ORIGINAL

Sprint

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September 9, 2002

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 020099-TP Sprint-Florida, Incorporated Post-Hearing Statement and Brief

Dear Ms. Bayó:

Enclosed for filing is the original and fifteen (15) copies of the redacted version of Sprint-Florida, Incorporated's (Sprint) Post-Hearing Statement and Brief in Docket No. 020099-TP. Also included is a diskette containing a redacted copy of the Post-Hearing Statement and Brief.

Copies of this have been served pursuant to the attached Certificate of Service.

ALEC has been served unredacted copy pursuant to its protective agreement with Sprint.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Sincerely,

Susan S. Masterton

Enclosures

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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of ALEC, Inc. for enforcement of interconnection agreement with Sprint-Florida, Incorporated and request for relief.	)))))	Docket No. 020099-TP Filed: September 9, 2002

SPRINT'S POST-HEARING STATEMENT AND BRIEF

Pursuant to the Prehearing Order in this proceeding, Order No. PSC-02-1003-PHO-TP, Sprint-Florida, Incorporated ("Sprint") submits its Post-hearing Statement and Brief.

INTRODUCTION AND BASIC POSITION

This docket is before the Commission as a result of a complaint filed by ALEC, Inc. ("ALEC") against Sprint to settle a billing dispute between the parties. The issues to be addressed by the Commission essentially involve a determination as to the proper interpretation of the terms of the parties' interconnection agreement (hereinafter "Agreement").

ALEC has billed Sprint inappropriate and excessive rates for the dedicated transport portion of reciprocal compensation charges in three ways. First, ALEC has applied multiple nonrecurring charges for circuits within a dedicated transport facility. The main point of the dispute between the parties regarding the nonrecurring charges is the propriety of the rates ALEC is billing Sprint to recover what it alleges to be the costs of the switch set-up activities associated with establishing the DS0 trunks in ALEC's switch. The Agreement between ALEC and Sprint does not contain a nonrecurring charge for the establishment of DS0 trunks in the switch of the terminating carrier, because Sprint's cost structure, approved by the Commission in the context of a previous

interconnection agreement arbitrations,[1] recovers these costs through the per minute end office switching rate. In contrast, the excessive costs that ALEC is billing Sprint for performing this activity have never been filed with or approved by this Commission, even though such approval is required by the Agreement and by FCC rules. Further, ALEC has offered no competent, substantial evidence in this docket to support its alleged costs. ALEC also bills Sprint nonrecurring charges for DS1 facilities from which the DS0s are derived and also for the DS3 facilities within which the DS1 facilities are transported to ALEC's switch. Because Sprint transports its traffic to ALEC at the DS1 level and orders DS1 facilities from ALEC, the only appropriate nonrecurring charges are the charges for the DS1 dedicated transport facilities. ALEC incorrectly bills these nonrecurring charges at its price list (or tariff) rates, even though the parties' Agreement clearly sets forth the appropriate nonrecurring charges. The Agreement does not authorize ALEC's price list rates to be billed in lieu of the rates set forth in the Agreement.

In addition to the improper multiple nonrecurring charges at non-Agreement rates, ALEC is also double billing Sprint monthly recurring charges for the facilities used to transport Sprint's traffic. ALEC is billing Sprint a recurring charge for the DS3s ALEC leases from Time Warner, which it uses to transport Sprint's traffic, and it is also billing Sprint a recurring charge for each DS1 that is derived from these DS3s. Since Sprint delivers its traffic to ALEC at the DS1 level, it is Sprint's position that the Agreement requires ALEC to bill Sprint for this transport at the DS1 level at the rates set forth in the Agreement. Clearly, billing both DS3 and the DS1 charges for the same transport facilities results in an unauthorized and gross over-recovery of ALEC's costs for providing

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[1] *Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida and Central Telephone Company of Florida concerning interconnection rates, terms, and conditions, pursuant to the Federal Telecommunications Act of 1996*, Docket No. 96-1230-TP, Order No. PSC-98-0829-FOF-TP, issued June 24, 1998.

the dedicated transport facilities. Further, as shown in Exhibit 9, such charges far exceed what ALEC pays Time Warner to lease the transport facilities.

Finally, ALEC has billed Sprint for dedicated facilities for transport of interLATA (nonlocal) traffic. The parties' Agreement unambiguously defines local traffic to include only traffic that originates and terminates in Sprint's local calling areas. ALEC has admitted that it has billed for dedicated transport services in the Ocala and Tallahassee LATAs to transport Sprint's traffic to ALEC's switches that are located outside the LATAs in which the traffic originates. ALEC has admitted that it has no customers physically located in these LATAs. (Tr. at 161. See also, Composite Exhibit 3, ALEC'S Revised Responses to Sprint's Interrogatories Nos. 11 & 12.) Therefore, the traffic does not terminate in Sprint's local calling area as required by the Agreement.

In sum, ALEC has misinterpreted and misapplied the parties' Agreement and over-billed Sprint for reciprocal compensation for the interconnection arrangements established by the parties. Sprint asks the Commission to reject ALEC's erroneous claims that it is owed additional reciprocal compensation payments by Sprint.

BACKGROUND

The parties operate under an Agreement dated June 1, 2001, allowed to take effect by operation of law by the Commission on September 20, 2001. (See, ALEC Petition at par. 1) The Agreement sets forth the terms and conditions under which the parties' will interconnect their networks for the exchange of telecommunications traffic. ALEC and Sprint exchange traffic at several POIs established in Sprint's territory. The POIs are generally collocated at Sprint tandem offices. (See, ALEC Petition, Exhibit C.) Pursuant to the Agreement, each party is responsible for transporting its originated traffic to the POI. The terminating party is responsible for the transport of the traffic from the POI to its switch and for termination of the traffic. To date, as

ALEC has stated in its Petition and in its testimony, all traffic exchanged under the Agreement has been Sprint-originated, ISP-bound traffic. (ALEC's Petition at par. 16, Tr. at 28) ALEC terminates the traffic to the ISP providers who are its customers. (Tr. at 181)

ISSUES, POSITIONS AND ARGUMENT

ISSUE 1: What is the Commission's jurisdiction in this matter?

Position: *The Commission has jurisdiction to resolve disputes concerning interconnection pursuant to s. 364.162 (1), F.S. In exercising its jurisdiction the Commission must act consistent with applicable state law and controlling federal law, including the 1996 Telecommunications Act and FCC regulations and orders issued pursuant to the Act.*

Argument: There appears to be no disagreement between the parties that the Commission has jurisdiction to determine the issues in dispute in this docket. Section 364.162(1), F.S., explicitly gives the Commission the authority to resolve interconnection disputes. Procedurally, in exercising its jurisdiction under state law, the Commission is governed by the Florida Administrative Procedures Act (ch. 120, F.S.) and its own rules and procedures. In addition to the Commission's authority under state law, federal law supports the Commission's jurisdiction to resolve disputes concerning interconnection agreements that it has previously arbitrated or approved.[2]

In exercising its statutory jurisdiction, the Commission must act consistent with governing law, including the federal Telecommunications Act of 1996 (the "Act") and orders issued by the FCC pursuant to its authority to implement the Act. Rules and orders relevant to this dispute include the FCC's interconnection and reciprocal compensation rules, adopted pursuant to the Local

[2] The Eleventh Circuit, pending an en banc decision, recently vacated its holding in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 278 F.3d 1223 11th Cir. 2002) wherein it found that state commissions do not have the authority under the Act to enforce and interpret interconnection agreements. BellSouth v. MCI, 297 F.3d 1276 (11th Cir. 2002)

Competition Order[3], and the ISP Remand Order.[4] The relevance of the ISP Remand Order to this dispute is particularly significant, since ALEC has stipulated that the traffic that is currently exchanged under its Agreement with Sprint is 100% ISP-bound traffic, originated by Sprint and terminated by ALEC. (Tr. at 28)

