

**STATE OF ILLINOIS**  
**BEFORE THE ILLINOIS COMMERCE COMMISSION**

\* \* \* \* \*

**SPRINT COMMUNICATIONS L.P. d/b/a )**  
**SPRINT COMMUNICATIONS )**  
**COMPANY L.P., SPRINTCOM, INC., )**  
**WIRELESSCO, L.P., NEXTEL WEST )**  
**CORP., and, NPCR, INC., )**

**Complainants, )**

**v. )**

**Docket No. 07- 0629**

**ILLINOIS BELL TELEPHONE )**  
**COMPANY, )**

**Respondent. )**

**RESPONSE TO SUPPLEMENTAL SUBMISSION**  
**IN OPPOSITION TO MOTION TO DISMISS**

AT&T Illinois respectfully submits this response to the Supplemental Submission in Opposition to Motion to Dismiss filed by the Complainants on February 28, 2008 (“Supp.”).

On February 6, 2008, AT&T Illinois filed in this docket a copy of the Petition of the AT&T ILECs for a Declaratory Ruling, which AT&T filed with the FCC on February 5, 2008. The Petition asked the FCC to resolve on an expedited basis the principal substantive issues in this case, which are also the principal substantive issues in parallel cases in the other 12 states in the legacy AT&T ILEC states. The FCC’s resolution of those issues could render unnecessary any further proceedings in this case. The schedule that the FCC established for comments and reply comments on AT&T’s Petition has already been completed: Sprint Nextel filed extensive comments in the FCC docket, and the Complainants attached those comments to their February

28 supplemental submission. AT&T Illinois submits herewith the reply comments that AT&T filed in the FCC docket on March 3, 2008.

The Complainants assert that, “[e]ven after losing its jurisdictional argument in eight of the nine BellSouth states and now in the State of Ohio, AT&T is still claiming state commissions have no jurisdiction over anything related to interconnection agreements affected by the Merger Commitments.” Supp. at p. 2. That assertion is wrong on two counts. First, AT&T lost its jurisdictional argument in only one of the BellSouth states, not eight. Specifically, one state (Mississippi) decided it did not have jurisdiction at all. One state (Florida) decided it did not have jurisdiction over Sprint’s claim in the form Sprint alleged it. One state (South Carolina) decided it had jurisdiction concurrent with the FCC and that it would defer to the FCC. One state (Louisiana) decided to hold the matter in abeyance while the PSC staff sought direction from the FCC. One state (Kentucky) decided to exercise jurisdiction over Sprint’s complaint without deferring to the FCC. And four states did not reach the question of jurisdiction because AT&T and Sprint resolved their differences in those states.

Second, AT&T is not claiming that state commissions have no jurisdiction over anything related to interconnection agreements affected by the Merger Commitments. AT&T Illinois’ position is as follows:

1. This Commission is without authority to issue the declaratory ruling the Complainants request in Count I of their Complaint, and Counts II and III should be dismissed for failure to state a claim.
2. The FCC has exclusive jurisdiction to interpret FCC Merger Commitment 7.1. In particular, the FCC has exclusive jurisdiction to decide the questions that AT&T posed in its February 5, 2008, Petition for Declaratory Ruling, one of which concerns the meaning of language in that merger commitment and the other of which is whether the merger commitment is to be applied in a manner consistent with FCC Rule 51.809(b).
3. In light of the short schedule the FCC established for comments on AT&T’s Petition, AT&T Illinois hopes and expects that the FCC will decide those

questions promptly. The FCC's determinations may render unnecessary any further proceedings in this docket.

4. Accordingly, if the Commission decides, notwithstanding items 1 and 2 above, to adjudicate the Complaint, the Commission should defer to the FCC so that the FCC can decide the questions set forth in AT&T's Petition.
5. If the parties fail to come to terms on a complete interconnection agreement in light of the FCC's resolution of the questions set forth in the Petition, it would be appropriate for this Commission to decide any questions of state law on which the parties might disagree, and AT&T Illinois would not object to the Commission's assertion of jurisdiction to do so at that time.

Finally, the Complainants assert that AT&T's Petition to the FCC is "just one more in a long line of delay tactics." Supp. at 2. That accusation is false. AT&T petitioned the FCC to resolve the core substantive issues in this case because the FCC is the forum that should decide those issues, both because the issues are squarely within the FCC's authority to decide and because it would be far better for the FCC to decide them than for thirteen state commissions, which would likely reach differing conclusions, to do so.

The Complainants assert that AT&T has been fighting their porting attempts "every step of the way." Supp. at 2. That is correct. Not because AT&T seeks delay, however, but because AT&T has opposed from the outset Sprint Nextel's improper attempt to leverage Merger Commitment 7.1, which was intended to cut transaction costs by reducing the need for interconnection agreement negotiations and arbitrations, into an opportunity for arbitrage that is wholly inconsistent with the purpose of the merger commitment. Sprint Nextel seeks to port to Illinois provisions in a Kentucky ICA that would give Sprint Nextel a financial windfall by imposing uncompensated costs on AT&T. Predictably, Sprint Nextel characterizes AT&T's vigorous opposition to Sprint Nextel's attempt to game the system as strategic delay; this is standard operating procedure for a party that encounters resistance to such a scheme. The Commission should not take Sprint Nextel's characterization seriously. AT&T has no interest in

delaying a legitimate part of an interconnection agreement in accordance with Merger  
Commitment 7.1.

Respectfully submitted,

By: /s/ Dennis G. Friedman

Theodore A. Livingston  
Dennis G. Friedman  
J. Tyson Covey  
Diana Andsager  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, IL 60606  
Telephone: (312) 782-0600  
Facsimile: (312) 701-7711

James A. Huttenhower  
AT&T Illinois  
225 West Randolph Street  
Suite 25-D  
Chicago, IL 60606  
Telephone: (312) 727-1444

Attorneys for Illinois Bell Telephone Company

## CERTIFICATE OF SERVICE

I, Dennis G. Friedman, Attorney for Illinois Bell Telephone Company d/b/a AT&T

Illinois, certify that a true and correct copy of this document was served on the following parties

of record via email on March 7, 2008:

Glennon P. Dolan  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, IL 60610  
[gdolan@icc.illinois.gov](mailto:gdolan@icc.illinois.gov)

Jeffrey M. Pfaff  
Senior Counsel  
Sprint  
Mailstop: KSOPHNO212-2A553  
6450 Sprint Parkway  
Overland Park, KS 66251  
[jeff.m.pfaff@sprint.com](mailto:jeff.m.pfaff@sprint.com)

Richard M. Waris  
Sprint  
Pretzel & Stouffer  
1 S. Wacker Dr., Ste. 2500  
Chicago, IL 60606  
[rwaris@pretzel-stouffer.com](mailto:rwaris@pretzel-stouffer.com)

Janis Von Qualen  
Office of General Counsel  
Illinois Commerce Commission  
527 E. Capitol Avenue  
Springfield, IL 62701  
[ivonqual@iccillinois.gov](mailto:ivonqual@iccillinois.gov)

Matt Harvey  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, IL 60610  
[mharvey@icc.illinois.gov](mailto:mharvey@icc.illinois.gov)

Roderick S. Coy  
Haran C. Rashes  
Clark Hill P.L.C.  
212 E. Grand River Avenue  
Lansing, MI 48906  
[rcoy@clarkhill.com](mailto:rcoy@clarkhill.com)  
[hrashes@clarkhill.com](mailto:hrashes@clarkhill.com)

Kenneth A. Schifman  
Director/General Attorney  
State Regulatory Affairs  
Sprint  
MS: KSOPHNO212-2A303  
6450 Sprint Parkway  
Overland Park, KS 66251  
[kenneth.schifman@sprint.com](mailto:kenneth.schifman@sprint.com)

Jeff Hoagg  
Illinois Commerce Commission  
527 E. Capitol Avenue  
Springfield, IL 62701  
[jhoagg@icc.illinois.gov](mailto:jhoagg@icc.illinois.gov)

/s/ Dennis G. Friedman  
Dennis G. Friedman

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

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In the Matter of	)	
	)	
Petition for Declaratory Ruling That	)	
Sprint Nextel Corporation, Its Affiliates,	)	WC Docket No. 08-23
And Other Requesting Carriers May Not	)	
Impose A Bill-and-Keep Arrangement Or	)	
A Facility Pricing Factor Under The	)	
Commitments Approved By The	)	
Commission In Approving The AT&T-	)	
BellSouth Merger	)	

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**REPLY IN SUPPORT OF PETITION OF THE AT&T ILECS  
FOR A DECLARATORY RULING**

Terri L. Hoskins  
Gary L. Phillips  
Paul K. Mancini  
AT&T INC.  
1120 20th Street, N.W.  
Washington, D.C. 20036  
(202) 457-3810

Theodore A. Livingston  
Dennis G. Friedman  
Demetrios G. Metropoulos  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
(312) 782-0600

