

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: April 24, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Bates)
Office of the General Counsel (Tan, 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: 05/06/08 – Regular Agenda – Motion for Summary Final Order – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\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 its Notice of Adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. (collectively "Sprint"), pursuant to AT&T/BellSouth Merger Commitments and Section 252(i) of the Federal Telecommunications Act of 1996 (Act).

In its Notice, Nextel stated that pursuant to Merger Commitment Nos. 7.1 and 7.2¹ as set forth in the Federal Communications Commission's (FCC) approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control and §252(i), Nextel has adopted in its entirety, effective immediately, the "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001 ("Sprint ICA") as amended. Nextel asserted that it has contacted AT&T regarding Nextel's adoption of the Sprint ICA, but AT&T refused to voluntarily acknowledge and honor Nextel's rights regarding such adoption.

On June 28, 2007, AT&T filed a motion to dismiss Nextel's adoption on three bases: the FCC maintains sole jurisdiction regarding the Merger Commitments; the adoption was not requested in a reasonable period of time; and Nextel did not comply with dispute resolution provisions of the existing agreement. On July 9, 2007, Nextel filed a Response in Opposition to AT&T's motion. Nextel countered that adoption rights are enhanced by the Merger Commitments and remain subject to concurrent FCC/FPSC jurisdiction; the underlying agreement is currently "deemed extended on a month-to-month basis"²; and the FPSC has previously rejected the argument that a CLEC must comply with dispute resolution procedures in its existing agreement when adopting a new one.³

By Order No. PSC-07-0813-FOF-TP (Order Denying Dismissal), issued October 16, 2007, AT&T's Motion to Dismiss was denied, and the dockets were to remain open pending

¹ Merger Commitment No. 7.1 states:

The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made."

Merger Commitment No. 7.2 states:

The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

² Nextel cites to Docket No. 040343-TP, Order No. PSC-04-1109-PCO-TP (Volo Order), as addressing a similar situation in which the LEC's motion to dismiss was denied.

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

resolution of Docket No. 070249-TP. Docket No. 070249-TP dealt with whether the underlying agreement between Sprint and AT&T (the agreement to be adopted by Nextel) had expired. The Sprint – AT&T docket was resolved when the parties filed a Joint Motion on December 4, 2007 to approve an amendment extending the underlying agreement for three years. The Commission, by Order No. PSC-08-0066-FOF-TP, issued on January 29, 2008, acknowledged the amendment of the Sprint ICA.⁴

Nextel filed a Motion for Summary Final Order on December 26, 2007, requesting that the Florida Public Service Commission (Commission) acknowledge Nextel's adoptions of the existing Sprint ICA. On January 22, 2008, AT&T filed a Response in Opposition to Nextel's Motion for Summary Final Order.

In February, AT&T filed several pleadings at the Commission which included copies of pleadings it had filed at the FCC seeking a ruling on AT&T's Merger Commitments. On February 7, 2008, AT&T filed a supplemental submission in support of its Response in Opposition to Nextel's Motion for Summary Final Order.⁵ On February 13, 2008, AT&T filed a letter with a FCC order.⁶ On February 19, 2008, AT&T filed a letter requesting this Commission to place the Nextel dockets in abeyance, pending FCC review of its Petition for Declaratory Statement regarding AT&T Merger Commitments.⁷

On February 18, 2008, Nextel filed a motion for leave to file a reply to AT&T's Response and Supplemental Submissions in Opposition to Nextel's Motion for Summary Final Order, which was granted by Order No. PSC-08-0242-PCO-TP, issued April 15, 2008.

On February 20, 2008, Nextel filed a notice of supplemental authority, which contained an order issued by the Public Service Commission of the Commonwealth of Kentucky in Case No. 2007-0255 and Case No. 2007-0256.⁸ AT&T filed a letter on March 28, 2008, that attached a ruling issued by the California Public Utilities Commission.⁹

⁴ Docket No. 070249-TP, Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.

⁵ AT&T filed its *Petition of the AT&T ILECs for a Declaratory Ruling*, WC Docket No. 08-23 (filed February 5, 2008), in which AT&T requests a ruling regarding the Merger Commitment allowing porting of interconnection agreements from one AT&T state to another.

