ORIGINAL

WOMBLE CARLYLE SANDRIDGE & RICE
A PROFESSIONAL LIMITED LIABILITY COMPANY

One Atlantic Center
1201 West Peachtree Street
Suite 3500
Atlanta, GA 30309
Telephone: (404) 872-7000
Fax: (404) 888-7490
Web site: www.wcsr.com

Loretta A. Cecil
Direct Dial: (404) 888-7387
Direct Fax: (404) 870-4826
E-mail: lcecil@wcsr.com

July 22, 2003

Mrs. Blanca S. Bayo
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Petition by AT&T Communications of the Southern States, LLC And TCG South Florida for Arbitration of Interconnection Agreement with Sprint-Florida, Incorporated Under the Telecommunications Act of 1996
Docket No.: 030296-TP

Dear Mrs. Bayo:

Please find enclosed for filing in your office the original and fifteen (15) copies of AT&T Communications of the Southern States, LLC's and TCG of South Florida's (collectively "AT&T") Response to Sprint-Florida, Incorporated's Motion to Compel, AT&T's Motion For Protective Order, and AT&T's Motion in Limine in the above referenced docket.

Please stamp two (2) copies of the this pleading in the usual manner and return to us via our courier.

If you have any questions, please do not hesitate to contact me at 404-888-7437.

Sincerely yours,

Loretta A. Cecil

Enclosure(s)

AUS
CAF
CMP
COM 3
CTR
ECR
GCL
OPC
MMS
SEC 1
OTH

CERTIFICATE OF SERVICE
DOCKET NO. 030296-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically and U.S. Mail this 22nd day of July, 2003 to the following:

AT&T
& TCG South Florida
Ms. Lisa A. Riley
1200 Peachtree Street, N.E., Ste. 8026
Atlanta, GA 30309-3579
Email: lisariley@att.com

AT&T Communications of the Southern States, LLC
Tracy Hatch
101 North Monroe Street, Suite 700
Tallahassee, FL 32301
Email: thatch@att.com

Ausley Law Firm
J. Jeffry Wahlen
P.O. Box 391
Tallahassee, FL 32301
Email: jwahlen@ausley.com

Sprint
Kenneth Schifman
6450 Sprint Parkway
Mail Stop: KSOPHTO101-Z2060
Overland Park, KS *66251*
Email: Kenneth.Schifman@mail.sprint.com

Womble Carlyle Law Firm (GA)
Loretta A. Cecil, Esq.
1201 West Peachtree St.
Suite 3500
Atlanta, GA 30309
Email: lcecil@wcsr.com

Linda Dodson, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 323 99-0870
Email: ldodson@psc.state.fl.us

Loretta A. Cecil, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Arbitration of Unresolved Issues Resulting From Negotiations with Sprint-Florida, Incorporated for Interconnection, Agreement By AT&T Communications of the Southern States, LLC d/b/a AT&T and TCG South Florida	)	Docket No.: 030296-TP
	)	Filed: July 22, 2003

AT&T'S RESPONSE TO SPRINT-FLORIDA INCORPORATED'S MOTION TO COMPEL

AT&T'S MOTION FOR PROTECTIVE ORDER

AT&T'S MOTION IN LIMINE REGARDING COMPENSATION FOR VOIP TRAFFIC

AT&T Communications of the Southern States, Inc. and TCG South Florida ("AT&T"), pursuant to Rules 28-106.204 and 28-106.303, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby (1) respond to the Motion to Compel filed by Sprint-Florida, Incorporated ("Sprint") on July 15, 2003 regarding Interrogatories No. 3 through 15 of Sprint's First Set of Interrogatories ("Sprint's Interrogatories"); (2) request that the Florida Public Service Commission ("Commission") enter a Protective Order finding that AT&T is not required to answer Sprint's Interrogatories; and (3) request that the Commission issue an order granting AT&T's Motion in Limine and determine that compensation for voice over internet protocol ("VOIP") traffic is not an appropriate issue in this proceeding.

