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 5, 1997

MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF FRANK HEATON AND JOHN MEYER

Comes now Sprint-Florida, Incorporated ("Sprint") and files this motion to strike certain portions of the testimony of John Meyer and Frank Heaton and the deposition of F. Ben Poag attached as exhibit FJH 1.9. This testimony was filed by Wireless One on the date rebuttal testimony was due -- October 28, 1997. The basis for this motion is that certain portions of the testimonies are not properly responsive to the prefiled direct testimony of Sprint's only witness providing direct testimony and that the wholesale inclusion of a deposition is improper use of the deposition. In support Sprint states the following:

1. On October 7, Sprint and Wireless One filed direct testimony in this matter. On October 20, depositions of all three witnesses were held for the purpose of conducting discovery in aid of developing rebuttal testimony. Mr. Poag is

Sprint's only witness on direct. His deposition was noticed by Wireless One on October 16. At the deposition, Wireless One's counsel explored a wide range of subjects including the development of access charges and his opinions about the direct testimony of Mr. Meyer.

2. On October 28, Wireless One filed "rebuttal" testimony of Messrs. Heaton and Meyer seeking to respond to statements not included in the prefiled direct testimony of Mr. Poag. Attachment 1 lists the portions of rebuttal testimony that is the subject of this motion. Wireless One's tactic is not lawful under FPSC practice, wholly inappropriate and objectionable. Also prominent among Sprint's objections is the inclusion of Mr. Poag's entire deposition as an exhibit to the so-called "rebuttal" testimony. This testimony purports to rebut certain statements contained in the deposition. Sprint strenuously objects to this bootstrapping maneuver. The deposition of Mr. Poag is not offered by Sprint as direct testimony in support of our case. Consequently any use of the deposition must comport with the prescribed method of presenting evidence before the FPSC and the Florida Rules of Civil Procedure which generally allow a deposition to be used for impeachment or contradiction. Any other lawful use that would be allowable in this case would have to involve the presentation of Mr. Poag -- through his deposition -- as Wireless One's own witness. As shown below, this attempted maneuver must fail.

3. Any testimony responding to Mr. Poag's deposition should not be allowed. The purpose of rebuttal testimony in FPSC proceeding has been to allow parties to respond to the direct testimony of another party. The FPSC has consistently stricken testimony that is not responsive to the prefiled direct testimony of another party. Any "rebuttal" testimony that is not directly responsive to the testimony offered by Sprint is either supplemental direct testimony or improper

rebuttal. Such testimony is not contemplated in the procedure established in Order No. PSC-97-1227-PCO-TP.

4. If the Commission were to allow the testimony as rebuttal, substantial prejudice to Sprint would occur. Sprint has played by the rules and limited its rebuttal testimony to responding to the prefiled direct testimony of the Wireless One witnesses. Furthermore, Sprint made Mr. Poag available for a deposition and reserved objections as to the scope of the deposition on the basis that the scope of discovery is traditionally broad. Mr. Poag's deposition contains a great deal of information that is not germane to the two narrow issues that are properly the subject of this hearing. By asking Mr. Poag questions about his views of the prefiled direct testimony of Mr. Meyer, then providing "rebuttal" to that deposition "testimony" in the filings of Mr. Meyer and Mr. Heaton, Wireless One has indeed turned the contemplated testimony filing process on its head.

5. The usurpation of the orderly evidence presentation process attempted by Wireless One must be rejected firmly. Otherwise, such prefiled "rebuttal" would allow one party to gain an advantage by conducting discovery on a witness filing direct testimony. Next, the party could guess that statements made in the deposition would be part of the rebuttal testimony (if any) of that witness. Finally that party could file anticipatory "rebuttal" testimony. This is precisely what Wireless One has done. Allowing, in this case, this end-run around the procedural order would create a horrific precedent and impose substantial prejudice on Sprint.

6. The Commission should resist sympathetic efforts to repair the fatal flaw in Wireless One's testimony. Counsel is charged with knowledge of FPSC rules and procedure and such an assumption is implicit in the Order Granting Motion

for Admission *Pro Hac Vice* (Order No. PSC-97-1234-PCO-TP). Wireless One's calculated gamble is inconsistent with the procedure adopted by the FPSC for the orderly presentation of evidence in the administrative process. In an arbitration where the testimony has been scheduled to be submitted by each side concurrently, due process requires that neither party have an advantage in the testimony filing process. Yet Wireless One seeks exactly such an advantage.

