State of Florida

Public Service Commission

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

DATE: August 7, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Bates, Simmons)
Office of the General Counsel (Tan)

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: 08/19/08 – Regular Agenda – Posthearing Decision – Participation is limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RCP\WP\070369.RCM.DOC

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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 7.2[1] 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/Florida Public Service Commission (FPSC or Commission) 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-07-0831-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. This 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 FPSC 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 with this 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 an attached 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]

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[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.

By Order No. PSC-08-0415-FOF-TP, issued June 23, 2008, the Commission denied Nextel's Motion for Summary Final Order and set Docket Nos. 070368-TP and 070369-TP for a proceeding under Section 120.57(2), Florida Statutes. By Order No. PSC-08-0402-PCO-TP, issued on June 17, 2008, the issues on which the parties were to file basic position statements and legal briefs were established. On this same date, the parties filed corrected stipulations of fact, which replace those included in Attachment B of Order No. PSC-08-0402-PCO-TP.

On June 26, 2008, Nextel timely filed its brief. On June 27, 2008, AT&T filed its brief and accompanying motion for extension of time to file brief and to accept brief as timely filed. AT&T's motion was granted by Order No. PSC-08-0456-PCO-TP, issued July 16, 2008.

On July 1, 2008, Nextel filed a motion to strike the affidavit of P.L. Ferguson, which was included as Attachment A to AT&T's legal brief. By Order No. PSC-08-0484-PCO-TP, issued July 28, 2008, Nextel's motion was granted in full.

The substantive and jurisdictional issues raised in the briefs are discussed below.

Executive Summary

Issue 1

Issue 1 addresses whether Nextel, as a wireless entity, can avail itself of 47 U.S.C. §252(i) to adopt the Sprint ICA. AT&T believes that Nextel may not adopt the Sprint ICA pursuant to §252(i) and offers two distinct arguments in support of its position.

First, AT&T alleges that the Sprint ICA is predicated on having a "balance of traffic" such that the number of minutes flowing from the Sprint entities to AT&T is roughly comparable to the number of minutes flowing in the reverse direction. According to AT&T, the parties to the Sprint ICA provided supporting cost studies as part of the negotiation process. AT&T is concerned that other stand-alone wireless carriers will adopt the Sprint ICA if Nextel prevails, and to the extent there is a traffic imbalance, AT&T will experience higher costs in providing the agreement as compared to its costs of providing the agreement to the original parties. A further concern of AT&T is that interstate porting of the adopted agreement through AT&T/BellSouth Merger Commitment 7.1 could further increase AT&T's costs of providing the agreement. In particular, AT&T indicates that Nextel would have a favorable traffic imbalance in the legacy AT&T ILEC states, which would enable Nextel to receive a "free ride" or subsidy from AT&T.

Second, AT&T takes the position that the Sprint ICA requires a specific mix of parties, both a wireless carrier and a wireline carrier. By not including a wireline CLEC, AT&T believes Nextel would not be adopting "upon the same terms and conditions" as the original agreement. AT&T strives to support its position in large part by addressing various conceivable scenarios for Nextel to obtain the Sprint ICA and discussing the alleged fallacies with each. These scenarios are summarized below:

- The addition of Nextel as a party to the Sprint ICA constitutes an amendment, not an adoption;
- An amendment scenario in which Nextel replaces Sprint PCS creates a situation where the Sprint CLEC would be party to two agreements with AT&T, which is impossible; and
- An adoption in which Nextel replaces both Sprint entities violates the "all-or-nothing" rule since this necessarily implies that Nextel can avail itself of all elements, which it cannot; Nextel cannot "pick and choose" just the wireless provisions.

Nextel presents two distinct arguments to support its position that adoption of the Sprint ICA is well within its rights under §252(i). First, using the FCC implementing rule, 47 C.F.R. §51.809, Nextel makes several points including: AT&T is not relying on either rule exception, an adoption cannot be restricted to carriers serving a comparable class of subscribers or providing the same service, and any requesting telecommunications carrier includes a wireless carrier (not just a CLEC). Nextel clarifies that the only two bases for rejecting an adoption were

unaffected by the FCC's decision to modify 47 CFR §51.809 to eliminate the pick-and-choose option and require that adoptions be all or nothing. Further, Nextel explains that the FCC has expressly rejected the concept that the adopting carrier(s) must be "similarly situated" to the original party.

Second, Nextel makes several observations gleaned from a close reading of the Sprint ICA. Unlike AT&T's representation that the Sprint ICA requires both wireless and wireline parties, Nextel observes that the "trigger" for termination/renegotiation of the "bill-and-keep" provision in the ICA is one Sprint entity adopting a different ICA that requires payment of reciprocal compensation. Therefore, since Sprint PCS could operate on a stand-alone basis pursuant to the contract, so may Nextel. Continuing with its careful review of the language in the Sprint ICA, Nextel recites several key findings: the bill-and-keep provision does not include a balance-of-traffic requirement, the provision for equal sharing of facility costs is an express wireless provision, and there is a prohibition on using unbundled network elements (UNEs) for the exclusive provision of wireless or interexchange services.

Staff recommends that Nextel's adoption of the Sprint ICA should be upheld as valid pursuant to 47 U.S.C. §252(i) and the FCC's implementing rule, 47 CFR §51.809. As demonstrated by Nextel, the Sprint ICA has no balance-of-traffic requirement despite AT&T's arguments to the contrary. AT&T's arguments go more towards the background behind the Sprint ICA, which is recited within the contract, but yet the controlling language does not require the original parties to maintain a balance of traffic. Since AT&T stated before this Commission at the June 3, 2008 Agenda Conference that it will not maintain the cost exception in 47 CFR §51.809(b) as a defense, staff believes its follows that Nextel would not receive a "free ride" or subsidy from AT&T if this adoption is permitted. Any future intrastate or interstate porting of the adopted agreement and any resulting traffic/cost imbalances for AT&T should not be of concern in the instant dockets. If faced with this situation, AT&T can seek to protect its interests through use of the cost exception in 47 CFR §51.809(b) in proceedings before the applicable state commissions. Staff believes that AT&T's apparent attempt to use the instant dockets as a vehicle for pre-empting speculative adverse consequences is not appropriate.

