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-08-0584-FOF-TP ISSUED: September 10, 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

FINAL ORDER GRANTING ADOPTION BY NEXTEL OF SPRINT - AT&T INTERCONNECTION AGREEMENT

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).

DOCUMENT NUMBER-DATE
08426 SEP 10 08
FPSC-COMMISSION CLERK

In its Notice, Nextel stated that pursuant to Merger Commitment Nos. 7.1 and 7.2[1] 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/Florida Public Service Commission (FPSC or Commission) jurisdiction; the underlying agreement is currently "deemed extended on a month-to-month basis"[2]; 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.[3]

By Order No. PSC-07-0831-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. By Order No.

---

[1] 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.

[2] 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.

[3] Docket No. 040799-TP, Order No. PSC-05-0158-PAA-TP (Z-Tel Order).

PSC-08-0066-FOF-TP, issued on January 29, 2008, we acknowledged the amendment of the Sprint ICA.[4]

Nextel filed a Motion for Summary Final Order on December 26, 2007, requesting that the FPSC 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 with 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.[5] On February 13, 2008, AT&T filed a letter with an attached FCC order.[6] 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.[7]

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.[8] AT&T filed a letter on March 28, 2008, that attached a ruling issued by the California Public Utilities Commission.[9]

By Order No. PSC-08-0415-FOF-TP, issued June 23, 2008, this Commission denied Nextel's Motion for Summary Final Order and set Docket Nos. 070368-TP and 070369-TP for a proceeding under Section 120.57(2), Florida Statutes. By Order No. PSC-08-0402-PCO-TP,

---

[4] 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.

[5] 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.

[6] 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.

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

[8] 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.

[9] 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.

issued on June 17, 2008, the issues on which the parties were to file basic position statements and legal briefs were established. On this same date, the parties filed corrected stipulations of fact, which replace those included in Attachment B of Order No. PSC-08-0402-PCO-TP.

On June 26, 2008, Nextel timely filed its brief. On June 27, 2008, AT&T filed its brief and accompanying motion for extension of time to file brief and to accept brief as timely filed. AT&T's motion was granted by Order No. PSC-08-0456-PCO-TP, issued July 16, 2008.

On July 1, 2008, Nextel filed a motion to strike the affidavit of P.L. Ferguson, which was included as Attachment A to AT&T's legal brief. By Order No. PSC-08-0484-PCO-TP, issued July 28, 2008, Nextel's motion was granted in full.

II. Analysis

A. Nextel's adoption of the Sprint ICA

AT&T

AT&T asserts the Sprint ICA relies on a balance of traffic between the original parties to the agreement. According to AT&T, the bill-and-keep arrangement was "the result of negotiation, compromise, and an extensive evaluation of costs incurred by each party for the termination of traffic."[10] AT&T is concerned that other stand-alone wireless carriers will adopt the Sprint ICA if Nextel prevails, and to the extent there is a traffic imbalance, AT&T will experience higher costs in providing the agreement as compared to its costs of providing the agreement to the original parties.[11] A further concern of AT&T is that interstate porting of the adopted agreement through AT&T/BellSouth Merger Commitment 7.1 could further increase AT&T's costs of providing the agreement.

If Nextel had adopted the Sprint ICA prior to AT&T's merger with BellSouth, "any imbalance of traffic . . . would have been limited to Florida." If Nextel is permitted to adopt post-merger, "[it] (and possibly other stand-alone wireless carriers) could improperly attempt to use the Merger Commitments" to "operate under the adopted agreement in one or more of the other 21 states in which AT&T is an ILEC." Defending against these adoptions and the increased costs incurred for transporting and terminating wireless traffic adds to AT&T's concerns. AT&T is particularly concerned that Nextel would have a favorable traffic imbalance in the legacy AT&T ILEC states, which would enable Nextel to receive a "free ride" or subsidy from AT&T.[12]

[10] AT&T Brief, pp. 4-5.
[11] AT&T argues other "wireless carriers could avoid providing [a] cost study supporting [their] costs . . . avoid an examination of the costs associated with a "bill-and-keep" arrangement . . . and simply walk into a 'bill-and-keep' arrangement for wireless local traffic despite an imbalance of such traffic." AT&T Brief, p. 7.
[12] AT&T Brief, pp. 2-3.

