

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 4:09-CV-00033-FL**

BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a)
AT&T NORTH CAROLINA,)

Plaintiff,)

v.)

NORTH CAROLINA UTILITIES COMMISSION,)
EDWARD S. FINLEY, JR., in his official capacity as the)
Chairman of the Commission, ROBERT V. OWENS, JR.,)
in his official capacity as Commissioner of the Commission,)
HOWARD N. LEE, in his official capacity as Commissioner)
of the Commission, BRYAN E. BEATTY, in his official capacity)
as Commissioner of the Commission, LORINZO LITTLE)
JOYNER, in her official capacity as Commissioner of the)
Commission, WILLIAM THOMAS CULPEPPER, III, in his)
official capacity as Commissioner of the Commission, SUSAN)
WARREN RABON, in her official capacity as Commissioner)
of the Commission, and NEXTEL SOUTH CORP.,)

Defendants.)

BRIEF FOR DEFENDANT NEXTEL SOUTH CORP.

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STATEMENT OF THE CASE

Incumbent local exchange carriers (“ILECs”)—the old monopoly local telephone companies, like Plaintiff BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (“AT&T”)—are required to offer interconnection to carriers like Defendant Nextel South Corp. (“Nextel”) by the Telecommunications Act of 1996 (“1996 Act” or “Telecommunications Act”), Pub. L. No. 104-104, 110 Stat. 56. The Act provides that carriers like Nextel, known as “requesting carriers” in this context, can obtain interconnection rights in several ways. They can negotiate an interconnection agreement. If negotiations prove unsuccessful, they can seek arbitration from the regulatory commission of the relevant state. Alternatively, a requesting carrier can avoid the time, expense, and uncertainty of either the negotiation or arbitration processes by choosing to “opt in” to or “adopt” an existing interconnection agreement between the relevant ILEC and another carrier. In addition, requesting carriers seeking to interconnect with any ILEC that was part of the AT&T-BellSouth merger—such as Plaintiff AT&T—benefit from expanded opt-in rights pursuant to the terms of the order permitting the merger. These additional interconnection rights are provided in what are known as the “Merger Commitments.”

This case arises out of Nextel’s attempt to opt in to an existing interconnection agreement between AT&T and certain Sprint entities (the “Sprint ICA”). In the Spring of 2007, Nextel and AT&T were exchanging traffic pursuant to their existing interconnection agreement. Nextel notified AT&T that it was exercising its right to opt in to the Sprint ICA pursuant to both the statute and the Merger Commitments. AT&T, however, sought to delay Nextel’s move to the lower prices of the Sprint ICA by raising a

host of objections. Nextel was obliged to petition for relief from the North Carolina Utilities Commission (“NCUC” or “Commission”), which ordered AT&T to permit Nextel to adopt the Sprint ICA. But the parties were unable to agree on *when* the agreement should be considered effective. Nextel argued that the whole point of the opt-in system was to enable rapid adoption by additional carriers of prices and terms *to which the ILEC had already agreed*, and that Nextel should enjoy the benefits of the Sprint ICA starting from the time when AT&T’s delaying tactics had obliged Nextel to file its petition for relief with the NCUC. AT&T claimed that it should receive the benefit of the delay it had introduced by requiring Nextel to go to the NCUC, and specifically that the benefits of the Sprint ICA should not accrue to Nextel until *after* the NCUC had rejected AT&T’s efforts at delay, *after* the parties had finalized a signed adoption agreement, and *after* the NCUC had formally approved the signed agreement. Of course, at the time when AT&T advanced those arguments to the NCUC, the effective date it favored was still some undetermined amount of time in the future.

The NCUC sided with Nextel, noting that there had “already been considerable delay in the instant docket” and concluding that adopting the “indeterminate future date” urged by AT&T would “further reward [AT&T for] litigation-related delay.” Order Setting June 22, 2007 Effective Date, N.C.U.C. Docket No. P-55, Sub. 1710 at 8-9 (filed Dec. 18, 2008) (“*Effective Date Order*”).

