

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

BELLSOUTH TELECOMMUNICATIONS, INC.,
d/b/a AT&T FLORIDA,

Plaintiff,

v.

FLORIDA PUBLIC SERVICE COMMISSION;
MATTHEW M. CARTER II, in his official
capacity as Chairman of the Public Service
Commission; LISA POLAK EDGAR, in her
official capacity as Commissioner of the Public
Service Commission; KATRINA J. McMURRIAN,
in her official capacity as Commissioner of the
Public Service Commission; NANCY
ARGENZIANO, in her official capacity as
Commissioner of the Public Service Commission;
NATHAN A. SKOP, in his official capacity as
Commissioner of the Public Service Commission;
NPCR, INC., d/b/a NEXTEL PARTNERS;
NEXTEL SOUTH CORP.; and NEXTEL WEST
CORP.,

Case No. 4:09-cv-102/RS-WCS

Defendants.

BRIEF FOR NEXTEL DEFENDANTS

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STATEMENT OF THE CASE

Although the factual and regulatory background of this case is complex, the fundamental issue is straightforward. The Telecommunications Act of 1996 (“1996 Act” or “the Act”) creates a system of joint federal-state responsibility over telecommunications. Under the Act, state commissions have the authority to arbitrate and approve the “interconnection agreements” (“ICAs”) that govern the terms on which incumbent local exchange carriers (“ILECs”)—the old monopoly local phone companies—must interconnect their networks with those of other carriers, known as “requesting carriers” in this context. The Act also allows requesting carriers to “opt in to” or “adopt” interconnection agreements already approved by a state commission between an ILEC and another carrier; this is also a process administered by state commissions.

In proceedings before the Florida Public Service Commission (“Florida PSC” or “Commission”), Defendants Nextel South Corp. and NPCR, Inc., d/b/a Nextel Partners (collectively, “Nextel”)¹ adopted an existing Sprint interconnection agreement, and Plaintiff BellSouth Telecommunications, Inc. d/b/a AT&T North Florida (“AT&T”) no longer challenges that adoption. The question in this case is whether federal law specifies the date on which such adoption should be considered effective, as AT&T argues, or instead whether federal law delegates authority over that issue to the state commissions that review and approve agreements, administer the opt-in process, and

¹ Defendant Nextel West Corp. does not do business in Florida and does not interconnect with any AT&T entity in Florida. Nextel’s answer properly denied AT&T’s allegations against Nextel West, *see* Answer ¶ 7. While Nextel West is therefore not a proper party to the suit and should be dismissed on those grounds, the error is not material to the Court’s consideration of AT&T’s arguments on the merits as to the other Nextel defendants.

adjudicate adoption disputes, as Nextel maintains. As set forth in detail below, while federal law authorizes adoptions and sets forth specific, narrow grounds on which ILECs may object to them, Congress and the FCC have sensibly delegated authority over most matters relating to such adoptions—including the question of effective dates—to the entities that administer the process, the state commissions. This Court should affirm the Florida PSC’s determination of an effective date challenged here.

STANDARD OF REVIEW

This Court reviews issues regarding the meaning and import of the Telecommunications Act *de novo*, and it reviews Commission determinations of “how to implement the Act as so construed only under the arbitrary and capricious standard.” *AT&T Commc’ns v. GTE Fla., Inc.*, 123 F. Supp. 2d 1318, 1322 (N.D. Fla. 2000).

BACKGROUND

Statutory and Regulatory Background. The Telecommunications Act of 1996 was intended to introduce competition into local telecommunications markets previously dominated by monopoly ILECs like Plaintiff AT&T. *See Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 476 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress was aware, however, that the ILECs were not anxious to accommodate rivals, and the 1996 Act accordingly imposed a number of statutory obligations on the ILECs to facilitate competition. The most fundamental of these requirements was the duty to interconnect with other carriers “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” 47 U.S.C. § 251(c)(2)(D).

Congress envisioned that such rates, terms, and conditions could be determined through voluntary negotiations between ILECs and requesting carriers seeking

interconnection. *See* 47 U.S.C. §§ 251(c)(1), 252(a)(1). But Congress also recognized that unfruitful negotiations should not be allowed to delay competition indefinitely, and it therefore provided that after 134 days either party may demand arbitration by the state’s public utilities commission. *See* 47 U.S.C. § 252(b)-(d). As a practical matter, the ILECs sought to delay the entry of competition into local markets, so interconnection agreements in the years following adoption of the 1996 Act were commonly established through the state commission arbitration process. *See* Gerald W. Brock, *Interconnection Policy and Technological Progress*, 58 Fed. Comm. L.J. 445, 450 (2006).

The 1996 Act further provides that interconnection agreements reached through negotiation or arbitration must be submitted to the state commission for review and approval. 47 U.S.C. § 252(e)(1)-(2). Again, however, to avoid undue delay and uncertainty, Congress provided that arbitrated agreements are deemed approved 30 days after submission unless the state commission acts first, while negotiated agreements are deemed approved after 90 days unless the state commission acts before that time. 47 U.S.C. § 252(e)(4).

In the 1996 Act, Congress also created an alternative approach to expedite the process by which a requesting carrier can implement its interconnection rights with an ILEC. Specifically, in § 252(i), Congress provided that requesting carriers are entitled to skip the cumbersome and time-consuming negotiation-and-arbitration process altogether by “opting in to” or “adopting” an existing interconnection agreement (already approved by a state commission) between the ILEC from which interconnection is sought and any other carrier. *See* 47 U.S.C. § 252(i) (ILECs must “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.”).

The FCC has emphasized that this opt-in process was intended to be simple and speedy. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16141 (¶ 1321) (Aug. 8, 1996) (“*Local Competition Order*”) (“[A] carrier seeking interconnection ... pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis”); *see also* 47 C.F.R. § 51.809. Thus, there is no need to “negotiate” under § 252(a) or “arbitrate” under § 252(b) if the ILEC refuses interconnection on an opt-in basis—the requesting carrier may seek immediate relief from the state commission. *See also Adoption by Nextel West Corp.*, Case No. 2007-00255 at 16-17, 2008 Ky. PUC LEXIS 229, *27-28 (Feb. 18, 2008) (“The adoption of an interconnection agreement pursuant to 47 U.S.C. § 252(i) generally is a straightforward procedure and should occur without much delay AT&T Kentucky’s untimely and incomplete objections ... turn a simple adoption proceeding into an arbitration proceeding, possibly extending over a year in length.”)

