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September 10, 2002

ORIGINAL

By Hand Delivery

Ms. Blanca S. Bayo', Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: Enforcement of an Interconnection Agreement Between ALEC, Inc. and Sprint-Florida, Inc.; PSC Docket No. 020099-TP

Dear Ms. Bayo':

Enclosed please find the Posthearing Brief of Duro Communications in the above-styled matter. Consistent with previous rulings by the Commission in this case, and the prehearing Order, portions of the Brief have been redacted. An unredacted version of the Brief is being filed under seal with the confidential information highlighted, consistent with Commission practice. If you have any questions or need any additional information, please let me know.

Sincerely,

Jon C. Moyle, Jr.

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JCMJ/jd
Enclosures (original and 15 copies of redacted Brief; 1 copy of unredacted Brief)
cc: PSC Staff (w/copy of redacted Brief)
Sprint Counsel (w/copy of unredacted Brief and redacted Brief)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of ALEC, Inc. for enforcement of interconnection agreement with Sprint-Florida, Incorporated and request for relief	)))	DOCKET NO. 020099-TP Filed: September 10, 2002

ALEC, INC.
BRIEF OF THE EVIDENCE

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"REDACTED VERSION"

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STATEMENT OF THE CASE

On June 1, 2001, ALEC and Sprint-Florida, Incorporated ("Sprint") entered into Sprint's standard interconnection agreement ("Agreement"), which was drafted by Sprint and accepted in its entirety by ALEC. The Agreement went into effect by operation of law on September 20, 2001. The Agreement governs the relationship between the Parties in all respects relevant and material to this matter. On February 5, 2002 ALEC filed a complaint with the Commission for resolution of certain disputes regarding the billing for interconnection facilities and reciprocal compensation. On March 4, 2002 Sprint filed a Motion to Dismiss Count II of ALEC, Inc.'s Complaint (regarding reciprocal compensation) and Answer. The Parties informally resolved their differences with respect to the issue of reciprocal compensation and on March 26, 2002 ALEC filed a Notice of Withdrawal of Count II from its Complaint. On March 29, 2002 Sprint filed its Notice of Withdrawal of Motion to Dismiss Count II of ALEC, Inc.'s Complaint.

A formal hearing was held on August 7, 2002. ALEC submitted the direct and rebuttal testimony of D. Richard McDaniel. Sprint submitted the direct and rebuttal testimony of John M. Felz and rebuttal testimony of Talmage O. Cox, III. The hearing produced a transcript of 286 pages and 12 exhibits. On August 23, 2002 Sprint requested that the Commission accord confidential status to Hearing Exhibit 4. On August 29, 2002 ALEC submitted late-filed exhibits 10 and 12.

This Brief of Evidence is submitted in accordance with the post-hearing procedures of Rules 25-22.056 and 28-106.215, FLA. ADMIN. CODE (2002), and Order No. PSC-02-1003-PHO-TP ("Pre-

Hearing Order") issued July 25, 2002. A summary of ALEC's position on each of the issues to be resolved in this docket is delineated in the following pages and marked with asterisks.

STATEMENT OF BASIC POSITION

This dispute arises from differing interpretations of an interconnection agreement between two local exchange carriers. ALEC adopts and reiterates its Basic Position set forth in the Pre-Hearing Order, summarized as follows:

* * *

> The Commission has jurisdiction to hear this matter. Sprint breached the Parties' Agreement by failing to pay most billed amounts for Sprint ordered and/or necessitated transport facilities. Sprint further breached the Agreement by failing to pay undisputed invoices. Sprint's defenses are deficient as a matter of fact and law.

