

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: September 13, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Bates)
Office of the General Counsel (Teitzman, McKay)

RE: Docket No. 070368-TP – 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. 070369-TP – 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.

AGENDA: 09/25/07 – Regular Agenda – Motion to Dismiss – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070368.RCM.DOC

Case Background

On June 8, 2007, NPCR, Inc. d/b/a Nextel Partners, Nextel South Corp. and Nextel West Corp. (collectively "Nextel") filed their 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., Sprint Spectrum L.P. (Notice). In its Notice, Nextel states that pursuant to Merger Commitment Nos. 1 and 2 as set forth in the Federal Communications Commission's (FCC) approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control¹ and 47 U.S.C. § 252(i), it has adopted, effective immediately, in its entirety 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 asserts that the Sprint ICA is current and effective, although Sprint and AT&T have a dispute regarding the terms of the agreement. Nextel asserts further that it has contacted AT&T regarding Nextel's adoption of the Sprint ICA, but AT&T refuses to voluntarily acknowledge and honor Nextel's rights regarding such adoption.

On June 28, AT&T filed its Motion to Dismiss Nextel's Notice (Motion). On July 9, 2007, Nextel filed its Response.² Staff's recommendation addresses AT&T's Motion.

¹ See In Re: In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, Order No. 06-189, released March 26, 2007, WC Docket No. 06-74. (Merger Order)

² Nextel's initial filing omitted seven pages of Attachment A attached to the Response. A corrected filing was made on that same day.

Discussion of Issues

Issue 1: Should the Commission grant AT&T's Motion to Dismiss?

Recommendation: No. Staff recommends that AT&T's Motion to Dismiss be denied, because Nextel's Notice of Adoption does state a cause of action upon which relief may be granted. (TEITZMAN, BATES)

Parties' Arguments

AT&T's Motion to Dismiss

In its Motion, AT&T requests the Commission dismiss Nextel's Notice based on three contentions: 1) The Commission does not have the authority to interpret and enforce the AT&T merger conditions; 2) Nextel is attempting to adopt an expired agreement and thus, the adoption request does not meet the legal timing requirement under the Telecommunications Act of 1996 (the Act); and 3) Nextel's Notice is premature because Nextel failed to abide by contractual obligations regarding dispute resolution found in its existing interconnection agreement with AT&T.

The Commission lacks authority.

AT&T contends that because Nextel relies on the merger commitments approved by the FCC in the Merger Order, Nextel is requesting the Commission to enforce federally approved merger commitments via a state proceeding. Consequently, AT&T argues that the Commission must determine whether the legislature has granted the Commission any authority to construe AT&T's federal merger commitments because the Commission's powers are only those granted by statute expressly or by necessary implication.

AT&T argues that although the Commission has authority under the Act in §252 arbitrations to interpret and resolve issues of federal law, the Act does not grant the Commission any general authority to resolve and enforce purported violations of federal law or FCC orders. In support of its contention, AT&T cites Order No. PSC-03-1392-FOF-TP, issued December 11, 2003, in Docket No. 030349-TP, (Sunrise Order) in which the Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative actions based solely on federal statutes. AT&T further asserts that the United States Supreme Court has held that the interpretation of an agency order, when issued pursuant to the agency's established regulatory authority, falls within the agency's jurisdiction. Serv. Storage & Co. v. Virginia, 359 U.S. 171, 177 (1959).

AT&T argues that the FCC explicitly reserved jurisdiction over the merger commitments contained in the Merger Order.³ Therefore, AT&T asserts that the FCC alone possesses the jurisdiction to interpret and enforce the merger commitments.

³ See Merger Order at p. 147. "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC and would apply in the

Nextel did not request adoption within a reasonable period of time.

AT&T asserts that Nextel seeks to adopt an expired agreement. AT&T argues that its obligation to provide competing carriers with any interconnection, service or network element on the same terms contained in any approved and publicly filed AT&T Florida contract is limited to a “reasonable period of time” after the original contract is approved.⁴ AT&T contends that although there is no definition of a “reasonable time period,” other state commissions have found that attempting to adopt an agreement several months before expiration of an agreement is not within “a reasonable period of time.”⁵

In the instant case, AT&T contends that Nextel seeks to adopt an agreement that has been expired for over two years. AT&T argues further that it is currently engaged in arbitrating a new interconnection agreement with Sprint. AT&T notes it would be highly inefficient and impractical to allow Nextel to adopt an antiquated expired agreement when the parties to the original agreement are themselves moving to an updated agreement.

