

Ruth Nettles

From: Slaughter, Brenda [bs3843@att.com]
Sent: Tuesday, July 08, 2008 1:38 PM
To: Filings@psc.state.fl.us
Cc: Tyler, John; Woods, Vickie; Holland, Robyn P; Tracy Hatch; Randa, Johna A
Subject: Docket 070368-TP/070369-TP
Attachments: 070368-TP 070369-TP Response in Opposition re Motion to Strike.pdf

A. Brenda Slaughter
Legal Secretary to J. Phillip Carver, Robert A. Culpepper, and John T. Tyler
BellSouth Telecommunications, Inc. d/b/a AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(404) 335-0714
brenda.slaughter@att.com

B. Re: Docket No. 070368-TP: Notice of the Adoption by NPCR, Inc. d/b/a Nextel Partners 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." dated January 1, 2001

Re: Docket No. 070369-TP: Notice of the Adoption by Nextel South Corp. and Nextel

West Corp. (collectively "Nextel") 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." dated January 1, 2001

C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida

on behalf of John T. Tyler

D. 10 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Nextel's Motion to Strike Affidavit of P.L. (Scot) Ferguson

<<070368-TP 070369-TP Response in Opposition re Motion to Strike.pdf>>

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7/8/2008

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John T. Tyler
General Attorney
Legal Department

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (404) 335-0757
F: (404) 927-3618
john.tyler@att.com

July 8, 2008

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 070368-TP (Nextel Partners)
Docket No. 070369-TP (Nextel)

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Nextel's Motion to Strike Affidavit of P.L. (Scot) Ferguson, which we ask that you file in the captioned dockets.

Copies have been served to the parties shown on the attached Certificate of Service on this day.

Sincerely,



John T. Tyler

cc: All Parties of Record
Gregory Follensbee
E. Earl Edenfield, Jr.
Lisa S. Foshee

CERTIFICATE OF SERVICE
Docket Nos. 070368-TP and 070369-TP

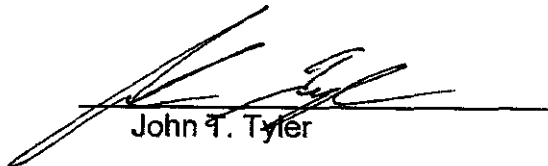
I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail
and First Class U. S. Mail this 8th day of July, 2008 to the following:

Florida Public Service Commission
Lee Eng Tan, Staff Counsel
Victor McKay, Staff Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Tel. No. (850) 413-6185
ltan@psc.state.fl.us
vmckay@psc.state.fl.us

Marsha E. Rule
Rutledge Law Firm
215 South Monroe Street,
Suite 420 (32301)
P.O. Box 551
Tallahassee, Florida 32302-0551
Tel. No. (850) 681-6788
Fax. No. (850) 681 -6515
marsha@reuphlaw.com

Douglas C. Nelson
William R. Atkinson
Sprint Communications/Sprint Nextel
233 Peachtree Street, N.E, Suite 2200
Atlanta, GA 30303-1504
Tel. No. (404) 649-0003
Fax. No. (404) 649-0009
douglas.c.nelson@sprint.com
bill.atkinson@sprint.com

Joseph M. Chiarelli
Sprint Nextel
6450 Sprint Parkway
Overland Park, KS 66251
Tel. No. (913) 315-9223
Fax. No. (913) 523-9623
joe.m.chiarelli@sprint.com


John T. Tyler

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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)
)
)
)
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)
Telecommunications, Inc. and Sprint)
Communications Company Limited Partnership,)
Sprint Communications Company L.P.,)
Sprint Spectrum L.P." dated January 1, 2001)
)
)
Filed: July 8, 2008

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO
NEXTEL'S MOTION TO STRIKE AFFIDAVIT OF
P.L. (SCOT) FERGUSON**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") files this Response in Opposition to Nextel's¹ Motion to Strike Affidavit of P.L. (Scot) Ferguson ("Motion"). For the following reasons, the Florida Public Service Commission ("Commission") should deny the Motion.

Background

1. Pursuant to the June 17, 2008 Order Establishing Procedure, on June 26, 2008, AT&T Florida filed its brief. Because the brief and attachments exceeded 100 pages, AT&T Florida's electronic filing was subsequently rejected as exceeding the page limit for electronic filings. Therefore, on June 18, 2008, without objection by Nextel, AT&T Florida filed its Motion For Extension of Time To File Brief and to Accept Brief As Timely Filed. In

¹ Petitioners, NPCR, Inc., d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. are collectively referred to herein as "Nextel."

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conjunction with its brief, AT&T Florida filed supporting attachments “A” through “G.” “Attachment A” to AT&T Florida’s brief is the supporting affidavit of P.L. (Scot) Ferguson (“Affidavit”).

Argument

2. Nextel has moved the Commission to strike the Affidavit in its entirety² on the unsubstantiated basis that: “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-PCA-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.” Motion at 5, ¶7.