In the ISP Remand Order, the FCC determined that ISP-bound traffic is not telecommunications traffic subject to the reciprocal compensation provisions of the section 251(b)(5) of the Act. ¶44 Rather, the FCC determined the traffic to be "information access" traffic and exempt from the provisions of 251(b)(5) under section 251 (g) of the Act.[5] The ISP Remand Order sets forth an alternative mechanism for compensation for ISP-bound traffic, contingent upon an ILEC's election of the alternative compensation scheme. ¶78 According to the provisions of the Order, if an ILEC elects the alternative mechanism, all traffic (251(b)(5) and ISP-bound traffic alike) must be exchanged at the rate set forth in the Order. ¶89 Conversely, if an ILEC does not elect the alternative compensation mechanism, all traffic (both 251(b)(5) traffic and ISP-bound traffic) must be exchanged at the 251(b)(5) reciprocal compensation rate. ¶89

This dispute, although involving solely ISP-bound traffic, is subject to determination by the Commission because, for the time periods at issue in this docket, Sprint had not yet elected to be subject to the FCC alternative compensation scheme for ISP-bound traffic.[6] Therefore, the 251(b)(5) rate is the applicable reciprocal compensation rate. Under the FCC's rules and orders, this

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[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Docket No, 96-98, First Report and Order, released August 8, 1996.

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-69,* Order on Remand and Report and Order (released April 27, 2001. ("ISP Remand Order")

[5]The DC Circuit recently rejected the FCC's analysis of the jurisdictional nature of ISP-bound traffic based on the agency's interpretation of section 251(g) of the Act and remanded it back to the FCC for further proceedings. However, the court refused to vacate the order, so that it continues to be the governing law pending the FCC's review. *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[6] Sprint opted into the alternative compensation mechanism in the ISP Remand Order on February 2, 2002. (Composite Exhibit 1, Sprint's Response to Staff's Interrogatory No. 1. The response contains a typographical error

Commission continues to have jurisdiction over the rates that apply to 251(b)(5) traffic. ¶89 It is Sprint's position that for any time periods subsequent to Sprint's election of the alternative compensation scheme for ISP-bound traffic, the FCC rather than Commission has jurisdiction over any disputes related to compensation for ISP-bound traffic. ¶82

ISSUE 2: Under the terms of the Parties' Interconnection Agreement, what are the appropriate dedicated transport charges for transport facilities used to transport Sprint-originated traffic from the POI to ALEC's switch?

Position: *The appropriate dedicated transport charges for transport facilities used to transport Sprint-originated traffic to ALEC's switch are Sprint's transport rates as set forth in the parties' Agreement. Such charges are applicable to reciprocal compensation for local traffic only.*

a) Has ALEC applied the correct methodology to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

Position: *No. ALEC is incorrectly assessing Sprint nonrecurring charges for DS0s, DS1s and DS3s when the correct nonrecurring charge is for the installation of DS1 facilities only. ALEC is incorrectly assessing Sprint a recurring charge for both DS1 and DS3 facilities when the correct charge is for DS1 facilities only. *

Argument: The major portion of the billing dispute between Sprint and ALEC involves the multiple nonrecurring charges for the same facility that ALEC has imposed on Sprint for the dedicated transport it is providing to transport Sprint-originated traffic from the POI to ALEC's switch. In addition, ALEC has billed Sprint for similar duplicative recurring transport charges. ALEC has willfully and arbitrarily (or at least with reckless

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by referring to Sprint's opt-in date as February 1, 2001. The ISP Remand Order was not issued by the FCC until April 27, 2001.)

disregard for the plain meaning) misinterpreted and misapplied the governing provisions of the Agreement, in contravention of the FCC rules relating to reciprocal compensation, to impose grossly excessive and unjustified charges on Sprint.

NONRECURRING CHARGES

The Agreement does not support ALEC's billing methodology

The Agreement sets forth the applicable compensation for interconnection between the parties. Section 2 of Attachment I of the Agreement establishes the general principles relating to interconnection and reciprocal compensation. (Exhibit 2, page 32) Section 3.1 of Attachment I provides that the rates to be charged for the exchange of local traffic are provided in Table 1 which are applied consistent with the provisions of Attachment IV of the Agreement.[7] The provisions applicable to interconnection are set forth in Attachment IV of the Agreement. (Exhibit 2, pages 118-120) Section 1.2 of Attachment IV describes the responsibilities of the parties relating to the establishment of a point of interconnection (POI) for the interconnection of the two networks. Section 1.2.3 provides that "CLEC will be responsible for engineering and maintaining its network on its side of the POI. Sprint will be responsible for engineering and maintaining its network on its side of the POI." The nonrecurring charges in dispute in this docket involve the exchange of Sprint-originated traffic at ALEC's POIs and transported through ALEC-provided dedicated transport facilities to ALEC's switches. In accordance with the Agreement, Sprint is responsible for its facilities on its side of the POI and ALEC is responsible for its facilities on its side of the POI.

[7] Attachment IV is entitled Interconnection.

The provisions relating to interconnection compensation[8] mechanisms are embodied in Article 2 of Attachment IV of the Agreement. (Exhibit 2, pages 119-120) Section 2.1 restates each party's responsibility for bringing their facilities to the POI. Section 2.2 explains how interconnection compensation (i.e., reciprocal compensation) is to be apportioned based on the ownership and provisioning of the facilities required to accomplish the interconnection of the parties' networks and the subsequent exchange of traffic over these facilities. Section 2.3 describes the components of interconnection compensation to be a "transport" element and a "termination" element. "Transport" is defined to include dedicated and common transport and any necessary tandem switching from the interconnection point to the terminating carrier's end office switch. "Termination" is defined to include the switching of local traffic at the terminating carrier's end office switch. Section 2.4 describes how the physical exchange of traffic may occur and then how the transport and termination elements of interconnection (reciprocal) compensation are to be applied.

The compensation scheme described in the Agreement is entirely consistent with the FCC's rules relating to interconnection and reciprocal compensation.[9] Rule 51.5 defines the term "interconnection" to mean the linking of two networks for the mutual exchange of traffic. It specifies that the term does not include the transport and termination of traffic. Rule 51.305 describes the duty of an incumbent local exchange carrier (ILEC) to provide interconnection for the transmission and routing of telephone exchange traffic, exchange access traffic, or both. Rules 51.701 through 51.717 set forth

[8] In the Agreement the term "interconnection compensation" is used interchangeably with the term "reciprocal compensation."

[9] The parties agree that it is their intent to comply with the Act and the FCC rules and regulations in the whereas clauses on page 1 of the Agreement.

the applicable standards for reciprocal compensation between carriers for the transport and termination of traffic exchanged by the parties through the interconnection of their networks at the designated point of interconnection. Rule 51.701 defines reciprocal compensation to include two elements: the "transport" element and the "termination" element. "Transport" is defined to include the transmission and any necessary tandem switching of telecommunications traffic subject to 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch. "Termination" is defined to include the switching of telecommunications traffic at the terminating carrier's end office switch and delivery of the traffic to the called party's premises.

Rule 51.711 sets forth the parameters of reciprocal compensation, including that it is to be symmetrical and based on the ILECs rates (required by Rule 51.705 to be TELRIC based) except under certain circumstances. Exceptional circumstances include an ALEC demonstrating to a state commission, based on a TELRIC cost study, that its costs of providing transport and termination exceed the ILEC's costs. Although they are not identical, it is obvious that the provisions of the Agreement related to "interconnection compensation" are essentially the same as the FCC rules for reciprocal compensation. It is also obvious that the "facility" referred to in Section 2.2 of the Agreement includes both the facility used to provide the physical point of interconnection between the parties (i.e., the POI) and the facilities used to provide transport and termination of the originating parties' traffic on the terminating carrier's side of the POI.