AT&T filed this suit seeking review of the NCUC’s determination of the effective date for the adoption agreement. AT&T principally claims that the NCUC violated federal law by “backdating” the effective date of the adoption agreement to June 22, 2007, the date on which Nextel filed its petition asking the NCUC to reaffirm Nextel’s

right to opt in. Alternatively, AT&T argues that the Sprint ICA was “expired” on June 22, 2007—even though AT&T and Sprint have to this day continuously operated without interruption under the Sprint ICA—and that Nextel’s decision to opt in therefore could not have become effective until December 10, 2007, when the NCUC issued a decision approving the three-year extension to the Sprint ICA.

There is no merit to AT&T’s contentions. In brief, federal law does not address the appropriate effective date of decisions to opt in to interconnection agreements. The FCC left such matters to the state commissions. The NCUC’s decision therefore does not conflict with federal law. To the contrary, it is a perfectly sensible decision, consistent with Congress’s goal of making it fast and easy to adopt already existing interconnection agreements. And notwithstanding AT&T’s rhetoric, there is no serious question that interconnection agreements may have effective dates that precede the date on which they are actually signed. Indeed, AT&T’s own repeated practice of setting effective dates prior to the date on which an agreement is signed—including with regard to the very interconnection agreement at issue here, the Sprint ICA—confirms that not even AT&T believes that such a practice is forbidden by federal law.

AT&T’s fallback argument lacks merit because the regulatory provision it is based on does not even apply to Nextel’s decision to opt in at issue in this case, which was adopted under the Merger Commitments. Even if the provision were applicable, though, AT&T is simply wrong: the Sprint ICA had *not* “expired” when Nextel opted in to it. The agreement’s stated multi-year term ran from 2001 to 2004; after that the agreement continued in force on a month-to-month basis by its express terms. Moreover, on the date Nextel adopted it, there was no dispute between AT&T and Sprint concerning

whether Sprint had validly exercised its right to extend the Sprint ICA. AT&T and Sprint did disagree about exactly when the extension commenced—but they agreed that it commenced no later than March 20, 2007, which was still *before* the date on which Nextel sought to opt in to the agreement. Accordingly, the Sprint ICA was plainly in effect when Nextel opted in to it.

STANDARD OF REVIEW

No statute explicitly provides a standard applicable to this Court’s review of state commission interconnection decisions, so the Court should apply generally applicable standards for review of agency action. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). Accordingly, the NCUC’s decision should be set aside only if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., GTE South, Inc. v. Morrison*, 6 F. Supp. 2d 517, 523-24 (E.D. Va. 1998), *aff’d* 199 F.3d 733. Applying this standard, the Court evaluates the agency’s decision on the basis of the administrative record to determine whether relevant factors support that decision and whether the agency has made a clear error of judgment. *See id.* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) and *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)).

AT&T argues that the NCUC’s ruling is not entitled to *Chevron* deference because state agencies do not receive deference on interpretations of federal law. AT&T Br. at 14. But the issue here—how to implement a requesting carrier’s valid election to opt in to an existing interconnection agreement in the face of meritless objections—is not a matter of federal law at all. Congress and the FCC left such matters to the state commissions, and the deferential standard set forth above therefore applies.

If this Court does review any NCUC conclusions of federal law, such review is, as AT&T states, *de novo*. Nevertheless, in light of the NCUC’s “considerable” experience and expertise in applying the Telecommunications Act as well as the role Congress has assigned to it, the Court must be careful not to discount the NCUC’s views. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) (in light of the NCUC’s “considerable” experience and expertise in applying the Act, its orders “should not be taken lightly”).

Finally, AT&T correctly sets forth that this Court should review the Commission’s factual determinations under the deferential “substantial evidence” standard. *GTE South*, 199 F.3d at 746. “In applying the substantial evidence standard, a court ... must uphold a decision that has substantial support in the record ... even if it might have decided differently as an original matter.” *Id.* (internal quotation marks omitted).¹

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

¹ This case arises under the doctrine of *Ex Parte Young*. As such, the Court has no authority to “vacate” or to “remand” any order of the Commission, notwithstanding AT&T’s requests for such relief in its brief. What AT&T actually seeks is injunctive relief.

