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February 25, 2008

Via Electronic Submission

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: *Opposition of Sprint Nextel Corporation, In the Matter of AT&T ILEC Petition for Declaratory Ruling, WC Docket No. 08-23*

Dear Ms. Dortch:

Sprint Nextel Corporation ("Sprint Nextel") hereby submits a redacted version of the *Opposition of Sprint Nextel* filed in the above-captioned proceeding. This redacted version is available for public inspection. Sprint Nextel is filing under separate cover a confidential, non-redacted version of the *Opposition of Sprint Nextel.*

We are filing electronically one copy of this letter and the redacted *Opposition of Sprint Nextel* in the above-captioned docket.

Respectfully submitted,

/s/ Anna M. Gomez
Vice President, Government Affairs

Attachment

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

In the Matter of	)	
AT&T ILECs Petition for	)	WC Docket No. 08-23
Declaratory Ruling	)	

OPPOSITION OF SPRINT NEXTEL CORPORATION

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February 25, 2008

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. BACKGROUND 8

III. DISCUSSION 13

A. The Sprint-BellSouth B&K/Facility Provisions are Not State-Specific Prices. ... 13

B. The Sprint-BellSouth ICA Was Not Predicated Upon Traffic Flows Being or Remaining "Roughly in Balance" 15

C. Confidential Discussion Regarding the "Assumptions" of the Parties When Entering the Sprint-BellSouth ICA. 17

D. The Sprint-BellSouth Negotiated ICA Is Not Subject to the Section 252(d) Pricing Standards Applicable to Arbitrated Agreements. 19

E. Merger Condition 7.1 Does Not Include a "Port-In" Requirement. 22

F. AT&T's Reliance on 47 C.F.R. § 51.809(b) is Misplaced. 25

G. Adoption of a Bill-and-Keep Arrangement is Not Regulatory Arbitrage 29

H. The Commission Should Toll and Extend the Sunset Date Upon Which AT&T's Merger Conditions Would Otherwise Expire. 32

IV. CONCLUSION 32

Before the
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AT&T ILECs Petition for	)	WC Docket No. 08-23
Declaratory Ruling	)	

OPPOSITION OF
SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint Nextel")[1] hereby submits the following Opposition to the Petition of the AT&T incumbent local exchange carriers ("ILECs") for a Declaratory Ruling.[2] If granted, the Petition would allow AT&T to renege on the most basic commitments it made to obtain Federal Communications Commission ("FCC" or "Commission") approval of its merger with BellSouth Corporation. AT&T's Petition is nothing but its latest tactic in a seemingly endless arsenal, flouting the Commission's Merger Order by refusing to honor its promises. The Commission should promptly dismiss AT&T's delaying tactic, initiate enforcement proceedings and impose penalties upon AT&T for its brazen refusal to comply with the Merger Conditions.[3]

I. INTRODUCTION AND SUMMARY

The Commission approved the merger of AT&T, Inc. and BellSouth Corporation on December 29, 2006. In approving this merger the Commission adopted certain

[1] "Sprint Nextel" collectively refers to Sprint Communications Company L.P. ("Sprint CLEC"), Sprint Spectrum L.P. ("Sprint PCS"), the various Nextel entities throughout AT&T's 22-state region, and NPCR, Inc. d/b/a Nextel Partners (the Nextel entities and NPCR, Inc. are collectively referred to as "Nextel").
[2] Petition of the AT&T ILECs for a Declaratory Ruling, *In the Matter of Petition for Declaratory Ruling that Sprint Nextel Corporation, Its Affiliates, and Other Requesting Carriers May Not Impose A Bill-and-Keep Arrangement Or A Facility Pricing Arrangement Under the Commitments Approved By The Commission in Approving the AT&T-BellSouth Merger,* WC Docket No. 08-23 (filed February 5, 2008) (the "Petition").
[3] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at p. 112 and Appendix F at p. 147, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*Merger Order*"). Specific condition(s) are hereinafter referred to as the "Merger Condition(s)".

conditions. Under these Merger Conditions, AT&T, *inter alia,* agreed to "Reducing Transaction Costs Associated with Interconnection Agreements."[4] Specifically, AT&T and BellSouth committed to allow a carrier to "extend its current interconnection agreement" for three years,[5] and to "make available 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."[6] As Commissioner Copps explained in his concurring statement, these conditions were intended to mitigate concern over creation of a consolidated entity that could use its power to thwart competition.[7]

Consistent with the Merger Conditions, Sprint Nextel has sought to extend its currently effective regional nine-state interconnection agreement with BellSouth Telecommunications, Inc.[8] (the "Sprint-BellSouth ICA") for three years, and to adopt it throughout the newly merged AT&T 22-state territory for use by all of Sprint Nextel's

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[4] "Reducing Transaction Costs Associated with Interconnection Agreements" is the "seventh" un-numbered category of identified Merger Conditions in Appendix F. Sprint Nextel has used AT&T's numbering format to identify the interconnection Merger Conditions as "7.1", "7.2", "7.3" and "7.4". *See* Petition, footnote 2.

[5] Merger Condition 7.4.

[6] Merger Condition 7.1.

[7] *See Merger Order* at p. 172, Concurring Statement of Commissioner Michael J. Copps ("[t]o mitigate this concern, the merged entity has agreed to allow the portability of interconnection agreements and to ensure that the process of reaching such agreements is streamlined. These are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition"); *see also* Concurring Statement of Commissioner Jonathan S. Adelstein, *id.* at page 178 ("I was also pleased that we require the applicants to take a number of steps – including providing interconnection agreement portability and allowing parties to extend their existing agreements – to reduce the costs of negotiating interconnection agreements.").

[8] BellSouth Telecommunications, Inc. (hereinafter "BellSouth") is the AT&T operating ILEC entity that is incorporated in Georgia and now operates throughout the nine legacy BellSouth states d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee.

entities, including the newly merged Nextel iDEN network entities.[9] Despite the commitments it made to the FCC, AT&T has resisted Sprint Nextel's efforts at every step, raising every conceivable objection in piecemeal fashion and forcing Sprint Nextel to engage in protracted proceedings throughout AT&T's 22-state territory.[10]

Fortunately, the state Commissions have not been receptive to AT&T's attempts to avoid its Merger Conditions. Based on Merger Condition 7.4, the Kentucky Public Service Commission ("PSC") first ordered a three-year extension of the Sprint-BellSouth ICA as to the original parties (Sprint CLEC, Sprint PCS and BellSouth), and thereafter approved Nextel's requests to adopt the agreement under 47 U.S.C. § 252(i). Kentucky also rejected AT&T's newly raised "additional cost" argument.[11] Similarly, based on Merger Condition 7.1, the Public Utilities Commission of Ohio ("PUCO") recently

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[9] The Commission recognized that state commissions would continue to exercise concurrent jurisdiction over the subject of the merger conditions. *See Merger Order,* Appendix F at p. 147 ("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").