A majority of the charges specifically at issue in this dispute involve the exchange of Sprint-originated traffic where Sprint's network interconnects with ALEC's network at

the POI located at Sprint's Winter Park tandem to transport Sprint-originated traffic at ALEC's switch in Maitland for termination. ALEC provides the necessary transport through the lease of DS3 circuits from a third party, identified by ALEC as Time Warner. (Composite Exhibit 3, ALEC's Response to Sprint's Interrogatory No. 20) During cross-examination, ALEC witness McDaniel appears to make a distinction between an "interconnection facility" and facilities used to transport the originating party's traffic from the POI to the terminating party's switch. (Tr. at 96) He attempts to use this distinction to justify ALEC's billing of multiple charges for the transport facilities, that is, the charges for DS3 facilities leased from Time Warner, for the DS1s that are delivered by Sprint and ride the DS3s, and for the DS0s that are derived from the DS1s. (Tr. at 96.)

There is no basis in law or fact for this distinction. ALEC uses the DS3s to transport Sprint's traffic that is delivered to and handed off to ALEC at the Winter Park tandem to ALEC's switch in Maitland. Mr. McDaniel has acknowledged that the end points for the DS3s (which he deems to be the "interconnection facilities", Tr. at 104) and the DS1s (which he deems to be the "transport facilities", Tr. at 96) are the same. (Tr. at 107, 108)[10] Mr. McDaniel also acknowledges that ALEC does not, in fact, provide any physical facilities to transport Sprint's traffic from the POI to its switch, other than the DS3s leased from Time Warner and the equipment provided by Time Warner to multiplex the DS1s, over which Sprint transports its traffic, up to the DS3 level. (Tr. at 104)

[10] Mr. McDaniel appears to be confused about what constitutes "transport" for the purposes of reciprocal compensation. On page 104 of the hearing transcript he states that ALEC is not providing transport from the POI in Winter Park to ALEC's switch in Maitland, although it is precisely the billing for those transport services that are at issue in this dispute.

Mr. McDaniel apparently believes that the dedicated transport component of reciprocal compensation (including, in this case, nonrecurring charges for the DS1s and DS0s that ride on the DS3 ALEC leases from Time Warner) is a charge, unassociated with any actual facilities, that a carrier is entitled to impose for the abstract concept of "transporting" the originating party's traffic to the terminating party's switch. This is absolutely contrary to the definition of transport in the Agreement and in FCC Rule 51.701. It is clear that ALEC is providing Sprint a single transport service and that Sprint should be billed accordingly. As Mr. Felz clearly states in his direct testimony, Sprint delivers its traffic to ALEC at the DS1 level, it orders transport from ALEC at the DS1 level and it should be billed by ALEC for transport at the DS1 level (the appropriate rates to be charged for such transport are discussed infra). (Tr. at 195, 205) These payments by Sprint are more than sufficient to cover the nonrecurring costs ALEC actually incurs to provide the transport service, that is, the charges it has paid to Time Warner to install the DS3s and any costs associated with framing and coding the DS1s.[11]

Transport and termination costs are recovered through the reciprocal compensation rates in the Agreement

In addition to this unsubstantiated distinction between an "interconnection facility" and a "transport facility," ALEC also attempts to support its billing of multiple nonrecurring charges to Sprint by asserting that it incurs costs relating to its provision of transport services to Sprint at the DS3, DS1 and DS0 level. (Tr. at 30-34)

A discussion of the relationship between ALEC's bills for recurring charges and what is actually charged by Time Warner is discussed later in this brief. As far as the

[11] ALEC paid Time Warner a total of $2,490.00 in nonrecurring charges for installation of the DS3s and the necessary multiplexing equipment. In contrast ALEC has billed Sprint hundreds of thousands of dollars in nonrecurring charges, including nonrecurring charges for DS3s, DS1s and DS0s. (ALEC's Petition, Exhibit D)

nonrecurring charges, Time Warner billed ALEC a total of $2,490 in installation charges (Tr. at 93. See also, Exhibit 9, at pages 12, 19, 20), including charges for the 3 DS3s and for the necessary multiplexing equipment. In contrast, on its July 11, 2001 invoice alone, ALEC billed Sprint $1,807.26 in nonrecurring charges for the DS3s and $517,045.23 in nonrecurring charges for DS1s and DS0s. (Tr. at 93. See also, Exhibit 9, at pages 24-41.) Obviously, there is no relationship between Time Warner's nonrecurring charges to ALEC and ALEC's nonrecurring charges to Sprint.

ALEC attempts to justify its additional nonrecurring charges for the DS1s and DS0s by indicating that it incurs costs associated with turning up these facilities. (Tr. at 48) For DS1s, ALEC asserts that it incurs costs associated with checking and setting up the framing and coding within its switch. (Tr. at 48) Sprint's witness Cox, who has been deeply involved in the development of Sprint's TELRIC rates for transport and switching in the context of local interconnection and the development of unbundled network element prices, describes how these DS1 costs are recovered in the nonrecurring charges for DS1s as set forth in the applicable rates in the Agreement. (Tr. at 254) ALEC never specifically disagrees that the nonrecurring charge for DS1s in the Agreement is insufficient to cover its costs. Rather, it indicates that it uses its own substantially higher nonrecurring DS1 charge from its price list, to be consistent with the use of its price list rates for the nonrecurring charges it imposes for DS0s. (Tr. at 37) ALEC has never filed a cost study supporting its price list rates based on the required TELRIC methodology. There is nothing in the record that would allow the Commission, either under the Agreement or the FCC rules, to authorize a higher charge for ALEC than the

presumptively valid symmetrical rates in the Agreement which are based on Sprint's TELRIC costs.

Next, ALEC attempts to justify its additional nonrecurring charges for DS0s (and these charges represent by far the largest portion of the billing dispute between the parties) by alleging that such charges are necessary to recoup its costs for the work necessary to turn the DS0s up in its switch (Tr. at 38.) Sprint witness Cox describes how the costs for activating DS0 trunks in the switch are included in the end office switching rate element. (Tr. at 255) The cost studies from Sprint's arbitration with MCI (in which the end office switching rates were initially established and approved) the cost factors and how the resultant costs were included in the rate development. (Confidential Exhibit 4. See, the explanation of how this rate was developed through the various cost components provided in the cost study in Sprint's response to ALEC's POD No. 30, contained in Composite Exhibit 3).

No rate is included in the Agreement for either recurring or nonrecurring DS0 charges, under the rates for transport for reciprocal compensation purposes. ALEC relies on this absence of any reference to the DS0 activation costs in the Agreement to justify its use of its price list rates. (Tr. at 38.) As Sprint's witness Felz aptly states, no rate or reference is necessary because the costs associated with the DSO activations is recovered in the recurring end office switching rate. (Tr. at 226) The basis for and the recovery of the underlying costs through the end office switching rate are established in the cost study filed with the Commission in the Sprint/MCI arbitration docket in support of Sprint's rate structure and rates. (Confidential Exhibit 4)

ALEC's charges grossly exceed its costs

ALEC makes no credible argument that its costs for activities associated with activating DS0s in its switch are not sufficiently recovered through the end office switching rate set forth in the Agreement. In its testimony and discovery responses, ALEC offers no quantitative costs to support its allegations that the rates it charges are necessary to cover its costs. Mr. McDaniel merely states the functions for which compensation is due, that is testing the voice path and signaling and identification in ALEC's switch. (Composite Exhibit 3, ALEC's Response to Sprint's Interrogatory No. 2) In response to Sprint's cross-examination, Mr. McDaniel wildly speculates some numbers in an attempt to cost-justify ALEC's exorbitant billings for DS0 installations. (Tr. at 144-147) These "estimated" numbers demonstrate why the exception in the FCC rule that allows an ALEC to impose higher charges requires that such charges be grounded in TELRIC-based cost studies submitted to and approved by a state commission.