AT&T takes the position that the Sprint ICA requires a specific mix of parties: both a wireline carrier and a wireless carrier.[13] By not bringing in a wireline CLEC, AT&T suggests that Nextel would not be adopting the agreement "upon the same terms and conditions" as the parties to the original agreement.[14] AT&T offers three examples to address the various conceivable scenarios for Nextel to obtain the Sprint ICA and discusses the fallacies it sees with each:

- The addition of Nextel as a party to the Sprint ICA is an amendment, not an adoption;
- An amendment scenario in which Nextel replaces Sprint PCS creates a situation where the Sprint CLEC would be party to two agreements with AT&T, which is not possible; and
- An adoption in which Nextel replaces both Sprint entities violates the all-or-nothing rule since this necessarily implies that Nextel can avail itself of all elements of the agreement, which it cannot; Nextel cannot pick and choose just the wireless provisions.[15]

AT&T argues that provisions in the Sprint ICA are only available to a group of entities comprising the same mix of parties as those in the underlying ICA and asserts this on two fronts. AT&T argues that certain provisions (the bill-and-keep and equal sharing of facility costs for wireless service) contained in the underlying agreement are unavailable for adoption. Secondly, since Nextel is a stand-alone wireless carrier, it cannot avail itself of various elements of the underlying agreement. Therefore, in effect, Nextel is "picking and choosing" elements rather than adopting in whole, and not adopting on "the same terms and conditions as those provided in the agreement."[16]

<u>Nextel</u>

Nextel's brief relies on two types of arguments to support its adoption of the Sprint ICA. First, using the implementing rule, 47 C.F.R. §51.809, Nextel notes that: AT&T is not relying on either exception,[17] an adoption cannot be restricted to carriers serving a comparable class of subscribers or providing the same service,[18] and any requesting telecommunications carrier

---

[13] AT&T believes that "[i]f Nextel wishes to rely on Section 252(i) to receive the benefits of the wireless provisions of [the] agreement . . . it must bring wireline interests to the table comparable to those brought by the original wireless party to the agreement." AT&T Brief, p. 12.
[14] AT&T argues, "Nextel, therefore, is seeking to adopt the Sprint ICA as a stand-alone wireless provider, which is not an adoption 'upon the same terms and conditions as those provided in the agreement.'" AT&T Brief, p. 13
[15] AT&T Brief, pp. 10-15.
[16] AT&T Brief, p. 13
[17] Nextel Brief, pp. 3, 8. Nextel cites the June 3, 2008 Agenda Conference transcript.
[18] Nextel Brief, pp. 7-8 cites to the First Report and Order in the Matter of FCC Docket No. 96-98 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and FCC Docket No. 95-185 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, (First Report and Order) ¶1318.

includes a wireless carrier (not just a CLEC).[19] Nextel clarifies that the only two bases for restricting an adoption were unaffected by the FCC's decision to modify 47 C.F.R. §51.809 eliminating the pick-and-choose option and requiring that adoptions be all or nothing.[20] Further, Nextel explains that the FCC has expressly rejected the concept that the adopting carrier(s) must be "similarly situated" to the original party.[21]

Nextel then notes that a careful review of the Sprint ICA indicates a stand-alone wireless carrier can operate under the agreement if the wireline carrier opts into a different bill-and-keep arrangement with AT&T. Contrary to AT&T's representation that the Sprint ICA requires both wireless and wireline parties, Nextel observes that the "trigger" for termination/renegotiation of the bill-and-keep provision in the ICA is when one Sprint entity adopts a different AT&T ICA that requires payment of reciprocal compensation.[22] Therefore, Sprint PCS may operate in a stand-alone capacity if Sprint CLEC leaves the agreement without activating the "trigger." By extension, the same applies to Nextel. Nextel also notes that the bill-and-keep provision does not have a balance-of-traffic requirement,[23] the provision for equal sharing of facility costs is an express wireless provision,[24] and there is a prohibition on using unbundled network elements (UNEs) for the exclusive provision of wireless or interexchange services.[25]

