



AT&T Kentucky  
601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

T: 502.582.8219  
F: 502.582.1573  
mary.keyer@att.com

February 1, 2008

**VIA HAND-DELIVERY**

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

**RECEIVED**

FEB 01 2008

**PUBLIC SERVICE  
COMMISSION**

Re: Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing  
Interconnection Agreement By and Between BellSouth  
Telecommunications, Inc. and Sprint Communications Company Limited  
Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P."  
dated January 1, 2001  
PSC 2007-00256

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10)  
copies of AT&T Kentucky's Opposition to Nextel Partners' Motion to Strike.

Thank you for your attention to this matter.

Sincerely,

  
Mary K. Keyer  
General Counsel-KY

Enclosures

cc: Parties of record

703204

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FEB 01 2008

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Adoption by NPCR, Inc. d/b/a Nextel Partners )  
of the Existing Interconnection )  
Agreement By and Between BellSouth )  
Telecommunications, Inc. and Sprint )  
Communications Company Limited Partnership, )  
Sprint Communications Company L.P., )  
Sprint Spectrum L.P." dated January 1, 2001 )

CASE NO.  
2007-00256

**AT&T KENTUCKY'S OPPOSITION TO  
NEXTEL PARTNERS' MOTION TO STRIKE**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky") hereby responds and objects to the Response and Motion to Strike ("Motion To Strike" or "Motion") filed by NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners") on January 28, 2008. For the reasons discussed below, the Kentucky Public Service Commission ("Commission") should deny the Motion.

Contrary to Nextel Partners' unfounded assertions, AT&T Kentucky did not file its Brief in Support of Request for Procedural Schedule and Hearing ("Brief") for the nefarious purposes alleged by Nextel Partners. Instead, AT&T Kentucky filed the brief to clarify that it is seeking a full hearing on the merits in this matter.<sup>1</sup> Therefore, AT&T Kentucky included in its Brief disputed factual issues to be resolved at hearing. Moreover, AT&T Kentucky is entitled to a hearing pursuant

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<sup>1</sup> In the Commission's order, dated January 10, 2008, the Commission granted AT&T Kentucky's Motion For Reconsideration, but did not in that order enter a procedural schedule setting the matter for hearing. Accordingly, to be afforded its due process rights and to assist the Commission in resolving the matter through a full evaluation of the underlying substantive issues, AT&T Kentucky filed its brief to respectfully request the Commission to conduct a hearing on the merits.

to 807 KAR 5:001, Section 4(b) which provides that "...the commission will grant a hearing ... [w]hen application has been made in a formal proceeding."

**Nextel Partners Fails to Meet the Standard for Striking  
AT&T Kentucky's Brief.**

In its flawed Motion, Nextel Partners fails to even provide the Commission with any analysis of the applicable standard regarding motions to strike. However, it is clear from a review of the standard generally applied by the Commission in resolving motions to strike, Nextel Partners' Motion does not meet the standard for granting such motions.

For example, Rule 12.06 of the Kentucky Rules of Civil Procedure provides:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter.

Nextel Partners has made no such showing. As set forth in AT&T Kentucky's Brief and as made clear here, Nextel Partners' Motion should be denied because it seeks to strike important relevant facts evincing the need for the requested hearing.

Moreover, the Commission exercises latitude in the application of the Rules of Civil Procedure, and the Commission has generally denied motions to strike in instances where the moving party is not unduly prejudiced, preferring instead to take in the evidence and give it the weight to which the Commission believes it is entitled. *See, e.g., In the Matter of: Dialog Telecommunications, Inc., v. BellSouth Telecommunications, Inc.*

Case No. 2005-00095, October 26, 2007 (denying AT&T Kentucky's motion to strike and instead giving necessary weight the Commission believed due the evidence); *In the Matter of: Investigation into the Membership of Louisville Gas and Electric Company and Kentucky Utilities Company in the Midwest Independent Transmission System Operator, Inc.* Case No. 2003-00266, February 4, 2005, at 4 (denying a motion to strike because it was "in effect a request for the Commission to adjudicate [the] case without an accurate and complete evidentiary record").

Equally invalid is Nextel Partners' assertion that because, in the Brief, AT&T Kentucky restates some of the things it asserted in its Motion for Reconsideration, the Brief should be stricken. *See, e.g. In Re Kentucky-American Water Company*, Case No. 2000-120, February 26, 2001, at 2 (finding "no reason to strike any portion of the testimony merely because it restates evidence adduced at the earlier hearing"). As stated above, AT&T Kentucky's Brief clarifies the need for a hearing in this matter, and in so doing necessarily points the Commission to the matters to be resolved at hearing.

