

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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|--|---|----------------------|
| Notice of the Adoption by NPCR, Inc. d/b/a       | ) |                      |
| Nextel Partners of the Existing “Interconnection | ) | Docket No. 070368-TP |
| 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      | ) |                      |
|  | ) |                      |
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| Notice of the Adoption by Nextel South Corp.     | ) |                      |
| and Nextel West Corp. (collectively “Nextel”)    | ) | Docket No. 070369-TP |
| Of the Existing “Interconnection Agreement       | ) |                      |
| By and Between BellSouth                         | ) | Filed: June 30, 2008 |
| Telecommunications, Inc. and Sprint              | ) |                      |
| Communications Company Limited Partnership,      | ) |                      |
| Sprint Communications Company L.P.,              | ) |                      |
| Sprint Spectrum L.P.” dated January 1, 2001      | ) |                      |
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**NEXTEL’S MOTION TO STRIKE AFFIDAVIT OF  
P.L. (SCOT) FERGUSON ON BEHALF OF AT&T FLORIDA**

NPCR, Inc., d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. (collectively referred to herein as “Nextel”), by and through counsel, and pursuant to Rule 28-106.211, Florida Administrative Code, files this Motion to Strike Attachment A to the Brief of AT&T Florida because it is not authorized by Order No. PSC-08-0415-FOF-TP, does not comply with Order No. PSC-08-0402-PCO-TP, is contrary to AT&T's representations to the Commission, and unfairly disadvantages Nextel. Nextel also requests an expedited ruling on this Motion. In support, Nextel states as follows:

**BACKGROUND**

1. Nextel filed its Notices of Adoption in these dockets over a year ago, on June 8, 2007. AT&T moved to dismiss the notices on June 28, 2007. Nextel filed its Response in

Opposition to AT&T's Motion on July 9, 2007. The Commission denied AT&T's Motion to Dismiss by Order No. PSC-07-0813-FOF-TP, issued on October 16, 2007. Thereafter, Nextel filed a Motion for Summary Final Order on December 26, 2007, to which AT&T responded on January 22, 2008. On April 25, 2008, Commission Staff issued its initial recommendation to grant Nextel's Motion. Staff issued an amended recommendation to grant Nextel's Motion on May 21, 2008, which the Commission considered during its June 3, 2008, Agenda Conference.

2. During the Commission's June 3, 2008 Agenda Conference, the Commission heard oral argument from the parties. Counsel for AT&T argued that the Commission had failed to provide AT&T with a procedural opportunity to put on its case under the Florida Administrative Procedure Act ("APA"), arguing that the "fundamental flaw" in the Commission's process was that "...you have jumped past the procedural stuff looking to rule on the merits having never given us the procedural opportunities to actually define and put on our case up front, which is required under the APA."<sup>1</sup> Commissioner McMurrin sought clarification of AT&T's APA argument, stating "...I also want to be clear about what it is AT&T wants as resolution of these APA concerns."<sup>2</sup> In response, counsel for AT&T stated that AT&T wanted to "put our remaining issues on the table, file an expedited brief" and have oral argument.<sup>3</sup>

3. Thereafter, following argument by counsel for Nextel, Commissioner McMurrin noted that "we do sometimes have paper hearings on legal issues,"<sup>4</sup> and sought clarification regarding the specific issues AT&T sought an opportunity to raise. AT&T advised that it intended to raise the "mixed question of law, policy, and fact" of "whether Nextel is an

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<sup>1</sup> See Pg. 8, lines 19-23 of the June 3, 2008 Agenda Conference Transcript, Item No. 5 (the "Transcript").

<sup>2</sup> Transcript, pg. 17, lines 19-20.

<sup>3</sup> Transcript, pg. 19, lines 11-25.

<sup>4</sup> Transcript, pg. 24, lines 3-8.

appropriate entity to opt into the Sprint agreement,” and that it proposed to resolve the issue based on a set of stipulated facts and legal briefs:

COMMISSIONER McMURRIAN: I guess with the confusion from before, maybe the easiest way is to ask Mr. Hatch, are there -- in your mind, are you trying to raise disputed issues of fact, of law? I know that you are raising the issue with the process of APA, but if you can just clarify that for me and what it is you are wanting to address in some other point of entry.