AT&T's argument that the adopting party must be similarly situated to the original party or parties and able to avail itself of all applicable elements is not supported by 47 CFR §51.809 or related FCC orders. Moreover, even if AT&T could prevail on those points, staff believes Nextel has argued persuasively that the Sprint ICA does not require both wireline and wireless parties and contains limiting language to ensure appropriate use of provisions.

Issues 2A and 2B

Issues 2A and 2B address whether this Commission has jurisdiction over the AT&T/BellSouth merger commitments and, if so, whether these commitments allow Nextel to adopt the Sprint ICA. AT&T believes that even if this Commission has jurisdiction, which AT&T argues it does not, the FCC should rule first. Nextel believes that the system of dual federal/state jurisdiction applies in this instance, and the merger commitments do apply to in-state adoptions.

In support of its position that the FCC has exclusive jurisdiction over the merger commitments, AT&T references Docket No. 070249-TP, an arbitration involving Sprint and AT&T, in which this Commission reached the same conclusion, albeit under somewhat different circumstances. According to AT&T, this Commission must have subject matter jurisdiction in order to act, and authority is granted only expressly, by the statutes pursuant to which the agency was created, or by necessary implication. Therefore, authority cannot be based solely on federal statutes. While this Commission has federal authority pursuant to §§ 251 and 252 of the Act and state authority through cross-referencing in Florida law, AT&T believes that states have no general authority to resolve issues of federal law or FCC orders. Further, AT&T maintains that the order approving the merger commitments does not provide for interpretation of merger commitments to occur outside the FCC, and merger commitments are separate and apart from the processes prescribed in §§ 251 and 252 of the Act.

If this Commission finds to the contrary that it does have jurisdiction over the merger commitments, AT&T believes this Commission should defer acting until the FCC rules on its pending Petition for Declaratory Ruling, which was filed February 5, 2008. In the event this Commission decides to render a decision, AT&T believes the merger commitments do not allow Nextel to adopt the Sprint ICA. According to AT&T, Merger Commitment 7.1 must apply only to interstate porting, since in-state adoption rights were established previously; Merger Commitment 7.2 applies to in-state adoptions, but has no bearing since the Sprint ICA was already amended to reflect changes in law. While still asserting that Merger Commitment 7.1 does not apply in this instance, AT&T provides another argument in the event that the Commission believes otherwise. Since the general obligation under § 252(i) is not applicable if the ILEC proves the cost exception, AT&T asserts that Merger Commitment 7.1 must too be limited so as to not impose greater costs on the ILEC.

In support of its position that the merger commitments are subject to dual federal/state jurisdiction, Nextel makes two key arguments. First, § 364.02(13), Florida Statutes, includes the provision that the "commission may arbitrate, enforce, or approve interconnection agreements, and resolve disputes as provided by 47 U.S.C. ss. 251 and 252, or any other applicable federal law or regulation." Second, Nextel points out that AT&T did not cite language preserving dual authority in the FCC's order approving the merger commitments – "not the intent . . . to restrict, supersede, or otherwise alter state or local jurisdiction . . . or to limit state authority . . . not inconsistent with these commitments" – that appears immediately before the language upon which AT&T relies. Finally, Nextel offers other supporting rationale such as state commission involvement can be inferred from the wording of Merger Commitment 7.1, other state commissions have denied motions to dismiss for lack of jurisdiction, and this Commission's staff has authority to administratively acknowledge adoptions made pursuant to merger conditions.

Inasmuch as the merger commitments were intended to streamline the process for obtaining agreements, Nextel argues that state-specific requirements do not preclude in-state adoptions. By suggesting that Merger Commitment 7.1 is limited to interstate porting, Nextel believes AT&T is attempting to impose a non-existent requirement, one that is simply not borne out by a plain and ordinary reading of the words. Lastly, other state commissions in Georgia and Tennessee have found that Merger Commitment 7.1 is not limited in this fashion.

Staff acknowledges that the FCC's order approving the AT&T/BellSouth merger commitments does preserve any existing state authority. While this Commission has state and federal authority regarding §251/§252 matters, staff believes that merger commitments are outside of that construct unless inextricably related to an open arbitration issue. The instant proceedings do not constitute a §252 arbitration; therefore, in staff's opinion, this Commission does not have jurisdiction in this instance. Such a conclusion would mesh squarely with Order No. PSC-02-1174-FOF-TP in Docket No. 020353-TP, wherein this Commission found that it lacked authority to approve or deny an adoption pursuant to a merger commitment. If, however, this Commission finds that it has jurisdiction, staff believes that the merger commitments do not allow Nextel to adopt the Sprint ICA.

Issue 3

If Nextel is entitled to adopt the Sprint ICA, Issue 3 addresses the effective date of the adoption. AT&T believes the effective date should be 30 calendar days after execution of the contract, whereas Nextel believes the date on which it filed the adoption notice, June 8, 2007, constitutes the presumptive effective date.

AT&T notes that its obligation to make agreements available for adoption is limited to a "reasonable period of time." Since the Sprint ICA was in "expired" status on the date requested, AT&T argues that the effective date cannot be June 8, 2007. Moreover, AT&T contends that a retroactive effective date is counter to the "basic rules of contract formulation," not required by the merger commitments, imposes a financial penalty (reciprocal compensation paid by Nextel) on AT&T, and equates to retroactive ratemaking. In an effort to further support its position, AT&T maintains that it "did not delay the process, wrongfully or otherwise." In conclusion, if the adoption is upheld, AT&T is seeking a list of conditions regarding its alleged right to terminate the bill-and-keep arrangement.