BACKGROUND

The same facts support AT&T's Response to Sprint's Motion to Compel, AT&T's Motion for Protective Order, and AT&T's Motion in Limine, relative to Issue 7. As agreed to by AT&T, Sprint, and the Commission Staff, Issue 7 asks:

> VOICE OVER INTERNET PROTOCOL: How should traffic originated and terminated by telephone and exchanged over internet protocol (in whole or in part, including traffic exchanged between the parties originated and terminated to enhanced service providers) be compensated?

In its Motion to Compel, Sprint insinuates that because AT&T included Issue 7 in its Petition, AT&T opened the "floodgates" relative to discovery regarding VOIP traffic.[1] Nothing could be further from the truth. From the very beginning of this proceeding, AT&T's position regarding compensation for VOIP traffic has been ever constant -- that determining compensation for VOIP traffic is not an appropriate issue in this proceeding. Moreover, AT&T has reiterated this position in no less than four (4) pleadings filed in this proceeding. Specifically, in its original Petition, AT&T stated:

> Issue 7 – VOIP Traffic: Determining compensation for VOIP traffic is not an appropriate issue in this arbitration. In Docket No. 000075-TP,[2] the

---

[1] Sprint Motion to Compel at Page 1; Pages 3-4.

[2] *In Re: Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996,* Florida PSC Docket No. 000075-TP, FL PSC Order PSC-02-1248-FOF-TP, September 10, 2002 (*"Florida Reciprocal Compensation Order"*).

> Commission previously determined that compensation regarding VOIP traffic was not "ripe" for consideration. Subsequent to the Commission's Order in this Docket, on October 18, 2002 AT&T filed with the FCC its "Petition For Declaratory Ruling That Phone-To-Phone IP Telephony Services Are Exempt From Access Charges."[3] Recognizing the pendency of this AT&T Petition at the FCC, on December 31, 2002 in Docket No. 021061-TP the Commission declined to address whether phone-to-phone IP telephony services constitute "telecommunications" under Florida law, noting that "the FCC currently is considering a similar matter."[4] In such Order, the Commission specifically found that "it would be administratively inefficient" to make such a determination while the FCC proceeding was underway.[5]

Thereafter in David L. Talbott's Direct Testimony, AT&T stated:

> Although the Commission's Order in the CNM proceeding is less than six (6) months old, once again Sprint is seeking to have the Commission rule on VOIP telephony (this time in the context of an arbitration with Sprint making inappropriate industry-wide allegations regarding [CLECs'] use of VOIP telephony to avoid access charges.) The Commission should not be persuaded by Sprint's repeated efforts to push this Commission into rendering a decision on VOIP – particularly in the context of this arbitration which is limited to AT&T and Sprint.[6]

Additionally, in Mr. Talbott's Rebuttal Testimony, AT&T stated:

> The vast majority of Sprint's arguments center in its

---

[3] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361 *("AT&T's FCC VOIP Petition").*

[4] *In Re: Petition of CNM Networks, Inc. For Declaratory Statement That CNM's Phone-To-Phone Internet Protocol (IP) Technology Is Not "Telecommunications" And That CNM Is Not A Telecommunications Company Subject To Florida Public Service Commission Jurisdiction,* FL PSC Docket No. 021061-TP, Florida PSC Order 02-1858-FOF-TP, December 31, 2002 at Page 1 *("Florida CNM Networks, Inc. Order").*

[5] AT&T Petition for Arbitration, Attachment B, Issue 7 – VOIP Traffic.

[6] Direct Testimony of David L. Talbott, page 67, lines 13-22 filed June 19, 2003 in this proceeding ("Talbott Direct Testimony").

