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 ORDER NO. PSC-03-1014-PCO-TP ISSUED: September 9, 2003

ORDER GRANTING IN PART, AND DENYING IN PART, MOTIONS TO COMPEL AND MOTIONS FOR PROTECTIVE ORDER AND DENYING MOTION IN LIMINE

I. Background

A. Tele-Competition Act

On May 23, 2003, Governor Bush signed the Tele-Competition Innovation and Infrastructure Enhancement Act (Tele-Competition Act) into law following its passage by the Florida Legislature. Among other provisions, the Tele-Competition Act amended Section 364.01(3), Florida Statutes, with the addition of the following statement:

> The Legislature further finds that the provision of voice-over-internet-protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest.

Further, the Tele-Competition Act amended the definition of "service" in Section 364.02(12), Florida Statutes, as follows:

> The term "service" does not include voice-over-internet-protocol service for purposes of regulation by the commission. Nothing herein shall affect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-internet-protocol service.

Finally, the Tele-Competition Act addressed VOIP service again in new Section 364.164(8), Florida Statutes, with the following:

> If either the Federal Communications Commission or the commission issues a final order determining that voice-over-internet-protocol service or a functionally equivalent service shall not be subject to the payment of switched network access

> rates pursuant to a local exchange telecommunications company tariff or interconnection agreement or other law, the provisions of subsection (2) shall immediately become operative as if the commission had granted a petition pursuant to subsection (1). Any local exchange telecommunications company subject to this section shall be authorized to reduce its switched network access rates to the company's authorized local reciprocal compensation rates in a revenue-neutral manner, pursuant to subsections (2)-(7), in the shortest remaining timeframe allowable under this section.

B. Request for Arbitration and Summary of Subsequent Motions Addressed Herein

On March 24, 2003, AT&T Communications of the Southern States, LLC and TCG South Florida (AT&T) filed a petition requesting arbitration of unresolved issues resulting from AT&T's negotiations with Sprint-Florida, Incorporated (Sprint) for an interconnection agreement pursuant to Section 252(b)(1) of the Telecommunications Act of 1996 (the Act). On April 21, Sprint filed its response. Pursuant to Section 252(b) of the Act, this matter was set for hearing. A prehearing conference was held on July 24, 2003.

Sprint filed a Motion to Compel on July 15, 2003. The Motion requested that AT&T be compelled to answer Interrogatory Nos. 3 through 15 of Sprint's First Set of Interrogatories to AT&T. On July 22, 2003, AT&T filed its response, and additionally, a Motion for Protective Order and a Motion in Limine. On July 28, 2003, Sprint filed its Response to AT&T's Motion for Protective Order and Motion in Limine. The parties presented oral arguments on the Motions at the prehearing conference.

On August 29, 2003, Sprint filed a Second Motion to Compel, requesting that AT&T be compelled to answer Sprint's Second Set of Interrogatory Nos. 19, 20, 22, 23, 24, and 28 for the same reasons stated in its original Motion to Compel. On September 5, 2003, AT&T filed a second Motion for Protective Order, renewing its previous motion, and asked that the Protective Order also include Sprint's potential deposition questions for Witness Talbott. On September 8, 2003, AT&T filed its Response to Sprint's Second Motion to Compel. On September 8, 2003, Sprint filed its Response to AT&T's second Motion for Protective Order. No new arguments were included in either response.

II. Sprint's Motions to Compel

Sprint asserts that it served its First Set of Interrogatories (Nos. 1-17) to AT&T on June 27, 2003. All of the information sought concerned AT&T's use of Voice Over Internet Protocol (VOIP) in Florida. AT&T served its preliminary objections to Sprint's First Set of Interrogatories on July 1, 2003. Sprint states that AT&T indicated therein its intent to object to Interrogatory Nos. 3 through 15 on the grounds that the interrogatories requested information beyond the scope of discovery in this case, which "is neither relevant nor reasonably calculated to lead to the discovery

of admissible evidence." Sprint adds that AT&T also asserted that Sprint's interrogatories were "overbroad, oppressive" and sought privileged trade secrets.