⁶ The order was issued in *In Re Ameritech Operating Companies Tariff FCC No. 2 et. Al.*, Transmittal No. 1666, which stated that parties remain free to file a complaint if parties believe AT&T has not complied with the Merger Commitments as they relate to detariffing and/or access services.

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

⁸ Case No. 2007-0255 and Case No. 2007-0256, *In the Matter of: Adoption by Nextel West Corp. of the Existing Interconnection Agreement, By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company, L.P., Sprint Spectrum, L.P.* Order issued by the Public Service Commission of the Commonwealth of Kentucky. The Kentucky cases appear to be mirrors of the instant Florida dockets.

⁹ Application of Sprint Communications Company L.P. (T 5112 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) for Commission Approval of an Interconnection Agreement with Pacific Bell Telephone Company d/b/a AT&T California pursuant to the "Port-In-Process" Voluntarily Created and Accepted by AT&T Inc. as a Condition of Securing Federal Communications Commission Approval of AT&T Inc.'s Merger with BellSouth Corporation.

Docket Nos. 070368-TP, 070369-TP

Date: April 24, 2008

In the issues that follow, staff addresses Nextel's request for Oral Argument, AT&T request for abeyance and Nextel's Motion for Summary Final Order. The Commission is vested with jurisdiction over this matter pursuant to Section 364.012(2), Florida Statutes (F.S.), and Section 252 of the 1996 Telecommunications Act.

Discussion of Issues

Issue 1: Should the Commission grant Nextel's Request for Oral Argument?

Recommendation: Yes. Staff recommends that the Commission grant Nextel's Request for Oral Argument, because staff believes that it would be beneficial for the parties to verbally address Nextel's Motion for Summary Final Order. Staff recommends allowing each party five minutes to present its argument, if oral argument is granted. (Tan)

Staff Analysis:

Nextel

Concurrently with its Motion for Summary Final Order, Nextel filed its Request for Oral Argument, pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.). Nextel argues that oral argument would aid the Commission in understanding and evaluating the legal bases for a summary order and how the standard for summary final order has been met as provided in Rule 28-106.204(4), F.A.C. Nextel asserts that oral argument would prevent further waste of the Commission's time and resources by assisting the understanding and evaluation of Nextel's ability to adopt the Sprint ICA. Nextel requests that each Party be granted ten minutes for oral argument.

AT&T

AT&T does not object to oral argument on Nextel's Motion

Analysis

Staff believes that it would be beneficial for the Commission to hear from the parties regarding Nextel's Motion for Summary Final Order. Staff believes oral argument may aid the Commission in its decision on the motion. Staff notes that the Commission has the discretion to grant or deny oral argument. If the Commission believes that the motion and responses are clear on their face and that oral argument would not be helpful, it has the discretion to deny the motion. If the Commission decides to hear from the parties, staff recommends that the Commission allow five minutes per side.

Issue 2: Should the Commission grant AT&T's request to place Docket Nos. 070368-TP and 070369-TP in abeyance?

Recommendation: No. The Commission should deny AT&T's request for abeyance of Docket Nos. 070368-TP and 070369-TP. (Tan, Bates)

Staff Analysis:

AT&T's Position

On February 7, 2008, AT&T filed a Supplemental Submission in Support of AT&T's Response in Opposition to Motion for Summary Final Order. In its submission, AT&T requests that the Commission defer ruling on Docket Nos. 070368-TP and 070369-TP while AT&T's Petition of AT&T ILECs for Declaratory Ruling (Petition), filed with the FCC on February 5, 2008, is pending. Specifically, AT&T asserts that the expedited resolution of its FCC Petition, which asks the FCC to resolve substantive issues involved in the dockets before this Commission, may render further Commission proceedings unnecessary. The Petition requests the FCC to answer specific questions regarding Merger Commitment 7.1, which addresses allowing a "carrier to 'port' an interconnection agreement from one AT&T/BellSouth state to another without the need for a new negotiation and arbitration."¹⁰

On February 13, 2008, AT&T filed an FCC Order¹¹ (Order), released February 7, 2008, as supplemental authority in support of its position that the Commission should allow the FCC to decide potentially dispositive questions in AT&T's Petition before proceeding any further. In support, AT&T relies on the particular section of the Order which states that Petitioners remain free to file complaints against AT&T for noncompliance, and clarifies that the FCC is ready to enforce commitments should it receive such complaints.¹² Further, AT&T asserts that in the event the FCC's determinations do not lead to a complete resolution of the issues, the Commission would then decide the remaining questions of law.

