

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 L.P., by NPCR, Inc. d/b/a Nextel Partners.

DOCKET NO. 070368-TP

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 L.P., by Nextel South Corp. and Nextel West Corp.

DOCKET NO. 070369-TP

ORDER NO. PSC-08-0415-FOF-TP

ISSUED: June 23, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

ORDER GRANTING ORAL ARGUMENT, DENYING REQUEST TO HOLD DOCKETS IN  
ABEYANCE, DENYING MOTION FOR SUMMARY FINAL ORDER AND SETTING  
DOCKETS FOR SECTION 120.57(2), FLORIDA STATUTES, PROCEEDING

BY THE COMMISSION:

**I. Case Background**

On June 8, 2007, NPCR, Inc. d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. (collectively "Nextel") filed its Notice of Adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. (collectively "Sprint"), pursuant to AT&T/BellSouth Merger Commitments and Section 252(i) of the Federal Telecommunications Act of 1996 (Act).

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In its Notice, Nextel stated that pursuant to Merger Commitment Nos. 7.1 and 7.2<sup>1</sup> as set forth in the Federal Communications Commission's (FCC) approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control and §252(i), Nextel has adopted in its entirety, effective immediately, the "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001 ("Sprint ICA") as amended. Nextel asserted that it has contacted AT&T regarding Nextel's adoption of the Sprint ICA, but AT&T refused to voluntarily acknowledge and honor Nextel's rights regarding such adoption.

On June 28, 2007, AT&T filed a motion to dismiss Nextel's adoption on three bases: the FCC maintains sole jurisdiction regarding the Merger Commitments; the adoption was not requested in a reasonable period of time; and Nextel did not comply with dispute resolution provisions of the existing agreement. On July 9, 2007, Nextel filed a Response in Opposition to AT&T's motion. Nextel countered that adoption rights are enhanced by the Merger Commitments and remain subject to concurrent FCC/FPSC jurisdiction; the underlying agreement is currently "deemed extended on a month-to-month basis"<sup>2</sup>; and the FPSC has previously rejected the argument that a CLEC must comply with dispute resolution procedures in its existing agreement when adopting a new one.<sup>3</sup>

By Order No. PSC-07-0813-FOF-TP (Order Denying Dismissal), issued October 16, 2007, AT&T's Motion to Dismiss was denied, and the dockets were to remain open pending resolution of Docket No. 070249-TP. Docket No. 070249-TP dealt with whether the underlying agreement between Sprint and AT&T (the agreement to be adopted by Nextel) had expired. The Sprint – AT&T docket was resolved when the parties filed a Joint Motion on December 4, 2007 to approve an amendment extending the underlying agreement for three years. This Commission,

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<sup>1</sup> Merger Commitment No. 7.1 states:

The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made."

Merger Commitment No. 7.2 states:

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>2</sup> Nextel cites to Docket No. 040343-TP, Order No. PSC-04-1109-PCO-TP (Volo Order), as addressing a similar situation in which the LEC's motion to dismiss was denied.

<sup>3</sup> Docket No. 040799-TP, Order No. PSC-05-0158-PAA-TP (Z-Tel Order).

by Order No. PSC-08-0066-FOF-TP, issued on January 29, 2008, acknowledged the amendment of the Sprint ICA.<sup>4</sup>

Nextel filed a Motion for Summary Final Order on December 26, 2007, requesting that the Florida Public Service Commission (Commission) acknowledge Nextel's adoptions of the existing Sprint ICA. On January 22, 2008, AT&T filed a Response in Opposition to Nextel's Motion for Summary Final Order.

In February, AT&T filed several pleadings at this Commission which included copies of pleadings it had filed at the FCC seeking a ruling on AT&T's Merger Commitments. On February 7, 2008, AT&T filed a supplemental submission in support of its Response in Opposition to Nextel's Motion for Summary Final Order.<sup>5</sup> On February 13, 2008, AT&T filed a letter with a FCC order.<sup>6</sup> On February 19, 2008, AT&T filed a letter requesting this Commission to place the Nextel dockets in abeyance, pending FCC review of its Petition for Declaratory Statement regarding AT&T Merger Commitments.<sup>7</sup>

On February 18, 2008, Nextel filed a motion for leave to file a reply to AT&T's Response and Supplemental Submissions in Opposition to Nextel's Motion for Summary Final Order, which was granted by Order No. PSC-08-0242-PCO-TP, issued April 15, 2008.

