Decision 08-11-041 November 21, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Sprint Communications Company L.P. (U 5112 C), Sprint Spectrum L.P. as agent for WirelessCo L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) for Commission Approval of an Interconnection Agreement with Pacific Bell Telephone Company d/b/a AT&T California pursuant to the "Port-In Process" Voluntarily Created and Accepted by AT&T Inc. as a Condition of Securing Federal Communications Commission Approval of AT&T Inc.'s Merger with BellSouth Corporation.	Application 07-12-017 (Filed December 20, 2007)

DECISION GRANTING SPRINT NEXTEL'S REQUEST TO PORT-IN TO CALIFORNIA A KENTUCKY INTERCONNECTION AGREEMENT, SUBJECT TO CERTAIN LIMITATIONS

1. Summary

In this decision, we grant the request of Sprint Communications Company L.P., Sprint Spectrum L.P. as agent for WirelessCo L.P. and Sprint Telephony PCS, L.P., and Nextel of California, Inc. to port-in to California an interconnection agreement approved by the Kentucky Public Service Commission, subject to certain limitations. The requirement for AT&T, Inc. (AT&T) to allow telecommunications carriers to port approved interconnection agreements to other states arises out of the merger commitments agreed to by

AT&T as a condition of Federal Communications Commission approval of its merger with BellSouth Corporation.

However, the decision finds that the bill-and-keep and facility sharing arrangements in the Kentucky agreement may not be ported because they constitute "state-specific pricing." The merger commitment excludes state-specific pricing from the porting requirement.

This proceeding is closed.

2. Background

Sprint Communications Company L.P., Sprint Spectrum L.P., as agent for WirelessCo, L.P. and Sprint Telephony PCS, L.P., and Nextel of California Inc. (Sprint Nextel or applicants) filed an application on December 20, 2007. According to the applicants, the sole issue that needs to be considered by the Commission is a legal issue, namely whether, pursuant to the "port-in process" created and accepted by AT&T Inc. as a merger commitment that it voluntarily undertook to secure Federal Communications Commission (FCC) approval of its merger with BellSouth Corporation, this Commission should allow applicants to port-in and adopt in California the Kentucky interconnection agreement (ICA) approved by the Public Service Commission of the Commonwealth of Kentucky (Kentucky PSC) in its orders dated September 18, 2007 and November 7, 2007 in Case No. 2007-00180. The Kentucky ICA was itself approved by the Kentucky PSC pursuant to the "ICA Merger Commitments."

On March 4, 2006, 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 and BellSouth Corporation filed a series of applications seeking FCC approval of the transaction. During the resulting FCC proceeding, AT&T made a number of legal commitments in order to elicit FCC

approval. The FCC ordered compliance with those commitments, and included such commitments as conditions of its approval of the AT&T Inc./BellSouth Corporation merger. These commitments are listed in Appendix F of the FCC Order.

In the FCC Order approving the AT&T Inc./BellSouth Corporation merger, the interconnection-related Merger Commitment No. 1 obligates AT&T as follows:

> **Merger Commitment No. 1:**
>
> The AT&T/BellSouth ILECs [Incumbent Local Exchange Carriers] 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 a state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE [unbundled network element] unless it is feasible to provide, given the technical, network, and OSS [Operation Support Systems] attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.[1]

On November 20, 2007, Sprint Nextel notified AT&T that Sprint Nextel was exercising its right to adopt the Kentucky ICA in California. On December 13, 2007, AT&T responded to Sprint Nextel's letter explaining that Merger Commitment 7.1 would permit the Kentucky ICA to be ported jointly by

[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, Appendix F.

one CLEC and one Commercial Mobile Radio Service (CMRS) provider, but not by a consortium consisting of one CLEC and multiple CMRS providers. Therefore, applicants filed the instant application seeking a decision from the Commission requiring AT&T to execute the Kentucky ICA in California.

