

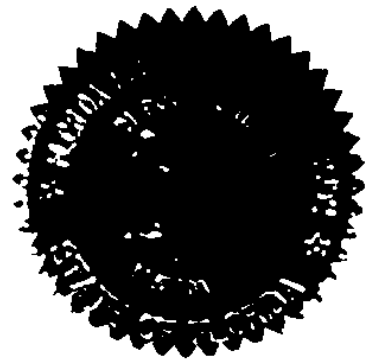
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of

Petition for approval of
election of interconnection
agreement with GTE Florida
Incorporated pursuant to
Section 352(i) of the
Telecommunications Act of
1996, by Sprint
Communications Company
Limited Partnership d/b/a
Sprint.

DOCKET NO. 971159-TP



PROCEEDINGS: **AGENDA CONFERENCE**
 ITEM NO. 16

BEFORE: **CHAIRMAN JULIA L. JOHNSON**
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER SUSAN F. CLARK
 COMMISSIONER JOE GARCIA
 (Teleconferencing from Miami)
 COMMISSIONER E. LEON JACORS, JR.

DATE: **Tuesday, February 3, 1998**

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

REPORTED BY: **JOY KELLY, CSR, RPR**
 Chief, Bureau of Reporting

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1 **PARTICIPATING:**

2 **BETH KEATING and MARTHA CARTER BROWN, FPSC**
3 **Division of Legal Services.**

4 **WAYNE STAVANJA and STAN GREER, FPSC Division**
5 **of Communications.**

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P R O C E E D I N G S

CHAIRMAN JOHNSON: Item 16.

MS. BROWN: Commissioners, Item 16 is Staff's post-hearing recommendation on Sprint's petition for approval to select an agreement other than the agreement the Commission approved for it in the arbitration proceeding.

The specific question in the case is whether a telecommunications company may choose another interconnection agreement with an incumbent LEC under the provisions of Section 252(1) of the 1996 Act after it has arbitrated an interconnection agreement with the Commission.

This is a case of first impression before the Commission, and while some other states have addressed the question, no Florida federal or state court has ruled on it.

As we said in the recommendation, this is a close case and we have, therefore, presented alternative recommendations for your consideration. Stan and I will present the primary and Beth and Wayne will present the alternative. We all think there's merit to both sides of this argument and before we got started we wanted to let you know that we believe either position is legally and logically supportable.

1 The primary recommendation proposes that
2 Sprint is precluded from taking another agreement
3 under the provisions of Section 252(1), because the
4 Commission has approved an agreement for Sprint and
5 GTE that is the result of a binding arbitration
6 proceeding that Sprint itself requested.

7 Sprint's request to discard that binding
8 agreement undermines the negotiation and arbitration
9 process that is central to the interconnection
10 provisions of the Act. Binding arbitrations conducted
11 by a state Commission when negotiations fail can
12 hardly be considered binding if a company can easily
13 reject them and choose something else instead.

14 I won't elaborate too much more in this
15 introduction. Our position is fully explained in the
16 recommendation, except I did want to say that when one
17 reads 252(1) in concert with the other provisions of
18 Section 252, and one understands that the purpose of
19 the Act is to encourage negotiations of workable,
20 practical binding interconnection agreements, it
21 doesn't appear to make much sense to then say that one
22 party to those agreements can renege on them and pick
23 another agreement and thus not really be bound by the
24 agreement at all whenever it chooses.

25 **CHAIRMAN JOHNSON:** Thank you, Ms. Brown.

1 **MS. KRATING:** Commissioners, in the
2 alternative Staff recommends that Sprint's petition be
3 granted in accordance with the plain language in
4 Section 252(i). Section 252(i) is not qualified in
5 any way, and Staff believes that this interpretation
6 best represents Congress's intent.

7 The purpose of the Telecommunications Act is
8 to open up competition in the telecommunications
9 market. Whether or not a company can navigate the
10 regulatory course in order to get to that competitive
11 market shouldn't determine whether a carrier enters
12 the market as a viable concern or not. Staff believes
13 that only the market itself should determine whether a
14 carrier survives. Section 252 is not part of the
15 competitive arena, and I note that your interpretation
16 of Section 252(i) is not going to affect just Sprint.
17 If any carrier for one reason or another finds itself
18 in an agreement that it believes hinders its ability
19 to compete, and if it has no means of obtaining a more
20 competitive agreement, that carrier may find itself
21 out of the market before it even really enters it.
22 The market, therefore, would be minus one competitor
23 and the consumers would be without another choice.

24 Staff does not believe that that's what
25 Congress intended, nor is that what the clear language

1 of Section 252(i) says.

2 **CHAIRMAN JOHNSON:** Okay. Any questions,
3 Commissioners?

4 **COMMISSIONER DEASON:** I don't want to
5 curtail discussion on it, but I'm willing to make a
6 motion. I would move Staff's alternative.

7 **CHAIRMAN JOHNSON:** There's a motion. Is
8 there a second?

9 **COMMISSIONER GARCIA:** I'll second.

