



Benjamin W. Fincher
Attorney, State Registrar

ORIGINAL

3100 Cumberland Circle
Atlanta, GA 30339
Telephone: (404) 649-5115
Fax: (404) 649-5171
Mailstop: GA 311 30802

December 12, 1997

VIA FED EX

Ms. Blanca S. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

In Re: Docket No. 971159-TP

Dear Ms. Bayó:

Enclosed for filing, are the original and fifteen (15) copies of Brief in Support of Petition of Sprint Communications Company Limited Partnership for Approval of Section 252(i) Election of Interconnection Agreement.

We are enclosing an extra copy of this transmittal letter. We ask that you please acknowledge receipt thereon and return to the undersigned in the enclosed self addressed stamped envelope.

Thank you for your cooperation.

Sincerely,

Benjamin W. Fincher
Benjamin W. Fincher

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint Communications)
Company Limited Partnership for Approval)
of Section 252(i) of Interconnection) Docket No. 971159-TP
Agreement with G. E. Florida Concerning)
Interconnection Rates, Terms and Conditions,) Filed December 15, 1997
Pursuant to the Federal Telecommunications)
Act of 1996)
_____)

**BRIEF IN SUPPORT OF PETITION OF
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
FOR APPROVAL OF SECTION 252(i) ELECTION OF
INTERCONNECTION AGREEMENT**

COMES NOW Sprint Communications Company Limited Partnership ("Sprint"),
Petitioner herein, pursuant to Stipulated Briefing Schedule, and submits this its Brief in
Support of its Petition for Approval of Section 252(i) Election of Interconnection
Agreement.

I.

INTRODUCTION AND BACKGROUND

The instant proceeding was initiated by Petition of Sprint, filed on September 3,
1997, with the Florida Public Service Commission ("Commission"), seeking approval of
Section 252(i) election of interconnection agreement. Sprint is seeking Commission
approval to elect the interconnection agreement between GTE Florida Incorporated
("GTE") and AT&T, as approved by the Commission on July 18, 1997 by Order number
PSC-97-0864-FOF-TP (Docket number 960847-TP). The basis for Sprint's petition
herein is Section 252(i) of the Telecommunications Act of 1996 ("Act"). Sprint filed a
Legal Memorandum in Support of its petition on November 20, 1997.

Section 252(i) of the Act states:

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. (Emphasis added)

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Congress included this "most favored nation" requirement to prevent discrimination among carriers and to help ensure a more level playing field for competition based on pricing, quality, and service.

The AT&T/GTE agreement contains more comprehensive terms than the Sprint/GTE agreement. Sprint has determined to adopt the AT&T/GTE agreement in its entirety to obtain parity with AT&T in the services and elements available from GTE. Absent such parity, Sprint will be severely disadvantaged in its efforts to compete for local telephone subscribers in Florida.

The Commission has recognized that GTE is obligated under Section 252(i) to make the AT&T/GTE agreement available to requesting carriers such as Sprint. However, the Commission denied an earlier request by Sprint to adopt the AT&T/GTE agreement because the Commission had not yet issued its final approval.¹ As indicated above, on July 18, 1997, the Commission issued an order approving the AT&T/GTE agreement. Sprint filed its Petition for Approval of Section 252(i) Election of the AT&T/GTE agreement on September 3, 1997, which is the subject of this proceeding.

Pursuant to agreement of the parties, on December 11, 1997, a stipulation was filed with the Commission with respect to (1) a "paper hearing" procedure; (2) the facts; (3) issue for resolution and, (4) a briefing schedule. Accordingly, pursuant to said agreement and stipulation, Sprint submits this its brief in support of its petition.