* * *

STATEMENT OF POSITION ON THE ISSUES

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

** **POSITION:**

> The Commission's jurisdiction in this matter arises from the express terms of the Agreement, Florida statutes and federal law. In this particular dispute, the Commission must apply settled principles of contract construction and interpretation, which favor ALEC's positions. **

Sections 14.1 and 21.1 of the Agreement establish that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of the Agreement. The Agreement specifically provides "that 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." *Id.* at § 21.1. The Agreement is consistent in this regard with Section 364.162(1) of Florida Statutes, which grants the Commission "the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions."[1]

The Agreement also provides that it "shall be governed and construed in accordance with the [Telecommunications Act of 1996], orders of the Commission, and the [Federal Communications Commission's] Rules and Regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of Florida, without regard to its conflicts of laws principles, shall govern . . . ."[2]

Commission precedent governs the *manner* in which this dispute should be decided. Where contracts are plain in their meaning, the actual language within the four corners of the contract governs contractual interpretation.[3] If the plain language of the contract is ambiguous, then the Commission can clarify the parties' intent utilizing settled principles of contract interpretation.[4] The Commission has held expressly that a contract is to be construed against the party that drafted it, generally when interpreting ambiguities and specifically when interpreting a standardized contract authored by an incumbent local exchange carrier ("ILEC") and executed by an alternative LEC.[5]

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1 FLA. STAT. Ch. 364.162(1) (2002).

2 Agreement at § 14.1.

3 *In re: Determination of regulated earnings of Tampa Electric Company pursuant to stipulations for calendar years 1995 through 1999*, Docket No. 950379-EI, Order No. PSC-01-2515-FOF-EI, 2001 Fla. PUC LEXIS 1428, *19-*20 (Dec. 24, 2001).

4 *Id.*

5 *In re: Request to modify [sic] definition of residential rate schedule by Gulf Power Company*, Docket No. 000206-EI, Order No. PSC-00-0622-TRF-EI, 2000 Fla. PUC LEXIS 373, *14 (Mar. 31, 2000); *In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and*

ALEC will demonstrate below that Sprint is trying to turn the standard interpretive paradigm on its head. Sprint seeks to avoid express contract language (and associated responsibilities and liabilities) contrary to its position, and Sprint embraces ambiguities that rightfully should operate against it as the Agreement's drafter. By contrast, ALEC believes its positions and past actions are, and have been, consistent with the language of the Agreement, and that it has produced evidence to satisfy its burden of proof on all claims made in its Complaint.

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

** **POSITION:**

The appropriate dedicated transport charges are recurring charges for DS-1 *and* DS-3 facilities, and installation charges for DS-0, DS-1 *and* DS-3 services. **

Attachment IV, Section 2.4 of the Agreement establishes the procedures that each Party uses to hand off traffic to the other. A Party hands off traffic to the other Party at an "established" Point Of Interconnection ("POI").[6] The Agreement provides that when Sprint hands off traffic to ALEC, Sprint may use either the established POI or designate its own additional POI(s).[7] Pursuant to Section 2.4, Sprint designated its own POIs in several different exchanges rather than using the established POI.[8] By electing its own POIs rather than the established POI, Sprint dictated the

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request for relief, Docket No. 991534-TP; Order No. PSC-00-1641-FOF-TP, 2000 Fla. PUC LEXIS 1042, *15-*16 (2000).

6 *See* Agreement, Att. IV, § 2.

7 *Id.* at § 2.4.

8 Complaint at Ex. C.; Tr. p 62.

interconnection architecture between the Parties, and impelled ALEC to deploy facilities from the Sprint-dictated POI to ALEC's switch. Sprint's election of alternate POIs also means that Sprint accepted responsibility for paying its fair share for dedicated facilities from its POIs to ALEC's switch.

Mr. McDaniel explained at the Hearing that ALEC leases dedicated DS-3 facilities from Time Warner Telecom ("Time Warner" – a third party) to provide interconnection service from Sprint's tandem in Winter Park (one of Sprint's selected POIs) to ALEC's switch in Maitland. (Tr. p. 62).[9] Mr. McDaniel also explained that, because Sprint insists on interconnecting at a DS-1 level, ALEC purchased multiplexing functionality from Time Warner to interface with Sprint. (Tr. p. 69). Sprint's witness, Mr. Felz, agreed that Sprint's policy is to interconnect only at the DS-1 level and that it is the responsibility of the connecting carrier (here, ALEC) to perform multiplexing to meet Sprint's DS-1 protocol. (Tr. pp. 236-37).