Nextel describes AT&T's litigation strategy as one of "serial objections" and makes several arguments in support of using the presumptive effective date of June 8, 2007:

- Federal law requirement for expedited treatment
- Nextel's due process rights, coupled with AT&T's failure to prove any exception to the adoption
- Sprint ICA extension, effective as of date of extension request
- Concept of "true-up," ensuring AT&T does not benefit from delay in honoring its obligations

Regardless of the alleged "expired" status on June 8, 2007, staff believes there was no doubt that the Sprint ICA was a current agreement at the time. Whether the initial term had expired seems inconsequential since the parties continued to operate under the agreement and ultimately agreed to a three-year extension. For all of the reasons cited by Nextel, staff recommends that the effective date of Nextel's adoption of the Sprint ICA be June 8, 2007. If

AT&T had not filed a motion to dismiss, this adoption would have been acknowledged effective June 8, 2007. Therefore, staff believes the Commission now is in the posture of merely upholding Nextel's rights and affirming the adoption as valid. Staff believes it would be premature to address AT&T's list of conditions related to its alleged right to terminate the bill-and-keep arrangement other than to reiterate the previous conclusion that the Sprint ICA does not require both a wireline party and a wireless party.

Discussion of Issues

Issue 1: Can Nextel as a wireless entity avail itself of 47 U.S.C. Section 252(i) to adopt the Sprint ICA?

Recommendation: Staff recommends that Nextel's adoption of the Sprint ICA should be upheld as valid pursuant to 47 U.S.C. §252(i) and the FCC's implementing rule, 47 C.F.R. §51.809. (Bates, Simmons, Tan)

Position of the Parties

AT&T: Nextel is not an appropriate entity to avail itself of the opt-in provisions of Section 252(i). Nextel is not seeking to adopt the Sprint interconnection agreement "upon the same terms and conditions" as required by the FCC's rulings. In addition, Nextel's proposed adoption of the Sprint ICA is an inappropriate attempt to evade its current wireless inter-carrier compensation mechanism by seeking a CLEC provision from the Sprint ICA that provides for bill and keep. Bill and keep has never been offered or required for interconnection for standalone wireless carriers. Moreover, Nextel is inappropriately attempting to take advantage of a CLEC provision from the Sprint ICA that provides for the equal sharing of facilities.

Nextel: Yes. "[A]ny requesting telecommunications carrier" can avail itself of 252(i), regardless of the technology it uses to provide service. Per federal law, the only exceptions upon which this Commission may allow AT&T to avoid Nextel's adoption of the Sprint ICA are expressly provided by 47 C.F.R. §51.809(b)(l) or (b)(2).

Staff Analysis:

AT&T's Arguments

AT&T asserts the Sprint ICA relies on a balance of traffic between the original parties to the agreement. According to AT&T, the bill-and-keep arrangement was "the result of negotiation, compromise, and an extensive evaluation of costs incurred by each party for the termination of traffic."[10] AT&T is concerned that other stand-alone wireless carriers will adopt the Sprint ICA if Nextel prevails, and to the extent there is a traffic imbalance, AT&T will experience higher costs in providing the agreement as compared to its costs of providing the agreement to the original parties.[11] A further concern of AT&T is that interstate porting of the adopted agreement through AT&T/BellSouth Merger Commitment 7.1 could further increase AT&T's costs of providing the agreement.

If Nextel had adopted the Sprint ICA prior to AT&T's merger with BellSouth, "any imbalance of traffic . . . would have been limited to Florida." If Nextel is permitted to adopt post-merger, "[it] (and possibly other stand-alone wireless carriers) could improperly attempt to use the Merger Commitments" to "operate under the adopted agreement in one or more of the

[10] AT&T Brief, pp. 4-5.
[11] AT&T argues other "wireless carriers could avoid providing [a] cost study supporting [their] costs . . . avoid an examination of the costs associated with a "bill-and-keep" arrangement . . . and simply walk into a 'bill-and-keep' arrangement for wireless local traffic despite an imbalance of such traffic." AT&T Brief, p. 7.

other 21 states in which AT&T is an ILEC." Defending against these adoptions and the increased costs incurred for transporting and terminating wireless traffic adds to AT&T's concerns. AT&T is particularly concerned that Nextel would have a favorable traffic imbalance in the legacy AT&T ILEC states, which would enable Nextel to receive a "free ride" or subsidy from AT&T.[12]

AT&T takes the position that the Sprint ICA requires a specific mix of parties: both a wireline carrier and a wireless carrier.[13] By not bringing in a wireline CLEC, AT&T suggests that Nextel would not be adopting the agreement "upon the same terms and conditions" as the parties to the original agreement.[14] AT&T offers three examples to address the various conceivable scenarios for Nextel to obtain the Sprint ICA and discusses the fallacies it sees with each:

- The addition of Nextel as a party to the Sprint ICA is an amendment, not an adoption;

- An amendment scenario in which Nextel replaces Sprint PCS creates a situation where the Sprint CLEC would be party to two agreements with AT&T, which is not possible; and

- An adoption in which Nextel replaces both Sprint entities violates the all-or-nothing rule since this necessarily implies that Nextel can avail itself of all elements of the agreement, which it cannot; Nextel cannot pick and choose just the wireless provisions.[15]

AT&T argues that provisions in the Sprint ICA are only available to a group of entities comprising the same mix of parties as those in the underlying ICA and asserts this on two fronts. AT&T argues that certain provisions (the bill-and-keep and equal sharing of facility costs for wireless service) contained in the underlying agreement are unavailable for adoption. Secondly, since Nextel is a stand-alone wireless carrier, it cannot avail itself of various elements of the underlying agreement. Therefore, in effect, Nextel is "picking and choosing" elements rather than adopting in whole, and not adopting on "the same terms and conditions as those provided in the agreement."[16]

Nextel's Arguments

Nextel's brief relies on two types of arguments to support its adoption of the Sprint ICA. First, using the implementing rule, 47 C.F.R. §51.809, Nextel notes that: AT&T is not relying on either exception,[17] an adoption cannot be restricted to carriers serving a comparable class of