On February 20, 2008, Nextel filed a notice of supplemental authority, which contained an order issued by the Public Service Commission of the Commonwealth of Kentucky in Case No. 2007-0255 and Case No. 2007-0256.<sup>8</sup> AT&T filed a letter on March 28, 2008, that attached a ruling issued by the California Public Utilities Commission.<sup>9</sup>

We are vested with jurisdiction over this matter pursuant to Section 364.012(2), Florida Statutes (F.S.), and Section 252 of the 1996 Telecommunications Act.

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<sup>4</sup> Docket No. 070249-TP, Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.

<sup>5</sup> AT&T filed its *Petition of the AT&T ILECs for a Declaratory Ruling*, WC Docket No. 08-23 (filed February 5, 2008), in which AT&T requests a ruling regarding the Merger Commitment allowing porting of interconnection agreements from one AT&T state to another.

<sup>6</sup> The order was issued in *In Re Ameritech Operating Companies Tariff FCC No. 2 et. Al.*, Transmittal No. 1666, which stated that parties remain free to file a complaint if parties believe AT&T has not complied with the Merger Commitments as they relate to detariffing and/or access services.

<sup>7</sup> *Petition of the AT&T ILECs for a Declaratory Ruling*, filed February 2008, WC Docket No. 08-23.

<sup>8</sup> Case No. 2007-0255 and Case No. 2007-0256, *In the Matter of: Adoption by Nextel West Corp. of the Existing Interconnection Agreement, By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company, L.P., Sprint Spectrum, L.P.* Order issued by the Public Service Commission of the Commonwealth of Kentucky. The Kentucky cases appear to be mirrors of the instant Florida dockets.

<sup>9</sup> Application of Sprint Communications Company L.P. (T 5112 C), Sprint Spectrum L.P. as agent for Wireless Co., 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.

## **II. Nextel's Request for Oral Argument**

Concurrently with its Motion for Summary Final Order, Nextel filed its Request for Oral Argument, pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.). In requesting oral argument, Nextel argues that oral argument would aid us in understanding and evaluating the legal bases for a summary order and how the standard for summary final order has been met as provided in Rule 28-106.204(4), F.A.C. Nextel asserts that oral argument would prevent further waste of our time and resources by assisting the understanding and evaluation of Nextel's ability to adopt the Sprint ICA. AT&T does not object to oral argument on Nextel's Motion. Therefore, it would be helpful to us, and otherwise appropriate, to allow oral argument on Nextel's Motion for Summary Final Order. Accordingly, that request is hereby granted.

## **III. AT&T's Request to Place Dockets in Abeyance**

### **A. Parties Arguments**

#### **AT&T's Position**

On February 7, 2008, AT&T filed a Supplemental Submission in Support of AT&T's Response in Opposition to Motion for Summary Final Order. In its submission, AT&T requests that we defer ruling on Docket Nos. 070368-TP and 070369-TP while AT&T's Petition of AT&T ILECs for Declaratory Ruling (Petition), filed with the FCC on February 5, 2008, is pending. Specifically, AT&T asserts that the expedited resolution of its FCC Petition, which asks the FCC to resolve substantive issues involved in the dockets before us, may render further proceedings unnecessary. The Petition requests the FCC to answer specific questions regarding Merger Commitment 7.1, which addresses allowing a "carrier to 'port' an interconnection agreement from one AT&T/BellSouth state to another without the need for a new negotiation and arbitration."<sup>10</sup>

On February 13, 2008, AT&T filed an FCC Order<sup>11</sup> (Order), released February 7, 2008, as supplemental authority in support of its position that this Commission should allow the FCC to decide potentially dispositive questions in AT&T's Petition before proceeding any further. In support, AT&T relies on the particular section of the Order which states that Petitioners remain free to file complaints against AT&T for noncompliance, and clarifies that the FCC is ready to enforce commitments should it receive such complaints.<sup>12</sup> Further, AT&T asserts that in the event the FCC's determinations do not lead to a complete resolution of the issues, we would then decide the remaining questions of law.

On February 19, 2008, AT&T reiterated its request for abeyance by filing with this Commission a copy of a Public Notice (Notice) in FCC WC Docket No. 08-23. Released on

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<sup>10</sup> To date, WC Docket No. 08-23 is still receiving ex parte comments. No further action has been taken by the FCC.

<sup>11</sup> See *In Re Ameritech*

<sup>12</sup> We notes that the FCC Order only deals with tariffing and detariffing and/or access services, not interconnection agreements, which is the issue in the instant dockets.