*Counsel for the AT&T ILECS*

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## INTRODUCTION

In its petition, AT&T demonstrated that the bill and keep and facility pricing provisions in the Kentucky Interconnection Agreement (“Kentucky ICA”) are state-specific pricing terms that may not be ported under Merger Commitment 7.1. We further demonstrated that Merger Commitment 7.1 must be read with reference to section 51.809(b) of the Commission’s rules, and that this commitment applies to inter-state ports, not intrastate adoptions. No commenter, including Sprint Nextel, successfully refutes these showings. Indeed, Sprint Nextel does not deny that the provisions at issue are pricing provisions. Instead, it argues that they are not “state-specific” pricing. But that argument relies entirely on tortured hair-splitting that has no basis in law and that would actually turn the merger commitment into a vehicle for delay and *increased* administrative costs, contrary to its core purpose. Beyond that, Sprint Nextel devotes most of its submission to irrelevancies designed to distract from the legal issues presented by AT&T’s Petition. For example, Sprint Nextel argues vehemently and at length that AT&T is engaged in a strategy of delay and that balance of traffic was not a consideration underlying the inclusion of the bill-and-keep and facility pricing provisions in the Kentucky ICA. As we demonstrate below (in sections III and I.B, respectively), Sprint Nextel is wrong on both counts, but, in all events, these arguments are completely beside the point. Even if BellSouth had not attached significance to the balance of traffic when it agreed to the bill-and-keep and facility pricing provisions in the Kentucky ICA, that would have no bearing on whether those provisions are state-specific pricing, which they are (*see infra* Section I), or on whether the Commission’s rule governing in-state adoptions under Section 252(i) of the Telecommunications Act of 1996 necessarily applies to ports of interconnection agreements under Merger Commitment 7.1, which it does (*see infra* Section II).

Neither Sprint Nextel nor any commenter that has weighed in on behalf of Sprint Nextel offers any cogent reason for denying the relief AT&T has requested. For the reasons set forth in AT&T's Petition and in this reply, AT&T respectfully urges the Commission to issue promptly the declaratory rulings AT&T has requested.

## DISCUSSION

### **I. THE KENTUCKY BILL-AND-KEEP AND FACILITY PRICING PROVISIONS ARE STATE-SPECIFIC PRICING AND THEREFORE ARE NOT ELIGIBLE FOR PORTING UNDER MERGER COMMITMENT 7.1.**

AT&T demonstrated in its Petition that the bill-and-keep and facility pricing provisions in the Kentucky ICA are state-specific pricing within the meaning of Merger Commitment 7.1.<sup>1</sup> That they are pricing is indisputable. The 1996 Act expressly classifies bill-and-keep as pricing,<sup>2</sup> and this Commission does as well:

States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology . . . . Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. . . . As a third alternative, in some circumstances states may order a "bill and keep" arrangement, as discussed below.<sup>3</sup>

Understandably, there is no parallel in the 1996 Act or the Commission's rules for the very specific 50/50 facility pricing arrangement in the Kentucky ICA. That arrangement, however, is determinative of price, just as bill-and-keep is.

Sprint Nextel does not dispute that bill-and-keep and facility pricing are pricing. Nor do most of the other commenters. One commenter, however, contends bill-and-keep is a

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<sup>1</sup> Pet. at 10-12 (bill-and-keep); 12-13 (facility pricing).

<sup>2</sup> See *id.* at 10-12, analyzing 47 U.S.C. §§ 252(d).

<sup>3</sup> First Report and Order, *Implementation of the Local Competition Provisions In the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) ("*Local Competition Order*"), ¶ 1055 (footnote omitted).

“compensation methodology” rather than a price,<sup>4</sup> while another contends it is a “method of interconnection.”<sup>5</sup> These contentions are readily disposed of. A “methodology” is a “system of methods, principles, and rules,”<sup>6</sup> such as TELRIC. Bill-and-keep is not a system of methods, principles and rules. It is a way of saying the price is zero.<sup>7</sup> And bill-and-keep is not, of course, a method of interconnection.<sup>8</sup>

Sprint Nextel, while not disputing that the bill-and-keep and facility pricing provisions in the Kentucky ICA are pricing, argues that they are not “state-specific pricing,” because they “*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.*”<sup>9</sup> Other commenters chime in that in order to be “state-specific,” pricing provisions must be state-mandated or tariffed.<sup>10</sup>

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<sup>4</sup> Opposition of Comcast Corporation (“Comcast Comments”) at 4.

<sup>5</sup> Comments of Indiana Paging Network (“IPN Comments”) at 2-3.

<sup>6</sup> *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 1209 (1996).

<sup>7</sup> IPN recognizes this. See IPN Comments at 3, characterizing the Kentucky ICA as “an interconnection agreement that specifies a reciprocal compensation rate of zero.”

<sup>8</sup> The provision in the 1996 Act governing interconnection, Section 251(c)(2), is separate from the provision governing “reciprocal compensation arrangements for the transport and termination of telecommunications,” Section 251(b)(5). The duty to establish reciprocal compensation arrangements is an “obligation[] of all local exchange carriers,” while the interconnection obligation of Section 251(c)(2) is an “additional obligation[] of incumbent local exchange carriers” alone. Enforcing the Act’s clear divide, this Commission has long since held that “the term ‘interconnection’ . . . refers only to the physical linking of two networks.” *Local Competition Order*, ¶ 176. In all events, even if bill-and-keep were an interconnection arrangement, the bill-and-keep provision in the Kentucky ICA would not be portable to states where traffic is not balanced because porting, in that instance, would necessarily be inconsistent with the laws or regulatory requirements of such states. Indeed, federal and state laws provide for bill and keep arrangements only when traffic is balanced; hence the adoption of bill and keep where traffic is not balanced is necessarily inconsistent with state laws or regulations.

<sup>9</sup> Sprint Opp. at 14 (emphasis in original).

<sup>10</sup> Comments of American Association of Paging Carriers (“AAPC Comments”) at 3; Comments of Cox Communications, Inc. and Charter Communications in Opposition to AT&T’s Petition for Declaratory Ruling (“Cox Comments”) at 10-12; IPN Comments at 2-3; Comments of Intrado Communications, Inc. (“Intrado Comments”) at 6-7.

The contention that pricing is state-specific only if it was arbitrated or otherwise state-mandated is pure invention, with no basis in the language or origins of the merger commitment. Moreover, if, as Sprint Nextel would have it, a negotiated pricing provision could be ported even though exactly the same provision could not be ported if it were arbitrated, AT&T would have a strong incentive to arbitrate pricing provisions to which it would otherwise be willing to agree. That cannot be the intent. The explicit purpose of the merger commitment was to reduce transaction costs, not to increase them. And to the extent that Sprint Nextel's position relies on the fact that the bill-and-keep and facility pricing provisions were adopted for all the former BellSouth states, and not just one state, the argument is little more than word play. Whether they were the product of a broader negotiation or not, the bill-and-keep and facility pricing arrangements were incorporated into individual, state-specific interconnection agreements that were submitted to and approved by each individual state in the BellSouth region. Indeed, it is an individual state agreement – the Kentucky ICA – that Sprint Nextel seeks to port to other states.<sup>11</sup> Moreover, the purpose of exempting state-specific pricing from ports under Merger Commitment 7.1 would be subverted if prices were deemed non-state-specific on the ground that they pertained in multiple states. If that were the intent – and such an intent would be nonsensical – the merger commitment would have exempted state-*unique* prices. *See infra* subsection A.

Finally, Sprint Nextel argues that the bill-and-keep and facility pricing provisions in the Kentucky ICA were not predicated on roughly balanced traffic, but instead were driven by other

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<sup>11</sup> In this proceeding, Sprint Nextel strategically refers to the agreement it seeks to port as the “Sprint-BellSouth ICA.” Sprint Opp. at 2. In the state proceedings it has initiated, however, Sprint Nextel more candidly and accurately refers to the agreement as the “Kentucky ICA.” *See, e.g.*, Sprint Nextel's Complaint in the ongoing docket in the State Corporation Commission of Kansas (Attachment 1 hereto), at pp. 1 and 8 and ¶¶ 10, 11, 12, 16, 17, 19.

considerations.<sup>12</sup> In truth, traffic balance was a consideration for BellSouth, as a document we discuss below confirms – and as it would have to be for any rational carrier agreeing to a bill-and-keep and 50/50 facility pricing arrangement. More importantly, though, Sprint Nextel’s account of the circumstances surrounding the inclusion of those provisions in the BellSouth agreement serves only to corroborate that those provisions were adopted under circumstances that were *specific* (whether or not unique) to a certain time and place and that do not pertain here. At the end of the day, it makes no difference what those circumstances were, because regardless of what they were, the bill-and-keep provision and the facility pricing arrangement are state-specific pricing plans. As such, they cannot be ported under Merger Commitment 7.1. *See infra* subsection B.<sup>13</sup>

**A. The Bill-and-Keep And Facility Pricing Provisions Are Not Portable Merely Because They Were Negotiated for the BellSouth Region Rather Than Arbitrated For A Single State.**

Sprint Nextel, while asserting with emphasis that the provisions at issue “*were not imposed by virtue of a state-arbitration decision or state-cost proceeding*”<sup>14</sup> does not explain why that makes a difference. It doesn’t. By its plain terms, the merger commitment exempts all “state-specific pricing . . . plans,” without regard to their source. The commitment does not say that interconnection agreements can be ported subject to “state-*arbitrated* pricing plans” or “state-*mandated* pricing plans” or “tariffed pricing plans.” And such a *post hoc* limitation would make no sense. Under the 1996 Act, parties are free to develop pricing plans through

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<sup>12</sup> Sprint Opp. at 15-19.