Further, Sprint states that on July 14, 2003, AT&T served its Responses to Sprint's First Set of Interrogatories, in which it repeated its preliminary objections and refused to answer Interrogatory Nos. 3 through 15. Sprint contends that it has conferred with AT&T in an attempt to resolve this matter, but no resolution has been forthcoming. Therefore, Sprint requests that AT&T be compelled to answer Interrogatory Nos. 3 through 15.

Sprint served its Second Set of Interrogatories (Nos. 18-28) to AT&T on August 19, 2003. Sprint states that Interrogatory Nos. 19, 20, 22, 23, 24, and 28 all seek information about AT&T's use of VOIP in Florida. AT&T served its preliminary objections to Sprint's Second Set of Interrogatories on August 25, 2003. Sprint states that AT&T indicated therein its intent to object to Interrogatory Nos. 19, 20, 22, 23, 24, and 28 on the grounds that the interrogatories requested information beyond the scope of discovery in this case, which "is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." Sprint adds that AT&T also asserted that Sprint's interrogatories were "overbroad, oppressive" and sought privileged trade secrets.

Regarding the information requested, Sprint argues that Interrogatory Nos. 3 through 15, 19, 20, 22, 23, 24, and 28 seek information relating to a central issue that both this Commission and AT&T have identified to be resolved; specifically, the appropriate compensation for traffic exchanged between the parties that originates or terminates to Enhanced Service Providers, including those providing Internet Protocol telephony, or VOIP. See Order Establishing Procedure in this docket, Order No. PSC-03-0692-PCO-TP, issued June 9, 2003 at pg. 7; Petition in this docket, Attachment B, page 3 of 6. Further, Sprint adds, the fact that AT&T would like us to abstain from deciding the question does not preclude Sprint from conducting discovery on what is "reasonably calculated to lead to admissible evidence" on a issue specifically identified to be decided in this case. Sprint contends that Rule 1.280(b)(1), Florida Rules of Civil Procedure defines the scope of discovery in civil cases:

> *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of the other party.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

Sprint states this indicates that the concept of relevancy in civil cases is broader in the discovery context than in the trial context and a party may be permitted to discover evidence that would be inadmissible at trial, if it would lead to the discovery of relevant, admissible evidence. Also see Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995).

Further, Sprint contends that AT&T has not denied that VOIP is an issue in this case. Rather, Sprint alleges, AT&T has unilaterally refused to respond to discovery that it believes is unnecessary to the resolution of Issue 7 if the Commission decides Issue 7 in the way AT&T wants it to be resolved. However, Sprint points out, the Florida Rules of Civil Procedure do not allow a party to resist discovery requests because the requests seek information that would harm that party or are inconsistent with that party's theory of the case. Rather, each party is allowed to discover facts and information to support their theory of the case and to support their claims and defenses. In addition, in this case, AT&T has filed rebuttal testimony on the merits of Issue No. 7, but refuses to answer interrogatories that would allow Sprint to quantify the financial impact of VOIP and to test the assertions made by AT&T in its testimony.

Sprint states that Florida courts have consistently rejected objections such as AT&T's and have compelled discovery. See, e.g., Behm v. Cape Lumber Co., 834 So.2d 285 (Fla. 2d DCA 2003); Balas v. Ruzzo, 703 So.2d 1076 (Fla. 5th DCA 1997); Lakeside Regent, Inc. v. FDIC, 660 So.2d 368 (Fla. 4th DCA 1995); Davich v. Norman Bros. Nissan, Inc., 739 So.2d 138 (Fla. 5th DCA 1999).

In Lakeside Regent, Sprint states, the FDIC brought suit against Lakeside for a deficiency judgment to collect the difference between the $1,000.00 proceeds from a foreclosure sale and the amount secured by judgment against Lakeside, approximately $6.6 million dollars. Lakeside attempted to conduct discovery to support his theory that the foreclosure sale was improper, but the trial court refused to allow the discovery and awarded FDIC summary judgment for the deficiency judgment. Lakeside Regent, 660 So.2d at 369. On appeal, the 4th DCA reversed, finding that the information sought in discovery was "directly relevant to the issues before the court and, therefore, clearly within the proper scope of discovery." Id. at 370.