Mr. McDaniel testified that there are substantial cost efficiencies to be realized when ordering at the DS-3 level, rather than continually deploying multiple DS-1 circuits. (Tr. p. 108). Sprint's Mr. Felz agreed that it makes economic sense for a carrier to deploy a DS-3 rather than a DS-1 when a certain capacity ceiling is reached. (Tr. p. 239). Thus, when calculating its contract liability to Time Warner, Mr. McDaniel included the base price for the DS-3 facilities necessary to support Sprint's traffic bound for ALEC ($2,334 per DS-3 per month), plus a charge for multiplexing ($600 per DS-3 per month), plus taxes (29%). The total per DS-3 facility per month as leased by ALEC from Time Warner is $3,608.82 per month. (Tr. p. 87; Exhibit 10). By contrast, were ALEC to use

9 Mr. Felz's assertion at page 7 of his prefiled direct testimony that the POI in question was "agreed upon" by the Parties is incorrect. Sprint designated this POI. (Tr. p. 62).

Time Warner's DS-1 rates for the same locations, 28 DS-1s would involve a total monthly recurring charge of $4,984 (28 x $178).

The Agreement provides a two-part mechanism for considering the costs of interconnection facilities in this circumstance. First, Section 2.2.3 provides with respect to *cost allocation*:

> If CLEC provides one-hundred percent (100%) of the interconnection facility via lease of meet-point circuits between Sprint and a third-party; lease of third party facilities; or construction of its own facilities; CLEC may charge Sprint for proportionate amount based on relative usage using the lesser of:
>
> 2.2.3.1 Sprint's dedicated interconnection rate;
>
> 2.2.3.2 Its own costs if filed and approved by a commission of appropriate jurisdiction; and
>
> 2.2.3.3 The actual lease cost of the interconnecting facility.

Second, Section 2.4.1.2 provides with respect to *cost recovery*:

> When Sprint terminates calls to CLEC's subscribers using CLEC's switch, Sprint shall pay CLEC for transport charges from the POI to the CLEC switching center for dedicated transport. Sprint shall also pay to CLEC a charge symmetrical to its own charges for the functionality actually provided by CLEC for call termination.

ALEC incurred 100% of the cost of the dedicated interconnection facilities by leasing them from Time Warner. (Tr. p. 62). Sprint terminated 100% of the traffic to ALEC.[10] As the party bearing the initial cost of the interconnection facility and receiving all the traffic, under Sections 2.2.3 and 2.4.1.2 of Attachment IV of the Agreement, ALEC was entitled to charge Sprint 100% of the cost of the DS-3 facility.

Mr. Felz's testimony indicates that Sprint interprets Section 2.2.3 of the Agreement to limit ALEC to the lesser of three enumerated cost elements -- Sprint's dedicated interconnection rate *or*

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10 Direct Testimony of McDaniel at 4.

ALEC's own costs if filed and approved by a commission of appropriate jurisdiction *or* the actual lease cost of the interconnecting facility. But Section 2.2.3 does not use the word "or" anywhere within its borders. Instead, Section 2.2.3 uses the word "and" after subsection 2.2.3.2. Although Mr. Felz testified that at times the words "or" and "and" can have the same meaning (Tr. p. 231), he conceded that the Agreement's terms should be given their plain meaning (*Id.*) and that, from his perspective, substituting the word "or" for "and" in Section 2.2.3 would be a reasonable change that would clarify the provision from Sprint's viewpoint. (*Id.*).