On January 23, 2008, AT&T California (AT&T) filed a protest to Sprint Nextel's application. According to AT&T, the 1,169-page Kentucky ICA contains provisions that are inconsistent with California law. Moreover, the ICA applicants seek to port is between AT&T Kentucky, on the one hand, and, on the other hand, one CLEC and one CMRS provider, and the ICA contains a bill-and-keep provision for the transport and termination of local traffic, that was predicated on the balance of traffic between those carriers. AT&T asserts that if the applicants here, which consistent of a CLEC and multiple CMRS providers--whose traffic does not balance with AT&T's in the same manner--were permitted jointly to port the ICA, they would reap a potentially enormous windfall.

AT&T states that the application must be dismissed because the lone issue presented in the application—whether the applicants can jointly port the Kentucky ICA to California—is not subject to this Commission's jurisdiction. According to AT&T, applicants have cited no California statute that authorizes the Commission to resolve the issue presented by the application, and the federal statute they cite does not provide jurisdiction either. Furthermore, the merger commitment that is the subject of the application is a commitment that AT&T made to the FCC, and the FCC, in its order approving the AT&T/BellSouth merger, expressly retained jurisdiction to enforce the merger commitments.

On January 23, 2008, the same date that AT&T filed its protest, AT&T filed a motion to dismiss the application. Sprint Nextel filed its response to AT&T's motion to dismiss on February 7, 2008, and AT&T filed its reply on February 19,

2008. Appended to AT&T's reply as Attachment 1 was AT&T's February 5, 2008 filing at the FCC, entitled, "Petition of the AT&T ILECs for a Declaratory Ruling." In its Petition, AT&T asks the FCC to declare the following:

(1) Bill-and-keep arrangements for the transport and termination of telecommunications and facility pricing arrangements 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 the 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

(3) Commitment 7.1 does not apply to in-state adoptions of ICAs or in any way supersede Commission rules governing such adoptions.

The FCC granted the AT&T ILECs' request for expedited resolution, and set up a schedule for opening and reply briefs. Since the matter had been referred to the FCC, the assigned Administrative Law Judge (ALJ) issued a ruling on March 26, 2008 saying that she intended to wait for the FCC's ruling before acting on AT&T's motion to dismiss. On April 1, 2008, Sprint Nextel filed a motion that the Ruling be modified to take account of the possibility that the FCC may not soon, or ever, issue a decision regarding the Petition. The assigned ALJ issued a ruling on July 21, 2008 granting Sprint Nextel's motion and saying that, since the FCC has not yet acted on the Petition, she intended to move forward with the proceeding.

On July 28, 2008, AT&T filed a motion requesting official notice of recent decisions relating to AT&T's motion to dismiss.

3. AT&T's Motion to Dismiss

AT&T asserts that the application must be dismissed because the lone issue presented in the application—whether all the applicants can collectively port the Kentucky ICA to California—is not subject to this Commission's jurisdiction. According to AT&T, the Commission's jurisdiction is limited to that which the California Legislature has conferred, and there appears to be no California statute that authorizes the Commission to resolve the issue presented by the application. AT&T notes that the Commission's rules limit it to approving "opt-ins" of ICAs approved by this Commission, not by other states. Sections 251 and 252 of the 1996 Act do not give the Commission jurisdiction to enforce merger commitments.

AT&T states applicants are mistaken when they assert that the Commission has jurisdiction here under § 252 because the FCC "delegated" authority over ICAs to state commissions. The 1996 Act explicitly gave state commissions authority only to arbitrate and approve or reject ICAs, and the courts decided that the jurisdictional grant to state commissions necessarily implied authority to interpret and enforce the ICAs the commissions had arbitrated and approved.[2] However, AT&T and BellSouth did not merge under the 1996 Act, and the FCC Merger Order was not an exercise of the FCC's authority under the 1996 Act, but arises out of §§ 214 and 303(r) of the 1934 Act.[3] AT&T concludes that allocation of jurisdiction in Section 252 of the 1996 Act over

[2] *See, e.g., Pacific Bell v. PacWest Telecomm, Inc.*, 325 F.3d 1114, 1124-25 (9th Cir 2003).

[3] *In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control,* FCC 06-189, 22 FCC Rcd. 5662 (rel. March 26, 2007), ¶ 22 & n.78 (FCC Merger Order).

issues that arise under the 1996 Act has nothing to do with the question of jurisdiction to enforce the FCC merger commitments.