Similarly, in Behm v. Cape Lumber Co., Sprint adds, the court rejected the lumberyard's refusal to respond to the homeowners' discovery that related to payments the lumberyard received from or on behalf of certain builders and whether the payments were properly credited, because the information was directly related to the homeowner's claim that the lumberyard had been paid. Behm, 834 So.2d at 287. The Second DCA found that "by denying their discovery requests, the trial court precluded [the homeowners] from establishing that [the lumberyard] had been paid but had failed to give credit for the payments," a defense essential to defending the lawsuit. Id.

In addition, Sprint states, this Commission has consistently recognized the broad standard of relevancy inherent in Rule 1.280(b)(1), Florida Rules of Civil Procedure. See, e.g., Order No. PSC-02-0274-PCO-TP, in Docket No. 001097-TP, issued March 1, 2002; Order No. PSC-01-1300-PCO-TP in Docket No. 001810, issued June 14, 2001.

Further, Sprint contends, the Telecommunications Act of 1996 ("Act") does not allow AT&T to unilaterally decide the issues to be arbitrated or how those issues should be decided. Rather, Section 252(b)(2) of the Act requires that an arbitration petition identify: "(i) the unresolved issues, (ii) the

position of the parties with respect to those issues, and (iii) any other issue discussed and resolved by the parties." Moreover, Sprint adds, once the issues have been identified, the Commission has a duty to resolve each issue set forth in the Petition and the response. See Section 252(b)(4)(C) of the Act. Sprint avers that AT&T asserts in its Petition that the VOIP question is an issue to be decided in this case, and therefore, Sprint has a right to conduct discovery on this issue.

Sprint contends the information sought in its discovery requests directly relates to Sprint's position that we should not defer resolution of the VOIP issue because it has a significant impact on the intercarrier compensation applicable to the parties under the interconnection agreement that is the subject of the arbitration, and therefore, clearly within the scope of discovery in this case.

Further, Sprint contends, AT&T's objections that Interrogatory Nos. 3 through 15, 19, 20, 22, 23, 24, and 28 are overbroad, oppressive and seek trade secrets are without merit. Sprint states that a party objecting to discovery because it is "burdensome" or "overly broad" must quantify the manner in which the discovery is "burdensome" or "overly broad," First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So. 2d 502, 503 (Fla. 4th DCA 1989), and AT&T has failed to do so. Moreover, Sprint adds, in asserting a "trade privilege," AT&T must "describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection" as required by Rule1.280(b)(5), Florida Rules of Civil Procedure. See TIG Ins. Corp. of America v. Johnson, 799 So. 2d 339 (Fla. 4th DCA 2001). Accordingly, AT&T's objections regarding burden, breadth and trade secrets should be rejected, and AT&T should be compelled to fully answer Interrogatory Nos. 3 through 15, 19, 20, 22, 23, 24, and 28.

III. AT&T's Responses to Sprint's Motions to Compel, Motions for Protective Order, and Motion in Limine

A. Responses to Sprint's Motions to Compel

The facts supporting 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 are the same. As agreed to by AT&T and Sprint, and set forth in the Order Establishing Procedure, Issue 7 asks:

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

In its Response, AT&T does not agree that by including Issue 7 in its Petition, AT&T opened the "floodgates" relative to discovery regarding VOIP traffic. AT&T states that in its original Petition it stated that determining compensation for VOIP traffic is not an appropriate issue in this arbitration. Further, AT&T emphasizes that the Commission, by Order No. PSC-02-1248-FOF-TP, in Docket No.