10 **CHAIRMAN JOHNSON:** There's a motion and
11 second. Any further discussion?

12 **COMMISSIONER CLARK:** I just had the view it
13 said it was a binding agreement, and I thought it
14 should be binding for the terms that they agreed to.
15 You know, the point is the Act is inconsistent. And
16 we're supposed to sort of sort it out. And I just
17 took the view that Sprint could have chosen to wait
18 and see what developed. They chose to pursue their
19 own agreement. I don't think it hinders competition
20 in the sense that everybody pursues an agreement that
21 they believe would be in their best interest.

22 **COMMISSIONER DEASON:** Well, you know, I
23 don't disagree with what you're saying. It's one of
24 these things like Martha said earlier on the
25 presentation, there's very good arguments on both

1 sides.

2 I tend to agree with the alternate because I
3 read the plain meaning of the law that says the
4 carriers have the option to do that. And we didn't
5 write that; that's what is in the law, though. And I
6 think the plain meaning of that would allow a carrier
7 -- even though they had gone through binding
8 arbitration, if there was another agreement out there
9 which was more attractive, that they would have the
10 opportunity to choose that.

11 **COMMISSIONER CLARK:** I think it argues that
12 they can protect themselves. They can limit the
13 length of their agreement so that they could do that
14 if they needed to. I would only point out that I was
15 persuaded by the notion that this is akin to the pick
16 and choose that was struck down. I agree it's not
17 completely, because pick and choose says you take the
18 whole -- you can't just take elements, you have to
19 take the whole thing. But I think some of the
20 arguments are the same. You know, it doesn't cause me
21 heartburn if the decision goes the other way.

22 **COMMISSIONER DEASON:** Well, it won't cause
23 me heartburn if it goes the other way.

24 **COMMISSIONER JACOBS:** I'm persuaded to the
25 alternative analysis, but with a caveat. And it

1 really goes to these facts, where the company has --

2 **COMMISSIONER GARCIA:** Leon Jacobs.

3 (Commissioner Garcia talking on phone)

4 **COMMISSIONER JACOBS:** -- where the company
5 has negotiated the agreement, and it only -- my
6 concern is only that if they are going to do this, we
7 ought to be advancing the underlying principles of the
8 Act. And so I would love for their petition to
9 demonstrate how it either -- how it advances
10 competition for them to be allowed to invoke this
11 option.

12 I guess if they have this as a matter of
13 right, I guess that doesn't make a difference. So I
14 guess what my real issue is can someone who's already
15 negotiated an agreement as a matter of right walk out
16 of that agreement when there is no ramifications --
17 competitive issues raised by walking away from that
18 agreement? I guess that's my real concern..

19 **COMMISSIONER DEASON:** Well, my thoughts on
20 that -- you're concerned about the impacts on the
21 market, on the competitive market, competitive aspects
22 of allowing this?

23 **COMMISSIONER JACOBS:** Yeah.

24 **COMMISSIONER DEASON:** I tend to view it that
25 it encourages competition in the sense that we have a

1 company here; and in this case it's Sprint, but it
2 could have been any other company. When the market is
3 opened up, I think they could have just sat back and
4 said, "Well, we're going to wait and let somebody else
5 negotiate something and then if we like that, then
6 we're going to opt in." I think they were, you know,
7 under an obligation to try to get into the market as
8 quickly as they could, so I felt they had an
9 obligation to try to go forward and negotiate and
10 arbitrate their own and, hopefully -- and I'm sure it
11 was their intent to try to get as much -- the best
12 deal they could; what was most advantageous for them
13 and their business plan in their particular place in
14 the market. And they did that.

15 But, apparently, another negotiation or
16 arbitration or decision was made they found more
17 attractive. And I look at it -- I think it was
18 Congress's intent that if a competitor, then, did not
19 have the option to choose that, then they would be
20 negatively impacted in the market. Not because of
21 their quality of service or their prices or whatever,
22 but just because of their negotiating ability and what
23 they could get out of an arbitration process.

24 So I think that was part of Congress's -- as
25 I read it -- their intent to allow a company to do

1 this. I think it would be inappropriate for a company
2 to be disadvantaged, for one area to have a more
3 advantageous agreement and another carrier not be able
4 to opt into it, because then they would be negatively
5 impacted in the market.

6 That's the reason I'm comforted that what
7 we're doing here I think is pro competition.

8 **COMMISSIONER GARCIA:** I would back
9 Commissioner Deason on that. I think it's pretty
10 clear from the reading. And beyond that, I think the
11 point that Susan clarified was that this is not a
12 question of picking and choosing separate parts of
13 different agreements, but it's simply coming to terms
14 with an overall agreement, which in some cases can
15 help very small carriers that can't get in there and
16 negotiate, but it should serve everyone equally. So,
17 again, I -- I don't know if it's been sitting to the
18 right of Commissioner Deason that's made me a convert
19 today but --

20 **CHAIRMAN JOHNSON:** Any further discussion?