Decision

The Act tasks each telecommunications carrier with "interconnect[ing] directly or indirectly with the facilities and equipment of other telecommunications carriers."[26] Along with the duty to interconnect, carriers have the duty to negotiate through the process in good faith. This obligation applies to both the incumbent LEC and the requesting carrier.

The Act defines a telecommunications carrier as "any provider of telecommunications services." In the context of this proceeding, this definition applies equally to AT&T and Nextel. In the First Report and Order, in discussing jurisdictional issues, the FCC notes that it also believed that "sections 251 and 252 will foster regulatory parity in that these provisions establish

---

[19] Nextel Brief, pp. 8, 12. Nextel clarifies that the First Report And Order and Second Report And Order were "certainly not 'issued' in the limited 'context of a CLEC and ILEC', much less any limited context of only a 'CLEC/ILEC agreement'."
[20] Nextel Brief, pp. 8-9.
[21] Nextel Brief, pp. 5, 11. Nextel believes "[the similarly situated argument] is a legally deficient argument."
[22] Nextel Brief, p. 17.
[23] Nextel Brief, pp. 3, 18-19. "AT&T has failed to cite to a single provision in the Sprint ICA that requires the original Sprint parties, either individually or collectively, to maintain any particular 'balance of traffic' with AT&T . . ."
[24] Nextel Brief, pp. 15, 19. "The provision for equal sharing of interconnection facilities that is applicable to Nextel is an express 'wireless' provision . . . "
[25] Nextel Brief, p. 16. "There is an express TRRO UNE restriction in amended Attachment 2 – an Attachment that Sprint PCS did elect to use – that states 'Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services'."
[26] 47 U.S.C. 251(a)(1).

a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers."[27]

There are two ways for a telecommunications carrier to interconnect with an incumbent LEC. The first method, described in §252(a), is through negotiation, and the second, detailed in §252(b), is through compulsory arbitration. In addition to these two processes, §252(i) of the Act describes the alternative to the aforementioned processes: adoption of an existing interconnection agreement.

> **Availability To Other Telecommunications Carriers** – 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.

At its sole discretion, an interested carrier may choose to adopt an existing interconnection agreement on file with the Commission that best meets its business needs. The requesting carrier must adopt all terms and conditions included within the existing interconnection agreement; however, there is no requirement in the Act that mandates the carrier utilize every service contained within the subject agreement. The FCC acknowledged that a carrier would not necessarily use every service or rate contained in an agreement when it addressed protections against discrimination.[28]

Whether a telecommunications carrier may adopt an entire, effective interconnection agreement is determined by whether a genuine exception to the above provision exists. The rule which implements §252(i), 47 C.F.R. §51.809, describes the only two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement. 47 C.F.R. §51.809(b) provides "[t]he 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."

Unless an incumbent LEC can demonstrate its costs will be greater to provide the agreement to the new carrier(s), or the agreement is not technically feasible to provide to the new carrier(s), the incumbent LEC may not restrict the carrier's right to adopt. The FCC said that it would "deem an incumbent LEC's conduct discriminatory if it denied a requesting carrier's

---

[27] The First Report and Order ¶1024. Nextel is a commercial mobile service provider, which meets the definition of telecommunications carrier in the Act.

[28] Second Report and Order In the Matter of FCC Docket No. 01-338 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, (Second Report and Order) ¶18.

request to adopt an agreement to which it is entitled under section 252(i) and our all-or-nothing rule."

All of AT&T's arguments are fatally flawed since each of them gives weight to considerations that are, at a minimum, inappropriate in the general context of adoptions, and specifically in the case of the instant dockets.

