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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Wireless One Network, L.P. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with Sprint-Florida, Incorporated Pursuant to Section 252 of the Telecommunications Act of 1996	Docket No. 971194-TP Filed: November 6, 1997

MOTION TO STRIKE PORTIONS OF DIRECT AND REBUTTAL TESTIMONY OF FRANCIS J. HEATON (SECOND MOTION)

Comes now, Sprint-Florida, Incorporated ("Sprint") and files this motion to strike portions of the direct and rebuttal testimony of Francis J. Heaton . The portions of testimony listed in Attachment 1 should be stricken primarily because they relate to matters and information that are outside the lawful, jurisdictional scope of the arbitration. In support, Sprint states the following:

I. Introduction

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1. This docket is a compulsory arbitration sought by Wireless One under the Telecommunications Act of 1996 ("Act"). Significantly, Wireless does not invoke the Florida Public Service Commission ("FPSC" or "Commission") jurisdiction pursuant to Section 364, Fla. Stat. Jurisdiction of the FPSC is pursuant to 47 U.S.C. § 252(b)(4), which states that a state Commission "shall limit its consideration of any petition . . . to the issues set forth in the petition and in the response . . . " [Emphasis added]. Thus, the scope of an arbitration and the

FPSC's jurisdiction is limited to the issues presented in the Petition and response of the respective parties. In its September 11, 1997 Petition ("Petition") Wireless One has submitted only two issues for resolution in this arbitration. These issues were framed as follows:

> I. Whether all land-to-mobile and mobile-to-land calls originated and terminated within an MTA are local telecommunications traffic subject to transport and termination rates, rather than toll charges. [Petition at 3]
>
> II. Whether Wireless One should receive tandem interconnection, transport and end office termination rates for Sprint calls terminating on Wireless One's network. [Petition at 4]

2. It is important to note that Wireless One made the following representation in the Petition after the presentation of the second (tandem switching) issue:

> Whether Wireless One's network is functionally equivalent to Sprint's traditional tandem and end office hierarchy presents a material issue of fact to be resolved in this arbitration.

No such representation was made in relation to the first issue on Reverse Toll Billing Option (RTBO). Following is a discussion of the portions of testimony that exceed the jurisdictional scope of this proceeding, divided by issue.

II. RTBO Issue

3. Sprint submits that it would be useful for the Commission to review the chronological evolution Wireless One's presentation of this "issue" and the proposed testimony.

- On September 12, Wireless One filed its Petition, raising the issue of the

lawfulness of the RTBO charge. Wireless One staked out a position that no RTBO charge was lawful.

- On October 2, Wireless One submitted a "clarification" that a LATA-wide additive would be "acceptable" to Wireless One. A new issue was proposed.[1]
- On October 3, in a staff conference call Wireless One revealed for the first time that the Bellsouth/Vanguard negotiated agreement had a $0.004 additive transport rate to which Wireless One would agree in lieu of the tariffed RTBO rate.
- On October 7, Wireless One submitted the testimony of Mr. Heaton attaching the BellSouth/Vanguard agreement and testifying that Wireless One would accept the selected provision of the Bellsouth/Vanguard negotiated agreement establishing a "LATA-wide additive."
- On October 20, Wireless One took the four-hour deposition of Sprint witness Ben Poag and inquired into the development of the RTBO rate and the cost-basis for intrastate access charges.
- On October 28, Wireless One submitted rebuttal testimony by Mr. Heaton asking the Commission in order to "reduce the Reverse Option price" to $0.00294. Mr. Heaton also allows that Wireless One is still willing to incorporate the BellSouth/Vanguard agreement charge. Mr. Heaton adds for the first time on October 28, however, that acceptance of that rate would be "subject to the true up as that agreement provides."

4. Against this backdrop, Sprint submits that this simple, straightforward, non-

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[1] That issue read:

> 2. Is a TELRIC-based Additive Rate An Acceptable Manner To Compensate Sprint For Any Additional Costs Associated With Transporting Local Calls Throughout The Larger MTA-Based Local Calling Area?

fact issue in this case has become a constantly moving target. Paramount among Sprint's objections is that the addition and mutation of issues are not permitted in an arbitration under the federal act. Such an approach is inconsistent with the concept of an arbitration where the parties submit their differences up front and the arbitrator decides. The transitory status of the Wireless One testimony and issues have made it impossible to respond to in prefiled testimony. In addition the presentation of an isolated provision the BellSouth/Vanguard negotiated agreement as an option that Wireless One is willing to accept is tantamount to publicly negotiating during the arbitration hearing. For these reasons, as further discussed below, Sprint submits that testimony on any issue relating to the RTBO charge be stricken to the extent that it advocates a fact-based resolution or one based on a privately negotiated agreement.

