FLORIDA PUBLIC SERVICE COMMISSION
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# MEMORANDUM

JANUARY 23, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, BROWN) AK MCB
DIVISION OF COMMUNICATIONS (STAVANJA, GREER) BS RAT

RE: DOCKET NO. 971159-TP - PETITION FOR APPROVAL OF ELECTION OF INTERCONNECTION AGREEMENT WITH GTE FLORIDA INCORPORATED PURSUANT TO SECTION 252(I) OF THE TELECOMMUNICATIONS ACT OF 1996, BY SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP D/B/A SPRINT

AGENDA: 02/03/98 - REGULAR AGENDA - SECTION 120.57(2), F.S., DECISION ON BRIEFS - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\971159.RCM

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## CASE BACKGROUND

In Docket No. 961173-TP, the Commission conducted an arbitration proceeding between Sprint Communications Comp ny Limited Partnership d/b/a Sprint (Sprint) and GTE Florida Incorporated (GTEFL) regarding rates, terms, and conditions of interconnection in accordance with the Telecommunications Act of 1996 (Act). By Order No. PSC-97-0641-FOF-TP, issued June 4, 1997, the Commission approved the final arbitrated agreement between Sprint and GTEFL. On September 3, 1997, Sprint filed a Petition for Approval of Section 252(i) Election of Interconnection Agreement. By its petition, Sprint seeks to elect the interconnection agreement between AT&T Communications of the Southern States (AT&T) and GTEFL. On September 23, 1997, GTEFL filed its Opposition to Sprint's Petition for Election. On November 20, 1997, Sprint filed a Legal Memorandum in Support of its Petition (Me...orandum).

On December 21, 1997, GTEFL and Sprint filed a Stipulation setting forth a list of Stipulated Facts and a stipulated issue. See Attachment A. The parties agreed that the Stipulated Facts are the material facts involved in consideration of Sprint's Petition. Having reached a stipulation of the facts, the parties requested that the stipulated facts be accepted and that the Commission conduct an informal proceeding on the issue identified in accordance with Section 120.57(2), Florida Statutes. By Order No. PSC-97-1585-PCO-TP, issued December 19, 1997, the Prehearing Officer approved the stipulated issue and facts. The matter was set for an informal proceeding pursuant to Section 120.57(2), Florida Statutes, with the decision to be based on the written submittals. Therefore, the prehearing officer directed the parties to file briefs of no more than 60 pages on the following stipulated issue:

> Should the Commission approve Sprint's petition to elect the AT&T-GTE interconnection and resale agreement?

The facts that the parties have stipulated as the material facts of this case are as follows:

1. At Sprint's request pursuant to the Telecommunications Act (Act) of 1996, the Commission conducted an arbitration between GTEFL and Sprint to resolve certain designated issues relative to interconnection and resale. The Commission conducted a full evidentiary hearing on Sprint's Petition for Arbitration and, on February 26, 1997, issued Order number PSC-97-0230-FOF-TP resolving those issues. That Order directed the parties to file an agreement implementing the rulings in the Order.

2. Instead of an agreement implementing the terms of the February 26 Order, Sprint submitted for approval a proposed interconnection and resale agreement between GTEFL and AT&T. (Sprint's Motion for Approval of Agreement and Order Directing Execution of Agreement, Mar. 28, 1997) Shortly thereafter, Sprint asked the Commission to stay the

post-arbitration proceedings to accommodate its election of the GTEFL-AT&T agreement. (Sprint's Amendment to Motion for Approval of Agreement and Order Directing Execution of Agreement of Sprint Communications Company Limited Partnership, Apr. 9, 1997.)

3. The Commission denied Sprint's request for stay and rejected its submission of the proposed GTEFL-AT&T contract. (Order No. PSC-97-0550-FOF-TP, May 13, 1997.) It ordered GTEFL and Sprint to execute an interconnection and resale agreement memorializing the Commission's rulings in the February 26 Order. (Id.)

4. On May 27, 1997, GTEFL and Sprint executed a contract in accordance with the Commission's February 26 and May 13 Orders. The Commission approved that contract on June 4, 1997, by Order number PSC-97-0641-FOF-TP.