From a contract construction standpoint, ALEC believes that Sprint's attempt to limit Section 2.2.3 to the least of three cost elements is untenable. Either the section is clear (which ALEC contends) and subsection 2.2.3.3 is to be considered an adder to either of the prior cost elements, or the section is ambiguous, in which case Commission precedent and Florida law dictate that it is to be construed against Sprint as the drafter.[11] In either construction, Sprint is obligated to pay ALEC the full contract liability associated with the dedicated interconnection facilities reflected on the Time Warner bills.[12]

ISSUE 2A: Has ALEC applied the correct methodology to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

** **POSITION:**

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11 *See* notes 3 and 5, *supra.*

12 Mr. McDaniel stated during the Hearing in response to a question from Commissioner Palecki that ALEC asks the Commission to direct Sprint to compensate ALEC only for the actual amounts Time Warner ultimately bills to ALEC. (Tr. 80). Exhibit 5 and Exhibit 10 suggest that this amount will be $2,934 plus tax per DS-3 per month, or $3,608.82. As Sprint required use of three DS-3s per month for 10 months, this would sum to $108,264.60 ($3,608.82 x 30). Non-recurring charges for these DS-3s are as billed, $1,726.26, of which Sprint has paid $747.78, leaving $978.78 outstanding.

Yes. ALEC has applied the correct methodology to calculate the appropriate recurring and non-recurring transport charges owed by Sprint. ALEC has correctly determined that the appropriate dedicated transport charges include recurring charges for DS-1 and DS-3 facilities, and nonrecurring charges for DS-0, DS-1 and DS-3 services. **

Recurring Charges

The recurring charges assessed by ALEC are associated with DS-3 and DS-1 interconnection circuits. For the period in question, ALEC assessed Sprint a monthly unit charge for each DS-3 and DS-1 facility necessary to provide the service Sprint ordered. Such charges are not duplicative, but rather allow recompense for all recurring expenses involved in the provisioning of that transport service. (Tr. p. 96). Mr. McDaniel explained that, pursuant to Section 2.2 of the Agreement (entitled "Interconnection Compensation") ALEC invoiced Sprint a recurring charge of $2,334 per DS-3 circuit employed to provide interconnection service from Winter Park (site of Sprint's tandem) to Maitland (site of ALEC's switch). (Tr. p. 77). The $2,334 represents the contract amount that Time Warner now bills ALEC for each DS-3 circuit ALEC orders to transport Sprint's traffic bound for ALEC's switch. (*Id.*) In addition, because Sprint hands off its traffic at a DS-1 level, ALEC must multiplex that traffic, so ALEC passes through the $600 per DS-3 multiplexing charge that ALEC is billed by Time Warner. (*Id.*) Finally, ALEC passed through the 29% tax on each DS-3, bringing the total pass-through charge for each DS-3 to $3,608.82 per month. (Tr. p. 87). ALEC charges Sprint this amount pursuant to Section 2.2.3 of Attachment IV of the Agreement because it is the lesser of the actual lease cost plus ALEC's own cost (ALEC having decided not to charge the

same cost twice) versus Sprint's dedicated transport rate plus ALEC's own cost (which would add $1,178.36[13] per month on top of ALEC's own cost).

Mr. McDaniel also explained that ALEC bills Sprint a monthly recurring charge for each DS-1 service that "rides" on the DS-3 circuit. (Tr. p. 63). The DS-1 recurring charge – $71.95 per month – is located in the schedule of charges included in the Agreement. (Agreement at 71; Tr. p. 116). ALEC assesses this amount because, following the logic of Section 2.2.3 of Attachment IV of the Agreement (and even though ALEC's recurring DS-1 charge falls under Section 2.3 of Attachment IV), Sprint's dedicated interconnection rate is less than ALEC's Price List rate (the third option, which is not available) and ALEC does not pay Time Warner for DS-1 service or facilities. (Tr. p. 91). Sprint does not dispute ALEC's assessment of recurring DS-1 charges. (Tr. p. 258). Billing for recurring costs for both the DS-3 facility and the DS-1 that rides on it is entirely consistent with industry practice and with the practice of the dominant ILEC in the state, BellSouth. As Mr. McDaniel noted in his prefiled rebuttal testimony, ALEC bills BellSouth, and BellSouth has paid, at both the DS-3 and DS-1 levels for recurring charges for the same routes.[14] BellSouth accepts, as Sprint apparently does not, that the DS-3 circuit is the underlying interconnection facility, while the DS-1 is but a service that rides on that circuit. Sprint has paid, belatedly, ALEC all amounts assessed for the DS-1 recurring charges for the period of the complaint.