> allegation that increased VOIP traffic is causing Sprint to lose access revenues. I will address Sprint's "the sky is falling" argument further below, but first I believe it necessary to reiterate AT&T's position that the Commission should not address compensation for VOIP traffic in the context of this arbitration. As the Commission will recall, my direct testimony sets forth in great detail the many reasons why the Commission should not rule on compensation for VOIP traffic in the context of this arbitration. Thus, I will not repeat them here. Accordingly, to the extent I have provided testimony to rebut Sprint's direct testimony, I am doing so solely to "correct the record," and not because AT&T believes it appropriate for the Commission to consider the complex technical and regulatory issues *raised by Sprint* relative to compensation for VOIP traffic.[7]

Finally in its Pre-hearing Statement relative to Issue 7, AT&T stated:

> This is not an appropriate issue in this arbitration. Previously, in the Commission's *Florida Reciprocal Compensation Order,* the Commission decided not to address compensation for voice over internet protocol (VOIP) finding that ". . . this issue is not ripe for consideration at this time."[8] Thereafter, the Commission also declined to address whether VOIP traffic constitutes "telecommunications" under Florida law in its *CMN Networks, Inc. Order.*[9] The reasoning behind the Commission's decision was its recognition that the FCC was considering AT&T VOIP Petition regarding compensation for VOIP traffic. AT&T's VOIP Petition has yet to be ruled upon by the FCC. Both AT&T and Sprint have had the opportunity to make comments regarding compensation for VOIP traffic in the context of AT&T's VOIP Petition. Therefore, it remains "administratively inefficient to make a determination on the issue while the FCC proceeding is underway and while the VOIP issue is not right for consideration."[10]

---

[7] Rebuttal Testimony of David L. Talbott, page 34, lines 5-18, filed July 10, 2003 in this proceeding ("Talbott Rebuttal Testimony") [emphasis added].

[8] *Florida Reciprocal Compensation Order* at Page 37.

[9] *CNM Networks, Inc. Order* at Page 1.

[10] Id.; *See also,* AT&T's Pre-hearing Statement at Page 6.

Accordingly, it is disingenuous for Sprint to assert that because AT&T included Issue 7 in its Petition, AT&T opened the "flood gates" relative to discovery regarding VOIP traffic. As Sprint well knows, AT&T only included Issue 7 in its Petition *because Sprint -- and not AT&T* -- affirmatively and repeatedly raised compensation for VOIP traffic in the interconnection negotiations between the Parties. Throughout these negotiations, AT&T remained steadfast in its position that compensation for VOIP traffic was not an appropriate issue for the Commission to decide in this proceeding.

Moreover, AT&T's Petition clearly frames Issue 7 as a policy issue - - the wording for which both the Commission Staff and Sprint have agreed. As a result, Issue 7 is not "fact specific, fact intensive, or fact dependant." In this respect, Sprint did not propose any such additional "fact" issues in its Response to AT&T's Petition, or during the issues identification conference held with the Commission's Staff.[11] Sprint also did not seek such facts from AT&T in its interconnection negotiations with AT&T. Rather, Sprint improperly and unfairly has waited until the month before the hearing in this proceeding to raise such "fact" questions before the Commission.

More specifically, although the words may vary in Sprint's Interrogatories, all ask the same two basic questions: Does AT&T provide

[11] Moreover, Sprint had every opportunity to propose additional "fact specific" issues regarding VOIP traffic at the issue identification conference. In fact, during this conference, the Parties and Commission Staff discussed Issue 7 at length, and changed the issue to accommodate proposed "policy related " word changes requested by Sprint to AT&T's framing of Issue 7.

service in Florida using VOIP? If so, in what amounts? The answers to both questions have no bearing regarding whether, and in what form, the Commission should establish compensation for VOIP traffic between AT&T and Sprint on a prospective basis. In this respect, Sprint's Interrogatories constitute the proverbial "fishing expedition" in which Sprint hopes to develop facts for a complaint regarding AT&T's past and present behavior -- and not to seek information that is "reasonably calculated to lead to admissible evidence" regarding the prospective policy ramifications presented by Issue 7.