Nextel failed to comply with the parties’ existing agreement.

AT&T contends that Nextel failed to comply with the dispute resolution provisions of the parties’ existing interconnection agreement, and therefore, its Notice is improperly before the Commission. AT&T asserts that Nextel’s right to adopt an interconnection agreement is addressed in Article XVI “Modification of Agreement” of the parties’ existing interconnection agreement. Consequently, because AT&T objects to Nextel’s adoption of the Sprint ICA, AT&T argues that the dispute resolution provisions of the parties’ existing interconnection agreement are triggered requiring negotiation for a period of thirty (30) days.

Nextel’s Response

In its Response, Nextel argues that it has exercised its adoption rights pursuant to Merger Commitments Nos. 1 and 2 to adopt, in its entirety, the Sprint ICA filed and approved in Florida. Nextel asserts further that the Sprint ICA is not expired, although Nextel acknowledges that AT&T and Sprint have a dispute regarding the remaining term of the agreement.⁶

AT&T’s Motion must be decided based on facts alleged in Nextel’s Notice.

Nextel contends that a Motion to Dismiss must, as a matter of law, address the sufficiency of the facts alleged in the Petition to state a cause of action. Nextel argues that for AT&T’s Motion to be sustained AT&T must demonstrate that, accepting all allegations in

AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter.”

⁴ See 47 C.F.R. §51.809(c).

⁵ In Re: Global NAPs South, Inc., 15 FCC R’cd 23318 (August 5, 1999). (In this case, Global NAPs sought to adopt an agreement with ten (10) months remaining.; In re: Global NAPs South, Inc., Case No. 8731 (Md. PSC July 15, 1999). (In this case, Global NAPs sought to adopt an agreement with seven (7) months remaining.)

⁶ See In re: 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, Docket No. 070249-TP. (Sprint-AT&T Arbitration)

Nextel's Notice as facially correct, the Notice fails to state a cause of action for which relief can be granted. Nextel asserts further that in determining the sufficiency of the petition, the Commission may not look beyond the four corners of the petition, may not consider any evidence likely to be produced, and may not consider any affirmative defenses raised by AT&T.

Commission's authority to acknowledge Nextel's exercise of its right to adopt the Sprint ICA.

Nextel contends that contrary to AT&T's assertion, the Commission has authority to acknowledge Nextel's exercise of its right to adopt the Sprint ICA. Nextel asserts that the Commission's Sunrise Order actually supports Nextel's position that the Commission can interpret and apply federal law in the course of exercising authority that the Commission is conferred under the Act and state law. Nextel argues that the Commission recognized in the Sunrise Order that the Act expressly provides a jurisdictional scheme of "cooperative federalism" under which Congress and the FCC have specifically designated areas in which they anticipate that state commissions do have a role. Nextel asserts that this includes matters relating to approval of interconnection agreements consistent with the Act and orders of the FCC. Nextel argues that contrary to the relief sought in the Sunrise Order case which the Commission held it had no power under the Act to grant, in the instant case Nextel seeks the exact same relief that the Commission has historically rendered to carriers that exercise their right to adopt.

Nextel argues that the fact that requesting carriers have been granted expanded adoption rights by the Merger Order does not divest the Commission of its existing authority to acknowledge a carrier adoption pursuant to §252(i) of the Act, or §364.01(4), Florida Statutes. Nextel contends that the FCC expects the states to be involved in the ongoing administration of interconnection-related merger conditions. In support of its assertion, Nextel cites Appendix F of the Merger Order which explicitly states that the FCC has no authority to alter the states' concurrent statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments.

Nextel's Notice of Adoption is timely

Nextel contends that AT&T's assertion that Nextel's Notice is untimely is erroneous because AT&T fails to recognize either: a) the express provisions of the Sprint ICA that establish it currently continues and is "deemed extended on a month-to-month basis"⁷, or b) AT&T admits without qualification that it acknowledged to Sprint that the Sprint ICA can be extended 3-years pursuant to Merger Commitment No. 4. Therefore, Nextel argues that the Sprint ICA not only continues to be effective, but there is a good faith argument that by Sprint's exercise of its right to a 3-year extension of the Sprint ICA, the Sprint ICA is not scheduled to expire until March 19, 2010.