Nonrecurring Charges

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13 Agreement, Attachment 1, Table 1 (p. 71).

14 McDaniel Rebuttal Testimony at 6; Rebuttal Testimony Exhibit 2.

With respect to non-recurring charges, ALEC properly billed Sprint a one-time charge for installation of each facility. This charge includes a small access order fee for each order, an installation fee for each DS-3 circuit (with a substantially higher price for the first DS-3 circuit), a charge for each DS-1 circuit (with a substantially higher price for the first DS-1 circuit), and a charge for each Feature Group D trunk ("FGD" or "DS-0") installation (again, with a substantially higher price for the first DS-0 trunk). Each of these levels of service involves separate obligations and separate charges, as Sprint concedes. (Tr. p. 226-7). A separate installation charge is warranted for DS-0 versus DS-1 trunks, for example, because separate identification and signaling continuity tests are required for each of the 24 DS-0 trunks within each DS-1 trunk. (Tr. p. 64). Also, each DS-1 facility itself must be checked and set up for the same framing and coding at each end. (*Id.*) As is the case for recurring charges that ALEC has billed, such non-recurring charges are not duplicative, but, rather, allow recompense for all expenses involved in the provisioning of that single transport service. (Tr. p. 65). A further discussion of the justification for DS-0 nonrecurring charges appears below.

Sprint owes ALEC $794,895 in DS-0 non-recurring charges. ALEC cannot determine how much remains due for Sprint's DS-1 non-recurring and installation ordering charges because it is not clear whether any recent payments are meant to apply to the outstanding balances of each account, rather than to later periods. ALEC billed $70,524.01 in DS-1 nonrecurring charges and Sprint remitted at least $16,275.35, leaving an outstanding balance of as much as $54,248.66. ALEC billed $2,187 in ordering charges and Sprint remitted at least $405.72, leaving an outstanding balance of as much as $1,781.28.

ISSUE 2B: Has ALEC applied the correct rate to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

** **POSITION**

Yes. ALEC charged Sprint the correct rate for both recurring and non-recurring transport charges owed by Sprint. The appropriate rates are the lease cost rate for DS-3 recurring charges, the Agreement rate for DS-1 recurring charges, and the ALEC Price List rates for all nonrecurring charges. **

Recurring Charges

For recurring DS-3 facilities charges, pursuant to Section 2.2.3 of the Agreement (which governs "Interconnection Compensation") ALEC passed through its contract liability for leased facilities from Time Warner. (Tr. p. 76). ALEC understands that Sprint does not oppose the DS-3 *rate* assessed by ALEC but Sprint does oppose the imposition of *any* DS-3 charge at all. (Tr. p. 216). As ALEC noted above, the Agreement clearly contemplates that ALEC will be compensated for interconnection service under Section 2.2 of Attachment IV, and ALEC selected the least cost option under the logic of Section 2.2.3 – its actual cost of providing the DS-3 circuits. ALEC did not add on Sprint's dedicated transport rate, which is permitted by the Agreement.

With respect to recurring DS-1 charges, ALEC charged Sprint the contract rate. (Tr. p. 63). Again, under the logic of Section 2.2.3 of Attachment IV of the Agreement, ALEC picked the least cost option, because the contract rate is less than ALEC's Price List rate, and Time Warner is not providing DS-1 service or circuits to ALEC. Sprint does not dispute ALEC's selection of the DS-1 rate. (Tr. p. 258).

Mr. Felz also raises in his rebuttal testimony the point that ALEC hauls certain traffic outside the Orlando LATA, and thus Sprint should not be charged for transport of that traffic. (Felz Rebuttal

Testimony at 3). Not only is this position at odds with customary cost causation and recovery principles, it misapprehends how certain traffic is handled by ALEC and how Sprint is being charged for it.