[10] For this reason, AT&T's recent filing certifying that it "has substantially complied with the terms of these [Appendix F] conditions in all material respects" cannot be taken seriously. *See also* Broadwing Communications, LLC v. AT&T et al., File No. EB-07-MD-005 (accusing AT&T, *inter alia,* of violating its merger condition related to special access rates).

[11] *In the Matter of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast,* Order issued September 18, 2007, Case No. 2007-00180 (finding concurrent jurisdiction; denying AT&T Motion to Dismiss; dismissing AT&T Issue 2 which attempted to force new contract provisions upon Sprint CLEC and Sprint PCS; and, finding commencement date for 3-year extension of Sprint-BellSouth ICA to be December 29, 2006) (the "Kentucky 3-year Extension Order"); *In the Matter of Adoption by Nextel West Corp. 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.* and *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.,* Orders issued December 18, 2007, Case Nos. 2007-00255 and 2007-00256 (granting Nextel's requests to adopt the Sprint-BellSouth ICA and denying AT&T's Motions to Dismiss) (the "Kentucky Adoption Orders"); Kentucky Public Service Commission Orders issued February 18, 2008, Case Nos. 2007-00255 and 2007-00256 (denying AT&T Kentucky's Motions for Reconsideration in which it raised the argument that Nextel could not adopt these agreements because AT&T would incur additional costs, see discussion infra at p.25) (the "Kentucky Reconsideration Orders").

ordered AT&T to permit Sprint Nextel to adopt the Sprint-BellSouth ICA (as extended three years in Kentucky) for all Sprint Nextel entities in Ohio, an AT&T ILEC territory.[12]

AT&T now seeks a Declaratory Ruling from this Commission that will bring all state proceedings to a halt, in all likelihood allowing the 42-month clock on the Merger Conditions to expire before final resolution is achieved. This Petition is a collateral attack upon the states' concurrent jurisdiction that seeks to restrict the application of AT&T's Merger Conditions and overturn the state decisions adverse to AT&T's position. Specifically, AT&T asks the Commission to conclude that the bill-and-keep and the equal sharing of interconnection facility costs provisions ("B&K/Facility Provisions") that were negotiated between BellSouth, Sprint CLEC and Sprint PCS are "state specific pricing" provisions that cannot be used either (a) by Sprint Nextel in any of the thirteen-legacy SBC states[13], or (b) by Sprint Nextel's iDEN entities within the nine-legacy BellSouth[14] states.

AT&T argues that these arrangements "were predicated on specific assumptions by BellSouth about the balance of traffic between the BellSouth ILECs and the two Sprint entities within the BellSouth region"[15] – implying, without citation to any provision of the agreement, that the creation and continued use of the B&K/Facility Provisions are premised on an agreement that traffic flows were, and had to remain, "roughly in balance." This implication is both factually incorrect and an improper

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[12] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. v. The Ohio Bell Telephone Company d/b/a AT&T Ohio,* Finding and Order issued February 5, 2008, Case No. 07-1136-TP-CSS (the "Ohio Adoption Order").

[13] The thirteen-legacy SBC states include: Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas and Wisconsin.

[14] The nine-legacy BellSouth states include: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

[15] Petition at p. 1.

attempt to insert a new contractual term within the agreement. If BellSouth had wished to restrict the application of the agreement based on a balance of traffic, it should have included such a provision in the contract terms.

The reality, however, is that the B&K/Facility Provisions are not predicated on any state-specific pricing mechanism and did not require a balance of traffic between the parties, either at the inception of the agreement or anytime thereafter. ***BEGIN CONFIDENTIAL INFORMATION*** [redacted] ***END CONFIDENTIAL INFORMATION*** To now suggest that the agreement was based upon an understanding that traffic was and would remain balanced is not supported by the facts.

BEGIN CONFIDENTIAL INFORMATION [redacted] ***END CONFIDENTIAL INFORMATION*** Sprint Nextel produced a cost study in a Florida Public Service Commission arbitration[16] to demonstrate that its costs of termination significantly exceeded those of BellSouth. It is the Florida arbitration cost study that is referenced in

[16] *See In Re: Petition by Sprint PCS for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Pursuant to Section 252 of the Communications Act*, Florida Public Service Commission, Docket No. 000761-T (filed June 23, 2000).

paragraph 6.1 of the contract. ***BEGIN CONFIDENTIAL INFORMATION*** [redacted] ***END CONFIDENTIAL INFORMATION***

To suggest that the Sprint-BellSouth ICA B&K/Facility Provisions constitute "regulatory arbitrage" is absurd and completely inconsistent with AT&T's previous positions on this issue. In filings before this Commission, AT&T has repeatedly argued that bill-and-keep is not only appropriate, but precisely the mechanism that would resolve

the problems of arbitrage surrounding the current intercarrier compensation regime.[17] Indeed, in the context of its interexchange service, AT&T sought and successfully imposed a bill-and-keep arrangement on Sprint Nextel's wireless entities, despite the fact that there is absolutely no "balance of traffic" in that circumstance.[18] AT&T interexchange traffic is 100% one-way, resulting in Sprint Nextel's wireless entities terminating AT&T interexchange traffic for free.

AT&T has also provided no explanation why state commissions should not continue to resolve the pending Merger Condition matters under their concurrent jurisdiction. Indeed, the arguments in AT&T's Petition highlight the reasons a state Commission is the appropriate forum for resolving these matters. For example, AT&T points to section 51.809(b) of the Commission's rules as evidence that it has no obligation to permit in-state adoptions of interconnection agreements pursuant to Section 252(i). Section 51.809, however, specifically calls on the states to resolve factual issues regarding the timeliness and substantive merit of an ILEC objection to a 252(i) adoption based upon 51.809(b).

For the reasons stated above, and further set forth herein, the Commission should deny all relief requested by AT&T, promptly dismiss AT&T's Petition, impose penalties upon AT&T for failure to comply with its merger conditions, and grant such further relief as sought herein by Sprint Nextel.