<sup>13</sup> One commenter argues that “state-specific pricing” refers to the state *to* which the agreement is being ported. Comments of MetroPCS Communications, Inc. at 9-11. Since bill-and-keep is a price, it would make no difference if MetroPCS were correct, because the bill-and-keep provision in the Kentucky ICA would still have to be replaced by the “state-specific pricing” of each state to which the agreement is ported.

<sup>14</sup> Sprint Opp. at 14 (emphasis in original).

negotiation, and a negotiated pricing plan for a given state will be based on the underlying costs and circumstances in that state every bit as much as any pricing plan imposed by a state commission. It is just as likely, in other words, that a *negotiated* pricing plan for state A would be uneconomic in state B (and thus unsuitable for porting to that state) as it is that a *state-ordered* pricing plan for state A would be uneconomic in state B. Thus, Sprint Nextel's proposed limitation on "state-specific pricing" is without a basis not only in the language of the merger commitment, but also in reason.

Indeed, Sprint Nextel's proposed gloss on the merger commitment would undermine the very purpose of the commitment, because it would discourage AT&T from agreeing on pricing with *any* carrier in *any* state, lest the agreed provision be ported into other states where it does not belong. Assume, for example, that AT&T Wisconsin is negotiating a two-year interconnection agreement with a CLEC in Wisconsin. The CLEC proposes bill-and-keep, and AT&T, upon examination of the traffic flowing between the parties' networks, determines that the traffic is balanced and is likely to remain balanced for at least two years. AT&T should, rationally, agree to the CLEC's proposal. Under Sprint Nextel's misreading of Merger Commitment 7.1, however, AT&T must oppose the bill-and-keep proposal in arbitration – with every expectation (and perhaps even hope) that it will lose. AT&T and the Wisconsin CLEC wind up with the same ICA either way, but by arbitrating, AT&T ensures that other carriers cannot port that provision of the ICA. Thus, Sprint Nextel's reading would impel AT&T to *increase* transaction costs by forcing arbitration instead of agreeing to economically rational proposals.<sup>15</sup>

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<sup>15</sup> Other commenters that contend that the only state-specific pricing is state-mandated pricing (*see supra* n.10) say nothing that furthers Sprint Nextel's argument. If anything, they undercut it. AAPC, for example, says only that state-specific pricing "simply refers to tariffed rates that vary from one state to another" (AAPC Comments at 3) – which is not even consistent with Sprint Nextel's position. Cox asserts that "ILECs rarely depart from these rates [established in state cost dockets] and they are seldom

Nor is Sprint Nextel's argument advanced by the proposition that it "did not enter into a state-specific . . . arrangement"<sup>16</sup> and that "the intent of the parties was to implement a "universal bill-and-keep arrangement."<sup>17</sup> The arrangement was not "universal." It applied only in the nine states in the BellSouth region, not to the 13 states to which Sprint Nextel now seeks to export it. And it applied only to the two Sprint entities that were parties to the interconnection agreements in those states, not to any Nextel entity.<sup>18</sup>

Beyond that, Sprint Nextel's claim that the pricing provisions are not state-specific because they emanated from a region-wide negotiation is a red herring. The fact that the bill-and-keep and facility pricing provisions were negotiated for multiple states may well mean they were not state-*unique*; it does not, however, render them non-state-specific. As an initial matter, those pricing arrangements have been incorporated into individual state interconnection agreements that were separately submitted to, reviewed by, and approved by individual states. Indeed, it is an individual state agreement – the Kentucky ICA – that Sprint seeks to port to other states. Consequently, the pricing provisions at issue cannot be viewed as anything other than state-specific. It does not matter, as Sprint Nextel argues, that the pricing terms in the Kentucky ICA and the other state agreements reflect considerations both within and outside of Kentucky. The principle underlying the pricing carve-out – that a price that makes economic sense in one

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the subject to (sic) voluntary agreements" (Cox Comments at 11), but does not explain why a negotiated variance from an established rate, however rare it might be, should not be treated as a state-specific price.

<sup>16</sup> Sprint Opp. at 13.

<sup>17</sup> *Id.* at 14

<sup>18</sup> When Sprint and BellSouth entered their interconnection agreements in 2001, neither of them could possibly have intended that bill-and-keep would extend "universally" to states that (i) were not served by any of the BellSouth parties to the agreement, (ii) were instead served by incumbents that were not affiliated with either BellSouth or Sprint, and (iii) were regulated by state commissions that did not even see, much less approve, the bill-and-keep arrangement. Nor could they have intended that bill-and-keep would be extended, seven years later, to Nextel.

state may not make sense in certain others – applies with just as much force to pricing that is intended for a specific group of states as it does to pricing that is unique to a single state. And the fact that a price makes economic sense in multiple states served by AT&T ILECs does not mean that it makes sense in all the rest.

The contrary view advanced by Sprint Nextel, which would redefine “state-specific pricing” to mean “state-unique pricing,” would subvert the goal of the merger commitment, in this instance by discouraging AT&T from the efficient practice of negotiating agreements for multiple states at once. For under Sprint Nextel’s view the pricing plans in those agreements could then be ported to other states where they would be uneconomic. Sprint Nextel’s approach would discourage negotiations at any level other than a grueling state by state by state by state slog.

**B. Sprint Nextel’s Account Of The Source Of The Bill-and-Keep And Facility Pricing Provisions In The Kentucky ICA Is Irrelevant.**

Sprint Nextel devotes seven pages of its submission<sup>19</sup> to a demonstration that Sprint’s and BellSouth’s agreement on the bill-and-keep and facility pricing provisions was driven by a set of considerations – namely, a Sprint claim to asymmetric reciprocal compensation rates in Florida and a disagreement concerning BellSouth’s alleged liability in the BellSouth region for ISP-bound traffic – that was patently specific to the BellSouth region and to the parties’ dealings with each other in 2001. This is another redherring, because whether BellSouth entered into the agreement based on traffic balance or on other considerations, the trade-off directly related to BellSouth’s costs and the prices the parties would pay to terminate each other’s traffic. If anything, Sprint Nextel’s extended harangue serves only to underscore what we have already

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<sup>19</sup> Sprint Opp. at 5-6; 15-19.

## Redacted- for Public Inspection

established: The bill-and-keep and facility pricing provisions are state-specific pricing, and cannot be ported under Merger Commitment 7.1.<sup>20</sup>

That said, AT&T's Petition was accurate when it said those provisions "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.'"<sup>21</sup> That fact was memorialized in a contemporaneous BellSouth document summarizing the parties agreement, that said "**Billing between BST and Sprint entities was balanced, each gave up billing the other [redacted] annually.**"<sup>22</sup> Moreover, the provision in the Kentucky ICA that allows for termination of the bill-and-keep arrangement if either Sprint PCS or Sprint CLEC opts into another agreement that provides for reciprocal compensation indisputably corroborates that balance was a consideration.<sup>23</sup> Indeed, it had to be: No rational firm would agree to bill-and-keep, or a 50/50 facility pricing arrangement, without considering the economic impact, and the economic impact depends on the extent to which the parties' traffic is balanced. The significance BellSouth attached to the fact that the parties' traffic was roughly balanced simply

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<sup>20</sup> IPN argues that under the "Commission's 'all or nothing' rule, the entire agreement is required to be ported." IPN Comments at 2. Similarly, Cox asserts that AT&T's position would "shrink the pool of available agreements." Cox Comments at 12. To the extent that these commenters are suggesting that resolution of the disputed issues in AT&T's favor would render the Kentucky ICA unavailable for porting, that is not the case. The Kentucky ICA is available for porting, excepting only the provisions exempted from porting by the merger commitment.

<sup>21</sup> Sprint Opp. at 15, quoting Pet. at 1 (Sprint Nextel's emphasis).

<sup>22</sup> Attachment 2 hereto (emphasis in original).

