

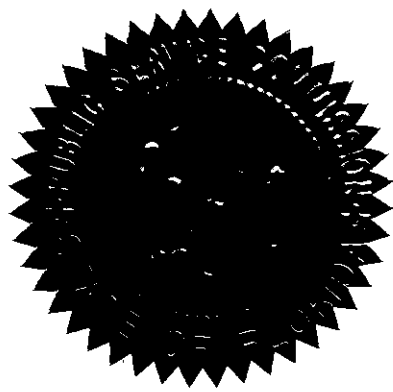
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Matter of:

NOTICE OF ADOPTION OF EXISTING DOCKET NO. 070368-TP
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.

NOTICE OF ADOPTION OF EXISTING DOCKET NO. 070369-TP
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.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, September 4, 2008

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6734

1 PARTICIPATING:

2 ADAM TEITZMAN, ESQUIRE, JEFF BATES and SALLY SIMMONS,
3 representing the Florida Public Service Commission staff.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

1
2 CHAIRMAN CARTER: Give staff a moment to get set up
3 here and we'll be on Item 5.

4 Okay. Staff, you're recognized for Item 5.

5 MR. TEITZMAN: Thank you, Mr. Chairman. Adam
6 Teitzman on behalf of Commission staff.

7 Commissioners, Item 5 is a posthearing recommendation
8 addressing Nextel's notice of adoption of an interconnection
9 agreement between Sprint and AT&T. At the June 3rd Agenda
10 Conference the Commission denied Nextel's motion for summary
11 final order and set this matter for a 120.57(2) proceeding,
12 which is commonly referred to as a paper hearing.

13 The recommendation before you addresses the issues
14 agreed upon and briefed by the parties. Chairman, at your
15 preference Mr. Bates is prepared to introduce Issue 1 for the
16 Commission's consideration.

17 CHAIRMAN CARTER: You're recognized.

18 MR. BATES: Good morning, Commissioners. I'm
19 Jeff Bates of the Regulatory Compliance Division.

20 The parties stipulated that Issue 1 is "Can Nextel as
21 a wireless entity avail itself of 47 U.S. Code Section 252(i)
22 to adopt the Sprint ICA?" AT&T believes Nextel may not adopt
23 the Sprint ICA because Nextel is not adopting upon, the
24 agreement upon the same terms and conditions, and Nextel is
25 seeking provisions from the ICA that provide reciprocal sharing

1 of costs. Nextel states that any requesting telecommunications
2 carrier can avail itself of Section 252(i) of the Act
3 regardless of the technology it uses to provide service. Per
4 federal law, the only exceptions upon which AT&T may rely to
5 avoid Nextel's adoption do not apply in this case.

6 The Act obligates telecommunications carriers
7 to interconnect with other telecommunications carriers,
8 and the only exceptions to this obligation are contained in
9 47 C.F.R. Section 51.809(B)(1) and (B)(2). These are the cost
10 and technical feasibility exceptions.

11 The FCC rejected the similarly situated argument in
12 the second report and order when it wrote, "We reject the
13 contention of at least one commenter that incumbent LECs should
14 be permitted to restrict adoptions to similarly situated
15 carriers." Staff believes Nextel is within its rights to adopt
16 the Sprint ICA under 47 U.S. Code 252(i).

17 CHAIRMAN CARTER: Thank you. Commissioners, this is
18 posthearing, so it's limited to Commissioners and staff only.

19 Commissioner McMurrian, you're recognized.

20 COMMISSIONER McMURRIAN: Thank you, Chairman.

21 I know staff knows that I've struggled with this one
22 a lot just because -- and I guess this is the best way to start
23 off because I do have some questions but I want to say this to
24 begin with. The reason I've struggled with this one is I'm
25 afraid that the decision, if we adopted the staff rec, would

1 lead to an unfair result, but not by a fault of ours, not by
2 something we haven't done or something we've overlooked, but by
3 the lack of any clear protection in federal law or orders. And
4 that seems to be the case to me -- just to put it in a little
5 bit of context, I guess. I know we all have reviewed this, but
6 there's an agreement between AT&T and two entities, one is a
7 wireless carrier, Sprint PCS, and one is a CLEC, the Sprint
8 CLEC. And according to the pick and choose rule that used to
9 be on the books at the FCC, parties could pick provisions out.
10 And then that was changed by the FCC, and I think that was a
11 good decision. You had to adopt the whole agreement or not at
12 all and I think that was a good provision.