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[17] Comments of SBC Communications, Inc., *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 (August 21, 2001) p. 25; Reply Comments of AT&T Wireless Services, Inc. on Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92 (November 5, 2001) p. 1-2; Comments of BellSouth, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92 (August 21, 2001) p. 12.

[18] Declaratory Ruling, *In the matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges,* 17 FCC Rcd 13192, WT Docket 01-316, FCC 02-203 (July 3, 2002).

II. BACKGROUND

Merger Condition 7.1 requires AT&T to make available to any requesting telecommunications carrier any entire effective negotiated or arbitrated interconnection agreement that was entered into in any state within AT&T's 22-state region subject to specified limitations, including state-specific pricing.[19] Merger Condition 7.4 requires AT&T to permit a requesting telecommunications carrier to extend its current interconnection agreement for a period up to three years.[20] These conditions apply in the AT&T/BellSouth in-region territory for a period of forty-two months from the Merger Closing Date and automatically sunset thereafter.[21] Therefore, the "clock" presumably started running as to any requesting carrier's ability to obtain any benefit from these Merger Conditions on the merger approval date of December 29, 2006.

When the AT&T/BellSouth merger was approved, Sprint CLEC and Sprint PCS were operating under the Sprint-BellSouth ICA. Although the companies were engaged in Section 251-252[22] negotiations for a new interconnection agreement, no new agreement had been reached and the option of arbitration remained open for both parties. After the Commission conditionally approved the merger, however, Sprint Nextel had the

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[19] *Merger Order,* Appendix F at p. 149, Merger Condition 7.1: "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."

[20] *Merger Order,* Appendix F at p. 150, Merger Condition 7.4: "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."

[21] *Merger Order*, Appendix F at p. 147.

[22] 47 U.S.C. §§ 251 and 252.

right under the conditions of approval to extend its existing ICA and was not required to incur the cost of either continuing to negotiate or arbitrate with BellSouth.

On March 20, 2007, pursuant to Merger Condition 7.4, Sprint Nextel requested that AT&T extend the Sprint-BellSouth ICA for a full three years. Although AT&T initially acknowledged that pursuant to Merger Condition 7.4, the existing nine-state regional Sprint-BellSouth ICA could be extended three years, under AT&T's interpretation of the Merger Commitment, AT&T would only offer a three-year extension *with a retroactive commencement date that preceded the AT&T/BellSouth merger approval by two-years, effectively resulting in only a one-year post-merger extension.*

On May 18, 2007, Sprint Nextel notified AT&T that it was exercising its right to adopt the Sprint-BellSouth ICA for its newly merged Nextel operating companies under the Merger Conditions and 47 U.S.C. § 252(i). Sprint Nextel also notified AT&T, on July 10, 2007, that all of its corporate operating entities, Sprint CLEC, Sprint PCS and the Nextel entities, sought to adopt the Sprint-BellSouth ICA in AT&T ILEC territory, specifically Ohio. And, finally, in response to receiving notice from AT&T that AT&T was terminating the existing interconnection agreements with Sprint Nextel for all operating companies in the balance of AT&T's 22-state territory, Sprint Nextel elected to adopt the Sprint-BellSouth ICA in these remaining AT&T ILEC states. AT&T has effectively refused each and every attempt by Sprint Nextel to adopt the Sprint-BellSouth ICA, either for the Nextel operating companies within AT&T's legacy BellSouth states or for the Sprint Nextel entities collectively within AT&T's legacy SBC states.

In response to AT&T's refusals to honor its obligations under the Merger Conditions and 252(i), between April 6, 2007 and January 2, 2008, Sprint Nextel filed

state Commission proceedings to implement its rights to extend and adopt the Sprint-BellSouth ICA throughout AT&T's 22-state region. In the nine legacy BellSouth states, Sprint CLEC and Sprint PCS filed single-issue arbitrations over AT&T's refusal to permit a post-merger three-year extension of the Sprint-BellSouth ICA.[23] In the nine legacy BellSouth states, the Nextel entities filed separate proceedings to adopt the Sprint-BellSouth ICA pursuant to Merger Condition 7.1, 7.2[24] and 47 U.S.C. § 252(i).[25] And, in the 13 legacy SBC states, the Sprint Nextel entities filed proceedings under state Commission procedures to collectively adopt the Sprint-BellSouth ICA.[26]

On September 18, 2007, the Kentucky PSC rejected AT&T's challenge to the Kentucky PSC's exercise of concurrent jurisdiction over the Merger Conditions and ordered an extension of the Sprint-BellSouth ICA for three years from December 29, 2006. The Kentucky PSC found AT&T's assertion that a three-year extension should commence two years prior to approval of the AT&T/BellSouth merger "is wholly inconsistent with the FCC merger commitment directive and would create an unreasonable result."[27] Notwithstanding this Order, Sprint Nextel was required to file a Motion to Enforce the Kentucky Extension Order before AT&T would agree to an appropriate implementation amendment. Thereafter, the Kentucky PSC granted the

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[23] *See, e.g.,* Kentucky Public Service Commission Sprint CLEC/Sprint PCS – AT&T Kentucky Arbitration Case No. 2007-00180.

[24] *Merger Order,* Appendix F at p. 149, Merger Condition 7.2: "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." AT&T has never claimed any Sprint Nextel entity adoption would be contrary to Merger Condition 7.2. The Sprint-BellSouth ICA has been repeatedly amended over time, including a March 11, 2006 effective date amendment that implements changes resulting from the Commission's Triennial Review Remand Order.

[25] *See, e.g.,* Kentucky Public Service Commission Nextel Adoption Case No. 2007-00255.

[26] *See, e.g.,* Public Utilities Commission of Ohio, Sprint Nextel-AT&T Ohio Adoption Case No. 07-1136-TP-CSS.

[27] Kentucky Extension Order, at p. 12.