The FCC’s implementation of § 252(i), like many of the rules implementing the 1996 Act, reflect the cooperative federal-state regulatory nature of the Act. *Cf. BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007) (describing the regulatory framework as “a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment”). The FCC has established uniform federal

standards for state commissions to apply in deciding whether to mandate interconnection over specific categories of ILEC objections contemplated by § 252(i). *See* 47 C.F.R. § 51.809(b) (ILECs are not required to honor opt-in requests where technically infeasible or where providing a service to an opt-in carrier would be much more costly than providing the service to the original requesting carrier). The FCC left other details governing the opt-in process to the state commissions. *Local Competition Order*, 11 FCC Rcd at 16141 (¶ 1321) (“[W]e leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.”). In one regard, however, the FCC limited state discretion over those processes, emphatically rejecting the idea that the “lengthy negotiation and approval process” applicable to *new* agreements could also be applied to *opt-in* agreements. *Id.* (concluding that requiring carriers to undergo negotiation and approval “before being able to utilize the terms of a previously approved agreement” would “defeat[]” the pro-competitive purpose of § 252(i)).

The Merger Commitments. While interconnection agreements are generally governed by the 1996 Act, the FCC, in approving the merger between AT&T and BellSouth, supplemented and modified the interconnection-related obligations of ILECs (like AT&T Florida in this case) that are part of that new merged entity, requiring them to comply with what are known as the Merger Commitments. *See AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5773 (¶ 227) & App. F (Mar. 26, 2007) (“*Merger Order*”). As relevant here, one of the Merger Commitments grants carriers with pre-existing ICAs with

AT&T/BellSouth ILECs the right to extend such ICAs by a term of three years. *Merger Order*, 22 FCC Rcd 5662, App. F.

The Sprint ICA Extension Dispute. The present dispute between Nextel and AT&T Florida arose from Nextel's attempt to opt in to the January 2001 ICA (the "Sprint ICA") between Sprint² and AT&T (then known as BellSouth)—as authorized by both the original opt-in language of § 252(i) and provisions of the Merger Commitments not relevant here. Significantly, however, at the time that Nextel sought to opt in to the Sprint ICA, Sprint and AT&T were already engaged in a dispute about that agreement. Because that dispute has a bearing on the present case, we briefly describe it here.

Like this case, the Sprint ICA extension dispute arose from AT&T's efforts to avoid its interconnection obligations. The Sprint ICA provided that the agreement would continue in force at least through December 31, 2004, and that it would continue on a month-to-month basis thereafter unless a party exercised its right to terminate the agreement. Following the adoption of the Merger Commitments, Sprint elected to extend its ICA—which was still in force on a month-to-month basis under the agreement's terms—by three years, as the Merger Commitments expressly permitted.

AT&T initially argued that while Sprint could extend the ICA, the extension should be considered to have begun running from the end of the agreement's initial term. According to AT&T, then, although the Merger Commitments were adopted in March 2007 and Sprint sought to invoke the extension in May of that year, Sprint's three-year

² "Sprint" here refers to Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS. The Sprint ICA was incorporated into the agency record by reference in Nextel's June 8, 2007 notices of adoption to the Florida PSC. Notice of Adoption by NPCR, Inc., Fla. PSC Docket No. 070368-TP (filed June 8, 2007) ("*Notice of Adoption*") (R. Vol. 1. Pg. 1); Notice of Adoption by Nextel South, Fla. PSC Docket No. 0703069-TP (R. Vol. 1 Pg. 5). The current version of the Sprint ICA is online at https://clec.att.com/clec_cms/clec/docs/5869e0b031484c52bfb353e1244c9760.pdf.

extension would end soon after, in December of 2007 (three years from the end of the Sprint's ICA's initial term). Sprint argued that could not have been what the FCC and the merging parties intended by a "three-year extension," and that the three years should run from the date on which Sprint exercised its Merger Commitment right to extend the agreement.

Because the parties were unable to resolve their disagreement concerning the commencement date of the three-year extension, Sprint filed for arbitration with the Florida PSC. Proceedings on this issue ensued before the Commission, but AT&T ultimately abandoned its position and agreed with Sprint that the three-year extension to its ICA should run from the date of Sprint's extension request. That three-year extension remains in force today. Notably, however, it was during the pendency of this Sprint ICA dispute before the Florida PSC that the current dispute between Nextel and AT&T arose.

The Present Dispute. Nextel sent AT&T a letter on May 18, 2007, invoking its rights to adopt the Sprint ICA pursuant to 47 U.S.C. § 252(i) and the expanded opt-in rights provided by the Merger Commitments. *See* AT&T's Motion to Dismiss, Exhibit B (filed June 28, 2007) (R. Vol. 1 Pg. 9 at 29). Following AT&T's refusal to permit Nextel to opt in to the Sprint agreement, Nextel filed its notice of adoption with the Florida PSC on June 8, 2007, explaining that it was adopting the Sprint ICA effective immediately. *See Notice of Adoption* (R. Vol. 1 Pg. 1).³

³ Because two Nextel subsidiaries sought to adopt the Sprint ICA, Nextel sent two letters, one for each entity, to AT&T on May 18, 2007, and thereafter filed two notices of adoption with the Commission. The Commission opened two dockets, 070368-TP and 070369-TP, to address them. The dockets were soon consolidated. For simplicity's sake, Nextel here treats them together, and all references to filings encompass filings in each docket.

Following several months of motions practice in this proceeding, the Florida Commission ordered the parties to file papers identifying the issues requiring decision, the parties' positions on those issues, and the stipulated facts, as well as briefs on the merits. The parties filed those papers in June 2008. *See* Nextel Issue Position Statements (filed June 17, 2008) (R. Vol. 4 Pg. 659); AT&T Florida/Nextel Stipulations of Fact (Corrected) (filed June 17, 2008) (R. Vol. 4 Pg. 663); AT&T Florida Statement of Positions (filed June 18, 2008) (R. Vol. 4 Pg. 672).

Initially, the case presented two primary issues: (1) whether Nextel should be allowed to adopt the Sprint ICA; and (2) if so, the date on which Nextel's adoption should be considered effective. As to the first issue, AT&T would have been entitled to argue that interconnection with Nextel under the Sprint ICA would have been technically infeasible or would have been much more costly than providing service to Sprint. *See* 47 C.F.R. § 51.809(b). But AT&T did not make such an argument. Instead, it argued that Nextel was not sufficiently like Sprint to be eligible to adopt the Sprint ICA. On the second issue, AT&T argued that Nextel should not receive the benefits of its opt-in until some indeterminate date in the future—specifically, 30 days *after* the date of the signature of the adopted agreement. Any earlier date, AT&T maintained, would be contrary to “basic rules of contract formulation,” and accepting Nextel's proposed effective date—the date it filed its adoption papers—would purportedly have had the effect of allowing Nextel to adopt an “expired” agreement. *See* Order No. PSC-08-0584-FOF-TP, *Final Order Granting Adoption by Nextel of Sprint – AT&T Interconnection Agreement*, at 4-5, 10 (filed Sept. 10, 2008) (“*Adoption Order*”) (R. Vol. 6 Pg. 987 at 990-91, 996).