[12] AT&T Brief, pp. 2-3.
[13] AT&T believes that "[i]f Nextel wishes to rely on Section 252(i) to receive the benefits of the wireless provisions of [the] agreement . . . it must bring wireline interests to the table comparable to those brought by the original wireless party to the agreement." AT&T Brief, p. 12.
[14] AT&T argues, "Nextel, therefore, is seeking to adopt the Sprint ICA as a stand-alone wireless provider, which is not an adoption 'upon the same terms and conditions as those provided in the agreement.'" AT&T Brief, p. 13
[15] AT&T Brief, pp. 10-15.
[16] AT&T Brief, p. 13
[17] Nextel Brief, pp. 3, 8. Nextel cites the June 3, 2008 Agenda Conference transcript.

subscribers or providing the same service,[18] and any requesting telecommunications carrier includes a wireless carrier (not just a CLEC).[19] Nextel clarifies that the only two bases for restricting an adoption were unaffected by the FCC's decision to modify 47 C.F.R. §51.809 eliminating the pick-and-choose option and requiring that adoptions be all or nothing.[20] Further, Nextel explains that the FCC has expressly rejected the concept that the adopting carrier(s) must be "similarly situated" to the original party.[21]

Nextel then notes that a careful review of the Sprint ICA indicates a stand-alone wireless carrier can operate under the agreement if the wireline carrier opts into a different bill-and-keep arrangement with AT&T. Contrary to AT&T's representation that the Sprint ICA requires both wireless and wireline parties, Nextel observes that the "trigger" for termination/renegotiation of the bill-and-keep provision in the ICA is when one Sprint entity adopts a different AT&T ICA that requires payment of reciprocal compensation.[22] Therefore, Sprint PCS may operate in a stand-alone capacity if Sprint CLEC leaves the agreement without activating the "trigger." By extension, the same applies to Nextel. Nextel also notes that the bill-and-keep provision does not have a balance-of-traffic requirement,[23] the provision for equal sharing of facility costs is an express wireless provision,[24] and there is a prohibition on using unbundled network elements (UNEs) for the exclusive provision of wireless or interexchange services.[25]

Analysis

The Act tasks each telecommunications carrier with "interconnect[ing] directly or indirectly with the facilities and equipment of other telecommunications carriers."[26] Along with the duty to interconnect, carriers have the duty to negotiate through the process in good faith. This obligation applies to both the incumbent LEC and the requesting carrier.

The Act defines a telecommunications carrier as "any provider of telecommunications services." In the context of this proceeding, this definition applies equally to AT&T and Nextel. In the First Report and Order, in discussing jurisdictional issues, the FCC notes that it also

[18] Nextel Brief, pp. 7-8 cites to the First Report and Order in the Matter of FCC Docket No. 96-98 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and FCC Docket No. 95-185 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, (First Report and Order) ¶1318.
[19] Nextel Brief, pp. 8, 12. Nextel clarifies that the First Report And Order and Second Report And Order were "certainly not 'issued' in the limited 'context of a CLEC and ILEC', much less any limited context of only a 'CLEC/ILEC agreement'."
[20] Nextel Brief, pp. 8-9.
[21] Nextel Brief, pp. 5, 11. Nextel believes "[the similarly situated argument] is a legally deficient argument."
[22] Nextel Brief, p. 17.
[23] Nextel Brief, pp. 3, 18-19. "AT&T has failed to cite to a single provision in the Sprint ICA that requires the original Sprint parties, either individually or collectively, to maintain any particular 'balance of traffic' with AT&T . . . "
[24] Nextel Brief, pp. 15, 19. "The provision for equal sharing of interconnection facilities that is applicable to Nextel is an express 'wireless' provision . . . "
[25] Nextel Brief, p. 16. "There is an express TRRO UNE restriction in amended Attachment 2 – an Attachment that Sprint PCS did elect to use – that states 'Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services'."
[26] 47 U.S.C. 251(a)(1).

believed that "sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers."[27]

There are two ways for a telecommunications carrier to interconnect with an incumbent LEC. The first method, described in §252(a), is through negotiation, and the second, detailed in §252(b), is through compulsory arbitration. In addition to these two processes, §252(i) of the Act describes the alternative to the aforementioned processes: adoption of an existing interconnection agreement.

> **Availability To Other Telecommunications Carriers** – 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.

At its sole discretion, an interested carrier may choose to adopt an existing interconnection agreement on file with the FPSC that best meets its business needs. The requesting carrier must adopt all terms and conditions included within the existing interconnection agreement; however, there is no requirement in the Act that mandates the carrier utilize every service contained within the subject agreement. The FCC acknowledged that a carrier would not necessarily use every service or rate contained in an agreement when it addressed protections against discrimination.[28]

Whether a telecommunications carrier may adopt an entire, effective interconnection agreement is determined by whether a genuine exception to the above provision exists. The rule which implements §252(i), 47 C.F.R. §51.809, describes the only two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement. 47 C.F.R. §51.809(b) provides "[t]he 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."

Unless an incumbent LEC can demonstrate its costs will be greater to provide the agreement to the new carrier(s), or the agreement is not technically feasible to provide to the new carrier(s), the incumbent LEC may not restrict the carrier's right to adopt. The FCC said that it would "deem an incumbent LEC's conduct discriminatory if it denied a requesting carrier's

[27] The First Report and Order ¶1024. Nextel is a commercial mobile service provider, which meets the definition of telecommunications carrier in the Act.
[28] Second Report and Order In the Matter of FCC Docket No. 01-338 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, (Second Report and Order) ¶18.

request to adopt an agreement to which it is entitled under section 252(i) and our all-or-nothing rule."

All of AT&T's arguments are fatally flawed since each of them gives weight to considerations that are, at a minimum, inappropriate in the general context of adoptions, and specifically in the case of the instant dockets.

The definition of "telecommunications carrier" does not include references to facilities used or customers served. The lack of further qualifying information related to facilities used or customers served is significant to these proceedings because these factors cannot be taken into account when an incumbent LEC considers the appropriateness of an adoption per §252(i).