Nextel subsidiaries' requests to adopt the Sprint-BellSouth ICA upon finding "that there is a reasonable time left to this agreement making its adoption lawful."[28] Within the past week, the Kentucky PSC further rejected AT&T's Motion for Reconsideration that raised new, untimely and incomplete objections.[29]

The Public Utilities Commission of Ohio has also rejected AT&T's claims and ordered that Sprint CLEC, Sprint PCS and the Nextel subsidiaries can, pursuant to Merger Condition 7.1, port and adopt in Ohio the Sprint-BellSouth ICA as extended three years by the Kentucky Commission, subject to the state-specific modifications. The Ohio PUC concluded that "the FCC clarified that the states have jurisdiction over the matters arising under the commitments," that the existence of "state-specific standards suggests that the states would be better qualified than the FCC to determine whether interconnection agreements adhere to unique state standards," and "it would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do."[30]

The Kentucky Arbitration Order extending the Sprint-BellSouth ICA three years brought sufficient pressure to bear upon AT&T to "modify" its position on Merger Condition 7.4 and not only agree to a post-merger three year extension of the Sprint-BellSouth ICA throughout the remaining legacy-BellSouth states, but to allow other carriers throughout its 22-state territory the benefit of full three year post-merger

[28] Kentucky Adoption Orders, at p. 3.
[29] Kentucky Reconsideration Orders, at p. 17 ("The practical effect of AT&T Kentucky's untimely and incomplete objections is to attempt to turn a simple adoption proceeding into an arbitration proceeding, possibly exceeding over a year in length, a result that could have been avoided had AT&T raised its objections when the petition was filed. Such a result is not only unfair, but it is also prohibited, as it is provided for in neither law nor regulation. Had AT&T raised its objections under 47 C.F.R. § 51.809 when the petition was filed, the Commission could have addressed all objections to the petition at the same time and this proceeding would already be complete.").
[30] Ohio Adoption Order at pp. 13 -14.

extensions.[31] To date, however, neither the Kentucky Adoption or Reconsideration Orders, nor the Ohio Adoption Order, has altered AT&T's position regarding adoption of the Sprint-BellSouth ICA in non-BellSouth states or by all Sprint Nextel entities in the BellSouth states.

Although the extension of the Sprint-BellSouth ICA eliminated AT&T's "timeliness" objections to Sprint Nextel's adoption requests, AT&T then began contending before the states that there are "issues of fact" to be resolved, including its argument that it will incur additional costs under section 51.809(b) of the Commission's rules.[32] This should be juxtaposed with the Petition before the FCC which, despite raising the same arguments, affirmatively states "[t]here is no need for extensive evidence gathering or fact-finding."[33] It is evident at this point that AT&T is merely attempting to generate further delay while it attempts to reverse its losses before the states.

As evidence of this delaying tactic, Sprint Nextel notes that AT&T has not only filed its Petition with this Commission, but is filing the Petition with the state Commissions across the 22-state AT&T region, accompanied by requests that the state Commissions hold their state adoption proceeding in abeyance, or otherwise "defer" taking any further action until the Commission rules on AT&T's Petition.[34] AT&T has

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[31] Even AT&T's "modified" position, however, attempts to re-write Merger Condition 7.4 to impose limitations that do not otherwise exist in 7.4 as originally approved by the Commission.

[32] *See, e.g.,* Kentucky Reconsideration Order at p. 4 describing AT&T Kentucky "Brief in Support of Request for Procedural Schedule and Hearing" filed January 24, 2008 which "contains arguments virtually identical to those AT&T Kentucky raised in its motion for reconsideration except that, for the first time, AT&T Kentucky raised the argument that the adoption might result in higher costs in its provision of the agreement.").

[33] Petition at p. 17.

[34] *See, e.g.* Supplemental Submission of AT&T Kentucky, Kentucky Case Nos. 2007-00255 and 00255 filed February 8, 2008 (AT&T Kentucky expectation that FCC Petition "may render unnecessary any

asked the states to defer action, despite the fact that AT&T in at least one state proceeding has sought to avoid FCC involvement based on the rationale that "AT&T knows" the FCC's intent of the Merger Conditions and did not need FCC guidance.[35] Notwithstanding its request for "expedited" consideration, AT&T's Petition is an obvious attempt to now bring the state adoption proceedings to a halt and the FCC should not countenance such a delaying tactic designed to chill the state Commissions' exercise of their concurrent jurisdiction while the Merger Conditions' time clock continues to run.

III. DISCUSSION

A. The Sprint-BellSouth B&K/Facility Provisions are Not State-Specific Prices.

AT&T incorrectly argues that the Merger Conditions prohibit the porting of the BellSouth ICA because it contains "state-specific pricing" provisions.[36] Sprint Nextel, however, did not enter into a state-specific bill-and-keep arrangement with BellSouth. Sprint Nextel entered into an agreement with BellSouth to address the exchange of all traffic between all of Sprint CLEC's, Sprint PCS's and BellSouth's operating entities under a bill-and-keep arrangement, regardless of state.[37] These provisions addressed the manner in which BellSouth would do business with all of the competitive Sprint entities operating in BellSouth's service territories. While effectuation of that agreement

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further proceedings" in these dockets and urges the Kentucky Commission to "defer ruling on this matter while the Petition is pending before the FCC").

[35] *See In the Matter of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast*, AT&T witness Scot Ferguson, Transcript of October 17, 2007 at pp. 156-158, Docket No. 25064-U ("CHAIRMAN BAKER: Well, the question I think really isn't what your understanding is. I mean isn't the issue what the FCC's understanding of the Merger Condition is? And I would imagine you might have a different version of what that might mean. THE WITNESS: Well, if I may step back, I'll say AT&T knows what the intent of it is. ... CHAIRMAN BAKER: ... How do you know what the FCC's interpretation of this is? Is it just through personal accounting of the negotiators for AT&T, through just their personal recollection, nothing written down - - that's their interpretation of the FCC's interpretation of the merger agreement? THE WITNESS: I would say that that's as good a characterization as I could give to it, what you just said - - I would agree with that").

[36] Petition at pp. 2, 10-13.

[37] See, Exhibit A and discussion infra.

required the parties to file interconnection agreements in each state, the intent of the parties was to implement a universal bill-and-keep arrangement. While AT&T may not wish to honor the terms of this agreement, it has committed to do so under the terms of its Merger Conditions.

The terms of the contract confirm that the B&K/Facility Provisions are not state-specific prices. While various appendices to the ICA *do* contain state-specific-prices that were previously established through state cost proceedings, Sprint does not seek to export these state-specific prices from one AT&T ILEC state to another. The B&K/Facility Provisions, however, which are contained within the core terms and conditions of the body of the agreement, *are identical for every state within the BellSouth operating territories and were not imposed by virtue of a state-arbitration decision or state-cost proceeding.*

AT&T's attempt to re-write history, undo the basis of the Sprint-BellSouth ICA, and avoid its obligations under the Merger Conditions, cannot be blessed by the Commission. Sprint Nextel entered this agreement precisely to avoid the need to engage in state-by-state arbitrations that would establish state-specific asymmetrical prices based upon state-by-state cost studies and for which any state-by-state balance-of-traffic studies would be entirely irrelevant. Likewise, the Merger Conditions were designed to allow competitive carriers to avoid the cost of such state proceedings, by allowing carriers to adopt their existing arrangements for use in whatever AT&T state territory the carrier saw fit. Now that it has made this commitment, AT&T cannot selectively determine which agreements it will permit to be used in any given state territory by any given carrier.

