

FLORIDA PUBLIC SERVICE COMMISSION  
Capital Circle Office Center • 2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

MEMORANDUM

SEPTEMBER 4, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BILLMEIER) *LMB MB*  
DIVISION OF COMMUNICATIONS (SHELPER) *ANS*

RE: DOCKET NO. ~~960838~~ - PETITION BY METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH CENTRAL TELEPHONE COMPANY OF FLORIDA AND UNITED TELEPHONE COMPANY OF FLORIDA CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: SEPTEMBER 16, 1996 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960838M.BCM - ALTHOUGH THE PARTIES DID NOT REQUEST ORAL ARGUMENT, THE DOCKET HAS NOT BEEN TO HEARING. THE PARTIES CAN PARTICIPATE BY ANSWERING QUESTIONS FROM THE COMMISSIONERS.

CASE BACKGROUND

On February 8, 1996, the Telecommunications Act of 1996 (the Act) became law. Part II of the Act sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

By letter dated February 7, 1996, MFS Communications Company, Inc. (MFS) requested that Central Telephone Company of Florida, Inc. and United Telephone Company of Florida, Inc. (collectively Sprint) commence good faith negotiations under Section 251 of the Act. On July 18, 1996, MFS petitioned the Commission to arbitrate unresolved issues with Sprint pursuant to Section 252. Part of MFS's petition was a request that the Commission include a specific liquidated damages provision (Attachment 1) in the agreement. On August 12, 1996, Sprint filed a Motion to Dismiss portions of the petition of MFS (Attachment 2). Sprint asks the Commission to

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damages provision on the parties in the arbitration proceeding. MFS filed a response in opposition on August 19, 1996 (Attachment 3). Neither party filed a request for oral argument.

Issue 1 is staff's recommendation that Sprint's Motion be granted with respect to MFS's request that a liquidated damages provision be included in the agreement.

#### DISCUSSION OF ISSUES

ISSUE 1: Should Sprint's Motion to Dismiss portions of the petition of MFS be granted?

RECOMMENDATION: Yes. Imposition of a liquidated damages provision is beyond the scope of arbitration contemplated by the Act. Further, the Commission cannot impose a liquidated damages provision upon the parties. If the Commission were to impose such a provision, it would be awarding damages to one of the parties. This is beyond the jurisdiction of the Commission.

STAFF ANALYSIS: When ruling on a motion to dismiss, the Commission must consider the facts of the case in a light most favorable to the non-moving party. Imposition of a liquidated damages provision is beyond the scope of arbitration contemplated by the Act. Further, MFS's request that the Commission impose a liquidated damages provision is beyond the jurisdiction of the Commission so the Commission cannot grant the relief requested by MFS. Accordingly, MFS's request should be dismissed.

Sprint makes essentially three arguments in support of dismissing MFS's request. First, it argues that MFS's request is beyond the scope of arbitration. It argues that Section 251 limits the topics that may be decided by arbitration to terms and conditions that specifically relate to duties imposed on the LECs by Sections 252(b) and (c). Second, Sprint argues that imposition of a liquidated damages provision is equivalent to imposing money damages. Sprint contends that the Commission lacks the jurisdiction to impose money damages. Third, Sprint argues that the specific provision requested by MFS is a penalty and therefore an illegal liquidated damages clause.

MFS responds that Section 252(b)(1) allows a party to petition the state commission to arbitrate "any open issues." MFS argues that whether or not to include a liquidated damages clause is an "open" issue subject to arbitration. MFS further argues that a liquidated damages clause is an enforcement provision and the Commission should include an enforcement provision in the interconnection agreement.

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Section 251(b) of the Act imposes certain duties upon local exchange companies regarding resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. Section 251(c) imposes additional requirements on LECs regarding duty to negotiate, interconnection, unbundled access, and resale. If a party requests negotiations under the Act, the parties may reach an agreement without regard to the standards set forth in Sections 251(b) and (c). 47 USC 252(a)(1). The negotiated agreement is submitted to the Commission under Section 252(e) and is approved if it is not discriminatory and not against the public interest. 47 USC 252(e)(2)(A).

If the parties do not reach agreement, one party may petition the Commission to arbitrate unresolved issues between them. 47 USC 252(b)(1). The Commission arbitrates the agreement pursuant to Sections 251 and 252 and approves the agreement if it meets the standards of 47 USC 252(e)(2)(B).