The Commission rejected AT&T's arguments. It found—without needing to address the Merger Commitments at all—that § 252(i) authorized Nextel to opt in to the Sprint agreement. It further held that AT&T's claim that Nextel, as a wireless carrier, was not sufficiently like Sprint to be eligible to adopt the Sprint ICA was not even a permissible argument under relevant FCC regulations. The Commission explained: “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.” *Id.* at 8 (R. Vol. 6 Pg. 987 at 994). While it would have been lawful for AT&T to make a cost-based objection (*see supra* at 8), the Commission explained, AT&T was arguing against Nextel's adoption on the basis of “speculative cost increases, using speculative scenarios, *right after admitting AT&T does not have a cost exception.*” *Id.* at 9 (R. Vol. 6 Pg. 987 at 995) (emphasis added). The Commission concluded that AT&T's argument was “directly at odds with the applicable FCC rule.” *Id.* at 8 (R. Vol. 6 Pg. 987 at 994).

Turning to the effective date, the Commission first rejected AT&T's argument that the Sprint ICA was “expired” when Nextel sought to adopt it on June 8, 2007. The Commission noted that in resolving the dispute regarding extension of the Sprint ICA, Sprint and AT&T had “by a joint motion” set a commencement date for the extension “of March 20, 2007.” *Id.* at 11 (R. Vol. 6 Pg. 987 at 997). Because that date preceded Nextel's exercise of its opt-in right, the Sprint ICA was not “expired” at the relevant time: “When Sprint and AT&T filed their joint motion to approve [the extension] amendment ... [they agreed] that the interconnection agreement was in operation and enforceable by both parties.” *Id.* The Commission set forth the general rule for

determining the effective date of an adopted agreement: “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.” *Id.* The Commission found that AT&T’s interposition of an objection—ultimately rejected by the Commission as contrary to law—did not alter that rule: “The effective date should not be affected by the passage of time during the litigation of [AT&T’s objection], and the effective date shall remain June 8, 2007.” *Id.*

AT&T then filed its complaint with this Court.

SUMMARY OF ARGUMENT

1. AT&T’s position that the terms of an adopted interconnection agreement cannot lawfully take effect until *after* the agreement is approved by the state commission has no basis in law, is inconsistent with the FCC’s express delegation of authority to the states, and is inconsistent with the clear purpose of the opt-in provision to provide a speedy and simple method of adopting an interconnection agreement.

There is nothing unlawful about setting an effective date for an adopted agreement prior to the date that it is eventually signed or acknowledged by a state commission. None of the statutory or regulatory authority upon which AT&T relies provides any support for its position. First, contrary to AT&T’s claims, there is no federal requirement that a state commission must finally approve a requesting carrier’s opt-in request before the adopted agreement’s terms may take effect between the requesting carrier and ILEC. The statute AT&T cites, 47 U.S.C. § 252(e), requires approval only for negotiated or arbitrated agreements, *not* for opt-in agreements, and it cannot sensibly be applied to opt-in agreements at all. Even if it could, though, § 252(e)

says only that a state commission must approve or reject negotiated or arbitrated agreements, not *when* such agreements may take effect. Neither do any FCC rules support AT&T's claim. Rather, in promulgating rules to implement the statutory provisions that apply to a carrier's opt-in rights, the FCC focused on the kinds of objections an ILEC could make in response to an opt-in demand—that is, *whether* adoption would be proper. The FCC expressly left it to the states to decide other issues relating to implementation of the opt-in right—including all questions of *how* the opt-in process would work. And the FCC's determination to do so cannot be collaterally attacked here, even if it were itself unlawful, which it obviously is not.

The Florida PSC's practice with regard to adopted agreements like the one at issue in this case is entirely consistent with this scheme. The Florida PSC, pursuant to § 252(e), approves agreements submitted to it that have been arrived at through negotiation or arbitration. In contrast, the Florida PSC does not "approve" opt-in agreements at all; it merely "acknowledges" them (an action performed not by the PSC but by its staff). And, in the rare case (like this one) where an ILEC objects to an opt-in request, the Florida PSC adjudicates that request applying the FCC's rules governing *whether* the ILEC (AT&T) is required to permit adoption—but, again, questions of *how* the opt-in process works, including the relevant effective date, remain subject to the state commission's own authority. The Florida PSC's orders, far from running afoul of the law, were thus entirely in accord with federal law, and well within the scope of the authority given to it by the FCC.

In fact, it is AT&T's position that is inconsistent with federal law. Under AT&T's view, ILECs could pursue a strategy of delay with impunity, thereby raising

rivals' costs and undermining competition while leaving state commissions powerless to remedy such foot-dragging. Congress and the FCC intended for the opt-in process to be the speedy and simple alternative to the time-consuming negotiation-and-arbitration process. But even the negotiation-and-arbitration process has strict time limits.

Permitting an ILEC to delay the effectiveness of a requesting carrier's opt-in election—a process intended to be *more expedient* than negotiation and arbitration—until after all of the ILEC's objections and obstructions (however frivolous) have been addressed thoroughly undermines congressional intent.

2. AT&T's fallback argument—"[i]f backdating is permitted, the only lawful effective date would be January 29, 2008"—is likewise meritless. *See* AT&T Br. at 28. First, the argument was never presented to the Florida PSC, and it is accordingly waived. Second, the argument is based on a fundamental misunderstanding of the relevant regulation, which provides that agreements must be available for adoption for a "reasonable period of time." That requirement, as is apparent both from its text and history, does not require a mechanical focus on dates, but rather inquires whether an adoption would be "reasonable" in light of the passage of time. AT&T does not even suggest that it would be "unreasonable" to permit Nextel to adopt the Sprint ICA as of June 2007, and it could not. Under AT&T's own theory, Nextel would have been permitted to adopt the Sprint ICA *later* than it did (in January 2008)—and so obviously in June 2007 there had not been sufficient passage of time to make adoption "unreasonable." Even setting aside AT&T's confusion on that point, the agreement was not and has never been, contrary to AT&T's wordplay, "expired." There is no question that the agreement continued in full force throughout the relevant time on a month-to-

month basis by its express terms. Moreover, there is also no question that Sprint, pursuant to its undisputed right to do so, had already elected to extend the agreement for another three-year term. And while Sprint and AT&T disagreed (for a time) about when that new three-year term should date from, they agreed that the extension should be dated from no later than March 20, 2007—well *before* Nextel sought to adopt it. Accordingly, the Sprint ICA was not “expired” at the time Nextel sought to adopt it, and indeed remains in force to this day.

ARGUMENT

I. The Commission’s Order Establishing the Nextel ICA Effective Date Was Lawful.

AT&T argues that federal law prohibits interconnection agreements adopted pursuant to 47 U.S.C. § 252(i) from having effective dates prior to the date that a state commission approves the agreement. AT&T’s position is untenable.

A. There is no general requirement for state approval as a condition precedent to an interconnection agreement’s effectiveness.