3. Nextel’s baseless Motion misinterprets AT&T Florida’s representations to the Commission; misconstrues the Commission’s orders; and speciously claims that Nextel is somehow in danger of being denied due process.

4. The Motion reveals Nextel’s fundamental misunderstanding of the purpose of a motion to strike, and the applicable legal standard for granting such motions. Nextel offers no legal basis for its Motion—there is none. Indeed, Nextel fails to cite to *any* competent authority that would compel the drastic relief it seeks.

² AT&T Florida agrees that ¶40 of the Affidavit should be stricken. That paragraph, in which the affiant “request[s] the opportunity to present the facts summarized in [the] affidavit to the Commission,” was erroneously included in the Affidavit. AT&T Florida is of course well aware of the fact that this proceeding does not include a formal hearing. Therefore, AT&T Florida conferred with opposing counsel, explained that inclusion of that paragraph was in error, that AT&T Florida did not intend to rely upon it and was not opposed to striking that paragraph from the Affidavit. Hence, it is misleading, disingenuous and wasteful for Nextel to include in its Motion the statement that AT&T Florida “even requests the opportunity to present the facts summarized in this Affidavit to the Commission.” Motion at ¶11. Nextel is fully aware that AT&T Florida agreed to correct that error, and the Commission need not waste time on Nextel’s non-productive ruse of attempting to draw attention to a non-issue.

Nextel's Motion Fails to Meet the Standard for Granting Motions to Strike.

5. Assuming Nextel's Motion was procedurally proper,³ the Commission should deny Nextel's Motion because Nextel cannot meet the standard under Rule 1.140(f). "A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision." *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A.*, 704 So. 2d 214, 216 (Fla. 2nd DCA 1998) (quoting *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762, 769 (Fla. App. 4th DCA 1972).

6. In *McWhirter, Reeves*, the court rejected a request to strike certain allegations in the plaintiff's complaint pursuant to Rule 1.140(f) because it found that the "allegations [in the complaint] were relevant and definitely had a bearing on the equities." *Id.* In the case at hand, Nextel takes issue with AT&T Florida providing the Commission with an attestation supporting AT&T Florida's position on the very issues that are before the Commission for resolution. Clearly the information contained in the Affidavit is entirely relevant and should be useful to the Commission in reaching resolution of the underlying dispute.

7. Ultimately, the Commission's decision rests on whether adoption by Nextel (a standalone CMRS carrier) of the three-party AT&T Florida/Sprint agreement would be proper. In evaluating this issue, information provided by AT&T Florida's expert policy witness is highly

³ Florida Rule of Civil Procedure 1.140 provides that "[a] party may move to strike or the court make strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time." Rule 1.110(a) provides that the term "pleadings" is limited to complaints, answers, cross claims and counter claims. *See* Rule 1.110 Fla. R. Civ. P; *see also, Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 72 n.3 (Fla. 3rd DCA 2000) (Cope, J., dissenting) (stating that the term "pleading" means complaint); *see also, Harris v. Lewis State Bank*, 436 So. 2d 338, 340 n.1 (Fla. 1st DCA 1983); *Motzner v. Tanner*, 561 So. 2d 1336 (Fla. 5th DCA 1990).

relevant to the analysis, and bears directly on the equities in this case and the policy considerations that this Commission must address.

8. Importantly, the rules of evidence in administrative hearings are liberal. *See In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket No. 060635-EU, Order No. PSC-07-0033-PCO-EU (Issued January 9, 2007). The types of evidence that may be received in administrative proceedings is as follows:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial on the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Florida Statutes § 120.569(2)(g). Section 90.401, Florida Statutes, defines “relevant evidence [as] evidence tending to prove or disprove a material fact.”

9. Thus, evidence admissible under the Florida rules of evidence is admissible in an administrative hearing, and evidence inadmissible in civil courts but “of a type commonly relied upon by reasonably prudent persons,” F.S. 120.569(2)(g), is also admissible in administrative hearings.

10. Furthermore, Mr. Ferguson is an expert in the field of wholesale policy issues as related to interconnection agreements and the disputes that arise out of those agreements. An expert is permitted to express an opinion on the matters in which the witness has expertise when the opinion is based upon facts which the expert personally knows, is in response to a hypothetical question, or is in response to facts disclosed to the expert at or before trial. *See* Erhardt, *Florida Evidence*, (2006 Ed.) Section 702.1, p. 688-89. *See also, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services*

Corporation, Docket No. 991666-WU, Order No. PSC-01-1919-PCO-WU (Issued September 24, 2001) (where the Commission held that a witness may offer opinion testimony or conclusions based on facts within the record). Consistent with the Commission's practice regarding expert testimony, Mr. Ferguson's Affidavit should be accorded weight that the Commission deems appropriate.

There is no Inconsistency in AT&T Florida's Filing and its Representations to the Commission.

11. Nextel correctly notes that AT&T Florida asserted that it seeks Commission resolution of "whether Nextel is an appropriate entity to opt into the Sprint agreement," which AT&T considers "a mixed question of law, policy, and fact." Motion at 6, ¶9.

