STATE OF SOUTH CAROLINA)
)

(Caption of Case)

Petition for Approval of Nextel South Corp. and Petition for Approval of NPCR, Inc. d/b/a Nextel Partners'

Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2007 - 255 - C

(Please type or print)
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DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
☐ Electric	☐ Affidavit	☐ Letter	☐ Request
☐ Electric/Gas	☐ Agreement	☐ Memorandum	☐ Request for Certification
☐ Electric/Telecommunications	☐ Answer	☐ Motion	☐ Request for Investigation
☐ Electric/Water	☐ Appellate Review	☐ Objection	☐ Resale Agreement
☐ Electric/Water/Telecom.	☐ Application	☐ Petition	☐ Resale Amendment
☐ Electric/Water/Sewer	☐ Brief	☒ Petition for Reconsideration	☐ Reservation Letter
☐ Gas	☐ Certificate	☐ Petition for Rulemaking	☐ Response
☐ Railroad	☐ Comments	☐ Petition for Rule to Show Cause	☐ Response to Discovery
☐ Sewer	☐ Complaint	☐ Petition to Intervene	☐ Return to Petition
☒ Telecommunications	☐ Consent Order	☐ Petition to Intervene Out of Time	☐ Stipulation
☐ Transportation	☐ Discovery	☐ Prefiled Testimony	☐ Subpoena
☐ Water	☐ Exhibit	☐ Promotion	☐ Tariff
☐ Water/Sewer	☐ Expedited Consideration	☐ Proposed Order	☐ Other:
☐ Administrative Matter	☐ Interconnection Agreement	☐ Protest	
☐ Other:	☐ Interconnection Amendment	☐ Publisher's Affidavit	
	☐ Late-Filed Exhibit	☐ Report	

Print Form Reset Form

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November 6, 2008

FILED ELECTRONICALLY
The Honorable Charles L.A. Terreni
Chief Clerk
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Petition for Approval of Nextel South Corporation's Adoption of the Interconnection Agreement between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-255-C

Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement between Sprint Communications, L.P./Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-256-C

Dear Mr. Terreni:

Enclosed for filing is **Nextel's Application for Rehearing and Response to AT&T's Petition for Rehearing/Reconsideration or, in the Alternative, for Clarification** in the above-referenced dockets.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: Patrick D. Turner, Esquire (via electronic mail service)
Nannette S. Edwards, Esquire (via electronic mail service)
William R. Atkinson, Esquire (via electronic mail service)
Mr. Joe M. Chiarelli (via electronic mail service)
Enclosures

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN THE MATTER OF PETITION FOR APPROVAL OF NEXTEL SOUTH CORP.'S ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-255-C
IN THE MATTER OF PETITION FOR APPROVAL OF NPCR, INC. D/B/A NEXTEL PARTNERS' ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-256-C

NEXTEL'S APPLICATION FOR RECONSIDERATION
AND RESPONSE TO
AT&T's PETITION FOR REHEARING/RECONSIDERATION OR,
IN THE ALTERNATIVE, FOR CLARIFICATION

Nextel South Corp. and NPCR, Inc., d/b/a Nextel Partners (collectively, "Nextel") hereby respectfully submits its Application for reconsideration of one portion of the Public Service Commission of South Carolina's ("Commission") Order on Consolidated Dockets, issued on October 22, 2008, in the above-styled proceeding. Nextel also takes this opportunity to respond to certain aspects of BellSouth Telecommunications, Inc., d/b/a AT&T South Carolina's ("AT&T") Petition for Rehearing / Reconsideration or, in the Alternative, for Clarification, filed on November 3, 2008.

I.

INTRODUCTION

On October 22, 2008 the Commission issued an *Order on Consolidated Dockets* in the above-captioned matters which was served upon Nextel on October 27, 2008 ("Order"). On November 3, 2008, AT&T South Carolina ("AT&T") filed its "Petition for Rehearing/Reconsideration or, In the Alternative, for Clarification" ("AT&T Petition"). For the reasons further explained herein[1], pursuant to S.C. Code Ann. § 58-9-1200, Nextel respectfully requests that the Commission: 1) reconsider and strike from its Order the conclusion that AT&T has a right to immediately renegotiate the Nextel adopted Sprint-AT&T ICA pursuant to Attachment 3, Section 6.1 of the agreement, and deny AT&T's Petition for rehearing or reconsideration of any remaining substantive aspect of the Commission's Order; and 2) clarify that the effective date of Nextel's adoption be the same date as the Commission's approval of the three-year extension of the Sprint-AT&T ICA, *i.e.,* January 23, 2008.