AT&T's argument that the adopting party must be "similarly situated" to the original party or parties and able to avail itself of all applicable elements is not supported by 47 C.F.R. §51.809 or related FCC orders. In the First Report and Order, the FCC made explicitly clear that incumbent LECs must permit requesting carriers to interconnect and that CMRS providers are telecommunications carriers. The FCC further held that "incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252."[29]

AT&T's argument that Nextel "must bring wireline interests to the table comparable to those brought by the original wireless party to the agreement"[30] is directly at odds with the applicable FCC rule and finding set forth in the Second Report and Order. The FCC noted:

> We also reject the contention of at least one commenter that incumbent LECs should be permitted to restrict adoptions to "similarly situated" carriers.[31]

Staff believes that assertions related to facilities used, customers served, or the mix of parties fall under the general category of "similarly situated" arguments, which the FCC has made clear are inappropriate. Moreover, even if AT&T's "similarly situated" argument had any merit, Nextel has argued persuasively that the Sprint ICA does not require both wireline and wireless parties and contains limiting language to ensure appropriate use of provisions.

The FCC concluded "an all-or-nothing rule would benefit competitive LECs because competitive LECs that are sensitive to delay would be able to adopt whole agreements . . . while others would be able to reach agreements on individually tailored provisions more efficiently."[32] Clearly, the FCC recognized that a competitive telecommunications carrier could adopt an agreement in whole but not make use of all its provisions, or the carrier could negotiate an

[29] First Report and Order ¶¶26, 34.
[30] AT&T Brief at p. 12.
[31] Second Report And Order ¶30 In addition, "[w]e conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement." Citing to the BellSouth/Hendrix affidavit.
[32] Second Report and Order ¶15.

agreement tailored to the specific needs of the carrier. Staff believes an interpretation of §252(i) suggesting the all-or-nothing rule requires a telecommunications carrier to use every service in an adopted ICA is not consistent with the FCC's view of "all or nothing."

The FCC made clear in the Second Report and Order that it did not believe §252(i) needed to be further clarified. In addition, the FCC put incumbent LECs on notice when it issued the Second Report and Order:

> We also clarify that in order to allow this regime to have the broadest possible ability to facilitate compromise, the new all-or-nothing rule will apply to all effective interconnection agreements, including those approved and in effect before the date the new rule goes into effect.[33]

That is, all agreements in effect on July 13, 2004, became available for adoption under the new all-or-nothing rule. The underlying agreement that Nextel seeks to adopt was in effect on that date. Any suggestion by AT&T that merger commitments shield this agreement from adoption is not supported by applicable law and is at odds with the FCC's prohibition on discrimination. Any limitation on Nextel's right to adopt the underlying agreement must "comply with the 1996 Act's general nondiscrimination provisions."[34]

As demonstrated by Nextel and confirmed by staff, the Sprint ICA has no balance-of-traffic requirement despite AT&T's arguments to the contrary. AT&T's arguments go more to the background of the Sprint ICA, which is recited within the contract, but the controlling language does not require the original parties to maintain a balance of traffic. Any future intrastate or interstate porting of the adoption and any resulting traffic imbalances for AT&T are not relevant at this time, as such matters are outside the scope of the FPSC's consideration in approving Nextel's adoption.

If AT&T's "free ride" argument were true in the context of Nextel's adoption of the Sprint ICA in Florida, AT&T would have asserted and attempted to prove an exception under 47 C.F.R. §51.809(b)(1). AT&T has not proffered such an argument.[35] Since AT&T stated that it will not maintain the cost exception in 47 C.F.R. §51.809 as a defense, staff infers that Nextel would not receive a "free ride" or subsidy from AT&T if this adoption is permitted. AT&T's complaint that intrastate or interstate porting of the adopted agreement would result in a traffic and/or cost imbalance is not an appropriate concern of this Commission at this time. If this situation should develop, AT&T can attempt to protect its interests through use of the cost exception in 47 C.F.R. §51.809(b) in proceedings before the applicable state commissions.

If Nextel adopts the Sprint ICA, AT&T's costs apparently will not increase as a result. Arguing speculative cost increases, using speculative scenarios, right after admitting AT&T does not have a cost exception under 47 C.F.R. §51.809, is a red herring within the context of these

[33] Second Report and Order ¶10.
[34] First Report and Order ¶1315.
[35] At the June 3, 2008 Agenda Conference, AT&T indicated it was not claiming either exception under §51.809(b).

dockets. Staff believes that AT&T has attempted to use the instant dockets as a vehicle for pre-empting speculative adverse consequences.

Conclusion

Staff recommends that Nextel's adoption of the Sprint ICA should be upheld as valid pursuant to 47 U.S.C. §252(i) and the FCC's implementing rule, 47 C.F.R. §51.809. In keeping with Order No. PSC-07-0831-FOF-TP, the Commission should affirm that Nextel is within its rights to adopt the Sprint ICA.

Issue 2A: Does the Commission have jurisdiction over AT&T's FCC Merger Commitments?

Recommendation: If the Commission approves staff's recommendation in Issue 1, this issue is moot because the Commission will have approved the adoption pursuant to §252(i) without reliance on application of the Merger Commitments. (Tan)

Position of the Parties

AT&T: The Commission does not have the jurisdiction under state law to interpret or enforce the AT&T/BellSouth merger conditions.

Nextel: Yes. By FCC Order, the Merger Commitments do not "restrict, supersede, or otherwise alter" this Commission's jurisdiction, or "limit state authority to adopt . . . policies that are not inconsistent with these Commitments." This Commission has already recognized its authority under Fla. Stat. §364.01(4) to acknowledge a Merger Commitment adoption.