**Nextel Partners' Reliance on KRS 278.400 As the Basis for Striking AT&T Kentucky's Brief Is Misplaced.**

In its Motion, Nextel Partners states that "KRS 278.400 contains no provision for additional pleadings by the petitioning party other than the motion for reconsideration which was filed by AT&T Kentucky on December 21, 2007."<sup>2</sup>

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<sup>2</sup> *Motion* at 3.

However, Nextel Partners' reliance on KRS 278.400 is entirely misplaced. KRS 278.400 entitled "Rehearing" provides:

After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.

As a threshold matter, AT&T Kentucky has not filed for a rehearing, no "determination has been made by the commission in any *hearing*" in this docket. As the Commission knows, an original hearing is precisely what AT&T Kentucky is requesting, and to what AT&T Kentucky is entitled pursuant to 807 KAR 5:001, Section 4(b). Moreover, although it is true that KRS 278.400 is silent on the matter of additional pleadings, importantly, it does not preclude such filings. The Commission does not grant motions to strike premised on fact patterns such as these. *See, e.g., In the Matter of: The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., and American Water Works Company, Inc. For Approval of a Change in Control of Kentucky-American Water Company, Case No. 2006-00197, August 14, 2006.*

In the *Joint Petition of Kentucky-American Water Company, supra*, the Kentucky Attorney General moved to strike a pleading filed by the joint petitioners, because 807 KAR 5:001, Section 7 “does not contemplate or authorize further pleadings.”<sup>3</sup> In denying the motion to strike, the Commission soundly reasoned that:

While Administrative Regulation 807 KAR 5:001, Section 7, makes no provision for a petitioner or opposing party to submit supplemental pleadings, we find nothing in that regulation to forbid them. As such **pleadings may better explain a party’s position and aid in our understanding of the issues, we find no reason to prohibit them generally. We further find that, as long as any opposing party is afforded an opportunity to respond to a petitioner’s supplemental pleading, no party is prejudiced by the submission of such pleading.**

*Id* at \*1 (emphasis added).

The same sound reasoning should be applied in the present instance. Even if KRS 278.400 were relevant, which it is not (since AT&T Kentucky has not had an initial hearing in this matter), while the statute does not expressly provide for supplemental pleadings it certainly does not affirmatively prohibit them. The Commission generally allows for supplemental filings in such instances and denies motions to strike.

Nextel Partners has the opportunity to respond and has failed to show, and cannot show, how it would be prejudiced by AT&T Kentucky’s Brief. Nextel Partners has a full opportunity to respond and provide the

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<sup>3</sup> 807 KAR 5:001, Section 7 deals specifically with petitions for confidential treatment of material. The analysis AT&T Kentucky provides regarding 807 KAR 5:001, Section 7, however, is directly applicable in the present instance because, like KRS 278.400, the statute provides guidelines regarding filings and responses. Like KRS 278.400, 807 KAR 5:001, Section 7 expressly affords parties the right to a petition and response, does not expressly provide for supplemental pleadings, but does not prohibit them. And as discussed in the text above, the Commission determined that under such circumstances, a motion to dismiss premised on the lack of express language permitting supplemental pleadings is properly denied.

factual basis for its underlying claim, and can proffer testimony it deems relevant at hearing.

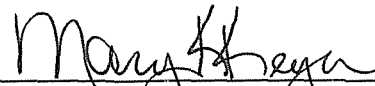
However, Nextel Partners is asking the Commission to adjudicate the case without an accurate and complete evidentiary record. This the Commission should not do. The equities are balanced, and public policy is better served by the Commission taking in all the evidence and affording it proper weight.

### **CONCLUSION**

For the foregoing reasons, the Commission should deny Nextel Partners' Motion to Strike.

Respectfully submitted, this 1st day of February, 2008.

AT&T Kentucky



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

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

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


**CERTIFICATE OF SERVICE KPSC 2007-00256**

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 1st day of February, 2008.

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

Legal/Telecom Mgmt. Privacy Group  
P.O. Box 7966  
Overland Park, KS 66207-0966

Sprint  
P.O. Box 7954  
Shawnee Mission, KS 66207-0954

  
Mary K. Keyer