00075-TP, issued September 10, 2002 (Reciprocal Compensation Order) that compensation regarding VOIP traffic was not "ripe" for consideration. Subsequent to that Order, AT&T states that it filed with the FCC, on October 18, 2002, its Petition For Declaratory Ruling That Phone-To-Phone IP Telephony Services Are Exempt From Access Charges. Because this Petition was pending at the FCC, this Commission declined to address whether phone-to-phone IP telephony services constitute "telecommunications" under Florida law in Order No. PSC-02-1858-FOF-TP, issued December 31, 2002, in Docket No. 02161-TP (CNM Networks, Inc. Order). In the CNM Networks, Inc. Order, we stated "it would be administratively inefficient" to make such a determination while the FCC proceeding was underway. In this arbitration, AT&T's position on compensation for VOIP was again stated in David L. Talbott's Direct Testimony, page 67, lines 13-22; Mr. Talbott's Rebuttal Testimony, page 34, lines 5-18, and; in its Pre-hearing Statement at pg. 6.

AT&T further states that it only included Issue 7 in its Petition because Sprint affirmatively, and repeatedly, raised compensation for VOIP traffic in the interconnection negotiations between the Parties. Moreover, AT&T adds, its Petition clearly frames Issue 7 as a policy issue. As a result, Issue 7 is not "fact specific, fact intensive, or fact dependant." AT&T contends that Sprint did not propose any such additional "fact" issues in its Response to AT&T's Petition, or during the issue identification conference, nor did it seek such facts from AT&T in its interconnection negotiations with AT&T. AT&T asserts that Sprint has improperly and unfairly waited until the month before the hearing in this proceeding to raise such "fact" questions before the Commission, when it had the opportunity to propose "fact specific" issues at the issue identification conference.

AT&T asserts that Sprint asks two basic questions: (1) Does AT&T provide service in Florida using VOIP? and (2) If so, in what amounts? AT&T contends that the answers to both questions have no bearing regarding whether, and in what form, we should establish compensation for VOIP traffic between AT&T and Sprint on a prospective basis. AT&T further contends that Sprint's Interrogatories constitute a "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. Sprint's Interrogatories, AT&T states, only serve the purpose of gathering information to support a future Sprint complaint against AT&T for past and present behavior which is irrelevant to prospective application of Issue 7.

AT&T asserts that 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. AT&T cites Mr. Burt's Rebuttal Testimony, where 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 . . . " (Rebuttal Testimony of James R. Burt at page 3, lines 19-20). AT&T adds that 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. AT&T contends that Sprint cannot request information in discovery, and then

at the same time, argue that the requested information is not "appropriate" for disclosure in this proceeding.

No new arguments were contained within AT&T's Response to Sprint's Second Motion to Compel.

B. Motions for Protective Order

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

In particular, AT&T states, in 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, AT&T states, Davich also is not on point.

Furthermore, AT&T adds, the two cases cited by Sprint relative to discovery issues decided by us, BellSouth v. Supra and TCG v. BellSouth, also involved complaint proceedings relative to enforcing provisions of existing interconnection agreements. In those proceedings the past and present actions of the alleged offending party in the context of recovering "damages" for such actions were at issue. Thus, AT&T states, these cases also are not on point regarding what discovery is permitted in the context of resolving a policy issue in an arbitration proceeding.

Finally, AT&T contends that 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." Contrary to Sprint's allegations, AT&T states, it clearly met this burden in its Objections to Sprint's Interrogatories. AT&T states it expressly declared that Sprint's Interrogatories were "overly broad" in that they went well beyond the scope of Issue 7. Further, AT&T adds that it set forth in detail why this 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. Therefore, because Issue 7 involves a matter of national policy, AT&T maintains,

it would be "burdensome" and "overly broad" to require AT&T to provide information which has no prospective policy ramifications.

Additionally, AT&T states, we need only look at Sprint's Interrogatories 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 in Florida, including minutes of use or other measurement factors for such services, and what compensation AT&T has paid local exchange carriers for transporting and terminating such traffic. AT&T contends these questions are not focused on the prospective policy ramifications of Issue 7, but rather on discovering information for a potential Sprint complaint against AT&T. Thus, AT&T argues, because Sprint's Interrogatories are not relevant to determining compensation on a prospective basis, by definition they are "burdensome" and "overly broad." Therefore, AT&T asks that we issue a Protective Order pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, ruling that AT&T is not required to answer Sprint's Interrogatories.

In its second Motion for Protective Order, AT&T renewed its previous motion but expanded the scope of its request. AT&T asks that the Protective Order it seeks also include Sprint's potential deposition questions for Witness Talbott.