Mr. McDaniel explained that ALEC serves Internet Service Providers ("ISPs") that may not have physical presences in certain communities, but which market to those communities by virtue of "virtual NXX" service purchased from ALEC. (Tr. p. 161-64). In such a circumstance, a Sprint end user customer dials a local number assigned to ALEC. Sprint hands off the call to ALEC at Sprint's tandem in Ocala (Sprint's selected POI) and ALEC hauls that call via a third party carrier to its switch in Maitland, which is in the Orlando LATA, then on to the call's final destination. (Tr. p. 62). Although it is true that the call ultimately terminates in the LATA where the ISP resides, ALEC does not charge Sprint interLATA transport for the call. And ALEC does not charge Sprint for the third party carrier's cost ALEC incurs to complete the call. Rather, as Mr. McDaniel explained, ALEC considers this traffic to be local traffic because it is rated as local traffic to the Sprint end user customer. (Tr. p. 163-4).

Nonrecurring Charges

Mr. McDaniel explained that compensation for nonrecurring charges for the DS-3 circuits, too, is addressed in Section 2.2 of Section IV of the Agreement, entitled "Interconnection Compensation" (because the cost being recovered is associated with the interconnection service provided). Here, ALEC charged its Price List (or tariff equivalent) rate because that rate is less than what Time Warner billed ALEC. (Tr. pp. 91, 117). With respect to the DS-3 circuits, ALEC did not exercise its opportunity under Section 2.2.3 to bill Sprint for both (1) Sprint's dedicated nonrecurring

interconnection rate plus the Time Warner nonrecurring cost; or (2) ALEC's Price List rate plus the Time Warner nonrecurring cost. As Mr. McDaniel explained, ALEC chose the consistency of its Price List nonrecurring rates because the Agreement lacks consistency as between DS-0, DS-1 and DS-3 nonrecurring rates. (Tr. p. 118).

ALEC also assessed Sprint nonrecurring charges for installation of DS-1 circuits using ALEC's Price List rate for the same reasons articulated immediately above. This action was entirely consistent with industry practice and with the practice of the dominant ILEC in the state, BellSouth. As Mr. McDaniel noted in his testimony, ALEC bills BellSouth, and BellSouth has paid, at both the DS-0 and DS-1 levels for installations for the same routes.[15] Likewise, BellSouth has billed ALEC, and ALEC has paid, for DS-0 and DS-1 installations for the same routes.[16]

With respect to DS-0 service, Sprint objects to the imposition of any nonrecurring rate. (Tr. p. 213-14). However, as noted above, Sprint concedes that DS-0 activation is necessary and requires work and effort from ALEC (Tr. p. 226-7).[17] ALEC applied Section 2.3 of Attachment IV of the Agreement and determined that it is entitled to recover DS-0 nonrecurring costs. ALEC next selected the lesser of the cost recovery options. Specifically, ALEC followed the logic of analogous

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15 McDaniel Direct Testimony at 4-5; Rebuttal Testimony Exhibit 1. Any Sprint attempts to portray ALEC's cost recovery as "manifestly unconscionable" are based on speculative labor rate and time calculations that pertain only to Sprint, not to ALEC or any other carrier. ALEC notes that no record evidence exists to support Sprint's claims in this regard. Mr. McDaniel agreed with a hypothetical postulation that allowing ALEC to charge Sprint rates far in excess of ALEC's costs would be manifestly unconscionable. (Tr. p. 151). Mr. McDaniel did not agree that ALEC had engaged in such behavior.

16 McDaniel Direct Testimony at 12-13.

17 Mr. Felz's attempt to suggest that ALEC spends 160 hours on each DS-1 installation (Tr. p. 227) ignores the lengthy discussion between his counsel, the bench and Mr. McDaniel on how much time ALEC spends on installing and testing DS-0, DS-1 and DS-3 circuits. (Tr. pp. 145-49; 176-80). Mr. McDaniel testified that ALEC charges Sprint less than the midpoint of the dollar range that results from multiplying a typical loaded labor rate by the actual time ALEC spends on these functions. (Tr. p. 179-80).

subsection 2.2.3 of Attachment IV of the Agreement to mean that where Sprint does not have a dedicated interconnection rate for DS-0 nonrecurring costs (*i.e.*, Sprint's rate is not an option), ALEC should charge its own costs as the only possible option to charge. ALEC did not add any actual lease costs, as Time Warner does not assess DS-0 nonrecurring charges to ALEC.