II.

APPLICATION FOR RECONSIDERATION

The majority of the Commission's Order clearly explains and correctly concludes that "Nextel's request for this Commission to approve Nextel's adoption of the Sprint-AT&T agreement is, on multiple, yet independent bases, consistent with federal law." (*See* Order, Sections II, III A – C, and first sentence of IV). Nextel respectfully requests, however, that the Commission rehear, reconsider and strike in their entirety the following

[1] For the sake of brevity, Nextel incorporates herein by reference and also relies upon all of its prior submissions in these consolidated dockets in support of this Application and Response.

portions of the Order, which, as a matter of law are clearly erroneous, unsupported by any evidence, and arbitrary and capricious:

- Page 12 – 13:

> **"D. AT&T's Right to Renegotiate the Sprint ICA**
>
> Our examination of the Sprint ICA leads to a different conclusion than that advocated by either of the parties. Both parties cited Attachment 3, 6.1 of the Sprint Agreement, ***We do not find this section relevant to the issue of adoption of the agreement***, but we do believe that under the circumstances presented here, it allows AT&T to seek renegotiation of the agreement [emphasis added]. The relevant language states:
>
> > 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.
>
> Attachment 3, Section 6.1. We find that this language provides AT&T the opportunity to renegotiate the terms of the ICA."

- Page 13, that portion of Section "**IV. CONCLUSION**" which states:

> "… . We further find, however, that the differences between the original and the present Nextel entities give rise to AT&T's right to renegotiate the terms of the agreement."

- Page 13, that portion of the Ordering paragraphs which states:

> "c. AT&T may, pursuant to Attachment 3, Section 6.1 of the Agreement, renegotiate the terms of the Agreement."

These portions of the October 22, 2008 Order identified above are contrary to the remaining explanations and conclusions in the Order, and constitute a legally erroneous conclusion that AT&T has an immediate right to re-negotiate the Sprint-AT&T ICA contrary to the express, very limited re-negotiation right that actually exists in Section 6.1 of the agreement. In the absence of any claim that the Sprint-AT&T ICA was ambiguous

(and no such claim was made by either party in this proceeding), it is clear legal error for the Commission to "interpret" and create an unfettered AT&T re-negotiation right that unequivocally does not otherwise exist in the Sprint-AT&T ICA. The South Carolina Court of Appeals recently summarized the law regarding contract interpretations as follows:

> One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson,* 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1992). To determine the intention of the parties, the court 'must first look at the language of the contract.' *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.* Op. No. 4389, 2008 S.C. App. LEXIS 83 (S.C. Ct. App. Filed May 12, 2008) (Davis Adv. Sh. No. 29 At 18); *see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n.* 343 S.C. 335, 339, 540 S.E. 2d 843, 845 (2001). It is also a question of law whether the language of a contract is ambiguous. *South Carolina Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *C.A.N. Enters., Inc.,* 296 S.C. at 377, 373 S.E.2d at 586. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. *Ebert v. Ebert,* 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct.App.1995). We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. *C.A.N. Enters., Inc.,* 296 S.C. at 378, 373 S.E.2d at 587. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).[2]

Although the Commission acknowledged in its Order that both parties discussed Attachment 3, Section 6.1, it first affirmatively found that this section was "not relevant" to whether or not Nextel could adopt the Sprint-AT&T ICA under federal law. Despite this finding of irrelevance to the controlling issues in these dockets - and no claim

[2] *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC., et al.,*667 S.E.2d 7, 2008 S.C. App. LEXIS 157 at *10 - *11 (Ct. App. 2008).