5. On July 18, 1997, by Order number PSC-97-0864-FOF-TP, the Commission approved an interconnection contract between AT&T and GTEFL that implemented the rulings made in the GTEFL/AT&T arbitration (Docket number 960847-TP).

6. On September 3, 1997, Sprint filed a Petition for Approval of Section 252(i) Election of Interconnection Agreement. That petition asked the Commission to approve Sprint's election of the interconnection contract between GTEFL and AT&T.

7. On September 23, 1997, GTEFL filed its Opposition to Sprint's Petition for Election.

8. On November 20, 1997, Sprint filed a Legal Memorandum in Support of its Petition for Approval of Section 252(i) Election of Interconnection Agreement.

On December 15, 1997, Sprint filed its brief in accordance with the approved stipulation. GTEFL timely filed its Response to Sprint's Brief and Legal Memorandum on December 24, 1997.

DOCKET NO. 971159-TP
DATE: JANUARY 23, 1998

This is staff's recommendation on the issue presented in this docket. Staff believes that this is a close issue with persuasive arguments presented by both parties. Staff, therefore, offers a primary and an alternative recommendation.

## DISCUSSION OF ISSUES

**ISSUE 1**: Should the Commission approve Sprint's petition to elect the GTEFL/AT&T interconnection and resale agreement?

**PRIMARY STAFF RECOMMENDATION**: No. Sprint should not be allowed to elect the GTEFL/AT&T agreement. By Order No. PSC-97-0641-FOF-TP and in accordance with Section 252(e) of the Act, this Commission approved an arbitrated agreement between Sprint and GTEFL. That approved agreement is binding on both parties for the full term of the agreement, subject to any modifications that may be made to the agreement by the U.S. District Court on appeal. (BROWN, GREER)

**ALTERNATIVE STAFF RECOMMENDATION**: Yes. Sprint should be allowed to elect the GTEFL/AT&T agreement in accordance with Section 252(i) of the Act and subject to any modifications that may be made to the GTEFL/AT&T agreement by the U.S. District Court on appeal. (KEATING, STAVANJA)

**POSITIONS OF PARTIES**[1]:

Sprint

Sprint seeks approval of its Petition to elect the GTEFL/AT&T agreement in accordance with Section 252(i) of the Telecommunications Act of 1996. The duty imposed on GTEFL by Section 252(i) to make the GTEFL/AT&T agreement is not qualified. Thus, the existing Sprint/GTEFL agreement does not preclude Sprint from seeking election of the GTEFL/AT&T agreement in accordance with that Section. Sprint, therefore, asks that the Commission approve its Petition.

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[1] The parties did not submit summaries of their positions on the issue. The positions of the parties set forth here are, therefore, staff's summarization of the arguments presented in the briefs.

GTEFL

GTEFL opposes Sprint's Petition to elect the GTEFL/AT&T agreement. Sprint has already entered into a binding arbitrated agreement with GTEFL. Furthermore, Sprint's request contradicts the Commission's prior orders rejecting Sprint's requests in Docket No. 961173-TP to approve Sprint's election of the GTEFL/AT&T agreement. GTEFL, therefore, asks that the Commission deny Sprint's Petition.

**ARGUMENTS PRESENTED:**

Sprint

In its Petition, Sprint states that it seeks approval of its election of the GTEFL/AT&T agreement in its entirety. Sprint argues that its election of the GTEFL/AT&T agreement should be approved because Section 252(i) imposes a duty on GTEFL to make the agreement available to Sprint, the duty imposed by Section 252(i) is unqualified, the existing Sprint/GTEFL agreement does not preclude Sprint's election of the GTEFL/AT&T agreement, and other state commissions have interpreted Section 252(i) to permit Sprint to adopt other GTE/AT&T agreements. (Memorandum at pp. 2-4, and Sprint Brief at p. 2).

Specifically, Sprint asserts that it is entitled to take the agreement pursuant to Section 252(i) of the Act, which provides that:

> 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.