1. AT&T argues that 47 U.S.C. § 252(e)(1), which provides for state commission review of interconnection agreements reached through negotiation or arbitration, creates a general requirement for state commission approval as a condition precedent for all interconnection agreements to become effective. *See* AT&T Br. at 17. Thus, the argument goes, the Nextel ICA could not become effective before the review mandated by that provision.

Though AT&T did not find occasion to set out § 252(e)(1) in full in its brief, the provision is short and, since AT&T’s argument depends on it, worth quoting in full. It provides:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

47 U.S.C. § 252(e)(1).

Section 252(e)(1) cannot bear the weight AT&T places on it. First, by its own terms, § 252(e)(1) applies to agreements “adopted by negotiation or arbitration,” which are specific methods for arriving at interconnection agreements, governed by subsections (a) and (b)-(d) of § 252, respectively. When a carrier adopts another carrier’s agreement by the opt-in process, however, it exercises a right conferred by subsection (i); § 252(e)(1) does not even purport to apply to such a situation.

Moreover, § 252(e)(1) *cannot* be read to apply to opt-in situations. Section 252(e) is comprised of two provisions, subdivision (1), which requires approval for negotiated and arbitrated agreements, and subdivision (2), which provides specific, limited grounds on which a state, conducting that review, can reject such an agreement reached through negotiation or arbitration. *See* 47 U.S.C. § 252(e)(1) (requiring review of agreements arrived at through negotiation or arbitration); *id.* § 252(e)(2)(A) (grounds for review of ICAs adopted by negotiation); *id.* § 252(e)(2)(B) (grounds for review of ICAs adopted by arbitration). In contrast, the statute does not purport to address the grounds on which a state commission may reject an opt-in agreement. Section 252(e)(2)’s standards governing state commission review plainly do not apply to opt-in agreements, and so § 252(e)(1)’s review provision, which applies § 252(e)(2)’s standards, cannot apply either.

Opt-in agreements are governed not by § 252(e), but by § 252(i) and the FCC’s rules implementing *that* provision. *See also Local Competition Order*, 11 FCC Rcd at

16141 (¶ 1321) (concluding that the negotiation-and-state commission approval process does not apply to agreements adopted pursuant to the opt-in provisions of § 252(i)). The only “review” federal law contemplates that a state commission will perform in the opt-in context occurs when an ILEC objects to an opt-in request.⁴ Otherwise, as the Florida Commission explained in its order, “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.” *Adoption Order* at 11 (R. Vol. 6 Pg. 987 at 997). Thus, while Florida acknowledges adoptions, it does not in any way “approve” them as a general matter. Nor is Florida alone in concluding that no review is required as a general matter for opt-in agreements. *See, e.g., Brooks Fiber Commc’ns of Ark., Inc. Notice of Election of an Existing Interconnection Agreement with Southwestern Bell Telephone Co., Ark. Pub. Serv. Comm’n, Docket No. 99-307-U, Order No. 2, 1999 Ark. PUC LEXIS 714 at *5-6 (filed Nov. 23, 1999) (order reaffirming that the Telecommunications Act does not require state commission approval of an opt-in agreement).*

AT&T’s confusion regarding the scope of § 252(e), on which its appeal is fundamentally based, seems to stem from its belief that an adoption is akin to a § 252(a)(2) *arbitration* under the Act. Thus, AT&T makes the otherwise-inexplicable claim that “a state commission is deemed to have approved an interconnection agreement—other than one that has been negotiated by the parties—30 days after the parties have submitted the agreement for approval, see 47 U.S.C. § 252(e)(4).” AT&T

⁴ The limited bases on which an ILEC can object are set out, not in § 252(e), but in 47 C.F.R. § 51.809, which provides, for example, that an ILEC can object if it can prove that it would be technically infeasible to accommodate a particular opt-in request.

Br. at 15. Section 252(e)(4), in fact, says nothing of the sort. It actually provides two time frames for state commission action in two different contexts: an agreement is deemed approved if the state commission does not act “within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b).” Section 252(e)(4) says *nothing* about opt-in requests. And there can be no dispute that an adoption under subsection (i) is simply not an “arbitration under subsection (b)” —among other things, carriers cannot request arbitration until they have negotiated unsuccessfully for more than 134 days, while a carrier need not wait even a single day before availing itself of its opt-in rights under § 252(i).

AT&T’s claim that while section 252(i) “speaks to *what* incumbent LEC’s must make ‘available’ ... it does not establish some unique method for *how* agreements requested under Section 252(i) become binding,” reflects this same confusion. *See* AT&T Br. at 19 (emphasis in original). Section 252(i) most certainly does provide a “unique method for *how*” to create binding agreements. The FCC confirmed as much when it declared that the process governing agreements reached through negotiation and arbitration would not apply to adoptions under § 252(i). *See Local Competition Order*, 11 FCC Rcd at 16141 (¶ 1321). The FCC provided that the rules governing this process implementing this unique method would be created by each state, while the FCC itself would provide general rules for determining whether adoption was appropriate. *See id.* (“[W]e leave to state commissions in the first instance the details of the procedures for making agreements available [under § 252(i)].”); 47 C.F.R. § 51.809 (rules establishing the circumstances under which adoption is proper).

2. AT&T, perhaps recognizing that section 252(e)(1) does not in fact apply to adopted agreements, argues that the “principles” section 252(e)(1) embodies nevertheless impose such a review requirement on adopted agreements. AT&T Br. at 19. AT&T does not explain *why* those principles would require such a surprising result, especially in light of the fact that Congress, which clearly knew how to require state commission review for “[a]ny interconnection agreement adopted by negotiation or arbitration,” 47 U.S.C. § 252(e)(1), made no such similar requirement for agreements adopted under § 252(i). Nor does AT&T attempt to explain why the FCC, in promulgating rules under § 252(i), created no general requirement for state commission review at all, but only provided for state commission involvement for the unusual case (like this one) where an ILEC has objections to an adoption. Again, as noted above, Florida generally performs *no* review of such adoptions, and it is not alone. See *supra* at 15.

Congress and the FCC’s choice not to require state commission review of adopted agreements makes perfect sense. To be available for opt-in in the first place, an agreement must have *already been approved* by a state commission under § 252(e). Given the relevant statutory standard, a state commission *could not* approve an agreement under § 252(e) as between an ILEC and one carrier but reject it under that same section as between the same ILEC and another carrier.⁵ Thus, the “principles” of section 252(e)

⁵ AT&T cites *dicta* from the “background” discussion in *Millennium One Communications, Inc. v. Public Utilities Commission*, 361 F. Supp. 2d 634, 637 (W.D. Tex. 2005), for the proposition that “[r]egardless of how the interconnection agreement is formed, the final version must be submitted to the state commission for its review and approval.” Yet as the *Millennium One* court noted, the “sole” issue there concerned the *interpretation* of an agreement, not approval, see *id.* at 638, and, as explained herein, the court’s *dicta* regarding approval is simply inaccurate. Notably, this case, which provides no support, is the *only* case that AT&T cites for the proposition that opt-in agreements must be approved by state commissions.

review to which AT&T refers have already been served in the context of a section 252(i) adoption.