February 14, 2008, the Notice invites interested parties to comment on the Petition by no later than February 25, 2008, with reply comments due on or before March 3, 2008.<sup>13</sup>

On March 28, 2008, AT&T filed another Supplemental Submission in Support of AT&T's Response in Opposition to Motion for Summary Final Order. AT&T makes note of a March 26, 2008 ruling by an Administrative Law Judge for the California Public Utilities Commission, granting parties' motions for leave to file a copy of their filings at the FCC.<sup>14</sup> In making this ruling, the judge stated it was her intention to wait for the FCC's ruling on the petition for declaratory statement before acting on the motion to dismiss.

#### Nextel's Position

On February 18, 2008, Nextel filed its Motion for Leave to File Reply to AT&T's Response in Opposition to Motion for Summary Final Order and Supplementary Submissions Thereto.<sup>15</sup> Nextel asserts that AT&T's request to defer our ruling is nothing more than another delay tactic to avoid complying with the Merger Commitments and its obligations under §252(i) of the Act. Nextel points to inconsistencies in AT&T's assertions, stating that AT&T is now arguing before the FCC precisely what Nextel has argued in this proceeding and before other state commissions. There is no need for extensive evidence-gathering or fact-finding that requires further proceedings before making a determination on Nextel's adoption of the Sprint ICA. There is no legal or logical reason for this Commission to defer final action on these dockets while AT&T's Petition with the FCC is pending for an indefinite period. Moreover, the allegations set forth in AT&T's Petition are not only irrelevant to the proceedings pending in the nine-state legacy BellSouth region, but are unsupported by any evidence. Nextel states that AT&T's Petition does not and cannot alter our deliberations, regardless of how the FCC will ultimately address it.

Nextel also makes note of AT&T's timing. Specifically, AT&T could have sought FCC intervention prior to state Commissions, including this Commission, deciding the issues. Failing to do so is an attempt by AT&T to benefit from the resulting further delay and is a demonstration of its callous disregard for the efforts and resources of this Commission, our staff, and Nextel entities.

Nextel asserts that this Commission should resolve this matter without further delay and may reexamine its determination, if necessary, after the FCC's decision. Nextel states that there is no guarantee that the FCC will act promptly or that it would reverse any state commission decisions rendered. Further, nothing prevents this Commission from reexamining its determinations should the FCC issue a contrary ruling in the future. Nextel states that delay is

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<sup>13</sup> *Petition of the AT&T ILECs for a Declaratory Ruling*

<sup>14</sup> Application of Sprint Communications Company L.P. (T 5112 C), Sprint Spectrum L.P. as agent for Wireless Co., 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.

<sup>15</sup> Granted by Order No. PSC-08-0242-PCO-TP, issued April 15, 2008.

harmful to it as AT&T will likely argue that the 42-month clock on the effectiveness of the AT&T Merger Commitments is running while its Petition is pending before the FCC.

In support of its position, Nextel cites to a Finding and Order by the Ohio Public Utilities Commission (OPUC), which allowed one wireline Sprint entity and three wireless Sprint entities to port and adopt in Ohio the same Sprint ICA that this Commission extended for three (3) years, subject to Ohio-specific modifications consistent with AT&T Merger Commitment 7.1.<sup>16</sup> The Finding and Order also dismissed AT&T Ohio's Motion to Dismiss and found that the OPUC had concurrent jurisdiction with the FCC to interpret the Merger Commitments. It further stated that deferring the matter to the FCC, as AT&T had urged, would have been contrary to FCC's policy aims. This finding was based on the OPUC's conclusion that the FCC had clarified that states have jurisdiction over matters arising under the AT&T Merger Commitments and that states are granted authority to adopt rules, regulations, programs, and policies respecting the Merger Commitments.

On February 20, 2008, Nextel filed its Notice of Supplemental Authority to its Motion for Summary Final Order and Reply to AT&T Florida's Response and Supplemental Submissions in Opposition to Nextel's Motion for Summary Final Order. Nextel's supplemental authority consisted of two Orders issued by the Kentucky Public Service Commission in Case No. 2007-0255 and Case No. 2007-0256.<sup>17</sup> Both Orders denied AT&T Kentucky's Motion for Reconsideration of Orders denying AT&T Kentucky's Motion to Dismiss Nextel West Corp.'s and NPCR, Inc. d/b/a Nextel Partners' notice of adoption of an interconnection agreement between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. Both Kentucky Orders found that there was no reason to suspend the state proceeding pending the FCC's resolution of AT&T's Petition and ordered submission of the executed adoption within 20 days.