The definition of "telecommunications carrier" does not include references to facilities used or customers served. The lack of further qualifying information related to facilities used or customers served is significant to these proceedings because these factors cannot be taken into account when an incumbent LEC considers the appropriateness of an adoption per §252(i).

AT&T's argument that the adopting party must be "similarly situated" to the original party or parties and able to avail itself of all applicable elements is not supported by 47 C.F.R. §51.809 or related FCC orders. In the First Report and Order, the FCC made explicitly clear that incumbent LECs must permit requesting carriers to interconnect and that CMRS providers are telecommunications carriers. The FCC further held that "incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252."[29]

AT&T's argument that Nextel "must bring wireline interests to the table comparable to those brought by the original wireless party to the agreement"[30] is directly at odds with the applicable FCC rule and finding set forth in the Second Report and Order. The FCC noted:

> We also reject the contention of at least one commenter that incumbent LECs should be permitted to restrict adoptions to "similarly situated" carriers.[31]

We find that assertions related to facilities used, customers served, or the mix of parties fall under the general category of "similarly situated" arguments, which the FCC has made clear are inappropriate. Moreover, even if AT&T's "similarly situated" argument had any merit, Nextel has argued persuasively that the Sprint ICA does not require both wireline and wireless parties and contains limiting language to ensure appropriate use of provisions.

The FCC concluded "an all-or-nothing rule would benefit competitive LECs because competitive LECs that are sensitive to delay would be able to adopt whole agreements . . . while others would be able to reach agreements on individually tailored provisions more efficiently."[32] Clearly, the FCC recognized that a competitive telecommunications carrier could adopt an agreement in whole but not make use of all its provisions, or the carrier could negotiate an

---

[29] First Report and Order ¶¶26, 34.
[30] AT&T Brief at p. 12.
[31] Second Report And Order ¶30 In addition, "[w]e conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement." Citing to the BellSouth/Hendrix affidavit.
[32] Second Report and Order ¶15.

agreement tailored to the specific needs of the carrier. We find an interpretation of §252(i) suggesting the all-or-nothing rule requires a telecommunications carrier to use every service in an adopted ICA is not consistent with the FCC's view of "all or nothing."

The FCC made clear in the Second Report and Order that it did not believe §252(i) needed to be further clarified. In addition, the FCC put incumbent LECs on notice when it issued the Second Report and Order:

> We also clarify that in order to allow this regime to have the broadest possible ability to facilitate compromise, the new all-or-nothing rule will apply to all effective interconnection agreements, including those approved and in effect before the date the new rule goes into effect.[33]

That is, all agreements in effect on July 13, 2004, became available for adoption under the new all-or-nothing rule. The underlying agreement that Nextel seeks to adopt was in effect on that date. Any suggestion by AT&T that merger commitments shield this agreement from adoption is not supported by applicable law and is at odds with the FCC's prohibition on discrimination. Any limitation on Nextel's right to adopt the underlying agreement must "comply with the 1996 Act's general nondiscrimination provisions."[34]

As demonstrated by Nextel and confirmed by our staff, the Sprint ICA has no balance-of-traffic requirement despite AT&T's arguments to the contrary. AT&T's arguments go more to the background of the Sprint ICA, which is recited within the contract, but the controlling language does not require the original parties to maintain a balance of traffic. Any future intrastate or interstate porting of the adoption and any resulting traffic imbalances for AT&T are not relevant at this time, as such matters are outside the scope of the FPSC's consideration in approving Nextel's adoption.

If AT&T's "free ride" argument were true in the context of Nextel's adoption of the Sprint ICA in Florida, AT&T would have asserted and attempted to prove an exception under 47 C.F.R. §51.809(b)(1). AT&T has not proffered such an argument.[35] Since AT&T stated that it will not maintain the cost exception in 47 C.F.R. §51.809 as a defense, we infer that Nextel would not receive a "free ride" or subsidy from AT&T if this adoption is permitted. AT&T's complaint that intrastate or interstate porting of the adopted agreement would result in a traffic and/or cost imbalance is not an appropriate concern of this Commission at this time. If this situation should develop, AT&T can attempt to protect its interests through use of the cost exception in 47 C.F.R. §51.809(b) in proceedings before the applicable state commissions.