AT&T states that under the federal Communications Act of 1934, the FCC has the responsibility for evaluating and approving telecommunication mergers.[4] In Appendix F of the Merger Order, the FCC explicitly reserved jurisdiction over the merger commitments. In that appendix, the FCC specifically provided, "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC…" Nowhere in the Merger Order did the FCC contemplate that any forum other than the FCC would interpret, clarify, or enforce the merger commitments.

AT&T states that the FCC's retention of exclusive jurisdiction to interpret and enforce the merger commitments was based on eminently sound policy considerations: It is vital that one body, the FCC, rather than the 22 state commissions in the merged AT&T/BellSouth ILEC region, resolve issues relating to the merger commitments in order to ensure a uniform regulatory framework and to avoid conflicting and diverse interpretations of FCC requirements.

AT&T posits that, if 22 state commissions were to interpret and enforce the FCC merger commitments, conflicting and diverse results would inevitably ensue. AT&T concludes that to avoid such a quagmire, any state commission that concludes it has jurisdiction concurrent with the FCC concerning the interpretation and enforcement of merger commitments should defer to the FCC.

Sprint Nextel responds to AT&T's motion to dismiss saying that AT&T is attempting to rewrite its merger commitment to include terms that it does not

[4] 47 U.S.C. §§214(a), 310(d).

contain. The merger commitment at issue states that "[a]ny requesting telecommunications carrier" may "port in" to one state an ICA that has been approved in another state. "Any" means any. Also, the Kentucky ICA does not contain any provision that requires renegotiation of the agreement if the traffic of Sprint CLEC and Sprint PCS suddenly grows into a sharp excess over the traffic of AT&T—the possibility of an "imbalance of traffic" is implicitly assumed within the Kentucky ICA.

Sprint Nextel asserts that the Commission has authority to interpret and apply federal and state law applicable to an interconnection-related dispute. Sprint Nextel cites Pub. Util. Code § 766, saying that that section provides the Commission with authority to order interconnection between carriers on rates, terms and conditions specified by the Commission. Section 766 provides, in part:

> Whenever the commission, after a hearing finds that a physical connection can reasonably be made between the lines of two or more telephone corporations or two or more telegraph corporations whose lines can be made to form a continuous line of communication, by the construction and maintenance of suitable connections for the transfer of messages or conversations, and that public convenience and necessity will be served thereby, or finds that two or more telegraph or telephone corporations have failed to establish joint rates, tolls, or charges for service by or over their lines, and that joint rates, tolls, or charges ought to be established, the commission may, by its order, require that such connection be made on the payment of such compensation, if any, as it finds to be just and reasonable, except where the purpose of the connection is primarily to secure the transmission of local messages or conversations between points within the same city, or city and county.

Sprint Nextel states that AT&T focuses on the fact that the merger evaluation was not conducted pursuant to the 1996 Act and then leaps to the

unsupported conclusion that resulting obligations affecting interconnection under the Act have somehow become untethered from the Act as well.

AT&T asserts that the FCC explicitly reserved jurisdiction over the merger commitments and then goes on to assert that nowhere in the merger commitments did the FCC contemplate that any forum other than the FCC would interpret, clarify or enforce the merger commitments. According to Sprint Nextel, AT&T's position is directly contradicted by the express terms of Appendix F. Contrary to what AT&T contends, nothing in the language it quotes and relies upon states that the FCC is the *exclusive* forum for seeking enforcement of the merger commitments. Further, the FCC clearly recognized elsewhere in Appendix F that it has no jurisdiction to alter, nor any intention to alter, the states' concurrent statutory jurisdiction under the Act over interconnection matters addressed in the merger commitments. Sprint Nextel cites the paragraph immediately preceding the language relied upon by AT&T which states:

> It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.[5]

Sprint Nextel notes that the above language was not part of the proposed merger commitments as originally filed with the FCC by AT&T. Rather, this language was specifically added by the FCC. According to Sprint Nextel, that language serves the obvious purpose of recognizing that the Act is designed with

[5] Merger Order, Appendix F, at 147.

dual jurisdiction for both and state and the FCC. Indeed, AT&T's apparently contrary view, if taken to its logical extreme, would make the merger commitments completely meaningless. State commissions have been delegated authority under Sections 251 and 252 of the Act to address interconnection matters. There is no dispute that Merger Commitment 7.1 imposes an obligation upon AT&T regarding interconnection. Pursuant to Sections 251 and 252, the only reasonable avenue to enforce this Merger Commitment 7.1 is at the appropriate state commission. Otherwise, the intended beneficiaries of Merger Commitment 7. 1 would have no way to enforce their rights.