(Sprint Petition at 3). Sprint further asserts that throughout its arbitration with GTEFL it sought to establish terms and conditions that would place Sprint at parity with AT&T. Sprint states that using the GTEFL/AT&T agreement as the basis for its own agreement

with GTEFL has been an ongoing issue between the parties throughout the negotiations. (Sprint Petition at 3).

In its November 20, 1997, Memorandum, Sprint asserts that Section 252(i) clearly requires GTEFL to offer the terms of the GTEFL/AT&T agreement to Sprint or any other requesting telecommunications carrier. Sprint argues that the purpose of Section 252(i) is to prevent discrimination among carriers and to promote a level playing field. (Memorandum at p. 2). Sprint adds that the negotiation and arbitration processes may not always ensure non-discriminatory access. Sprint states that Section 252(i) is, therefore, an option by which carriers may choose another, previously approved agreement.

Sprint also argues that the Section 252(i) duty to provide the GTEFL/AT&T agreement is not qualified in any way. Sprint states that Section 252(i) requires that interconnection agreements be made available to "any other telecommunications carrier." (Memorandum at p. 4). Sprint argues that Section 252(i) does not include any exceptions. Sprint asserts that it has not waived any right to take another agreement under Section 252(i) simply because it arbitrated and signed its own interconnection agreement with GTEFL.

Sprint further asserts that the statutory language clearly expresses Congress's intent and states that if Congress intended the provisions of Section 252(i) to be limited to those carriers that had not already negotiated an agreement with the ILEC, then Congress would have included such a qualification within this section. Sprint also argues that Congress did not intend to punish new entrants into the local telecommunications market by precluding them from taking a better agreement under Section 252(i) if the carrier had already sought early entry into the market through negotiation, arbitration, and execution of an interconnection agreement with the ILEC. (Memorandum at p. 4).

Sprint also argues that its existing agreement with GTEFL does not prevent it from electing the GTEFL/AT&T agreement under Section 252(i). Sprint states that GTEFL's own witness in the arbitration proceedings admitted that Sprint could accept the whole contract executed with another carrier. Sprint states that GTEFL now argues that Sprint is precluded from electing another agreement because it already has a binding agreement. Sprint, however, argues that a recent federal court decision in Texas rejected GTEFL's argument on

this point. Sprint states that the court held that Section 252(i) allows a company to terminate an agreement and pick another one to replace it. Sprint states that in that case, the federal court granted summary judgment in Sprint's favor on Sprint's claim that it should be allowed to adopt the GTE/AT&T agreement. (Sprint Brief at p. 3).

Sprint further asserts that GTEFL's actions with regard to its current interconnection agreement with Sprint are at odds with GTEFL's own argument that the current agreement is binding. Sprint states that GTEFL has admitted that it did not sign the agreement voluntarily and has included a disclaimer to that effect in its signature to the agreement. As such, Sprint argues that there was no true agreement under contract principles; thus, a binding contract does not exist. (Sprint Brief at pgs. 3-4).

Furthermore, Sprint argues that even if there were a valid contract between Sprint and GTEFL, there is case law supporting the proposition that a statutory duty cannot be abrogated by private contractual provisions.[2] (Sprint Brief at p. 4). Sprint adds that GTEFL has appealed the Commission's decision approving the arbitrated interconnection agreement between GTEFL and Sprint to the U.S. District Court for the Northern District of Florida. Sprint states that the federal court stayed the pending action in that case pending the outcome of Sprint's Petition in this Docket. Sprint states that in staying the federal action, Judge Hinkle noted that Section 252(i) does not include language indicating that carriers which already have an interconnection agreement with the ILEC are precluded from electing another agreement in accordance with Section 252(i).

Sprint also states that the various requirements associated with adopting an interconnection agreement will act as a restraint preventing companies from constantly changing contracts as suggested by GTEFL. Sprint adds that the Commission retains jurisdiction to address any abuses of the process that are perceived. (Sprint Brief at p. 5).

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[2]In Footnote 4, at page 4 of Sprint's Brief, Sprint cites Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986); Ewert v. Bluejacket, 259 U.S. 129 (1922); and Gully v. Southwestern Bell Tel. Co., 774 F.2d 1287 (5th Cir. 1985).