Obviously, since no state commission review or approval under § 252(e) is required for opt-in agreements, it is not true that the effective date of such agreements must be set after “approval” under that section.

3. Even if § 252(e) were relevant to the present dispute, it would provide scant support for AT&T’s claim. Nothing in the text of subsection (e) imposes AT&T’s imagined prohibition on agreements with effective dates set prior to state consideration. Section 252(e) requires only that a state commission approve or reject the agreement—it literally says nothing about timing. AT&T conveniently ignores this fact, reading into the text a limitation that does not appear.

Not only is there no textual support in § 252(e) for AT&T’s argument, but reading in such a limitation would be contrary to the purpose of the Act. State commissions have up to 90 days to evaluate negotiated agreements submitted under this provision. *See* 47 U.S.C. § 252(e)(4). Requiring carriers that have successfully negotiated an agreement to wait so long before their agreements become effective would be contrary to the Act’s overarching purpose to *facilitate* competitive entry and competition. *See* Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (stating that the purpose of the statute was “[t]o promote competition ... in order to secure lower prices and higher quality services”). Indeed, if carriers have negotiated agreements covering operations in several states and wish for all such agreements to become effective simultaneously, they would be effectively held hostage to the slowest-moving

commission's timetable. There is no justification for imposing such a requirement on carriers.⁶

The Sprint ICA at issue in this very dispute is, in fact, an ICA covering many states, and AT&T's own behavior in connection with that ICA is inconsistent with the theory it now advances. The introductory paragraph of the Sprint ICA recites an Effective Date of January 1, 2001, but it was not signed by the parties until June 2002, and obviously was not (and could not have been) approved by the state commission until after that date. *See* Sprint ICA, *current version available online at* https://clec.att.com/clec_cms/clec/docs/5869e0b031484c52bfb353e1244c9760.pdf (pdf pages 5 (effective date), 37 (signatures)).

In fact, AT&T itself has argued to the FCC that there is nothing in federal law that prevents setting effective dates of agreements prior to state commission approval. As AT&T explained, “[n]othing in section 252 or any other provision of the Act provides that, until a state commission completes its review of the negotiated agreement, the parties are prohibited from abiding by the agreement’s terms.” *Qwest Communications Int’l Inc. Petition for Declaratory Ruling*, Opposition of AT&T Corp., FCC Docket No. WC 02-89, at 12 (May 29, 2002); *see also FCC Qwest Order*, 17 FCC Rcd at 19340 (acknowledging AT&T’s point).

As with many things governed by the cooperative federal-state regulatory regime of the Telecommunications Act, states have taken different approaches to the process for

⁶ State commission review under § 252(e) is, as a practical matter, largely a formality anyway, as it would be quite unusual for a state commission to reject an interconnection agreement under that section. *See, e.g., Qwest Communications Int’l Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340 (¶ 6) (Oct. 2, 2002) (“*FCC Qwest Order*”) (noting that “according to AT&T ... interconnection agreements are rarely rejected”).

approval of *negotiated and arbitrated agreements under section § 252(e)*, which, again, is not the issue here. AT&T dutifully cites a handful of states that have adopted the rule AT&T urges here in the § 252(e) context (and thus have disagreed with AT&T's own practice and its previous position). *See* AT&T Br. at 18. On the other hand, AT&T neglects to mention that most states have articulated no such prohibition, and that other states have expressly come to the opposite conclusion, finding that agreements may have effective dates set prior to state commission approval. *See, e.g.*, 4 N.C. Admin. Code 11.R17-4 (North Carolina); *FCC Qwest Order*, 17 FCC Rcd at 19340 (n.20) (noting that the Minnesota Department of Commerce filed comments in an FCC proceeding stating that effective dates could be set prior to state commission approval). Moreover, when this issue was specifically raised before and discussed by the FCC, it did *not* endorse the position AT&T now advocates, but instead pointed out that the comments in the proceeding were not supportive of it. *See FCC Qwest Order*, 17 FCC Rcd at 19340 (¶ 6).

Of course, all this debate about the rules that states have adopted for setting effective dates under § 252(e) is beside the point, because, as set forth in parts I.A.1 and I.A.2 above, § 252(e) does not and cannot apply to § 252(i) adoptions. Indeed, Florida is a state that does not even conduct reviews for adoptions under section 252(i).⁷ AT&T's focus on a statutory provision that is inapplicable is perhaps due to the fact that relevant

⁷ AT&T quibbles (at 26) with the Florida PSC's determinations regarding state law and interpreting prior decisions of the Commission. The Commission gave these arguments more than adequate attention in its order denying reconsideration, showing that each of those situations was quite distinguishable from the present case. *See* Order No. PSC-08-0817-FOF-TP, *Final Order Denying Motion for Reconsideration*, at 3-5 (filed Dec. 18, 2008) (R. Vol. 6 Pg. 1126 at 1129-1131). Indeed, as the Commission explained in the *Adoption Order* (at 11) (R. Vol. 6 Pg. 987 at 997), the rule is that opt-in agreements are presumptively effective when filed. The Commission has, in certain rare circumstances, determined that that rule should not apply. But that does not show that *this* case is such a rare, exceptional case. Far less does it show that the Commission was arbitrary and capricious for not concluding that this was a case to apply the exception rather than the rule.

authority on the provision that *is* applicable, § 252(i), is even more decidedly against it, as discussed below in part I.B.4.

B. The Florida PSC’s decision is consistent with 47 U.S.C. § 252(i) and the FCC’s rules implementing that provision.

In addition to incorrectly claiming that § 252(e) or its “principles” somehow creates a general prohibition against effective dates prior to state commission approval, AT&T argues that the Florida PSC’s orders are inconsistent with the FCC’s rules implementing the statutory opt-in right of § 252(i). That contention is also meritless.

1. The FCC promulgated rules implementing § 252(i) in its 1996 *Local Competition Order*. The FCC decided that federal rules were required in two respects. First, the FCC addressed whether the opt-in right was limited to entire agreements or whether requesting carriers could select individual aspects of various agreements to adopt (commonly referred to as the “all-or-nothing” rule and the “pick-and-choose” rule). *See Local Competition Order*, 11 FCC Rcd at 16139 (¶ 1314).⁸ Second, recognizing that in rare circumstances it might be inappropriate to allow one carrier to opt in to another carrier’s agreement as a matter of *unqualified* right—even though the ILEC was obviously already interconnecting pursuant to the terms contained in the agreement—the FCC set forth limited grounds on which ILECs may object to an opt-in request. Specifically, if an ILEC can prove that serving an opt-in carrier would be more costly than serving the original carrier or would be technically infeasible, the ILEC is not required to serve the former on the same terms as the latter. *See id.* at 16140 (¶ 1317); 47 C.F.R. § 51.809(b).