The question raised by Sprint's motion is: exactly what issues are appropriate for arbitration under the Act? Staff believes the Commission should limit its consideration to the items enumerated in Sections 251 and 252 and issues necessary to implement those items. A liquidated damages provision does not meet that standard. A liquidated damages provision in a contract allows the parties to determine, in advance, the appropriate level of damages in the event of a breach of contract. Parties typically include such provisions in their contracts in order to lessen the cost of litigating disputes that may arise in the future. The Act does not require parties to include in their agreements a method to resolve disputes. Instead, the Act includes provisions to deal with disputes. For example, Section 252(e)(6) allows the parties to petition the Federal Communications Commission if the state commission fails to act. Further, if the state commission takes action, an aggrieved party may bring an action in Federal district court to determine whether the state commission's action complies with Sections 251 and 252. If Congress wanted to require enforcement provisions in agreements, it would have specifically said so.

The Act is silent on how to resolve intercompany disputes once an agreement has been reached. If a party to an arbitrated agreement believes the other party is not performing its duties under the agreement, it has remedies under state law. A party may file an appropriate petition or complaint under Rule 25-22.036, Florida Administrative Code.

Section 252(a) allows parties to enter into a binding agreement without regard to Section 251. This agreement can include any issues the parties wish to put in it, including

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enforcement provisions such as liquidated damages, or other forms of dispute resolution rather than bringing a complaint to the Commission. A liquidated damages provision might be an appropriate method for parties to resolve disputes without resorting to litigation in court or before the Commission. However, it is not a requirement of Section 251 and the issue of whether or not it should be included is not relevant to the Commission's resolution of contested issues pursuant to Sections 251 and 252. Sprint is under no obligation to include such a provision in any agreement. Accordingly, MFS's request should be dismissed.

Even if the Act allows the Commission to arbitrate a dispute over liquidated damages, imposing such a requirement violates state case law. If the Commission were to impose a liquidated damages provision, it would be, in effect, awarding damages to one party for a breach of contract. The Commission lacks the authority to award money damages. Southern Bell Telephone and Telegraph Company v. Mobile America Corporation 291 So.2d 199, 202 (Fla. 1974). If the Commission were to take the action MFS requests, it would be authorizing an award of damages to MFS when Sprint breached the agreement. If the Commission cannot directly award money damages, it cannot do so indirectly by imposing a liquidated damages arrangement on the parties.

For the reasons discussed above, Sprint's motion should be granted and MFS's request that the Commission impose a liquidated damages provision in the arbitration agreement should be dismissed.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open and proceed to hearing.

ATTACHMENT 1

MFS Communication Co., Inc., & Sprint United-Cellular of Florida, Inc.  
Florida Interconnection Agreement  
Under Sections 251 and 252 of the Telecommunications Act of 1996

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- other than to pay to the other Party any amounts owed under this Agreement.

21.4 Obligations Upon Termination or Expiration

Upon termination or expiration of this Agreement in accordance with this Section 21.0:

- a) Each Party shall comply immediately with its obligations set forth in Section 32.4.9;
- b) Each Party shall continue to perform its obligations and provide the services as described herein until such time as a successor agreement between the Parties is entered into; provided, however, that the Parties shall renegotiate the rates, fees and charges contained herein; and
- c) Each Party shall promptly pay all amounts (including any late payment charges) owed under this Agreement.

21.5 Remedy

Except as set forth in Section 23.5, no remedy set forth in this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable law or otherwise.

22.0 INSTALLATION

Sprint and MFS shall effectuate all the terms of this Agreement by September 1, 1996. Moreover, MFS and Sprint agree to begin implementing the terms of the agreement immediately upon execution of this agreement, and specifically will begin to implement and install network interconnection and other network infrastructure orders, e.g. DLC collocation capabilities, within two weeks upon execution of this agreement.

23.0 STIPULATED DAMAGES FOR SPECIFIED ACTIVITIES

23.1 Certain Definitions

When used in this Section 23.0, the following terms shall have the meanings indicated:

MFS Communication Co., Inc., & Sprint United-Cellular of Florida, Inc.  
Florida Interconnection Agreement  
Under Sections 251 and 252 of the Telecommunications Act of 1996

- 23.1.1 "Specified Performance Breach" means the failure by Sprint to meet the Performance Criteria for any Specified Activity for a period of three (3) consecutive calendar months.
- 23.1.2 "Specified Activity" means any of the following activities:
- a) the installation by Sprint of unbundled Loops for MFS ("Unbundled Loop Installation");
  - b) Sprint's provision of Interim Telecommunications Number Portability; or
  - c) the repair of out of service problems for MFS ("Out of Service Repairs").
- 23.1.3 "Performance Criteria" means, with respect to each calendar month during the term of this Agreement, the performance by Sprint during such month of each Specified Activity shown below within the time interval shown in at least eighty percent (80%) of the covered instances:

SPECIFIED ACTIVITY	PERFORMANCE INTERVAL DATE
(i) <u>Unbundled Loop Installation</u>	
1-10 Loops per Service Order	5 days from Sprint's Receipt of valid Service Order
11-20 Loops per Service Order	10 days from Sprint's Receipt of valid Service Order
21+ Loops per Service Order	to be Negotiated
(ii) <u>Interim Number Portability</u>	
1-10 Numbers per Service Order	5 days from Sprint's Receipt of valid Service Order
11-20 Numbers per Service Order	10 days from Sprint's Receipt of valid Service Order
21+ Numbers per Service Order	to be Negotiated

MFS Communication Co., Inc., & Sprint United-Cell of Florida, Inc.  
Florida Interconnection Agreement  
Under Sections 251 and 252 of the Telecommunications Act of 1996

(iii) <u>Out-of-Service Repairs</u>	Less than 24 hours from Sprint's Receipt of Notification of Out-of-Service Condition
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**23.2 Specified Performance Breach**

In recognition of the (1) loss of Customer opportunities, revenues and goodwill which MFS might sustain in the event of a Specified Performance Breach; (2) the uncertainty, in the event of such a Specified Performance Breach, of MFS having available to it customer opportunities similar to those opportunities currently available to MFS; and (3) the difficulty of accurately ascertaining the amount of damages MFS would sustain in the event of such a Specified Performance Breach, Sprint agrees to pay MFS, subject to Section 23.4 below, damages as set forth in Section 23.3 below in the event of the occurrence of a Specified Performance Breach.

**23.3 Stipulated Damages**

The damages payable by Sprint to MFS as a result of a Specified Performance Breach shall be \$75,000 for each Specified Performance Breach (collectively, the "Stipulated Damages"). MFS and Sprint agree and acknowledge that (a) the Stipulated Damages are not a penalty and have been determined based upon the facts and circumstances of MFS and Sprint at the time of the negotiation and entering into of this Agreement, with due regard given to the performance expectations of each Party; (b) the Stipulated Damages constitute a reasonable approximation of the damages MFS would sustain if its damages were readily ascertainable; and (c) MFS shall not be required to provide any proof of the Stipulated Damages.



MFS Communication, Co., Inc., & Sprint United-Cell of Florida, Inc.  
Florida Interconnection Agreement  
Under Sections 251 and 252 of the Telecommunications Act of 1996

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23.4 Limitations

In no event shall Sprint be liable to pay the Stipulated Damages if Sprint's failure to meet or exceed any of the Performance Criteria is caused, directly or indirectly, by a Delaying Event. A "Delaying Event" means (a) a failure by MFS to perform any of its obligations set forth in this Agreement (including, without limitation, the Implementation Schedule and the Joint Grooming Plan), (b) any delay, act or failure to act by a Customer, agent or subcontractor of MFS or (c) any Force Majeure Event. If a Delaying Event (i) prevents Sprint from performing a Specified Activity, then such Specified Activity shall be excluded from the calculation of Sprint's compliance with the Performance Criteria, or (ii) only suspends Sprint's ability to timely perform the Specified Activity, the applicable time frame in which Sprint's compliance with the Performance Criteria is measured shall be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the Delaying Event.

23.5 Records

Sprint shall maintain complete and accurate records, on a monthly basis, of its performance under this Agreement of each Specified Activity and its compliance with the Performance Criteria. Sprint shall provide to MFS such records in a self-reporting format on a monthly basis. Notwithstanding Section 32.0, the Parties agree that such records shall be deemed "Proprietary Information" under Section 32.0.

24.0 SECTION 252(I) OBLIGATIONS

If Sprint enters into an agreement (the "Other Agreement") approved by the Commission pursuant to Section 252 of the Act which provides for the provision of arrangements covered in this Agreement to another requesting Telecommunications Carrier, including itself or its affiliate, Sprint shall make available to MFS such arrangements upon the same rates, terms and conditions as those provided in the Other Agreement. At its sole option, MFS may avail itself of either (i) the Other Agreement in its entirety or (ii) the prices, terms and conditions of the Other Agreement that directly relate to any of the following duties as a whole:

- 1) Interconnection - Section 251(c)(2) of the Act (Sections 4.0 and 5.0 of this Agreement); or

ATTACHMENT 2

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-CENTEL OF )  
FLORIDA, INC. (also known as )  
CENTRAL TELEPHONE COMPANY OF )  
FLORIDA AND UNITED TELEPHONE )  
COMPANY OF FLORIDA) )  
 )

DOCKET NO. 960838-TP  
Filed: August 12, 1996

MOTION TO DISMISS

Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,<sup>1</sup> and Rule 25-22.037, Florida Administrative Code, United Telephone Company of Florida, Inc. ("Sprint-United") and Central Telephone Company of Florida, Inc. ("Sprint-Centel") (together "Sprint" or the "Companies") Move to Dismiss the portion of the Petition<sup>1</sup> filed by

<sup>1</sup> Pub.L.No. 104-104 § 101(a), 110 Stat. 70 to be codified at 47 U.S.C. § 252(b). The Communications Act of 1934, as amended by the Telecommunications Act of 1996, is referred to herein as the 1996 Act.

<sup>2</sup> The Companies note that the style of the Petition refers to "Sprint United-Centel of Florida, Inc." as a legal entity that does not exist. The Companies have interpreted the petition to relate to United Telephone Company of Florida and Central Telephone Company of Florida, two separate legal entities, both of which are certificated local exchange companies and both of which are under common ownership, management and control.

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MFS Communications Company, Inc. ("MFS") on July 17, 1996 dealing with stipulated damages, and state:

1. MFS's petition identifies Sprint's refusal to agree on MFS's proposed stipulated damage clause as an unresolved issue to be arbitrated by the FPSC. See Petition at 8-9, ¶ 7. MFS proposes that the Commission adopt § 23 of MFS's Comprehensive Interconnection Agreement as a means to resolve this unresolved issue. This portion of MFS's petition and request for relief should be stricken and/or dismissed by the FPSC for the following reasons.

2. First, the 1996 Act does not give the FPSC the power to arbitrate a dispute regarding the propriety of a stipulated damages clause. Section 252 of the 1996 Act empowers a state commission to arbitrate unresolved issues and the state commission is required to "ensure that such resolution and conditions meet the requirements of Section 251" and "establish any rates for interconnection, service, or network elements according to subsection (d) [Pricing Standards]. . ." A stipulated damages clause is not a requirement of Section 251 nor is it a rate for "interconnection, services, or network elements." Additionally, agreeing to a stipulated damages clause is not one of the express or implied duties or obligations of an incumbent local exchange company specified in Section 251. Accordingly, the FPSC does not have the authority under the 1996 Act to arbitrate Sprint's refusal to agree to MFS' proposed stipulated damages clause.


3. Second, because imposing a stipulated damages clause in arbitration is tantamount to awarding damages for breach of contract or failure to follow a Commission order, the FPSC does not have the power to impose a stipulated damages clause. Awarding damages is a judicial function beyond the power of the FPSC. See Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So.2d 399, 201 (Fla. 1974).

4. Third, because the proposed stipulated damages provision involves the imposition of a \$75,000 payment for even a minor breach, the stipulated damages is not a valid liquidated damage provision but is, instead, a penalty which is against Florida public policy.

5. Accordingly, MFS' request for the FPSC to impose a stipulated damages clause should be dismissed from the Petition.

WHEREFORE, Sprint requests that the FPSC enter an Order dismissing the stipulated damages portions of the Petition as set forth in this Motion.

Dated this 12th day of August, 1996.

  
LEE L. WILLIS  
JOHN P. FONS  
J. JEFFRY MAHLEN  
Ausley & McMullen  
P. O. Box 391  
Tallahassee, Florida 32302  
(904) 224-9115

ATTORNEYS FOR CENTRAL TELEPHONE  
COMPANY OF FLORIDA AND UNITED  
TELEPHONE COMPANY OF FLORIDA

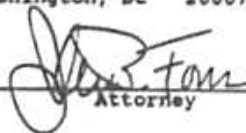
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, hand delivery (\*) or overnight express (\*\*) this 12th day of August, 1996, to the following:

Michael Billmeier \*  
Division of Legal Services  
Florida Public Service Comm.  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Andrew D. Lipman \*\*  
Russell M. Blau  
Lawrence R. Freedman  
Swidler & Berlin, Chartered  
3000 K Street, N.W., Suite 300  
Washington, DC 20007-5116

  
\_\_\_\_\_  
Attorney

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ATTACHMENT 3

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 21-22.037 (2)(b), Florida Administrative Code, Part 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'

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 in the agreement as being beyond the scope of arbitration outlined in Section 252 of the Act.<sup>1</sup> In fact, Section 252(b)(1) states that "the carrier or any other party to the negotiation may petition a State commission to arbitrate

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<sup>1</sup>Motion at 2.

any open issues"<sup>2</sup> (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.<sup>3</sup> 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.'"<sup>4</sup> 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

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<sup>2</sup>47 U.S.C. §252(b)(1).

<sup>3</sup>Motion at 2.

<sup>4</sup>*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.<sup>5</sup>

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"<sup>6</sup> (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

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<sup>5</sup>See 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").

<sup>6</sup>H.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.<sup>7</sup> 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 damages<sup>8</sup> 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

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<sup>7</sup>Motion at 3, and 5.

<sup>8</sup>Even 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).

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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,

*Russell M. Blau / MB*  
Andrew D. Lipman  
Russell M. Blau  
SWIDLER & BERLIN, Chartered  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Tel.)  
(202) 424-7657 (Fax)

Attorneys for MFS COMMUNICATIONS  
COMPANY, INC.

August 19, 1996

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