Mr. McDaniel estimates that it takes anywhere from two to four hours to activate a single DS0 trunk in its switch. (Tr. at 144) Compare this to the 20 minutes that Sprint estimates it takes to activate all 24 DS0 trunks derived from a DS1 circuit. (Tr. at 258) In contrast to Mr. McDaniel's unbridled speculation, Sprint's estimates are based on its many years of experience as an ILEC and form the basis for its TELRIC costs submitted in support of the rates approved by this Commission to establish the reciprocal compensation rates contained in Sprint's interconnection agreements. In addition, Mr. McDaniel estimates ALEC's loaded labor rate at more than $100 per hour. (Tr. at 145,

146) Compare this to the $43.00 loaded labor rate associated with the development of Sprint's nonrecurring charges. (Tr. at 258)[12]

Based on ALEC's price list, the nonrecurring charges it imposes on Sprint for activating the 24 DS0 trunks within one DS1 equate to $6,964. Using Mr. McDaniel's highly speculative and obviously inflated estimates for work time and loaded labor rates, ALEC's counsel calculated costs for activating the 24 DS0s within a DS1 that Mr. McDaniel appeared to confirm could actually exceed the inflated rates ALEC charges based on its access tariff![13] (Tr. at 180) Based on Sprint's loaded labor rate of $43.00 an hour, the $6,964 charges would represent 162 hours to activate the 24 DS0s in a DS1, compared to Sprint's estimate of 20 minutes for this same work. Sprint has produced the cost studies that show that its switch costs to activate DS0 trunks are recovered in the end office switching charge. However, as a point of comparison, the costs for activating the 24 DS0 trunks is $14.33 using Sprint's estimates of work time and loaded labor rates. (Tr. at 258.)

The terms of the parties' Settlement Agreement are consistent with Sprint's position

During cross-examination of Mr. Cox, ALEC's counsel asked the witness a series of questions that appeared to be designed to establishment consistency between a Settlement Agreement (Confidential Exhibit No. 7) that Sprint and ALEC entered into to resolve reciprocal compensation issues relating to the termination element of reciprocal compensation. (Tr. at 273-275) Sprint agrees that terms of the Settlement Agreement are

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[12] Mr. McDaniel admits that the 2.5 loading factor used to speculate ALEC's loaded labor rate is not based on ALEC's actual loaded labor rate but is just a factor he has chosen based on his "experiences as a consultant". (Tr. at 145) In addition, ALEC's counsel agrees with Commissioner Baez's characterization of the numbers offered by Mr. McDaniel as merely hypothetical. (Tr. at 177)The admittedly speculative and hypothetical nature of the numbers ALEC presented for the first time at the hearing, render them meaningless as a justification or explanation of ALEC's costs associated with activating DS0 trunks.

completely consistent with the terms of the Agreement relating to the transport and termination elements of reciprocal compensation.

ALEC points to a whereas clause in the Settlement Agreement that [redacted] (Confidential Exhibit 7, page 1) The whereas clause [redacted] These costs are consistent with the cost recovery alternatives set forth in section 2.2.3 of the Agreement, as well as the rates and rate structure set forth under reciprocal compensation in Table 1 of the Agreement (Exhibit 2, page 44) Finally, the whereas clause [redacted] In addition, it is consistent with Sprint's position, set forth in the testimony of Sprint's cost witness, Mr. Cox, that the DS0 activation charges are properly recovered through the minutes of use termination charge, since the DS0 installation activity is a function performed at ALEC's switch and, therefore, is associated with termination rather than transport of the traffic, as defined in both the Agreement and Settlement Agreement.

[13] Using ALEC's estimates for an ILEC of Sprint's size, with thousands of DS1 lines in service providing interoffice transport, the total cost to Sprint would be an astronomical.

The parties agree (and the terms of the Settlement Agreement confirm) that the minutes of use charges associated with the termination element are not a subject of this dispute. (Tr. at 40) Sprint has paid ALEC the minutes of use charges as agreed to by the parties. (Tr. at 256)

ALEC'S relationship with BellSouth is irrelevant to this dispute

ALEC appears to believe that whatever relationship ALEC has established through its interconnection agreement with BellSouth is also applicable to its relationship under its interconnection agreement with Sprint. (Tr. at 34) ALEC states that BellSouth bills ALEC and ALEC bills BellSouth using the same methodology and the same rates that ALEC uses to bill Sprint. (Tr. at 34) Sprint has no knowledge of and there is insufficient record evidence concerning the interconnection arrangements between BellSouth and ALEC.[14] This lack of any evidence to support any similarity between ALEC's agreement with BellSouth and its Agreement with Sprint renders ALEC's argument irrelevant on its face.

The TELRIC-based rates and rate structures are different for each ILEC. They are based on different costs and on different cost recovery mechanisms. For example, in the BellSouth/ALEC interconnection agreement ALEC provided in response to staff's POD request, BellSouth's reciprocal compensation minutes of use (MOU) charge is $.0015.[15] This is less than Sprint's MOU rate in the Agreement of $.003671. This difference in recurring charges (as well as the difference in the way nonrecurring charges are applied, according to ALEC) demonstrates the difference in the two carriers' rate structures that

[14] ALEC provided a copy of what it represents to be the relevant portions of its Interconnection Agreement with BellSouth in its response to Staff's POD No. 1. (See, Composite Exhibit No.1) On its face this document bears little resemblance to the provisions of ALEC's Agreement with Sprint.
[15] See, Composite Exhibit No. 1.

make any comparison meaningless and inapplicable to a discussion of the appropriate rates to be charged between ALEC and Sprint.

RECURRING CHARGES

ALEC has also billed Sprint duplicate recurring charges for the transport component of the reciprocal compensation charge. ALEC is billing Sprint a recurring charge for DS3s that ALEC says is based on the its actual costs of leasing the DS3 facilities from Time Warner. In addition, ALEC is billing Sprint the recurring rate from the Agreement for the DS1s.[16] ALEC's justification for this duplicate billing is the same as discussed above for the nonrecurring charges. ALEC has made a distinction between the "interconnection facility" (which it has designated to be the DS3s) from the dedicated facilities used to provide transport (again ALEC has determined this to be the DS1 facilities, even though ALEC admits that it does not physically provide DS1 facilities to Sprint). As argued above, this interpretation is not supported by the Agreement and is contrary to the plain language of the reciprocal compensation provisions of the FCC rules.

According to the Agreement, transport includes the dedicated transport from the interconnection point between the two carriers to the terminating carrier's switch. (Exhibit 2, at page 120) FCC Rule 51.701 defines transport as the transmission of telecommunications traffic from the interconnection point to the terminating carrier's switch. This dedicated transport, or transmission, is clearly the service ALEC provides to Sprint by muxing the DS1 circuits that Sprint delivers to ALEC up to the DS3 level and

[16] Although ALEC attempts to impose a nonrecurring transport charge for DS0 trunks, in addition to the nonrecurring DS3 and DS1 charges, ALEC does not bill recurring transport charges for the DS0s. This appears to be because ALEC acknowledges that DS0s trunks are not facilities that are used to provide dedicated transport.

transporting the traffic over the DS3s to its switch. This is a single transport service, subject to compensation pursuant to section 2.3 of the Agreement at the rates set forth in Table 1, consistent with the FCC's rules for reciprocal compensation, and in accordance with Section 2.2 of the Agreement allocating the compensation based on the ownership of the facility that provides the service.

b) Has ALEC applied the correct rate to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

Position: *No. ALEC has billed Sprint rates from ALEC's price list for installation of the dedicated facilities, in violation of the Agreement. In addition, ALEC is billing Sprint recurring rates for interLATA transport of traffic that is not subject to reciprocal compensation under the terms of the parties' Agreement.*

Argument: A discussion of this issue is inextricably linked with the previous discussion regarding ALEC's erroneous application of multiple nonrecurring and recurring charges for the same transport facility. ALEC also is improperly billing Sprint for traffic that does not originate and terminate within the same local calling area, as defined in the Agreement. Finally, ALEC is not applying the correct rates under the Agreement for the nonrecurring charges for dedicated DS1 facilities that Sprint has ordered to provide transport from the POI to ALEC's switch.