If Nextel adopts the Sprint ICA, AT&T's costs apparently will not increase as a result. Arguing speculative cost increases, using speculative scenarios, right after admitting AT&T does not have a cost exception under 47 C.F.R. §51.809, is a red herring within the context of these

[33] Second Report and Order ¶10.
[34] First Report and Order ¶1315.
[35] At the June 3, 2008 Agenda Conference, AT&T indicated it was not claiming either exception under §51.809(b).

dockets. We find that AT&T has attempted to use the instant dockets as a vehicle for pre-empting speculative adverse consequences.

B. Effective Date of Nextel's Adoption of the Sprint ICA.

AT&T

AT&T argues that the effective date should be 30 calendar days after the final party executes the adoption contract. AT&T argues that the Sprint ICA was not available when Nextel requested its adoption on June 8, 2007 because the contract was in an "expired" status and therefore cannot have an effective date of June 8, 2007.[36] AT&T asserts that its obligation under 252(i) to make an agreement available is limited to a "reasonable period of time," and the Sprint ICA was no longer available at the time of Nextel's adoption request.

AT&T argues that by applying a June 8, 2007 effective date, this Commission will in effect create a retroactive effective date. AT&T states that a retroactive effective date is counter to "basic rules of contract formulation," and is, in addition, not required by the Merger Commitments.[37] AT&T further argues that this would impose a financial penalty by negating the reciprocal compensation paid by Nextel and would be equivalent to retroactive ratemaking. AT&T asserts that it did not wrongfully or otherwise delay the adoption process.[38]

AT&T requests this Commission set forth certain conditions should this Commission decide to allow Nextel to adopt the Sprint ICA. AT&T requests that this Commission "specify in its Order that: (1) AT&T Florida is entitled to terminate the bill-and-keep arrangement in the adopted agreement; (2) if AT&T Florida terminates the bill-and-keep arrangement in the adopted agreement, Nextel and AT&T Florida must negotiate new reciprocal compensation arrangements; (3) any new reciprocal compensation arrangements, whether resulting from mutual agreement of the parties or from a ruling by this Commission or the FCC, shall apply as of the effective date of the adoption."

Nextel

Nextel argues its statutory rights must be obtained on an expedited basis, and AT&T's litigation strategy consisting of "serial objections" served to delay the proceeding. Nextel asserts AT&T's actions have been contrary to federal law.[39] Nextel argues that the adoption is presumptively effective from the date of Nextel's notice (June 8, 2007), consistent with the federal law that requires AT&T as an ILEC to respond expediently.[40] Nextel further argues that a June 8, 2007 effective date is Nextel's right by due process if this Commission follows its existing procedure with respect to adoption notices, as AT&T has failed to prove to this Commission any exception to the adoption. Nextel contends that AT&T must honor this date

[36] AT&T Brief, p. 26.
[37] AT&T Brief, p. 28.
[38] AT&T Brief, p. 29.
[39] Nextel Brief, p. 28.
[40] Nextel Brief, p. 29.

since the Sprint ICA is current and effective. Under the concept of "true-up" AT&T must not benefit from its delay in honoring its obligation and must provide the requested adoption as if no protest had occurred.[41]

Decision

The Act states that an ILEC shall make available any interconnection, service, or network element provided under an agreement approved under this section. The adoption of an ICA does not create or modify an approved ICA, but simply replicates the agreement and substitutes one or more new entities for the original non-ILEC party or parties. The underlying ICA between AT&T and Sprint, submitted by a joint motion, extended their existing interconnection agreement as of March 20, 2007, in Docket No. 070249-TP.[42]

Two issues based on the Sprint ICA have been raised by AT&T: the Sprint ICA was "expired" on June 8, 2007, when Nextel's filed its Notice of Adoption, and AT&T has an alleged right to terminate the "bill-and-keep" arrangement. When Sprint and AT&T filed their joint motion to approve amendment, the parties stated that it was an effective interconnection agreement. AT&T and Sprint stated the interconnection agreement was in operation and enforceable by both parties. This Commission subsequently approved the Sprint ICA amendment in Order No. PSC-08-0066-FOF-TP.