In fact, the Commission must conclude that Sprint's Interrogatories serve no purpose except to gather information to support a future Sprint complaint for AT&T's past and present behavior - - behavior which is irrelevant to prospective application of Issue 7. Consider the following Direct Testimony filed by James R. Burt on behalf of Sprint:

> Q. Are you aware of the Florida statute that addresses the issue of carriers knowingly using local interconnection facilities to avoid access charges?
>
> A. Yes. Section 364.16(3)(b), Florida Statutes, states that "No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service."
>
> Q. In your opinion, is this statute relevant to Issue 7 in the Sprint/AT&T interconnection agreement?
>
> A. Although I am not an attorney, the statute appears to relate directly to Issue 7, which addresses

> the inter-carrier compensation that applies to Phone-to-Phone VOIP. If AT&T were to terminate VOIP toll traffic over Sprint local interconnection trunks, *it appears it would be a violation of the statute.*[12]

Sprint's own testimony reflects that AT&T's past and present actions regarding VOIP traffic are of interest to Sprint solely in regards a future complaint by Sprint alleging AT&T's violation of Section 364.16(3)(b), Florida Statutes, and not this proceeding. In Mr. Burt's Rebuttal Testimony, he specifically testifies that *in this proceeding,* it would be " . . . inappropriate to specifically quantify the amount of [VOIP] traffic AT&T has terminated without appropriately compensating Sprint . . ."[13] This testimony is particularly revealing regarding Sprint's discovery motives, and Sprint cannot have it both ways. It cannot request information in discovery, and then at the same time, argue that the requested information is not "appropriate" for disclosure in this proceeding.

ARGUMENT

I. SPRINT'S INTERROGATORIES ARE NOT AIMED AT THE PROSPECTIVE POLICY IMPLICATIONS POSED BY ISSUE 7; THUS THEY ARE NEITHER RELEVANT TO THIS PROCEEDING NOR REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

The discovery cases cited by Sprint in its Motion to Compel are not on point. All of them deal with traditional litigation and none deal with policy

---

[12] Direct Testimony of James R. Burt, page 12, lines 19-24 and page 13, lines 1-10, filed June 19, 2003 in this proceeding ("Burt Direct Testimony") [emphasis added].

[13] Rebuttal Testimony of James R. Burt at page 3, lines 19-20, filed on July 10, 2003 in this proceeding ("Burt Rebuttal Testimony"). In his Rebuttal Testimony, Mr. Burt goes on to state that Sprint ". . . has identified millions of dollars in lost access revenue over the last several months resulting from this access toll arbitrage by AT&T." Id. Clearly, this testimony clearly begs the question of why Sprint needs AT&T to answer Sprint's

formation. In particular, the *Behm, Balos,* and *Lakeside* cases all stand for the proposition that a *defendant is entitled to conduct discovery regarding defenses which are relevant to the plaintiff's claims.* This is axiomatic "black letter law" which AT&T does not dispute. However, these cases deal with discovery of facts necessary for proving a defendant's defenses. Thus, by analogy or otherwise, they are not on point given that this proceeding has nothing to do with defenses proposed by either AT&T or Sprint. Rather, this proceeding involves establishing interconnection terms and conditions on a prospective basis and the policy ramifications related thereto.

In particular, relative to the *Davich* case, discovery was permitted so that the plaintiff could support its theory that the defendant had violated Florida statutory law for which the plaintiff sought damages, as well as other common law claims of fraud and deceit. Although Sprint implies that AT&T has violated Florida statutory law, Sprint has not made any such claim in this proceeding, and it has not sought any damages from AT&T regarding the same. Accordingly, *Davich* also is not on point.

Furthermore, the two cases cited by Sprint relative to discovery issues decided by this Commission, namely *BellSouth v. Supra* and *TCG v. BellSouth,* also involved complaint proceedings relative to enforcing provisions of existing interconnection agreements. At issue in both of these proceedings were the past and present actions of the alleged offending party in the context of recovering "damages" for such actions. Thus, these cases

---

Interrogatories in the first place.

also are not on point regarding what discovery is permitted in the context of resolving a policy issue in an arbitration proceeding.