On February 19, 2008, AT&T reiterated its request for abeyance by filing with the Commission a copy of a Public Notice (Notice) in FCC WC Docket No. 08-23. Released on February 14, 2008, the Notice invites interested parties to comment on the Petition by no later than February 25, 2008, with reply comments due on or before March 3, 2008.¹³

On March 28, 2008, AT&T filed another Supplemental Submission in Support of AT&T's Response in Opposition to Motion for Summary Final Order. AT&T makes note of a March 26, 2008 ruling by an Administrative Law Judge for the California Public Utilities Commission, granting parties' motions for leave to file a copy of their filings at the FCC.¹⁴ In

¹⁰ To date, WC Docket No. 08-23 is still receiving ex parte comments. No further action has been taken by the FCC.

¹¹ See *In Re Ameritech*

¹² Staff notes that the FCC Order only deals with tariffing and detariffing and/or access services, not interconnection agreements, which is the issue in the instant dockets.

¹³ *Petition of the AT&T ILECs for a Declaratory Ruling*

¹⁴ Application of Sprint Communications Company L.P. (T 5112 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) for

making this ruling, the judge stated it was her intention to wait for the FCC's ruling on the petition for declaratory statement before acting on the motion to dismiss.

Nextel's Position

On February 18, 2008, Nextel filed its Motion for Leave to File Reply to AT&T's Response in Opposition to Motion for Summary Final Order and Supplementary Submissions Thereto.¹⁵ Nextel asserts that AT&T's request to defer a Commission ruling is nothing more than another delay tactic to avoid complying with the Merger Commitments and its obligations under §252(i) of the Act. Nextel points to inconsistencies in AT&T's assertions, stating that AT&T is now arguing before the FCC precisely what Nextel has argued in this proceeding and before other state commissions. There is no need for extensive evidence-gathering or fact-finding that requires further proceedings before making a determination on Nextel's adoption of the Sprint ICA. There is no legal or logical reason for the Commission to defer final action on these dockets while AT&T's Petition with the FCC is pending for an indefinite period. Moreover, the allegations set forth in AT&T's Petition are not only irrelevant to the proceedings pending in the nine-state legacy BellSouth region, but are unsupported by any evidence. AT&T's Petition does not and cannot alter the Commission's deliberations, regardless of how the FCC will ultimately address it.

Nextel also makes note of AT&T's timing. Specifically, AT&T could have sought FCC intervention prior to state Commissions, including this Commission, deciding the issues. Failing to do so is an attempt by AT&T to benefit from the resulting further delay and is a demonstration of its callous disregard for the efforts and resources of the Commission, its staff, and Nextel entities.

Nextel asserts that the Commission should resolve this matter without further delay and may reexamine its determination, if necessary, after the FCC's decision. Nextel states that there is no guarantee that the FCC will act promptly or that it would reverse any state commission decisions rendered. Further, nothing prevents the Commission from reexamining its determinations should the FCC issue a contrary ruling in the future. Nextel states that delay is harmful to it as AT&T will likely argue that the 42-month clock on the effectiveness of the AT&T Merger Commitments is running while its Petition is pending before the FCC.

In support of its position, Nextel cites to a Finding and Order by the Ohio Public Utilities Commission (OPUC), which allowed one wireline Sprint entity and three wireless Sprint entities to port and adopt in Ohio the same Sprint ICA that this Commission extended for three (3) years, subject to Ohio-specific modifications consistent with AT&T Merger Commitment 7.1.¹⁶ The Finding and Order also dismissed AT&T Ohio's Motion to Dismiss and found that the OPUC

Commission Approval of an Interconnection Agreement with Pacific Bell Telephone Company d/b/a AT&T California pursuant to the "Port-In-Process" Voluntarily Created and Accepted by AT&T Inc. as a Condition of Securing Federal Communications Commission Approval of AT&T Inc.'s Merger with BellSouth Corporation.