<sup>23</sup> See Pet. at 5. Sprint Nextel accuses AT&T of "ignor[ing] the key operative clause in [that provision], 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 compensation." Sprint Opp. at 16. In reality, AT&T both quoted *and* paraphrased that clause. Pet. at 5. More important, the fact that bill-and-keep could be terminated only if one of the Sprint entities converted to a paying reciprocal compensation arrangement does not detract from AT&T's point: The fact that both Sprint entities had to stick with bill-and-keep in order for either one of them to retain it corroborates that balance was a significant consideration.

dramatizes that what Sprint Nextel is now proposing is arbitrage, because where Sprint Nextel's and AT&T's traffic is *not* balanced, Sprint Nextel would be getting a free ride while AT&T picks up the tab.

**II. THE COMMISSION SHOULD DECLARE THAT AN INTERCONNECTION AGREEMENT THAT IS INELIGIBLE FOR ADOPTION UNDER THE COMMISSION'S RULES IMPLEMENTING SECTION 252(i) IS ALSO INELIGIBLE FOR PORTING UNDER MERGER COMMITMENT 7.1.**

Interconnection agreement provisions that section 51.809(b) of the Commission's Rules ("Rule 809(b)") exempts from in-state adoption under Section 252(i) of the Telecommunications Act of 1996 cannot properly be ported pursuant to Merger Commitment 7.1. If they could, Rule 809(b) would be eviscerated. This is true for the inter-state ports contemplated by Merger Commitment 7.1 (subsection A below), and it would also be true for merger commitment ports within a state if the merger commitment contemplated such a thing, which it does not (subsection B below).

**A. Sprint Nextel Cannot Port To The Legacy AT&T ILEC States Provisions in the Kentucky ICA That Rule 809(b) Exempts From Adoption Under Section 252(i).**

Sprint Nextel misunderstands (or pretends to) the issues AT&T has raised concerning the interplay between Merger Commitment 7.1 and Rule 809(b). As a result, Sprint Nextel says nothing that even purports to counter AT&T's position on this point.

Section 252(i) imposes on ILECs an obligation to make available to any requesting carrier, in-state, any approved interconnection agreement to which the ILEC is a party.<sup>24</sup> Rule 809(b), however, provides that that obligation does not apply if the cost of providing the

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<sup>24</sup> 47 U.S.C. § 252(i).

agreement to the requesting carrier would be greater than the cost of providing it to the carrier that originally negotiated the agreement.<sup>25</sup>

Sprint Nextel seeks to port the Kentucky ICA to all 13 legacy AT&T ILEC states.<sup>26</sup> AT&T intends to show – in state commission proceedings that are ongoing – that it would cost AT&T more to provide the Kentucky ICA to Sprint Nextel in each of those states than it costs AT&T to provide the agreement to the two Sprint companies (Sprint CLEC and Sprint PCS) that are parties to the agreement in Kentucky. And AT&T maintains that in any state where it makes that showing, Sprint Nextel cannot be allowed to port the Kentucky ICA pursuant to Merger Commitment 7.1. In other words, as AT&T demonstrated at pages 13-15 of the Petition, the limitations that the Commission established in Rule 809(b) must apply to inter-state ports under Merger Commitment 7.1 just as they do to in-state adoptions under Section 252(i). *Sprint Nextel's Opposition does not dispute this.*

Sprint Nextel contends, however, that AT&T's reliance on Rule 809(b) is misplaced because, "First, the attempt to insert a 'similarly situated' requirement into section 51.809 has already been rejected by the Commission."<sup>27</sup> That assertion is bizarre. AT&T has not asked the Commission to make a determination of any sort concerning how an ILEC makes a showing under Rule 809(b) in general, or how AT&T will establish in the ongoing state commission proceedings that it would cost more to provide the Kentucky ICA to the Sprint Nextel entities in a given state than it costs to provide the agreement to Sprint CLEC and Sprint PCS in Kentucky. The only proposition AT&T is advocating concerning Rule 809(b) in this proceeding is that the limitations it imposes must apply to ports under Merger Commitment 7.1. Sprint Nextel's

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<sup>25</sup> 47 C.F.R. § 51.809(b).

<sup>26</sup> Sprint Opp. at 10.

<sup>27</sup> Sprint Opp. at 25.

extended refutation of a similarly situated argument that AT&T has not made<sup>28</sup> is beside the point.

Sprint Nextel compounds its confusion by asserting, “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.”<sup>29</sup> Sprint Nextel thus assumes, with no basis whatsoever, that AT&T proposes to make such a demonstration, and thereby sets up a straw man that it then purports to refute. Again, though, there is no question in this proceeding concerning how an ILEC makes the showing required by Rule 809(b), and no question concerning what AT&T will or will not succeed in showing. As Sprint Nextel observes,<sup>30</sup> state commissions are to make the factual determination contemplated by Rule 809(b). Accordingly, the Commission should disregard Sprint Nextel’s arguments concerning how AT&T may or may not make that showing.

While Sprint Nextel does not contest the proposition that the limitation on adoptions that the Commission established in Rule 809(b) must apply to ports under Merger Commitment 7.1, other commenters do.<sup>31</sup> AAPC contends that the merger commitment must have been intended to abrogate or supersede the restrictions that apply to Section 252(i), because otherwise, “it is hard to fathom what purpose Commitment 7.1 was intended to serve in the first place.”<sup>32</sup> The answer, of course, is that it was intended to permit inter-state ports under certain circumstances.

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<sup>28</sup> *Id.* at 26-28

<sup>29</sup> *Id.* at 25. *See also id.* at 28 (“AT&T cannot demonstrate that the cost for the network functions involved in receiving and terminating traffic from Nextel would vary in anyway (sic) from the cost for the exact same functions in receiving and terminating traffic from Sprint PCS.”)

<sup>30</sup> Sprint Opp. at 28.

<sup>31</sup> AAPC Comments at 3; Comcast Comments at 6; Cox Comments at 6-10; IPC Comments at 4; MetroPCS Comments at 11-12.

<sup>32</sup> AAPC Comments at 3.

Furthermore, as we discuss immediately below, similar porting commitments made in connection with previous mergers were explicitly subject to the restrictions that apply to Section 252(i), and no one had difficulty fathoming the purpose of those commitments – nor did any advocate of Merger Commitment 7.1 contend that it should not be subject to those restrictions because the restrictions had made the previous porting commitments ineffective.

Other commenters rely on a hyper-literal reading of the merger commitment. Cox, in particular, makes much of the fact that Merger Commitment 7.1 does not *explicitly* state that ports are subject to the rules and requirements that apply to Section 252(i), while similar commitments made in connection with previous mergers did.<sup>33</sup> As Cox notes,<sup>34</sup> the 2000 *Bell Atlantic/GTE Merger Order* included a porting commitment that was expressly subject to those rules and requirements. The 1999 *SBC/Ameritech Merger Order* did as well.<sup>35</sup> Cox infers that the absence of a reference to Section 252(i) in Merger Commitment 7.1 bespeaks an intent that this time, the rules and requirements that apply to Section 252(i) would not apply. But neither Cox nor any other commenter offers a shred of evidence that anyone intended or understood that the Section 252(i) limitations would not apply in this instance. For example, there is no citation to a comment in the AT&T/BellSouth merger docket suggesting that application of the Section 252(i) rules and regulations to the previous merger commitments had proven unsatisfactory. This is because there was no such comment.

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<sup>33</sup> Cox Comments at 8. *See also* Comcast Comments at 6.

<sup>34</sup> Cox Comments at 8 n.14.

<sup>35</sup> *See Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, Memorandum Opinion and Order (*SBC/Ameritech Merger Order*), 14 FCC Rcd. 14712 (rel. Oct. 8, 1999), Appendix C, ¶ 43.

Furthermore, it simply is not plausible that AT&T would have accepted,<sup>36</sup> or that the Commission would have required, a porting commitment in connection with the December, 2006, approval of the AT&T/BellSouth merger that was *more* onerous than the parallel commitment in the earlier mergers. If anything, with competition having increased dramatically since the Commission approved the SBC/Ameritech merger in 1999, and with the Commission distinctly less concerned about the potential anti-competitive effects of the AT&T/BellSouth merger than it had been about the SBC/Ameritech merger,<sup>37</sup> the intent that Cox infers is not only unsupported by anything in the 2006 record, but is also not plausible.

A more plausible explanation for the absence of an explicit reference to Section 252(i) is apparent on the face of the commitments: The 2006 merger commitments are truncated compared with their predecessors. Appendix F to the *AT&T/BellSouth Merger Order* – the merger commitments – is 11 pages long, with eight pages of attachments. In contrast, Appendix C to the *SBC/Ameritech Merger Order* – the Conditions to that merger – was 72 pages long, not counting the 130 pages of attachments. More specifically, Merger Commitment 7.1 is less than one quarter as long as its counterpart in the SBC/Ameritech merger conditions – 102 words vs. 465 words. Especially since there is no credible reason to believe that the non-reference to Section 252(i) in 2006 was intended to signify anything, the explanation of the omission that is

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<sup>36</sup> [Merger Commitment 7.1, in the final form to which AT&T agreed, was substantially as it was proposed by the advocates of the commitment. AT&T certainly was not the draftsman of the commitment, against whom any ambiguities might appropriately be resolved.]