13 AT&T, I think, is making the argument that it's, it's
14 not really fair, and I guess I tend to agree with them here,
15 that it's not really fair that a party such as Nextel as a
16 wireless carrier can adopt in a sense half of the agreement
17 because only half of the agreement, well, maybe it's not
18 exactly half, but part of the agreement wouldn't apply to
19 Nextel because they're not a CLEC. And that in a sense, the
20 way AT&T has characterized it, that that would be in a sense a
21 pick and choose because you're only picking out parts of the
22 agreement that pertain to the wireless carrier.

23 I don't think that the law allows that splitting
24 though, as Mr. Bates suggested. There's some important orders
25 that suggest that you can't make the similarly situated

1 argument or that that won't really hold up. But, again, I kind
2 of go back to it doesn't seem like a reasonable result or a
3 fair result. And the reason I say that and the reason that I
4 didn't like the pick and choose rule is I believe in the give
5 and take of negotiations there may be a provision -- well, let
6 me leave it to this example.

7 In this example it may be that part of the agreement
8 was more beneficial to the wireless carrier and part of it, and
9 part of the agreement where something was given up was on the
10 CLEC side. And if a wireless carrier comes in and adopts in a
11 sense part of the agreement, that they also haven't given up
12 the other part that would be subject to negotiations. So
13 that's why I say that I think that it's not really a fair
14 result. I do think that Nextel has made a case for being able
15 to adopt because of the way the federal law is laid out. I
16 guess I would encourage parties to try to clear that up.

17 I do have a few questions though just to make sure
18 that I've got it all straight here about how the agreement
19 would work. Given that Nextel would be adopting the agreement
20 and there is no CLEC that would be adopting the agreement with
21 them and that they are not a certificated CLEC, is Nextel as a
22 carrier substituted for every reference to Sprint PCS and the
23 Sprint CLEC throughout the agreement or would it only be that
24 they would be inserted into the areas where the wireless
25 carrier was in the agreement before?

1 MR. BATES: Commissioner, Jeff Bates with Regulatory
2 Compliance.

3 The preamble to the underlying agreement separates
4 the entities by name. When it refers specifically to the CLEC
5 portion of the company it refers to Sprint CLEC. When it
6 refers specifically to Sprint PCS, that is the wireless
7 aspects, it specifically means the wireless aspects for Sprint
8 PCS.

9 The third description that they use is Sprint when it
10 includes both Sprint PCS and Sprint CLEC or either Sprint PCS
11 or either Sprint CLEC. So in that context, every service,
12 every term and every condition is covered by the description of
13 who can use what.

14 COMMISSIONER McMURRIAN: So, Mr. Chairman, if I may,
15 so everywhere Sprint PCS is throughout the agreement definitely
16 Nextel would be inserted. But what about where Sprint CLEC
17 shows up in the agreement? Would Nextel be replaced, would the
18 word Nextel go in place of Sprint, of Sprint CLEC even though,
19 of course, Nextel is not a CLEC?

20 MS. SIMMONS: Commissioner McMurrrian, this is Sally
21 Simmons with Regulatory Compliance. My answer to that would be
22 that Nextel would be inserted in every mention.

23 COMMISSIONER McMURRIAN: Okay.

24 MS. SIMMONS: There are also some safeguards in the
25 contract in terms of how various provisions can be used. And I

1 think that, that would clear up any kind of confusion as to
2 how, as they say, how a provision would be used.