¹⁵ Granted by Order No. PSC-08-0242-PCO-TP, issued April 15, 2008.

¹⁶ Ohio PUC, Case No. 07-1136-TP-CSS, *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.*, Finding and Order (issued February 5, 2008).

had concurrent jurisdiction with the FCC to interpret the Merger Commitments. It further stated that deferring the matter to the FCC, as AT&T had urged, would have been contrary to FCC's policy aims. This finding was based on the OPUC's conclusion that the FCC had clarified that states have jurisdiction over matters arising under the AT&T Merger Commitments and that states are granted authority to adopt rules, regulations, programs, and policies respecting the Merger Commitments.

On February 20, 2008, Nextel filed its Notice of Supplemental Authority to its Motion for Summary Final Order and Reply to AT&T Florida's Response and Supplemental Submissions in Opposition to Nextel's Motion for Summary Final Order. Nextel's supplemental authority consisted of two Orders issued by the Kentucky Public Service Commission in Case No. 2007-0255 and Case No. 2007-0256.¹⁷ Both Orders denied AT&T Kentucky's Motion for Reconsideration of Orders denying AT&T Kentucky's Motion to Dismiss Nextel West Corp.'s and NPCR, Inc. d/b/a Nextel Partners' notice of adoption of an interconnection agreement between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. Both Kentucky Orders found that there was no reason to suspend the state proceeding pending the FCC's resolution of AT&T's Petition and ordered submission of the executed adoption within 20 days.

Staff Analysis

The issue here is whether the Commission should defer ruling on the Nextel dockets while AT&T's Petition is pending before the FCC.

Section 252(i) of the Act and 47 C.F.R. §51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

Section 252(i) provides:

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.

Section 51.809 provides:

- (a) An incumbent ILEC shall make available ***without unreasonable delay*** to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to §252 of the Act, upon the same rates, terms and conditions as those provided in the agreement. An incumbent LEC may

¹⁷ Orders issued on December 26, 2007, and February 18, 2008, *In the Matter of: Adoption by Nextel West Corp. of the Existing Interconnection Agreement, By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company, L.P., Sprint Spectrum, L.P.*, Public Service Commission of the Commonwealth of Kentucky.

not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement. (*emphasis added.*)

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

2) the provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under §252(h) of the Act.

Section 252(i) makes it clear that adoption of an existing ICA is available to requesting telecommunications carriers, and §51.809, the rules which implement §252(i), describes the conditions under which agreements may be adopted, and the two exceptions thereof.

While Nextel requests to adopt the Sprint ICA pursuant to the Merger Commitments and §252(i), it is clear that Nextel may adopt the Sprint ICA without availing itself of the Merger Commitments. The Commission determined in Order No. PSC-07-0831-FOF-TP that “§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 interconnection agreement . . . Nextel’s adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety.”¹⁸

AT&T’s FCC Petition is seeking declarations regarding specific questions on Merger Commitment 7.1, regarding intrastate and interstate porting of agreements, and state-specific pricing and consistency. Because Nextel may adopt the agreement pursuant to §252(i) and §51.809 and is not dependent on the Merger Commitments, the FCC’s decision on AT&T’s Petition ultimately has no bearing on the issue at hand. Nextel is requesting to adopt a Florida ICA, not an out-of-state agreement. Because the outcome of the FCC Petition is not dispositive on the Florida dockets, there is no reason to defer a Commission decision while the Petition is pending before the FCC. Holding these proceedings in abeyance until the FCC rules on AT&T’s petition serves no other purpose than further delay.

Accordingly, staff recommends that the Commission deny AT&T’s request for abeyance of Docket Nos. 070368-TP and 070369-TP.

¹⁸ Order Denying Dismissal, in the instant dockets.

Issue 3: Should the Commission grant Nextel's Motion for Summary Final Order?