<sup>37</sup> In the *SBC/Ameritech Merger Order* (at ¶ 55), the Commission identified an array of potential public interest harms that led it to conclude “that the proposed merger, considered without supplemental conditions, threatens our ability to fulfill our statutory mandate.” The Commission devoted more than 80 pages (*id.* ¶¶ 56-254) to its analysis of those harms. In the *AT&T/BellSouth Merger Order*, in contrast the Commission concluded (at ¶ 3) that the “merger is not likely, with one exception, to result in anticompetitive effects in relevant markets,” and there is no statement to the effect that the proposed merger would threaten the Commission’s ability to fulfill its mandate if supplemental conditions were not imposed.

most realistic, and that is most in keeping with the principle of Ockham's razor, is simply that the 2006 version was, compared to its predecessors, abridged.

Common sense compels the same conclusion. According to Cox's reading of the merger commitment, AT&T voluntarily agreed that any AT&T or BellSouth interconnection agreement in any of the 22 states could be ported, by any carrier, to any one of those 22 states, *without regard to how much it would cost to provide that agreement to the porting carrier*, and the Commission – presumably knowingly – ordered AT&T to fulfill that agreement. This simply did not happen. That is why no commenter is able to point to anything that was said by any commenter in the merger docket that remotely suggests that the advocates of the merger commitment were proposing, or that AT&T was agreeing to, such a thing.

That is also why no commenter responded to AT&T's demonstration (Pet. at 14) that preposterous results would follow if the limitations of Rule 809(b) did not apply to ports under Merger Condition 7.1. The commenters' reading would, nonsensically, permit a carrier to port to Georgia a Florida agreement that Rule 809(b) would prevent the carrier's Florida affiliate from adopting under Section 252(i). Worse, assume that Carrier X in Indiana wants to adopt an existing Indiana agreement under Section 252(i), but cannot do so because it would cost AT&T more to provide the agreement to Carrier X than it costs to provide the agreement to the carrier that originally negotiated it. If the commenters' reading were correct, Carrier X could achieve its aim – in derogation of Section 252(i) – by having its Ohio affiliate port the agreement from Indiana (free of the constraints imposed by Rule 809(b)) and then by porting back to Indiana the resulting "Ohio" agreement. The consequence, of course, would be the evisceration of Rule 809(b). The Commission cannot have intended such a result when it approved Merger Commitment 7.1.

**B. Sprint Nextel Cannot Port To The Legacy BellSouth States Provisions in the Kentucky ICA That Rule 809(b) Exempts From Adoption Under Section 252(i).**

In addition to the 13 inter-state ports that Sprint Nextel seeks in the legacy AT&T states, the Nextel entities in each of the nine legacy BellSouth states seek to adopt the Sprint/BellSouth ICA for that state pursuant to not only Section 252(i), but also Merger Commitment 7.1.<sup>38</sup> They invoke Merger Commitment 7.1 because, they argue, that commitment does not incorporate any of the principles set forth in Rule 809(b). AT&T has shown above that this reading of Commitment 7.1 cannot be squared with the record in the underlying merger proceeding or with common sense. But, in all events, Sprint Nextel's argument that Commitment 7.1 applies to in-state adoptions is indefensible. The obvious aim of the commitment was to make available on an inter-state basis that which was already available in-state under Section 252(i). No commenter points to anything in the history of the merger commitment that suggests it was intended to apply within a state. Indeed, Sprint Nextel's theory – that a merger commitment intended merely to reduce administrative costs by allowing inter-state ports, subject to certain limitations, effectively authorizes any entity to adopt any agreement anywhere without regard to longstanding substantive Commission rules that were never discussed by any party on the record and which promote economic efficiency and fairness – is a radical reinvention of that commitment that must be rejected.

**III. IT IS SPRINT NEXTEL'S ATTEMPT AT ARBITRAGE, NOT AT&T'S ALLEGED DELAY, THAT THE COMMISSION SHOULD PROSCRIBE.**

A section of Sprint Nextel's Opposition is entitled "Adoption of a Bill-and-Keep Arrangement is Not Regulatory Arbitrage."<sup>39</sup> In reality, however, history – of which Sprint

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<sup>38</sup> Sprint Opp. at 10.

<sup>39</sup> Sprint Opp. at 29-31.

Nextel relates only strategically selected portions – makes crystal clear that Sprint Nextel did indeed invoke the merger commitments in order to accomplish arbitrage, not in order to reduce transaction costs.

As of late December, 2006, Sprint Nextel and AT&T, after two and a half years of intensive negotiation for replacement interconnection agreements for the nine BellSouth states – negotiations that occupied thousands of hours of time of the parties’ CLEC and CMRS negotiators, lawyers and subject matter experts – had reached an agreement in principle. While a few side issues remained, execution was anticipated in a matter of weeks, and the parties agreed they had achieved a milestone.

On January 25, 2007, however, Sprint repudiated the agreement the parties had reached and told AT&T it had to offer a “sweeter deal” if it wanted a negotiated agreement. What precipitated this reversal? The recently announced merger commitments, which Sprint told AT&T gave Sprint “leverage.”<sup>40</sup>

Plainly, then, Sprint Nextel did not invoke the merger commitments in order to reduce its transaction costs. On the contrary, Sprint Nextel walked away from the substantial transaction costs it had already incurred and abandoned a negotiated agreement that would have avoided arbitration in order to try to avail itself of the leverage it claimed to have found in the merger commitments – an undertaking that has dramatically increased both parties’ transaction costs.<sup>41</sup>

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<sup>40</sup> The words in quotations marks were Sprint’s actual words.

<sup>41</sup> Counting this docket, the parties are engaged in simultaneous proceedings in 23 jurisdictions, all sparked by Sprint Nextel’s machinations. Especially if the Commission does not act quickly, this could yield the greatest transaction costs of any interconnection agreement undertaking since enactment of the 1996 Act.

Remarkably, in fact, the section of Sprint Nextel’s brief entitled, “Adoption of a Bill-and-Keep Arrangement is Not Regulatory Arbitrage”<sup>42</sup> *does not actually dispute that what Sprint Nextel is seeking here is arbitrage.* Except for the heading, there is not even a hint of a denial anywhere in that section. In particular, Sprint Nextel does not contest any of the following propositions:

- If an AT&T ILEC is required to exchange traffic with Sprint Nextel on a bill-and-keep basis in a state in which Sprint Nextel delivers more traffic to AT&T for termination to AT&T customers than AT&T delivers to Sprint Nextel for termination to Sprint Nextel customers, Sprint Nextel will enjoy an economic windfall, and AT&T will incur uncompensated costs.
- If an AT&T ILEC is required to share equally with Sprint Nextel the cost of interconnection facilities in a state in which Sprint Nextel puts substantially more of its traffic on those facilities than AT&T does, Sprint Nextel will enjoy a substantial economic windfall, and AT&T will incur substantial uncompensated costs.
- Merger Commitment 7.1 was not intended by anyone – not by AT&T, not by the Commission, and not by the CLECs or cable operators that advocated the commitment – to yield such results.

Nor does Sprint Nextel say anything else to refute AT&T’s contention that the requested ports of the Kentucky ICA would constitute arbitrage.

Instead, it asserts that AT&T has advocated bill-and-keep in other contexts, and argues that what is good for the goose is good for the gander. In addition to being irrelevant, Sprint Nextel’s argument is woefully unconvincing, even on its own terms. First, Sprint Nextel points out that AT&T has advocated bill-and-keep in CC Docket 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime*.<sup>43</sup> AT&T has indeed, and, as Sprint Nextel emphasizes with gusto, AT&T has argued that bill-and-keep is the best way to eliminate arbitrage. *But only as part of a comprehensive program of reform that ensures that carriers will*

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<sup>42</sup> *Id.*

<sup>43</sup> Sprint Opp. at 29-30 & n. 63.

recover their costs. Thus, for example, SBC, in the August 21, 2001, Comments cited by Sprint Nextel,<sup>44</sup> stated, “SBC supports the Commission’s proposal to extend bill-and-keep to all local, wireless and Internet telecommunications traffic that currently is subject to the Commission’s reciprocal compensation rules. However, *the Commission needs to ensure that ILECs have an opportunity to recover their costs for their end users.*” (Emphasis added.)<sup>45</sup> Similarly, BellSouth, in the August 21, 2001, Comments cited by Sprint Nextel,<sup>46</sup> supported bill-and-keep “[a]s long as the bill-and-keep mechanism provides for adequate cost recovery, the Commission has the authority to establish a unified intercarrier compensation mechanism based on bill-and-keep.”<sup>47</sup>

AT&T’s advocacy of bill-and-keep in a context that is removed as it could possibly be from the current dispute does not remotely justify the game that Sprint Nextel is trying to play with the current regime.