3 COMMISSIONER McMURRIAN: So it would be, it would be
4 clear -- if there was something that only a CLEC could avail
5 itself of, Nextel wouldn't be able to, to avail itself of that
6 provision because it would be clear in the contract that it was
7 a CLEC provision?

8 MS. SIMMONS: Well, I don't believe, and Mr. Bates
9 can jump in to clarify here, but I don't believe it's actually
10 expressed that way.

11 I'll give you an example. For instance, unbundled
12 network elements cannot be purchased for provision of wireless
13 service. That's as an example. So it's, the agreement is more
14 descriptive in terms of how the various provisions can be used.

15 COMMISSIONER McMURRIAN: Okay. Okay. I think, I
16 think that does it. Let me see.

17 So it should be clear going forward -- and, for
18 instance, if we were to have any dispute arising out of the
19 interconnection agreement, it should be clear to us or even to
20 the, more importantly to the parties which provisions clearly
21 would only apply to Nextel because they are a wireless carrier.

22 MR. BATES: Yes, Commissioner.

23 COMMISSIONER McMURRIAN: Okay. Let me just -- and
24 this is sort of off the top of my head.

25 How often does it happen that you have an agreement

1 between like in this case an ILEC and then two other parties?
2 Do we have other agreements like that?

3 MR. BATES: To my knowledge this is the only one.

4 COMMISSIONER McMURRIAN: Okay.

5 MR. BATES: But I don't believe that there's a rule
6 or statute that says there must be or there must not be.

7 MS. SIMMONS: Sally Simmons again. It's not unusual
8 to have, for instance, multiple CLEC entities under the same
9 family that are party to the same agreement.

10 COMMISSIONER McMURRIAN: Okay. Okay. Then I have a
11 few more questions, Mr. Chairman.

12 CHAIRMAN CARTER: You're recognized.

13 COMMISSIONER McMURRIAN: One of the other concerns
14 that AT&T had raised about the adoption was that essentially it
15 sort of starts the slippery slope, if Nextel adopts the
16 agreement because of merger commitments and some other things
17 that are going on specific to AT&T, that other carriers in
18 other states may be able to also adopt that agreement because
19 of the porting (phonetic) language and the merger commitments
20 and things like that. I know we're not really deciding that
21 today.

22 And I know that you all have made the point that, of
23 course, AT&T didn't raise the cost exception. But if, for
24 instance, another carrier wants to adopt the agreement, another
25 wireless carrier, and AT&T were to invoke the cost exception,

1 whether that's before us or before some other Commission, would
2 wireless carriers also have to provide that cost study the same
3 way that Sprint did in the original agreement to prove that the
4 balance of traffic would be there such that it would justify
5 the bill-and-keep provisions?

6 MS. SIMMONS: I believe in that instance the burden
7 would be on the ILEC, in this case AT&T, to prove the cost
8 exception to the state Commission.

9 COMMISSIONER McMURRIAN: Okay. I think, I think that
10 may be it for my questions, Mr. Chairman.

11 CHAIRMAN CARTER: Thank you.

12 Commissioners, any further questions on Issue 1?
13 Okay. No further questions, Commissioners, what's, what's your
14 pleasure on the disposition of Issue 1? Commissioner Edgar?

15 COMMISSIONER EDGAR: I guess I'd like to, if I may,
16 just sort of take the discussion a little further to -- I was
17 going to say play off, that's not the right phrase, but to take
18 some of the comments and questions --

19 CHAIRMAN CARTER: On Issue 1?

20 COMMISSIONER EDGAR: Yes. On Issue 1.

21 CHAIRMAN CARTER: Okay.

22 COMMISSIONER EDGAR: Thank you.

23 Commissioner McMurrrian, you had mentioned earlier
24 some concerns about perhaps, in your words, an unfair result,
25 and I think I understand what you mean by that and have had

1 some of the, I think, similar thoughts when I was meeting with
2 staff as well. So I guess could you maybe just elaborate on
3 that? Because I'm not, I'm not sure how much discretion there
4 is under the fact scenario that is, that is before us.