Recommendation: Yes. Staff recommends granting Nextel's Motion for Summary Final Order and acknowledging Nextel's adoptions of the Sprint ICA and requiring that the Adoption Agreements be executed. (Tan)

Staff Analysis:

Nextel's Motion:

Nextel asserts in its Motion that there is no genuine issue as to any material fact regarding Nextel's adoption of the Sprint ICA, and Nextel is entitled to adopt the Sprint ICA under both AT&T's Merger Commitments and §252(i) as a matter of law. Nextel respectfully requests that this Commission enter an order that acknowledges Nextel's adoption of the Sprint ICA under both AT&T's Merger Commitments and §252(i) as a matter of law and require AT&T to execute the Adoption Agreements.

Nextel alleges that the following facts are undisputed:

AT&T and BellSouth Corporation voluntarily proposed "Merger Commitments" that became "Conditions" of approval of the AT&T/BellSouth Merger when the FCC authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates are required to comply with Merger Commitments.¹⁹

Merger Commitment No. 7.1 imposed upon AT&T an obligation to "make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility."²⁰

The Sprint ICA is an interconnection agreement previously approved by this Commission; therefore, AT&T is also required by §252(i) to make the Sprint ICA available for adoption by Nextel.

On May 18, 2007, Sprint Nextel sent a letter to AT&T on behalf of Nextel as a requesting carrier for the stated purpose of exercising Nextel's right to adopt the Sprint ICA pursuant to AT&T's Merger Commitments and §252(i).

Sprint Nextel's letter specifically advised AT&T that "[a]lthough neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to execute the Sprint ICA as adopted by Nextel in order to implement Nextel's adoption."

¹⁹ *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74, adopted on December 29, 2006.

²⁰ *See FCC BellSouth Merger Order*, at page 149, Appendix F, Merger Commitment No.1 under "Reducing Transaction Costs Associated with Interconnection Agreements."

AT&T refused to grant Nextel's requests to adopt the Sprint ICA on the basis of a "lack of understanding regarding the applicability of the Merger Commitments to Nextel's requests" and an assertion that the Sprint ICA was not available for adoption because it was expired and in arbitration, and not adopted within a reasonable period of time under §51.809(c).

Nextel filed with the Commission its Notices of Adoption of the Sprint ICA on June 21, 2007. AT&T filed Motions to Dismiss on July 16, 2007, were denied by the Commission at the September 25, 2007 Agenda Conference.²¹

In its Motion, Nextel argues that if a party is going to file a response, pursuant to Florida Rule of Civil Procedure 1.140(b), every defense in law or fact to a claim for relief "shall be asserted in the responsive pleading."²² Nextel asserts further that pursuant to Rule 1.140(a)(2), to the extent any further response may be appropriate after a party's initial motion has been denied, such response "shall be served within 10 days after notice of the court's action" and that AT&T has failed to raise timely objections. Nextel also points out that Rule 1.140(h), Florida Rules of Civil Procedure, provides that a party waives any affirmative defense not plead in its answer or responsive motion such as the Motion to Dismiss filed by AT&T.

Sprint and AT&T filed in the Sprint arbitration docket a Joint Motion to approve an amendment to the Sprint ICA on December 4, 2007. The Amendment to the Sprint ICA was executed by both parties on December 4, 2007.

Nextel contends that it is entitled to adopt the Sprint ICA as a matter of law pursuant to AT&T's Merger Commitments and §252(i). Nextel argues that Merger Commitments 7.1 and 7.2 were intended to encourage competition and that Nextel satisfies the requirement of being a member of the group of "any requesting telecommunications carrier". Nextel requests to adopt the Sprint ICA, which is an effective interconnection agreement that contains state-specific pricing and performance plans. The Sprint ICA also has no issue of technical feasibility and has been amended to reflect changes of law, a requirement under the Triennial Remand Review Order.

Nextel argues that pursuant to §252(i) Nextel satisfies the adoption requirements set forth in the §51.809. Nextel has filed an adoption for the agreement with the same rates, terms and conditions as the Sprint ICA and that there was no cost exception nor a technical feasibility exception available to AT&T. Nextel contends that AT&T intends to avoid its §252(i) obligation to permit Nextel's adoption of the Sprint ICA on a streamlined basis.

Nextel also argues that the FCC review of §252(i) obligations continued to be served by the "all-or-nothing" rule.²³ Under the "all-or-nothing" rule, if a requesting CLEC is interested in

²¹ Order Denying Dismissal

²² Nextel notes in its Motion, that pursuant to Rule 28-106.203, F.A.C., an "Answer" is not required.