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 could not be allowed to delay competition indefinitely, and 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, because the ILECs wished to delay the entry of competition into local markets, 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 (“ICAs”) 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. 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 an existing interconnection agreement between the ILEC from which

interconnection is sought and any other carrier. 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 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 § 252(i) need not make such requests pursuant to the procedures for initial § 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” or “arbitrate” if the ILEC refuses interconnection on an opt-in basis—the requesting carrier may seek immediate relief from the state commission. *See also Kentucky PSC Orders*, Nextel Case Nos. 2007-00255 and 2007-00256 at 16-17, 2008 Ky. PUC LEXIS 229, *27-28 and 2008 Ky. PUC LEXIS 230, *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 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*, 494 F.3d at 449 (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 require interconnection over ILEC objections under § 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. Although interconnection agreements are generally governed by the 1996 Act, another alternative is available to carriers that seek to interconnect with an ILEC entity (like AT&T North Carolina in this case) within the company formed by the merger of AT&T and BellSouth—an “AT&T/BellSouth ILEC.” In approving that merger, the FCC imposed certain requirements known as the “Merger Commitments” on AT&T/BellSouth ILECs. *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, the Merger Commitments further facilitate and expedite the opt-in approach to interconnection agreements by requiring AT&T/BellSouth ILECs to provide requesting carriers *broader* opt-in opportunities than are available under the 1996 Act. Compare C.F.R. § 51.809 with *Merger Order*, 22 FCC Rcd 5662, App. F. The Merger Conditions also granted 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. This case involves Nextel’s attempt to opt in, under the Merger Commitments and § 252(i), to the interconnection agreement dated January 1, 2001, between Sprint² and BellSouth (*i.e.*, the company now known as AT&T)—a process that was complicated by the fact that Sprint and AT&T were, at the time, engaged in a dispute about that very agreement.

The Sprint ICA in force at the time of Nextel’s attempt to opt in provided that the agreement’s term would expire on December 31, 2004, but that it would continue on a month-to-month basis thereafter unless a party exercised its right to terminate the agreement. See Sprint ICA § 2.1 (as amended in N.C.U.C. Docket No. P-55, Sub. 1326 (*amendment filed June 23, 2004 approved July 12, 2004*)), *current version online at* <https://clec.att.com/clec/cms/clec/docs/5869e0b031484c52bfb353e1244c9760.pdf> (relevant amendment at 834). Following the adoption of the Merger Commitments,

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 22, 2007 petition to the agency. Petition for Approval of Nextel South, Corp.’s Adoption of the Bellsouth-Sprint Interconnection Agreement, N.C.U.C. Docket No. P-55, Sub. 1710 at 5 n.6 (filed June 22, 2007). The current version of the Sprint ICA is online at <https://clec.att.com/clec/cms/clec/docs/5869e0b031484c52bfb353e1244c9760.pdf>.

Sprint elected to extend its agreement—then in force on a month-to-month basis—by three years, as the Merger Commitments expressly permitted.

BellSouth agreed that Sprint could extend its agreement under the Merger Commitments, but the two parties disagreed about the date the new three-year extension commenced on, and thus what the new expiration date would be. *See* AT&T North Carolina’s Brief and Proposed Order, N.C.U.C. Docket No. P-294 Sub. 31 at 2 (filed Sept. 20, 2007). BellSouth argued that the extension necessarily dated from the date the existing ICA converted from a multi-year term agreement to a month-to-month agreement (December 31, 2004), while Sprint maintained that the extension took effect on the date Sprint actually exercised its right to extend the agreement (March 20, 2007), which was then in effect on a month-to-month basis. Both parties thus agreed that the three-year extension term commenced *prior* to the date Nextel had sought to adopt the agreement (May 18, 2007). This dispute was eventually resolved in Sprint’s favor, and the Sprint ICA with its three-year extension term remains in force today.