WINTER PARK TO MAITLAND TRAFFIC

As described above, the major portion of this dispute involves ALEC's transport for termination of Sprint-originated traffic from the POI at Sprint's Winter Park tandem to ALEC's Maitland switch over DS3 facilities its leases from Time Warner. Under the terms of the interconnection compensation provisions of Attachment IV of the Agreement, this fits the compensation scheme described in Section 2.2.3. ALEC agrees

that Section 2.2.3 is the governing provision of the Agreement. (Tr. at 30, 47.) Under this provision, when the CLEC provides 100% of the interconnection facility, the Agreement specifies that the CLEC may charge Sprint the lesser of three alternatives: 1) Sprint's dedicated interconnection rate; 2) its own costs if filed and approved by a commission of appropriate jurisdiction; and 3) the actual lease cost of the interconnecting facility. This provision is consistent with the FCC rule regarding symmetrical reciprocal compensation in that it provides for the use of the ILEC rates, unless the ALEC has filed and had approved a cost study showing that its costs differ from the ILEC's costs. One important difference between the Agreement and the FCC rule is that an ALEC may only charge something other than Sprint's rates if its approved costs are less than Sprint's rates. The Agreement also contains a third "least cost" alternative, that is, the actual lease cost incurred by the CLEC in acquiring the subject facilities from a third party.

Sprint's reciprocal compensation rate for dedicated DS1 transport is the applicable rate

Multiple nonrecurring charges for the same transport service are inappropriate and inconsistent with the contract and federal law. Sprint believes that no charges are warranted for either DS0 installation (because costs associated with DS0 activation are recovered in the end office switching rate) or DS3s (because Sprint orders services at the DS1 level and delivers it traffic to ALEC over DS1s). Sprint asserts that nonrecurring charges for the installation of DS1s are the only appropriate nonrecurring charges under the terms of the Agreement. Similarly, Sprint believes that recurring charges for DS1 facilities are the only applicable recurring charges. ALEC's billing of recurring charges for DS3 facilities, in addition to the DS1 recurring charges, results in excessive dedicated transport cost recovery by ALEC.

Sprint believes that the contract is unambiguous that Sprint's rates for DS1 dedicated transport as set forth in the Agreement are the appropriate rates for ALEC to charge Sprint for the transport of Sprint-originated traffic from the POI to ALEC's switch.

ALEC picks and chooses to apply to highest rate

While the terms of the Agreement are unambiguous, ALEC has attempted to apply "creative construction" to the terms in an effort to pick and choose among the Agreement's three specified alternatives.[17] It appears that, in addition to billing multiple times for the same transport facility, ALEC arbitrarily selects from the three alternatives to generally apply the highest available charges rather than the lowest. (Tr. at 51) [18]

First, ALEC makes the argument that a proper construction of the Agreement would allow it to charge a combination of the charges listed under Section 2.2.3. (Tr. at 30-31, 102.) According to ALEC's interpretation of the Agreement, it has the option of charging either Sprint's costs or ALEC's rates, plus the actual lease amount they are paying to Time Warner, because the Agreement says "and" before the third alternative.[19] This interpretation completely ignores the structure of the section and its subordinate clauses. The colon after the phrase "lesser of" is followed by three clauses (paragraphs 2.2.3.1, 2.2.3.2, and 2.2.2.3), with the first two followed by semi-colons and the last one

[17]General rules related to contracts provide that where the language of a contract is clear, it does not call for judicial interpretation. However, where the agreement is badly drafted or contains language which is ambiguous and uncertain, susceptible of more than one interpretation, a court (or in this instance the Commission) may, under the well-established rules of construction, interfere to reach a proper construction..." 11 Fla. Jur. Contracts §139.

[18] The one instance in which ALEC did not choose the "highest" rate is when applying the nonrecurring charges for DS3s. There, ALEC chose the price list rate to be consistent with its use of the price list rate for the recurring DS0 and DS1 charges, rather than the higher lease rate from Time Warner. Both rates are higher than the Agreement rate. And, in any event, Sprint believes that nonrecurring charges for the DS1s are the only appropriate charges, as additional nonrecurring charges for the DS3s and DS0s result in multiple billings for the same transport facilities.

ending in a period. The commonly understood rules of grammar support that each of these paragraphs is of equal weight and that the three options are meant as alternatives to each other.[20] Mr. McDaniel agrees that a proper interpretation of the phrase "the lesser of" is "whichever is the least." (Tr. at 100) In addition, ALEC makes much of the adjunctive nature of the word "and," implying that it can only be used in the conjunctive, rather than the disjunctive sense. (Tr. at 102) ALEC's assumption is not only erroneous, but defies logic. In fact, in various contexts the terms "and" and "or" may be used interchangeably and may interpreted as either conjunctive or disjunctive, depending on the context. (Tr. at 231)[21]

Using this "pick and choose" methodology, ALEC has arbitrarily applied the Agreement rate in some instances, the rates from its price list in some instances and its purported actual lease costs in some instances to flagrantly inflate its bills to Sprint. (Tr. at 118, 119.) For instance, ALEC applies the Agreement rate for its recurring charge for DS1 facilities, while it applies its higher price list rate for the nonrecurring charge for DS1 facilities. (Tr. at 31, 37, 117, 118.)[22]

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[19] This rationale appears to be an alternative explanation for ALEC's multiple billing of charges for the same facility, in addition to its argument that there are two facilities, that is, the interconnection facility and the transport facility, addressed above.

[20] The rules of grammar also indicate that the disjunctive/conjunctive following the penultimate item in a series is to be read into the preceding list of items as well. Using ALEC's interpretation, this would mean that ALEC could charge all three of the charges in the list, an obviously nonsensical result, totally obviating the meaning of the phrase the "lesser of" and also allowing ALEC triple recovery of its costs for the interconnection services it provides. Instead, ALEC uniterally revises the Agreement by adding an implied "or" between the first two alternatives.

[21] See, *Queen v. Clearwater Electric,* 555 So. 2d 1262 (Fla. 4th D.C.A. 1989) at page 1265, note 4, recognizing that "and" can sometimes mean "or." See also, *Capital City Bank v. Hilson,* 51 So. 853 (Fla. 1910) at page 223, in which the Court states "it frequently happens that "and" means "or" and will be so construed by the Court in order to carry out the intention of the parties."

[22] Sprint has not disputed (and has, in fact, paid) ALEC's bills at the Agreement rate for the recurring DS1 dedicated transport. (Tr. at 205, 207, 258)

ALEC's price list rate is not the lesser of the alternative rates

As discussed above, ALEC has erroneously assessed a nonrecurring charge for DS0s. In determining the rate for this charge, ALEC has used the rates from its price list. ALEC asserts that it had no choice but to use its price list rates for the nonrecurring charges for DS0s, because the Agreement does not contain a nonrecurring rate under the reciprocal compensation charges for DS0s. (Tr. at 37-38) Sprint's analysis of ALECs arguments concerning the need for such a charge and Sprint's explanation of its position that the costs are recovered in the end office switching rate are fully explicated above.