B. The Sprint-BellSouth ICA Was Not Predicated Upon Traffic Flows Being or Remaining "Roughly in Balance."

AT&T makes repeated unsupported assertions that the B&K/Facility Provisions in the Sprint-BellSouth ICA "were predicated on specific *assumptions by BellSouth*" that the traffic flows between the BellSouth ILECs and the two Sprint entities (Sprint CLEC and Sprint PCS) "were roughly in balance."[38] Grounded upon such assertions, AT&T contends the B&K/Facility Provisions "are pricing arrangements that are specific, not only to the BellSouth states, but to the two Sprint affiliates that were the original parties to the agreement."[39] This argument is directly refuted by the terms of the contract itself and amounts to nothing more than an attempt to insert a new and additional contract term after the fact.

AT&T does not, and cannot, cite to a single provision within the Sprint-BellSouth ICA that requires a balance of traffic or that permits the parties to undo the B&K/Facility Provisions if traffic is, or becomes, out of balance. If, as AT&T contends, this was a rate arrangement, AT&T is correct that BellSouth would have insisted on an express balance of traffic provision. BellSouth did not insert such a provision, however, precisely because it was not attempting to impose a "state-specific rate" when it entered into this agreement. AT&T cannot now attempt to insert this provision into the contract after the fact.

Indeed, AT&T ignores the key operative clause in the provision of the contract that it cites, which expressly provides that the bill-and-keep arrangement will continue even if the mix of parties changes as long as neither Sprint entity forced BellSouth into a subsequent individual arrangement that required BellSouth to pay reciprocal

[38] *See e.g.* Petition at p. 1 (emphasis added).
[39] *Id.*

compensation.[40] If, for example, Sprint CLEC opted into a stand-alone AT&T CLEC agreement (under which the compensation is indeed typically bill and keep), the existing bill-and-keep arrangement with Sprint PCS would continue under the Sprint ICA, despite the fact that this would have changed whatever the overall ratio of traffic exchanged between the three parties under the Sprint-BellSouth ICA might otherwise have been at that time. There simply is no requirement that both a wireline and wireless Sprint entity remain as joint parties to the Sprint-BellSouth ICA throughout the entirety of the agreement, or that the Sprint entities either combined or individually, maintain any particular traffic-exchange ratio with BellSouth, "roughly in balance" or not.

AT&T, in suggesting that a "balance of traffic" was the basis of this agreement, has also chosen to ignore the reasons and conditions under which Sprint CLEC, Sprint PCS and BellSouth agreed to the B&K/Facility Provisions. As noted above, the Sprint-BellSouth ICA was entered into only after Sprint PCS had filed for arbitration before the Florida Public Service Commission, seeking to recover its actual costs of termination pursuant to 47 C.F.R. §51.711(b). ***BEGIN CONFIDENTIAL INFORMATION***

[redacted]

[redacted] ***END CONFIDENTIAL INFORMATION***

[40] Section 6.1, quoted at Petition p. 5 expressly states "...the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act ***which calls for reciprocal compensation,*** the bill and keep arrangement between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth" (emphasis added).

C. Confidential Discussion Regarding the "Assumptions" of the Parties When Entering the Sprint-BellSouth ICA.

BEGIN CONFIDENTIAL SECTION

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]. ***END CONFIDENTIAL INFORMATION***

D. The Sprint-BellSouth Negotiated ICA Is Not Subject to the Section 252(d) Pricing Standards Applicable to Arbitrated Agreements.

AT&T argues that the B&K/Facility Provisions are a state-specific "pricing plan" because bill-and-keep is mentioned as an alternative within the pricing provisions of Section 252(d). According to AT&T, "the 1996 Act classifies bill-and-keep arrangements as a form of pricing plan, as one of the '*Pricing* Standards' governed by Section 252(d)."[41] AT&T's argument fails, however, because the B&K/Facility Provisions between BellSouth Corporation and Sprint Nextel were not the result of a

[41] AT&T Petition at p. 11 (emphasis in Petition).

Section 252 state-specific arbitration that imposed such "pricing standards" by virtue of the approval process under Section 252(e)(2)*(B),*[42] but were instead pursuant to a voluntarily negotiated arrangement between two companies for all states subject to approval under Section 252(e)(2)*(A),*[43] which makes no reference to the pricing standards set forth in Section 252(d).

Section 252 of the Act, among other things, sets forth the procedures for state arbitration of the terms and conditions of an interconnection agreement under the standards of Section 251(b) and (c).[44] Section 252(d)(2) sets forth the manner in which a state Commission would determine whether rates for transport and termination are "just and reasonable" when conducting an arbitration. However, Section 252 states specifically that an ILEC, upon receiving a request for interconnection, "may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251*."[45] It was this path that BellSouth chose, not state-specific arbitration.

Section 252(d)(2)(B)(i) is not, as AT&T incorrectly implies, a finding that bill-and-keep is always a pricing arrangement or that it can be entered only when traffic is in balance. Section 252(d)(2)(B)(i) merely states that the pricing standards applicable to arbitrated provisions implementing section 251(b)(5) do not "*preclude* arrangements that

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[42] 47 U.S.C. § 252(e)(2)(B) provides that a "State commission may only reject … an agreement (or portion thereof) *adopted by arbitration* … if it finds that the agreement does not meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section*" (emphasis added). Subsection "(d)" of section 252 contains the "Pricing standards" relied upon by AT&T.

[43] 47 U.S.C. § 252(e)(2)(A) provides that a "State commission may only reject … an agreement (or any portion thereof) *adopted by negotiation* … if it finds that – (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity" (emphasis added).

[44] 47 U.S.C. §251(c)(1).

[45] 47 U.S.C. §252(a) (emphasis added).

afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)" (emphasis added). Because those standards apply only to arbitrated agreements, nothing prevents carriers from agreeing to other arrangements.