Staff Analysis:

AT&T's Arguments

AT&T contends that the FCC holds exclusive jurisdiction over Merger Commitments. AT&T notes that the Commission has reached a similar finding in the Sprint/AT&T arbitration docket.[36] AT&T argues further that the Commission must have subject matter jurisdiction over Merger Commitments, which can only be granted by statute expressly or by necessary implication.[37] AT&T opines that the Commission's authority under the Act is not broad, nor does it include any general authority to resolve issues of federal law or FCC orders.[38]

AT&T contends that a state agency is not authorized to take action based on federal statutes, but receives authority conferred by the statutes that create the state agency.[39] In support of its contention, AT&T cites to Order No. PSC-03-1392-FOF-TP, issued December 11, 2003, where the Commission held that "it cannot provide a remedy (federal or state) for a violation of federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law."[40] AT&T further argues the Merger Order does not provide for interpretation of merger commitments to occur outside the FCC, and states that the Merger Commitments are separate and apart from the processes defined in §251/§252.[41]

[36] 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.
[37] AT&T Brief, p. 18.
[38] AT&T Brief, p. 19.
[39] AT&T Brief, p. 19.
[40] AT&T Brief, p. 19, citing Order No. PSC-03-1392-FOF-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information, Docket No. 030349-TP.
[41] AT&T Brief, pp. 20-21.

Nextel's Arguments

Nextel argues that the Act provides for dual federal and state jurisdiction. Nextel further argues that the Commission can interpret and apply federal law in exercising its authority pursuant to the Act and state law.[42] Nextel states that Section 364.01, F.S., which encourages and promotes competition between telecommunication carriers, confers authority to the Commission for purposes of interconnection-specific matters.[43] Nextel contends that the definition of service in Section 364.02(13), F.S., directs the Commission to "arbitrate, enforce, or approve interconnection agreements and resolve disputes as provided by U.S.C. §§ 251 and 252, or any other applicable federal law or regulation."[44]

In addition, Nextel argues that AT&T fails to cite the FCC language preserving dual authority, when it relied upon language that interpretation of the Merger Commitments did not involve state commissions. Nextel asserts that the FCC did intend for states to interpret merger commitments, and that Appendix F of the Merger Commitments provides that it:

> ". . . is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments."[45]

Nextel argues that this specific language establishes that the FCC envisioned dual authority for states and the FCC; therefore, the Commission has the authority to ensure that the adoption is consistent with Florida law.

Nextel argues that Merger Commitment 7.1 states that an adoption must be "consistent with the laws and regulatory requirements of the state for which the request is made," thereby directing the Commission's involvement with the Merger Commitments.[46] Nextel further argues that the Commission should look to decisions by the Georgia Public Service Commission,[47] the Kentucky Public Service Commission[48] and the Tennessee Regulatory Authority[49] which held that adoption of an intrastate interconnection agreement was not precluded by the Merger Commitments. Nextel asserts that the Commission has jurisdiction over the Merger Commitments to consider Nextel's adoption of the Sprint ICA because the last requirement of

[42] Nextel Brief, p. 21.
[43] Nextel Brief, p. 22.
[44] Nextel Brief, p. 22, citing Section 364.02(13), F.S.
[45] Nextel Brief, p. 23, citing the FCC Order at 147.
[46] Nextel Brief, p. 24.
[47] See Docket No. 25430, Order Granting Adoption of Interconnection Agreements, May 20, 2008, pg.7, establishing that the Merger Commitments applies to the porting of the Sprint ICA but does not prohibit its application to adoption.
[48] See Docket No. 2007-00255, Order, issued February 18, 2008, pp. 10-11, which found that Nextel can adopt the Sprint ICA pursuant to the merger commitments.
[49] Nextel cites to a statement from an April 21, 2008 transcript, p. 59, that plain language reading of Merger Commitment 7.1 is not applicable only to interstate agreements.

Merger Commitment 7.1 is that the adoption be consistent with the laws and regulatory requirements of the state for which the request is made.[50]

Analysis and Conclusion

If the Commission approves staff's recommendation in Issue 1, this issue is moot because the Commission will have approved the adoption pursuant to §252(i) without reliance on application of the Merger Commitments.

If, however, the Commission denies staff's recommendation for Issue 1, staff notes that pursuant to Order No. PSC-07-0680-FOF-TP, issued August 21, 2007, in Docket No. 070249-TP, the Commission rejected Sprint's request for the Commission to assert complete jurisdiction over the AT&T Merger Commitments. The Commission held that where there is an open §252 arbitration that intertwines with the Merger Commitments, the Commission would have jurisdiction, as the Commission has state and federal authority regarding §251 and §252 matters. The instant dockets are not before this Commission as an open issue in a §252 arbitration; therefore, consistent with the Commission's previous finding, the Commission would not have jurisdiction in this instance.

[50] Nextel Brief, p. 24.

Issue 2B: If so, do the Merger Commitments allow Nextel to adopt the Sprint ICA?

Recommendation: As discussed in Issue 2A, if the Commission approves staff's recommendation in Issue 1, this issue is moot. (Tan)

Position of the Parties

AT&T: If the Commission has jurisdiction to interpret and enforce the merger commitments, the merger commitments do not allow Nextel to adopt the Sprint ICA.

Nextel: Yes. Independent of Section 252(i) the Merger Commitments allow Nextel to adopt "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.

Staff Analysis:

As discussed in Issue 2A, if the Commission approves staff's recommendation in Issue 1, this issue is moot because Nextel's adoption of the Sprint ICA is available pursuant to §252(i). However, if the Commission were to find that (1) Nextel cannot avail itself of §252(i) of the Act, and (2) the Commission does have jurisdiction over the Merger Commitments, staff believes that the Merger Commitments do not provide a basis for allowing an intrastate adoption, as requested by Nextel in the instant proceedings.