#### B. Decision

The issue here is whether we should defer ruling on the Nextel dockets while AT&T's Petition is pending before the FCC.

Section 252(i) of the Act and 47 C.F.R. §51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

Section 252(i) provides:

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<sup>16</sup> Ohio PUC, Case No. 07-1136-TP-CSS, *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.*, Finding and Order (issued February 5, 2008).

<sup>17</sup> Orders issued on December 26, 2007, and February 18, 2008, *In the Matter of: Adoption by Nextel West Corp. of the Existing Interconnection Agreement, By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company, L.P., Sprint Spectrum, L.P.*, Public Service Commission of the Commonwealth of Kentucky.

A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Section 51.809 provides:

- (a) An incumbent ILEC shall make available *without unreasonable delay* to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to §252 of the Act, upon the same rates, terms and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the *original party to the agreement. (emphasis added.)*
- (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
  - 1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
  - 2) the provision of a particular agreement to the requesting carrier is not technically feasible.
- (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under §252(h) of the Act.

Section 252(i) makes it clear that adoption of an existing ICA is available to requesting telecommunications carriers, and §51.809, the rules which implement §252(i), describes the conditions under which agreements may be adopted, and the two exceptions thereof.

While Nextel requests to adopt the Sprint ICA pursuant to the Merger Commitments and §252(i), it is clear that Nextel may adopt the Sprint ICA without availing itself of the Merger Commitments. We determined in Order No. PSC-07-0831-FOF-TP that “§252(i) obligates incumbents, such as AT&T, to enable Nextel and other CLECS to operate upon the same terms

and conditions as those provided in a valid interconnection agreement . . . Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety."<sup>18</sup>

AT&T's FCC Petition is seeking declarations regarding specific questions on Merger Commitment 7.1, regarding intrastate and interstate porting of agreements, and state-specific pricing and consistency. Because Nextel may adopt the agreement pursuant to §252(i) and §51.809 and is not dependent on the Merger Commitments, the FCC's decision on AT&T's Petition ultimately has no bearing on the issue at hand. Nextel is requesting to adopt a Florida ICA, not an out-of-state agreement. Because the outcome of the FCC Petition is not dispositive on the Florida dockets, there is no reason to defer our decision while the Petition is pending before the FCC. Holding these proceedings in abeyance until the FCC rules on AT&T's petition serves no other purpose than further delay.

We find it appropriate that AT&T's request for abeyance of Docket Nos. 070368-TP and 070369-TP is hereby denied.

#### **IV. Nextel's Motion for Summary Final Order**

##### **A. Parties Arguments**

##### **Nextel's Motion**

Nextel asserts in its Motion that there is no genuine issue as to any material fact regarding Nextel's adoption of the Sprint ICA, and Nextel is entitled to adopt the Sprint ICA under both AT&T's Merger Commitments and §252(i) as a matter of law. Nextel respectfully requests that this Commission enter an order that acknowledges Nextel's adoption of the Sprint ICA under both AT&T's Merger Commitments and §252(i) as a matter of law and require AT&T to execute the Adoption Agreements.

Nextel alleges that the following facts are undisputed:

AT&T and BellSouth Corporation voluntarily proposed "Merger Commitments" that became "Conditions" of approval of the AT&T/BellSouth Merger when the FCC authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates are required to comply with Merger Commitments.<sup>19</sup>

Merger Commitment No. 7.1 imposed upon AT&T an obligation to "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

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<sup>18</sup> Order Denying Dismissal, in the instant dockets.

<sup>19</sup> *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74, adopted on December 29, 2006.



AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility.<sup>20</sup>

The Sprint ICA is an interconnection agreement previously approved by this Commission; therefore, AT&T is also required by §252(i) to make the Sprint ICA available for adoption by Nextel.

On May 18, 2007, Sprint Nextel sent a letter to AT&T on behalf of Nextel as a requesting carrier for the stated purpose of exercising Nextel's right to adopt the Sprint ICA pursuant to AT&T's Merger Commitments and §252(i).

Sprint Nextel's letter specifically advised AT&T that "[a]lthough neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to execute the Sprint ICA as adopted by Nextel in order to implement Nextel's adoption."

AT&T refused to grant Nextel's requests to adopt the Sprint ICA on the basis of a "lack of understanding regarding the applicability of the Merger Commitments to Nextel's requests" and an assertion that the Sprint ICA was not available for adoption because it was expired and in arbitration, and not adopted within a reasonable period of time under §51.809(c).