In this case, the B&K/Facility Provisions were knowingly agreed to without any restriction based upon either the volume or balance of traffic exchanged between the original parties. *Under these circumstances*, the use of bill-and-keep and the equal sharing of interconnection facility costs were intended to be the purest form of a "negotiated bill-and-keep" arrangement. Voluntarily established outside the parameters of arbitration, bill-and-keep means "an arrangement in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network. Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network."[46]

The Commission has repeatedly recognized that a bill-and-keep arrangement is an alternative mechanism to the traditional "calling party's network pays" reciprocal compensation arrangements.[47] In the context of bill-and-keep reached through negotiations, the parties make their own determination as to the economic efficiency of

[46] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16139 at ¶ 1096 (1996) ("First Report and Order").

[47] *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, at ¶ 9 (2001) ("An alternative to such CPNP arrangements, however, is a 'bill and keep' arrangement."); *see also In the Matter of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge Caps*, CC Dockets No. 96-262, 94-1, Order, 17 FCC Rcd 10868 at ¶ 44 (Describing bill and keep systems as an alternative to traditional intercarrier compensation mechanisms).

the arrangement.[48] It is only when a party seeks to impose bill-and-keep upon the ILEC *through a Section 251-252 arbitration* that a "roughly balanced" exchange of traffic requirement arises.[49]

Merger Condition 7.1 expressly provides that AT&T "shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, *whether negotiated or arbitrated*" (emphasis added). The B&K/Facility Provisions in this agreement were negotiated between the parties, not arbitrated, and accordingly are not subject to the pricing requirements of Section 252(d)(2). The Commission should not allow AT&T to make promises in exchange for the opportunity to reap billions of dollars in benefits from its merger, and then re-write those promises in order to avoid Sprint Nextel's use of voluntarily negotiated B&K/Facility Provisions throughout AT&T's 22 states.

E. Merger Condition 7.1 Does Not Include a "Port-In" Requirement.

AT&T contends Merger Condition 7.1 "does not apply to in-state adoptions of interconnection agreements,"[50] asserting that the cable telephony providers that proposed Merger Condition 7.1 did not intend for it to include "in-state" adoptions:

> The cable operators claimed that they experienced delays and increased costs associated with negotiating interconnection agreements and argued that allowing them, *inter alia,* to port interconnection agreements across state boundaries, subject to technical feasibility and state-specific pricing and performance plans, would allow them to enter the market more quickly.[51]

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[48] *See* First Report and Order at ¶ 1118.
[49] *See* First Report and Order at ¶ 1097 – 1118.
[50] *See* Petition at p. 2, requested declaratory ruling "(3)".
[51] Petition at p. 4, citing *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control,* Ex Parte Presentation filed by Michael Pryor, Mintz, Levin, WC Docket No. 06-74 (filed September 27, 2006).

Initially, it should be noted that what the cable telephony providers intended is no longer relevant to interpreting the clear language of the Merger Conditions. The Commission adopted AT&T's commitments as conditions to approving its merger, and it is the language of the Commission's Order that controls, not *ex* parte presentations prior to adoption of the Order. Nevertheless, the cable telephony providers' Ex Parte Presentation cited by AT&T does not make any reference to a "port-in" requirement, and clearly documents the express concerns over AT&T's dilatory tactics with respect to in-state "opt-ins" and dealings with multiple in-state AT&T entities:

> Cable telephony providers have experienced first hand the delays and costs that can be imposed when attempting to negotiate, *or even just opt into*, interconnection agreements with the merger applicants. The combined resource imbalance created by the merger, on the heels of the AT&T/SBC merger, will fundamentally disrupt a core goal of the Communications Act, namely that entrants and incumbents would be able to negotiate and arbitrate as equals. This resource imbalance would clearly advantage AT&T because the costs of arbitration (per customer) for a cable telephone provider would far exceed any costs incurred by AT&T. As a result, any express or implicit strategy by AT&T that creates unnecessary litigation and/or arbitration costs would harm competitors far more than it would harm AT&T. *The Commission thus should consider requiring AT&T to abide by procedures that would streamline the interconnection agreement adoption process and eliminate areas of potential friction.*
>
> Specifically, we recommend that AT&T should be required to permit cable telephony providers to opt into any entire interconnection agreement, whether negotiated or arbitrated, in any state across the merged entity's footprint, subject to technical feasibility and exclusive of state-specific pricing and performance plans.
>
> ... Nor should AT&T be permitted to require competitors to enter into separate agreements for one state simply because AT&T has multiple affiliates operating *in the same state*."[52]

[52] *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, Ex Parte Presentation filed by Michael Pryor, Mintz, Levin, WC Docket No. 06-74 (filed September 27, 2006) (emphasis added).

The cable telephony providers' comments do not contain any suggestion that Merger Condition 7.1 was limited to the adoption of an AT&T agreement that was entered into in one state being "ported into" another state.

When the Commission approved the merger, Commissioner Copps acknowledged that: (a) concern was raised with the creation of a "consolidated entity – one owning nearly all of the telephone network in roughly half the country – using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether"; (b) "[t]o mitigate this concern, the merged entity has agreed to allow the *portability of interconnection agreements and to ensure that the process of reaching such agreements is streamlined*"; and, c) that "[t]hese are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition."[53] These comments were clearly in support of the cable companies' concerns and were certainly not intended in any way to interject a "port-in" requirement within Merger Condition 7.1 that would otherwise limit what the cable telephony companies had proposed.

Even if Merger Condition 7.1 were construed to include a "port-in" requirement, however, one cannot ignore what logically follows from the fact that the Sprint-BellSouth ICA is a nine-state regional agreement that was submitted to and approved by each Commission in the same form in each of the nine-legacy BellSouth states.[54] Sprint

[53] *Merger Order,* Concurring Statement of Commissioner Michael J. Copps at p. 172 *see also* Concurring Statement of Commissioner Jonathan S. Adelstein, *id.* at p. 178 ("I was also pleased that we require the applicants to take a number of steps – including providing interconnection agreement portability an allowing parties to extend their existing agreements – to reduce the costs of negotiating interconnection agreements.").

[54] *See, e.g.* Kentucky Public Service Commission Nextel Adoption Case No. 2007-00255, Nextel's Notice of Adoption of Interconnection Agreement at p. 2 ("The Sprint ICA that Nextel adopts was initially approved by the Commission in Case No. 2000-480. Nextel adopts the Sprint ICA in its entirety and as amended. … The Sprint ICA has been filed and approved in each of the 9-legacy BellSouth states. A true

Nextel's adoption in one BellSouth state could simply be treated as the "porting-in" of the Sprint-BellSouth ICA from any of the other remaining eight-legacy BellSouth states. Being the same nine-state regional ICA, each version previously filed in the adopting state already has its state-specific provisions within it, resulting in no need for it to be further "conformed" in the adopting state.

