

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-08-0817-FOF-TP
ISSUED: December 18, 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 DENYING MOTION FOR RECONSIDERATION

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")¹, pursuant to AT&T/BellSouth Merger Commitments and Section 252(i) of the Federal Telecommunications Act of 1996 (Act).

¹ "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.

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FPSC-COMMISSION CLERK

We approved Nextel's adoption of the Sprint ICA² on September 4, 2008. This Commission's vote was finalized by Order No. PSC-08-0584-FOF-TP, issued September 10, 2008. On September 11, 2008, AT&T filed the Notice of Adoption by Nextel of the Sprint ICA on September 11, 2008. On September 17, 2008, AT&T filed a Motion for Reconsideration of a portion of Order No. PSC-08-0584-FOF-TP.

Nextel filed a Motion for Extension of Time to Respond to AT&T Florida's Motion for Reconsideration on September 17, 2008. On September 22, 2008, AT&T filed its Response to Nextel's Motion for Extension of Time. The Prehearing Officer issued Order PSC-08-0627-PCO-TP on September 24, 2008, granting Nextel's motion for extension of time. On September 30, 2008, Nextel filed a Response in Opposition to AT&T's Motion for Reconsideration.

On October 10, 2008, Nextel filed a letter with this Commission regarding the adoption of the Sprint ICA, stating that the pro forma language currently in the signed Adoption of the Sprint ICA did not include the Extension Amendment granted in Docket No. 070249-TP (Order No. PSC-08-0066-FOF-TP). Nextel requests that this Commission require the parties to execute and file revised adoption documents. Nextel also states that Nextel raised the language inconsistency to AT&T and was advised that AT&T will wait for resolution of the Motion for Reconsideration. AT&T filed a response on October 13, 2008, arguing that Nextel requested to adopt only the Sprint ICA and all amendments thereto that were filed and approved by this Commission as of Nextel's original filing of June 8, 2007. AT&T further argues that we should deny Nextel the relief sought in Nextel's October 10, 2008, letter.

II. Analysis

A. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

B. AT&T's Motion for Reconsideration

AT&T seeks reconsideration of the portion of our decision allowing Nextel to adopt the Sprint ICA with an effective date of June 8, 2007. AT&T asserts that the effective date should properly be no earlier than the date upon which this Commission approved the adoption. In support of its Motion, AT&T argues that we overlooked or failed to consider several points of

² By Order No. PSC-08-0066-FOF-TP, issued on January 29, 2008, we approved the amendment of the Sprint ICA, effective March 29, 2007, per the express terms of the amendment.

fact or law in reaching our decision. Particularly, AT&T contends that we failed to consider Section 364.162(1) of the Florida Statutes, as well as prior Commission rulings within which the Commission found an adopted interconnection agreement effective only after we approve it.

With regards to Section 364.162(1), Florida Statutes (F.S.), AT&T specifically pinpoints the portion which states explicitly that “whether set by negotiation or by the commission, *interconnection and resale prices, terms and conditions shall be filed with the commission before their effective date.*” AT&T contends that this requires that interconnection rates, terms and conditions be filed with us before they go into effect and therefore, prohibits retroactive effective dates. AT&T argues that our decision in this docket establishes a retroactive effective date for Nextel’s adoption of the Sprint ICA.

Furthermore, AT&T argues that in previous Commission rulings involving contested adoptions, this Commission established precedent which makes adopted agreements effective prospectively, and rejected arguments to adopt the terms and conditions of an interconnection agreement upon notice of adoption. AT&T refers to Order No. PSC-98-0251-FOF-TP (Sprint-GTE Order), issued February 6, 1998 in Docket No. 971159-TP and Order No. PSC-01-0824-FOF-TP (MCImetro–BellSouth Order), issued on March 30, 2001 in Docket 000649-TP, as examples of prior Commission action regarding the effective dates of adopted ICAs. Relying on what it considers “well–established procedure,” AT&T argues that the earliest date upon which the adopted agreement could have possibly been filed was September 11, 2008, when the parties filed the signed adoption papers with this Commission.

C. Nextel’s Response

In its response, Nextel asserts that reconsideration is not appropriate under these circumstances. Nextel argues that AT&T has wholly failed to identify any controlling point of fact or law that this Commission overlooked or failed to consider. Nextel contends that the issue of the proper effective date for Nextel’s adoption was raised in Nextel’s Notice of Adoption, where it was clearly asserted that it was effective immediately, and that this Commission has been well informed as to each party’s position and arguments in support thereof. Nextel further contends that AT&T’s Motion should be denied because it only seeks a second hearing on the same contentions, and that errors alleged by AT&T were major issues which have already been fully argued before this Commission.

Nextel argues that AT&T is inappropriately attempting to reargue a position with new arguments and citing new authorities. Particularly, Nextel contends that AT&T’s argument as it pertains to Section 364.162(1), F.S., should be rejected because the statute pertains only to negotiated and arbitrated interconnection agreements. Furthermore, Nextel argues that the previous Commission rulings relied upon by AT&T do not establish a precedent for the effective date of contested adoptions.

D. Prior Commission Orders

AT&T argues that we failed to consider the following Commission Orders, the Sprint-GTE Order and the MCImetro–BellSouth Order, which discussed effective dates of interconnection agreements. AT&T argues that we established precedent in these orders. However, each Order involved a different set of facts and circumstances. The Sprint-GTE Order involved the parties entering into an arbitrated interconnection agreement and subsequently requesting to adopt a different interconnection agreement while still bound by our approved

arbitrated interconnection order. At the time of the MCImetro–BellSouth Order, CLECs were still permitted to “pick and choose” provisions from various interconnection agreements pursuant to FCC rules, which were amended later to require the “all or nothing” approach currently in place today. The petitioners had requested that we approve their new interconnection agreement created from language from other interconnection agreements, which were specifically requested by the petitioners. These Orders dealt with specific facts and actions requested by the petitioners, neither of which were an adoption of an approved interconnection agreement pursuant to 47 U.S.C. § 252(i).