Finally, in support of its arguments, Sprint asserts that other state commissions have interpreted Section 252(i) to allow Sprint to adopt other GTE/AT&T agreements. Sprint asserts that other state commissions have been faced with this very question and have granted Sprint's requests to adopt the GTEFL/AT&T agreements. Sprint further asserts that, to date, no state commission has denied a Sprint request to adopt an approved GTE/AT&T agreement.[3] (Memorandum at p. 3). Sprint asserts that the Washington and Minnesota Commissions recognized that there is no language in Section 252(i) that indicates that Congress intended to allow telecommunications carriers to adopt agreements under Section 252(i) only if they did not already have a prior agreement with the ILEC. (Memorandum at p. 4; Attachment A to Memorandum). Sprint further states that the Minnesota Commission found that Sprint's actions in pursuing an arbitrated agreement then seeking to adopt another agreement under 252(i) were appropriate and stated:

> While the Commission agrees that significant resources have been expended in the arbitration proceeding, it is difficult to see how Sprint could have acted differently. In light of the swiftly opening competitive market, Sprint reasonably chose not to wait to see how other entrants' contracts developed before entering into interconnection negotiations with GTE. Once Sprint had started the negotiation process, federal deadlines dictated the timetable for progressing through arbitration and the final contract process. Sprint's actions were consistent with the policies and procedures of the Federal Act; they do not justify an abridgment of [Sprint's] right to adopt existing contracts under Section 252(i).

(Memorandum at p. 5).

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[3]In Footnote 3, of page 3 of Sprint's November 20,1997, Memorandum, Sprint cites Dockets before the California Public Utility Commission, the Public Utility Commission of Hawaii, the Indiana Utility Regulatory Commission, the Minnesota Public Utility Commission, the Public Utility Commission of Ohio, and the Pennsylvania Public Utility Commission.

GTEFL

GTEFL opposes Sprint's request to elect the GTEFL/AT&T agreement. GTEFL states that Sprint's request contradicts the Commission's prior orders rejecting Sprint's requests in Docket No. 961173-TP to approve Sprint's election of the GTEFL/AT&T agreement.

In its September 23, 1997, Opposition to Sprint's Petition, GTEFL argues that the Commission has already disapproved Sprint's post-arbitration, post-decision efforts to obtain the GTEFL/AT&T agreement. (GTEFL Opposition p. 1). GTEFL notes that the Commission directed Sprint and GTEFL to submit an agreement implementing the Commission's arbitration decision. GTEFL states, however, that Sprint instead submitted a version of the GTEFL/AT&T agreement. GTEFL states that Sprint then requested that the Commission stay the post-arbitration proceedings in order to allow Sprint to elect the GTEFL/AT&T agreement. (GTEFL Opposition p. 2). GTEFL notes that by Order No. PSC-97-0550-FOF-TP, issued May 13, 1997, the Commission rejected Sprint's request. GTEFL further notes that in that Order the Commission stated:

> Sprint, therefore, had ample opportunity prior to the Commission's final decision in this docket to withdraw its Petition for Arbitration and request the AT&T/GTEFL agreement. It chose not to do so. Rather, the arbitration continued. The issues were framed, litigation ensued and we made our determination on the evidence in the record. This, we believe, is the procedure contemplated by the Act. We do not believe Congress intended to permit parties to make parallel tracks in arbitration proceedings: one track to pursue the best deal possible in an arbitration, and the other track to keep all options open so that either party can abandon an arbitration order simply because it does not like what it gets.

(GTEFL Opposition at p. 3, citing Order No. PSC-97-0550-FOF-TP at 9).

GTEFL states that the same logic should apply in this attempt by Sprint to obtain the GTEFL/AT&T agreement. GTEFL argues that if

Sprint is allowed to elect another agreement now, Sprint will never be bound by an agreement, and all of the Commission's previous efforts to ensure that the parties enter a binding agreement will have been for nothing. If Sprint is not bound by the current arbitrated agreement, GTEFL argues that the contract, as well as any other entered into under that Act, will be illusory. (GTEFL December 24, 1997, Response at p. 4).