ALEC uses its application of its price list rate for the DS0 nonrecurring charge as a springboard and a justification for applying its price list rates for the nonrecurring charges for DS1s and DS3s (Tr. at 37), even though nonrecurring rates to recover the costs of DS1s and DS3s are clearly set forth in the applicable reciprocal compensation portion of the Agreement and are clearly less than ALEC's price list rates. (Tr. at 214) ALEC's sole justification for this sleight of hand to apply its higher price list rates, rather than the contract rates, is that it applied its price list rates in the interests of "consistency." (Tr. at 37) The only consistency in ALEC's pricing rationale seems to be consistently higher billings. In any event, Sprint believes that only one nonrecurring charge is applicable, and that is the DS1 charge at the rate set forth in the Agreement.

The Agreement does not authorize ALEC to use its tariffed rates

ALEC argues that it is entitled to use its price list rates because there is no nonrecurring rate for DS0s set forth under reciprocal compensation in Table 1 setting forth the rates applicable to the Agreement. (Tr. at 53) Sprint has explained above from a cost perspective why no separate nonrecurring DS0 rate is necessary. Therefore, ALEC's argument that this lack of a rate presents

a conflict between ALEC's price list and the Agreement has no merit. There is no conflict, because the Agreement contemplates the DS0 cost in is end office switching rate. (Tr. at 255. 256) ALEC is also in error in pointing to Section 1.4 of Part B of the Agreement as authorizing ALEC to use its price list rates. (Exhibit 2, page 14).

Section 1.4 states that the terms and conditions of Sprint's tariffs govern Sprint's performance under the Agreement and that if there is a conflict between the Agreement and Sprint's tariffs, Sprint's tariffs will apply to the extent allowed by law or Commission order. This provision is consistent with Sprint's position as a regulated ILEC in Florida. Sprint is, and historically has been, required to file extensive tariffs for the regulated services its offers, including basic services, nonbasic services and access services. In contrast, pursuant to Commission rules, CLECs in Florida are required only to file tariffs for the basic services that they provide.[23] Therefore, it makes sense for the Agreement to provide for the applicability of Sprint's tariffs, but not for voluntary CLEC "price lists." In addition, the FCC rules relating to symmetrical reciprocal compensation give deference to an ILEC's tariffs, subject to certain exceptions that are not applicable here. The reference to Sprint's tariffs in Section 1.4, Part B, is consistent with the FCC's symmetrical reciprocal compensation provisions. [24]

Had the parties intended the section 1.4 of Part B to apply to ALEC's tariffs as well as Sprint's, they would have said so. The language in section 3.4 of Attachment I related to the access charges that apply to non-local traffic specifically encompass each party's access tariff. (Exhibit 2, page 33)

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[23] Rule 25-24.825, F.A.C.

[24] Even as applied to Sprint's tariffs, tariff only controls to the extent allowed by law. ALEC's price list is not based on TELRIC costs approved by the Commission and it therefore does not comply with the FCC rules relating to reciprocal compensation. Therefore, ALEC's price list rates are not "allowed by law" to apply, even if this provision were construed to encompass ALEC's tariffs as well as Sprint's.

BellSouth's access rates are irrelevant to this dispute

ALEC asserts that its price list rates are consistent with the second alternative in Attachment IV, section 2.2.3.2 of the Agreement because they have been filed with (though not approved by) this Commission. (Tr. at 123) To the extent that ALEC concedes that a cost study may be required, ALEC asserts that this requirement has been met because ALEC's charges mirror the rates contained in BellSouth's intrastate access tariff. (Tr. at 39, 131)

Mr. McDaniel professes not to know whether access charges are TELRIC-based. (Tr. at 131.) However, it is axiomatic that access charges are not required to be based on TELRIC costs, and, in fact, frequently exceed an ILEC's incremental costs, to provide support for an ILEC's basic local service rates.[25] The 1993 order of the Commission approving the BellSouth rates that ALEC's price list mirrors, contains no explanation of how the costs were calculated or the components of the costs.[26] Certainly, there is nothing in the order to indicate that the costs are in any way related to TELRIC and, in fact, the rates were implemented several years before local competition was authorized and the TELRIC standard for local interconnection charges was adopted by the FCC. In any event, BellSouth's cost study would not meet the FCC requirement that a CLEC submit a cost study based on its TELRIC costs as justification for ALEC charging asymmetrical (higher) rates.

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[25] See, e.g., *Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida and Central Telephone Company of Florida concerning interconnection rates, terms, and conditions, pursuant to the Federal Telecommunications Act of 1996,* Docket No. 961230-TP, Order No. PSC-97-0294-F)F-TP, issued March 14, 1997; *In re: Investigation into Nontraffic-sensitive Cost Recovery*, Docket No. 860184, Order No. 18598, Issued December 24, 1987.

[26] *In re: Proposed Tariff to Restructure and Reprice Nonrecurring Switched Access Charges, Restructure Rearrangement Charges for Switched Special Access,* Docket No. 920117-TL, Order No. PSC-92-0199-FOF-TL, issued April 14, 1997.

It is inarguable that ALEC's application of its price list rates for nonrecurring charges is in violation of the Agreement. The appropriate charge is the charge set forth in Table 1 of the Agreement under transport for reciprocal compensation, that is, $79.80 for each DS1 installed. (Tr. at 199)

ALEC has misrepresented its actual lease costs

Sprint believes that the only appropriate charges for ALEC to assess Sprint pursuant to the Agreement are recurrring and nonrecurring charges for DS1 transport set forth in the reciprocal compensation rate section of the Agreement. (Tr. at 199. See also Composite Exhibit 3, Sprint's Response to ALEC's Interrogatory No. 12) ALEC has also presented testimony concerning the appropriateness of the rates its has assessed for the DS3s it leases from Time Warner. Sprint believes that no recurring rate for DS3s is due. However, even if such a charge were appropriate, the terms of the Agreement dictate that the appropriate charge would be the lesser charge, that is, the recurring rate set forth in Table 1 of the Agreement. But, Sprint also believes that ALEC has misrepresented in its testimony that it has billed to Sprint the actual recurring costs of these facilities based on what it has been billed for these facilities by Time Warner.

ALEC asserts that it has billed Sprint the actual lease cost for the recurring charges for the DS3 circuits that it leases from Time Warner. (Tr. 30) An examination of the actual bills to ALEC from Time Warner (Exhibit No. 9, pages 3-23) shows that, in fact, ALEC's bills to Sprint have never reflected the actual amount that ALEC was billed by Time Warner for the DS3s.

Subsequent to the initiation of this proceeding, ALEC asserts that it became aware of incorrect billing by Time Warner in an amount far less than what ALEC had billed

Sprint for the DS3s and than ALEC had asserted in testimony reflected the actual lease cost of the facilities. (Tr. at 69) There is nothing in the record to show that Time Warner has ever billed ALEC an amount that would recapture these allegedly "misbilled" charges. (Tr. at 79) ALEC's bills to Sprint, which are nearly double the actual costs that Time Warner billed ALEC during the time period at issue in this dispute, are relevant as another example of how ALEC has twisted the facts and its interpretation of the Agreement to attempt to extract excessive compensation from Sprint under the guise of reciprocal compensation.

TALLAHASSEE AND OCALA TRAFFIC

In reviewing ALEC's bills to Sprint that were provided pursuant to this dispute, Sprint discovered another area in which ALEC was overbilling Sprint. [27] In addition to the Sprint-originated traffic that is handed off to ALEC at the POI at the Winter Park tandem for termination at ALEC's switch, Sprint also hands off traffic, transported from Sprint's end users in the LATA, to ALEC at the POI at the Tallahassee tandem (in the Tallahassee LATA) and the POI at the Ocala tandem (in the Gainesville LATA).[28] (Tr. at 54) The traffic handed off to ALEC in Tallahassee is transported by ALEC to its switch in Valdosta. The traffic handed off to ALEC in Ocala is transported by ALEC to its switch in Maitland (in the Orlando LATA). (Tr. at 192)

In Part A, Section 1.63, the Agreement defines "local traffic" as traffic that is originated and terminated within Sprint's local calling area, including mandatory EAS areas.[29] Therefore,

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[27] Because Sprint did not become aware of this billing error until after this dispute was filed and therefore has not previously disputed these charges, Sprint has paid the amounts billed as required by Agreement and asks that, should the Commission rule in Sprint's favor, ALEC be required to refund the overpayments made by Sprint in error and cease billing Sprint reciprocal compensation charges for this traffic.