The key issue in AT&T's motion to dismiss is whether this Commission has jurisdiction to enforce merger commitments. The section that Sprint Nextel cited above is instructive. From that language, which was specifically added to the merger commitments by the FCC, we conclude that the FCC clarified that the states have concurrent jurisdiction over interconnection matters arising under the merger commitments.

Before setting forth the commitments, the FCC states the following: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC…." While AT&T sees that as granting the FCC exclusive jurisdiction to enforce merger commitments, we agree with Sprint Nextel that the FCC does not specify that the commitments will be enforceable *only* by the FCC.

Considering that we are dealing with interconnection issues, it makes sense the states would retain jurisdiction over the process since § 252 grants states the authority under the 1996 Act to approve interconnection arrangements.

As further support for the fact that the FCC did not intend that its jurisdiction over the merger commitments would be exclusive, we note that in

Merger Commitment 1, the FCC mandated that ICAs would be subject to state-specific pricing, performance monitoring plans, and technical feasibility. In our minds, the existence of state-specific standards and pricing suggests that the FCC recognizes that the states would be in the best position to determine whether ICAs adhere to unique state standards. We conclude that the FCC has specifically carved out a place for state jurisdiction in the enforcement of the merger commitment relating to interconnection.

While no agreement is currently before us to approve, we rely on the language of § 252(e) which reads as follows:

> …nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

This provision allows states to approve and enforce provisions of ICAs, such as the Kentucky ICA, provided the Commission has independent state authority to do so. The State Legislature has granted that authority in Pub. Util. Code § 766.

We concur with Sprint Nextel that the Commission may exercise the authority it holds under Pub. Util. Code § 766 to order interconnection between carriers on such rates, terms and conditions as the Commission deems just and proper. We reject AT&T's narrow interpretation of our authority under § 766 as simply authorizing the Commission to require telephone companies to establish physical connections between their lines. AT&T asserts that § 766 does not authorize the Commission to decide whether the applicants can port the Kentucky ICA that covers unbundled network elements, resale, collocation, and an array of other subjects that go far beyond the establishment of physical

connections between lines. On the contrary, we believe that § 766 grants this Commission general authority over all aspects of interconnection between carriers, including the rates and charges that should apply. There is no question that the Kentucky ICA relates to the interconnection rates and charges that apply between the parties, and that issue is at the heart of Sprint Nextel's request.

We conclude that we have jurisdiction under both state and federal law to address the interconnection issue presented in Sprint Nextel's application. AT&T's motion to dismiss Sprint Nextel's application, on the basis that this Commission does not have jurisdiction to act, is hereby denied.

4. Sprint Nextel's Request to Adopt the Kentucky ICA

On February 5, 2008, the AT&T ILECs filed their "Petition of the AT&T ILECs for a Declaratory Ruling" at the FCC. The FCC opened WC docket No. 08-23 to address AT&T Petition, and invited interested parties to comment on the Petition by February 25, 2008, with reply comments due by March 3, 2008. The ALJ assigned to this matter determined that we should wait for the FCC to act before moving forward with the proceeding, stating that the FCC was in the best position to interpret its own merger order. However, several months have passed, and the FCC has failed to act on the matter, so we determined that we would move forward to resolve the substance of the application, as several other state commissions have done in recent months.

In its support of its Motion to Dismiss, AT&T states that if the Commission concludes it has concurrent jurisdiction to resolve disagreements about application of Merger Commitment 7.1, it should not exercise that jurisdiction but should instead defer to the FCC. According to AT&T, chaos would ensue if each of the 13 state commissions in which Sprint Nextel have raised the same

issue were to individually resolve that issue. AT&T states that allowing the FCC to interpret Merger Commitment 7.1 would ensure uniform national application.