MR. HATCH: Setting the APA issue aside, assuming had gotten all the process that was due, and we were here to argue what I wanted to argue, the answer to your question is it's a mixed question -- essentially our real remaining issue is a mixed question of law, policy, and fact. That issue is essentially whether Nextel is an appropriate entity to opt into the Sprint agreement.

There is a legal component of that obviously as to whether that complies with all the requirements under the federal law for an opt-in. There is a factual component to that dealing with what is Nextel? What does it do? What does it not do? What does it intend to do with this agreement, assuming it is able to operate under it? And the big policy question is -- there, essentially, is a big policy question hanging out there as to the ultimately a policy question as to the appropriateness of whether Nextel should be allowed to opt into this agreement and utilize particular portions of that agreement. I mean, our allegation is that they are not a CLEC, they are not certificated as a CLEC in Florida. They are not entitled to opt into this agreement at all under any circumstances as a policy matter, once you establish all the other things.

COMMISSIONER McMURRIAN: And a follow up to that, Mr. Hatch. How would you propose -- because you have raised these issues about your point of entry, *how would you propose that we can resolve that? I mean, would a paper hearing do that?*

MR. HATCH: I think it would do that. I think what *we would have to have is a set of stipulated facts as to what Nextel is or is not based on that specific set of facts, then we can argue based on those facts whether we think Nextel is an appropriate entity to opt into this agreement, both as a matter of law and as a matter of policy.*<sup>5</sup>

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<sup>5</sup> Transcript, pg. 26, line 1 – pg. 27, line 14, emphasis added.

4. Thereafter, in response to further questioning, counsel for AT&T emphasized that it sought a decision from the Commission based on stipulated facts, legal briefs, and oral argument:

MR. HATCH: . . . Let me be clear to everybody. While the staff has focused on the cost issue and our potential waiver of the cost issue, at this point we have determined that we are not going to put on a cost case, but that isn't the only issue that we raised.

The other issue is the one that has generated the most discussion from us certainly, and that is *whether Nextel is suitable for opting into the Sprint agreement. That's the question. That's the issue that we want resolved.*<sup>6</sup>

And, so what we would like is what I had referred to earlier is the opportunity -- and I think we could probably come to a *quick list of stipulated facts* with Nextel that at least support the factual basis for our arguments as to whether they are an inappropriate entity to opt into the Sprint agreement. And from that, we would then file a brief, some brief oral argument, five minutes, probably more, actually, is what we would request, but we could ask for that and you could give us what we want, or what you would choose to give us. From that, to answer Mr. Cooke's last question, he wants some assurances, we would treat that as a 120.57(2) opportunity, which is what I think Commissioner McMurrian was alluding to earlier saying, you know, if there are no disputed issues of fact, then we still do hearings. That's what 120.57(2) is designed to accomplish.<sup>7</sup>

5. The Commission voted set the matter for a paper hearing as requested by AT&T. Thereafter, the Commission issued its Order No. PSC-08-0415-FOF-TP, stating as follows: “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.”<sup>8</sup>

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<sup>6</sup> Transcript, pg. 32, lines 1-9, emphasis added.

<sup>7</sup> Transcript, pg. 32, line 19 – pg. 33, line 9, emphasis added.

<sup>8</sup> Order No. PSC-08-0415-FOF-TP, pg. 12, emphasis added.

6. In compliance with the Commission's June 3, 2008, decision, Nextel and AT&T provided Staff with an agreed-upon list of issues to be addressed in the upcoming proceeding, and filed an initial list of Stipulated Facts in support of their argument thereon. Certain errors in the Stipulated Facts were corrected on June 17, 2008 (the "Corrected Stipulations"). In Order No. PSC-08-0402-PCO-TP, issued on June 17, the Prehearing Officer set forth the following procedure to be used in connection with such hearing:

After participation by the parties and staff in a series of conference calls, the parties were able to reach agreement on a proposed list of issues (Attachment A) and a list of stipulated facts (Attachment B). Additionally, the parties reached agreement on the following procedural dates:

1. Basic Position Statements            June 17, 2008
2. Legal briefs                            June 26, 2008

Upon consideration, I find it reasonable and appropriate to approve the agreements reached by the parties as set forth above. Parties shall file basic position statements of no more than 50 words per issue by June 17, 2008. Legal briefs shall be filed by June 26, 2008, and shall be limited to thirty (30) pages excluding attachments.<sup>9</sup>