When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption party. Without objection from the ILEC, the adoption would be acknowledged effective as of the filing date.

In the instant dockets, AT&T filed a Motion to Dismiss, which this Commission denied on October 16, 2007, in Order No. PSC-07-0831-FOF-TP. The Motion to Dismiss pauses the Adoption but does not halt the process entirely. When a party files a Notice of Adoption, the adoption is considered presumptively valid and effective upon receipt of the adoption notice. We find that Nextel is allowed to adopt the Sprint ICA, which means that AT&T did not have a valid objection to the Adoption. Therefore, we believe the process shall continue where paused as there is no barrier to adoption under FCC Rule 47 C.F.R. 51.809(a). The effective date should not be affected by the passage of time during the litigation of this issue, and the effective date shall remain June 8, 2007.

AT&T requests this Commission approve conditions should this Commission acknowledge Nextel's adoption. With the exception of the previous conclusion that the Sprint ICA does not require both a wireline and a wireless party, we believe it is not ripe to address AT&T's list of conditions. To the extent that there is a future dispute between the parties, any party to the agreement may pursue their rights pursuant to the dispute resolution provision in the interconnection agreement.

---

[41] Nextel Brief, p. 29.
[42] Sprint ICA, Section 2.1 states "Agreement is extended three years from March 20, 2007 and shall expire as of March 19, 2010."

III. Conclusion

We find that Nextel's adoption of the Sprint ICA shall be upheld as valid pursuant to 47 U.S.C. §252(i) and the FCC's implementing rule, 47 C.F.R. §51.809. In keeping with Order No. PSC-07-0831-FOF-TP, we affirm that Nextel is within its rights to adopt the Sprint ICA. We further find that the adoption is effective as of June 8, 2007.

Docket Nos. 070368-TP and 070369-TP shall remain open pending the filing of the signed adoption between the parties, which shall occur no later than 7 days following this Commission's vote. These dockets shall be closed administratively upon issuance of a memo by our staff acknowledging the Adoption of the Sprint – AT&T Interconnection Agreement.[43]

Based on the foregoing, it is

ORDERED that the Florida Public Service that Nextel's adoption of the Sprint – AT&T ICA is valid pursuant to 47 U.S.C. §252(i) and 47 C.F.R. §51.809. It is further

ORDERED that the effective date of Nextel's adoption of the Sprint ICA shall be June 8, 2007. It is further

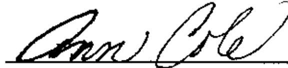
ORDERED that Docket Nos. 070368-TP and 070369-TP shall remain open pending the filing of the signed adoption between the parties, which shall occur no later than 7 days following this Commission's vote. It is further

ORDERED that these dockets shall be closed administratively upon issuance of a memo by our staff acknowledging the Adoption of the Sprint – AT&T Interconnection Agreement.

---

[43] If Nextel's Adoption is granted under Section 252(i), the adoption may be acknowledged by administrative memo pursuant to A.P.M. 2.07.C.5.b. If Nextel's Adoption occurs under Merger Commitments, administrative acknowledgment is granted by Docket No. 020353-TP, Order No. PSC-02-1174-FOF-TP, Order Approving Petition for Acknowledgment of Adoption of an Agreement under FCC Approved Merger Conditions and Granting Staff Authority to Administratively Acknowledge Adoption of Agreements Under FCC Approved Merger Conditions and Order Amending Administrative Procedures Manual.

By ORDER of the Florida Public Service Commission this 10th day of September, 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.