²³ The "pick-and-choose" rule allowed CLECs to opt into either the full agreement between an ILEC and another CLEC or select individual parts of the agreement for its own use.

a service or network element provided by an ILEC, it may adopt *in its entirety* any approved agreement that includes that service or element to which the ILEC is already a party.²⁴

Finally, Nextel argues that the only issue of material fact in the matter at hand is whether or not the Sprint ICA was amended by Sprint and AT&T in Docket No. 070249-TP. The Commission acknowledged the signed Sprint ICA on January 29, 2008, thereby extending the Sprint ICA for three years.²⁵ Therefore, Nextel finds that it is entitled to adopt the Sprint ICA under both AT&T's Merger Commitments and §252(i) as a matter of law.

AT&T Response in Opposition to Motion for Summary Final Order

AT&T asserts that Nextel's motion did not meet the legal standard for a summary final order and genuine issues of material fact remain, including: the adoptions do not comply with the Merger Commitments and §252(i), and granting the adoptions would violate FCC rules.

AT&T states that Nextel is requesting to approve the adoptions without a hearing on the substantive merits despite the Commission request that these dockets remain open pending further proceedings. AT&T contends that granting Nextel's Motion would deprive AT&T of its due process rights and would run counter to public policy.

AT&T argues that these dockets are in a preliminary state, and the parties have not completed discovery nor filed testimony. AT&T states that the Commission has previously found that it was premature to consider a motion for summary final order before the parties had the opportunity to "complete discovery and file testimony."²⁶ AT&T states that it has not waived its rights to fully complete and perfect the evidentiary record.

AT&T contends that Florida law establishes that a party moving for summary final judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.²⁷ AT&T further contends that a summary final judgment cannot be granted unless the facts are so crystallized that nothing remains but questions of law.²⁸ If the evidence permits different reasonable inferences, it should be submitted as a question of fact.²⁹ AT&T argues that the burden is on Nextel to prove that AT&T cannot prevail.³⁰ AT&T contends that the Commission has previously determined that policy considerations must be acknowledged, and caution must be exercised in granting a summary judgment because it forecloses the litigant from the benefit of and right to a trial.³¹

²⁴ See *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 F.C.C.R. 13494 (2004) ("Second Report and Order").

²⁵ Order No. PSC-08-0066-FOF-TP, Docket 070249-TP

²⁶ *Re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*; Docket No. 991437-WS, July 27, 2001.

²⁷ *Moore v. Moore*, 475 So. 2d 666, 668 (Fla. 1985).

²⁸ *Id.*, *McCraney v. Barberi*, 677 So. 2d 355 (Fla. 1st DCA 1996).

²⁹ *Id.*

³⁰ *Christian v. Overstreet Paving Co.*, 679 So. 839 (Fla. 2nd DCA 1996).

³¹ See Order No. PSC-98-1353-PCO-WS, issued November 20, 1998. See also Order No. PSC-01-0360-PAA-WS, issued February 9, 2001.

AT&T further argues that the Commission has denied granting summary order in the past because of the severity of the remedy sought. Therefore, AT&T contends that this matter remains at a preliminary stage, has unresolved genuine issues of material fact, and therefore should not be granted.

AT&T contends that the following are unresolved genuine issues of material fact:

- 1) Nextel's Attempted Adoption does not comply with the Merger Commitments and is not applicable to this depute.
- 2) Nextel's Attempted Adoption does not comply with §252(i) because Nextel cannot avail itself of all the interconnection services and network elements provided within the Sprint agreement because Nextel is a wireless carrier and Sprint is both a wireline and wireless service provider.
- 3) Granting the adoption would violate FCC Rules. Nextel's adoption would involve wireless and wireline carriers; however, Nextel only provides wireless services in Florida. AT&T argues that allowing Nextel to take an agreement where CLEC-only provisions cannot apply is the equivalent to allowing Nextel to "pick and choose" only the wireless terms and conditions from the Sprint ICA.³²
- 4) AT&T also states that AT&T is not required to make agreements for adoption available if the incumbent LEC proves to the Commission that the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement under the exceptions provided in §51.809(b).³³

AT&T argues that Nextel's adoption should not be allowed because the ICA cannot be made "upon the same terms and conditions as those provided in the agreement" and because the adoption of the Sprint ICA would increase AT&T's costs as compared to its costs of providing the Sprint ICA to the original parties.