⁸ The FCC initially chose “pick-and-choose,” but changed its mind several years later.

Having issued federal rules regarding these two opt-in issues, the FCC expressly left *other* questions regarding the implementation of § 252(i) to the states. *Local Competition Order*, 11 FCC Rcd at 16141 (¶ 1321) (“[W]e leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.”). The FCC nevertheless offered the states some guidance, emphatically declaring that carriers choosing to opt in to existing agreements should be entitled to do so on an expedited basis: carriers “need not make such requests pursuant to the procedures for initial section 251 requests [(i.e., the negotiation-arbitration-approval process)], but shall be permitted to obtain [their] statutory rights on an expedited basis.” *Id.* The FCC explained:

We find that this interpretation furthers Congress’s stated goals of opening up local markets to competition ... as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.

Id. The FCC’s determination to leave such questions to the states, with only this broad guidance, is not open to challenge in these proceedings. *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 394 F.3d 568, 569 (8th Cir. 2004) (“The Administrative Orders Review Act (‘Hobbs Act’) prescribes the sole conditions under which the courts of appeals have jurisdiction to review the merits of FCC orders.... No collateral attacks on the FCC Order are permitted.”); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1273 n.8 (10th Cir. 2007) (same). And of course, even if it were open to challenge, the FCC would be entitled to *Chevron* deference on this question. *See Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

AT&T's claim that the rules governing § 252(i) are somehow incompatible with the Florida PSC's action thus faces three insurmountable obstacles before it even gets started. First, there is nothing in the federal rules—which, again, govern the *grounds* for ILEC objections to opt-in demands—that even addresses the question of effective dates for such agreements once the objections are determined to be completely meritless, as here. Second, the FCC expressly “le[ft] to state commissions ... the details of the procedures for making agreements available to requesting carriers on an expedited basis.” *Local Competition Order*, 11 FCC Rcd at 16141 (¶ 1321). The Florida PSC's determination of how best to enforce Nextel's right to obtain the Sprint ICA “on an expedited basis” was well within that express grant of authority, and so can hardly violate federal law. Third, the FCC's guidance to states also expressly emphasized the importance of making the opt-in right fast and easy to exercise.

2. Even if AT&T's argument about the FCC's regulations were not foreclosed on those grounds, it fails on its own terms. AT&T argues (at 20-21) that an ILEC's obligation to make interconnection available without “unreasonable delay,” 47 C.F.R. § 51.809(a), somehow compels the conclusion that states may not set effective dates of such agreements prior to state commission approval. That is a *non sequitur*. What is prohibited is “unreasonable” delay. In some cases *reasonable* delay may occur—for example, if no connection between the carriers currently exists, delay that arises while technical interconnection details are worked out might be reasonable. But the prohibition against “unreasonable” delay would forbid the ILEC from, for example, forcing the requesting carrier to schedule such logistical discussions a year in advance. In the present case, where interconnection already existed and the exercise of the opt-in right

was essentially to obtain more favorable prices, there was no “reason” for any “delay” at all. Accordingly, once the state commission finds ILEC objections to an opt in to be completely baseless, as here, there is nothing improper in it ordering an effective date prior to that date and preventing the ILEC from gaining any advantage from having interposed meritless objections. The Florida rule that adoptions are generally effective immediately, but that the particular circumstances of a given case might require a different outcome, is entirely consistent with this provision.

AT&T also argues that 47 C.F.R. § 51.809(b) establishes that “resolution of any objections [by an ILEC] is a condition precedent to the effectiveness of the opt-in request.” AT&T Br. at 21. AT&T is wrong on that score as well. *First*, the provision it cites states that “the obligations” to allow adoption of an ICA “shall not apply” if the ILEC can prove that (1) it would be more costly to provide services to the requesting carrier than to the carrier that already is interconnecting under the agreement in question or (2) it would be technically infeasible to provide them. 47 C.F.R. § 51.809(b)(1)-(2). AT&T neglects to mention that it did not make *either* of these objections, and so § 51.809(b), even if it did require resolution of certain objections prior to effectiveness of an opt-in request, would not have any bearing on the present case. *Second*, contrary to AT&T’s claim, § 51.809(b) says nothing about timing or effective dates. It says only that the requirements of § 51.809(a) shall not apply in certain situations, and subsection (a), not subsection (b), is the only provision that even arguably addresses timing. As explained in the previous paragraph, subsection (a) only states that ILECs must make available agreements without unreasonable delay. What is “reasonable” might depend on the specifics of the objection. But there is nothing “unreasonable” about rejecting

AT&T's attempts, based on frivolous arguments, to delay Nextel's move to the lower prices of the Sprint ICA—if AT&T had even made a § 51.809(b) objection, which, again, it did not.

3. In fact, the present dispute demonstrates that it is AT&T's position, rather than Nextel's, that is inconsistent with federal law. If, as AT&T argues, a state commission has no power to order an interconnection agreement to be considered effective as of the date of filing with the commission, then ILECs will have both the means and the incentive to thwart § 252(i)'s purpose of providing an *expedited* process for opting in to an interconnection agreement. Indeed, the theory AT&T advances here allows for *unlimited* delay in § 252(i) proceedings while state commissions consider and reject meritless objections by ILECs seeking to run out the clock on the agreement to be adopted. Yet even AT&T would concede that the statute provides firm limits on how long the arbitration-and-approval process can take—and that time-consuming and cumbersome process is what the “expedited” and straightforward opt-in process is supposed to improve upon. *See* 47 U.S.C. § 252(b)(4), (e)(4) (providing that states must complete arbitration proceedings within 9 months, and must approve or reject an arbitrated agreement within 30 days). AT&T's argument is that a state commission is *powerless* to conclude at the end of an opt-in process—even one that took longer than any arbitration process ever could—that, under the particular circumstances of that case, the ILEC should not be able to reap the benefit of its dilatory tactics.