AT&T's Arguments

AT&T argues that the Commission should allow the FCC to rule before attempting to exercise any jurisdiction over the Merger Commitments. AT&T states that Merger Commitment 7.1 establishes interstate porting and does not address the in-state adoption rights carriers already had prior to the addition of the Merger Commitments. AT&T asserts that while Merger Commitment 7.2 applies to in-state adoptions, it has no bearing here because the Sprint ICA was already amended to reflect changes of law. AT&T contends that any general obligation under § 252(i) is not applicable if AT&T as the ILEC proves the cost exception and states that Merger Commitment 7.1 must also be limited so as to avoid imposing greater costs on the ILEC.[51]

Nextel's Arguments

Nextel argues that state-specific requirements do not preclude in-state adoptions. Nextel asserts that the Merger Commitments are intended to streamline the process for obtaining agreements and encourage competition by reducing interconnection costs between a requesting carrier and AT&T, not for creating roadblocks to a competitive marketplace.[52] Application of the plain and ordinary meaning of words in Merger Commitment 7.1 entitles Nextel to adopt the Sprint ICA pursuant to the Merger Commitments because Nextel is a requesting

[51] AT&T Brief, pp. 22, 24-25.
[52] Nextel Brief, pp. 25-26.

telecommunications carrier who has a specific current underlying ICA to adopt, and that has state-specific pricing and performance plans for Florida. Nextel asserts that AT&T's position attempts to impose a non-existent requirement that the agreement be ported from one state to another. Nextel states that other states, including the Georgia Public Service Commission, the Kentucky Public Service Commission and the Tennessee Regulatory Authority, found that the Merger Commitments did not preclude the adoption of an in-state interconnection agreement.[53]

Analysis

Based upon the arguments stated in the previous issue and staff's recommendation that the FPSC does not have jurisdiction over the Merger Commitments unless intertwined with open issues of a §252 arbitration, whether or not Nextel may adopt the Sprint ICA pursuant to Merger Commitments becomes moot without further determination.

However, should the Merger Commitments be within the FPSC's jurisdiction, Merger Commitment 7.1 and 7.2 potentially impact Nextel's adoption of the Sprint ICA in Florida.

- Merger Commitment 7.1

Merger Commitment 7.1 deals primarily with the state-to-state porting of acknowledged Interconnection Agreements, stating that:

> 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.[54]

In the instant proceedings, an intrastate adoption has been requested. Staff believes that the Merger Commitments neither preclude intrastate adoptions, nor do they specifically provide for intrastate adoptions. The Merger Commitments are not stand alone conditions, but rather work in conjunction with the existing obligations under § 252(i) of the Act and FCC rules, such as 47 C.F.R. §51.809. Staff believes that intrastate adoption is available pursuant to §252(i) and that the merger commitments were only intended to address interstate porting of ICAs.

AT&T raises the issue of cost and states that the Merger Commitments should be limited to avoid imposing a greater cost on an ILEC.[55] Rather than look to the Merger Commitments

[53] Nextel Brief, p. 27.
[54] FCC BellSouth Merger Order, at p. 149, Appendix F.
[55] AT&T Brief, pp. 24-25.

regarding cost, staff believes it is more appropriate to apply 47 C.F.R. § 51.809(b), which allows for two exceptions, technical feasibility and cost. As stated previously, the Merger Commitments provide an overlay to the ILEC's obligations regarding interstate porting.

Both AT&T and Nextel's interpretations are plausible and pivot around whether an intrastate adoption and interstate porting are both addressed by Merger Commitment 7.1. However, staff believes that the Merger Commitments are supplemental in nature to the existing obligations. Intrastate adoption of an ICA is handled pursuant to the Act and applicable FCC rules, while interstate porting is addressed by the Merger Commitments, specifically 7.1. Following this line of reasoning, Merger Commitment 7.1 does not expressly create any additional rights to intrastate adoption of existing ICAs.

- Merger Commitment 7.2

  Merger Commitment 7.2 deals with provisions of a change in law, stating that

  > The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the grounds 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 in the agreement.[56]

Staff believes Merger Commitment 7.2 does apply to intrastate agreements. However, both parties agree that the underlying Sprint ICA has been amended to reflect applicable changes of law. Therefore, if the Commission were to find jurisdiction over the Merger Commitments, Merger Commitment 7.2 need not be considered as it does not affect Nextel's ability to adopt the underlying Sprint ICA in the instant proceedings.

Conclusion

If the Commission approves staff's recommendation in Issue 1, this issue is moot because Nextel's adoption of the Sprint ICA is available pursuant to §252(i). Staff believes that should the Commission find that Nextel cannot avail itself of §252(i) of the Act, and that the Commission does have jurisdiction over the Merger Commitments, staff believes that the Merger Commitments do not provide a basis for allowing an intrastate adoption, as requested by Nextel in the instant proceedings.

[56] FCC BellSouth Merger Order, at p. 149, Appendix F.

Issue 3: If the answer to Issue 1 or Issue 2B is "yes," what should be the effective date of Nextel's adoption of the Sprint ICA?

Recommendation: If the answer to Issue 1 or Issue 2B is "yes," staff recommends the effective date of Nextel's adoption of the Sprint ICA should be June 8, 2007. (Tan, Bates)

Position of the Parties

AT&T: If the answer to Issue 1 or Issue 2B is "yes," then the effective date of Nextel's adoption of the Sprint ICA should be thirty (30) calendar days after the final party executes the adoption document.

Nextel: The effective date should be June 8, 2007, the date of Nextel's Notice of Adoption. Any other date is inconsistent with sound public policy and the Merger Commitments, resulting in prejudice to Nextel and rewarding AT&T for any delay that has occurred, regardless of the reason for delay.

Staff Analysis:

AT&T's Arguments

AT&T argues that the effective date should be 30 calendar days after the final party executes the adoption contract. AT&T argues that the Sprint ICA was not available when Nextel requested its adoption on June 8, 2007 because the contract was in an "expired" status and therefore cannot have an effective date of June 8, 2007.[57] AT&T asserts that its obligation under 252(i) to make an agreement available is limited to a "reasonable period of time," and the Sprint ICA was no longer available at the time of Nextel's adoption request.