C. Motion in Limine

AT&T requests that we issue an order determining that compensation for VOIP traffic is not an appropriate issue in this arbitration. AT&T contends that 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 DCA 1977). AT&T supports the Motion with the arguments stated under the Response to Sprint's Motion to Compel:

1. David L. Talbott's Direct Testimony which states that in the Reciprocal Compensation Order, we previously determined that compensation regarding VOIP traffic was not "ripe" for consideration.

2. Recognizing the pendency of AT&T's FCC VOIP Petition, on December 31, 2002 in the CNM 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."

Additionally, AT&T adds, 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 Ex Parte Presentation on March 13, 2003. AT&T state that 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. Moreover, in urging the FCC to so rule, AT&T states, Sprint specifically brought to the FCC's attention that we had dismissed CNM's Petition.

Also, AT&T adds that Sprint, in its Reply Comments, emphasized the need for the FCC to resolve compensation for VOIP traffic, and urged the FCC to take action relative to VOIP traffic. Sprint then provided the FCC with four criteria for defining Phone-to-Phone IP telephony which mirror the criteria which Sprint has suggested that we use to define VOIP traffic. Moreover, contrary to the discovery position taken by Sprint in this proceeding, in its Reply Comments Sprint also advised the FCC 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.

Thus, AT&T argues, 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 CNM Networks, Inc. Order, we 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.

IV. Sprint's Responses to the AT&T's Motions for Protective Order and Motion in Limine

A. Response to Motion in Limine

1. The Act compels us to decide Issue 7

Sprint argues that the issue was included in this docket because the parties were unable to agree on contract language to resolve the compensation approach for VOIP on a prospective basis. Sprint states that AT&T wants language in the interconnection agreement stating that "the Parties agree, on

a prospective basis, to abide by any effective and applicable FCC rules and orders regarding such traffic and the compensation payable by the Parties for the same." Sprint, on the other hand, wants the contract language to read that "Calls that are originated and terminated by telephone but are transmitted via the internet network (VOIP) shall be compensated in the same manner as voice traffic." Therefore, Sprint concludes, Issue No. 7 is not a policy issue of general application throughout the telecommunications industry, but rather an unresolved issue between two parties arising from negotiation of an interconnection agreement to be decided by this Commission.

Sprint states that Section 252(b)(2) of the Act states that an arbitration petition must identify: "(i) the unresolved issues, (ii) the position of the parties with respect to those issues, and (iii) any other issue discussed and resolved by the parties." In addition, Sprint adds, once the issues have been identified, we have a duty, under Section 252(b)(4)(C) of the Act, to resolve the issues set forth in the Petition and the response. Therefore, Sprint states, we have a duty to resolve Issue No. 7. Further, Sprint adds, this question was decided on appeal to the U.S. District Court in MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp. 2d 1286 (N. D. Fla. 2000). Sprint states that the Eleventh Circuit Court of Appeals affirmed that decision, but narrowed the ruling to clarify that our obligation is to decide issues that the parties are obligated to negotiate (items in Sections 251(b) and (c) of the Act. See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 298 F. 3d 1269 (11th Cir. 2002).

Sprint reasons that since intercarrier compensation is one of the matters to be negotiated under Sections 251(b) and (c) of the Act, and since Section 251(g) requires local exchange carriers to provide exchange access to interexchange carriers, we are required by Section 252(c)(1) to resolve an arbitration consistent with the requirements of Section 251. In addition, Sprint states it includes this issue in its interconnection agreements with other carriers, such as its interconnection agreement with Metro Teleconnect Companies, Inc., filed with us on July 25, 2003.

Sprint states that in the Reciprocal Compensation Docket we discussed the compensation for a call provisioned using phone-to-phone IP telephony in the arbitration between BellSouth and Intermedia and decided that "switched access traffic [should] be defined in accordance with BellSouth's existing access tariff and include phone-to-phone internet protocol telephony." See Reciprocal Compensation Order at 35-36. Compensation for VOIP traffic is also an issue in the current XO Florida, Inc./Sprint arbitration before us, Sprint states. See Issue 25 in Order No. PSC-03-0865-PCO-TP, issued July 24, 2003, in Docket No. 030467-TP .