The Current Dispute. In response to Nextel’s May 18, 2007 letter invoking its opt-in rights pursuant to the Merger Commitments and 47 U.S.C. § 252(i), AT&T asserted that the Sprint ICA was “expired” and therefore not available for adoption (although, as noted above, the Sprint ICA always continued to remain in force). *See* Nextel Petition for Approval Ex. C, N.C.U.C. Docket No. P-55, Sub. 1710 (filed June 22, 2007) (letter from AT&T refusing opt-in adoption). On June 22, 2007, Nextel accordingly filed a petition with the NCUC, asserting that it had a right under both the Merger Conditions and § 252(i) to opt in to the Sprint ICA and that AT&T had

unreasonably and unlawfully refused to permit it to do so. *See* Nextel Petition for Approval, N.C.U.C. Docket No. P-55, Sub. 1710 (filed June 22, 2007).

As just explained above, however, at that time AT&T and Sprint were in the midst of a dispute about the extension of the Sprint ICA—while they agreed that Sprint had elected to extend the Sprint ICA by three years and that the three-year term commenced *before* June 22, 2007, they did not agree regarding what that date was, and the issue was in litigation before the NCUC. The Commission elected to hold the Nextel opt-in case in abeyance until it resolved the dispute regarding the date the Sprint ICA three-year extension term commenced. Once that case was resolved in favor of Sprint, Nextel sought summary judgment from the NCUC on its opt-in request and AT&T opposed on a variety of grounds. The Commission granted Nextel’s motion, concluding that Nextel was entitled to adopt the Sprint ICA under *both* the Merger Commitments and § 252(i). *See* Order Allowing Adoption of Sprint ICA, N.C.U.C. Docket No. P-55, Sub. 1710 at 15 (filed Sept. 2, 2008) (“*Adoption Order*”). The Commission ordered the parties to submit an agreement reflecting their executed adoption of the Sprint ICA within 30 days.

The parties could not meet the deadline, as they failed to agree about the date the Nextel adoption of the Sprint ICA would be effective. Nextel returned to NCUC and requested that it order the parties to sign an agreement specifying a June 22, 2007 effective date (with an argument in the alternative for a December date). The Commission succinctly summarized Nextel’s arguments:

Nextel argue[s] that its proposed Effective Dates are consistent with federal law, the Commission’s Sprint ICA Extension Order, AT&T’s own practice of using an Effective Date that pre-dates the actual signing and filing dates of a given agreement (e.g., the Sprint ICA), and the decisions of the Florida and Georgia

Public Service Commissions (PSCs) addressing the identical issue between the same parties regarding the identical Sprint ICA in those two states.

Effective Date Order at 1-2.

In response, AT&T claimed that Nextel should not begin to receive the benefits of opting into the Sprint ICA until sometime in the future, *after* a new agreement was finally approved. Specifically, AT&T argued for an effective date of 30 days after the final signature on the agreement, *i.e.*, some yet-to-be-determined future date. AT&T further maintained that any “retroactive” effective date would be unfair and “denied that it had acted in bad faith by dragging out the resolution of” the proceeding. *Effective Date Order* at 5.

The Commission sided with Nextel. It set an effective date of June 22, 2007, and rejected the notion that doing so would be “unfair to AT&T.” *Id.* at 8. “What would be unfair,” the Commission concluded, “would be to further reward litigation-related delay, an outcome which would result in the event that the Commission approved use of the indeterminate future date proposed by AT&T or failed to require adoption of the proposed June 22, 2007, effective date.” *Id.* at 8-9.

AT&T then filed its complaint with this Court.

SUMMARY OF ARGUMENT

AT&T’s position that the terms of an agreement cannot lawfully take effect until *after* the agreement is approved by the state commission has no basis in law 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 agreement prior to the date that it is eventually signed or approved by a state commission. None of the

authority AT&T relies upon, statutory or regulatory, 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 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 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. The FCC expressly left it to the states to decide *other* issues relating to implementation of the opt-in right. The NCUC's orders, far from running afoul of the law, were thus 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 time limits. Permitting an ILEC to delay the effectiveness of a requesting carrier's opt-in election until after all of the ILEC's objections and obstructions—however frivolous—have been addressed thoroughly undermines congressional intent.