Nextel filed with us its Notices of Adoption of the Sprint ICA on June 8, 2007. AT&T filed Motions to Dismiss on June 28, 2007, were denied at the September 25, 2007 Agenda Conference.<sup>21</sup>

In its Motion, Nextel argues that if a party is going to file a response, pursuant to Florida Rule of Civil Procedure 1.140(b), every defense in law or fact to a claim for relief "shall be asserted in the responsive pleading."<sup>22</sup> Nextel asserts further that pursuant to Rule 1.140(a)(2), to the extent any further response may be appropriate after a party's initial motion has been denied, such response "shall be served within 10 days after notice of the court's action" and that AT&T has failed to raise timely objections. Nextel also points out that Rule 1.140(h), Florida Rules of Civil Procedure, provides that a party waives any affirmative defense not plead in its answer or responsive motion such as the Motion to Dismiss filed by AT&T.

Sprint and AT&T filed in the Sprint arbitration docket a Joint Motion to approve an amendment to the Sprint ICA on December 4, 2007. The Amendment to the Sprint ICA was executed by both parties on December 4, 2007.

Nextel contends that it is entitled to adopt the Sprint ICA as a matter of law pursuant to AT&T's Merger Commitments and §252(i). Nextel argues that Merger Commitments 7.1 and 7.2 were intended to encourage competition and that Nextel satisfies the requirement of being a

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<sup>20</sup> See *FCC BellSouth Merger Order*, at page 149, Appendix F, Merger Commitment No.1 under "Reducing Transaction Costs Associated with Interconnection Agreements."

<sup>21</sup> Order Denying Dismissal

<sup>22</sup> Nextel notes in its Motion, that pursuant to Rule 28-106.203, F.A.C., an "Answer" is not required.

member of the group of “any requesting telecommunications carrier”. Nextel requests to adopt the Sprint ICA, which is an effective interconnection agreement that contains state-specific pricing and performance plans. The Sprint ICA also has no issue of technical feasibility and has been amended to reflect changes of law, a requirement under the Triennial Remand Review Order.

Nextel argues that pursuant to §252(i) Nextel satisfies the adoption requirements set forth in the §51.809. Nextel has filed an adoption for the agreement with the same rates, terms and conditions as the Sprint ICA and that there was no cost exception nor a technical feasibility exception available to AT&T. Nextel contends that AT&T intends to avoid its §252(i) obligation to permit Nextel’s adoption of the Sprint ICA on a streamlined basis.

Nextel also argues that the FCC review of §252(i) obligations continued to be served by the “all-or-nothing” rule.<sup>23</sup> Under the “all-or-nothing” rule, if a requesting CLEC is interested in a service or network element provided by an ILEC, it may adopt *in its entirety* any approved agreement that includes that service or element to which the ILEC is already a party.<sup>24</sup>

Finally, Nextel argues that the only issue of material fact in the matter at hand is whether or not the Sprint ICA was amended by Sprint and AT&T in Docket No. 070249-TP. We acknowledged the signed Sprint ICA on January 29, 2008, thereby extending the Sprint ICA for three years.<sup>25</sup> Therefore, Nextel finds that it is entitled to adopt the Sprint ICA under both AT&T’s Merger Commitments and §252(i) as a matter of law.

#### AT&T Response in Opposition to Motion for Summary Final Order

AT&T asserts that Nextel’s motion did not meet the legal standard for a summary final order and genuine issues of material fact remain, including: the adoptions do not comply with the Merger Commitments and §252(i), and granting the adoptions would violate FCC rules.

AT&T states that Nextel is requesting to approve the adoptions without a hearing on the substantive merits despite the request that these dockets remain open pending further proceedings. AT&T contends that granting Nextel’s Motion would deprive AT&T of its due process rights and would run counter to public policy.

AT&T argues that these dockets are in a preliminary state, and the parties have not completed discovery nor filed testimony. AT&T states that we previously found that it was premature to consider a motion for summary final order before the parties had the opportunity to

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<sup>23</sup> The “pick-and-choose” rule allowed CLECs to opt into either the full agreement between an ILEC and another CLEC or select individual parts of the agreement for its own use.

<sup>24</sup> See *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 F.C.C.R. 13494 (2004) (“Second Report and Order”).

<sup>25</sup> Order No. PSC-08-0066-FOF-TP, Docket 070249-TP

“complete discovery and file testimony.”<sup>26</sup> AT&T states that it has not waived its rights to fully complete and perfect the evidentiary record.