7. Nextel filed its legal brief on June 26, 2008. AT&T filed its legal brief on June 27, 2008, without objection by Nextel as to timeliness. AT&T's legal brief consists of 30 pages of argument, followed by several attachments. Attachment A to AT&T's legal brief is a 15-page document entitled "Affidavit of P.L. (Scot) Ferguson On Behalf Of AT&T Florida" (the "Affidavit"). As explained more fully below, AT&T's Affidavit should be stricken from the record of this proceeding because it is contrary to AT&T's representations to the Commission, is not authorized by Order No. PSC-08-0415-FOF-TP, does not comply with Order No. PSC-08-0402-PCO-TP, and the Commission's consideration of the Affidavit would provide an unfair procedural and substantive advantage to AT&T, thus denying Nextel procedural due process.

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<sup>9</sup> Order No. PSC-08-0402-PCO-TP, pg. 2.

## DISCUSSION AND ARGUMENT

8. In order to avoid any misunderstanding, Nextel notes in an abundance of caution that in moving to strike AT&T's Affidavit, Nextel does not in any respect concede that the Affidavit evidences the existence of any issues of fact that require the Commission's resolution. As it did in its Motion for Summary Final Order, Nextel maintains that there are no legitimate genuine issues of material fact remaining and that the Commission can and should decide this case based on legal issues.

9. Indeed, during the June 3, 2008 Agenda Conference, the *only* factual question raised by AT&T was Nextel's status as a wireless provider – which was never actually in contention. In response to pointed questioning from the Commission, AT&T admitted that the “real remaining issue” issue for which AT&T sought resolution was “whether Nextel is an appropriate entity to opt into the Sprint agreement,” which counsel characterized as “a mixed question of law, policy, and fact.”<sup>10</sup> Counsel for AT&T specified the “factual component” to that issue as follows:

MR. HATCH: ...There is a factual component to that [issue], dealing with what is Nextel? What does it do? What does it not do? What does it intend to do with this agreement, assuming it is able to operate under it?<sup>11</sup>

10. AT&T further represented to the Commission that the factual aspect of Nextel's status as a wireless provider could be covered in a “quick list of stipulated facts” that would “provide a factual basis for our [AT&Ts] arguments as to whether they [Nextel] are an

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<sup>10</sup> Transcript, pg. 26. lines 11-14.

<sup>11</sup> Transcript, pg. 26, lines 17-20.

inappropriate entity to opt into the Sprint agreement.”<sup>12</sup> The Commission granted AT&T’s request, ordering a hearing “on *issues of policy and law*, to be identified and briefed by the parties,”<sup>13</sup> and the parties agreed upon the list of stipulated facts sought by AT&T.<sup>14</sup>

11. Despite AT&T’s clear and repeated representations to the Commission that it sought a proceeding based on *stipulated facts and legal briefs*; despite AT&T’s representations that the only factual question to be addressed was Nextel’s status as a wireless carrier (to which Nextel has stipulated); despite the Commission’s order granting a hearing only on issues of policy and law; and despite the Prehearing Officer’s order limiting briefs to 30 pages; AT&T filed – in addition to its 30-page brief – a 15-page Affidavit that not only purports to establish additional “facts” upon which it attempts to rely, but also includes many pages of policy argument,<sup>15</sup> and even requests “the opportunity to present the facts summarized in this Affidavit to the Commission.”<sup>16</sup>

12. The Commission never authorized the parties to present additional factual affidavits, and indeed, given AT&T’s assertions that it sought the opportunity to file briefs and present oral argument on legal and policy issues, AT&T never even sought such authority. In filing an Affidavit that contains factual assertions, AT&T flouts both the letter and the spirit of Order No. PSC-08-0415-FOF-TP, which set these dockets for a proceeding “on issues of policy and law....” and should be stricken on that basis alone.

13. Further, the Affidavit is additionally improper in that it purports to address matters of contract interpretation. Interpretation of an unambiguous contract unquestionably is a

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<sup>12</sup> Transcript, pg. 32, lines 21-24. *See also* Transcript, pg. 27, lines 9-14 (“...we would have to have ... a set of stipulated facts as to what Nextel is or is not based on that specific facts, then we can argue based on those facts whether we think Nextel is an appropriate entity to opt into this agreement both as a matter of law and as a matter of policy.”)

<sup>13</sup> Order No. PSC-08-0415-FOF-TP, pg. 12, emphasis added.