AT&T's other argument, that the NCUC's order had the effect of allowing Nextel to adopt the Sprint ICA when that agreement was "expired" and that therefore the adoption was not made within the "reasonable period of time" required under FCC rules, is likewise meritless. First, the FCC rule on which AT&T relies does not apply to agreements adopted pursuant to the Merger Commitments, which this one was. Second, AT&T misunderstands the purpose of the requirement that an agreement be adopted within a "reasonable period of time." That rule 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: even under AT&T's theory on this point, Nextel would be permitted to adopt the Sprint ICA even *later* than that, in December 2007. Third, the agreement was not "expired" in any relevant sense. 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 about when that new three-year term should be dated *from*, they *agreed* that the extension should be dated from no later than March 20, 2007—before Nextel sought to adopt it.

ARGUMENT

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

AT&T argues that federal law bars interconnection agreements that have effective dates prior to the date that a state commission issues an order approving the agreement,

“particularly” when the ILEC objects to the opt-in request. AT&T Br. at 15. 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 primarily 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 interconnection agreements to become effective. *See* AT&T Br. at 15.

Though AT&T did not find occasion to set forth § 252(e)(1) in its brief, the provision is short and 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) simply does not purport to apply to such a situation.

Moreover, § 252(e)(1) *cannot* be read to apply to opt-in situations. Section 252(e)(1) must be read together with § 252(e)(2), which provides specific, limited grounds on which a state, conducting the review required by subsection (e)(1), can reject an agreement reached through negotiation or arbitration, such as when an agreement

discriminates against nonparties. *See* 47 U.S.C. § 252(e)(2). In contrast, the statute provides *no* grounds on which a state commission is permitted to reject an opt-in agreement.

The only “review” federal law contemplates a state commission will perform in the opt-in context occurs when an ILEC objects to an opt-in request. The very limited bases on which an ILEC can object are set out 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. The grounds for objection to opt-in requests set out in 47 C.F.R. § 51.809 have nothing in common with the standards for reviewing agreements set out in 47 U.S.C. § 252(e)(2). Just as § 252(e)(2)’s standards governing state commission review do not apply to opt-in agreements, § 252(e)(1)’s review provision, which applies § 252(e)(2)’s standards, cannot apply either. Opt-in agreements are governed by § 252(i) instead, 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)); *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 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).³

³ That opt-in agreements need not be submitted for approval makes sense because only already-approved agreements are available for opt-in in the first place and, given the relevant statutory standard, a state commission could not approve an agreement as between an ILEC and one carrier but reject it as between the same ILEC and another carrier. AT&T cites *dicta* from the “background” discussion in *Millennium One Communications, Inc. v. Public Util. Comm’n*, 361 F. Supp. 2d 634, 637 (W.D. Texas 2005), for the proposition that opt-in agreements must be

Obviously, if no state commission approval under § 252(e) is required for opt-in agreements, it simply cannot be true that the effective date of such agreements must be set after “approval” under that section.⁴

2. Even if § 252(e) were relevant to the present dispute, it would provide no 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 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, 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

approved by a state commission. As that court noted, the “sole” issue in that case was another question entirely, and, as explained herein, the court’s *dicta* about opt-in agreements is simply inaccurate. Notably, this is the only case that AT&T cites that states, even in *dicta*, that opt-in agreements necessarily must be approved by state commissions.

⁴ AT&T’s contention that “backdating” is *always* inappropriate necessarily fails, then. Its alternative argument that such “backdating” is “particularly” inappropriate when the ILEC objects, AT&T Br. at 15, must be an argument that § 252(i) (which governs opt-in agreements and disputes), or the FCC’s rules implementing that section, prohibits backdating. That argument is also wrong, as explained in part I.B.

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.⁵

3. Furthermore, AT&T's own practice, including with regard to the Sprint ICA at issue in this very dispute, 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)). Similarly, the 2007 amendment to the Sprint ICA recites that it would be effective upon the date the amendment was executed, which, again, would be before the state could possibly have approved it. *See* Joint Motion, N.C.U.C. Docket No. P-294 sub. 31 (filed Dec. 6. 2007).

