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August 16, 1996

VIA FEDERAL EXPRESS

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: **MFS Communications Company, Inc.'s Opposition to Sprint's Motion to Dismiss Portions of MFS's Arbitration Petition and its Motion to Compel Discovery and Opposition to Sprint's Motion for Protective Order.**
Docket No. 960838-TP

ACK _____

AFA _____ Dear Mrs. Bayo:

APP _____

CAF _____ Enclosed for filing is an original and 15 copies of MFS Communications Company, Inc.'s
CMU She ("MFS") Opposition to Sprint's Motion to Dismiss Portions of MFS's Arbitration Petition. Also
enclosed is an original and 15 copies of MFS's Motion to Compel Discovery and Opposition to Sprint's
Motion for Protective Order.

CTR _____

EAG _____ The enclosed computer disk, formatted in WordPerfect 6.1 for Windows, also contains a copy
LEG 1 of the respective documents.

LIN 5

OPC 1 Please date stamp extra copy of each of these filings, and return them in the enclosed self-
addressed envelope.

RCH _____

SEC 1

If there are any questions concerning this matter, please contact me.

WAS _____

OTH _____

RECEIVED & FILED

Sincerely,


Michael D. Breen

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Enclosures

cc: Counsel for Sprint
Michael Billmeier, Esq.
Timothy Devine
(w/o encl.): Russell M. Blau, Esq.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the matter of)
)
MFS COMMUNICATIONS COMPANY,)
INC.)
)
Petition for Arbitration Pursuant to)
47 U.S.C. § 252(b) of Interconnection Rates,)
Terms, and Conditions with)
)
SPRINT UNITED-CENDEL OF)
FLORIDA, INC. (also known as)
CENTRAL TELEPHONE COMPANY OF)
FLORIDA AND UNITED TELEPHONE)
COMPANY OF FLORIDA))

Docket No. 960838-TP

**MFS COMMUNICATIONS COMPANY, INC'S OPPOSITION TO
SPRINT'S MOTION TO DISMISS PORTIONS OF MFS'S ARBITRATION PETITION**

MFS Communications Company, Inc. ("MFS"), by its undersigned attorneys and pursuant to Rule 25-22.037 (2)(b), Florida Administrative Code and Rule 1.140, Florida Rules of Civil Procedure, hereby files this Opposition to Sprint United-Centel of Florida, Inc.'s ("Sprint") Motion to Dismiss Portions of MFS's Petition for Arbitration of Interconnection Rates, Terms and Conditions ("Motion"). Sprint's Motion is without merit and should be summarily denied for the following reasons: (1) Inclusion of a damages provision in the parties' interconnection agreement is clearly within the intended purview of disputed issues to be arbitrated pursuant to Section 252(b) of the Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq.* ("Act"); and (2) The issue of whether the Florida Public Service Commission ("Commission") has the power to award damages is not relevant at this juncture because the incorporation and scope of such a clause in the parties'

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agreement will be determined by arbitration. MFS opposes Sprint's Motion, and states the following in support of its Opposition:

1. Sections 251 and 252 of the Act specify the process to be utilized when an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier negotiate the terms of an interconnection agreement. Section 251(c) requires the parties to negotiate in good faith. Section 252(b) provides for compulsory arbitration as a continuation of the negotiation process if the parties are unable to reach agreement on specified issues. After the disputed matters are resolved through arbitration, Section 252(e) mandates state commission review and approval of the agreement.

2. In compliance with the Act, MFS engaged in negotiations with Sprint over the terms and conditions of interconnection between their two networks. Although the parties have reached agreement on other relevant interconnection provisions, disputed issues remain. Accordingly, MFS filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions ("Petition") on July 17, 1996. The Petition specifies the issues which MFS believes are disputed, including whether the interconnection agreement "shall include provisions for liquidated damages which Sprint shall pay to MFS for specified performance breaches under that agreement."

3. Sprint filed its Motion on August 12, 1996. It objects to the portions of MFS's Petition which request arbitration regarding the liquidated damages clause in the agreement as being beyond the scope of arbitration outlined in Section 252 of the Act.¹ In fact, Section 252(b)(1) states that "the carrier or any other party to the negotiation may petition a State commission to arbitrate

¹Motion at 2.

*any open issues*² (emphasis added). Sprint did not and cannot assert that the issue regarding the liquidated damages clause is resolved. As such, it is an open issue in the negotiation for an interconnection agreement and appropriate for arbitration.