<sup>14</sup> *See* Corrected Stipulations, June 17, 2008.

<sup>15</sup> Affidavit, ¶4, 5, 6.

<sup>16</sup> Affidavit, ¶40.

matter of law, and thus testimony on matters of contract interpretation is neither necessary nor proper. *Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc.*, 353 So.2d 840 (Fla. 1977). Accordingly, the opinion of AT&T's affiant regarding the meaning of the Sprint agreement is simply irrelevant to this proceeding.

14. Additionally, even assuming *arguendo* that the Commission could simply ignore the Affidavit's factual assertions and legal arguments, the document should be stricken because it provides AT&T with 15 additional pages of argument in support of its position on the issues, in direct violation of Order No. PSC-08-0402-PCO-TP. That Order limited legal briefs to 30 pages, and the Commission should reject AT&T's attempt to evade the Prehearing Officer's reasonable page limitation by the simple device of labeling its legal and policy argument as an "affidavit" and submitting it as a separate document.<sup>17</sup>

15. Finally, the schedule in this case does not provide an opportunity for Nextel to reply to the additional argument and purported facts set forth in the Affidavit.<sup>18</sup> Accordingly, the Commission's consideration of the statements therein would provide an unfair procedural and substantive advantage to AT&T, thus denying Nextel procedural due process.

16. Movant has conferred with counsel for AT&T and states that AT&T Florida opposes this Motion.

WHEREFORE, Nextel respectfully requests that the Commission grant this Motion to Strike.

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<sup>17</sup> Although Nextel has not moved to strike AT&T's statements of position on the Issues set forth in Attachment A to Order No. PSC-08-0402-PCO-TP, it notes that AT&T also failed to comply with the Prehearing Officer's Order to limit such position statements to 50 words.

<sup>18</sup> Nextel does not believe that revising the schedule to provide Nextel with an opportunity to respond to the Affidavit is an appropriate remedy for AT&T's violation of the Commission's orders. AT&T has delayed Nextel's adoption of the Sprint interconnection agreement for over a year based on spurious legal and procedural claims (most recently by arguing that it required an opportunity to file a *brief based on stipulated facts*) and the proceeding should not further be delayed to accommodate AT&T's improper Affidavit.



Respectfully submitted this 1<sup>st</sup> day of July, 2008.

/s/ Marsha E. Rule

Marsha E. Rule  
Rutledge, Ecenia & Purnell, P.A.  
P.O. Box 551  
Tallahassee, FL 32302-0551  
(850) 681-6788  
Fax: (850) 681-6515  
[marsha@reuphlaw.com](mailto:marsha@reuphlaw.com)

Douglas C. Nelson  
William R. Atkinson  
Sprint Nextel  
233 Peachtree Street NE, Suite 2200  
Atlanta, GA 30339-3166  
(404) 649-0003  
Fax: (404) 649-0009  
Email: douglas.c.nelson@sprint.com  
bill.atkinson@sprint.com

Joseph M. Chiarelli  
6450 Sprint Parkway  
Mailstop: KSOPHN0214-2A671  
Overland Park, KS 66251  
Voice: 913-315-9223  
Fax: 913-523-9623  
Email: joe.m.chiarelli@sprint.com

ATTORNEYS FOR  
SPRINT COMMUNICATIONS  
COMPANY LIMITED PARTNERSHIP,  
AND SPRINT SPECTRUM LIMITED  
PARTNERSHIP

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail and email to the following parties on this 1<sup>st</sup> day of July, 2008:

Lee Eng Tan, Esq.  
Adam Teitzman  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850  
[ltan@psc.state.fl.us](mailto:ltan@psc.state.fl.us)  
[ateitzma@psc.state.fl.us](mailto:ateitzma@psc.state.fl.us)

E. Edenfield, Jr.  
Tracy W. Hatch  
Manuel Gurdian  
c/o Greg Follensbee  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301  
[thatch@att.com](mailto:thatch@att.com)  
[greg.follensbee@att.com](mailto:greg.follensbee@att.com)

John T. Tyler  
AT&T Midtown Center – Suite 4300  
675 West Peachtree Street, NE  
Atlanta, GA 30375  
[John.tyler@bellsouth.com](mailto:John.tyler@bellsouth.com)

*/s/ Marsha E. Rule*  
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Marsha E. Rule