Indeed, 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.

⁵ As a practical matter, state commissions almost never reject interconnection agreements under § 252(e). *See Qwest Communications Int'l Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340 (¶ 6) (Oct. 2, 2002).

WC 02-89, at 12 (May 29, 2002); *see also Qwest Communications Int'l Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340 (Oct. 2, 2002) (acknowledging AT&T's point).

Consistent with this view, North Carolina expressly provided, *in 1996*, that carriers could set effective dates for their interconnection agreements prior to NCUC approval. *See* 4 N.C. Admin. Code 11.R17-4; Order Allowing Interim Operation under Interconnection Agreements, NCUC Docket No. P-100, Sub. 133 (June 18, 1996). This issue has thus been settled law for well over a decade now. *See also Qwest Communications Int'l Inc. Petition for Declaratory Ruling*, Memorandum Opinion and 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).

B. The NCUC's decision is consistent with § 252(i) and the FCC's rules implementing that provision.

In addition to incorrectly claiming that § 252(e) somehow creates a general prohibition against effective dates prior to state commission approval, AT&T argues that the NCUC'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 “pick-and-choose” aspects of various agreements. *See*

Local Competition Order, 11 FCC Rcd at 16139 (¶ 1314).⁶ 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 prevent a requesting carrier from adopting an existing interconnection agreement. For example, if an ILEC can prove that serving an opt-in carrier would be more costly than serving the original carrier, the ILEC is not required to serve the former on the same terms. *See id.* at 16140 (¶ 1317); 47 C.F.R. § 51.809(b).

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

⁶ The FCC initially chose “pick-and-choose,” but changed its mind several years later.

251 before being able to utilize the terms of a previously approved agreement.

Id.

AT&T's claim that the rules governing § 252(i) are somehow incompatible with the NCUC's action thus fails for three separate reasons. 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 “[e]ft to state commissions ... the details of the procedures for making agreements available to requesting carriers on an expedited basis.” *Id.* The NCUC'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 thus can hardly violate federal law. Third, the FCC's guidance to states also expressly emphasized the importance of making opt-in right fast and easy to exercise.⁷

2. The present dispute demonstrates that it is AT&T's position, rather than Nextel's, that is inconsistent with federal law. If a state commission has no power to order an interconnection agreement to be considered effective as of the date of the

⁷ AT&T argues (at 18) that an ILEC's obligation to make interconnection available without “unreasonable delay” 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 on “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 exercise of opt-in rights 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.

petition to 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. In no rush to permit the Commission to make its decision, AT&T was still making fresh objections more than 10 months after Nextel filed its petition with the Commission seeking to enforce its opt-in right. *See Adoption Order* at 6, 9-11. After Nextel pointed out that AT&T's new argument was, among other things, precluded by relevant precedent, more months elapsed before AT&T withdrew it on the basis of a “recent re-evaluation of data.” *See id.* at 11-12, 19. In all, it took more than 14 months from the time Nextel petitioned the state to approve its opt-in election until all of AT&T's meritless objections were 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.⁸

3. North Carolina 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. Indeed, 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 Florida PSC came to the same conclusion as North Carolina and set the effective date of the agreement there at issue to the date Nextel initiated proceedings before that Commission. *See* Final Order Granting Adoption by Nextel of Sprint-AT&T Interconnection Agreement, Order No. PSC-08-0584-FOF-TP, Docket Nos. 070368-TP, 070369-TP, 2008 Fla. PUC LEXIS 412 (issued Sept. 10, 2008). Similarly, the Georgia state commission set an effective date for the Nextel-AT&T agreement prior to the date of state commission approval (though not the date that Nextel filed its petition). *See* 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* 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

⁸ The NCUC’s decision was not, in any event, a sanction against AT&T, so AT&T’s claim that it was punished without adequate record support (at 21-25) is entirely beside the point. Of course, that is not to say that the NCUC could not have sanctioned AT&T by imposing a penalty or directing it to compensate Nextel. The point is simply that the NCUC reasonably determined an effective date based on the facts of the case and time-honored regulatory concepts.