This case illustrates that this danger is not merely hypothetical. After months of delay in which AT&T offered shifting rationales for why the adoption should not be permitted (and in which it likewise resisted complying with its legal obligations regarding

extension of the Sprint ICA), AT&T finally settled on its argument that Nextel was not sufficiently like Sprint to adopt the Sprint ICA. But as the Commission rightly concluded (and AT&T does not challenge here), that particular argument is “directly at odds with the applicable FCC rule.” *Adoption Order* at 8 (R. Vol. 6 Pg. 987 at 994). In all, it took more than 15 months from the time Nextel filed its notice of adoption with the Commission until AT&T’s frivolous objection to adoption was finally rejected. If, as AT&T claims, the Commission is powerless under all circumstances to order that the agreement be considered effective until *after* it has completely adjudicated all objections, then the “expedited” right to opt in has been eviscerated.⁹

4. Florida is not the only state to come to the conclusion that opt-in agreements can be “backdated,” as AT&T puts it, to a date before the state commission approves such a request. In fact, in several disputes essentially identical to the present one, between the same corporate entities (various affiliates of AT&T and Nextel), several states found that “backdating” was appropriate. The North Carolina Utilities Commission also set the effective date of the agreement there at issue to the date Nextel initiated proceedings before that Commission. *See Petition for Approval of Nextel South Corp’s Adoption*, Order Setting June 22, 2007 Effective Date, N.C.U.C. Docket No. P-55, Sub. 1710, 2008 N.C. PUC LEXIS 2211 (filed Dec. 18, 2008). Similarly, the Georgia state commission set an effective date for the Nextel-AT&T agreement prior to the date

⁹ AT&T argues (at 25-26) that the requirement for “expedited” state commission action on opt-in agreements would not make sense unless it is right that effective dates of such agreements must be after state commission approval. That is incorrect. It is plainly sensible to encourage state commissions to resolve opt-in disputes on an expedited basis. For one thing, expedited action reduces uncertainty for both the ILEC and the requesting carrier. For another, it is at least conceivable that a state commission might agree with an ILEC that an opt-in demand should not be granted; it is in the interest of both carriers—and consumers—for that to be resolved quickly so that negotiations over a new agreement might commence as soon as possible.

of state commission approval (though not the date that Nextel filed its petition). *See Petition for Approval of NPCR, Inc. Adoption*, Order on Motion to Enforce, Docket Nos. 25430, 25431, 2008 Ga. PUC LEXIS 131 (Sept. 24, 2008). Louisiana, too, in a similar dispute between Nextel and AT&T set an effective date prior to the date of the Commission's order resolving the dispute. *See NPCR, Inc. Ex Parte*, Opinion, Order Nos. U-30185, U-30186, Docket Nos. U-30185, U-30186, 2009 La. PUC LEXIS 100 (May 14, 2009). Other states likewise have concluded that setting effective dates prior to the date a state commission resolves an opt-in dispute can be appropriate.¹⁰

AT&T, in contrast, has identified *zero* state Commissions that have agreed with it that § 252(i) adoptions cannot have effective dates prior to state commission action. The state authority it cites, as discussed above at 19-20, interprets a different section entirely, § 252(e); and even as to that section, the balance of state authority does not support AT&T's strained interpretation of the statute. Of course, even if AT&T did have some authority on its side on the question of § 252(i) adoptions, which it does not, that would not be helpful to AT&T, given that the FCC expressly conferred discretion on the states to implement § 252(i) how they wished.

5. AT&T's claim (at 21-23) that *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650 (6th Cir. 2006), supports its position here is likewise erroneous.

¹⁰ For example, California's rules governing opt-in requests also contemplate "backdating" of such agreements. They provide that the responding ILEC must permit adoption or object, which they term a request for arbitration of the issue, within 15 days. Even if the ILEC objects, the agreement "could be made effective retroactive to the date when the arbitration request was filed." Cal. PUC, Resolution ALJ-181, Rule 7.3.2, 2000 Cal. PUC LEXIS 864 at * 35 (Oct. 5, 2000). The Washington state commission has likewise found it appropriate, in at least certain circumstances, to set an effective date prior to the date the Commission resolved an opt-in dispute. *Focal Communc'ns Corp. v. Verizon Northwest, Inc.*, Docket No. UT-013019, 2001 Wash. UTC LEXIS 332 at * 30 (Oct. 17, 2001).

In *Southeast Telephone*, a competitive local exchange carrier (a “CLEC”), relying on the FCC’s then-current “pick-and-choose” rule, sought to adopt a new dispute resolution provision from a third party’s ICA with BellSouth into the CLEC’s existing agreement. BellSouth objected. The state commission eventually granted the CLEC’s pick-and-choose request, even though in the meantime the FCC had replaced the “pick-and-choose” rule with the “all-or-nothing” rule. Notwithstanding that rule change, the state commission concluded that it should review the request under the prior rule, which had been in effect at the time the CLEC filed its request. Although the district court upheld the state commission’s decision, the Sixth Circuit reversed. The Sixth Circuit found that the “FCC intended for the new rule to go into effect immediately,” *Id.* at 654, and held that the state commission had no authority to apply a rule that had been repealed because the new rule did not have an impermissibly retroactive effect under relevant precedent. Notably, while the Sixth Circuit addressed *which rule* should apply to the interconnection agreement there at issue, nothing in that case addressed the state’s authority to set effective dates for whatever agreement might be entered into.

Instead, the Sixth Circuit’s decision was a conventional application of retroactivity analysis. As the Supreme Court has explained, a statute (or administrative rule) is not said to operate retroactively merely because it is applied in a case arising from conduct that predates the statute’s enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). Rather, a new rule or statute must “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to the transactions already completed” before a court will conclude that the statute or rule has retroactive effect in the “disfavored” sense. *Id.* at 268, 280. *See also AT&T*

Co. v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006) (rejecting the claim that an FCC decision imposing fees on AT&T was impermissibly retroactive because the decision “did not change settled law”).

Plainly, retroactivity analysis has nothing to do with the present case. No new statute or regulation was promulgated midway through the Florida PSC proceedings, so there is no question here of whether such a new rule was improperly applied retroactively. The Florida PSC simply applied well-settled existing law—in particular, 47 U.S.C. § 252(i), 47 C.F.R. § 51.809, and Florida’s procedures implementing them—to a dispute between two parties. There is nothing “disfavored” or even unusual about an agency or a court applying existing law to acts that have occurred in the past.

A more relevant analogy than retroactivity analysis is the commonplace regulatory concept of “true up.” “True up” occurs, for example, when carriers provide services to each other for a time but are later directed by a regulator to alter the rates charged for the services already rendered. *See, e.g., AT&T Corp. v. FCC*, 220 F.3d 607, 621 (D.C. Cir. 2000); *see also Quick Commc’ns, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581 (6th Cir. 2008) (upholding state commission determination to require retroactive amendment to existing interconnection agreements to set new prices and requiring “true up” for the difference from prior prices). Of course, nothing in § 252(i) or the FCC’s rules forbids states from treating an ILEC’s efforts to delay implementation of an opt-in interconnection as another instance where “true up” is appropriate.¹¹

¹¹ Even if retroactivity analysis were relevant to the present case, *Southeast Telephone* would not support AT&T. AT&T had no “vested right” that was taken away by any “disfavored” retroactive effect of anything at all. Rather, AT&T had a right under the law to have its objections adjudicated, which they were. AT&T never had any right, vested or contingent, to have any particular date chosen as the effective date of the agreement between AT&T and Nextel. AT&T’s suggestion (at 20 n.5) that “the PSC’s decision impairs AT&T Florida’s rights

II. AT&T's Argument in Favor of a January 29, 2008 Effective Date Is Meritless.

While AT&T primarily argues that “backdating,” as it calls it, of interconnection agreements is unlawful, it offers as a fallback the argument that “[i]f backdating is permitted, the only lawful effective date would be January 29, 2008.” AT&T Br. at 28. AT&T’s arguments in this regard are unavailing.