2. AT&T's Motion in Limine is procedurally improper

Sprint states that a motion in limine may be used only in jury actions. Trawick, Fla. Prac. And Proc., Section 19-6, citing Baldwin v. InterCity Contractors Serv., Inc., 297 N.E.2nd 831, 834 (Ind. App. 1973). Further, Sprint adds, the law is settled that a motion in limine may not be used to summarily dismiss a portion of a party's case or as a motion for summary judgment. See Dailey v. Multicon

Development, Inc., 417 So.2d 1106, 1107 (Fla. 4th DCA 1982); Brock v. G.D. Searle & Co., 530 So.2d 428, 431 (Fla. 1st DCA 1988); Saunders v. Alois, 604 So.2d 18, 19 (Fla. 4th DCA 1992).

Sprint contends that AT&T's Motion in Limine states "[T]he Commission should grant ATA&T's Motion in Limine and issue an order determining that compensation for VOIP traffic is not an appropriate issue in this proceeding." Sprint argues that this is evidence that AT&T's motion seeks to either dismiss the issue from the docket or decide it on a summary basis in AT&T's favor.

3. The Commission has invited telecommunications companies to present this issue for decision

Sprint states that in the Reciprocal Compensation Order we said that although there was not enough record in that proceeding to determine compensation between carriers, intercompensation issues might arise that must be addressed by us. Further, Sprint adds, we stated that carriers were not precluded "from petitioning us for decisions regarding specific IP telephony services through arbitration or complaint proceedings." Reciprocal Compensation Order at 37.

B. Responses to AT&T's Motions for Protective Order

Sprint states that it does not object to narrowing the scope of Interrogatory Nos. 3 through 15 to Sprint's territory in Florida, rather than to Florida generally. However, Sprint argues that the Motion for Protective Order must be denied on other grounds.

Sprint states that Rule 1.280(c), Florida Rules of Civil Procedure, allows a court, for good cause shown, to protect a party from discovery that would cause "annoyance, embarrassment, oppression or undue burden or expense. Office of the Attorney General v. Millenium Comm. & Fulfillment, Inc., 800 So.2d 255, 258 (Fla. 3d DCA 2001). Further, Sprint adds, the party moving for the protective order has the burden to show good cause. Medina v. Yoder Auto Sales, Inc., 743 So.2d 621, 623 (Fla. 2d DCA 1999). Sprint argues that AT&T has failed to show good cause for a protective order.

Sprint contends that the Interrogatories in question ask questions requesting the kind of information this Commission asked for in the Reciprocal Compensation Order. Sprint states it has filed testimony that carriers such as AT&T are terminating their VOIP toll traffic on Sprint's network over local interconnection trunks, which means that substantial access revenue is being lost. AT&T, Sprint asserts, has filed rebuttal testimony indicating that this is not so. Sprint argues that Sprint is, therefore, entitled to discovery that would lead to evidence that would prove or disprove that assertion.

Further, Sprint states that these interrogatories will allow Sprint and us to evaluate AT&T's claim that VOIP is still a "nascent technology, with limited application to the present marketplace." In addition, Sprint contends that we cannot resolve issues in an arbitration without the facts and competent substantial evidence as support.

No new arguments were contained within Sprint's Response to AT&T's second Motion for Protective Order.

V. Decision

In resolving these motions, it is appropriate to begin with AT&T's Motion in Limine, which questions the propriety of continued inclusion of Issue 7 in this case. The purpose of such a motion is to exclude irrelevant and immaterial matters or to exclude evidence when its probative value is outweighed by the danger of unfair prejudice. Devoe v. Western Auto Supply Co., 537 So. 2d 188 (Fla. 2d DCA 1989), cited in Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, in Docket No. 970657-WS.[1] A motion in limine is designed to prevent the introduction of evidence, the mere mention of which at trial would be prejudicial. Dailey v. Multicon Development, Inc., 417 So. 2d 1106 (Fla. 4th DCA 1982). A motion in limine

> ... seeks a protective order prohibiting the opposing party, counsel, and witnesses from offering offending evidence at trial, or even mentioning it at trial, without first having its admissibility determined outside the presence of the jury. The motion affords an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter ....