concluded that setting effective dates prior to the date a state commission resolves an opt-in dispute can be appropriate.⁹

AT&T identifies a handful of states that have allegedly found that the effective dates of agreements must be after the agreement has been approved by the state commission. AT&T Br. at 16-17 & n.6.¹⁰ Of course, if a few states were to reach different conclusions about how to implement § 252(i)'s opt-in provisions, that would not be surprising, given that the FCC expressly conferred such discretion on the states. What is surprising, though, is that AT&T does not actually cite a *single* state decision regarding the opt-in provision of § 252(i). All of AT&T's state citations are, instead, about effective dates for agreements submitted to state commissions under § 252(e)(1) and (e)(2). But as explained above, § 252(e)(1) does not apply to opt-in agreements, which are governed by § 252(i). Of course, even as to § 252(e)(1), states have varying approaches—North Carolina, to take just one example, has long held that interconnection agreements may have effective dates prior to the date of state commission approval under

⁹ 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 Communications Corp. v. Verizon North, Inc.*, Docket No. UT-013019, 2001 Wash. UTC LEXIS 332 at * 30 (Oct. 17, 2001).

¹⁰ Notably, not even all the states AT&T identifies actually have taken the position AT&T claims. The Ohio case AT&T cites, for example, does not take a position on whether an effective date may precede state commission approval. The passage AT&T quotes is actually a reference to how the parties have defined the effective date. *Cf.* AT&T & SBC Ameritech Joint Filing Part 1 of 2, Ohio PUC Case No. 00-1188-TP-ARB, SBC-Ameritech Ohio: AT&T Interconnection Agreement § 21.1.1 at XXI - 1 (page 190 of online PDF), online at <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=00-1188&x=0&y=0> (filed Oct. 15, 2002).

§ 252(e)(1), *see* 4 N.C. Admin. Code 11.R17-4—and nothing in the Telecommunications Act’s cooperative federal-state approach forbids that.

4. AT&T’s claim (at 19-20, 25) that *BellSouth Telecomms., Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650 (6th Cir. 2006), supports its position here is likewise erroneous.

In *Southeast Telephone*, 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 Kentucky PSC 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 Kentucky PSC 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 Kentucky PSC’s decision, the Sixth Circuit reversed. The Sixth Circuit found that the “FCC intended for the new rule to go into effect immediately,” 462 F.3d at 654, and held that the Kentucky PSC 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) does not operate retroactively merely because it is applied in a case arising from

conduct that predates the statutes' 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 AT&T’s claim that an FCC decision imposing fees on AT&T was impermissibly retroactive because the decision “did not change settled law”).

Plainly, the Supreme Court’s retroactivity precedents have nothing to do with the present case. No new statute or regulation was promulgated midway through the NCUC proceedings, so there is no question here of whether such a new rule was improperly applied retroactively. The NCUC simply applied well-settled existing law—in particular, 47 U.S.C. § 252(i), 47 C.F.R. § 51.809, the Merger Commitments, and North Carolina’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 under interim rates, knowing that a regulator might determine the proper rate at some point in the future. That proper rate will then be applied prospectively, but also retrospectively to the “interim” period. *See, e.g., AT&T Corp. v. FCC*, 220 F.3d 607, 621 (D.C. Cir. 2000). Of course, nothing in § 252(i), the Merger Commitments, 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

II. The Commission Did Not Unlawfully Permit Nextel to Adopt an Expired Interconnection Agreement.

AT&T claims that the Commission violated federal law by permitting Nextel to adopt an “expired” interconnection agreement. More specifically, AT&T’s argument appears to be 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 26-27. AT&T’s argument suffers from three fatal flaws. First, the “reasonable period of time” standard on which AT&T relies does not apply here at all, because Nextel adopted the interconnection agreement under the AT&T-BellSouth Merger Commitments (as well as under § 252(i)), and under the Merger Commitments there is no such requirement. Second, even if the “reasonable period of time” requirement were applicable, AT&T misconceives the nature of that requirement, which the FCC specifically adopted so that state commissions would focus on what would be reasonable under all the circumstances of a particular opt-in request and *avoid* any sort of mechanical date-based test. Third, and most fundamentally, AT&T simply mischaracterizes the status of the Sprint ICA at the time of Nextel’s request. The agreement was *not* expired and, in fact, at the very time that Nextel sought to adopt it, AT&T itself was arguing to the NCUC that the Sprint ICA should be considered as extended from *before* the date Nextel sought to opt into it.