A. As an initial matter, AT&T waived this argument by not presenting it to the Florida Commission. It is well established that a party must present its arguments to the agency first if it wishes to preserve those arguments on appeal. *See, e.g., Miami-Dade County v. EPA*, 529 F.3d 1049, 1058 n.8 (11th Cir. 2008) (“a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue”) (quoting *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991); *see also McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992) (explaining the “general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts”).

AT&T argued at the Commission that any retroactive effective date at all would be unlawful, in part because the interconnection agreement was allegedly “expired” when Nextel originally sought to adopt it. *See* Brief of AT&T Florida at 26-30 (filed June 27, 2008) (R. Vol. 5 Pg. 775 at 804-08). AT&T’s new approach is to offer this Court a split-

under the parties’ prior interconnection agreement” is simple question-begging to the extent it is relevant at all. It is undisputed that interconnection agreements create rights for all parties. The relevant question, though, is whether AT&T had a vested right to a particular effective date for the adopted agreement—in other words, whether AT&T had a right to have the prior interconnection agreement continue in force after Nextel made demand upon AT&T for adoption of the Sprint ICA when AT&T had no lawful objection to that adoption. AT&T had no such right. Moreover, AT&T *does not even claim* that it had such a right that was taken away by any “retroactive” application of a new law or rule, which is what it would need to allege for any of the Supreme Court’s retroactivity precedents (or *Southeast Telephone*, for that matter) to be relevant.

the-difference solution, to say that if it loses on its statutory arguments, the Commission should have set an alternate retroactive date on the date that the Sprint ICA became (in AT&T's view) "un-expired." But AT&T never told the Commission that. That is why, as AT&T says, "[t]he Florida PSC said little about this argument in the orders on review." AT&T Br. at 32. What AT&T told the Commission was that "backdated" effective dates were unlawful, full stop, a point that was easily refuted (and which the Commission did refute). AT&T cannot now change tacks and offer a new argument.

B. Even if AT&T had not waived its argument in favor of a January 29, 2008 effective date, the argument is meritless. AT&T appears to claim that federal law limits opt-in requests to "a reasonable period of time" following adoption of an agreement by the original parties, and the "reasonable period of time" must necessarily lapse by the time an agreement has "expired." AT&T Br. at 28-32. Yet 47 C.F.R. § 51.809(c)'s "reasonable period of time" requirement offers no assistance to AT&T. The rule requires that interconnection agreements "shall remain available ... for a reasonable period of time after the approved agreement is available for public inspection." *Id.* The FCC explained that its rule would:

address[] incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.

Local Competition Order, 11 FCC Rcd at 16140 (¶ 1319). The rule thus strikes a balance. Communications technology changes over time, and ILECs should not be required to make available an ancient interconnection agreement that was based on

outdated technologies when the ILEC has no other reason for continuing to support those older technologies. On the other hand, the FCC wanted to ensure that, even if *some* time had passed and technology had changed *somewhat* since a particular agreement was made, ILECs would not be able to use that as an excuse to refuse an opt-in request that was otherwise reasonable. The watchword, the FCC concluded, was “reasonableness.”

AT&T, however, has never attempted to make any showing that permitting Nextel to adopt the Sprint ICA would be “unreasonable.” Indeed, although AT&T points out (at 28) the “important policy purposes” supporting the rule that interconnection agreements should be available for a “reasonable” time, it does not allege that any of those policy purposes support refusing to permit Nextel to adopt the Sprint ICA. And of course they obviously do not. While it is true that *some* states have concluded that the anticipated expiration of an interconnection agreement is relevant to the question whether adoption would be reasonable, the relevant standard is “reasonableness” and AT&T cannot challenge the Florida PSC’s order when it never made any effort (and still makes no effort) to show that the adoption was not “reasonable.”

Indeed, AT&T’s position is wholly implausible. As discussed above, the “reasonable period of time” requirement is intended to prevent the adoption of extremely stale ICAs. But AT&T argues that would have been perfectly “reasonable” for Nextel to have adopted the Sprint ICA in *January 2008*, when even AT&T agrees that the agreement was in force. It is therefore nonsensical to argue that it was “unreasonable” for Nextel to adopt the same agreement in June 2007, several months *earlier*, and this Court should not endorse such a strange conclusion.

C. Finally, although AT&T argues that the Sprint ICA was “expired” at the time Nextel sought to adopt it, that is simply not so. AT&T’s argument that the Sprint ICA was “expired” uses that term in a creative and unusual way. The agreement was “expired,” AT&T claims, because when Nextel first sought to adopt the Sprint ICA, AT&T and Sprint had not yet signed an amendment to the agreement reflecting Sprint’s election to extend it for three more years pursuant to the Merger Commitments on account of a disagreement about when the three-year extension should be dated from: AT&T argued that it should be dated from December 31, 2004, while Sprint maintained it should be dated from March 20, 2007. Notably, both sides thought that the extension should be dated from *before* Nextel sought to adopt the Sprint ICA in June 2007. That is, June 2007 falls within the three-year extended term of the Sprint ICA, and there was never any doubt, at any relevant time, that it would.

Perhaps more to the point, however, there is no question that the Sprint ICA agreement remained in effect by its own terms under the month-to-month extension provision of § 2.1. Indeed, while the agreement may be replaced by a subsequent negotiated or arbitrated agreement, in the absence of being replaced by such an agreement, it simply does not *ever* “expire” until one of the parties to it elects to terminate it—something that has never happened. In short, while the “expiration date” for the prior multi-year term of the agreement had passed, it is beyond dispute that the agreement itself remained in force, and indeed Sprint had already elected to extend it.

Moreover, when it joined with Sprint in asking the Florida PSC to extend the term of the Sprint ICA by an additional three years, AT&T represented to the Florida PSC that the agreement was “an effective interconnection agreement” that was “in operation and

enforceable by both parties.” *Adoption Order* at 11 (R. Vol. 6 Pg. 987 at 997). AT&T’s acknowledgment that the Sprint ICA was effective should be the end of the matter. An agreement that was effective enough to be suitable for extension is effective enough to be suitable for adoption under any reasonable view. And certainly, there can be no basis on which to second-guess the Commission’s determination in that regard.

CONCLUSION

The orders of the Commission challenged by AT&T were lawful. The Complaint should be dismissed.

Respectfully submitted,

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Dated: September 22, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on all parties and counsel of record by Notice of Electronic Filing via CM/ECF this 22nd day of September, 2009.

/s/ Joseph C. Cavender
Joseph C. Cavender