Based on the foregoing, Sprint Nextel is entitled to adopt the Sprint-BellSouth ICA for each Sprint Nextel entity under Merger Condition 7.1 whether it has a "port-in" requirement or not.

F. AT&T's Reliance on 47 C.F.R. § 51.809(b) is Misplaced.

AT&T contends that Sprint Nextel cannot adopt the Sprint-BellSouth ICA on behalf of its Nextel subsidiaries because Section 252(i) of the Act and section 51.809(b) of the Commission's rules prohibit Sprint Nextel from adopting an agreement that would "change the mix of parties."[55] Specifically, AT&T asserts that adoption by the Nextel operating entities would increase AT&T's costs of entering the agreement. This argument is flawed on at least two levels. First, the attempt to insert a "similarly situated" requirement into section 51.809 has already been expressly rejected by the Commission. Second, AT&T has not, and indeed cannot, demonstrate that the cost of terminating traffic from Sprint Nextel's iDEN network is any different from the cost of terminating traffic from Sprint Nextel's CDMA network.

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and correct copy of the agreement, as amended, can be viewed on AT&T Southeast's website at http://cpr.bellsouthc.com/clec/docs/all_states/800aa291.pdf and is incorporated by reference herein. Due to the size of the file and its general availability, we are not providing a copy of the agreement with this letter, but will provide paper or electronic copies upon request."). Sprint Nextel notes that AT&T has apparently removed the foregoing Sprint-BellSouth ICA filing from its website to result in the agreement no longer being easily accessible for public viewing as originally cited in both the Nextel adoption proceedings and the Sprint-AT&T arbitrations.

[55] *See* Petition at p. 6.

AT&T omits the most relevant sub-section of section 51.809 of the Commission's Rule, 51.809(a) which provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. *An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.* [Emphasis added].

When the Commission modified its "pick and choose" interpretation of section 51.809 to the current "all or nothing" rule, it did so in direct contradiction to BellSouth's stated contention in that proceeding that ILECs should be permitted to restrict adoptions of interconnection agreements to "similarly situated" carriers.[56] In explaining its risks associated with the "pick and choose" rule in the context of a potential bill-and-keep scenario, BellSouth stated that if it agreed to bill-and-keep and "construct[s] contract language specific to this situation, *there is still risk that CLECs who are not similarly situated will argue they should be allowed to adopt the language, or parts thereof.*"[57] Notwithstanding such assertions, the Commission held:

> We also reject the contention of at least one commentator that incumbent LECS should be permitted to restrict adoptions to "similarly situated" carriers. *We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement.* Subject to the limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety that the requesting carrier deems appropriate for its business needs. Because the all-or-nothing rule should be more easily administered and enforced than the

[56] Second Report and Order at ¶ 30 and n. 101.

[57] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No.01-338, "Affidavit of Jerry D. Hendrix on Behalf of BellSouth Telecommunications Inc. ('Bellsouth')" filed by letter of Mary L. Henze, BellSouth Assistant Vice President Federal Regulatory, to Marlene Dortch, FCC, dated May 11, 2004.

> current rule, we do not believe that further clarifications are warranted at this time.[58]

Subsequent to the Second Report and Order, AT&T's other predecessor, SBC, attempted yet a further spin to the "similarly situated" argument in an effort to avoid filing and making available in its entirety all of the terms of an agreement it had entered into with a CLEC named Sage Telecom.[59] In *Sage*, SBC entered into a "Local Wholesale Complete Agreement" ("LWC") that included not only products and services subject to the requirements of the Act, but also certain products and services that were not governed by either Sections §§ 251 or 252. Following the parties' press release and filing of only that portion of the LWC that SBC and Sage considered to be specifically required under Section 251 of the Act, other CLECs filed a petition requiring the filing of the entire LWC. The Texas Commission found the LWC was an integrated agreement resulting in the entire agreement being an interconnection agreement subject to filing and thereby being made available for adoption by other CLECs pursuant to Section 252(i).

On appeal, SBC argued that "requiring it to make the terms of the entire LWC agreement with Sage available to all CLECs was problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs."[60] The federal district court rejected this argument stating:

> [SBC's] argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry

[58] *Second Report and Order* at ¶ 30 (emphasis added).
[59] *Sage Telecom, L.P. v. Public Utility Commission of Texas*, 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) (*"Sage"*).
[60] *Id.* at *23.

> simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.[61]

Accordingly, both the Commission and the courts have already rejected AT&T's attempt to restrict the application of Section 252(i) of the Act and section 51.809 of the Commission's rules to a party that is similarly situated to the LEC as the original contracting party, even if the agreement being adopted includes bill-and-keep provisions.

AT&T also argues that its costs of "providing the agreement" to the Nextel entities would be greater than AT&T's cost of providing the agreement to the original parties. First, the cost of providing the agreement to the Nextel entities is irrelevant to AT&T's obligations to abide by its Merger Conditions. That issue aside, however, AT&T cannot demonstrate that the cost for the network functions involved in receiving and terminating traffic from Nextel would vary in anyway from the cost for the exact same functions in receiving and terminating traffic from Sprint PCS. At most, AT&T could demonstrate that its revenue from intercarrier compensation would be decreased, not that its costs would be increased.

Moreover, 51.809(b) specifically states that this factual determination is to be resolved by state commissions, the very entities that AT&T is attempting to prevent from addressing this issue. Either way, any revenue change comes as a direct result of AT&T's Merger Condition, to which it agreed in order to reap the benefits of combining to form the largest ILEC in the country.

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[61] *Id.* at *23 - *24.

