

State of Florida



## Public Service Commission

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

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**DATE:** November 18, 2008

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Compliance (Bates)  
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:** 12/02/08 – Regular Agenda – Motion for Reconsideration – Oral Argument Not Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\070368.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")<sup>1</sup>, pursuant to AT&T/BellSouth Merger Commitments and Section 252(i) of the Federal Telecommunications Act of 1996 (Act).

The Florida Public Service Commission (Commission) approved Nextel's adoption of the Sprint ICA<sup>2</sup> on September 4, 2008. The Commission's vote was finalized by Order No. PSC-08-0584-FOF-TP, issued September 10, 2008. On September 11, 2008, AT&T filed the Notice of Adoption by Nextel of the Sprint ICA on September 11, 2008. On September 17, 2008, AT&T filed a Motion for Reconsideration of a portion of Order No. PSC-08-0584-FOF-TP.

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

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

This recommendation addresses AT&T's Motion for Reconsideration.

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<sup>1</sup> "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.

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

### Discussion of Issues

**Issue 1:** Should the Commission grant BellSouth Telecommunications, d/b/a AT&T Florida's Motion for Reconsideration?

**Recommendation:** No. Staff recommends that AT&T fails to identify any points of fact or law that the Commission overlooked or failed to consider in its decision; therefore, AT&T's Motion for Reconsideration should be denied. Staff also recommends that the Commission clarify that Nextel is adopting the current Sprint ICA, which includes the 3-year term Extension Amendment jointly filed on December 4, 2007 by AT&T Florida and Sprint in Docket No. 070249-TP, which was effective March 20, 2007. **(Tan)**

**Staff Analysis:** As set forth in the Case Background, AT&T filed a Motion for Reconsideration of a portion of Order No. PSC-08-0584-FOF-TP (Final Order), to which Nextel responded in opposition. The parties' arguments are addressed in the following analysis.

#### I. Standard of Review

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

#### II. Parties' Arguments

##### A. AT&T's Motion for Reconsideration

AT&T seeks reconsideration of the portion of the Commission's decision allowing Nextel to adopt the Sprint ICA with an effective date of June 8, 2007. AT&T asserts that the effective date should properly be no earlier than the date upon which the Commission approved the adoption. In support of its Motion, AT&T argues that the Commission overlooked or failed to consider several points of fact or law in reaching its decision. Particularly, AT&T contends that the Commission failed to consider Section 364.162(1) of the Florida Statutes, as well as prior Commission rulings within which the Commission found an adopted interconnection agreement effective only after the Commission approves it.

With regards to Section 364.162(1), Florida Statutes (F.S.), AT&T specifically pinpoints the portion which states explicitly that "whether set by negotiation or by the commission, *interconnection and resale prices, terms and conditions shall be filed with the commission before*

*their effective date.*” AT&T contends that this requires that interconnection rates, terms and conditions be filed with the Commission before they go into effect and therefore, prohibits retroactive effective dates. AT&T argues that the Commission’s decision in this docket establishes a retroactive effective date for Nextel’s adoption of the Sprint ICA.

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

#### B. Nextel’s Response

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

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

#### III. Analysis

AT&T contends that in ruling upon the post - hearing recommendation, the Commission was incorrect in the following respects: 1) the Commission did not correctly apply previous Commission Orders; and 2) the Commission did not consider Section 364.162(1), F.S., when setting the effective date for Nextel’s adoption of the Sprint ICA. For the reasons set forth below, staff recommends that the Commission find that AT&T’s Motion for Reconsideration fails to meet the standard of review and therefore, should be denied.

A. Prior Commission Orders

AT&T proposes that the Commission failed to consider the following Commission Orders, the Sprint-GTE Order and the MCImetro–BellSouth Order, which discussed effective dates of interconnection agreements. AT&T argues that the Commission established precedent in these orders. However, each Order involved a different set of facts and circumstances. The Sprint-GTE Order involved the parties entering into an arbitrated interconnection agreement and subsequently requesting to adopt a different interconnection agreement while still bound by the Commission approved arbitrated interconnection order. At the time of the MCImetro–BellSouth Order, CLECs were still permitted to “pick and choose” provisions from various interconnection agreements pursuant to FCC rules, which were amended later to require the “all or nothing” approach currently in place today. The petitioners had requested that the Commission approve its new interconnection agreement created from language from other interconnection agreements, which were specifically requested by the petitioners. However, these Orders dealt with specific facts and actions requested by the petitioners from the Commission, neither of which were an adoption of an approved interconnection agreement pursuant to 47 U.S.C. § 252(i).

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

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

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

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

C. Previous Actions

Specifically, AT&T argues that a new effective date should be considered because we failed to consider previous Commission action and restates the reason AT&T believes that the effective date is incorrect. AT&T is simply rearguing the points that were already asserted by AT&T in its post-hearing brief. Both AT&T and Nextel extensively briefed the issue of the effective date and AT&T’s arguments regarding the effective date were considered. Re-

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argument or reweighing of the evidence is improper in the context of a motion for reconsideration. Sherwood v. State, 111 So. 2d 96 (Fla. 3<sup>rd</sup> DCA 1959), Stewart Bonded Warehouse, Inc. v. Bevis, 293 So. 2d 315 (Fla. 1974).

Both AT&T and Nextel have discussed the effective date. However, the Commission does not have to respond in its opinion to every argument and fact raised by each party. Staff believes that the Commission has considered both parties arguments. The Court in State ex. Rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1959) stated:

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

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

However, Nextel has identified an aspect of the Order that should be clarified or amended, as set forth in the following staff analysis. As noted in the Case Background, both parties filed letters addressing whether the interconnection agreement is properly referenced in the Notice of Adoption filed by AT&T pursuant to Order No. PSC-08-0584-FOF-TP. In particular, staff recommends clarifying that the Commission approved the adoption of the current Sprint ICA by Nextel.

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

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

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

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<sup>3</sup> Id. at 819.

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

To avoid any misinterpretation of the Order, staff recommends that the Commission clarify that Nextel is adopting the current Sprint ICA, which includes the 3-year Extension Amendment jointly filed on December 4, 2007 by AT&T Florida and Sprint in Docket No. 070249-TP, which was effective March 20, 2007. The above cited language is inconsistent with the clarification since the 3-year Extension Amendment was not approved until Order No. PSC-08-0066-FOF-TP was issued January 29, 2008. AT&T and Nextel will need to refile the adoption in both of the instant dockets with conforming language, as addressed in Issue 2.

#### IV. Conclusion

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

Docket Nos. 070368-TP, 070369-TP

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**Issue 2**: Should these Dockets be closed?

**Recommendation**: Docket Nos. 070368-TP and 070369-TP should be closed administratively by staff once the parties refile the adoption in both of the instant dockets, and staff determines that the contractual language conforms with the Commission's decisions in the these dockets.

**(Tan)**

**Staff Analysis**: Docket Nos. 070368-TP and 070369-TP should be closed administratively by staff once the parties refile the adoption in both of the instant dockets, and staff determines that the contractual language conforms with the Commission's decisions in the these dockets.