Finally, Sprint cites *First City Developments* and *TIG Ins.* for the proposition that a party objecting to discovery must quantify the manner in which the discovery is "burdensome" or "overly broad." AT&T also does not dispute this "black letter law." However, contrary to Sprint's allegations, AT&T clearly met this burden in its Objections to Sprint's Interrogatories. AT&T expressly stated that Sprint's Interrogatories were "overly broad" in that they went well beyond the scope of Issue 7. In this respect, AT&T set forth in detail why the Commission should not rule on compensation for VOIP traffic while *AT&T's FCC VOIP Petition* was pending. In particular, AT&T referenced Sprint's Comments regarding the same in which Sprint urged the FCC to decide compensation for VOIP traffic as a matter of *national policy.*[14] Clearly, because Issue 7 involves a policy matter - - which even Sprint advocated that the FCC should decide as a matter of *national policy* - - it would be *fundamentally* "burdensome" and "overly broad" to require AT&T to provide information which has no prospective policy ramifications.

Additionally, the Commission need look no further than Sprint's Interrogatories themselves to determine that they do not constitute permitted discovery in this proceeding. These interrogatories ask for numerous details regarding AT&T's service offerings over the course of years

[14] See, AT&T Objections to Sprint's First Set of Interrogatories at Pages 6-8 filed July 1,

in Florida, including minutes of use or other measurement factors for such services, and what compensation AT&T has paid local exchange carries for transporting and terminating such traffic. These questions clearly are not focused on the prospective policy ramifications of Issue 7. Rather, all are focused on discovering information for a potential Sprint complaint against AT&T. Thus, because Sprint's Interrogatories are not relevant to determining compensation on a prospective basis, *by definition they are "burdensome" and "overly broad."* Accordingly, AT&T hereby moves the Commission for a Protective Order pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, that AT&T is not required to answer Sprint's Interrogatories.

II. THE COMMISSION SHOULD RESOLVE ISSUE 7 BY GRANTING AT&T'S MOTION IN LIMINE BY DETERMINING THAT COMPENSATION FOR VOIP TRAFFIC IS NOT AN APPROPRIATE ISSUE IN THIS PROCEEDING.

Given Sprint's abuse of discovery in this proceeding, AT&T files this Motion In Limine requesting that the Commission issue an order determining that compensation for VOIP traffic is not an appropriate issue in this arbitration. A Motion in Limine is appropriate for purposes of preventing an attempt to introduce improper evidence during conduct of a trial. *Adkins v. Seaboard Coast Line Railroad Company,* 351 So.2d 1088 (2 D.C.A. 1977).

Support for this Motion in Limine is found in AT&T's Talbott Direct

---

2003.

Testimony. As AT&T described in the Talbott Direct Testimony, in the *Florida Reciprocal Compensation Order* the Commission previously determined that compensation regarding VOIP traffic was not "ripe" for consideration.[15] Thereafter, on October 18, 2002, AT&T filed with the FCC its *AT&T's FCC VOIP Petition.* Recognizing the pendency of *AT&T's FCC VOIP Petition,* on December 31, 2002 in the *Florida CMN Networks, Inc. Order,* the Commission declined to address whether Phone-To-Phone IP telephony services constitute "telecommunications" under Florida law, noting that the ". . . the FCC currently considering a similar matter."[16] In such Order, the Commission also specifically found that ". . . it would be administratively inefficient" to make such a determination while this FCC proceeding was underway."[17]

Additionally, as AT&T indicated in Talbott's Direct Testimony, Sprint is fully engaged in *AT&T's FCC VOIP Petition,* having filed Comments with the FCC on December 18, 2002, Reply Comments on January 24, 2003, and an Exparte Presentation on March 13, 2003. In its Comments, Sprint indicated that it ". . . agree[d] with AT&T that there was a pressing need for the [FCC] to clarify whether Phone-To-Phone VOIP traffic should be subject to or exempt from access charges."[18] Moreover, in urging the FCC to so rule, Sprint specifically brought to the FCC's attention that this Commission had dismissed CNM's Petition. Sprint stated:

---

[15] *Florida Reciprocal Compensation Order* at Page 37.
[16] *Florida CNM Networks, Inc. Order* at Page 3.
[17] Id.