However, seven months have passed since the comments were filed in WC Docket No. 08-23, and the FCC has not issued an order in this matter. In the meantime, a number of state commissions have acted on Sprint Nextel's request, with varying outcomes, and chaos has not resulted. It is a fact of regulation that ICAs vary among the states, as a result of negotiations and arbitrations, and there is no reason that the outcome needs to be uniform across AT&T's service territory.

According to Sprint Nextel, under Merger Commitment 7.1, applicants are entitled to port-in and adopt the Kentucky ICA in California. Sprint Nextel states that because the Kentucky ICA has not previously been approved by the Commission, the Commission's rules for adopting a previously approved ICA as set forth in Rule 7 of the Commission Resolution ALJ 181 do not apply. Sprint Nextel asserts that the sole legal issue is applicants' right to port-in and adopt the Kentucky ICA in California, subject to California state-specific pricing.

In our analysis of AT&T's motion to dismiss, we have disposed of the jurisdictional issue raised by AT&T, and will not address that issue further. In our ruling on AT&T's motion to dismiss, we previously concluded that we have the authority to address Sprint Nextel's request.

AT&T acknowledges that a commitment that AT&T made to the FCC allows the Kentucky agreement to be ported to California, but not jointly, by all applicants, and only after it has been modified, consistent with the terms of that commitment, to conform with California pricing, California performance measures and remedy plans, and other applicable California legal and regulatory requirements. The parties that wish to port the Kentucky ICA to California are

Sprint Communications Company L.P., Sprint Spectrum L.P. (as agent for Wireless Co., L.P. and Sprint Telephony PCS, L.P.), and Nextel of California Inc.

On December 13, 2007, AT&T responded to Sprint Nextel's letter explaining that Merger Commitment 7.1 would permit the Kentucky ICA to be ported jointly by one CLEC and one CMRS provider, but not by a consortium consisting of one CLEC and multiple CMRS providers. This is because the Kentucky ICA is an arrangement between an ILEC and one CLEC and one CMRS provider, and in order for it to remain the same contract, it must remain an arrangement between one ILEC and one CLEC and one CMRS provider. AT&T asserts that a deviation from the Kentucky ICA arrangement would surely impact the balance of traffic assumptions that were predicates for the trunking and reciprocal compensation arrangements in the Kentucky ICA.

AT&T claims that applicants are improperly attempting to convert a merger commitment whose sole purpose was to reduce the transaction costs associated with negotiation of an ICA into an arbitrage opportunity. Accordingly, AT&T's letter stated that once applicants inform AT&T which one of the CMRS providers is to be a party to the ICA, AT&T will accept and process the porting request. AT&T indicates that modifying the ICA for use in California will require thousands of modifications. While most such changes will be simple and mechanical, such as carrier name changes, AT&T personnel must review every substantive provision of the Kentucky ICA to assess whether it is in conflict with California law. In its January 23, 2008 filing, AT&T indicated that it expected to provide a redlined version of the Kentucky ICA by February 15, 2008. We assume that AT&T has completed the task of reviewing the Kentucky ICA to determine what must be changed for use in California.

Sprint Nextel rebuts AT&T's assertion that applicants are attempting to create an illicit arbitrage opportunity. AT&T provides no factual support for this suggestion, and Sprint Nextel asserts there is nothing in the Kentucky ICA that requires renegotiation of the ICA if the traffic of either party grows substantially out of balance to the traffic of the other party. Instead, the Kentucky ICA itself does not require both the Sprint CLEC and the Sprint CMRS provider to remain parties to the Kentucky ICA throughout its term, nor does it require renegotiation of the ICA if the traffic exchanged by the parties suddenly grows out of balance. Instead, it contains express provisions that affirmatively contemplate that either Sprint entity can adopt another ICA under § 252(i) and the remaining Sprint entity can continue to operate under the Kentucky ICA even if the remaining entity is the sole CMRS provider.

Sprint Nextel states there is nothing in the Merger Commitments that states that AT&T's "port in" promises to the FCC somehow become "inapplicable" if the balance of traffic in one state is different from that in another where a "port in" ICA has been approved.

Clearly, the key element of the Kentucky ICA is the bill-and-keep provision for the exchange of local traffic. An excerpt from Merger Commitment 7.1 states:

> The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement…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….