5 COMMISSIONER McMURRIAN: Certainly. Mr. Chairman?

6 CHAIRMAN CARTER: You're recognized.

7 COMMISSIONER McMURRIAN: Yes. Where, where I'm,
8 where I'm coming from is that in this particular situation, and
9 it sounds like we don't have a lot of these where you have an
10 ILEC, normally we have agreements between ILECs and one party
11 whether it's an ILEC and a wireless company or an ILEC and a
12 CLEC, it's usually just those two parties. And with the all or
13 nothing rule, you do, you take the good with the bad, and that
14 good with the bad that came with the negotiation process, that
15 seems fair to me. And unlike the old regime of the pick and
16 choose, I think you could pick out things that were beneficial
17 to you and you could, of course, leave behind those things that
18 weren't exactly so pretty.

19 And I think you have sort of an extension of that in
20 this case. And I think it's unusual and it hasn't come up, I
21 don't think, I'm not saying that Nextel hasn't -- I think under
22 the law, the federal laws and orders that are out there and
23 that staff has referenced, it seems like there's not a lot of
24 flexibility there to say, well, this may not be entirely fair,
25 we may not like it, but still that's what the laws seem to

1 point to in my mind. It seems to say that they can adopt it.
2 And I've looked through the contract language somewhat, some of
3 the language that AT&T has pointed out in their briefs.

4 I still think though that in, if there's some way to
5 make that process better, it seems like there's some things
6 going on at the FCC, maybe they've raised some of these issues
7 that perhaps they could say similar to what was wrong with the
8 pick and choose rule is wrong in this case. As a wireless
9 carrier, Nextel, and I'm not sure exactly which provisions are
10 good or bad for Nextel in this agreement, but Nextel would
11 really only be adopting, in a sense would really only be
12 adopting the portions that pertain to a wireless carrier.

13 So, for instance, if there are things that were sort
14 of the give part in the original agreement, they wouldn't be
15 giving those. They may only be getting the good pieces of the
16 part on the wireless side. I don't know that that's true, but
17 it seems like an unreasonable result to have a party adopt the
18 whole agreement, and I think they're doing that consistent with
19 the law, but most of it or a good part of it may not even apply
20 to them and that could be where the give part of the
21 negotiation is. And that's why I think that that may be
22 somewhat unfair.

23 AT&T did not invoke the cost exception, so I think
24 that they have that ability to show that in this case that
25 there wouldn't be a balance of traffic and they could have made

1 the argument that Nextel, that in Nextel's adoption of that
2 agreement that it would have been an unfair cost imbalance and
3 therefore the bill-and-keep shouldn't apply. They didn't make
4 that argument here, so I think that that was an out. And in
5 other cases where others might try to adopt this agreement
6 there might be an argument that there's an imbalance of traffic
7 and AT&T may have that out in other, in other situations. But,
8 again, it doesn't seem like they've raised that here.

9 So it's not that I think that it's by a fault of ours
10 that, that we would be leading to an unfair result. I think
11 it's sort of just the way the process is set up. Perhaps it
12 just wasn't contemplated that you would have an agreement with
13 two entities like this, and it looks like most of them are not.
14 So in my mind it seems like in that sense it leads to an unfair
15 result because you're not really adopting the entire agreement.
16 I know legally they're adopting the entire agreement and it
17 looks like their name would go throughout it, but I don't think
18 they're really adopting the entire thing. That seems a little
19 bit like the pick -- well, it seems a lot like the pick and
20 choose rule to me.

21 But I'm not -- I guess I'm not suggesting -- I've
22 struggled over it. I don't like unfair results, of course,
23 and, but I can't seem to, I can't seem to read anything in
24 federal law other than how Mr. Bates has interpreted it that
25 would lead to, that would give us an ability to correct that on

1 our own, and that's where I'm at. But thank you for the
2 question.

3 CHAIRMAN CARTER: Thank you. Thank you.
4 Commissioner Argenziano.

5 COMMISSIONER ARGENZIANO: Yes, Mr. Chair. I think
6 that the CLEC has the, the, under the law the right to adopt
7 the agreement without discretion for us to look at fairness.
8 So I don't know how you ignore the law, whether it's fair or
9 not. So that's the result I come up with after reading the
10 statute.