12. That is exactly what AT&T Florida addressed in its brief--those mixed questions of law, policy and fact. And that is why the supporting Affidavit from AT&T Florida's policy witness is entirely appropriate. At no time did AT&T Florida represent to the Commission that it would not provide documentation to support its position, and indeed AT&T Florida would have been remiss not to provide the Commission with documentation in support of its brief.

13. Indeed, because the instant proceeding is being conducted pursuant to agreement of the parties as a "paper proceeding" based on briefs of the parties and subsequent oral argument, there is no typical record that has been compiled by the Commission to which a party's brief can cite. Accordingly, AT&T Florida attached a number of documents to its brief upon which it relies as support for its arguments. Likewise, Nextel referred to and attached exhibits to its brief.

Nothing in Order Nos. PSC-08-0415-FOF-TP and PSC-08-0402-PCO-TP Precludes a Party from Filing an Affidavit.

14. Nextel's allegation that "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..." (Motion at 7, ¶12.) is without any rationalization whatsoever. Order No. PSC-08-0415-FOF-TP is not even procedural in nature. The obvious intent and effect of this order was simply to resolve some preliminary matters, i.e., motions, that were then pending before the Commission. Specifically, the Commission ordered: that AT&T Florida's request that the dockets be placed in abeyance be denied; that Nextel's request for oral argument be granted; that Nextel's Motion for Summary Final Order be denied, and that the dockets be set for a proceeding on issues to be identified and briefed by the parties. Order No. PSC-08-0415-FOF-TP at 4. Nothing within that order, express or implied, comes anywhere close to precluding the parties from filing attachments (including supporting affidavits) regarding the issues to be identified and briefed by the parties. Filing the supporting Affidavit is entirely consistent with the goal of assisting the Commission in resolving the disputed issues of policy and law.

15. Likewise, Order No. PSC-08-0402-PCO-TP, the Order Establishing Procedure, does not state or imply that parties cannot file affidavits in support of their briefs. However, in mandating that briefs "be limited to thirty (30) pages *excluding attachments*," it clearly contemplates and expressly allows parties to file attachments to their briefs. Order No. PSC-08-0402-PCO-TP at 2 (emphasis added). That specific allowance for attachment pages beyond the 30-page brief limit eviscerates Nextel's nonsensical claim that the Affidavit violates the 30-page brief limit.⁴ Apparently, while Nextel considers AT&T Florida's attachment as a violation of the 30-page limit, that same distorted view does not apply to its own attachments which if taken in

⁴ See Motion at ¶14.

conjunction with the Nextel brief far exceed the limit and contain things as extraneous as transcripts from matters in other jurisdictions.

Nextel is Not Being Denied Due Process.

16. Finally, Nextel's claim that AT&T Florida's Affidavit somehow deprives it of due process is equally fallible and as readily disposed of. Like AT&T Florida, Nextel was free to file attachments to its brief, and in fact did file 6 exhibits as attachments to its own 30 page brief. The parties had the exact same opportunity to address in full the issues set forth in the List of Issues. AT&T Florida chose to include six attachments to its brief as did Nextel.

17. The disingenuousness of Nextel's claim that AT&T Florida's Affidavit somehow places it at a procedural disadvantage is obvious. Nextel's fictitious assertion is belied by the fact that Nextel ironically claims that it would not be satisfied with an opportunity to respond to the Affidavit.⁵ Obviously if the Affidavit truly presented an affront to Nextel's due process rights, Nextel could be expected to argue vehemently for the opportunity to respond.

18. Even had Nextel requested the opportunity to respond to the Affidavit, its request would have properly have been denied. Like AT&T Florida, Nextel had an equal opportunity to submit its brief and supporting attachments for the Commission's consideration. As is clear from the absence of even a scintilla of support for its claim, Nextel's due process claim is wholly without legitimacy.

Conclusion

19. The Affidavit is a valid supporting attachment to the brief and contains relevant information that the Commission should consider in resolving this matter. The Commission


⁵ See Motion at 8, fn. 18 ("Nextel does not believe that ...provid[ing] Nextel with an opportunity to respond to the Affidavit is an appropriate remedy").


should maintain the Affidavit within the record and afford it the weight to which it believes it is due.⁶ Nextel cites to absolutely no authority that would compel a different outcome.

WHEREFORE, for the foregoing reasons, AT&T Florida respectfully requests that the Commission deny Nextel's Motion to Strike the Affidavit of P.L. (Scot) Ferguson.

Respectfully submitted, this 8th day of July, 2008.

BELLSOUTH TELECOMMUNICATIONS, INC.
d/b/a AT&T FLORIDA


E. EARL EDENFIELD, JR..
TRACY W. HATCH
MANUEL A. GURDIAN
c/o Gregory R. Follensbee
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558


LISA S. FOSHEE
JOHN T. TYLER
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0757

#715152

⁶ As mentioned at the outset (in footnote 2) AT&T Florida does not object to having paragraph 40 of the Affidavit stricken, as that paragraph was erroneously included. The remainder of the Affidavit is procedurally and substantively sound and should remain a part of the record in this docket.