4. According to Sprint, the Commission cannot arbitrate this issue because it is outside the scope of negotiations under Section 251.³ Sprint argues that under Section 251 of the Act “a stipulated damages clause is not a requirement . . . nor is [a stipulated damages clause] ‘a rate for interconnection, services, or network elements.’”⁴ The short answer to Sprint’s assertion is that arbitration is not limited to rates, but also encompasses “terms and conditions” related to interconnection duties. Section 251(c)(1) states that an ILEC has a duty to negotiate in good faith “the particular *terms and conditions* of agreements to fulfill the duties described in subsections (b) and (c) [which include resale, number portability, dialing parity, access to rights of way, reciprocal compensation and interconnection].” Likewise, Section 252(b)(4)(c) empowers a state commission to impose “appropriate conditions” on carries in arbitration.

5. While MFS agrees that the specific duties listed in Sections 251(c) and (c) must be negotiated in good faith by an ILEC, nowhere does the language of Section 251(c)(1) limit negotiations to encompass only those duties. To claim otherwise is to argue that all of the significant provisions of an interconnection agreement, not directly pertaining to one of the enumerated categories, must be negotiated and incorporated into the agreement by some other means. This is

²47 U.S.C. §252(b)(1).

³Motion at 2.

⁴*Id.*

unsupported and unsupportable. The intent of Section 251 is that negotiations must be undertaken in good faith and must accomplish at least the duties required by the section. There is simply no indication of any intent to limit the subject of these negotiations.⁵

6. Moreover, the language of Sections 252(b)(1) and (2), as indicated by its drafting history, is inclusive rather than exclusive. With regard to the section addressing procedures for negotiation, arbitration, and approval of agreements, the House Conference Report states that a party may "ask the State to participate in the negotiations and to arbitrate *any* differences arising in the negotiations"⁶ (emphasis added). Simply put, if Congress had intended to limit the subjects of either the negotiations or the subsequent arbitration of those negotiations, it would have included such limiting language in the Act.

7. Even if Sprint's assertion was correct that arbitrations are limited to the items specifically enumerated in Section 251, the unresolved issues that Sprint seeks to exclude from arbitration are directly relevant to Sprint's interconnection duty. Liquidated damages is the enforcement mechanism proposed by MFS to apply to various of Sprint's interconnection duties, and therefore is a "term or condition" relevant to those duties. Sprint may propose its own enforcement mechanism to be considered in the arbitration. Eliminating enforcement mechanisms from consideration in arbitration, as Sprint advocates by urging the Commission to exclude liquidated or specified damages from consideration, would result in a meaningless, unenforceable

⁵See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 118 (1996) ("The negotiation process established by this section is intended to resolve questions of economic reasonableness with respect to the interconnection requirements").

⁶H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 124 (1996).

interconnection agreement. That is not a sensible result and it should be discouraged.

8. Furthermore, MFS also disagrees with Sprint's assertions that no arbitration is appropriate because the Commission may not award damages and that the proposed damages provision is against Florida public policy.⁷ MFS's request for arbitration of the disputed liquidated damages issue is not an immediate request to recover any type of damages. What MFS seeks is eventual Commission approval of an interconnection agreement which contains the damages clause it proposes. Whether or not the clause ultimately becomes a part of the parties' agreement will be determined through arbitration. While MFS does not agree with Sprint's position that a damages provision cannot be part of the contract because the Commission lacks authority to award damages⁸ and that the proposed damages provision is against Florida public policy, these issues are not relevant here because MFS is not requesting a damages award from the Commission. If the parties' ultimate agreement includes a specified or liquidated damages provision, it will be because MFS and Sprint agreed to its terms or because such a clause was imposed by the Commission, which does not bear the sole responsibility for its enforcement. The only issue that is now before the Commission

⁷Motion at 3, and 5.

⁸Even if it is assumed, *arguendo*, that the Commission has no jurisdiction to award damages, this limitation is immaterial. The authority cited by Sprint does not indicate that parties to an interconnection agreement may not include a liquidated damages clause in their contract. Instead, the cases state that a petitioner's request for money damages in administrative proceedings is heard by the circuit court *Southern Bell Telephone and Telegraph Co. v. Mobile America Co., Inc.*, 291 So.2d 199, 200-201 (Fla. 1974) (circuit court rather than Public Service Commission has jurisdiction over claim for money damages and may, in its discretion, refer questions of statutory compliance to Public Service Commission). See *Winter Springs Development Co. v. Florida Power Co.*, 402 So.2d 1225, 1227 (Fla. Dist. Ct. App. 1981) (where plaintiff seeks money damages which an administrative body is not empowered to award, it is not required to pursue inadequate administrative remedies and may file suit in court).

is Sprint's objection to the validity of MFS's arbitration petition.

WHEREFORE, MFS opposes Sprint's Motion and requests that it be denied in its entirety.

Respectfully submitted,

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August 19, 1996