Equally irrelevant – and equally baseless – is Sprint Nextel’s diatribe about Commission-mandated compensation arrangements concerning termination of traffic by interexchange wireless carriers. Contrary to Sprint Nextel’s characterization, AT&T did not “successfully impose[] a unilateral bill-and-keep system on Sprint Nextel in the context of interexchange services.”<sup>48</sup> Rather, *the Commission* held that *Sprint* could not unilaterally impose charges on

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<sup>44</sup> *Id.* at 7 n. 17.

<sup>45</sup> Comments of SBC Communications, Inc., *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 (Aug. 21, 2001), p. 24. See also, e.g., *id.* at 31 (“[U]nder SBC’s plan, bill and keep must be accompanied by pricing reforms that permit recovery of all end office switching, common line charges and N2N transport costs from residential and business end users.”).

<sup>46</sup> Sprint Opp. at 7 n.17.

<sup>47</sup> Comments of BellSouth, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 (Aug. 21, 2001), p. 29.

<sup>48</sup> Sprint Opp. at 30.

the legacy AT&T long-distance company without an agreement. In the Commission’s words – which Sprint Nextel omits from its rant – “[t]hat Sprint may *seek* to collect access charges from AT&T does not . . . resolve the question whether Sprint PCS may unilaterally *impose* such charges on AT&T,” and “there is no Commission rule that enables Sprint PCS unilaterally to impose access charges on AT&T.”<sup>49</sup> Instead, the Commission held, “Sprint PCS is entitled to collect access charges . . . only to the extent that a contract imposes a payment obligation.”<sup>50</sup> If anything, that conclusion refutes rather than supports Sprint Nextel’s latest attempt to unilaterally impose a pricing plan (this time, bill-and-keep) on AT&T.

Throughout its brief, Sprint Nextel accuses AT&T of tactical delay. That accusation is false, and is based, as we explained above, on a highly selective and misleading recitation of the facts. The truth of the matter is that what AT&T seeks with respect to Sprint Nextel’s improper request to port bill-and-keep and facility pricing arrangements is not delay, but a swift rejection. That is why AT&T devoted two pages of its Petition to a plea for expedited treatment of the Petition and reiterates its plea below.

Sprint Nextel’s purported grievance is based in significant part on AT&T’s objections to the extension of its interconnection agreements with Sprint CLEC and Sprint PCS in the legacy BellSouth region pursuant to Merger Commitment 7.4.<sup>51</sup> But AT&T’s objections to that

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<sup>49</sup> *In re Petitions of Sprint PCS and AT&T Corp.*, 17 F.C.C. Rcd. 13192, ¶¶ 8, 9 (2002).

<sup>50</sup> *Id.* ¶ 12. Despite Sprint Nextel’s present protestations, it was hardly damaged by the Commission’s decision. As the Commission noted, wireless carriers like Sprint PCS “have never operated under the same calling-party’s network pays (CPNP) compensation regime as wireline LECs” (like the AT&T incumbents here). *Id.* ¶ 14. Rather, wireless carriers “have charged their end users both to make and to receive calls” and have thus “recovered the cost of terminating long-distance calls from their end users, and not from interexchange carriers.” *Id.* In other words, Sprint was already receiving compensation and was attempting to obtain by force a *second* recovery (from AT&T) for terminating calls. The AT&T wireline incumbents would not have the same luxury if Sprint Nextel were allowed to accomplish its plan to force them to terminate calls without any compensation.

<sup>51</sup> Sprint Opp. at 9-12.

extension were based on legitimate concerns and on a perfectly defensible reading of Merger Commitment 7.4. When Sprint Nextel repudiated the parties' virtually consummated negotiations and told AT&T it saw the merger commitments as "leverage" to get a "sweeter deal," AT&T was legitimately concerned that Sprint Nextel was abusing the merger commitments by trying to convert them from a mechanism for reducing transaction costs into a bludgeon for extracting substantive concessions. And when Sprint Nextel invoked Merger Commitment 7.4 in the service of that goal, AT&T stated its eminently reasonable belief – one based on both the language and purpose of the commitment – that it allowed carriers to extend the terms of expired agreement, as measured from the date of expiration. Ultimately, in recognition that the operative language of the merger commitment at issue was ambiguous, AT&T decided in good faith to accede to CLEC demands on this point, and as a result, AT&T allowed Sprint to extend for three full years agreements that already had been in effect for six years. Far from evidencing an intent to delay, AT&T's actions represent quite the opposite. Indeed, if AT&T's purpose had been delay, AT&T would have forced Sprint Nextel to litigate the Merger Commitment 7.4 issue in all nine BellSouth states rather than acquiescing after a single state commission rejected AT&T's position.<sup>52</sup>

Sprint Nextel also suggests that AT&T is promoting delay – and being duplicitous – by telling state commissions that Rule 809(b) presents fact issues for them to resolve while at the same time representing to the Commission that there is no need for evidence or fact-finding.<sup>53</sup> This reflects not AT&T duplicity but Sprint Nextel confusion. The questions AT&T has

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<sup>52</sup> Since the nine interconnection agreements in the BellSouth states that Sprint Nextel sought to extend have been or are in the process of being extended, and Sprint Nextel will obtain the full benefit of the three-year extension contemplated by Commitment 7.4, this aspect of Sprint Nextel's purported grievance is moot in any event.

<sup>53</sup> Sprint Opp. at 12.

presented to this Commission, including the questions concerning Rule 809(b), do not require evidence or fact-finding. When AT&T undertakes to establish in a state commission proceeding that it would in fact cost more to provide the Kentucky ICA to requesting carriers in that state than it costs to provide the agreement to the carriers that originally negotiated it, *that* will raise issues of fact for the state commission in that state.

#### **IV. THE COMMISSION SHOULD RESOLVE ON AN EXPEDITED BASIS THE ISSUES PRESENTED IN THE PETITION.**

AT&T has explained why the Commission should decide this case on an expedited basis.<sup>54</sup> Two commenters expressly agree,<sup>55</sup> while others are silent concerning expedition but evidently agree the Commission should resolve the issues.

Sprint Nextel, however, asserts that “AT&T has . . . provided no explanation why state commissions should not continue to resolve the pending Merger Condition matters under their concurrent jurisdiction”;<sup>56</sup> that a “state Commission is the appropriate forum for resolving these matters”;<sup>57</sup> and that the “Petition is a collateral attack upon the states’ concurrent jurisdiction that seeks to . . . overturn the state decisions adverse to AT&T’s position.”<sup>58</sup>

Notwithstanding these intimations, Sprint Nextel does not actually *argue* that the Commission should not proceed. Nor could it. The Commission indisputably has jurisdiction to issue the declaratory ruling AT&T has requested, and the Commission is plainly in a better

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<sup>54</sup> Pet. at 16-17.

<sup>55</sup> AAPC Comments at 3 (“Commitment 7.1 . . . should be definitively construed by this Commission . . . . The Commission properly should not leave it to the states to try to divine the meaning of federal requirements the Commission has imposed. . . . The Commission also should issue its ruling expeditiously . . . .”); Comcast Comments at 7 (suggesting Commission should act “promptly”).

<sup>56</sup> Sprint Opp. at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 4.

position to resolve the issues presented by the Petition – which concern the meaning of Merger Commitment 7.1 and the applicability of a Commission Rule to that merger commitment – than state commissions are. Furthermore, it would be far better for the Commission to resolve these issues decisively, as one commenter noted,<sup>59</sup> than to have 22 state commissions decide them, with inevitably disparate results. And finally, there is, as far as AT&T knows, no such thing as a “collateral attack upon . . . concurrent jurisdiction.”

AT&T recognizes that state commissions may have an important role to play in the implementation of Merger Commitment 7.1. If, for example, a question arises concerning whether it is feasible for AT&T to provide a particular UNE “given the technical, network, and OSS attributes and limitations in . . . the state for which the request is made,”<sup>60</sup> that would be a question for the state commission. Similarly, if the Commission declares, as AT&T has requested, that the principles of Rule 809(b) apply to ports pursuant to Merger Commitment 7.1, then it will be to each state commission that AT&T will present its case that it would cost more to provide the Kentucky ICA to the Sprint Nextel entities that seek to port the agreement to that state than it costs AT&T to provide the agreement to Sprint CLEC and Sprint PCS in Kentucky. The questions presented in the Petition, however – and these questions go to the core of AT&T’s objection to Sprint Nextel’s request to port the Kentucky ICA – are uniquely appropriate for decision by this Commission.

Contrary to Sprint Nextel’s assertion, the Petition does not seek to “overturn the state decisions adverse to AT&T’s position.”<sup>61</sup> In fact, no state commission has made a ruling that is inconsistent with any ruling the Petition advocates. No state commission has addressed the

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<sup>59</sup> See *supra* n.56.

<sup>60</sup> Merger Commitment 7.1.

<sup>61</sup> Sprint Opp. at 4.

question whether the bill-and-keep provision or the facility pricing arrangement in the Kentucky ICA is or is not state-specific pricing within the meaning of Merger Commitment 7.1. No state commission has addressed the question whether, as AT&T maintains, Rule 809(b) applies to a port pursuant to Merger Commitment 7.1 or whether, as Sprint Nextel maintains, the merger commitment effectively overrides the Rule.<sup>62</sup> For that matter, no state commission has made *any* substantive decision concerning Sprint Nextel’s request to port the Kentucky ICA pursuant to the merger commitments.<sup>63</sup> AT&T respectfully reiterates its request that the Commission resolve the Petition on an expedited basis.

### CONCLUSION

For the reasons set forth above, the Commission should grant the AT&T ILECs’ request for expedited resolution, and declare that

(1) bill-and-keep arrangements for the transport and termination of telecommunications and facility pricing factors are “state-specific pricing” terms, not subject to porting under Commitment 7.1 to other states;

(2) Commitment 7.1 does not give a carrier the right to port an agreement from one state to another if that carrier would be barred by Commission rules implementing Section 252(i) of the Telecommunications Act of 1996 from adopting that agreement within the same state; and

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<sup>62</sup> Sprint Nextel’s assertion that the Kentucky Public Service Commission “rejected AT&T’s newly raised ‘additional cost’ argument” (Sprint Opp. at 3) is misleading. What the Kentucky PSC actually held in the Kentucky Reconsideration Order cited in Sprint Opp. at 3 n.11 was that AT&T Kentucky asserted the argument too late, and that the argument as AT&T Kentucky framed it did not constitute a claim of “additional cost” under Rule 809(b).

<sup>63</sup> The Public Utility Commission of Ohio (“PUCO”), in the course of denying an AT&T Ohio motion to dismiss, stated that Sprint may port the Kentucky ICA, subject to state-specific modifications. AT&T does not believe that that was intended as a substantive decision, and is moving the PUCO to so clarify. In any event, the Ohio decision did not even arguably concern any question presented here.

(3) Commitment 7.1 does not apply to in-state adoptions of interconnection agreements or in any way supersede Commission rules governing such adoptions.<sup>64</sup>

Respectfully submitted,

/s/ Terri L. Hoskins

Terri L. Hoskins  
Gary L. Phillips  
Paul K. Mancini  
AT&T INC.  
1120 20th Street, N.W.  
Washington, D.C. 20036  
(202) 457-3810

Theodore A. Livingston  
Dennis G. Friedman  
Demetrios G. Metropoulos  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
(312) 782-0600

*Counsel for the AT&T ILECs*

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<sup>64</sup> The Commission should ignore Intrado's tale concerning its attempt to arrive at a 22-state interconnection agreement with AT&T (Intrado Comments at 4-6), because it has nothing to do with this proceeding. As Intrado admits (at 4), Intrado "is in the process of negotiating and in many cases arbitrating interconnection agreements with [AT&T] ILECs in various states." These negotiations and arbitrations arise not out of a porting request, but out of requests under 47 U.S.C. § 252(a) to establish new interconnection agreements. See, e.g., *Petition for Arbitration, In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish and Interconnection Agreement with The Ohio Bell Telephone Company d/b/a AT&T Ohio*, Case No. 07-1280-TP-ARB (Pub. Utils. Comm'n of Ohio, filed Dec. 21, 2007).

Intrado's grievance is that AT&T has declined to negotiate a single 22-state ICA. AT&T has no obligation, however, under the 1996 Act or otherwise, to provide a 22-state agreement. And, at a more practical level, AT&T, which has been a 22-state ILEC for just a little longer than a year, does not have a template for a 22-state ICA that could be used as a basis for negotiating a single ICA that would cover all 22 states. AT&T is working on such a template, but the process is extremely complex and time-consuming because of the many differences in practices, procedures, network arrangements, capabilities, etc., in the different AT&T regions. AT&T does have a 13-state template ICA for the legacy AT&T states, and a 9-state template ICA for the BellSouth pre-merger ILEC states. AT&T has provided those to Intrado and sought to negotiate with Intrado based upon them. To the extent that Intrado may think it can "port" the 13-state template to the 9-state region and thereby arrive at a 22-state agreement (Intrado Comments at 5) – which is the only remotely plausible connection between Intrado's claim and this proceeding – Intrado is obviously mistaken. The template is just that – a template – it is not an "entire effective interconnection agreement" subject to porting under Merger Commitment 7.1.

# ATTACHMENT 1

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

COPY TO:  
JEL  
BAN  
MNM  
JA  
D MGR

Sprint Communications Company L.P., )  
Sprint Spectrum L.P., Nextel West Corp )  
and NPCR, Inc., )  
Complainants, )  
)  
vs. )  
)  
Southwestern Bell Telephone Company )  
d/b/a AT&T Kansas, )  
Respondent. )

Docket No. \_\_\_\_\_

COMPLAINT

COMES NOW Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively "Sprint") seeking resolution of disputes with Southwestern Bell Telephone Company d/b/a AT&T Kansas ("AT&T Kansas" or "AT&T") that have arisen out of the Agreements for Interconnection by and between Sprint and AT&T Kansas and AT&T Kansas's violation of the conditions imposed by the Federal Communications Commission ("FCC") on the merger between AT&T and BellSouth. Specifically, Sprint petitions the Commission to direct AT&T to execute an adoption amendment to port in and adopt the interconnection agreement between BellSouth Telecommunications Inc. d/b/a AT&T Southeast and Sprint Communications Company L.P. and Sprint Spectrum L.P., as extended and approved in Kentucky (the "Kentucky ICA"), for all Sprint entities in accordance with merger commitments made by AT&T. Sprint alleges the following:

JURISDICTION

1. This Commission, pursuant to 47 U.S.C. §252, is vested with jurisdiction to oversee matters relating to the interconnection.
2. In addition, Kansas statutes, with respect to the Commission, provide it with jurisdiction to hear complaints, including K.S.A. 2006 Supp. 66-1,188 and 66-1,192, which

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DEC 27 2007

applies when a party alleges "any practice or act whatsoever, affecting or relating to any service performed or to be performed by such telecommunications public utility. . . is in any respect unreasonable, unfair, unjust, unreasonably inefficient or . . . unjustly discriminatory." See also, K.S.A. 2006 Supp. 66-1,190; and K.S.A. 2006 Supp. 66-1,194.

3. The Sprint entities filing this Complaint and who are requesting interconnection are indirect wholly-owned subsidiaries of Sprint Nextel Corporation that provide competitive local exchange and wireless services. Sprint Communications Company L.P. ("Sprint CLEC"), a Delaware limited partnership, is a competitive local exchange carrier under the Act, and an interexchange carrier, and is certified by the Commission to provide telecommunications service in Kansas. Sprint Spectrum L.P., a Delaware limited partnership, as agent and General Partner for WirelessCo, L.P., a Delaware limited partnership, and SprintCom, Inc., a Kansas corporation, all the foregoing entities jointly d/b/a Sprint PCS ("Sprint PCS"), provides commercial mobile radio service ("CMRS") in Kansas under licenses issued by the Federal Communications Commission ("FCC"). Nextel West Corp., a Delaware corporation, provides CMRS in Kansas under licenses issued by the FCC. The Sprint entities are "telecommunications carriers" under the Communications Act of 1934, as amended (the "Act").

4. Sprint's principal place of business is 6200 Sprint Parkway, Overland Park, Kansas 66251. The Sprint representatives involved in this dispute are:

Kenneth A. Schiffman  
Director, Government Affairs  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A303  
(913) 315-9783 (voice)  
(913) 523-9827 (facsimile)  
kenneth.schiffman@sprint.com

Jeffrey M. Pfaff  
Senior Counsel  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A553  
(913) 315-9294 (voice)  
(913) 315-0785 (facsimile)  
jeff.m.pfaff@sprint.com

Diane C. Browning  
Attorney, Government Affairs  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A411  
(913) 315-9284 (voice)  
(913) 523-0571 (facsimile)  
diane.c.browning@sprint.com

5. AT&T is a Kansas corporation having an office at 220 SE Sixth Street, Topeka, Kansas, 66603. AT&T is an incumbent local exchange carrier as defined by 47 U.S.C. § 252(h). AT&T is subject to the Commission's jurisdiction. AT&T, Sprint CLEC and Sprint PCS have been operating in Kansas under various interconnection agreements, with the latest version of the agreements effective in August, 2003. Nextel West Corp and AT&T entered into an interconnection agreement in August, 1998. The interconnection agreements have been subject to various amendments subsequent to their initial execution.

6. On March 4, 2006, AT&T's parent corporation, AT&T Inc., entered into an agreement to merge with BellSouth Corporation, the parent company of BellSouth Telecommunications, Inc. On March 31, 2006, AT&T Inc. and BellSouth Corporation filed a series of applications seeking FCC approval of the transaction.<sup>1</sup> During the resulting FCC proceeding, AT&T Inc. made a number of promises in the form of commitments in order to elicit FCC approval. The FCC ordered compliance with these commitments, and included such commitments as Conditions of its approval of the AT&T Inc./BellSouth Corporation merger.<sup>2</sup> Appendix F of the FCC Order is attached to this Complaint as Exhibit A.