II. ARGUMENT

A. The existing Sprint/GTE interconnection agreement does not preclude Sprint's election under Section 252(i).

GTE has agreed with Sprint, and does not dispute the fact, that Section 252(i) of the Act allows Sprint to obtain interconnection terms by electing another carrier's agreement. Further, GTE has admitted that its witness in the Sprint/GTE arbitration proceeding testified under oath that Sprint could accept the whole contract executed with another carrier. However, despite its concession that Sprint can elect the AT&T/GTE

¹ See In re Petition by Sprint Communications Company Limited Partnership d/b/a Sprint for Arbitration with GTE Florida Incorporated, Fla. Pub. Serv. Comm'n Order on Arbitration Agreement, Order No. PSC-97-0550-POF-TP (May 13, 1997).

agreement, GTE argues that since Sprint already has a "binding" agreement with GTE, Sprint is precluded from now electing the AT&T/GTE agreement.²

A federal court in Texas recently rejected this very argument by GTE. The court ruled that Section 252(i) allows Sprint to terminate its separate, commission approved interconnection agreement with GTE and to adopt instead GTE's interconnection agreement with AT&T – precisely what Sprint seeks to do here.³ In so holding the court ruled "[T]he statute allows them to...have the right to terminate an agreement and pick another one, terminate theirs and pick another one. That way, everybody's treated the same. I understand the public policy behind that statute...." *Id.* At 6. The court granted summary judgment in Sprint's favor on its right to adopt the AT&T/GTE agreement, dismissed GTE's separate case against Sprint, and Sprint intervention in the AT&T/GTE case to defend its adopted form of the AT&T/GTE agreement. *Id.* At 8

Moreover, given GTE's actions with respect to that "binding" agreement, GTE cannot credibly, and with a straight face, make such an argument. GTE has admitted that it did not voluntarily sign the Sprint/GTE interconnection agreement. GTE has stated that it signed the Sprint/GTE agreement only upon direction of the Commission. Specifically, GTE placed a disclaimer on its signature to the agreement which stated, in effect that (1) it did not consent to the purported agreement, (2) the agreement does not comply with the federal Telecommunications Act of 1996, and (3) GTE does not authorize any of its representatives to consent to it. GTE further indicated that it only signed the agreement under duress of the Commission.

For GTE to now argue that Sprint cannot elect the AT&T/GTE agreement because it has a "binding" contract with Sprint is disingenuous. As any first year law student would recognize, GTE's written disclaimer to its signature would, under plain common law contract principles, render the agreement void or voidable. Since GTE refused to consent to the Sprint/GTE agreement, there has been no "meeting of the minds" under conventional contract principles. Therefore, for GTE to claim that the Sprint/GTE agreement is a "binding" agreement, GTE is, in effect, saying that

² See GTE Florida Incorporated's Opposition to Petition of Sprint Communications Company Limited Partnership for Approval of Section 252(i) Election of Interconnection Agreement Docket 971159-TP, filed September 23, 1997, page 5.

conventional contract law and principles governing negotiations and agreements do not apply. GTE cannot have it both ways. GTE cannot evade its obligation under Section 252(i) by arguing principles of private contract when it essentially denied, at time of signature, that the Sprint/GTE agreement was a valid agreement.

Moreover., there is ample authority for the proposition that one may not defeat a statutory duty or right by private contractual provisions. If the regulatory statute is otherwise within the powers of Congress...its application may not be defeated by private contractual provisions.⁴

Moreover, GTE further attacked this Commission's determinations approving the interconnection agreement between Sprint and GTE, by filing an action in the U.S. District Court for the Northern District of Florida, Tallahassee Division.⁵ In that case, United States District Judge Robert L. Hinkle, issued an order on November 21, 1997, staying the court action pending the Commission's determination in this proceeding. A copy of that order is attached hereto and marked as Appendix A.

Sprint invites the Commission's attention to page 4, wherein Judge Hinkle stated:

GTE asserts, however, that, because Sprint is a party to its own agreement with GTE, Sprint cannot invoke Section.252(i) and adopt the GTE-AT&T agreement. GTE thus apparently asserts, in effect, that "any other telecommunications carrier," as used in Section 252(i), means "any other telecommunications carrier that does not itself have an agreement with the local exchange carrier."

This is not, of course, what Congress said.

Judge Hinkle, (who will ultimately review any appeal by GTE on this issue) has clearly read the plain language of Section 252(i) the same way as the Federal court in Texas. Indeed, there is no contrary authority on this point.

Through its change of positions with respect to whether or not there is a valid contract with Sprint, GTE is attempting to rewrite Section 252(i) of the Act, to state that 252(i) applies only in those cases where there is no existing agreement. As Judge Hinkle

³ November 24, 1997 Hearing Transcript at 8, GTE Southwest, Inc. v. Wood, Case No. CA M-97-78 (N.D. Tex) (November 24 Tr.)