whatsoever by any party that section 6.1 was in any way ambiguous – in the above-identified portions of its Order, the Commission nevertheless proceeded to "interpret" Section 6.1 of the agreement and create a "right" that AT&T can re-negotiate the entire Sprint-AT&T ICA. This interpretation and creation of a new right is directly contrary to the very specific existing re-negotiation language in the Sprint ICA, which requires a specific triggering event that has not taken place in this case. Further, even if the specified triggering event occurs (and it has not), the agreement only allows re-negotiation as to the very discrete "bill and keep arrangement" of the agreement. To place the partial 6.1 language cited by the Commission in context, the complete text of Attachment 3, 6.1 of the Sprint Agreement states:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Traffic is the result of negotiation and compromise between BellSouth, Sprint CLEC and Sprint PCS. The Parties' agreement to establish a ***bill and keep compensation arrangement*** was based upon extensive evaluation of costs incurred by each party for the termination of traffic. Specifically, Sprint PCS provided BellSouth a substantial cost study supporting its costs. As such the ***bill and keep arrangement is contingent*** upon the agreement by all three Parties to adhere to bill and keep. ***Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation,*** *the* ***bill and keep arrangement*** *between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.* [Emphasis added].

The record is devoid of any evidence whatsoever that:

- Sprint CLEC has opted into another interconnection arrangement with AT&T that calls for reciprocal compensation; or,
- Sprint PCS has opted into another interconnection arrangement with AT&T that calls for reciprocal compensation; or,
- There exists any Nextel affiliate that would have been (or is now) subject to the adopted Sprint-AT&T ICA and has opted into another interconnection arrangement with AT&T that calls for reciprocal compensation.

AT&T has never contended, much less attempted to prove the existence of any triggering event under the clear and unambiguous language of Section 6.1 that would authorize AT&T's re-negotiation of *any* portion of the adopted Sprint-AT&T agreement as to Nextel, much less the *entire* agreement. Indeed, even assuming for the sake of argument alone that AT&T could establish the predicate express triggering event, the only thing AT&T would be entitled to re-negotiate under the agreement is "the bill and keep arrangement" and nothing more. Again, no such event has triggered any right to renegotiate the "bill-and-keep arrangement".[3]

In summary, despite the Commission's correct and well-reasoned finding that Nextel as a stand-alone carrier is, as a matter of federal law and AT&T's own voluntary Merger Commitments, entitled to adopt the Sprint-AT&T ICA, by the above-identified portions of its Order the Commission committed legal error by re-writing the Sprint-AT&T ICA to provide AT&T an escape path that is directly contrary to such federal law and voluntary AT&T commitments. Nextel respectfully requests the Commission correct this error by deleting the above-identified passages from its Order, and denying AT&T's Petition for rehearing or reconsideration.

[3] Nextel believes that the Commission may have relied on its prior ruling in Order No. 2008-504 in Docket No. 2000-130-C in making the incorrect determinations described above. However, the factual situation that existed in that case is clearly different from the instant Dockets. In that case, Windstream did in fact elect to leave the ACI/BellSouth agreement and opt into the BellSouth-DukeNet agreement, thereby triggering the renegotiation provisions of the ACI/BellSouth agreement. As described above, no such triggering event has taken place in these Dockets.

III.

AT&T's REQUEST FOR CLARIFICATION

The Federal Communication Commission ("FCC")'s rule implementing Section 252(i) of the Act, 47 C.F.R. Section 51.809, obligated AT&T to make the Sprint-AT&T ICA available to Nextel "without unreasonable delay". Under no theory should Nextel be penalized for AT&T's decision to litigate non-meritorious "objections" that were contrary to well-established federal law and AT&T's own voluntary Merger Commitments. Simply stated, no state commission has yet to agree with AT&T's proposed "30-day after signature" effective date position in the Nextel adoption proceedings in the other legacy-BellSouth states.

In Kentucky, the Nextel adoption case decisions occurred in late December, 2007 and the parties mutually agreed to use a January 7, 2008 effective date. In Tennessee, the Tennessee Regulatory Authority ("TRA") granted Nextel's adoption request from the bench on May 19, 2008 and upon issuing its formal approval order on July 17, 2008, the TRA specified that the parties use May 19, 2008 as the effective date for the to-be-filed adoption documents. In contrast to Kentucky and Tennessee, Florida, Georgia, and Alabama are the states in which the effective date issue has been fully and extensively briefed and a decision rendered based upon such briefs.[4]

As further explained herein, and contrary to AT&T's assertions, Nextel has no objection to the Commission following the Georgia and Alabama decisions and utilizing an effective date of January 23, 2008, *i.e.*, the date the Commission approved the amendment to the Sprint-AT&T ICA "which in fact extended the ***then-effective*** month-

[4] The issue regarding the appropriate effective date for the Nextel adoptions has been briefed, but no final decision has been rendered to date in North Carolina, Florida and Louisiana.

to-month term of the Sprint ICA for three years from March 20, 2007, to March 19, 2010, and closed the Sprint-AT&T Arbitration Docket No. 2007-215-C" ("Sprint-AT&T ICA Extension Order").[5] By contrast, AT&T's proposed effective date of 30 days following the last signature on the adoption document, which is essentially some as-yet-to-be-but still-undetermined date in the future, is not only inconsistent with federal law and the other state decisions following such federal law, but would affirmatively *reward* AT&T and *prejudice* Nextel by denying Nextel the benefit of the Sprint-AT&T ICA for more than a year while AT&T engaged in its efforts to avoid the very obligations that required it to make the Sprint-AT&T ICA available to Nextel "without unreasonable delay."

A. Nextel's Proposed January 23, 2008 Effective Date is Consistent With the Established Purpose of a Section 252(i) Adoption

The FCC stated in the Local Competition Order that "a carrier seeking interconnection, network elements or services ... shall be permitted to obtain its statutory rights on an expedited basis" and "the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated" if requesting carriers must undergo a lengthy process before being able to utilize the terms of a previously approved agreement.[6] Further, the FCC left it "to state commissions in the first instance" to determine the procedures for making agreements available to requesting carriers ***on an expedited basis***.[7]

Having failed to establish any legitimate basis to justify AT&T's actions, it would be patently unfair and contrary to the federal policies of nondiscrimination and pro-competition to now reward AT&T for more than a year of unmeritorious objections by

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[5] *See* Order at p. 4, emphasis added.

[6] *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 ¶ 1321 (1996) ("Local Competition Order").

[7] *Id.* (emphasis added).

using AT&T's proposed effective date of thirty (30) days following the date of the last signature of both parties. Nextel's proposed January 23, 2008 effective date is consistent with the federal policies of prohibiting discrimination and encouraging competition. Had AT&T timely honored its Merger Commitment obligation to Sprint to extend the Sprint ICA 3 years and its further statutory and Merger Commitment obligations to permit Nextel's adoption of the extended Sprint ICA, Nextel would have been enjoying the benefits of the Sprint ICA more than six months prior to January 23, 2008. Under the circumstances there is simply is no legitimate basis under federal law for AT&T to benefit from its patently dilatory tactics asserting invalid objections over the past year.

B. Nextel's Proposed Effective Date of January 23, 2008 Is Consistent With the Commission's Order in the Sprint Arbitration Docket

But for AT&T's efforts to avoid its responsibilities under federal law, the ICA adoption should have been implemented in short order following Nextel's notice of adoption letter of May 18, 2007. To the extent there was ever any factual issue in this matter, *i.e.*, the commencement date of the three-year extension of the Sprint ICA, that issue was resolved with the Commission's January 23, 2008 Sprint-AT&T ICA Extension Order in the Sprint-AT&T Arbitration in Docket No. 2007-215-C. Not only was it resolved, but it was resolved exactly as Sprint had requested at the outset, thereby further punctuating the lack of merit in AT&T's contention that the Sprint-AT&T ICA was ever "expired". Notwithstanding that every potentially controlling issue that was raised by AT&T has been resolved against AT&T, by its proposed effective date AT&T is still attempting to do indirectly what it has been rebuffed from doing directly in every state, including South Carolina, that has ruled on the merits of the matter. Allowing

AT&T to continue to avoid its responsibilities rewards its delay and frustrates the FCC's direction for expedition.

C. Nextel's Proposed Effective Date of January 23, 2008 Is Consistent With AT&T's Prior Practice

AT&T's argument that the Commission can only approve an effective date that arises after its Order approving Nextel's adoption is, ironically, contrary to AT&T's own established practice of executing ICAs well after any stated "effective date" in the ICA. The very Sprint-AT&T ICA as to which the Commission has approved Nextel's adoption contains an effective date that precedes the parties' execution, and therefore, any filing of the document. The introductory paragraph of the Sprint ICA recites its Effective Date of January 1, 2001, although it was not signed by Sprint Communications Company L.P. until June 19, 2002, by Sprint Spectrum, L.P. until June 26, 2002 and by BellSouth Telecommunications, Inc. until June 28, 2002. Thus, AT&T cannot credibly claim that there is anything inherently illegal, improper or otherwise inappropriate with the principle that, in the absence of a sustained valid objection, and as a matter of federal policy prohibiting ILEC discrimination and anti-competitive practices, an adoption should indeed be considered effective as of the date of its request at the earliest and, at the latest, when that request is filed with the Commission.

D. Nextel's Proposed Effective Dates of January 23, 2008 Is Consistent With Other State Commission Decisions That Have Expressly Addressed the Effective Date Issue

While this Commission is not bound by the decisions reached by other state commissions, it is significant that where the parties have fully briefed this very issue to decision in Florida, Georgia and Alabama, no state has approved the 30-day post-

signature effective date proposed by AT&T.[8] Instead, the Florida Pubic Service Commission determined that Nextel's adoption was presumptively valid when its Notice of adoption was filed with the Commission June 8, 2007 and, in light of the lack of any valid AT&T objection, that date should remain the appropriate date of Nextel's adoption of the Sprint-AT&T ICA.[9] The Georgia Commission based its decision in part on its "bright-line test" requirement that there must be at least six months remaining to an ICA before it can be adopted. Rather than use the date of Nextel's filing with the Commission, in the face of AT&T's lack of valid objections and a finding of unreasonable delay (AT&T having raised at a late date the cost objection to demand a hearing in Georgia, and then withdrew its hearing request shortly prior to the hearing date), the Georgia PSC determined that the appropriate effective date should be the date that the Georgia PSC approved the extension of the three-year extension of the Sprint-AT&T ICA which, in Georgia, was January 8, 2008.[10]

And finally, in Alabama, at its November 4, 2008 Commission Meeting, the Alabama Public Service Commission also approved Nextel's adoption of the Sprint-

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[8] In Florida, AT&T proposed the same Effective date that it now proposes in South Carolina, i.e., 30 calendar days after the final party executes the adoption. In Georgia, AT&T proposed an effective date that coincided with the date of the commission's May 29, 2008 Order Granting Adoption, which had not addressed the effective date issue.

[9] *See In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum, by NPCR, Inc. d/b/a Nextel Partners* and, separately, *Nextel South Corp. and Nextel West,* Florida PSC Docket Nos. 070368-TP and 070369-TP, Final Order Granting Adoption by Nextel of Sprint – AT&T Interconnection Agreement, Order No. PSC-08-0584-FOF-TP issued September 10, 2008. AT&T has since filed for reconsideration of the Florida Commission's determination regarding the June 8, 2007 effective date.

[10] *See In re: Petition for Approval of NPCR, Inc. d/b/a Nextel Partners'* and, separately, *Nextel South Corp.'s Adoption of the Existing Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast,* Georgia PSC Docket Nos. 25430 and 25431, Order on Motion to Enforce the Commission's May 29, 2008 Action Granting Adoption of Interconnection Agreements, issued September 24, 2008.

AT&T ICA with an effective date of March 4, 2008, the effective date of the Commission's Order approving the three-year extension Amendment to the Sprint ICA.

E. AT&T's Opposition To An Appropriate Effective Date

AT&T's arguments to avoid an effective date that is consistent with the federal anti-discrimination policy appear to be: 1) that an adoption agreement is apparently the same thing as a negotiated or arbitrated agreement and, therefore, must be executed, filed and approved pursuant to Sections 252(e) and 252(h) before it can be effective; and, 2) that an effective date prior to such approval would be inconsistent with the Sixth Circuit case *BellSouth Telecomm., Inc. v. Southeast Telephone, Inc.*, 462 F.2d 650 (6th Cir. 2006) (*"Southeast"*). AT&T's first argument is directly contrary to the FCC's express 252(i) precedent. AT&T's second argument is premised on an erroneous interpretation and application of *Southeast* that is wholly inapplicable to the facts of this case.