5. In the Petition, Wireless One takes the position in the In its argument and discussion regarding this issue that the imposition of the RTBO charge is unlawful. Specifically Wireless One states that "No toll charges may be assessed for such calls." (Petition at 3). Wireless One characterizes the RTBO charges as "toll charges for all land-to-mobile calls." (Petition at 4, ¶9.)

6. There can be no other interpretation of Wireless One's position than that the RTBO charges are toll charges that may not lawfully be charged. Wireless One asserts that Sprint's position on the assessment of these charges is "unlawful" and that "The FCC has expressly forbidden this practice." (Petition at 7.) Sprint, of course, takes the exact opposite position; hence the arbitration on this issue.

7. At no point in the Petition and response is the Commission presented with a dispute other than the legal/policy polarization regarding the lawfulness of

applying the tariffed RTBO charge. Nowhere in the Petition is the Commission asked to establish a "cost-based" RTBO rate. Remember that the Petition submits that "all but two issues between the parties" have been resolved by the agreement attached to the Petition. (Petition at 2.) Contrasted with the representation that the second issue relating to tandem switching presents a "material fact to be resolved," it must be concluded that there is no factual dispute on the RTBO issue. The dispute is a legal/policy issue one only.

8. The Commission was not asked in the Petition to set rates for local interconnection. These rates have already been agreed to and established as represented in the Petition. Exhibit one to Attachment 1 to the Agreement attached to Wireless One's Petition contains the stipulated rates.

9. Of equal concern is the fact that Wireless One never raised in negotiations the issues of the so-called LATA-wide additive negotiated privately between BellSouth and Vanguard. The first time Sprint became aware of the Vanguard agreement in this context was on October 2, when Wireless One proposed the addition of an issue. See footnote 1, *supra*. Accompanying that proposed issue was a statement that "Wireless One wishes to clarify that a TELRIC-based additive rate is an acceptable manner to compensate Sprint for any additional costs associated with transporting calls throughout the larger MTA-based local calling area."[2]

10. Sprint submits it would be contrary to the Act, grossly unfair and a denial of

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[2]It may seem odd that Wireless One seeks a price increase in the form of the additive to the stipulated transport rate. This neighborly gesture fades into a self-serving haze when one realizes the purpose. The goal is to belatedly amend the Petition in order to forcibly insert a token cost recovery mechanism in the interconnection agreement. This overly-clever effort is intended to strip the FPSC of its authority to set Sprint's end user rates and foreclose Sprint from recovering toll charges from its customers or their stand-in.

due process for an entirely new issue - the proposal to set a transport additive -- to be raised and considered when said issue was never raised in negotiations or in the Petition giving rise to the FPSC's exercise of Federal jurisdiction.

11. The "additive" issue was first raised on Thursday, October 2, 1997. Direct Testimony was due on October 7 and Rebuttal Testimony was filed on October 28. In that time frame Sprint has not had (nor should it be required to find) the opportunity to delve into all the private confidential considerations of a negotiated agreement. Although it was approved by the FPSC, the commission's role is rightfully a relatively passive one. In no way has the Commission made a finding that the agreement (or any piece of it) is, or should be, applicable to other companies.

12. Sprint cannot compel BellSouth or Vanguard to disclose the negotiations leading to a nine-state agreement that includes a lone provision that Wireless One finds to its liking and seeks to have the FPSC impose on Sprint. Thus, Sprint will be denied due process if it cannot confront the "evidence"[3] submitted in the form of the BellSouth/Vanguard agreement.

13. The subject testimony should not be considered by the FPSC in the context of 47 U.S.C. 252(b)(4) which requires a party to continue to participate in further negotiations. Wireless One may suggest that it is merely seeking to continue those ongoing negotiations, albeit publicly. Regardless of whether that is the case, such a public offer can have no place in a compulsory arbitration hearing. A request for arbitration cannot reasonably include an

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[3]Sprint does not raise the same objection to the Sprint/360° agreement to which Mr. Heaton also testifies since Sprint was a party to that negotiation. Even so, it is probably not appropriate to seek to "pick and choose" portions of negotiated agreements for the presentation of direct evidence. Sprint reserves any objection in that regard for the hearing process.

issue not raised in the 135-day period established for negotiation. Efforts to have the 25-day arbitration period be a time slot for raising, negotiating and arbitrating a new issue would be an improper use of the dispute resolution process. The United States Eighth Circuit Court of Appeals recognized this in stating:

> [The parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. Id. 252(b)(1). These provisions reveal that the Act establishes a preference for incumbent LECs and requesting carriers to reach agreements independently and that the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations.