⁴ See Connolly v. Pension Benefit Guar. Corp. 475 U.S. 211, 224 (1986); Ewert v. Bluejacket 259 U.S. 129 (1922); Gully v. Southwestern Bell Tel. Co. 774 F.2d 1287 (5th cir. 1985)

⁵ Case No. 4:97cv234-RH GTE Florida Incorporated v. Julia L. Johnson, et al.

correctly noted, Congress did not include such language in the Act. GTE's position on this point is without merit and should be disregarded.

Nor can GTE credibly claim that it will face the prospect of constantly changing contract relations or that Sprint will continually be electing contracts that are more favorable, if Sprint is allowed to adopt the AT&T/GTE agreement. The administrative and business requirements of adopting and implementing different interconnection agreements will act as a practical restraint on the exercise of Section 252(i) adoption rights by Sprint or any other requesting carrier. However, most importantly, this Commission, like other state commissions, retains plenary jurisdiction under the Act to enforce or adjust the adoption procedures to address any potential abuses of Section 252(i) by Sprint or other requesting carriers. GTE would have this Commission rewrite Section 252(i) or assume some responsibility for policing future adoption requests to protect GTE from its fears of "contract shopping".

III.

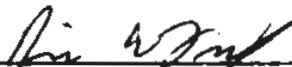
CONCLUSION

GTE has played, and is playing, a shell game with Sprint and the Commission with its position on Section 252(i) and an "on again" and "off again" validity of the Sprint/GTE interconnection agreement. It should be noted that GTE is arguing to this Commission that Sprint should not be allowed to adopt the more comprehensive AT&T/GTE agreement while, at the same time, GTE is asking the U.S. District for the Northern District of Florida to enjoin implementation of the less favorable Sprint/GTE agreement. GTE has deliberately impeded Sprint's efforts to timely resolve the 252(i) adoption issue in utter disregard of its own witness's testimony that Sprint could adopt another contract. GTE's conduct in this proceeding is an obvious and improper attempt to delay local exchange competition in Florida. Through its actions GTE has demonstrated that it does not want Sprint to enter into competition with GTE, in Florida, under any terms.

WHEREFORE, for reasons stated herein, Sprint respectfully requests that the Commission approve its Petition to elect the AT&T/GTE interconnection and resale agreement.

Respectfully submitted,

**Sprint Communications Company
Limited Partnership**



**Benjamin W. Fincher
3100 Cumberland Circle
Atlanta, Georgia 30339
(404) 649-5145**

**C. Everett Boyd, Jr.
Ervin Law Firm
P.O. Drawer 1170
Tallahassee, Florida 32802
(850) 224-9135**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and exact copy of the within and foregoing Brief in Support of Petition of Sprint Communication Company Limited Partnership for Approval of Section 252(i) Election of Interconnection Agreement has been served upon the following, via United States Mail, first class postage prepaid.

Jim Butler
Cox Communications
4585 Village Ave.
Norfolk, VA 23502

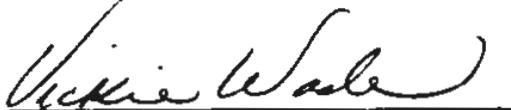
Beverly Y. Menard
GTE Florida Incorporated
% Mr. Ken N. Waters
106 East College Ave., Ste. 1440

Anthony P. Gillman
GTE Florida Incorporated
One Tampa City Center
P.O. Box 110
Tampa, FL 33601

Scheffel Wright
Lander Law Firm
P.O. Box 271
Tallahassee, FL 32302

Ruthedge Law Firm
Hoffman/Willingham
P.O. Box 551
Tallahassee, FL 32302

This 12th day of December, 1997



Vickie Wade

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GTE FLORIDA INCORPORATED,

Plaintiff,

v.

CASE NO. 4:97cv234-RH

JULIA L. JOHNSON, et al.,

Defendants.