E. Consideration of Section 364.162(1), F.S.

AT&T argues that we erred by failing to consider 364.162(1), F.S., when establishing an effective date for the adoption of the Sprint-AT&T Interconnection Agreement by Nextel. We find that AT&T has not demonstrated that 364.162(1), F.S., is controlling in our consideration of an effective date for an adopted interconnection agreement. Section 364.162(1), F.S., offers a timeline specifically for negotiated or arbitrated interconnection agreements, stating that:

Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

At issue here is not an approved interconnection agreement that is negotiated or arbitrated, but rather the adoption of an interconnection agreement. This statute therefore does not pertain to the effective date of an adopted agreement, which is governed by Section 252(i) of the Act, consistent with Section 120.80(13), Florida Statutes. Therefore, Section 364.162(1), F.S., is not applicable to our consideration of Nextel’s adoption of the Sprint ICA.

F. Previous Actions

Specifically, AT&T argues that a new effective date should be considered because we failed to consider previous Commission action and restates the reason AT&T believes that the effective date is incorrect. AT&T is simply rearguing the points that were already asserted by AT&T in its post-hearing brief. Both AT&T and Nextel extensively briefed the issue of the effective date, and AT&T’s arguments regarding the effective date were considered. Re-argument or reweighing of the evidence is improper in the context of a motion for reconsideration. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), Stewart Bonded Warehouse, Inc. v. Bevis, 293 So. 2d 315 (Fla. 1974).

Both AT&T and Nextel have discussed the effective date. However, we do not have to explicitly respond in our opinion to every argument and fact raised by each party. We have fully considered both parties’ arguments. The Court in State ex. Rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1959) stated:

An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.³

Rather than point to a fact or law that we failed to consider, AT&T simply reargues its position regarding the effective date and therefore fails to meet the standard for reconsideration. AT&T has not demonstrated that we failed to consider or overlook any point of fact or law. Thus, AT&T's motion is mere re-argument, which is inappropriate for a motion for reconsideration.

G. Clarification

Nextel has identified an aspect of the Order that should be clarified. As noted in the Case Background, both parties filed letters addressing whether the interconnection agreement is properly referenced in the Notice of Adoption filed by AT&T pursuant to Order No. PSC-08-0584-FOF-TP. In particular, we find it appropriate to clarify that our Order approved the adoption of the current Sprint ICA by Nextel.

The basis for this clarification is that the 3-year extension amendment of the underlying agreement, which was jointly filed by Sprint and AT&T, established an effective date of March 20, 2007 for the extension. Order No. PSC-08-0066-FOF-TP, issued January 29, 2008, approved the amendment, which includes the following language:

This Agreement is extended three years from March 20, 2007 and shall expire as of March 19, 2010. Upon mutual agreement of the Parties, the term of this agreement may be extended. If, as of the expiration of this Agreement, a Subsequent Agreement . . . has not been executed by the Parties, this Agreement shall continue on a month-to-month basis.

We established that the effective date of Nextel's adoption is June 8, 2007. Therefore, Nextel's adoption of the current Sprint ICA includes the 3-year extension amendment, which was effective on March 20, 2007. The Adoption filed on September 22, 2008, by Nextel and AT&T, states the following:

As of the Effective Date of this Agreement, Nextel Partners adopts in its entirety the 2001 AT&T Florida/Sprint Agreement and any and all amendments to said agreement executed and approved by the Florida Public Service Commission as of the Effective Date of this Agreement.

To avoid any misinterpretation of the Order, we find it appropriate to clarify that Nextel is adopting the current Sprint ICA, which includes the 3-year Extension Amendment jointly filed on December 4, 2007 by AT&T Florida and Sprint in Docket No. 070249-TP, which was

³ Id. at 819.

effective March 20, 2007. The above cited language is inconsistent with the clarification since the 3-year Extension Amendment was not approved until Order No. PSC-08-0066-FOF-TP was issued January 29, 2008. AT&T and Nextel will need to refile the adoption in both of the instant dockets with conforming language.

III. Decision

We find that AT&T fails to identify any points of fact or law that we overlooked or failed to consider in our decision; therefore, AT&T's Motion for Reconsideration shall be denied. We also find it appropriate to clarify that Nextel is adopting the current Sprint ICA as amended by the 3-year term Extension Amendment jointly filed on December 4, 2007 by AT&T Florida and Sprint in Docket No. 070249-TP, which was effective March 20, 2007.

Docket Nos. 070368-TP and 070369-TP shall be closed administratively by our staff once the parties refile the adoption in both of the instant dockets, and our staff determines that the contractual language conforms with our decisions in the these dockets.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission, that AT&T's Motion for Reconsideration be denied. It is further

ORDERED that Order No. PSC-08-0584-FOF-TP is clarified to reflect that Nextel is adopting the current Sprint ICA as amended by the 3-year term Extension Amendment jointly filed on December 4, 2007 by AT&T Florida and Sprint in Docket No. 070249-TP, which was effective March 20, 2007. It is further

ORDERED that Docket Nos. 070368-TP and 070369-TP shall be closed administratively once the parties refile the adoption in both of the instant dockets, and our staff determines that the contractual language conforms with our decisions in the these dockets.

By ORDER of the Florida Public Service Commission this 18th day of December, 2008.



ANN COLE
Commission Clerk

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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.