GTEFL also asserts that parties must be bound by agreements under the Act, as made clear by the Eighth Circuit Court. GTEFL states that the Court struck down the FCC's "pick and choose" provisions, which would have allowed parties to unilaterally select portions of other agreements and incorporate them in their own agreement with the LEC. GTEFL states that the Court indicated that the "pick and choose" provisions conflicted with the Act's requirement that Agreements be binding. (GTEFL Opposition at p. 4, citing Iowa Util. Board v. Bell Atlantic Corp., Nos. 96-3321, etc., 1997-2 Trade Case (CCH)P71, 876, 1997 U.S. App. Lexis 18183 at 38 (8th Cir. July 18, 1997)). GTEFL also notes that the Court stated that LECs would have as much incentive as other carriers to avoid costs of prolonged negotiations or arbitrations by negotiating initial agreements that would satisfy a variety of future requesting carriers. Id. at 6. GTEFL asserts that Sprint's attempts to gain the GTEFL/AT&T agreement in place of its own valid agree ent with GTEFL is clearly in conflict with the Court's enunciation of the Act's requirement.

In addition, GTEFL argues that Sprint already has a binding agreement with GTEFL. While GTEFL states that it agrees that a carrier can obtain an interconnection agreement by electing another agreement under Section 252(i), GTEFL asserts that the ability to elect an agreement is not "unqualified," as Sprint asserts. (GTEFL Opposition at p. 5). GTEFL states that the right to elect an agreement under 252(i) is only an alternative to arbitration, not a simultaneous process. GTEFL states that Sprint should have elected the GTEFL/AT&T agreement before going through the arbitration process with GTEFL. GTEFL asserts that Sprint did not, and that it now has a valid arbitrated agreement with GTEFL. GTEFL argues, therefore, that Sprint should remain bound by its arbitrated agreement with GTEFL.

GTEFL further asserts that Sprint's argument regarding the District Court's stay of the current appeal of the Sprint/GTEFL arbitration is misleading. Also, responding to Sprint's statement

that GTEFL does not want Sprint to compete with GTEFL, in Florida, under any circumstances, GTEFL argues that it has not asked the court for an injunction of the existing contract between GTEFL and Sprint. (GTEFL Response at p. 5, citing Sprint Brief at p. 5). GTEFL asserts that it stands ready to honor the contract during the pendency of the appeal. However, GTEFL argues that when the Court does find the contract unlawful, then it will be necessary to enter a new contract with Sprint. But, until the Court finds the current contract between Sprint and GTEFL unlawful, GTEFL states that it will perform under the terms of that contract; thus, it is not trying to prevent Sprint from competing in Florida. (GTEFL Response at p. 5).

GTEFL adds that the stay implemented by the District Court is not authority or guidance for the Commission in this decision. GTEFL argues that Sprint, in quoting the Court's discussion of the parties' interpretations of Section 252(i), failed to include the Court's full statement, which reads:

> 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. Whether this is what Congress meant is not an issue now before this court.

GTEFL asserts that the Court clearly intends this issue to be a matter to be decided by the Commission, and that the above dicta is not intended to provide any guidance. (GTEFL Response at p. 9).

Finally, GTEFL argues that the Commission should reject Sprint's "opportunistic" arguments. Specifically, GTEFL asserts that contrary to Sprint's assertions, Sprint is not just seeking parity with AT&T. GTEFL argues that if that were all that Sprint truly wanted to do, it would have exercised its option to obtain the GTEFL/AT&T agreement earlier and avoided going through the rest of the arbitration process. GTEFL notes that the Commission recognized that Sprint knew what the terms of the GTEFL/AT&T agreement were before Sprint's arbitration hearing began, but it

went through the arbitration in the hope of obtaining even better terms. GTEFL further states that the Commission acknowledged that it is

> . . . unfair for a party to impose on another party the time, effort, and expense of an arbitration proceeding, only to back out in the end because it did not get what it wanted from the proceeding.

(GTEFL Opposition at p. 7, citing Order No. PSC-97-0550-FOF-TP at 11). Thus, GTEFL asks that the Commission reject Sprint's request to allow it to elect the GTEFL/AT&T agreement now.