G. Adoption of a Bill-and-Keep Arrangement is Not Regulatory Arbitrage

AT&T protests that implementation of bill-and-keep in all 22 of its operating states would result in regulatory arbitrage and allow Sprint Nextel a "free ride."[62] Besides also being irrelevant to AT&T's obligations under its Merger Conditions, such comments are the height of irony in light of AT&T's previous arguments before the Commission on this subject. At roughly the same time this agreement was entered, SBC, the predecessor to AT&T, told this Commission:

> *In order to eliminate existing arbitrage opportunities* and avoid creating new arbitrage problems, *it is critical that the transition to bill and keep be mandatory for the exchange of all telecommunications traffic* between a LEC network and another carrier's network (including transport arrangements) in all states.[63]

Likewise, AT&T Wireless emphasized not only that bill-and-keep was the most appropriate mechanism for exchanging traffic, but that facility charges should be shared on an equal basis:

> On the whole, bill and keep is a simpler, and more efficient and pro-competitive system than the current calling party's network pays regime. Accordingly, AWS proposes that the Commission adopt a bill and keep system for local traffic currently subject to Section 251(b)(5), in which both the LEC and the interconnecting carrier equally share in the cost of transport and interconnection facilities between networks, and in which the interconnecting carrier may choose its points of interconnection, as well as the point of interconnection to which traffic should be sent by the originating carrier. If the Commission declines to adopt bill and keep for all forms of intercarrier compensation, AWS strongly urges the Commission to adopt, at a minimum, bill and keep for CMRS-ILEC traffic, including traffic between MTAs. This is particularly appropriate given the many inequities, inefficiencies, and inconsistencies that exist under the current intercarrier compensation scheme for CMRS traffic, and the fact that problems identified generally by commenters opposing bill

[62] Petition at p. 9.
[63] Comments of SBC Communications, Inc., *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 (August 21, 2001) p. 25.

> and keep do not apply to CMRS-ILEC interconnection. Similarly, bill and keep for CMRS traffic that is subject to access charges is the best method for addressing current inefficiencies and arbitrage opportunities that exist under the current system.[64]

Consistent with its entering into the current agreement with Sprint Nextel, BellSouth Corporation likewise emphasized that bill-and-keep was the best means of preventing regulatory arbitrage:

> The goal of this proceeding should be to craft an intercarrier compensation mechanism that minimizes opportunities for manipulation for private gain. Such an approach creates the conditions for efficient interconnection and provides the climate needed for investment and innovation. Business success will be tied to how well market needs are satisfied. Investment in new technology and network infrastructure will be essential elements of the formula for profitability.
>
> Bill-and-keep, properly implemented, is the intercarrier compensation mechanism that can achieve this goal. Not only should bill-and-keep eliminate regulatory arbitrage, but it should also lead to more efficient retail rates and efficient network usage. With bill-and-keep, these improvements can be accomplished with a minimum of regulatory intervention.[65]

AT&T suggests that bill-and-keep in this circumstance would amount to regulatory arbitrage because it believes that the current traffic flows are not balanced. However, AT&T successfully imposed a unilateral bill-and-keep system on Sprint Nextel in the context of interexchange services despite the fact that the balance of traffic was 100% in one direction.[66] To this day, AT&T pays nothing for the use of Sprint Nextel's network, or any other wireless carrier's network, when terminating interexchange traffic.

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[64] Reply Comments of AT&T Wireless Services, Inc. on Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92 (November 5, 2001) p. 1-2.
[65] Comments of BellSouth, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92 (August 21, 2001) p. 12.
[66] Declaratory Ruling, *In the matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges,* 17 FCC Rcd 13192, WT Docket 01-316, FCC 02-203 (July 3, 2002).

It is AT&T's desire to avoid the B&K/Facility Provisions of the BellSouth ICA - not Sprint Nextel's continued use of such provisions - that will result in arbitrage under the broken intercarrier compensation regime. Under AT&T's interpretation of the Merger Conditions, AT&T deems itself *entitled* to 1) remain the net beneficiary of terminating reciprocal compensation from the Sprint Nextel wireless entities, 2) not pay for access to Sprint Nextel wireless networks when terminating interexchange traffic, or even intraMTA traffic dialed on a 1+ basis and delivered for termination via an IXC,[67] and 3) impose facility costs on Sprint Nextel that are associated with AT&T's delivery of third-party originated transit traffic, rather than recouping such costs from the originating carrier as part of AT&T's transit charges.[68]

AT&T's arguments are the worst form of opportunism. When it needs Commission approval of the largest telecommunications merger in history, it makes promises to allow interconnection agreements to be easily adopted throughout its territory. But when companies attempt to actually adopt these agreements for use throughout AT&T's territory, they are accused of regulatory arbitrage. Apparently the only agreements that AT&T will allow to be ported are those that continue to ensure that it is a net beneficiary of the bankrupt intercarrier compensation regime.

[67] IntraMTA traffic dialed on a 1+ basis and delivered by an IXC is, however, subject to reciprocal compensation. *Atlas Tel. Co. v. Oklahoma Corp. Comm'n,* 400 F.3d 1256, 1265 (10th Cir. 2005); *WWC License, L.L.C. v. Boyle et al.,* Case No. 4:03CV 3393, Mem.Op., p. 6 (D. Neb. Jan 20, 2005), *appealed on other grounds and affirmed, WWC License, L.L.C. v. Boyle,* 459 F.3d 880 (8th Cir. 2006).

[68] *See Mountain Communications, Inc. v. FCC,* 355 F.3d 644, 649 (D.C. Cir. 2004) (an originating carrier should bear *all* transport costs associated with delivery of its originated traffic).

H. The Commission Should Toll and Extend the Sunset Date Upon Which AT&T's Merger Conditions Would Otherwise Expire.

Sprint Nextel first attempted to obtain information from AT&T regarding the application of AT&T's Merger Conditions on January 3, 2007 – less than a week after public disclosure of the Merger Conditions. AT&T has, however, fought Sprint Nextel every step of the way, all the while knowing that the time clock with respect to the Merger Conditions has continued to run.

The only way to maintain the integrity of the Commission's Merger Conditions, including the forty-two month interconnection obligations, is to impose consequences on AT&T for its delay tactics. As part of any action the Commission may take in this matter, Sprint respectfully urges the Commission to toll and extend the sunset date upon which AT&T's Merger Conditions are otherwise set to expire. Such tolling should begin with the date Sprint Nextel issued a request to adopt the Sprint-BellSouth ICA in a given state, through and including the date an Order is issued by that state Commission which constitutes a final non-appeallable decision in that proceeding. As to Sprint Nextel, such extension should also apply to the underlying Sprint-BellSouth ICA as to each entity that seeks to adopt the agreement.

IV. CONCLUSION

For the reasons set forth above, Sprint Nextel requests that the Commission promptly dismiss AT&T's Petition, toll and extend the sunset date of the Merger Conditions as requested herein, impose penalties upon AT&T for failure to comply with its Merger Conditions, and grant Sprint Nextel such further relief as the Commission deems just and proper.

Respectfully submitted,

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February 25, 2008

CERTIFICATE OF SERVICE

I, Jo-Ann Monroe, certify that on February 25, 2008, I caused a copy of the foregoing Opposition of Sprint Nextel to be mailed first class, postage prepaid, to:

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