In response to AT&T's reliance on the Global NAPs cases, Nextel cites this Commission's decision in Order No. PSC-04-1109-PCO-TP, issued November 8, 2004 in Docket No. 040343-TP. (Volo Order) In that docket Alltel cited the same Global NAPs cases in requesting the Commission dismiss Volo's Notice of Adoption of an ICA that was set to expire

⁷ Sprint ICA, Section 2.1 at page 815.

within 72 days after the adoption date, but was likely to remain in effect beyond the stated termination date. In the Volo Order, the Commission held that there is no definitive standard set forth by the FCC as to what constitutes a reasonable time, and furthermore, that Alltel's Motion to Dismiss failed because, on its face, Volo's Notice of Adoption stated a cause of action on which relief could be granted. Nextel contends that similar to the Volo Order, Nextel's Notice states a cause of action on its face, and AT&T has failed to establish as a matter of fact or law that Nextel's Notice is untimely.

Nextel was not required to invoke the parties' existing dispute resolution provisions.

Nextel argues that AT&T's assertion that Nextel was required to invoke the parties' existing dispute resolution provisions is erroneous. In support of its contention, Nextel cites Order No. PSC-05-0158-PAA-TP, issued February 9, 2005, in Docket No. 040779-TP (Z-Tel Order). Nextel asserts that in the Z-Tel Order the Commission rejected the identical argument asserted by AT&T in the instant case. In the Z-Tel Order, the Commission held that "Z-Tel's adoption [was] well within its statutory right under §252(i) to opt-in to such an agreement in its entirety." Nextel also notes that AT&T fails to cite any authority in support of its contention that Nextel must invoke the parties' dispute resolution provisions under these circumstances.

Nextel argues that there is no basis for requiring it to engage in a dispute resolution process based upon AT&T's failure to voluntarily acknowledge its obligation to make the Sprint ICA available to Nextel.

Staff Analysis:

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

Upon review of the parties' arguments and consistent with previous Commission decisions, staff recommends that AT&T's Motion to Dismiss be denied, because Nextel's Notice of Adoption states a cause of action upon which relief may be granted. However, as noted in the Volo Order, staff believes AT&T raises a valid argument as to what constitutes a reasonable period of time under 47 C.F.R. §51.809(b), which staff believes may involve legal and policy arguments that could implicate a dispute of material fact.

Although the FCC has adopted a regulation implementing §252(i) of the Act that requires an ILEC to make an interconnection agreement available for a reasonable period of time, there seems to be no definitive standard set forth by the FCC as to what constitutes a reasonable time. Whether such a limitation would apply to Nextel's adoption of the Sprint ICA may depend on the Commission's further analysis and interpretation of 47 C.F.R. §51.809(c) in this proceeding.

Similarly, staff believes that whether the Sprint ICA Nextel seeks to adopt has expired is a disputed material fact. As stated above, in resolving AT&T's Motion, the Commission must consider Nextel's allegations as facially correct. Consequently, staff believes that whether the Sprint ICA has expired will require further fact finding and policy analysis by the Commission.

Finally, consistent with the Commission's findings in the Z-Tel Order, staff believes that Section 252(i) obligates incumbents, such as AT&T, to enable Nextel and other CLECs to operate upon the same terms and conditions as those provided in a valid existing interconnection agreement. Staff does not believe that Nextel is obligated to invoke the parties' existing dispute resolution provisions. Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety.

Accordingly, staff believes AT&T's Motion fails because Nextel's Notice, on its face, states a cause of action upon which relief could be granted.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 1, this Docket should be held open pending further proceedings. **(TEITZMAN)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, this Docket should be held open pending further proceedings.⁸

⁸ Staff notes that because Nextel seeks to adopt the existing Sprint ICA, the procedure and ultimate resolution of this docket may rely heavily on the outcome of the Sprint – AT&T Arbitration in Docket No. 070249-TP. Pursuant to Order No. PSC-07-0680-FOF-TP, issued August 21, 2007, the Commission granted AT&T's Motion to Dismiss Sprint's Petition for Arbitration in that proceeding. However, on August 9, 2007, Sprint filed its Motion for Leave to File Amended Petition. As of the filing of this recommendation, that Motion remains a pending matter.