Nextel's Reply to AT&T Florida's Response

Nextel argues that the Commission should grant its Motion for Summary Final Order due to the extension and approval of the Sprint ICA by the Commission. Nextel states that the Commission has the authority and obligation to approve adoptions pursuant to §252(i) and §51.809, notwithstanding any Merger Commitments made by BellSouth and AT&T. Nextel states that the Order Denying Dismissal, determined that "Nextel's adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety."

³² The FCC no longer permits "pick-and-choose" and instead allows only "all-or-nothing" adoptions of existing agreements.

³³ Section 51.809(b) provides two exceptions, the cost exception and the technical feasibility exception to adoptions.

Scope of Review:

Under Rule 28-106.204(4), F.A.C., “[a]ny party may move for summary final order whenever there is no genuine issue of material fact.” Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists as to the material facts.³⁴ When a party establishes that there is no genuine issue of material fact, the burden shifts to the opponent to demonstrate the falsity of the showing.³⁵ “If the opponent does not satisfy that burden, summary judgment is proper and should be affirmed.”³⁶ “A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.”³⁷

Staff Analysis:

AT&T contends that in the instant dockets, Nextel cannot adopt the Sprint ICA. AT&T also contends that Nextel is not adopting “under the same terms and conditions,” as required by §252(i) and that under §51.809(b), AT&T will experience disparate costs.³⁸

In the Order Denying Dismissal, the Commission found that the Notices of Adoption stated a cause of action upon which relief may be granted.³⁹ The instant dockets are centered on the Notices of Adoption of the Sprint ICA.⁴⁰ Specifically, the Commission held in the Order Denying Dismissal that “§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 . . . Nextel’s adoption is well within its statutory right to opt-in to the Sprint Agreement in its entirety.” Whether or not the Sprint ICA had expired was a disputed material fact, but that issue was addressed later in Docket No. 070249-TP.

In its Response in Opposition to Nextel’s Motion for Summary Final Order, AT&T alludes to a cost exception under §51.809(b)(1), where the costs of providing a particular

³⁴ See Order No. PSC-01-1427-FOF-TP; Docket No. 001801-TP, In Re Request for arbitration concerning complaint of TCG South Florida and Teleport Communications Group against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement, and Order No. PSC-05-0702-FOF-TP, Docket 040732-TP, In Re Complaint against BellSouth Telecommunications, Inc. seeking resolution of monetary dispute regarding alleged overbilling under interconnection agreement, and requesting stay to prohibit any discontinuance of service pending resolution of matter, by Saturn Telecommunications Services, Inc. d/b/a STS Telecom.

³⁵ Order No. PSC-01-1427-FOF-TP, Docket No. 001801-TP.

³⁶ Id.

³⁷ Moore v. Morris, 475 So. 2d 666,668 (Fla. 1985). See also City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

³⁸ §51.809(b), provides a limited exception to an ILEC’s general obligation to allow parties to opt into agreements, where “[t]he costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.”

³⁹ Order No. PSC-07-0831-FOF-TP, Order denying AT&T’s Motion to Dismiss.

⁴⁰ Docket No. 070249-TP, Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.

agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement. This argument was not raised in AT&T's Motion to Dismiss, and staff does not believe the Commission has previously addressed this argument. However, staff believes that a party must take the opportunity to raise any exceptions to §252(i) as early as possible in a docket to prevent unreasonable delay in violation of §51.809. In addition, Florida Rules of Civil Procedure, Rule 1.140(h), provides that a party waives any affirmative defense not plead in its answer or responsive motion.⁴¹