7. Additionally, if Mr. Poag's deposition is to be introduced for any purposes other than impeaching or contradicting Mr. Poag's prefiled testimony at the hearing, Mr. Poag's testimony in the deposition would become the testimony of Wireless One and Mr. Poag would be the witness of Wireless One to that extent. See, Rule 1.330(c), F.R.C.P.[1] In pertinent part, that rule provides:

> Rule 1.330. Use of Depositions in Court Proceedings
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> (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness were then present and testifying in accordance with any of the following provisions:
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> 1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.
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> 2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a

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[1] Commission Rule 25-22.034, F.A.C., provides that parties may obtain discovery through the means and in the manner provided in Rules 1. 280 through 1.400, Florida Rules of Civil Procedure. These rules do not necessarily dictate the conduct or presentation of evidence. Taken in the best light, however, the best that Wireless One can make of the deposition as proposed is to present it as its own testimony under the procedure set out by the Commission.

person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a public or private corporation, a partnership or association, or a governmental agency that is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; © that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.

(5) Substitution of parties pursuant to rule 1.260 does not affect the right to use depositions previously taken and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions

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© Effect of Taking or Using Depositions. A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part of it for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that

party or by any other party. [Emphasis added].

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8. Mr. Poag was not noticed or produced for deposition pursuant to Rule 1.310 or 1.320, F.R.C.P.[2] Mr. Poag is an expert witness. However, he will be available at hearing and subject to cross-examination. In that case Rule 1.330(3)(F) has no applicability. Likewise, the last sentence in Rule 1.330© does not provide a way for Wireless One to evade the testimony filing regime of the Procedural Order. The deposition must be fairly introduced before the "rebuttal" contemplated in the rule can occur. Because rebuttal testimony must be prefiled and responsive to prefiled and timely direct testimony, the above provision is not applicable in this FPSC proceeding.

9. Unquestionably, a party may not provide rebuttal to the testimony of its own witness. Furthermore, if Mr. Poag's deposition is being offered by Wireless One the question arises whether it is direct or rebuttal testimony. If it is direct testimony on behalf of Wireless One, then it is untimely -- filed 21 days late. If it is "rebuttal" then Wireless one must identify the portions of direct testimony that it "rebuts." If offered as rebuttal, then portions of the Meyer and Heaton testimony would then constitute impermissible surrebuttal (of one's own witness, no less).

10. Sprint submits that the surreal notion of Mr. Poag's deposition being offered either as rebuttal to his own testimony or so that Messrs. Heaton and Meyer can design their own rebuttal should not be countenanced. If there is

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[2] The exception in rule 1.330© allowing for broader use of a deposition if taken pursuant to subdivision (a)(2) applies to depositions taken upon written questions (1.320) or where the corporation is noticed to designate an officer, director or managing agent or other person to answer questions in designated areas (1.310). Neither situation pertains to Mr. Poag's deposition

any proper use of Mr. Poag's deposition it would have to be for impeachment purposes at hearing consistent with the rules of evidence.

11. Wireless One has not sought reconsideration of the Order on Prehearing Procedure in the time frame allowed, nor have they sought a waiver to be allowed to file supplemental direct, surrebuttal or anticipatory rebuttal.

12. Sprint further submits that the allowance of the inclusion of a deposition in this context -- as an exhibit to the very testimony that purports to rebut it would create a chilling effect on the efficient conduct of discovery. Beyond the abuse of the direct/rebuttal process utilized by the Commission, Wireless One seeks to introduce the deposition of Mr. Poag for purposes not contemplated by the Florida Rules of Civil Procedure (F.R.C.P.).

13. Rule 1.330 (a)(3)(F) does allow the use of a deposition if a witness is an expert or skilled witness. A literal reading of the language of the rule would mean that the deposition might be offered as direct evidence. However, this aspect of the rule does not apply in the case of a witness who is already prefiling testimony in the administrative process and also making himself available on behalf of Sprint in accordance with the orderly presentation of witnesses established in Order No. PSC-97-1227-PCO-TP. In any event, the provisions of Rule 1.330© would still apply to Mr. Poag being a witness on behalf of Wireless One. As discussed above, this would not be proper.