Iowa Utilities Bd. v FCC, No. 96-3321 and consolidated cases, 1997 WL 403401 (8th Cir. July 18, 1997). The arbitration process cannot perform this impasse-resolution for failed negotiations when the negotiations do not begin (in this case on the LATA-wide additive) until the 22nd day of the 25-day arbitration window.

III. Tandem Switching Issue

14. Mr. Heaton has attempted to interject a new issue into the hearing regarding the manner in which Sprint has chosen to route or not route traffic over type 2B trunks. Also, Mr. Heaton suggests that Sprint is somehow not provisioning SS7 to Wireless One's liking. There is little if any testimony demonstrating how these portions of Mr. Heaton's testimony fall within the scope of the issues properly put forth for arbitration.

15. As Wireless One defined the tandem switching issue, the only material fact for resolution is whether Wireless One's network is functionally equivalent to

Sprint's network. Wireless One did not present the issue of what additional services, network configurations, software purchases, additional service offerings or traffic routing changes Sprint should provide. Nonetheless, the identified portions of Mr. Heaton's testimony call into question these non-germane issues.

16. This compulsory arbitration hearing is not a general gripe session. Efforts to turn the commission's attention away from the specific, jurisdictionally grounded issues for resolution and completion of the agreement should be rebuffed.

IV. Conclusion

17. In sum, the portions of testimony identified in Attachment 1 should be stricken because each is outside the scope of the issues raised in Wireless One's Petition and Sprint's response. Consequently, the Commission has no jurisdiction in the context of a state-run, federally mandated arbitration to enter an arbitration decision based on such testimony. 47 U.S.C. 252(b) (4). Furthermore, consideration of a portion of a privately negotiated agreement as dispositive competent substantial evidence in an arbitration is not proper and would deprive Sprint of its due process right to confront and cross-examine such evidence.

18. In conclusion, Sprint urges the FPSC to keep in mind that the Petition and response contain six blocks of contract language. The only request is for the commission to pick from among three from each side. The guiding principle in this decision making should be whether any given piece of testimony advances that goal and facilitates the FPSC's task. Otherwise, chasing rabbits can only

lead to the agency taking an unprecedented hand in rewriting the agreement. To date, this is a burden that the Commission has assiduously avoided.

19. Based on the above, Sprint respectfully requests that the portions of testimony identified in Attachment 1 be stricken because:

(1) The testimony addresses matters beyond the lawful jurisdictional scope of this compulsory arbitration hearing; or
(2) The testimony addresses matters in a manner that deprives Sprint the opportunity to cross-examine the information.

WHEREFOR, Sprint-Florida requests that the Commission grant the relief requested herein.

RESPECTFULLY SUBMITTED this 6th day of November 1997.

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Motion to Strike - Beyond Scope of Petition

= overlap with deposition "rebuttal"; subject to a motion to strike filed November 5, 1997

Witness/ Direct/Rebuttal	Subject	Testimony Segment	Basis for Striking
Heaton - Direct	Vanguard/ BellSouth Negotiated Agreement	p.11, ll. 6-22; p.12, ll. 1-19	• Not raised in the Petition. • Cannot be subjected to cross-exam.
Heaton - Direct	Vanguard/ BellSouth Negotiated Agreement	p. 23, ll. 13-15	• Not raised in the Petition. • Cannot be subjected to cross-exam
Heaton - Direct	Vanguard/ BellSouth Negotiated Agreement	Exh. FJH 1.8	• Not raised in the Petition. • Cannot be subjected to cross-exam
Heaton - Rebuttal	Type 2B interconnection; SS7 availability	p.5, ll.13-22; pp.6-8 (all); p.9, ll.1-4 & 12-21; p.10, ll. 1-9	• Not raised in the Petition.
Heaton - Rebuttal	Cost basis for RTBO	p. 16, ll. 8-20; p. 17 (all); p.18 (ll. 1-4)	• Not raised in the Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail or hand delivery (*) upon the following on this 6th day of November 1997.

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