**PRIMARY STAFF ANALYSIS:**

After considering the information and the arguments in the briefs and the stipulations, staff recommends that Sprint should not be allowed to elect the GTEFL/AT&T agreement. Staff does not believe that election of an agreement under Section 252(i) is an option for carriers that already have a Commission-approved agreement with the LEC, unless the approved agreement provides for such action. Staff believes that the intent of the Act is that carriers should seek an agreement with the ILEC by negotiation. If negotiation is not successful, carriers may pursue an agreement through arbitration or may seek to elect another carrier's agreement with the ILEC pursuant to Section 252(i). Once an agreement has been reached and approved in accordance with Section 252(e), staff believes that the agreement is then binding for the full term of the agreement upon the parties. Staff does not believe that Section 252(i) provides a means for carriers to "escape" from an agreement which, upon reflection, they deem unsatisfactory. Staff recommends that Section 252(i) should be read only within the full context of the Act.

Specifically, the Act itself clearly indicates that agreements should be binding upon the parties. Section 252(a)(1) states:

> VOLUNTARY NEGOTIATIONS.-Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunication carrier or carriers. . . .

(Emphasis added.)

As indicated by GTEFL, this point was further clarified by the Eighth Circuit. In its Order, the Court discussed the FCC's "pick and choose" rules implementing Section 252(i) extensively. See Iowa Util. Board v. Bell Atlantic Corp., 1997 U.S. A.P.. Lexis 18183 at 38-39. Therein, the Court stated that

> [w]e think that the language of subsection 252(i) in isolation does not clearly reveal Congress's intent on this issue. Consequently, we "must look to the structure and language of the statute as a whole" to determine if the FCC's interpretation . . . is a reasonable one.

Id., citing National R.R. Passenger Corp. V. Boston & Maine Corp., 503 U.S. 407, 417 (1992). Upon review, the Court determined that "[o]ur analysis leads us to conclude that the FCC's rule conflicts with the Act's design to promote negotiated binding agreements." The Court further stated that the "pick and choose" provisions "would discourage the give-and-take process that is essential to successful negotiations" because carriers would be able to select more advantageous provisions in agreements reached by other carriers. Thus, the Court stated that negotiated agreements would not really be binding. The Court then reiterated its finding on the matter by stating that "[t]his result conflicts with the Act's requirement that agreements be 'binding,' and is an additional impediment to subsequent negotiations. . . ." Id.

Staff notes that in striking down the FCC's "pick and choose" rules, the Court also discussed what it determined to be the more appropriate interpretation of Section 252(i). The Court indicated that entrants should be required "to accept the terms and conditions of prior agreements in their entirety." Id. (Emphasis added.) The Court stated that it did not agree with the FCC's assertion that this interpretation of Section 252(i) would encourage ILECs to include terms in their agreements that would "discourage subsequent entrants from adopting those agreements." Id. (Emphasis added.) To the contrary, the Court stated that it believed this interpretation would encourage ILECs to establish terms and conditions that would be satisfactory to a variety of "later requesting carriers." Id. (Emphasis added.) Staff believes that the language chosen by the Court clearly indicates that Section 252(i) is only available to new entrants that have not already established an approved agreement with the ILEC.

Furthermore, staff agrees with GTEFL that this Commission has already determined that it is inappropriate for a party to try to pursue "parallel tracks" in arbitration proceedings. As stated in Order No. PSC-97-0550-FOF-TP, Sprint had an opportunity to elect the GTEFL/AT&T agreement prior to the start of the Sprint/GTEFL arbitration. Sprint, instead, chose to pursue arbitration in the apparent hope of obtaining a more advantageous agreement. Sprint decided that electing the GTEFL/AT&T agreement was the better option only after significant time and expense had already been expended on the arbitration process. Now that a final arbitrated agreement between GTEFL and Sprint has been approved by the Commission, staff believes that allowing Sprint to elect the GTEFL/AT&T agreement would not only invalidate the approved arbitrated agreement, but also the entire arbitration process.