14. For the above reasons, the testimony of Messrs. Heaton and Meyer should be stricken to the extent that they purport to respond to the deposition of Mr. Poag. The specific provisions are as set out in attachment 1, which is incorporated herein by reference. In addition, Mr. Poag's deposition should be

stricken as well. [3]

15. Certain of Mr. Meyer and Heaton's rebuttal testimony should also be stricken since those provisions do not respond to the prefiled direct testimony of Mr. Poag. Instead the testimonies attempt to rebut allegations contained in Sprint's responsive pleading. If the responsive argument in Sprint's pleading -- which is not evidence -- is wrong, the petition of Wireless One speaks for itself. In any event the testimony should be disallowed because it exceeds the scope and purposes of rebuttal.

16. In conclusion, Sprint requests that the Commission strike the testimony of Wireless One Witnesses Heaton and Meyer as set out in Attachment 1. The identified portions of the testimony should be stricken for the following reasons:

(1) Portions of the testimony respond to or rebut statements made in a deposition that was not filed as direct testimony by Sprint. Thus the offered testimony is improper rebuttal. Prefiled rebuttal testimony can only rebut prefiled direct testimony offered by a party.

(2) If the deposition of Mr. Poag is allowed to be offered wholesale as evidence rather than used to impeach or contradict Mr. Poag, if appropriate, then Mr. Poag becomes Wireless One's witness and his deposition becomes the testimony of Wireless One. In such a case, the "rebuttal" testimony of Heaton and Meyer becomes improper surrebuttal.

(3) Portions of the testimony respond to statements in a pleading and not to Mr. Poag's direct testimony.

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[3]Sprint anticipates shortly filing a motion to strike premised upon principle that testimony must address only issues within the scope of the hearing.

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

RESPECTFULLY SUBMITTED this 5th Day of November 1997.

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Motion to Strike - Improper Rebuttal

= overlap with testimony outside scope of proceeding: subject of another motion to be filed.

Witness/ Direct/Rebuttal	Subject	Testimony Segment	Basis for Striking
Meyer - Rebuttal	Poag Deposition	p. 1, ll. 9 (begin. "This testimony...) - 12	• Improper "rebuttal" of a deposition.
Meyer - Rebuttal	Sprint Oct. 7 Response	p. 1, ll. 13-19;	• Improper rebuttal of a pleading
Meyer - Rebuttal	Poag Deposition	p. 2, ll. 6--21, pp. 7-11 (all), p. 12, ll. 1-5	• Improper "rebuttal" of a deposition
Heaton - Rebuttal	Poag Deposition	p. 1, ll. 8-10 (begin. "In addition..."/ ending "...FJH 1.9")	• Improper "rebuttal" of a deposition
Heaton - Rebuttal	Poag Deposition	p. 2, ll. 20-21; p. 3, ll. 1-5	• Improper "rebuttal" of a deposition
Heaton - Rebuttal	Poag Deposition	p. 5, ll. 13-22; p. 6, ll. 1-3	• Improper "rebuttal" of a deposition
Heaton - Rebuttal	Poag Deposition	p. 7, ll. 21-22; p. 8, ll. 1-2 (ending "...end offices")	• Improper "rebuttal" of a deposition
Heaton - Rebuttal	Poag Deposition	p. 9, ll. 5-11	• Improper "rebuttal" of a deposition

Heaton - Rebuttal	**Poag Deposition**	**p. 11, ll. 6 (begin. "In his deposition...") - 15; ll. 17-18 (ending "...tandem office"); l. 22 (Begin. "In essence...") - p. 12, l. 1 (ending "This is wrong-...")**	• **Improper "rebuttal" of a deposition**
Heaton - Rebuttal	**Sprint Oct. 7 Response**	**p. 14, ll. 17-22; p.15, ll. 1-17**	• **Improper response to a pleading**
Heaton - Rebuttal	**Poag Deposition**	**p. 16, ll. 16-20; p. 17, ll. 1-3**	• **Improper "rebuttal" of a deposition**

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 5th day of November 1997.

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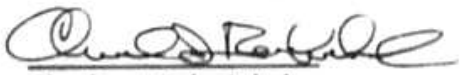

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