[28] Sprint have also established POIs for the exchange of traffic at other locations, as detailed in Exhibit C to ALEC's Petition. Whatever generally applicable prinicples are established by the Commission in this docket should apply to the exchange of traffic at these locations and any future locations, as well.

[29] Although not specifically applicable to this dispute, the Commission's ruling on August 20, 2002, in *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the*

according to the Agreement, in order for the traffic exchanged at the Tallahassee and Ocala tandems to be considered local traffic, subject to reciprocal compensation, the traffic must be terminated by ALEC to an end user customer location within the local calling area of Sprint's originating customer. In the generic reciprocal compensation docket, the Commission has ruled that for reciprocal compensation to apply, a call must physically terminate in the same local calling area as it originated.[30]

ALEC has admitted that it does not have a customer with a physical location in either the Tallahassee or Ocala LATAs.(Tr. at 161. See also Composite Exhibit 3, ALEC's revised response to Sprint's Interrogatories Nos. 11 and 12). ALEC explains that the customer to whom it terminates Sprint's calls handed off at the POIs within each of these LATA's is not physically located within the LATA, but that ALEC has a local number at which the call terminates thereby making the call a local call. (Tr. at 163) ALEC asserts that for reciprocal compensation purposes, it is charging Sprint only the transport costs from the tandem to this number at its POI in the same location, where, according to ALEC, the call terminates.[31] (Tr. at 162) The arrangement appears similar to a "virtual NXX" as discussed in the generic reciprocal compensation docket. The Commission ruled that the appropriate intercarrier compensation in the virtual NXX context is to be determined by the physical end points of the call, not the rating

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Telecommunications Act of 1996, Docket 000075-TP (Phase IIA), the generic reciprocal compensation docket, concerning local calling areas is consistent with the local calling area definition in the Agreement, at least as it applies to Sprint-originated traffic, which is 100% of the traffic that is the subject of this dispute.

[30] Staff Recommendation in *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996,* Docket No. 000075-TP (Phase II), approved by the Commission on December 5, 2001, at Issue 15.

[31] It is unclear how charges for "transport" as defined in the Agreement would apply here. As discussed above, transport is defined at the transmission of traffic from the POI to the terminating carriers switch. (Exhibit 2, page 120)

of the NXX.[32] Since, as ALEC has stated, it does not physically terminate a call back to the LATAs in which the call originates, the traffic exchanged by Sprint for termination by ALEC at the Tallahassee and Ocala POIs is not local traffic and therefore no reciprocal compensation at any rate is due for these calls.

ISSUE 3: Under the terms of the Parties' Interconnection Agreement, what minute-of-use charges are applicable for the transport of Sprint-originated traffic from the POI to ALEC's switch?

Position: *This issue has been WITHDRAWN.*

ISSUE 4: Has Sprint paid ALEC the appropriate charges pursuant to the terms of the Parties' Interconnection Agreement?

Position: *Yes. Sprint has paid ALEC undisputed amounts for the dedicated transport portion of the reciprocal compensation charge pursuant to the parties' Agreement.*

Argument: The appropriate rates that ALEC should be billing Sprint for providing dedicated transport of Sprint's traffic from the POI at Winter Park to ALEC's switch in Maitland, are the rates set forth in the Agreement in Table 1. (Exhibit 2, pages 35-77). These rates are $79.80 in nonrecurring charges per DS1 (page 44 under Reciprocal Compensation, Dedicated DS1 Transport) and $71.95 (page 71 of Table 1, Maitland – Winter Park) in monthly recurring charges for each DS1. (Tr. at 199) Sprint has paid the full amount of these charges for the time period that is the subject of this dispute: a total $123,990.88[33], which is the amount due and owing for the DS1 facilities provided at the rates set forth in the Agreement.[34] (Tr. at 200) The

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[32] Staff Recommendation in *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996,* Docket No. 000075-TP (Phase II), approved by the Commission on December 5, 2001, at, Docket Issue 15.

[33] As previously stated, these amounts also include charges for transport of traffic in the Tallahassee and Ocala LATAs that Sprint has discovered is not local and therefore not subject to reciprocal compensation.

[34] Sprint paid undisputed amounts on a monthly basis for a total of $45,389.50 through November 2001. Sprint paid the remaining amount of $78,601.38 in undisputed charges on May 22, 2002.

undisputed amounts paid by Sprint are calculated based on the nonrecurring and recurring charges set forth in the Agreement for the dedicated DS1 transport provided by ALEC to Sprint from April 2001 through January 2002.

ISSUE 5: Did Sprint waive its right to dispute charges because it did not properly follow applicable procedures outlined in the Parties' Interconnection Agreement?

Position: *No. Sprint informed ALEC that it was disputing its inappropriate and excessive billing and the reasons for this dispute upon receipt and review of ALEC's initial bill for reciprocal compensation charges. Sprint has paid the amounts not disputed, as required by the parties' Agreement.*

Argument: Ironically, after having ignored are misinterpreted many of the Agreement's provisions relating to reciprocal compensation, ALEC takes the position that Sprint did not comply in all technical respects with the dispute resolution provisions of the Agreement and, therefore, has permanently forfeited (or waived) its rights to dispute the validity of the charges. According to ALEC, even if the Commission determines that the charges billed by ALEC are not in compliance with the reciprocal compensation provisions of the Agreement or the FCC rules, Sprint must pay the full amount billed by ALEC for the services, because Sprint did not provide written notice to ALEC within 30 days of receiving the bills containing the disputed amounts.

At best ALEC may have an argument that Sprint should have paid the bills, rather than withhold payment, during the pendency of its dispute, because Sprint did not fully comply with the Agreement's conditions for withholding payment of disputed amounts. Sprint argues that it substantially complied with the dispute resolution provisions and, therefore, acted properly in withholding payment. Under no circumstances did Sprint indicate an intent to or act in a manner

that would constitute a waiver of its rights to enforce the reciprocal compensation provisions of the Agreement.

The Dispute Resolution provisions of the Agreement address when payment nay be properly withheld

Two sections of the Agreement govern the resolution of billing disputes between the parties. Part B, General Terms and Conditions, Section 5, entitled Charges and Payments sets forth procedures to be followed in collecting amounts due under the Agreement. (Exhibit 2, pages 17-19) Section 5.4 provides that bills for which written, itemized disputes or claims have been filed are not due for payment until such disputes or claims have been resolved in accordance with the dispute resolution provisions of the Agreement. The purpose of this provision appears on its face to provide a procedure by which the due date for disputed amounts is postponed until resolution of a dispute, thereby suspending the collection procedures set forth in Section 5.6.

Section 21 of the Agreement contains the dispute resolution procedures referred to in section 5.6. (Exhibit 2, pages 26-27) Section 21.1 expresses the parties' recognition of the Commission's jurisdiction to resolve disputes arising out of or relating to the Agreement. Section 21.2 provides that if a portion of the amounts due to the "billing party" by the "non-paying party" under the agreement are subject to a "bona fide" dispute, then the non-paying party must give written notice to the billing party at the address provided in the notice section of the Agreement of the amounts it disputes, along with specific details and reasons for disputing each item. The section goes on to require the nonpaying party to pay all undisputed amounts and include a copy of the dispute with the payment. Any disputed amounts determined to be properly payable are to be paid, along with applicable late charges, upon resolution of the dispute.