Staff notes that this view of the arbitration process is similar to the FCC's view of its own role in an arbitration conducted by the FCC in accordance with Section 252(e)(5) of the Act. Pursuant to Section 252(e)(5), the FCC will conduct an arbitration if the state commission refuses to act on a petition in accordance with the Act. As set forth in the FCC's First Report and Order at paragraph 1433, the FCC will use a "final offer" arbitration method in such circumstances. Paragraphs 1435 and 1436 of that Order clearly state that the final decision of the arbitrator in such proceedings will be binding upon the parties. That determination is further emphasized in FCC Rule 51.807(h) which states

> Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

Staff believes that this Commission's arbitration decisions should be viewed in a similar light.

Finally, regarding the numerous decisions of other state commissions that Sprint has offered in support of its position, review of those decisions indicates that none of those state commissions had actually approved a final arbitration agreement between the parties in question. The state commissions identified each viewed the Act's requirements for the arbitration and agreement approval process somewhat differently than does this Commission. See Order No. PSC-97-0550-FOF-TP, pages 5-8. In each

case, the commissions allowed Sprint to elect another agreement prior to approving a final arbitration agreement. Staff does not, therefore, believe that these determinations are persuasive. As such, staff believes that Sprint's petition should be denied.

**ALTERNATIVE STAFF ANALYSIS:**

After analyzing the arguments, the Act, and the pertinent case law, staff recommends that Sprint should be allowed to elect the GTEFL/AT&T agreement because 1) the right to elect an agreement under Section 252(i) is not qualified in any way, 2) election under Section 252(i) promotes the Act's goal of a level playing field between all carriers, and 3) Sprint's latest request to elect the GTEFL/AT&T agreement does not "parallel" any ongoing arbitration process between the two parties.

Specifically, staff believes that Sprint should be allowed to elect the GTEFL/AT&T agreement because Section 252(i) plainly 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). Staff's review of the Act has not revealed any provision that would indicate that Congress intended this provision to be limited to only those carriers that do not already have an approved agreement with the LEC.

While staff agrees with GTEFL's assertions that the Act requires that agreements be binding, staff does not believe that the ability to elect an agreement under Section 252(i) conflicts with that requirement. To the extent that parties ultimately achieve an agreement that is acceptable to both parties, be that by negotiation, arbitration, or election under Section 252(i), the parties are then bound by the terms of that agreement for as long as they operate under that agreement. Merely because a carrier

seeks to elect another agreement under Section 252(i) does not mean that whatever prior agreement the carrier had with the LEC was not binding; it simply means that the carrier seeks to be bound by different terms which it now deems more acceptable, and terms which the LEC has already deemed acceptable by entering into with another carrier.

Also, regarding GTEFL's assertion that the Eighth Circuit has already stated that the Act intends agreements to be binding, staff notes that the statements to which GTEFL refers were made within the context of a discussion regarding the FCC's "pick and choose" provisions. In that discussion, the Eighth Circuit focuses on the Act's apparent intent to encourage negotiation as the primary means for reaching agreements. The Eighth Circuit determined that the FCC's "pick and choose" provisions undermined negotiation as an option. Staff does not believe that the statements by the Eighth Circuit within this context were intended to define the extent to which an agreement is actually "binding" under the Act. Furthermore, staff agrees with Sprint's assessment that the various requirements associated with entering an agreement with the LEC will prevent carriers from frivolously seeking to change agreements.

Staff also does not believe that the act of entering into an early agreement with a LEC through negotiation or arbitration, should preclude a carrier from taking advantage of another carrier's ability to negotiate more competitive terms with the LEC. Staff believes that to preclude a carrier from electing agreements could lead to imbalance among the new entrants based solely upon one carrier's ability to negotiate with the LEC better than another carrier. As indicated by Sprint's arguments, the new entrants seek parity not only with the LECs, but also with the other new entrants in the market. Staff believes that the Act's intent is that the success of <u>all</u> carriers in this new environment be marked by their ability to compete in the provision of telecommunications services based upon a level initial playing field, not upon their ability to negotiate an agreement with the LEC that is more advantageous than any other carrier is able to negotiate. Thus, staff believes that Section 252(i) ensures that all carriers have the opportunity to enter the market at parity with other carriers and not be constrained by their ability, or inability, to negotiate advantageous terms. Furthermore, staff believes that if election under 252(i) is viewed only as an alternative to pursuing an agreement through negotiation or arbitration, carriers that

actively seek entry into the competitive market would be penalized while carriers that take a "wait and see" approach by deferring entry into the market until some other carrier is able to establish appealing terms with the LEC would be rewarded. Staff believes that view does not encourage timely entry into the new competitive market by as many viable carriers as possible.