55 Fla Jur 2d, Trial § 71 (2003).

A trial court has discretion in determining whether to rule on a motion in limine prior to trial or to rule on the admissibility of the evidence when it is actually offered. Order No. PSC-98-1089-PCO-WS, citing Erhardt, Florida Evidence, § 15 (2d ed. 1984).

As noted in Order No. PSC-03-0850-PCO-EI, issued July 22, 2003, motions in limine are appropriate in certain circumstances in administrative proceedings, but it is important to ensure that they are used to enforce the correct evidentiary standards. This Commission has previously acknowledged that administrative proceedings are not subject to the same strict evidentiary standards used in trial courts. Id. at p. 10. Section 120.569(2)(g), Florida Statutes, states that in administrative hearings to determine the substantial interests of the parties:

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[1]The Commission has addressed motions in limine under various circumstances in several prior cases. See, e.g., Order No. PSC-02-1282-PCO-EI, issued September 19, 2002, in Docket 020262-EI (testimony of witnesses at hearing was excluded as prejudicial and inconvenient to other parties, when prefiled testimony for those witnesses had not been filed); Order No. PSC-02-0876-PCO-TP, issued June 28, 2002, in Docket No. 020129-TP (denied motion in limine to strike legal arguments made in prefiled testimony, reasoning that the Commission has the discretion of allowing such testimony to be presented and simply giving it the weight that it is due in its deliberations); Order No. PSC-00-1549-PCO-WS, issued August 25, 2000, in Docket No. 990080-WS (motion in limine granted to the extent that the issues in dispute in the motion were those raised in the protest); Order No. PSC-03-0850-PCO-EI, issued July 22, 2003.

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

This evidentiary standard is fully consistent with our longstanding practice of including evidence for consideration in our decision-making, rather than excluding it. Also, the concern that improperly allowed evidence will prejudice a trial jury does not necessarily apply to administrative matters heard before us in light of our technical expertise in those matters. We have the judgment to weigh the evidence presented, and accord it the weight that it is due, if any. See Order No. PSC-02-0876-PCO-TP, supra.

The law is clear that a proper motion in limine is aimed at the exclusion of evidence from a proceeding--be it a civil or administrative proceeding. In this case, however, AT&T is not only asking that evidence be excluded, but also that an entire issue be stricken from the case. Such a request is not proper within the context of a Motion in Limine. Furthermore, AT&T included this issue in its Petition for Arbitration, although AT&T stated therein that it did not believe the issue was appropriate for resolution in this proceeding. In its Response to the Petition for Arbitration, Sprint agreed that the issue was in dispute between the parties, but Sprint further contended that the issue was appropriate for this Commission to consider through the arbitration process. Thereafter, the Order Establishing Procedure was issued in this matter on June 9, 2003, which included Issue 7. Since the issuance of that Order, testimony has been filed addressing the issue, and the hearing in this matter is close at hand. Only now, over one month after the issuance of the Order Establishing Procedure and in response to a Motion to Compel, AT&T moves to have Issue 7 removed from this case. As such, the Motion is not only procedurally improper, but untimely.

In addition, as set forth in MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., we are duty-bound by Section 252(b)(4)(C) of the Act to resolve issues set forth in a petition for arbitration or in the response to such petition that are within the scope of those issues that the incumbent companies are required to negotiate pursuant to Section 251 (c) and (b) of the Act. MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 298 F.3d 1269, 1274 (11th Cir. 2002). Issue 7 asks this Commission to determine the following:

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

Clearly, this issue falls within the scope of Section 251(b)(5) of the Act, which obligates incumbent companies to establish reciprocal compensation arrangements for the exchange of traffic. Furthermore, while AT&T included the issue in its original petition with the caveat that it did not believe the issue

was appropriate for us to address, Sprint also included it in its response with an indication that the issue was appropriate and ripe for our consideration. Thus, pursuant to the Act and pertinent case law, the issue is properly before us in this arbitration context.