As with the provisions of Section 5.4, these provisions appear to be intended to allow a party to defer payment of amounts that are properly disputed until the dispute is resolved. On their face the provisions appear to provide that if an amount is not properly disputed, then it is due and payable upon the applicable invoice due date. As noted by Mr. Felz, there is nothing in this provision that specifies any consequences outside establishing the applicable due date for failure to comply with the dispute notification provisions. (Tr. at 222) Rather, the provisions of that section address only when payment is due and when late charges will apply. Most notably, there is nothing in this provision that indicates that a Party has waived its right to question the validity of an the other party's bills at a later date and to request or attempt to obtain a refund of any amounts that may have been improperly paid.

The remaining provisions of the dispute resolution section set forth a process for the parties' to attempt to resolve disputes between themselves through designated representatives and escalation of the dispute after 30 days, if the dispute cannot be resolved at the initial attempt. As set forth in Sprint's testimony and supported by the correspondence provided in Sprint's discovery responses, consistent with these procedures Sprint and ALEC made several attempts to resolve the dispute through e-mails and meetings and even through informal Commission involvement before this dispute was submitted to the Commission as a formal complaint. (Tr. at 154-156. See also Composite Exhibit 3, Sprint's Response to ALEC's POD No. 4)

Enforcement of the substantive provisions of the Agreement is not conditioned upon strict compliance with the Dispute Resolution provisions

Other provisions of the Agreement support an interpretation of the intent of the dispute resolution provisions to provide for designating a disputed amount solely for the purpose deferring the due date of the payment. Section 6 of the Agreement authorizes either party to audit the services performed and amounts billed by the other party pursuant to the Agreement for the

12 months preceding the audit. (Exhibit 2, pages 19-20) Section 6.4 allows adjustments based on the audit findings to be applied to the 12 month period included in the audit. Clearly this provision allows for refunds of improperly billed amounts whether or not such amounts were disputed within 30 days of the due date of the bill. This contradicts ALEC's assertion that Sprint's failure to comply in all technical respects with the process for disputing an invoice constitutes a "waiver" of Sprint's rights to challenge at a later time the propriety of the charges imposed by ALEC.

Section 18.1 of the Agreement states that "no waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed." (Exhibit 2, page 25) While Sprint may not have technically complied with all of the provisions that allowed it to properly withhold payment of disputed amounts, clearly Sprint did not waive any of its rights to assert any substantive claim that ALEC's billing practices are in violation of the Agreement and federal law. In fact, Sprint's actions to communicate its disagreement with ALEC's billing practices, while perhaps not strictly in compliance with the Agreements provisions relating to whether such payment could be withheld legitimately, clearly demonstrate Sprint's assertion of its right to contest the billings.

Sprint's actions substantially comply with the intent of notice provisions

Sprint received the first bill from ALEC, representing billing for the months of April – June 2001, on July 18, 2002. (Tr. at 240) The bills were voluminous and reflected substantially higher charges than what Sprint was anticipating based on the services it had ordered. Understandably, it took some time for Sprint to analyze and attempt to understand the basis of the charges. (Tr. at 241)

According to Mr. McDaniel, the first discussions he had with Sprint regarding the billing were via a telephone call he placed to Sprint personnel. (Tr. at 154) Although Mr. McDaniel did not indicate the date of that call, presumably it was before August 20, 2001, since that was the date on which Sprint first sent written notice, via e-mail, to ALEC that it had questions about the accuracy of the billing. (Composite Exhibit 3, Sprint's Response to ALEC's POD No. 4.) In fact, Mr. McDaniel states that Sprint's e-mail was in response to ALEC's call to Sprint. (Tr. at 154) Therefore, ALEC had notice of Sprint's disagreement with the bills it had rendered to Sprint in writing no more than two days past the 30-day time frame specified in the Agreement. In addition, based on Mr. McDaniel's reference to his prior phone call, it is likely that ALEC had verbal notice of Sprint's intent to question to the bills within the 30-day period.

Substantial performance of the terms of a contract has been held to be sufficient to establish a party's rights to enforce the contract. In *Edward Waters College v. Johnson*, 707 So. 2d 801 (Fla. 1st D.C.A. 1989) the Court recognized that "the modern trend of decisions concerning brief delays in performance of a contract or conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is to not treat such delays as a failure of a constructive condition discharging the other party, unless performance on time was clearly an essential and vital part of the bargain." (at page 802)

As discussed above, the Agreement does not clearly state the consequences of failure to provide the notice within 30 days, certainly it does not clearly state that such failure results in a waiver of any claim to enforce the substantive provisions of the Agreement related to appropriate reciprocal compensation charges. In addition, the Agreement does not clearly state that "time is of essence" regarding the timeframes for set forth for providing notice of a dispute. This is in contrast to the contract considered by the Fourth District Court of Appeals in *Treasure Coast v.*

Ludlum, 760 So. 2d 232 (Fla. 4th D.C.A. 2000). In that case the contract expressly stipulated the specific consequences of making a payment beyond the contract due date. The Court held that because the contact clearly contained a specific remedy for failure to pay on time the contract met the requirement of a "time is of the essence" clause.

Similarly, although Sprint did not transmit its notice to the individual listed in the Notice section of the Agreement, it substantially performed the requirements of the Dispute Resolution provision by providing written notice to the individual designated on ALEC's invoices as the appropriate contact person. (Composite Exhibit 3, Sprint's Response to ALEC POD No. 4.) ALEC can make no claim that it did not have actual notice of Sprint's dispute, as evidenced by the numerous e-mails and other correspondence exchanged between the parties and the face-to-face meeting conducted to attempt to resolve the dispute. (Composite Exhibit 3, Sprint's Response to ALEC's POD No. 4.)

In fact, there is no question that, from a practical perspective, ALEC has been aware that Sprint disputed ALEC's bills since not later than August 20, 2001. (Tr. at 42) Subsequent to that date Sprint and ALEC exchanged multiple e-mails concerning Sprint's dispute of ALEC's charges. (Sprint's Response to ALEC's POD No. 4, Composite Exhibit 3) Ultimately, Mr. McDaniel flew to Kansas City to meet with Sprint personnel in an attempt to resolve the dispute. (Tr. at 155, 156) Finally, when negotiations between the parties failed, ALEC filed an informal letter of dispute with the Commission on October 29, 2001. (Composite Exhibit 8, Direct Exhibit DRM-1) Sprint responded to the informal dispute and discussions between the parties continued until ALEC filed the formal complaint that is the subject of this docket. Any argument that ALEC may make that it was harmed by Sprint's failure to comply in all technical respects with the dispute notification provisions is not supported by the facts. ALEC had notice within a very

short time frame after submitting its bills to Sprint that Sprint had no intention of paying ALEC's grossly excessive and improper bills that were based on methodologies and rates in direct conflict with the provisions of the Agreement and the FCC's rules relating to reciprocal compensation.

CONCLUSION

ALEC has billed Sprint inappropriate and excessive charges for the dedicated transport portion of reciprocal compensation. ALEC has incorrectly applied multiple nonrecurring charges for circuits within a dedicated transport facility. ALEC is also double billing Sprint monthly recurring reciprocal compensation charges for the facilities used to transport Sprint's traffic. Finally, ALEC has billed Sprint for dedicated facilities for transport of interLATA (nonlocal) traffic. Sprint's rates for DS1 dedicated transport as set forth in the Agreement are the appropriate rates for ALEC to charge Sprint for the transport of Sprint-originated local traffic from the POI to ALEC's switch.

WHEREFORE, Sprint respectfully requests the Commission to deny the relief sought by ALEC, enter judgement in favor of Sprint, dismiss the Complaint, and grant any other relief deemed appropriate by the Commission.

RESPECTFULLY SUBMITTED this 9th day of September 2002.

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