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 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.

A. AT&T contends that Nextel could not lawfully opt in to the Sprint ICA because 47 C.F.R. § 51.809(c) limits opt in requests to a “reasonable period of time” after the agreement is made public. But this provision does not apply to agreements adopted pursuant to the Merger Commitments. Merger Commitment 1 provides:

The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

Merger Order, 22 FCC Rcd 5663, App. F (emphasis added). This Merger Commitment explicitly states that requesting carriers may opt into *any* “effective” agreement. In other words, AT&T and BellSouth explicitly waived any objection to an opt-in adoption on the ground that the attempted adoption was not within “a reasonable time” if that agreement was “effective.”

There is no doubt in the present case that the Sprint ICA was “effective.” AT&T argues strenuously that the agreement was “expired” (a term they use in a most unusual way, as described below in more detail), but they never argue that the Sprint ICA was not effective. And of course, it is not disputed that the agreement was effective, as Sprint and AT&T continued to operate pursuant to it, and as its own terms provided that it would remain in force *forever* until a party canceled it or it was replaced by another agreement (neither of which has ever happened).

In this case, Nextel sought to adopt the Sprint ICA under both the Merger Commitments and under § 252(i). And the NCUC concluded that Nextel was entitled to adopt it under either provision. *See Adoption Order* at 18; *Effective Date Order* at 8. Accordingly, AT&T's argument that Nextel did not seek to adopt the Sprint ICA within the "reasonable period of time" contemplated by 47 C.F.R. § 51.809(c) is irrelevant.

B. Even if 47 C.F.R. § 51.809(c)'s "reasonable period of time" requirement were applicable, it would not help 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 Commission 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 27) the “important policy purposes” supporting the rule that interconnection agreements should be available for a “reasonable” time, it does not even allege that *any* of those policies 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 NCUC’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 does not dispute that it would have been perfectly “reasonable” for Nextel to have adopted the Sprint ICA in December 2007, 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 3-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. *See* Public Staff’s Proposed Recommended Arbitration Order, N.C.U.C. Docket No. P-55, Sub. 31, at 10 (filed Sept. 20, 2007). Notably, both sides thought that the extension should be dated from *before* Nextel sought to adopt the Sprint ICA in June 2007.

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, it is inarguable that while the “expiration date” for the prior multi-year term of the agreement had passed, the agreement itself remained in force, and indeed Sprint had already elected to extend it. It would make no sense to conclude that such an agreement was not available for adoption, and the NCUC quite reasonably rejected AT&T’s argument.

III. Conclusion

The order of the Commission challenged by AT&T was lawful. The Complaint should be dismissed.

Respectfully submitted,

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Dated: July 29, 2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 4:09-CV-00033-FL**

BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a)
AT&T NORTH CAROLINA,)
)
Plaintiff,)
)
v.)
)
NORTH CAROLINA UTILITIES COMMISSION,)
EDWARD S. FINLEY, JR., in his official capacity as the)
Chairman of the Commission, ROBERT V. OWENS, JR.,)
in his official capacity as Commissioner of the Commission,)
HOWARD N. LEE, in his official capacity as Commissioner)
of the Commission, BRYAN E. BEATTY, in his official capacity)
as Commissioner of the Commission, LORINZO LITTLE)
JOYNER, in her official capacity as Commissioner of the)
Commission, WILLIAM THOMAS CULPEPPER, III, in his)
official capacity as Commissioner of the Commission, SUSAN)
WARREN RABON, in her official capacity as Commissioner)
of the Commission, and NEXTEL SOUTH CORP.,)
)
Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2009, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to all parties.

Respectfully submitted,

/s/ Joseph C. Cavender
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