A major dispute between the parties is whether the bill-and-keep arrangement in the Kentucky ICA constitutes "state-specific pricing." If so, it would not be covered by Merger Commitment 7.1.

AT&T asserts that the plain language of Merger Commitment 7.1 expressly excludes "state-specific pricing….plans" from the porting commitment. According to AT&T, the bill-and keep arrangement at issue is a state-specific pricing plan. It sets a price—zero—for the transport and termination of traffic by each party. Likewise, the 1996 Act classifies bill-and-keep arrangements as a form of pricing plan, as one of the "Pricing Standards" governed by § 252(d). Subsection (2) of that Section addresses "*Charges* for transport and termination of traffic."[6] Simply put, states AT&T, the Act recognizes that bill-and-keep is simply one method to address "charges" for the "recovery of costs," just like any other pricing plan covered by the Act's "Pricing Standards."

According to AT&T, it is plain that the pricing arrangement here is "state-specific." The arrangement was premised on a BellSouth study of the balance of traffic and payments among the contracting entities within the nine BellSouth states. This pricing arrangement is thus ineligible for porting outside those states under the plain terms of Commitment 7.1.

AT&T also states that the fact that bill-and-keep arrangements are inherently state-specific pricing arrangements, and thus, ineligible for porting under Commitment 7.1 is further underscored by the 1996 Act and the Commission rules implementing the Act. The Act requires that reciprocal compensation arrangements "provide for the mutual and reciprocal recovery" of costs "by each carrier" and it contemplates bill-and-keep only as an arrangement

[6] 47 U.S.C. § 252(d)(2) (emphasis added).

to "afford the mutual recovery of costs through the offsetting of reciprocal obligations.[7]

Likewise, the FCC's rules implementing the 1996 Act limit the imposition of bill-and-keep arrangements to the context where "the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so."[8] Because a state may require bill-and-keep only for traffic that is roughly balanced, bill-and-keep is necessarily a state-specific pricing arrangement. Traffic that is balanced in one state may not be balanced in another.

Sprint Nextel responds that AT&T incorrectly argues that the merger conditions prohibit the porting of the BellSouth ICA because it contains "state-specific pricing" provisions. Sprint Nextel asserts that it did not enter into a state-specific bill-and-keep arrangement with BellSouth. Rather, Sprint Nextel entered into an agreement with BellSouth to address the exchange of all traffic between all of Sprint CLEC's, Sprint PCS's and BellSouth's operating entities under a bill-and-keep arrangement, regardless of state. These provisions addressed the manner in which Bellsouth would do business with all of the competitive Sprint entities operating in BellSouth's service territories. While effectuation of that agreement required the parties to file ICAs in each state, the intent of the parties was to implement a universal bill-and-keep arrangement.

[7] 47 U.S.C. § 252(d)(2)(A)(i),(B)(1).

[8] 47 C.F.R. § 51.713(b).

Further, asserts Sprint Nextel, the bill and keep[9]/facility provisions 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.

According to Sprint Nextel, AT&T argues that the bill and keep/facility provisions are a state-specific "pricing plan" because bill-and-keep is mentioned as an alternative within the pricing provisions of § 252(d). According to AT&T, "the 1996 act classifies bill-and-keep arrangements as a form of pricing plan, as one of the '*Pricing* Standards' governed by § 252(d)." Sprint Nextel asserts that AT&T's argument fails, however, because the bill-and-keep/facility provisions between BellSouth Corporation and Sprint Nextel were not the result of a § 252 state-specific arbitration but were instead pursuant to a voluntarily negotiated arrangement between two companies under § 252(e)(2)(A) which makes no reference to the pricing standards set forth in § 252(d).

Sprint Nextel states that § 252 of the Act sets forth the procedures for state arbitration of the terms and conditions of an ICA under the standards of §§ 251(b) and (c). Section 252(d)(2) sets forth the manner in which a state Commission would determine whether rates for transport and termination are "just and reasonable" when conducting an arbitration. However, § 252 states specifically that an ILEC, upon receiving a request for interconnection "may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers." However, the pricing standards of

[9] In a bill-and-keep arrangement, neither of the two interconnecting carriers charges the other carrier for terminating traffic that originates on the other carrier's network. The FCC has determined that this form of reciprocal compensation for local traffic is appropriate only if the amount of traffic flowing between the two networks is approximately in balance.