21 **COMMISSIONER JACOBS:** I think I'm
22 comfortable -- I understand the analysis and I'm okay
23 in going along with it. Let me toss one hypothetical
24 at you very quickly.

25 Let's say ALEC No. 1 came in -- and I think

1 you're right, Commissioner Deason, they should go into
2 the market as quickly and forthright as possible.
3 They came in and got an agreement on an element such
4 as collocation. And ALEC B comes in later and gets
5 the more favorable. In my mind do you automatically
6 say to ALEC B you guys got to fight it out for that
7 space, that collocation terms and space? Or what do
8 you do there? If in the event what we're saying ALEC
9 No. 1 automatically walks into that agreement for
10 collocation as ALEC No. 2?

11 **COMMISSIONER DEASON:** I don't understand
12 your example. I guess I got a little confused.

13 **COMMISSIONER JACOBS:** ALEC No. 1 comes in
14 early one, gives an agreement which includes terms for
15 collocation. ALEC 2, comes later, gets a more
16 favorable agreement for collocation.

17 **COMMISSIONER GARCIA:** Commissioner, I think
18 your comments go to specifically what I think
19 Commissioner Clark specified when we began. These are
20 not about specific parts of overall agreements. It's
21 all or nothing.

22 **COMMISSIONER CLARK:** Well, but I think the
23 answer to that is whoever asks for it at a specific
24 office first gets to go -- I mean, they get the better
25 agreement, and they get to go first. The collocation

1 agreement is just the terms and conditions. And then
2 I understand they have to go out and ask for
3 particular central offices. And if they would elect
4 the new contract, they would get in under the new
5 contract terms, but who gets it depends on who asks
6 for it first for that particular central office.

7 **COMMISSIONER JACOBS:** Okay.

8 **CHAIRMAN JOHNSON:** Mr. Greer, did you have
9 something you wanted to add?

10 **MR. GREER:** Well, I hate to belabor the
11 point, but, Commissioners, there's very little on
12 252(i) in the Congressional record and whatever. And
13 the Eight Circuit rule is that you can't read 252(i)'s
14 language by itself; that you have to get the intent of
15 Congress. That they thought the intent of Congress
16 was to enter into binding agreements. And to me, if
17 the alternative is approved, you don't have the
18 binding agreements.

19 I've searched through the record of what I
20 could find on 252(i). And, essentially, what I think
21 the intent was, was to allow companies not to have to
22 go through the negotiation and arbitration process to
23 select an agreement. That's all I'll say about it.

24 **CHAIRMAN JOHNSON:** Thank you, Mr. Greer.

25 **COMMISSIONER CLARK:** Is this likely to go

1 before Judge Hinkle as part of -- I mean, it's going
2 to be resolved probably by someone other than us,
3 anyway.

4 MS. BROWN: Yes.

5 CHAIRMAN JOHNSON: Is it a part of an
6 appeal? Is this issue a part of any of the appeals
7 that have been filed?

8 MR. GREER: It's my understanding that the
9 FCC has appealed the Eighth Circuit decision to the
10 Supremas, but I think there's also a federal
11 district --

12 COMMISSIONER CLARK: Yes, GTE has appealed
13 our arbitration decision in this case and it's --

14 MS. BROWN: I'm not certain whether this is
15 a specific issue, but he did stay the process, that
16 case, until you all made the decision on this matter.

17 CHAIRMAN JOHNSON: On this?

18 MS. BROWN: It may well -- this specific
19 issued may be raised before them.

20 CHAIRMAN JOHNSON: Okay. There's a motion.
21 And I think there was a second from Joe. Any further
22 discussion? All those in favor signify by saying
23 "aye."

24 COMMISSIONER JACOBS: Aye.

25 COMMISSIONER DEASON: Aye.

1 **COMMISSIONER GARCIA:** Aye.

2 **CHAIRMAN JOHNSON:** Opposed?

3 **COMMISSIONER CLARK:** Nay.

4 **CHAIRMAN JOHNSON:** Nay.

5 Show it approved on a 3-to-2 vote.

6 Item 16-A was withdrawn.

7 **COMMISSIONER CLARK:** Staff, if you would
8 just show a simple dissent indicating that I was
9 persuaded by the notion that these were supposed to be
10 binding but acknowledging both sides have merit.

11 **MS. BROWN:** Yes, Commissioner.

12 **CHAIRMAN JOHNSON:** Same here.

13 **MS. BROWN:** All right.

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

3 I, JOY KELLY, CSR, RPR, Chief, Bureau of
 Reporting, Official Commission Reporter,
 4

5 DO HEREBY CERTIFY that Item 16, Docket No.
 971159-TP of the 2-3-98 Agenda Conference was heard by
 the Florida Public Service Commission at the time and
 6 place herein stated; it is further

7 CERTIFIED that I stencographically reported
 the said proceedings; that the same has been
 8 transcribed under my direct supervision; and that this
 transcript, consisting of 14 pages, constitutes a true
 9 transcription of my notes of said proceedings.

10 DATED this 10th day of February, 1998.

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