Staff believes that AT&T should have raised its objections under §51.809 when the petition was filed or when the Motion to Dismiss was denied, so that the Commission could have addressed all objections at that time rather than in a piece-meal fashion. Staff believes that by failing to raise all objections to Nextel's adoption of the Sprint ICA upon AT&T's filing of its Motion to Dismiss, it has unreasonably delayed the Commission's ability to address this matter in a timely fashion. An adoption of an existing interconnection agreement, under most circumstances, is a clear and fast administrative proceeding in compliance with the intent of §252(i). Further, in its Response, AT&T only raises the possibility that the cost exception may apply to Nextel's adoption of the Sprint ICA. Furthermore, AT&T did not provide any analysis or additional support whatsoever.⁴² Staff believes that AT&T has neither raised the cost exception in a timely manner nor sufficiently raised the cost exception as a material fact for the Commission to consider in resolving Nextel's motion for Summary Final Order.

The Commission has acknowledged that before a summary final order will be granted, two requirements must be met (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.⁴³ In this instance, staff believes the only genuine issue of material fact to be considered is whether there was an Amendment extending the Sprint ICA. An adoption under §252(i) cannot be executed without a valid ICA to adopt. The Sprint ICA Amendment was executed by both parties to the Amendment on December 4, 2007, and acknowledged by the Commission in Order No. PSC-08-0066-FOF-TP. Therefore, no genuine issue of material fact exists. AT&T has the burden to demonstrate that Nextel does not have a valid interconnection agreement to adopt. Staff believes AT&T has failed to meet this burden, as there is a signed, approved ICA extension amendment. Pursuant to §252(i), a local exchange carrier shall make any approved ICA available to any requesting telecommunication carriers upon the same terms and conditions as those provided in the agreement. As a matter of law, Nextel is entitled to Adoption of the Sprint ICA.

Therefore, as the Sprint ICA Amendment has been signed, and acknowledged, thereby extending the Sprint ICA for three years, staff believes that Nextel has met the standard

⁴¹ Rule 1.140(h)(1), Florida Rules of Civil Procedure states that "A party waives all defenses and objections that he party does not present either by motion under subdivisions (b), (e), o r (f) of this rule..."

⁴² Though not a waiver of its argument in the instant Florida dockets, staff notes that AT&T withdrew its cost exception based request for a hearing in Georgia. Staff further notes that the argument proffered by AT&T in its direct testimony in Georgia was based on the revenue loss to AT&T if the adoption is permitted, which differs from the grounds required pursuant to §51.809(b)(1).

⁴³ Order No. PSC-01-1427-FOF-TP.

necessary to grant its Motion for Summary Final Order. It is staff's recommendation that Nextel's Motion for Summary Final Order should be granted.

However, if the Commission determines that AT&T has appropriately raised its cost exception argument, staff believes it would be appropriate to consider the following two options.

Option I

Due to the significant delay in resolving this matter, staff believes it would be appropriate to require the parties to execute the adoption of the Sprint ICA by Nextel, subject to the outcome of an expedited hearing solely on the cost exception issue. If the Commission ultimately determines after hearing, that AT&T has proven it is not required to make the ICA available for adoption pursuant to §51.809, then the Commission could rescind the adoption on a going forward basis.

Option II

The Commission may deny Nextel's Motion for Summary Final Order and set Docket Nos. 070368-TP and 070369-TP for hearing on the cost exception issue raised by AT&T. Staff recommends that such a hearing be set expeditiously, as staff continues to have concerns regarding AT&T's unreasonable delay in executing the Sprint ICA adoption.

Staff Recommendation

Staff believes that since the Sprint ICA Amendment has been signed, and acknowledged, thereby extending the Sprint ICA for three years, there is no genuine issue of material fact. Accordingly, Nextel has met the standard necessary to grant its Motion for Summary Final Order. Therefore, staff recommends the Commission grant Nextel's Motion for Summary Final Order, acknowledge Nextel's adoptions of the Sprint ICA and require that the Adoption Agreements be executed.

Docket Nos. 070368-TP, 070369-TP

Date: April 24, 2008

Issue 4: Should these dockets be closed?

Recommendation: In the event Nextel's Motion for Summary Final Order is granted, staff recommends closing Docket Nos. 070368-TP and 070369-TP because no further action is needed by the Commission. (Tan)

Staff Analysis: In the event Nextel's Motion for Summary Disposition is granted, staff believes that no further action is needed by the Commission.