11 CHAIRMAN CARTER: Commissioners? Commissioner
12 McMurrian, then Commissioner Edgar.

13 COMMISSIONER McMURRIAN: I'll just, I'll just add
14 that I would -- as this, as this debate continues, and I
15 suspect it might for all the reasons that AT&T is concerned
16 about other carriers adopting this same kind of agreement and
17 perhaps they may have traffic imbalances and perhaps the merger
18 commitments allow others to adopt it and maybe it would be even
19 hard to make that kind of a case, and for those concerns that
20 they would have, that they're going to have a lot of cost as a
21 result of this process. I mean, I'm concerned about that too.
22 It seems like that it would be appropriate for them to continue
23 to raise those concerns with the FCC, and I think I would
24 encourage them to do it. Because I think in the same way that
25 the pick and choose wasn't, you know, wasn't a fair way of, of

1 allowing adoptions, I think that this probably isn't entirely
2 fair either. But, again, it's no fault of Nextel's. I think
3 Nextel is just doing what they think is the best thing for
4 their company, and I do believe that the law allows them to do
5 it, as Commissioner Argenziano said.

6 CHAIRMAN CARTER: Thank you.

7 Commissioner Edgar.

8 COMMISSIONER EDGAR: Thank you. I was just going to
9 follow up on that and comment that I think, Commissioner
10 McMurrian, you've done, you know, an excellent job in laying
11 out a number of the issues that are kind of all wrapped up into
12 this and I appreciate that discussion.

13 I guess just to follow up on the comments of both of
14 my colleagues, as I said when I first sort of posed the
15 question, said let's discuss this a little bit more, that I
16 just don't see a whole lot of discretion under this factual
17 scenario and the law as it is before us. I think it raises a
18 number of those points kind of centered around the whole issue
19 of parity, and I know we will be having those discussions in
20 this forum and many others and I look forward to that over the
21 next little while.

22 But I am comfortable with the staff recommendation
23 under the scenario that we have before us and I can make a
24 motion at the appropriate time, Mr. Chair.

25 CHAIRMAN CARTER: Commissioners, before I recognize

1 Commissioner Edgar for the motion, any further discussion?

2 Commissioner Edgar, you're recognized for a motion.

3 COMMISSIONER EDGAR: Then per our discussion, I would
4 move that we approve the staff recommendations for Issues 1,
5 3 and 4, with the understanding that if that is approved,
6 Issues 2A and 2B would become moot.

7 COMMISSIONER SKOP: Second.

8 CHAIRMAN CARTER: It's been moved and properly
9 seconded. Commissioners, are there any questions or any
10 further discussion? Hearing none, all those in favor, let it
11 be known by the sign of aye.

12 (Unanimous affirmative vote.)

13 All those opposed, like sign.

14 Show it done.

15 (Agenda Item 5 concluded.)

16

17

18

19

20

21

22

23

24

25

1 STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
 2 COUNTY OF LEON)

3

4 I, LINDA BOLES, RPR, CRR, Official Commission
 Reporter, do hereby certify that the foregoing proceeding was
 5 heard at the time and place herein stated.

6 IT IS FURTHER CERTIFIED that I stenographically
 reported the said proceedings; that the same has been
 7 transcribed under my direct supervision; and that this
 transcript constitutes a true transcription of my notes of said
 8 proceedings.

9 I FURTHER CERTIFY that I am not a relative, employee,
 attorney or counsel of any of the parties, nor am I a relative
 10 or employee of any of the parties' attorneys or counsel
 connected with the action, nor am I financially interested in
 11 the action.

12 DATED THIS 10th day of September,
 13 2008.

14

15

Linda Boles
 LINDA BOLES, RPR, CRR
 FPSC Official Commission Reporter
 (850) 413-6734

16

17

18

19

20

21

22

23

24

25