_____ /

ORDER STAYING FURTHER PROCEEDINGS

In this action plaintiff GTE Florida Incorporated ("GTE") challenges determinations of the Florida Public Service Commission ("the Florida Commission"), under the Telecommunication Act of 1996, 47 U.S.C. § 251-252, approving an arbitrated agreement between GTE (a local exchange carrier) and Sprint Communications Company Limited Partnership ("Sprint"). Sprint has moved to stay this action. For the reasons that follow, I grant the motion.

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Detweiler, Smith,
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Blairdeau, Hart, Kennedy.

Sprint asserts it does not intend to proceed under the agreement at issue in this proceeding ("the GTE-Sprint agreement") but instead intends to proceed under the terms and conditions provided by a separate agreement between GTE and AT&T Communications of the Southern States, Inc. ("AT&T").

Sprint asserts it has a right to proceed in this manner under 47 U.S.C. § 252(i). That section requires GTE to make available to "any other telecommunications carrier" the "same terms and conditions" provided in the GTE-AT&T agreement.

Sprint has petitioned the Florida Public Service Commission for approval of its adoption of the GTE-AT&T agreement. That petition is pending and is not currently before this court. Sprint seeks to stay this lawsuit (in which the only issues relate to the validity of the GTE-Sprint agreement) pending the Commission's resolution of the petition to adopt.

If Sprint is allowed to adopt the GTE-AT&T agreement

and thus does not proceed under the GTE-Sprint agreement, this action will, in all likelihood, become moot. An agreement that will never be implemented obviously does not create the kind of real case or controversy on which this court can act.

It is true, as GTE notes, that an extant agreement is subject to adoption by another carrier under § 252(i). GTE asserts that even if Sprint does not proceed under the GTE-Sprint agreement, some other carrier may choose to do so. This speculative, hypothetical and apparently remote possibility is not the stuff of which federal jurisdiction is made. Moreover, if Sprint secures final approval to proceed under the GTE-AT&T agreement, then presumably all parties will concur in appropriate action vacating the GTE-Sprint agreement. Thus even if this action would not automatically be rendered moot by Sprint's adoption of the GTE-AT&T agreement without more, there presumably will be something more: an express termination of the GTE-Sprint agreement. At that point, if there has been no adoption of

the GTE-Sprint agreement by another carrier, this proceeding undoubtedly will be moot.

GTE asserts, however, that, because Sprint is a party to its own agreement with GTE, Sprint cannot invoke § 252(i) and adopt the GTE-AT&T agreement. GTE thus apparently asserts, in effect, that "any other telecommunications carrier," as used in § 252(i), means "any other telecommunications carrier that does not itself have an agreement with the local exchange carrier."

This is not, of course, what Congress said. Whether this is what Congress meant is not an issue now before this court. It is sufficient, for purposes of considering the motion to stay, that Sprint's attempt to adopt the GTE-AT&T agreement is not frivolous or insubstantial. There is, at the least, a very real possibility that this action will become moot. I conclude I should not reach out to resolve issues on the merits that may never have to be resolved by any court and that I therefore should stay this action until the Commission acts on Sprint's petition to adopt.

To be sure, federal courts have a "virtually unflagging obligation" to exercise the jurisdiction Congress has provided, just as GTE has noted. Federal courts also have an actual - not just virtual - unflagging obligation to decide only real cases and controversies. GTE cites cases addressing the appropriateness of staying one proceeding in deference to another; in general, those cases deal with real cases and controversies that will require resolution in one forum or another, and the only question is when and where the controversy will be decided. The issues raised by GTE's complaint in the case at bar, in contrast, may never have to be resolved anywhere. Under these circumstances, a stay is appropriate.


Accordingly,

IT IS ORDERED:

The motion to stay (document 15) is GRANTED. All further proceedings in this action are stayed pending a determination by the Florida Public Service Commission of Sprint's petition to adopt the separate interconnection

agreement between GTE and AT&T. Within 21 days after the Commission renders its ruling on the petition to adopt, the attorneys for the parties shall confer, and, within 14 days thereafter, the parties shall file a joint scheduling report setting forth a brief summary of their respective positions regarding the effect of the Commission's determination and their recommended schedule for further proceedings in this action.

SO ORDERED this 21st day of November, 1997.



Robert L. Hinkle
United States District Judge