§ 252(d)(2)(B)(1) are applicable only to arbitrated provisions. This case involves a negotiated agreement. Sprint Nextel concludes that because those standards apply only to arbitrated agreements, nothing prevents carriers from agreeing to other arrangements. In this case, the bill and keep/facility provisions were knowingly agreed to. It is only when a party seeks to impose bill-and-keep upon the ILEC through a Section 251-252 arbitration that a "roughly balanced" exchange of traffic requirement arises.

AT&T states that while not disputing that the bill-and-keep and facility pricing provisions on the Kentucky ICA are pricing, Sprint Nextel 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. AT&T finds 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 of the merger commitment. Moreover, if, as Sprint Nextel would have it, a negotiated pricing provision could be ported even though exactly the same provisions 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.

Sprint Nextel, while asserting that the provisions at issue were not imposed by virtue of a state-arbitration decision or state-cost proceeding does not explain why that makes a difference. AT&T asserts that it does not. By its plain terms, the merger commitment exempts all "state-specific pricing…plans," without regard to their source, whether they were arbitrated or negotiated. It is just as likely 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.

Nor is Sprint Nextel's argument advanced by the proposition that it did not enter into a state-specific…arrangement and the intent of the parties was to implement a universal bill-and-keep arrangement.[10] According to AT&T, the arrangement was not universal. It applied only in the nine states in the BellSouth region, not to the 13 state to which Sprint Nextel now seeks to export it. And it applied only to the two Sprint entities that were parties to the ICA in those state, not to any Nextel entity.

AT&T asserts that a price that makes economic sense in one state may not make sense in certain others—and that 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 it makes sense in all the rest.

AT&T rebuts Sprint Nextel saying that when BellSouth, Sprint PCS and Sprint CLEC entered into the Kentucky ICA, their traffic was roughly balanced throughout the nine-state BellSouth region, as was the balance of compensation payments for such traffic. In light of that balance, the three parties agreed that the reciprocal compensation arrangement in the BellSouth state would be bill-and-keep. Consistent with the parties' treatment of their reciprocal compensation obligations to each other as a wash in light of the balance of traffic, the parties also agreed to share equally the cost of interconnection facilities between BellSouth and Sprint PCS switches within BellSouth's service area.

[10] Sprint Opp. To Petition at 13.

We find that AT&T makes a convincing argument that the balance of traffic was a consideration before the parties negotiated a bill-and-keep/facility sharing arrangement for the nine BellSouth states. It does not make sense that the parties would not review their traffic data before agreeing to such a provision. And just because bill-and-keep makes sense for the nine BellSouth states does not mean that it would make sense in other states, where traffic might not be in balance.

The FCC has made it clear that balance of traffic is a requirement for instituting a bill-and-keep arrangement. Rule 51.713(b) states as follows:

> A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so….

Sprint Nextel makes much of the fact that the provisions in the BellSouth region were negotiated, rather than arbitrated or set through state pricing proceedings. However, we concur with AT&T that the merger commitment makes no distinction between negotiated and arbitrated rates. Sprint Nextel is asking the Commission to allow it to port-in the Kentucky ICA. In that case, the Commission will be "imposing" bill-and-keep arrangements and must be cognizant of the requirements of Rule 51.713(b) cited above. We would be in violation of that rule if we were to allow Sprint Nextel to port-in the Kentucky ICA without assuring ourselves that the traffic is roughly balanced. There is nothing in the record of this proceeding to allow us to determine that the traffic between the applicants and AT&T would be balanced, and since the mix of

carriers in the instant application is different than the mix in the Kentucky ICA, it may well not be balanced.

The single issue presented to the Commission is whether Sprint Nextel is entitled to port-in to California the Kentucky ICA. We conclude that Sprint Nextel is entitled to port-in the Kentucky ICA for use in California, subject to state-specific pricing. Further, we find the bill-and-keep/facility sharing provisions of the Kentucky ICA to be state-specific pricing, as described in Merger Commitment 7.1, and therefore ineligible for porting to California.