AT&T's argument elevates form over substance by attributing unwarranted significance to the *pro forma* adoption agreement itself. While a convenient method of tracking adoptions and demonstrating that the ILEC has no objection to an adoption, federal law does not require an ILEC's affirmative agreement to an adoption under 252(i). Negotiated and arbitrated interconnections require state commission approval and filing under §252(e) and §252(h), respectively. Adoptions of existing interconnection agreements under §252(i) clearly do not.

As for the *Southeast* case, it is clearly distinguishable on several levels. In that case, relying upon the FCC's then-current "pick and choose" rule, a CLEC asked the Kentucky Public Service Commission to approve an amendment by which the CLEC adopted and incorporated a new dispute resolution provision from a third-party's ICA

with BellSouth into the CLEC's existing agreement, and to "make[e] the amendment to the interconnection agreement *effective as of the date of the Order.*"[11] BellSouth filed a formal objection to the CLEC's request. Thereafter, the Kentucky PSC granted the CLEC's "pick and choose" request to amend its interconnection agreement, despite the fact that the FCC had in the meantime adopted the "all or nothing rule" and repealed the "pick and choose" rule. Notwithstanding this intervening change in FCC regulation, the Kentucky PSC reasoned that it should review the request under the FCC regulation that existed at the time the CLEC filed its request.

Although the District Court upheld the Kentucky PSC's decision, the Sixth Circuit reversed. The Sixth Circuit, found that "[t]he FCC intended for the new [all or nothing] rule to go into effect immediately"[12], the Kentucky PSC had no authority to apply the "pick and choose" rule after it was repealed, and application of the new rule did not have an "impermissibly retroactive" effect because the CLEC had no "vested right" to adoption under prior law. Thus, the CLEC's attempt to adopt less than an entire agreement constituted a valid objection by BellSouth under the newly applicable "all or nothing rule". Importantly, the Sixth Circuit made no attempt to address the Kentucky PSC's authority to set an effective date for adoption of an interconnection agreement either in the absence of a change of law or the absence of a valid objection. Thus, even if Sixth Circuit decisions were binding on this Commission – which they are not – the decision would establish no precedent applicable to the instant case.

AT&T had more than ample opportunity to assert a valid objection in this docket if it had one that it could prove, but it could not. In the absence of a valid objection, the

[11] *Southeast* at. 660, emphasis in original.
[12] *Id.*, 654.

Commission's recognition of Nextel's adoption as of the January 23, 2008 date affirmatively nullifies, at least in part, the prejudice that will otherwise result if AT&T is allowed to yet further delay implementation of its obligations.

IV.

Conclusion

Wherefore, for the foregoing reasons Nextel respectfully moves the Commission to:

a) reconsider and strike from its Order the above-identified passages on pages 12 and 13, finding that AT&T has a right to immediately renegotiate the Nextel adopted Sprint-AT&T ICA pursuant to Attachment 3, Section 6.1 of the agreement, and deny AT&T's Petition for rehearing or reconsideration of any remaining substantive aspect of the Commission's Order;

b) clarify that the effective date of Nextel's adoption be the same date as the Commission's approval of the three-year extension of the Sprint-AT&T ICA, *i.e.*, January 23, 2008; and,

c) grant Nextel such other and further relief as the Commission deems just and proper.

Respectfully submitted this 6th day of November, 2008.

[Signature page to follow]

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Attorneys for Nextel South Corp.
and NPCR, Inc. d/b/a Nextel Partners

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN THE MATTER OF PETITION FOR APPROVAL OF NEXTEL SOUTH CORP.'S ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-255-C
IN THE MATTER OF PETITION FOR APPROVAL OF NPCR, INC. D/B/A NEXTEL PARTNERS' ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-256-C

This is to certify that I have caused to be served this day, one (1) copy of **Nextel's Application for Rehearing and Response to AT&T's Petition for Rehearing/Reconsideration or, in the Alternative, for Clarification** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

VIA ELECTRONIC MAIL SERVICE
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Carol Roof

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Paralegal

November 6, 2008
Columbia, South Carolina