AT&T argues that by applying a June 8, 2007 effective date, the Commission will in effect create a retroactive effective date. AT&T states that a retroactive effective date is counter to "basic rules of contract formulation," and is, in addition, not required by the Merger Commitments.[58] AT&T further argues that this would impose a financial penalty by negating the reciprocal compensation paid by Nextel and would be equivalent to retroactive ratemaking. AT&T asserts that it did not wrongfully or otherwise delay the adoption process.[59]

AT&T requests the Commission implement certain conditions should the Commission decide to allow Nextel to adopt the Sprint ICA. AT&T requests that the Commission "specify in its Order that: (1) AT&T Florida is entitled to terminate the bill-and-keep arrangement in the adopted agreement; (2) if AT&T Florida terminates the bill-and-keep arrangement in the adopted agreement, Nextel and AT&T Florida must negotiate new reciprocal compensation arrangements; (3) any new reciprocal compensation arrangements, whether resulting from mutual agreement of the parties or from a ruling by the Commission or the FCC, shall apply as of the effective date of the adoption."

[57] AT&T Brief, p. 26.
[58] AT&T Brief, p. 28.
[59] AT&T Brief, p. 29.

Nextel's Arguments

Nextel argues its statutory rights must be obtained on an expedited basis, and AT&T's litigation strategy consisting of "serial objections" served to delay the proceeding. Nextel asserts AT&T's actions have been contrary to federal law.[60] Nextel argues that the adoption is presumptively effective from the date of Nextel's notice (June 8, 2007), consistent with the federal law that requires AT&T as an ILEC to respond expediently.[61] Nextel further argues that a June 8, 2007 effective date is Nextel's right by due process if the Commission follows its existing procedure with respect to adoption notices, as AT&T has failed to prove to the Commission any exception to the adoption. Nextel contends that AT&T must honor this date since the Sprint ICA is current and effective. Under the concept of "true-up" AT&T must not benefit from its delay in honoring its obligation and must provide the requested adoption as if no protest had occurred.[62]

Analysis

The Act states that an ILEC shall make available any interconnection, service, or network element provided under an agreement approved under this section. The adoption of an ICA does not create or modify an approved ICA, but simply replicates the agreement and substitutes one or more new entities for the original non-ILEC party or parties. The underlying ICA between AT&T and Sprint, submitted by a joint motion, extended their existing interconnection agreement as of March 20, 2007, in Docket No. 070249-TP.[63]

Two issues based on the Sprint ICA have been raised by AT&T: the Sprint ICA was "expired" on June 8, 2007, when Nextel's filed its Notice of Adoption, and AT&T has an alleged right to terminate the "bill-and-keep" arrangement. When Sprint and AT&T filed their joint motion to approve amendment, the parties stated that it was an effective interconnection agreement. AT&T and Sprint stated the interconnection agreement was in operation and enforceable by both parties. The Commission subsequently approved the Sprint ICA amendment in Order No. PSC-08-0066-FOF-TP.

When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption party. Without objection from the ILEC, the adoption would be acknowledged effective as of the filing date.

In the instant dockets, AT&T filed a Motion to Dismiss, which the Commission denied on October 16, 2007, in Order No. PSC-07-0831-FOF-TP. The Motion to Dismiss pauses the Adoption but does not halt the process entirely. When a party files a Notice of Adoption, the adoption is considered presumptively valid and effective upon receipt of the adoption notice. If the Commission approves Issue 1 or Issue 2B, that Nextel is allowed to adopt the Sprint ICA,

[60] Nextel Brief, p. 28.
[61] Nextel Brief, p. 29.
[62] Nextel Brief, p. 29.
[63] Sprint ICA, Section 2.1 states "Agreement is extended three years from March 20, 2007 and shall expire as of March 19, 2010."

this means that AT&T did not have a valid objection to the Adoption. Therefore, staff believes the process should continue where paused as there is no barrier to adoption under FCC Rule 47 C.F.R. 51.809(a). The effective date should not be affected by the passage of time during the litigation of this issue, and the effective date should remain June 8, 2007.

AT&T requests the Commission approve conditions should the Commission acknowledge Nextel's adoption. With the exception of the previous conclusion that the Sprint ICA does not require both a wireline and a wireless party, staff believes it not ripe to address AT&T's list of conditions. To the extent that there is a future dispute between the parties, any party to the agreement may pursue their rights pursuant to the dispute resolution provision in the interconnection agreement.

Conclusion

Staff recommends that if the Commission approves Nextel's adoption of the Sprint ICA, then the Commission should find the adoption is effective as of June 8, 2007.

Issue 4: Should this docket be closed?

Recommendation: If the Commission approves Nextel's adoption of the Sprint ICA in Issue 1 or Issue 2B, Docket Nos. 070368-TP and 070369-TP should remain open pending the filing of the signed adoption between the parties, which should occur no later than 7 days following the Commission's vote. These dockets should be closed administratively upon issuance of a memo by staff acknowledging the Adoption of the Sprint – AT&T Interconnection Agreement.

If the Commission denies Nextel's adoption of the Sprint ICA in Issue 1 and Issue 2B, Docket Nos. 070368-TP and 070369-TP should be closed upon issuance of the Final Order. (Tan)

Staff Analysis: If the Commission approves Nextel's adoption of the Sprint ICA in Issue 1 or 2B, Docket Nos. 070368-TP and 070369-TP should remain open pending the filing of the signed adoption between the parties, which should occur no later than 7 days following the Commission's vote. These dockets should be closed administratively upon issuance of a memo by staff acknowledging the Adoption of the Sprint – AT&T Interconnection Agreement.[64]

If the Commission denies Nextel's adoption of the Sprint ICA in Issue 1 and Issue 2B, Docket Nos. 070368-TP and 070369-TP should be closed upon issuance of the Final Order.

[64] If Nextel's Adoption is granted under Section 252(i), the adoption may be acknowledged by administrative memo pursuant to A.P.M. 2.07.C.5.b. If Nextel's Adoption occurs under Merger Commitments, administrative acknowledgment is granted by Docket No. 020353-TP, Order No. PSC-02-1174-FOF-TP, Order Approving Petition for Acknowledgment of Adoption of an Agreement under FCC Approved Merger Conditions and Granting Staff Authority to Administratively Acknowledge Adoption of Agreements Under FCC Approved Merger Conditions and Order Amending Administrative Procedures Manual.