In its opening comments on the PD, AT&T states that the parties have engaged in extensive discussions of the redline ICA that AT&T provided to Sprint Nextel in February. According to AT&T, at last count there were approximately 58 open items concerning contract language (including the bill-and-keep and facility price sharing disagreements). AT&T asks that the PD be modified to reflect that other provisions, in addition to reciprocal compensation, must be negotiated by the parties.

In its comments Sprint Nextel raises the issue of what would happen if the parties cannot reach agreement on some of the remaining issues. Sprint Nextel suggests that if the parties cannot reach agreement on any remaining issues within 30 days of the Commission's decision, they should be allowed to ask the assigned ALJ to immediately convene a PHC to identify a schedule for submission of comments (or, if need be, for submission of testimony and the holding of an evidentiary hearing) for resolution of any open issues.

In essence, Sprint Nextel is asking us to convert this proceeding into an arbitration proceeding under the Telecommunications Act of 1996 (TA96). TA96 sets up a process for parties that are unable to reach agreement on any terms in their ICA to follow before filing an arbitration request with the appropriate state

commission. However, this proceeding arose out of a merger commitment, rather than a provision of TA96. We do not have the authority to convert this proceeding into an arbitration proceeding.

We understand that negotiations are ongoing, and we hope that the parties will reach agreement on a negotiated ICA. However, if parties are unable to reach agreement and believe they would benefit from the services of a mediator, they should contact the Chief ALJ to have a mediator assigned to work with them. If the parties are unable to resolve all of the outstanding issues, TA96 sets a process for filing a request for arbitration of open issues.

5. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on October 29, 2008, by AT&T and Sprint Nextel, and reply comments on November 3, 2008 by AT&T and Sprint Nextel. Those comments have been taken into account, as appropriate, in finalizing this decision.

6. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Karen A. Jones is the assigned ALJ in this proceeding.

Findings of Fact

1. The FCC does not specify that the merger commitments will be enforceable only by the FCC.

2. Section 252 grants states the authority under the 1996 Act to approve interconnection arrangements.

3. The reference to state-specific standards and pricing in Merger Commitment 7.1 suggests that the FCC recognizes that the states would be in the best position to determine whether ICAs adhere to unique state standards.

4. AT&T's interpretation of the Commission's authority under Section 766 as simply authorizing physical connections between telephone carriers is too narrow in scope.

5. AT&T makes a convincing argument that the balance of traffic was a consideration before the parties negotiated a bill-and-keep/facility sharing arrangement for the nine BellSouth states.

6. It does not make sense that the parties would not review their traffic data before agreeing to a bill-and-keep/facility sharing provision.

7. Merger Commitment 7.1 does not make a distinction between arbitrated and negotiated ICAs.

Conclusions of Law

1. The FCC clarified that the states have concurrent jurisdiction over interconnection matters arising under the merger commitments.

2. The FCC has specifically carved out a place for state jurisdiction in the enforcement of the merger commitment relating to interconnection.

3. The state has authority under Section 252(e) to utilize its authority under state law to address issues relating to interconnection between carriers.

4. The Commission has authority under Pub. Util. Code § 766 to order interconnection between carriers on such rates, terms and conditions as the Commission deems just and proper.

5. The FCC made it clear in Rule 51.713(b) that balance of traffic is a requirement for instituting a bill-and-keep arrangement.

6. AT&T's July 28, 2008 motion should be granted.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The January 23, 2008 motion of AT&T Inc. to dismiss the application of Sprint Communications Company L.P., Sprint Spectrum L.P. as agent for WirelessCo L.P. and Sprint Telephony PCS, L.P., and Nextel of California, Inc. (Sprint Nextel) on the basis that this Commission does not have jurisdiction to act is denied.

2. Sprint Nextel is entitled to port-in the Kentucky interconnection agreement, subject to certain limitations. The bill-and-keep/facility sharing provisions of the Kentucky agreement are deemed to be state-specific pricing which is excluded from the porting requirement pursuant to Merger Commitment 7.1.

3. The July 28, 2008 motion of AT&T, Inc. requesting that the Commission take official notice of recent decisions relating to AT&T's motion to dismiss is hereby granted.

4. Application 07-12-017 is closed.

This order is effective today.

Dated November 21, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners