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September 5, 2001

BY HAND DELIVERY

Blanca Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Complaint of MCImetro Access Transmission Services, LLC Against
Sprint-Florida, Inc. for Improper Attempt to Terminate Interconnection
Agreement -- Docket No. 011177-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCImetro Access Transmission Services, LLC are the original and fifteen copies of its:

- (1) Complaint, Request for Interim Relief and Request for Expedited Processing 11039-01
- (2) Direct Testimony of Ron Martinez 11040-01
- (3) Direct Testimony of John Monroe 11041-01
Exhibit IM-1 11042-01

By copy of this letter, copies have been furnished to the parties shown on the attached certificate of service. If you have any questions regarding this filing, please give me a call at 425-2313.

APP _____
CAF _____
CMP (copy will be sent)
COM 5 + orig
CTR _____
ECR _____
LEG _____
OPC 1 RDM/mee
PAI _____ Enclosures
RGO _____
SEC 1 ec: Certificate of Service
SER _____
OTH _____

Very truly yours,

Richard D. Melson

Richard D. Melson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Complaint and the accompanying exhibits, including the direct testimony of John Monroe and Ron Martinez, were served on the following this 5th day of September, 2001:

Beth Keating
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

BY HAND DELIVERY

Charles Rehwinkle
Sprint-Florida, Inc.
1313 Blairstone Road
Tallahassee, FL 32301

BY HAND DELIVERY

F.B. (Ben) Poag
Sprint-Florida, Inc.
1313 Blairstone Road
Tallahassee, FL 32301

BY HAND DELIVERY

Director-Local Carrier Markets
Sprint Local Telecommunications Division
Mailstop: KSFRWA0301
2330 Shawnee Mission Parkway
Westwood, KS 66205

BY FEDERAL EXPRESS

Vice President-Law and External Relations
Sprint-Florida, Inc.
555 Lake Border Drive
Apopka, FL 32703

BY FEDERAL EXPRESS



Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of MCImetro Access)
Transmission Services, LLC against Sprint-)
Florida, Inc. for Improper Attempt to)
Terminate Interconnection Agreement)
_____)

Docket No. 011177-7P

Filed: September 5, 2001

**MCIMETRO'S COMPLAINT,
REQUEST FOR INTERIM RELIEF AND
REQUEST FOR EXPEDITED PROCESSING**

MCImetro Access Transmission Services, LLC ("MCImetro") files this Complaint against Sprint-Florida, Inc. ("Sprint") for its improper attempt to terminate the Interconnection Agreement (the "Agreement") between MCImetro and Sprint which was approved by the Commission under Section 252 of the Telecommunications Act of 1996 (the "Act") in Order No. PSC-97-0565-FOF-TP, issued May 20, 1997 (the "Order").

By this Complaint, MCImetro asks the Commission: (1) to declare that Sprint's attempt to terminate the Agreement is improper and that the Agreement remains in full force and effect; (2) because the dispute is adversely impacting MCImetro's ability to serve new and existing customers in Sprint's territory, to grant relief on an interim basis requiring Sprint to continue to operate under the Agreement pending the Commission's final ruling in this docket; and (3) to process this Complaint using the expedited dispute resolution procedures outlined in the Staff Memorandum to the Commissioners dated June 19, 2001 (the "expedited procedures").

MCImetro is committed to reaching a satisfactory resolution of this dispute. MCImetro is continuing to discuss the underlying issues with Sprint and is willing to mediate the dispute before the Commission Staff. Because of the customer-impacting nature of Sprint's action, however, MCImetro has no alternative but to formally seek relief from the Commission at this time.

In support of this Complaint, MCImetro states:

1. MCImetro is certificated by the Commission as an alternative local exchange company. MCImetro's official address for receiving communications from the Commission is:

MCImetro Access Transmission Services, LLC
Concourse Corporate Center Six
Six Concourse Parkway, Suite 3200
Atlanta, GA 30328

2. Sprint is certificated by the Commission as an incumbent local exchange company. Sprint's official address for receiving communications from the Commission is:

F. B. (Ben) Poag
Sprint-Florida, Inc.
(MC FLTLHO0107)
P. O. Box 2214
Tallahassee, FL 32316-2214

In addition, copies of this Complaint have been provided to:

Charles Rehwinkle
Sprint-Florida, Inc.
1313 Blairstone Road
Tallahassee, FL 32301

Director-Local Carrier Markets
Sprint Local Telecommunications Division
Mailstop: KSFRWA0301
2330 Shawnee Mission Parkway
Westwood, KS 66205

Vice President-Law and External Relations
Sprint-Florida, Inc.
555 Lake Border Drive
Apopka, FL 32703

JURISDICTION

3. This Complaint is filed pursuant to Chapters 120 and 364, Florida Statutes, the Telecommunications Act of 1996, and Rules 25-22.036 and 28-106.201, Florida Administrative Code.

4. The Agreement at issue in this case was approved by the Commission pursuant to Section 252 of the Act in Order No. PSC-97-0565-FOF-TP issued May 20, 1997 in Docket No. 961230-TL. Amendments to the Agreement have been approved by the Commission pursuant to the Act in Order Nos. PSC-98-0829-FOF-TP and PSC-00-0742-FOF-TP. A copy of the Agreement is attached as Exhibit ___ (JM-1) to the Direct Testimony of John Monroe filed with this Complaint.

5. State commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. *Iowa Utils. Bd. v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997).

DISPUTE

6. The ultimate dispute between the MCImetro and Sprint is whether or not Sprint acted properly in attempting to terminate the Agreement effective August 21, 2001. Sprint's stated reason for the termination was MCImetro's failure to negotiate in good faith to amend the Agreement pursuant to its change in law provision. MCImetro asserts that the change in law provision of the Agreement had not been triggered so as to require any amendments. MCImetro nevertheless was ready and willing to consider any specific amendment language that Sprint might propose, but none was forthcoming. In addition, although Sprint complains that MCImetro refused to negotiate amendments to the contract, Sprint actually demanded that MCImetro renegotiate the entire agreement. Sprint's attempted termination was therefore improper and invalid under the terms of the Agreement, and MCImetro asks the Commission to declare that the Agreement remains in full force and effect notwithstanding the Notice of Termination given by Sprint. The relevant provisions of the Agreement, and the facts leading up to the Notice of Termination, are as follows. MCImetro believes that the facts stated below are not in dispute.

Applicable Provisions of Agreement

7. The term of the Agreement is set forth in Section 3 of Part A as follows:

Section 3. Term of Agreement

This Agreement shall become binding upon the Effective Date and continue for a period of three (3) years from the Commission approval date ("Approval Date"), unless earlier terminated or withdrawn in accordance with Section 20 (Termination). Renewal after the initial term for successive one (1) year terms shall be at MCI's option upon written notice to Sprint.

Under this provision, the initial term of the Agreement extended for three years from May 20, 1997, the date of the Order approving the Agreement, or until May 20, 2000. MCImetro exercised its option to renew the Agreement for additional one year terms in both April 2000 and May 2001, hence the current expiration date of the Agreement, pending future renewals, is May 20, 2002. Copies of the renewal letters are attached as Composite Exhibit ___ (JM-2) to the Direct Testimony of John Monroe filed with this Complaint.

8. The provisions for terminating the Agreement are set forth in Section 20 of Part A. The relevant portions of that provision are as follows:

Section 20. Termination

20.1 In the event of breach of any material provision of this Agreement by either Party, the non-breaching Party shall give the other Party written notice thereof, and:

* * *

20.1.3 If such material breach is for any other failure to perform in accordance with the Agreement, the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within forty-five (45) days, and if it does not, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching party shall be entitled to pursue all available legal and equitable remedies for such breach.

As described in more detail below, on June 21, 2001, Sprint sent MCImetro a letter stating that Sprint considered MCImetro to be in breach of the agreement for refusing to negotiate promptly

and in good faith to amend the Agreement pursuant to its change in law provisions. On August 21, 2001, Sprint notified MCImetro that Sprint was terminating the Agreement as a result of MCImetro's alleged breach.

9. Section 2.2 of Part A of the Agreement is the change in law provision.

That section provides:

2.2 In the event the FCC or the Commission promulgates rules or regulations or issues orders, or a court with appropriate jurisdiction issues orders which conflict with or make unlawful any provision of this Agreement, the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which are consistent with such rules, regulations or orders. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 23 (Dispute Resolution Procedures) hereof.

By its terms, this change in law provision is triggered only by rules or orders that "conflict with" or "make unlawful" any provision of the Agreement. In order for a contract provision to "conflict with" the law, it must be impossible to reconcile the law and the contract. That is, there is a "conflict with" the law only if it is impossible both to obey the law and to perform the contract.

10. In addition, Section 6 of Part A of the Agreement addresses the renegotiation of specific provisions of the Agreement in the event that any FCC Rules and Regulations are invalidated. This section provides in pertinent part:

Section 6. Compliance with Laws

. . . In the event the Act or FCC Rules and Regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated.

This section reflects the parties' intent that the invalidation of applicable FCC rules does not impact the Agreement unless the invalidation leaves any provisions "insufficiently clear to be effectuated."

11. If the Parties are unable to agree on the amendment language, if any, needed to reflect a change in law, Section 2.2 of Part A states that their remedy is petition the Commission to resolve the dispute pursuant to Section 23 of Part A of the Agreement. That section provides:

Section 23. Dispute Resolution Procedures

The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. The Parties agree to seek expedited resolution by the Commission, and shall request that resolution occur in no event later than sixty (60) days from the date of submission of such dispute. If the Commission appoints an expert(s) or other facilitator(s) to assist in its decision-making, each Party shall pay one-half of the fees and expenses so incurred. During the Commission proceeding, each Party shall continue to perform its obligations under the Agreement; provided, however, that neither Party shall be required to act in any unlawful fashion. This provision shall not preclude the Parties from seeking relief available in any other forum.

Importantly, if a dispute is taken to the Commission under this provision, each party is required to continue to perform its obligations under the Agreement while the Commission proceeding is pending.

Facts of This Case

12. On May 24, 2001, Sprint sent a letter to MCImetro request renegotiation of the Agreement. That letter cited several changes in the law since the Agreement was originally executed and sought to invoke the change in law provisions of Section 2.2 and 6 of Part A of the Agreement. A copy of this letter is attached as Exhibit ____ (RM-1) to the Direct Testimony of Ron Martinez filed with this Complaint.

13. On May 31, 2001, MCImetro responded to Sprint's letter, stating that none of the items in Sprint's letter was the type of change that would trigger the change of law provisions of the Agreement. MCImetro stated that it did not want to renegotiate the entire Agreement, but that it was willing to discuss any particular issues that Sprint wanted to bring to its attention. A copy of this letter is attached as Exhibit ____ (RM-2) to the Direct Testimony of Ron Martinez filed with this Complaint.

14. On June 21, 2001, Sprint sent MCImetro a letter stating that Sprint disagreed with MCImetro's position that none of the items in Sprint's May 31 letter were sufficient to trigger the change in law provisions. Sprint therefore considered MCImetro to be in material breach of the Agreement for refusing to negotiate promptly and in good faith to amend the Agreement. A copy of this letter is attached as Exhibit ____ (RM-3) to the Direct Testimony of Ron Martinez filed with this Complaint.

15. On June 22, 2001, MCImetro responded to Sprint's letter and asserted that MCImetro was not refusing to negotiate an amendment to the Agreement. MCImetro pointed out that despite its request that Sprint bring to its attention any matters that Sprint would like to discuss, Sprint still had not proposed any new contract language. MCImetro renewed its invitation for Sprint to make specific contract amendment proposals. A copy of this letter is attached as Exhibit ____ (RM-4) to the Direct Testimony of Ron Martinez filed with this Complaint.

16. On August 21, 2001, Sprint notified MCImetro that Sprint was exercising its option under Section 20.1.3 to terminate the Agreement for MCImetro's alleged bad faith failure to engage in negotiations to amend the Agreement (the "Notice of Termination"). A copy of this letter is attached as Exhibit ____ (RM-5) to the Direct Testimony of Ron Martinez filed with this Complaint.

17. On August 30, 2001, MCImetro replied to the Notice of Termination, again denying the breach, again inviting Sprint to propose contract amendments, and notifying Sprint that MCImetro intended to seek relief for Sprint's termination. A copy of this letter is attached as Exhibit ___ (RM-6) to the Direct Testimony of Ron Martinez filed with this Complaint.

Effect on Substantial Interests

18. Subsequent to the notice of termination, Sprint disconnected MCImetro's access to the system that MCImetro uses to access Sprint's customer service records ("CSRs"). See Exhibit ___ (RM-7) to the Direct Testimony of Ron Martinez filed with this Complaint. Without access to this system, MCImetro is precluded from obtaining the information necessary to submit orders to Sprint for service to customers who wish to change from Sprint to MCImetro. In addition, Sprint has cancelled existing local service requests ("LSRs") on the grounds that MCImetro no longer has an interconnection service agreement. See Exhibit ___ (RM-8) to the Direct Testimony of Ron Martinez filed with this Complaint. As a result of this action, Sprint has denied MCImetro the ability to market its service to new customers and its ability to process changes to service for existing customers. MCImetro's substantial interests are therefore adversely affected by Sprint's action in improperly terminating the Agreement.

19. MCImetro has escalated this issue within Sprint. As of the date of this Complaint, Sprint has provided MCImetro with a verbal assurance that Sprint will resume processing orders from MCImetro for 90 days from the date of Sprint's Notice of Termination. That commitment, however, has not yet been provided in writing.

Disputed Issues of Fact & Issues to be Resolved

20. MCImetro is not aware of any disputed issues of material fact related to this Complaint. The issues of law and policy which the Commission is being asked to resolve, and MCImetro's position on those issues, are:

Issue 1: Did Sprint properly terminate its Interconnection Agreement with MCImetro?

MCImetro: No, for the following reasons:

1. None of the legal changes cited in Sprint's May 21, 2001 letter are sufficient to trigger the change of law provisions of either Section 2.2 or 6 of Part A of the Agreement. There are no provisions in the Agreement that "conflict with," are "unlawful," or are "insufficiently clear to be effectuated" as a result of those changes.
2. Sprint never offered specific amendment language, but instead requested renegotiation of the entire Agreement.
3. MCImetro is not required by any provision of the Agreement to renegotiate the Agreement in its entirety. MCImetro invited Sprint to propose the specific contract amendment language which it wishes to negotiate, but Sprint has failed to do so.
4. There has been no failure by MCImetro to negotiate, and certainly no bad faith refusal to negotiate, hence there has been no material breach of the Agreement.
5. If Sprint believes that it has properly framed the issues to be negotiated and the parties still have been unable to agree, Sprint's remedy under Section 2.2 of the Agreement is to petition the Commission to resolve the dispute pursuant to Section 23 of the Agreement, not to unilaterally seek to terminate the Agreement. Under Section 23, Sprint must continue to provide service under the Agreement while the dispute is pending at the Commission.

Issue 2: What relief should the Commission order?

MCImetro: If the Commission finds that Sprint improperly attempted to terminate the Agreement, the Commission should declare that the Agreement remains in full force and effect and should order Sprint to continue to provide service in accordance with the terms of the Agreement.

If the Commission finds that MCImetro has improperly refused to negotiate any amendments that are required by the change in law provisions, the Commission should order the parties to negotiate any required amendments and, failing agreement, to bring their dispute to the Commission pursuant to Section 23 of the Agreement. The Commission should order the parties to continue to operate under the Agreement pending the execution of any required amendments.

REQUEST FOR INTERIM RELIEF

MCImetro requests that the Commission at its first available agenda conference enter an order requiring Sprint to reinstate service to MCImetro under the Agreement (if it has not already been reinstated by mutual agreement of the parties) and requiring Sprint to continue providing uninterrupted service to MCImetro under the Agreement pending the resolution by the Commission of the underlying dispute. In support of this request for interim relief, MCImetro states:

21. As indicated above, Sprint's actions subsequent to its Notice of Termination have prevented MCImetro from acquiring new customers, or processing changes for existing customers, in Sprint's service territory. These actions impact not only MCImetro's ability to compete with Sprint, they also damage MCImetro's reputation with existing or potential customers in a way that is impossible to quantify. Immediate relief is required to prevent further harm to MCImetro and its reputation in the marketplace.

22. Restoring the preexisting status quo would eliminate these adverse impacts on MCImetro and its customers without damaging Sprint. Even if Sprint were ultimately to prevail on the merits of the dispute, any resulting amendments to the Agreement could be applied retroactively, and any additional financial obligations from MCImetro to Sprint could be trued-up back to the date of the Notice of Termination.

23. The Agreement itself contemplates that service will be continued under the Agreement in the event of a dispute about the application of the change in law provision. Section 2.2 of Part A requires the parties to pursue their Section 23 remedies in the event they are unable to agree on appropriate contract amendments. Under Section 23, service must remain in force under the Agreement while Commission proceedings to resolve the dispute are pending. In the case where one party has side-stepped Section 23 and unilaterally terminated the contract

based on an alleged failure to negotiate pursuant to the change of law provisions, it is appropriate for the Commission to apply the continuation of service principle of Section 23 during the pendency of Commission proceedings regarding the lawfulness of that termination.

REQUEST FOR EXPEDITED PROCESSING

MCImetro requests that the Commission handle this Complaint under the expedited procedures outlined in the Memorandum dated June 19, 2001 from the Commission Staff to the Commissioners. In support of this request, MCImetro states:

24. The Memorandum outlines a 99-day procedure for processing complaints involving the interpretation of contracts that have been approved by the Commission pursuant to Section 252 of the Act. This Complaint satisfies each of the three criteria set forth in the Memorandum as necessary to qualify for expedited processing:

(a) Complaint limited to three issues (no subparts). As shown above, MCImetro believes that this case involves only two issues: (i) whether or not Sprint's Notice of Termination was properly given in light of all applicable provisions of the Agreement, and (ii) what relief should be granted.

(b) Complaint limited to issues of contract interpretation. While resolution of the Complaint involves construction of several provisions of the contract in light of various orders and judicial decisions which may or may not constitute a change in law, the issues ultimately involve only questions of contract interpretation and of the appropriate remedy to be granted.

(c) Parties do not dispute the actions each took (rightly or wrongly) under the contract. To the best of MCImetro's knowledge, there is no factual dispute about the actions that each party took in reliance on its interpretation of the contract.

25. Section 23 of the Agreement contemplates that in the event of a contract dispute, the parties will seek expedited resolution by the Commission within 60 days. While this timetable does not appear to be realistic given existing Commission procedures, the expedited process set out in the Memorandum meets the intent of this provision as closely as possible. Because Sprint agreed contractually to a 60-day process, it cannot complain that the expedited procedures prejudice it in any way.

26. In compliance with the Memorandum, the Complaint and the supporting direct testimony and exhibits of John Monroe and Ron Martinez have been served by hand on the Sprint and the Commission Staff. Also in compliance with the Memorandum, MCImetro is willing to mediate this dispute before one or more members of the Commission Staff during the pendency of this process.

WHEREFORE, MCImetro requests that the Commission:

- (a) enter its interim order requiring Sprint to continue to operate under the terms of the Agreement pending resolution by the Commission of the Complaint;
- (b) process the Complaint using the Commission's expedited dispute resolution procedures;
- (c) hold a hearing on this Complaint pursuant to Chapter 120, Florida Statutes on the timetable set for in the expedited dispute resolution procedures;
- (d) after hearing, enter its order declaring that Sprint's attempt to terminate the Agreement was improper and that the Agreement remains in full force and effect;
- (e) in the alternative, order the parties to negotiate such amendments to the Agreement as the Commission determines are required by the change in law provisions and, failing agreement, to bring their dispute to the Commission for resolution under Section 23 of the Agreement.

RESPECTFULLY SUBMITTED this 5th day of September, 2001.

HOPPING GREEN SAMS & SMITH, P.A.

By: Richard D. Melson

Richard D. Melson
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Tallahassee, FL 32301
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ATTORNEYS FOR MCIMETRO ACCESS
TRANSMISSION SERVICES, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Complaint and the accompanying exhibits, including the direct testimony of John Monroe and Ron Martinez, were served on the following this 5th day of September, 2001:

Beth Keating
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Florida Public Service Commission
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