In accepting this issue for arbitration, the Commission will be fulfilling its obligations under the Act to arbitrate the terms and conditions of interconnection agreements. Arbitration of this issue should not, however, be construed as an indication of any predisposition by the Commission towards a general policy regarding VOIP, nor an impetus to regulate VOIP, particularly in view of recent legislative changes to our state statute, which indicate that VOIP should be "free of unnecessary regulation" and which exclude VOIP from the definition of "service" in Chapter 364. Sections 364.01(3) and 364.02(12), Florida Statutes. In addition, the U.S. District Court for the Northern District of Florida, as well as the U.S. Court of Appeals for the 11th Circuit, have acknowledged that, at the end of the day, the Commission does not have to accept either parties' proposal regarding the issue, nor does the arbitration of said provision necessarily require enforcement by this Commission. MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 298 F.3d 1269, 1274 (11th Cir. 2002) and MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp. 2d 1286 at p. 1298 and fn. 16 (N.D. Fla. 2000). Nevertheless, new Section 364.164(8), Florida Statutes, clearly contemplates that this Commission has a role in determining the proper compensation for VOIP traffic. Thus, under state law, this issue is properly before us.

As for AT&T's contention that we should decline to address this issue because it is currently before the FCC, I emphasize that the fact that this matter is before the FCC does not negate our obligation to consider it here as an open issue in an arbitration proceeding. This would not be the first time that the Commission has had to address through an arbitration an issue that is contemporaneously pending before the FCC. Ultimately, as in prior similar situations, if the FCC renders a decision that differs from and preempts the Commission's decision, the carriers will either have to renegotiate the issue or operate under the "change of laws" provision in their agreement as appropriate to comply with the FCC's decision. Thus, this issue shall be retained in this proceeding.

Because Issue 7 will be retained in this case, discovery on this issue is appropriate. Furthermore, the scope of discovery under the Florida Rules of Civil Procedure is liberal. Rule 1.280(b)(1), Florida Rules of Civil Procedure, states that:

> . . . Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This standard is not, however, without limit. In this case, some limitation is appropriate, because this is an arbitration between only these two parties, which is aimed at the development of an

interconnection agreement governing their relationship in Florida. As such, it is appropriate to limit the scope of Interrogatory Nos. 3 through 15 to Sprint's territory in Florida. Moreover, the purpose of Issue 7 is narrow and quite specific: to determine what form of compensation is appropriate for traffic that is *originated and terminated by telephone* and exchanged by the parties, transported using internet protocol, including calls terminated to enhanced service providers. Other possible forms of Voice Over Internet Protocol are not the subject of this proceeding and thus inappropriate for discovery. Accordingly, discovery is to be limited solely to those services that utilize VOIP technology to provide *phone-to-phone telephony services*. I would also note that these are procedural rulings pertaining only to the appropriateness of including Issue 7 and allowing discovery to be conducted on this issue. No substantive inferences regarding any form of VOIP should be drawn. The responses shall be provided to Sprint and the Commission staff by close of business on Friday, September 12, 2003. The copies provided for Commission staff shall be filed with the Commission as confidential and shall be treated as such until further review and determination on the nature of the information provided.

Based on the foregoing, Issue 7 shall be retained for our consideration at hearing. As such, Sprint may conduct discovery regarding the issue within the narrowed scope stated. Accordingly, Sprint's Motions to Compel and AT&T's Motions for Protective Order are granted in part, and denied in part, to the extent set forth herein, and AT&T's Motion in Limine is denied.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that Sprint's Motions to Compel and AT&T's Motions for Protective Order are granted in part, and denied in part, as set forth in the body of this Order, and AT&T's Motion in Limine is denied. It is further

ORDERED that AT&T's responses, as limited by this Order, shall be provided to Sprint and the Commission staff by close of business on Friday, September 12, 2003. The copies provided for Commission staff shall be filed with the Commission as confidential and shall be treated as such until further review and determination on the nature of the information provided.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 9th day of September, 2003.

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

LHD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.