AT&T contends that Florida law establishes that a party moving for summary final judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.<sup>27</sup> AT&T further contends that a summary final judgment cannot be granted unless the facts are so crystallized that nothing remains but questions of law.<sup>28</sup> If the evidence permits different reasonable inferences, it should be submitted as a question of fact.<sup>29</sup> AT&T argues that the burden is on Nextel to prove that AT&T cannot prevail.<sup>30</sup> AT&T contends that we previously determined that policy considerations must be acknowledged, and caution must be exercised in granting a summary judgment because it forecloses the litigant from the benefit of and right to a trial.<sup>31</sup>

AT&T further argues that we have denied granting summary order in the past because of the severity of the remedy sought. Therefore, AT&T contends that this matter remains at a preliminary stage, has unresolved genuine issues of material fact, and therefore should not be granted.

AT&T contends that the following are unresolved genuine issues of material fact:

- 1) Nextel’s Attempted Adoption does not comply with the Merger Commitments and is not applicable to this depute.
- 2) Nextel’s Attempted Adoption does not comply with §252(i) because Nextel cannot avail itself of all the interconnection services and network elements provided within the Sprint agreement because Nextel is a wireless carrier and Sprint is both a wireline and wireless service provider.
- 3) Granting the adoption would violate FCC Rules. Nextel’s adoption would involve wireless and wireline carriers; however, Nextel only provides wireless services in Florida. AT&T argues that allowing Nextel to take an agreement where CLEC-only provisions cannot apply is the equivalent to allowing Nextel to “pick and choose” only the wireless terms and conditions from the Sprint ICA.<sup>32</sup>

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<sup>26</sup> *Re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*; Docket No. 991437-WS, July 27, 2001.

<sup>27</sup> *Moore v. Moore*, 475 So. 2d 666, 668 (Fla. 1985).

<sup>28</sup> *Id.*, *McCraney v. Barberi*, 677 So. 2d 355 (Fla. 1<sup>st</sup> DCA 1996).

<sup>29</sup> *Id.*

<sup>30</sup> *Christian v. Overstreet Paving Co.*, 679 So. 839 (Fla. 2<sup>nd</sup> DCA 1996).

<sup>31</sup> See Order No. PSC-98-1538-PCO-WS, issued November 20, 1998. See also Order No. PSC-01-0360-PAA-WS, issued February 9, 2001.

<sup>32</sup> The FCC no longer permits “pick-and-choose” and instead allows only “all-or-nothing” adoptions of existing agreements.

- 4) AT&T also states that AT&T is not required to make agreements for adoption available if the incumbent LEC proves to this Commission that the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement under the exceptions provided in §51.809(b).<sup>33</sup>

AT&T argues that Nextel's adoption should not be allowed because the ICA cannot be made "upon the same terms and conditions as those provided in the agreement" and because the adoption of the Sprint ICA would increase AT&T's costs as compared to its costs of providing the Sprint ICA to the original parties.

Nextel's Reply to AT&T Florida's Response

Nextel argues that this Commission should grant its Motion for Summary Final Order due to the extension and approval of the Sprint ICA by this Commission. Nextel states that we have the authority and obligation to approve adoptions pursuant to §252(i) and §51.809, notwithstanding any Merger Commitments made by BellSouth and AT&T. Nextel states that the Order Denying Dismissal, determined that "Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety."

B. Decision

Nextel's Motion for Summary Final Order is hereby denied. Upon consideration of the parties' arguments, we find it appropriate to set Docket Nos. 070368-TP and 070369-TP for a proceeding under Section 120.57(2), Florida Statutes, on issues of policy and law, to be identified and briefed by the parties. These dockets shall remain open pending the Section 120.57(2), F.S. proceeding.

Based on the foregoing, it is,

ORDERED that the Florida Public Service Commission deny BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast request that Docket Nos. 070368-TP and 070369-TP be placed in abeyance. It is further

ORDERED that Nextel's Request for Oral Argument is hereby granted. It is further

ORDERED that Nextel's Motion for Summary Final Order be denied. It is further

ORDERED Docket Nos. 070368-TP and 070369-TP are set for a proceeding under Section 120.57(2), Florida Statutes, on issues to be identified and briefed by the parties. It is further

ORDERED that Docket Nos. 070368-TP and 070369-TP shall remain open.

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<sup>33</sup> Section 51.809(b) provides two exceptions, the cost exception and the technical feasibility exception to adoptions.

By ORDER of the Florida Public Service Commission this 23rd day of June, 2008.



ANN COLE  
Commission Clerk

( S E A L )

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.