T Kentucky requests that, in resolving this matter, the Commission take judicial notice of "the existing interconnection agreement between Nextel West and AT&T [Kentucky]," referred to by Nextel West on page 2 of its *Notice of Adoption*. Terms and conditions found within that existing interconnection agreement between Nextel West and AT&T Kentucky require Nextel West to abide by "FCC rules and regulations regarding" adoption of interconnection agreements. *See* AT&T Kentucky/Nextel West Interconnection Agreement, Article XVI. That interconnection agreement also contains a dispute resolution process by which the parties must abide in resolving disputes. *See id.*, Article XIX.

granted"). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *See Kellerman.* In determining the sufficiency of a complaint, a court may take judicial notice of the records in another case in resolving a motion to dismiss, where the judgment and record in such case are pleaded. *See generally*, Kentucky Rules of Evidence, Rule 201. *See also, National Bank of Monticello v. Bryant, American Reliance Ins.* 76 Ky. 419, 13 Bush 419, 1877 WL 7698 (1877) (courts will take judicial notice of their own records when they pertain to the case at hand).

In its *Notice of Adoption*, Nextel West refers to, and thereby pleads, the existing interconnection agreement between itself and AT&T Kentucky as well as the interconnection agreement between AT&T Kentucky and Sprint that it seeks to adopt.[2] Those interconnection agreements were approved by this Commission on January 24, 2002, and on June 10, 2002, respectively, and both are Commission records. Accordingly, AT&T Kentucky requests, pursuant to Rule 201, Kentucky Rules of Evidence, that the Commission take judicial notice of the existing interconnection agreements between AT&T Kentucky and Nextel West, and between AT&T Kentucky and Sprint.

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

In its *Notice of Adoption*, Nextel West claims to rely upon merger commitments adopted and approved by the FCC in the BellSouth/AT&T merger order, *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket NO. 06-74, adopted December 29, 2006,

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

released March 26, 2007 ("*Merger Order*"), as the basis for adoption of the ICA.[3] However, the federal merger commitments approved by the FCC cannot support Nextel West' claim because the Commission does not have jurisdiction over them.

It is well settled that the Commission has to possess jurisdiction over the parties, as well as jurisdiction over the subject matter. *See Tolley v. Commonwealth of Kentucky*, 65 S.W. 3d 531 (Ky. App. 2001). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Gordon v. NKC Hospitals, Inc.,* 887 S.W. 2d 360, 362 (1994). Accordingly, a complaint or request for relief is properly dismissed if it asks the Commission to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant.

The Commission, therefore, must determine whether the Legislature has granted it any authority to construe AT&T's federal merger commitments. In that regard, "[t]he PSC is a creature of statute and has only such powers as granted by the General Assembly." *Public Service Commission v. Jackson County Rural Electric Cooperative, Inc., et al.,* 50 S.W. 3d 764, 767 (Ky. App. 2000). Powers granted to the Commission are strictly statutory and like other administrative bodies and agencies, the Commission possesses only such powers as are conferred upon it expressly or by necessary or fair implication. *See Croke v. Public Service Commission of Kentucky*, 573 S.W. 2d 927 (Ky. App. 1978).

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

Finally, any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. *See Northern Kentucky Emergency Medical Services, Inc. v. Christ Hospital Corporation, et al.,* 875 S.W. 2d 896 (Ky. App. 1993).

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

The Florida Public Service Commission ("Florida Commission") addressed a similar issue in *In re: Complaint by Supra Telecommunications and Information Systems, Inc., against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Dkt. No. 030349-TP, Order No. PSC-03-1392-FOF-TP (Dec. 11, 2003) ("*Sunrise Order*"). The complainant in that case alleged that BellSouth violated 47 U.S.C. § 222. In dismissing that claim, the Florida Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created." *See Sunrise Order* at 3 (citations omitted). The Florida Commission further noted, however, it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law. *Id.* at 3-4. Accordingly, in the *Sunrise*

Order, the Florida Commission determined that it cannot provide a remedy (federal or state) for a violation of federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. *Id.* at 5.

The Florida Commission echoed these same principles in *In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC*, Dkt. No. 031125-TP, Order No. PSC-04-0423-FOF-TP (Apr. 26, 2004), wherein it dismissed a request by a competitive local exchange carrier to find that BellSouth violated federal law. Based on the *Sunrise Order*, the Florida Commission dismissed the federal law count of the complaint, holding "[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five." *Id.*

Consistent with the above decisions, the United States Supreme Court has held that the interpretation of an agency order, when issued pursuant to the agency's established regulatory authority, falls within the agency's jurisdiction. *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959). Therefore, interpretation of an FCC order, *i.e.*, the *Merger Order*, clearly falls within the jurisdiction of the FCC and not this Commission.

In this case before the Commission, Nextel West's claim is not under state law; instead, it is attempting to enforce federal merger commitments via a state proceeding. Consequently, the FCC alone possesses the jurisdiction to interpret and enforce the subject merger commitments.

Indeed, the FCC explicitly reserved jurisdiction over the merger commitments contained in the *Merger Order*. Specifically, the FCC stated that "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, ***all conditions and commitments proposed in this letter are enforceable by the FCC*** and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter." *Merger Order* (Appendix F), p. 147 (attached hereto as **Exhibit A**) (emphases added). Nowhere in the *Merger Order* does the FCC provide that the interpretation of merger commitments is to occur outside the FCC.[4]

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

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

Even if the Commission were to exert jurisdiction over this matter, which it should not do, the Commission should nonetheless dismiss the attempted adoption because it is contrary to federal law. This is so because Nextel West

[4] AT&T Kentucky recognizes that the FCC stated in the Merger Order that "[i]t is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended...." *Merger Order* at 147. The purported source of Nextel West' adoption right, at least in part, however, is pursuant to the *Merger Order* and *not* the Act. Thus, the above statement from the FCC does not salvage this portion of Nextel West' argument.

wants to adopt an expired agreement.[5] Although Section 252(i) of 47 U.S.C. obligates AT&T Kentucky to provide competing carriers with "any interconnection, service or network element" on the same terms contained in any approved and publicly-filed AT&T Kentucky contract, this obligation is not unlimited. Particularly, in accordance with federal law, AT&T Kentucky's obligation to provide the facilities and services to carriers such as Nextel West is limited to only a "reasonable period of time" after the original contract is approved.[6]

Although there is no precise definition of a "reasonable period of time," other commissions have found that attempting to adopt an agreement several months *before* expiration of an agreement is not within "a reasonable period of time." For example, in *In Re: Global NAPs South, Inc.*, 15 FCC Rcd 23318 (August 5, 1999) ("*Global NAPs One*"), attached hereto as **Exhibit B**, and *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999) ("*Global NAPs Two*"), attached hereto as **Exhibit C**, a CLEC's request to adopt an interconnection agreement within approximately 10 months and seven months, respectively, of each adopted agreement's termination date was found to be beyond the "reasonable period of time" requirement.[7]

---

[5] Pursuant to the authority cited herein, AT&T Kentucky requests that the Commission take judicial notice of the Commission-approved AT&T Kentucky/Sprint ICA that Nextel West seeks to adopt and which is the subject of its *Notice of Adoption*.

[6] In limiting the period of time during which an interconnection agreement can be adopted, 47 C.F.R. §51.809(c) provides that "[i]ndividual agreements shall remain available for use by telecommunications carriers pursuant to this section **for a reasonable period of time after the approved agreement is available for public inspection** under section 252(h) of the Act" (emphases added).

[7] The Sixth Circuit Opinion in *BellSouth Telecommunications, Inc. v. Universal Telecom, Inc.*, No. 05-5674 (Decided July 21, 2006), is distinguishable from this case in that the premise of BellSouth's argument in *Universal Telecom* was that changes in law created by two intervening

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

Likewise, in *Global NAPs Two*, the Maryland Public Service Commission held that it was unreasonable to allow Global NAPs to adopt a three-year interconnection agreement approximately two and a half years into its term.

Nextel West is erroneously attempting to push the "reasonable period of time" envelope even further as Nextel West seeks to adopt an *expired* agreement.[8] It stretches credulity to assert that an attempt to adopt an *expired* agreement (and in this case, one that has been *expired for over two years*) has been made within a reasonable period of time after the agreement was approved by this Commission and made available for public inspection.

Furthermore, AT&T Kentucky and Sprint are currently engaged in arbitrating a new interconnection agreement. It would be highly inefficient and impractical to allow Nextel West to adopt an antiquated expired agreement when

---

FCC orders necessarily established that Universal had exceeded the time limit set forth in 47 C.F.R. § 51.809 in its attempt to adopt the MCI interconnection agreement. The court did not address the issue of a carrier attempting to adopt an *expired* agreement, as is the case before this Commission in this docket.

[8] The ICA was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004.

parties to the original agreement are themselves moving to an updated agreement. Clearly such a result was never contemplated under the "reasonable period of time" limitation found in 47 C.F.R. §51.809(c) and would be inconsistent with common sense and good public policy.

Indeed, the telecommunications industry is highly dynamic and undergoes rapid technological and regulatory changes. To maintain efficiencies and encourage innovation, interconnection agreements must be updated to keep pace with the ever-advancing industry. Allowing carriers to opt into antiquated expired agreements would be inconsistent with that goal. For example, since the ICA that Nextel West seeks to adopt became effective in 2001, the wireless industry's traffic patterns have continued to evolve. To address proper jurisdiction of traffic for billing purposes, AT&T Kentucky has developed a methodology to accurately measure the traffic between Major Trading Areas ("InterMTA traffic") based upon wireless carriers populating a new field found in call detail records. The old ICA that Nextel West wishes to adopt does not address this issue, but any new ICA will.

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

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

Nextel West did not comply with the requisite steps for dispute resolution set forth in the parties' current interconnection agreement, and therefore its *Notice of Adoption* is improperly before the Commission.[9] Nextel West and AT&T Kentucky entered into an interconnection agreement with an effective date of June 14, 2001. Given Nextel West's statement that the current agreement will terminate when the *Notice of Adoption* is approved, that agreement is currently operational and its terms and conditions are binding. The agreement contains a provision addressing Nextel West's right to adopt interconnection agreements that AT&T Kentucky has entered into with other carriers. Specifically, under Article XVI titled "Modification of Agreement," the AT&T Kentucky/Nextel West interconnection agreement provides in pertinent part:

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

(Emphases added).

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

As conceded by Nextel West in its *Notice of Adoption*, AT&T Kentucky disagrees with Nextel West's position. *See Notice of Adoption* at 3. Nevertheless, Nextel West unilaterally filed its "Notice of Adoption" with the Commission on June 21, 2007, rather than submitting its dispute to the Commission. The AT&T Kentucky/Nextel West agreement contains provisos designed to assist the parties in resolving any and all disputes regarding terms and conditions contained within the agreement. Of particular importance is Section XIX, the dispute resolution clause, that states:

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

Here, because Nextel West disagreed with AT&T Kentucky's position that Nextel West could not adopt the *expired* Sprint interconnection agreement, Nextel West was contractually bound to bring its dispute to the Commission for resolution pursuant to the dispute resolution process contained in the parties' agreement which it did not do. Accordingly, Nextel West's *Notice of Adoption* is improperly before the Commission and should be dismissed.

CONCLUSION

For the foregoing reasons, AT&T Kentucky respectfully requests the Commission to dismiss the *Notice of Adoption* filed by Nextel West in this docket.

Respectfully submitted, this 3rd day of July, 2007.

AT&T Kentucky

MARY K. KEYER
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
(502) 582-8219

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

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.,
d/b/a AT&T KENTUCKY

682625

EXHIBIT A

APPENDIX F

Conditions

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

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

MERGER COMMITMENTS

For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter.

Repatriation of Jobs to the U.S.

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

Promoting Accessibility of Broadband Service

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

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

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

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

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

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

Statement of Video Roll-Out Intentions

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

Public Safety, Disaster Recovery

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

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

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

Service to Customers with Disabilities

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

UNEs

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

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

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

Reducing Transaction Costs Associated with Interconnection Agreements

1. The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

2. The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

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

4. The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.

Special Access

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

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

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

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

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

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

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

[6] BOC data shall not include retail data.

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

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

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

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

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

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

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

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

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

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

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

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

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

Transit Service

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

ADSL Service[12]

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

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

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

ADSL Transmission Service

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

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

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

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

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

Net Neutrality

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

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

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

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

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

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

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

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

Internet Backbone

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

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

Forbearance

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

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

Wireless

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

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

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

Divestiture of Facilities

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

Tunney Act

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

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

Certification

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

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

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

Conditions
ATTACHMENT A

Service Quality Measurement Plan
For Interstate Special Access

Contents

Section 1: Ordering
FOCT: Firm Order Confirmation (FOC) Timeliness

Section 2: Provisioning
PIAM: Percent Installation Appointments Met
NITR: New Installation Trouble Report Rate

Section 3: Maintenance and Repair
CTRR: Failure Rate/Trouble Report Rate
MAD: Average Repair Interval/Mean Time to Restore

Section 4: Glossary

Section 1: Ordering

FOCT: Firm Order Confirmation (FOC) Timeliness

Definition
Firm Order Confirmation (FOC) Timeliness measures the percentage of FOCs returned within the Company-specified standard interval.

Exclusions
- Service requests identified as "Projects" or "ICBs"
- Service requests cancelled by the originator
- Weekends and designated holidays of the service center
- Unsolicited FOCs
- Administrative or test service requests
- Service requests that indicate that no confirmation/response should be sent
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules
Counts are based on the first instance of a FOC being sent in response to an ASR. Activity starting on a weekend or holiday will reflect a start date of the next business day. Activity ending on a weekend or holiday will be calculated with an end date of the last previous business day. Requests received after the company's stated cutoff time will be counted as a "zero" day interval if the FOC is sent by close of business on the next business day. The standard interval will be that which is specified in the company-specific ordering guide.

Calculation
Firm Order Confirmation (FOC) Interval = (a - b)
- a = Date and time FOC is returned
- b = Date and time valid access service request is received

Percent within Standard Interval = (c / d) X 100
- c = Number of service requests confirmed within the designated interval
- d = Total number of service requests confirmed in the reporting period

Report Structure
- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

Geographic Scope
- State

SQM Disaggregation (Percent FOCs returned within Standard Interval)
- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

Section 2: Provisioning

PIAM: Percent Installation Appointments Met

Definition
Percent Installation Appointments Met measures the percentage of installations completed on or before the confirmed due date.

Exclusions
- Orders issued and subsequently cancelled
- Orders associated with internal or administrative (including test) activities
- Disconnect Orders
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules
This measurement is calculated by dividing the number of service orders completed during the reporting period, on or before the confirmed due date, by the total number of orders completed during the same reporting period. Installation appointments missed because of customer caused reasons shall be counted as met and included in both the numerator and denominator. Where there are multiple missed appointment codes, each RBOC will determine whether an order is considered missed.

Calculation
Percent Installation Appointments Met = (a / b) X 100
- a = Number of orders completed on or before the RBOC confirmed due date during the reporting period
- b = Total number of orders where completion has been confirmed during the reporting period

Report Structure
- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

Geographic Scope
- State

SQM Disaggregation
- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

NITR: New Installation Trouble Report Rate

Definition
New Installation Trouble Report Rate measures the percentage of circuits or orders where a trouble was found in RBOC facilities or equipment within thirty days of order completion.

Exclusions
- Trouble tickets issued and subsequently cancelled
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- RBOC troubles associated with administrative service
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions defined by each RBOC to reflect system and operational differences
- Subsequent trouble reports

Business Rules
Only the first customer direct trouble report received within thirty calendar days of a completed service order is counted in this measure. Only customer direct trouble reports that required the RBOC to repair a portion of the RBOC network will be counted in this measure. The RBOC completion date is when the RBOC completes installation of the circuit or order.

Calculation
Trouble Report Rate within 30 Calendar Days of Installation = (a / b) X 100
- a = Count of circuits/orders with trouble reports within 30 calendar days of installation
- b = Total number of circuits/orders installed in the reporting period

Report Structure
- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

Geographic Scope
- State

SQM Disaggregation
- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

Section 3: Maintenance & Repair

CTRR: Failure Rate/Trouble Report Rate

Definition
The percentage of initial and repeated circuit-specific trouble reports completed per 100 in-service circuits for the reporting period.

Exclusions
- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports/circuits associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules
Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this report. The trouble report rate is computed by dividing the number of completed trouble reports handled during the reporting period by the total number of in-service circuits for the same period.

Calculation
Percent Trouble Report Rate = (a / b) X 100
- a = Number of completed circuit-specific trouble reports received during the reporting period
- b = Total number of in-service circuits during the reporting period

Report Structure
- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

Geographic Scope
- State

SQM Disaggregation
- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

MAD: Average Repair Interval/Mean Time to Restore

Definition
The Average Repair Interval/Mean Time to Restore is the average time between the receipt of a customer trouble report and the time the service is restored. The average outage duration is only calculated for completed circuit-specific trouble reports.

Exclusions
- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules
Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this measure. The average outage duration is calculated for each restored circuit with a trouble report. The start time begins with the receipt of the trouble report and ends when the service is restored. This is reported in a manner such that customer hold time or delay maintenance time resulting from verifiable situations of no access to the end user premise, other CLEC/IXC or RBOC retail customer caused delays, such as holding the ticket open for monitoring, is deducted from the total resolution interval ("stop clock" basis).

Calculation
Repair Interval = (a – b)
- a = Date and time trouble report was restored
- b = Date and time trouble report was received

Average Repair Interval = (c / d)
- c = Total of all repair intervals (in hours/days) for the reporting period
- d = Total number of trouble reports closed during the reporting period

Report Structure
- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

Geographic Scope
- State

SQM Disaggregation
- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

GLOSSARY

Access Service Request (ASR)	A request to the RBOC to order new access service, or request a change to existing service, which provides access to the local exchange company's network under terms specified in the local exchange company's special or switched access tariffs.
RBOC 272 Affiliates Aggregate	RBOC Affiliate(s) authorized to provide long distance service as a result of the Section 271 approval process.
RBOC Affiliates Aggregate	RBOC Telecommunications and all RBOC Affiliates (including the 272 Affiliate). Post sunset, comparable line of business (e.g., 272 line of business) will be included in this category.
Business Days	Monday thru Friday (8AM to 5PM) excluding holidays
CPE	Customer Provided or Premises Equipment
Customer Not Ready (CNR)	A verifiable situation beyond the normal control of the RBOC that prevents the RBOC from completing an order, including the following: CLEC or IXC is not ready to receive service; end user is not ready to receive service; connecting company or CPE supplier is not ready.
Firm Order Confirmation (FOC)	The notice returned from the RBOC, in response to an Access Service Request from a CLEC, IXC or affiliate, that confirms receipt of the request and creation of a service order with an assigned due date.
Unsolicited FOC	An Unsolicited FOC is a supplemental FOC issued by the RBOC to change the due date or for other reasons, e.g., request for a second copy from the CLEC/IXC, although no change to the ASR was requested by the CLEC or IXC.
Project or ICB	Service requests that exceed the line size and/or level of complexity that would allow the use of standard ordering and provisioning interval and processes. Service requests requiring special handling.
Repeat Trouble	Trouble that reoccurs on the same telephone number/circuit ID within 30 calendar days
Service Orders	Refers to all orders for new or additional lines/circuits. For change order types, additional lines/circuits consist of all C order types with "I" and "T" action coded line/circuit USOCs that represent new or additional lines/circuits, including conversions for RBOC to Carrier and Carrier to Carrier.

Conditions
ATTACHMENT B

Building List

Metro Area	CLLI	Address	City	State	Zip Code
Atlanta	ALPRGAVP	5965 CABOT PKWY	ALPHARETTA	GA	30005
Atlanta	ATLNGABI	2751 BUFORD HWY NE	ATLANTA	GA	30324
Atlanta	CHMBGAJG	2013 FLIGHTWAY DR	CHAMBLEE	GA	30341
Atlanta	NRCRGAER	6675 JONES MILL CT	NORCROSS	GA	30092
Atlanta	NRCRGAIJ	4725 PEACHTREE CORNERS CIR	NORCROSS	GA	30092
Atlanta	NRCRGANX	3795 DATA DR NW	NORCROSS	GA	30092
Atlanta	NRCRGARC	335 RESEARCH CT	NORCROSS	GA	30092
Birmingham	BRHMALKU	101 LEAF LAKE PKWY	BIRMINGHAM	AL	35211
Charlotte	CHRMNCXI	2605 WATER RIDGE PKWY	CHARLOTTE	NC	28217
Chattanooga	CHTGTNAC	537 MARKET ST	CHATTANOOGA	TN	37402
Jacksonville	JCVNFLHK	10201 CENTURION PKWY N	JACKSONVILLE	FL	32256
Knoxville	KNVLTNHB	8057 RAY MEARS BLVD	KNOXVILLE	TN	37919
Knoxville	KNVNTN82	2160 LAKESIDE CENTER WAY	KNOXVILLE	TN	37922
Miami	BCRTFLAU	851 NW BROKEN SOUND PKWY	BOCA RATON	FL	33487
Miami	BCRTFLCM	501 E CAMINO REAL	BOCA RATON	FL	33432
Miami	DLBHFLDU	360 N CONGRESS AVE	DELRAY BEACH	FL	33445
Miami	JPTRFLAC	100 MARQUETTE DR	JUPITER	FL	33458
Miami	JPTRFLBC	1001 N USHWY 1	JUPITER	FL	33477
Miami	PLNBFLAZ	1601 SW 80TH TER	PLANTATION	FL	33324
Miami	PLNBFLCQ	1800 NW 69TH AVE	PLANTATION	FL	33313
Miami	SUNRFLCF	720 INTERNATIONAL PKWY	SUNRISE	FL	33325
Nashville	BRWDTNEV	210 WESTWOOD PL	BRENTWOOD	TN	37027
Nashville	NSVLTNIH	1215 21ST AVE S	NASHVILLE	TN	37212
Nashville	NSVLTNWL	28 OPRYLAND DR	NASHVILLE	TN	37204
Nashville	NSVNTNFO	252 OPRY MILLS DR	NASHVILLE	TN	37214
Nashville	NSVPTNIJ	332 OPRY MILLS DR	NASHVILLE	TN	37214
Nashville	NSVPTN98	427 OPRY MILLS DR	NASHVILLE	TN	37214
Nashville	NSVPTNJX	540 OPRY MILLS DR	NASHVILLE	TN	37214
Miami	LDHLFLAC	4300 N UNIVERSITY DR	LAUDERHILL	FL	33351
Miami	SUNRFLBD	440 SAWGRASS CORP. PARKWAY	SUNRISE	FL	33325
Orlando	ORLFFLYL	8350 PARKLINE BLVD	ORLANDO	FL	32809

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Global NAPs South, Inc. Petition for	)	CC Docket No. 99-198
Preemption of Jurisdiction of the Virginia	)	
State Corporation Commission Regarding	)	
Interconnection Dispute with	)	
Bell Atlantic-Virginia, Inc.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1999 **Released: August 5, 1999**

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses the petition of Global NAPs South, Inc. (GNAPs) for preemption of jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to an arbitration proceeding involving GNAPs and Bell Atlantic-Virginia, Inc. (Bell Atlantic).[1] The Commission placed GNAPs' preemption petition on public notice on May 24, 1999.[2] Ameritech, Bell Atlantic, Connect!, Cox Communications, Inc., and the Virginia Commission filed comments, and GNAPs filed a reply.

2. GNAPs seeks preemption of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended.[3] Section 252(e)(5) authorizes the

---

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

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

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

Commission to preempt a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.[4] Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier (LEC).[5] For the reasons discussed below, we find that the Virginia Commission has not "failed to act" within the meaning of our rules implementing section 252(e)(5).[6] We therefore deny GNAPs' petition and do not preempt the Virginia Commission.

II. BACKGROUND

A. Statutory Provisions

3. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale.[7] Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251.[8] Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations between the

---

as amended, as "the Communications Act" or "the Act."

[4] 47 U.S.C. § 252(e)(5).

[5] *See generally* 47 U.S.C. § 252.

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

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

[8] *See generally* 47 U.S.C. § 252.

carriers, (2) mediation by state commissions, or (3) arbitration by state commissions.[9] These interconnection agreements must then be submitted for approval to the appropriate state commission.[10]

4. In addition, section 252(i) provides another means for establishing interconnection. Pursuant to section 252(i), local exchange carriers must "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[11] Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement. Although there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve,[12] states may adopt "procedures for making agreements available to requesting carriers on an expedited basis."[13] As the Commission observed three years ago, a party seeking interconnection pursuant to section 252(i) "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis."[14] Otherwise, the "non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251."[15]

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

> (5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an

---

9 *See* 47 U.S.C. § 252(a), (b).

10 47 U.S.C. § 252(e)(1).

11 47 U.S.C. § 251(i).

12 47 U.S.C. § 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission"); *see also Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321 (indicating that carriers "seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 252 requests").

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

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

15 *Id.*

order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.[16]

B. Commission's Rules

6. The *Local Competition Order* adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission . . . ."[17] The *Local Competition Order* concluded that the Commission would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).[18] Rather, the *Local Competition Order* interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner. The *Local Competition Order* limited the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to "when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(c)."[19] Under the Commission's rules, "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act."[20]

C. Procedural History

7. On July 2, 1998, GNAPs asked Bell Atlantic to commence negotiations for interconnection.[21] The parties subsequently attempted to negotiate the terms of an interconnection agreement.[22] In August 1998, GNAPs concluded that it could meet its

---

16 47 U.S.C. § 252(e)(5).

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

18 *Id.* at 16128, ¶ 1285.

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

20 47 C.F.R. § 51.803(b); *see also Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285.

21 Virginia Petition at 1.

22 *Id.*

interconnection needs by opting-into a 1996 agreement between Bell Atlantic and MFS Intelenet (MFS) pursuant to section 252(i).[23] As a result, GNAPs advised Bell Atlantic that GNAPs wanted to interconnect with Bell Atlantic on the same terms as contained in Bell Atlantic's 1996 agreement with MFS (1996 MFS Agreement).[24] According to GNAPs, Bell Atlantic refused to honor GNAPs' right to opt-into the 1996 MFS Agreement without modifications.[25]

8. On November 16, 1998, GNAPs filed a petition for arbitration with the Virginia Commission,[26] pursuant to section 252(b) of the Act.[27] On November 25, 1998, GNAPs filed a motion requesting expedited treatment of its petition and further requesting that Bell Atlantic

---

23 *Id.* Section 252(i) provides that: "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt-into an existing contract as a whole rather than "pick and choose" different elements from different existing contracts. *Iowa Utils. Bd.*, 120 F.3d at 800-801. The Supreme Court since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. *AT&T Corp.*, 119 S.Ct. at 738; *see generally* 47 C.F.R. § 51.809.

24 Virginia Petition at 1.

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

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

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

provide GNAPs interconnection on an interim basis.[28] On December 11, 1998, Bell Atlantic filed its response to the GNAPs arbitration petition and motion.[29]

9. In a January 29, 1999 order, the Virginia Commission determined that there was no need to hold an evidentiary hearing in the GNAPs/Bell Atlantic arbitration proceeding, having found that the issues raised by the parties presented only legal questions.[30] In the same order, however, the Virginia Commission encouraged the parties to supplement their pleadings in order to further clarify their positions on the issues, and to address how the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board* might impact the arbitration of unresolved issues between GNAPs and Bell Atlantic.[31]

10. On February 10, 1999, Bell Atlantic filed a supplemental brief in response to the January 29, 1999 order. [32] According to the Virginia Commission's April 2, 1999 final order, Bell Atlantic argued in its supplemental brief that the Supreme Court's reinstatement of section 51.809 of the Commission's rules did not entitle GNAPs to adopt Bell Atlantic's 1996 MFS Agreement.[33] On February 10, 1999, GNAPs also filed a supplemental brief in response to the January 29, 1999 order.[34] According to the Virginia Commission's April 2, 1999 final order, GNAPs argued in its supplemental brief that it was entitled to reciprocal compensation for terminating Internet Service Provider (ISP) traffic; that it should be able to opt-into the 1996 MFS Agreement for a full three-year term; and that section 51.809 of the Commission's rules did not prevent GNAPs from adopting Bell Atlantic's 1996 MFS Agreement.[35] GNAPs further asserted that Bell Atlantic acted in bad faith by not permitting it to opt-into the 1996 MFS Agreement in August 1998.[36]

---

28 Virginia Final Order at 2.

29 *Id.* at 1.

30 *Id.* at 2.

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

32 Virginia Final Order at 2.

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

34 Virginia Final Order at 2.

35 *Id.* at 3-4.

36 *Id.* at 3.

11. On February 26, 1999, the Commission released its *ISP Compensation Ruling and NPRM*.[37] On March 11, 1999, the Virginia Commission released an order scheduling oral argument so that the parties could address what effect, if any, the Commission's *ISP Compensation Ruling and NPRM* and the Supreme Court's decision might have on the resolution of the GNAPs/Bell Atlantic arbitration proceeding.[38] Oral argument was held on March 25, 1999.[39]

12. On April 2, 1999, the Virginia Commission issued its final order in the GNAPs/Bell Atlantic arbitration proceeding. In its final order, the Virginia Commission acknowledged that the 1996 MFS Agreement would terminate on July 1, 1999 and that any carrier opting-into this agreement would necessarily find themselves bound by this termination date, unless otherwise negotiated.[40] The Virginia Commission noted that in light of the very limited time remaining under the 1996 MFS Agreement, there would likely be only thirty days, at most, from the time an adopted GNAPs/Bell Atlantic agreement based on the 1996 MFS Agreement would be approved until Bell Atlantic could terminate the agreement pursuant to the contract terms.[41] Thus, citing both the maxim "equity will not do a vain or useless thing," and the "reasonable time" language in section 51.809(c) of the Commission's rules, the Virginia Commission denied GNAPs' petition to adopt the 1996 MFS Agreement and dismissed the GNAPs/Bell Atlantic arbitration proceeding.[42]

13. On April 21, 1999, GNAPs filed a petition for reconsideration of the April 2, 1999 final order with the Virginia Commission.[43] Under the Virginia Commission's rules, an order becomes final within 21 days after entry, unless modified or vacated in a response to a petition for reconsideration or on the Virginia Commission's own motion.[44] The Virginia Commission

---

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

38 Virginia Final Order at 4-5.

39 *Id.* at 5.

40 *Id.*

41 *Id.* at 5-6.

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

43 Virginia Petition at 6.

44 *Id.*

elected not to act in response to GNAPs' petition for reconsideration and therefore allowed its April 2, 1999 order to become final.[45]

D. GNAPs' Petition for Preemption of Jurisdiction

14. GNAPs requests in its petition that the Commission "preempt the jurisdiction" of the arbitration proceeding it requested before the Virginia Commission, pursuant to section 252(e)(5).[46] GNAPs alleges that the April 2, 1999 final order is a "plain failure of the [Virginia Commission] to fulfill its responsibilities under the Act."[47] GNAPs does not allege, however, that the Virginia Commission "failed to act" upon its arbitration request in a timely manner, nor that the April 2, 1999 final order was untimely rendered.[48]

15. GNAPs alleges that, without identifying any provision of the 1996 MFS Agreement that was technically infeasible or impractical, or any rate in that agreement that was based on outdated cost analyses, the Virginia Commission found that the 1996 MFS Agreement was too old to be opted-into and denied and dismissed GNAPs' arbitration petition.[49] GNAPs maintains that it does not know whether the Virginia Commission's April 2, 1999 final order is the product of confusion regarding whether or not its efforts to opt-into the 1996 MFS Agreement were subject to arbitration; confusion regarding the jurisdictional status of ISP-bound calls; uncertainty following the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*; or some other misunderstanding.[50] GNAPs argues, however, that the effect of the April 2, 1999 final order is to put them "back at ground zero" and leave them without an interconnection agreement nearly a year after their negotiations with Bell Atlantic began.[51] In light of this outcome, GNAPs alleges that the Virginia Commission has "failed to act to carry out its responsibilities under section 252 of the Act."[52]

---

45 *Id.*

46 *Id.* at 1.

47 *Id.* at 6.

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

49 Virginia Petition at 5.

50 *Id.* at 6.

51 *Id.*

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

III. DISCUSSION

16. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]."[53] Here, the Virginia Commission has not "failed to act" under Commission rules implementing section 252(e)(5) solely because it has issued a decision denying GNAPs the terms and conditions on which it sought to interconnect with Bell Atlantic.[54] As noted above, in the *Local Competition Order*, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's failure to act, noting its belief that "states [would] meet their responsibilities and obligations under the 1996 Act."[55] Therefore, the Commission determined that it would preempt a state commission's jurisdiction for "failure to act" under section 252(e)(5) only in those "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."[56] Thus, under the Commission's current rules, a state commission does not "fail to act" when it responds to a request for arbitration but subsequently dismisses or denies an arbitration within the nine month time limit in section 252(b)(4)(C).

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

18. Moreover, GNAPs does not claim that the Virginia Commission acted outside of any statutory time frame.[57] Although GNAPs contends that the Commission "failed to act to carry out its responsibilities under section 252 of the Act," we note that the Virginia Commission issued its April 2, 1999 final order within nine months after Bell Atlantic received GNAPs' request for interconnection, consistent with the requirements of section 252(b)(4)(C). According to the Virginia Commission, GNAPs presented no evidence regarding terms for an

---

53 47 U.S.C. § 252(e)(5).

54 *See* Virginia Commission Comments at 1.

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

56 47 C.F.R. § 51.801(b). *See also Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; Bell Atlantic Comments at 3.

57 *See* Bell Atlantic Comments at 3.

interconnection agreement with Bell Atlantic in the event the Virginia Commission determined it was not reasonable to require Bell Atlantic to offer the soon to expire 1996 MFS Agreement to GNAPs.[58] Because section 51.801 of the Commission's rules does not focus on the validity of state commission decisions, we do not see a basis for examining the underlying reasoning of the Virginia Commission. While we recognize the frustration GNAPs has experienced in its efforts to obtain interconnection with Bell Atlantic, we cannot conclude that the Virginia Commission has "failed to act" under the Commission's rules implementing section 252(e)(5).

19. Commission precedent supports our conclusion that there is no basis for preemption here. In the *Low Tech Order*, the Commission denied three preemption petitions filed by Low Tech Designs, Inc. (Low Tech), pursuant to section 252(e)(5).[59] The three state commission arbitration proceedings at issue dismissed or denied Low Tech's arbitration petition on the basis that Low Tech was not yet a certified carrier in the relevant state.[60] The Commission held that a state commission has not "failed to act" when it issues a decision that dismisses or denies an arbitration petition on grounds that prevent it from resolving the substantive issues in the arbitration petition.[61] There, as here, the petitioner essentially argued that there was a failure to act because the state commission had erroneously applied the law and our rules in rendering its decision. The Commission concluded that there was no basis to examine the substantive validity of the state commission's decision under section 51.801 of its rules. Accordingly, we do not preempt the Virginia Commission's jurisdiction and do not assume responsibility for this arbitration.

20. Finally, we note that the Commission's decision not to preempt the jurisdiction of the Virginia Commission does not leave GNAPs without a remedy. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.[62] Thus, GNAPs may still challenge the Virginia Commission determination in federal district court pursuant to section 252(e)(6).

21. In sum, we conclude that GNAPs has not met its burden of demonstrating that the Virginia Commission has "failed to act" within the meaning of the Commission's rules implementing section 252(e)(5). Rather, the Virginia Commission has met the requirements of

---

58 Virginia Commission Comments at 1-3.

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

60 *Id.*

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

62 47 U.S.C. § 252(e)(6); *Local Competition Order*, 11 FCC Rcd 15563, ¶ 124; Bell Atlantic Comments at 2.

the statute and our rules by responding to GNAPs' request for arbitration and rendering a final decision in the arbitration within nine months after Bell Atlantic received GNAPs' request for interconnection. We therefore do not preempt the jurisdiction of the Virginia Commission pursuant to the authority granted the Commission in section 252(e)(5).

IV. CONCLUSION

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

VI. ORDERING CLAUSES

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

FEDERAL COMMUNICATIONS COMMISSION

Robert C. Atkinson
Deputy Chief
Common Carrier Bureau

EXHIBIT C

ORDER NO. 75360

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

I. **Procedural History**

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

II. **Discussion**

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

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

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

---

[1] Due to some confusion regarding the service of process, the parties agreed that Bell Atlantic – Maryland, Inc. would respond to the Petition within twenty-five days after January 15, 1999.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

SIGNATURE PAGE

_____

_____

_____

_____

_____

Commissioners

CERTIFICATE OF SERVICE KPSC 2007-00255

It is hereby certified that a true and correct copy of the foregoing was served on the following individual by mailing a copy thereof, this 3rd day of July, 2007.

Honorable John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601

Mary K. Keyer

683385