Finally, staff does not agree with GTEFL that a Commission decision allowing Sprint to elect the GTEFL/AT&T agreement now would conflict with the Commission's prior decisions not allowing Sprint to do so. In the Commission's order approving the language to be included in the final arbitration agreement between Sprint and GTEFL, Order No. PSC-97-0550-FOF-TL, the Commission denied Sprint's request for stay of the post-arbitration proceedings in Docket No. 961173-TP by stating that the Act does not intend for parties to take "parallel tracks" in arbitration proceedings. The Commission further indicated that parties should not enter arbitration proceedings while keeping all other options open to pursue another course should the arbitration not produce the desired results. Order No. PSC-97-0550-FOF-TL at 8. The Commission added, however, that

> It is unclear whether, after we approve an agreement, Sprint is foreclosed from obtaining relief under Section 252(i). Regardless, we do not believe that question is ripe for decision in this proceeding.

Staff believes that, in the context of that Order, the primary purpose of the Commission's statement regarding a party's inability to take "parallel tracks" was to discourage any party from embarking upon the expensive and time-consuming arbitration process in circumstances where a party had a reasonable indication that another course would ultimately provide results that were preferable for that party. Once the arbitration proceedings have begun, a party should not be permitted to "waffle" regarding its intent to follow through with the process; it should also not be permitted to prolong the process with procedural attempts to alter its chosen course mid-stream. Once the arbitration proceedings have been concluded, however, and no further action remains to be undertaken within the context of the arbitration, staff believes that a carrier should be allowed to pursue a new "track" in its pursuit of parity, including election of another agreement under Section 252(i).

While the agreement produced in Docket No. 961173-TP is currently the subject of an appeal, there are no further determinations to be made in that docket by the Commission. Staff, therefore, recommends that Sprint should now be allowed to pursue the new "track" that it has chosen, which is the election of the GTEFL/AT&T agreement. As succinctly stated by the Minnesota Commission in its assessment of a similar situation:

> Sprint's actions were consistent with the policies and procedures of the Federal Act; they do not justify an abridgment of the CLEC's right to adopt existing contracts under Section 252(i).

Staff further notes that Sprint's election of the GTEFL/AT&T should not be affected by GTEFL's appeal of that agreement to the Federal District Court. Sprint has indicated that it only wants the same terms and conditions as those that AT&T obtains. Therefore, to the extent that the Court alters any of those terms and conditions, Sprint should be allowed to take the GTEFL/AT&T agreement subject to those modifications.

**ISSUE 2**: Should this docket be closed?

**STAFF RECOMMENDATION**: Ye . If the Commission approves staff's primary recommendation in Issue 1, no further matters will remain for the Commission to address. If the Commission approves staff's alternative recommendation in Issue 1, the parties should be required to submit the signed agreement within 2 weeks of the Commission's Order from this recommendation. Upon filing of the signed agreement, the agreement should be deemed effective upon the parties. Upon filing of the agreement, no other issues will remain for the Commission to determine. This docket may, therefore, be closed. (KEATING)

**STAFF ANALYSIS**: If the Commission approves staff's primary recommendation in Issue 1, no further matters will remain for the Commission to address. If the Commission approves staff's alternative recommendation in Issue 1, the parties should be required to submit the signed agreement within 2 weeks of the Commission's Order from this recommendation. Upon filing of the signed agreement, the agreement should be deemed effective upon the parties. Upon filing of the agreement, no other issues will remain for the Commission to determine. This docket may, therefore, be closed.