> On December 17, 2002, the Florida PSC dismissed a petition filed by CNM Networks, Inc. for a declaratory statement that Phone-To-Phone IP telephony is not telecommunications (PSC Docket No. 0216061-TP). The PSC cited, among other factors, the instant proceeding before the FCC as a reason to defer action at the state level at this time. Thus, it is clear that at least some state PUC's expect the FCC to assume a leadership role in this matter and clarify this *national policy.*[19]

Additionally, in its Reply Comments, Sprint emphasized the need for the FCC to resolve compensation for VOIP traffic, stating that ". . . [t]he Commission should so clarify [that VOIP traffic is subject to access charges] on an expedited basis, to ensure that, on a going forward basis, all basic telecommunications calls are properly assessed appropriate access charges on a non-discriminatory basis."[20] In these same Reply Comments, Sprint also urged the FCC to take action relative to VOIP traffic, stating that ". . .[it is critical that the FCC specifically define what is and what is not considered Phone-To-Phone IP telephony."[21] Sprint then provided the FCC with four criteria for defining Phone-to-Phone IP telephony. These criteria mirror the criteria which Sprint has suggested that this Commission use in order to define VOIP traffic.[22] Moreover, contrary to the discovery position taken by Sprint in this proceeding, in its Reply Comments Sprint also advised the FCC that "[t]he Commission now has before it the requisite information

---

[18] *AT&T FCC VOIP Petition,* Sprint Comments at Page 9.
[19] Id. at Pages 9-10 [emphasis added].
[20] *AT&T FCC VOIP Petition,* Sprint Reply Comments at Page 2.
[21] Id. at Page 3.
[22] Id. at Pages 3-4. *See also,* Burt Direct Testimony at Page 4-11.

needed to issue an explicit clarification about the applicability of access charges to the type of VOIP traffic at issue here."[23] Finally, Sprint stated that the time was right for the FCC to resolve this issue:

> The Commission now has before it a sufficiently developed record to rule on this matter: a description of the Phone-To-Phone VOIP service being offered by AT&T and other carriers; an explanation of how the LEC network is used to originate and terminate these calls; analyses of the impact grant of AT&T's petition would have on various segments of the telecommunications industry and on universal service funding; and a summary of relevant, previously issued, orders and rules. Although complete data on actual Phone-To-Phone VOIP usage may be difficult to obtain, commenting parties agree that VOIP is a measurable and growing market segment. If such usage accounts for only one percent of total switched interstate access minutes of use (and this percentage is almost certainly understated to a significant degree), there would be approximately 5.4 billion minutes of Phone-To-Phone VOIP. IF VOIP service providers are not paying switched access charges for half of those minutes, this equates to $21.1 million in "lost" switched access revenues at an average interstate access charge of $.0078 per minute. Actual switched access charge revenue losses are undoubtedly higher, since some percentage (perhaps the majority) of Phone-To-Phone VOIP usage is undoubtedly intrastate calling, and intrastate access charges are generally higher than interstate rates.[24]

Thus, because (1) Sprint is engaged fully in the current FCC proceeding dealing with VOIP traffic; (2) Sprint agrees that the FCC now has before it all relevant information regarding VOIP traffic, and that the FCC should decide compensation for VOIP as a matter of *national policy;* and (3) the Commission should not "overrule" itself and decide what compensation, if any, is appropriate for VOIP traffic only seven (7) months after issuing its

---

[23] Id. at Page 6.

Florida CNM Networks, Inc. Order, the Commission should grant AT&T's Motion in Limine and issue an order determining that compensation for VOIP traffic is not an appropriate issue in this proceeding.

WHEREFORE, AT&T respectfully requests that the Commission (1) deny Sprint's Motion to Compel relative to Sprint's Interrogatories; (2) grant AT&T's Motion for a Protective Order and issue an order that AT&T is not required to answer Sprint's Interrogatories; and (3) grant AT&T's Motion in Limine and issue an order that determining compensation for VOIP traffic is not an appropriate issue in this proceeding.

Respectfully submitted this 22nd day of July, 2003.

Loretta A. Cecil, Esq.
Womble Carlyle Sandridge & Rice PLLC
Suite 3500
1201 West Peachtree Street
Atlanta, GA 30309
Email: lcecil@wcsr.com
(404) 888-7437

Attorney for:
AT&T Communications of the
Southern States and
TCG South Florida

[24] Id. at Pages 7-8.