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<sup>1</sup> In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, FCC 06-189, paragraphs 14, 17 (released March 26, 2007).

<sup>2</sup> Id. at para. 227. ("IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order.").

7. In the FCC Order approving the AT&T Inc./BellSouth Corporation merger, the interconnection-related Merger Commitments Nos. 1 and 2 (under the heading "**Reducing Transaction Costs Associated with Interconnection Agreements**") (collectively, the "Merger Commitments") obligate AT&T as follows:

**Merger Commitment No. 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, than 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*<sup>3</sup>

**Merger Commitment No. 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.*<sup>4</sup>

8. Sprint CLEC and Sprint PCS entered into an interconnection agreement with BellSouth Telecommunications, Inc. effective January 1, 2001 for the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee (the "BellSouth ICA"). By Order dated November 7, 2007, the Kentucky Public Service Commission

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<sup>3</sup> FCC Order at p. 149, APPENDIX F (emphasis added).

<sup>4</sup> *Id.*

extended the interconnection agreement between Sprint and AT&T for three years from December 29, 2006 (Exhibit B). The BellSouth ICA as extended by the Kentucky PSC is referred to herein as the "Kentucky ICA."

9. On August 21, 2007, AT&T notified Sprint that AT&T intended to terminate its existing interconnection agreements with Sprint<sup>5</sup> (Exhibit C). On August 31, 2007, Sprint replied to AT&T that it had received the notice and agreed to establish an arbitration window that would open on January 12, 2008, but also noted that it reserved its right to enforce any merger commitment, including the right to port an interconnection agreement from another state (Exhibit D).

10. On November 20, 2007, Sprint notified AT&T that it intended to exercise its right under the Merger Commitments to port and adopt the Kentucky ICA in Kansas. The subject notification is attached hereto as Exhibit E.

11. AT&T has not honored Sprint's request to port and adopt the Kentucky ICA in Kansas for all of the Sprint entities. In a December 13, 2007 letter from AT&T to Sprint, AT&T claims that it will allow certain Sprint entities to adopt the Kentucky ICA in certain states, including Kansas, subject to still unidentified state-specific modifications and other unspecified modifications, but AT&T will not allow all Sprint entities to do so, claiming a restriction from Merger Commitment 7.1. The restriction mentioned by AT&T is non-existent in Merger Commitment 7.1. The December 13, 2007 letter from AT&T is attached hereto as Exhibit F.

12. AT&T has not raised any state-specific pricing issues or technical feasibility issues in other communications with Sprint that would preclude the adoption of the Kentucky

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<sup>5</sup> On August 24, AT&T withdrew its notice of termination regarding Sprint's CLEC entity, noting that the agreement's terms did not allow for notice until October 30, 2007. On November 1, 2007, in conformity with the agreement, AT&T filed its notice of termination regarding Sprint's CLEC entity. The result is that AT&T has terminated all the interconnection agreements with the Sprint entities in Kansas.

ICA in Kansas. Sprint has twice requested that AT&T identify any provisions in the Kentucky ICA that would require modification for use in another state.

13. On January 26, 2007, Sprint requested that AT&T identify any specific provisions of the 2001 ICA [BellSouth ICA] that AT&T would not consider applicable in a given legacy AT&T state, along with an explanation as to why. Then, on July 10, 2007, Sprint requested to port the BellSouth ICA into Ohio and requested that AT&T "identify any state orders that AT&T believes constitutes 'state-specific pricing and performance plans and technical feasibility such that it effects these state specific sections.'" (See Exhibit G). AT&T's response, dated October 9, 2007, did not identify any state-specific modifications necessary; AT&T only claimed that the BellSouth ICA could not be ported because it had expired. (See Exhibit H).

14. Starting in April, 2007, Sprint commenced a series of proceedings before the state commissions in the legacy BellSouth states seeking to implement the Merger Commitments. Despite the stated intent of the interconnection-related commitments – Reducing Transaction Costs Associated with Interconnection Agreements – AT&T opposed Sprint's election at each State Commission, forcing Sprint to litigate to implement the commitment. After making Sprint litigate this matter in every BellSouth state, and following Sprint's success in obtaining an extension from the Kentucky Commission, AT&T finally conceded Sprint's election and issued an Accessible Letter dated November 16, 2007 recognizing Sprint's right to extend its agreement for three years ("Accessible Letter"). The Accessible Letter is attached as Exhibit I.

15. Under the paragraph titled, "Porting ICAs", the Accessible Letter states, "Merger Commitment 7.1 allows carriers to port effective interconnection agreements entered into in any state in AT&T's 22-state ILEC operating territory (subject to stated limitations and requirements)." The Accessible Letter further indicates that agreements that have not been

noticed for termination/renegotiation – like the Kentucky ICA – are eligible for porting under Merger Commitment 7.1.

16. On December 18, 2007, the Kentucky Public Service Commission entered its order granting Nextel West's request to adopt the Kentucky ICA, finding the adoption lawful and denying AT&T's motion to dismiss the adoption petition (Exhibit J). The effect of the Kentucky Commission order is that the Kentucky ICA is available to Sprint CLEC and both Sprint CMRS providers (Sprint PCS and Nextel West Corp.).

17. While AT&T and Sprint have engaged in negotiations regarding a new interconnection agreement that would include Kansas, those discussions have not resulted in an executed agreement. In lieu of initiating a full-blown arbitration proceeding in Kansas, and unnecessarily utilizing the resources of the Kansas Commission and Sprint, Sprint files this Complaint and exercises its rights under Merger Commitment 1 to port and adopt the Kentucky ICA in Kansas for all of the Sprint entities and requests that the Commission acknowledge and implement Sprint's request to adopt the Kentucky ICA, subject to state-specific pricing, and direct AT&T to execute an appropriate adoption amendment.

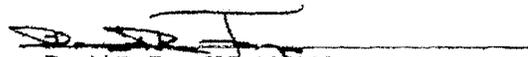
18. The Commission has jurisdiction over this Complaint. Pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended, the FCC delegated authority over interconnection agreements to the State commissions.

19. Sprint presents only one legal issue to be resolved. That single issue is Sprint's right to exercise the porting of the Kentucky ICA into Kansas for all Sprint entities in accordance with Merger Commitment 1. A version of the AT&T Kentucky ICA can be viewed on AT&T's website at: [http://cpr.bellsouth.com/clec/docs/all\\_states/800aa291.pdf](http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf). Sprint respectfully requests the Commission, pursuant to Sections 251 and 252, to order AT&T to enter into an

agreement adopting the AT&T Kentucky ICA, subject to state-specific pricing, in Kansas for all Sprint entities.

WHEREFORE, Sprint respectfully requests that the Commission assert jurisdiction over this Complaint, require AT&T Kansas to honor its commitment by fulfilling its obligation without unnecessary delay or transaction costs, and enter an order directing AT&T to execute an adoption amendment adopting the Kentucky ICA, subject to state-specific pricing, in Kansas for all Sprint entities. The Commission should direct the parties to execute the adoption amendment as expeditiously as possible.

Respectfully submitted,



David R. Frye KS. #13133  
Paul S. DeFord MO.# 29509  
LATHROP & GAGE L.C.  
2345 Grand Boulevard  
Kansas City, MO 64108-2612  
Telephone: (816) 292-2000  
Facsimile: (816) 292-2001  
pdeford@lathropgage.com

Jeffrey M. Pfaff KS. # 15717  
Senior Counsel  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A553  
(913) 315-9294 (voice)  
(913) 315-0785 (facsimile)  
jeff.m.pfaff@sprint.com

Kenneth A. Schifman KS. # 15354  
Director, Government Affairs  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A303  
(913)315-9783 (voice)  
(913)523-9827 (facsimile)  
kenneth.schifman@sprint.com

Diane C. Browning KS. #22336  
Attorney, Government Affairs  
6450 Sprint Parkway  
Overland Park, Kansas 66251  
Mailstop: KSOPHN0212-2A411  
(913)315-9284 (voice)  
(913)523-0571 (facsimile)  
diane.c.browning@sprint.com

ATTORNEYS FOR  
SPRINT COMMUNICATIONS COMPANY L.P.  
SPRINT SPECTRUM L.P.  
NEXTEL WEST CORP.

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing Complaint has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 21<sup>st</sup> day of December, 2008, to:

Bruce A. Ney  
Melanie N. McIntyre  
220 SE Sixth Street, Room 515  
Topeka, Kansas 66603-3596  
(785) 276-8413  
(785) 276-1948 (facsimile)  
bruce.ney@att.com

  
\_\_\_\_\_  
Attorney for Complainants

# ATTACHMENT 2

Redacted Version - For Public Inspection

# Sprint Settlement

**\*REDACTED\***

- **Billing between BST and Sprint entities was balanced, each gave up billing the other \*redacted\* annually**