Sprint also argues that ALEC's nonrecurring charge must be symmetrical with Sprint's under FCC Rule 51.711. (Tr. p. 276). Thus, since Sprint has no DS-0 charge listed in the Agreement, Sprint apparently contends that ALEC cannot assess one either. Sprint's position that FCC Rule 51.711 extends to nonrecurring charges is incorrect. 47 C.F.R. § 51.711 was established in the FCC's *Local Competition Order*[18] issued six months after passage of the Telecommunications Act of 1996. The *Local Competition Order* does not specify that nonrecurring charges are included within the definition of "rates" for purposes of the rule. Moreover, the text of the rule, related rule-based definitions and several passages in the *Local Competition Order* indicate the rule is intended to apply only to Minute-Of-Use ("MOU") charges, not nonrecurring charges.

47 C.F.R. § 51.711 reads in relevant part:

Symmetrical reciprocal compensation.

(a) Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC *assesses upon an incumbent LEC for transport and termination of telecommunications traffic* equal to those that the incumbent LEC assesses upon the other carrier for the same services.

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18 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

* * *

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. (Emphasis added.)

Definitions for the key terms "transport" and "termination" are set forth in 47 C.F.R. § 51.701:

(c) Transport. For purposes of this subpart, transport is *the transmission and any necessary tandem switching of telecommunications traffic* subject to Section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is *the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.* (Emphasis added.)

Clearly § 47 C.F.R. § 51.711 does not expressly provide, as Sprint contends (Tr. p. 276), that nonrecurring charges are subject to the federal symmetry requirement. And just as clearly, the definitions for "transport" and "termination" in 47 C.F.R. § 51.701 do not mention of any of the functions – installation, testing, signaling and identification – or the costs associated with those functions that make up nonrecurring charges. (Tr. pp. 259-60). Instead, the definitions for "transport" and "termination" contain only functions related to the transmission and switching of telecommunications traffic. In other words, 47 C.F.R. § 51.711 addresses symmetry for MOU charges, not nonrecurring or other charges.

The *Local Competition Order* proves this out, providing in pertinent part:

Symmetrical compensation arrangements are those in which *the rate* paid by an incumbent LEC to another telecommunications carrier for transport and termination

> of traffic originated by the incumbent LEC is the same as *the rate* the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier . . . We, therefore, address whether rates for transport and termination should be symmetrical and consist of *only a single rate* regardless of where the call is handed off, or if rates should be priced on an element-by-element basis.[19]

The FCC's reference to the singular "rate" indicates that the agency's symmetry requirement for transport and termination charges applies only to the MOU rate. Further FCC analysis of the benefits of a symmetrical rate bear out the view that it was contemplating only the MOU rate:

> Even if, under the additional cost standard, incumbent LECs were required to reflect any improvements in operating efficiency, and consequent cost reductions, in reduced termination rates, the cost savings realized by the incumbent LEC are likely to be much greater than its reduction in net termination revenues, *because the majority of traffic transported and terminated is likely to be its own.* Even if a pass-through of incumbent LEC's cost reductions were instantaneous and complete, *the number of minutes of use on which an incumbent LEC's net termination revenues is assessed is much smaller than its overall number of minutes of switching and transport.* Moreover, if a portion of the reduction in costs is specific to exchange traffic, under symmetrical rates, *the LEC's revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates.*[20]

The entire tenor of the FCC's discussion on symmetry leaves no doubt that the agency was contemplating MOU rates, and no other. Thus, Sprint's reliance on § 47 C.F.R. § 51.711 is misplaced and its assertion that nonrecurring charges must be symmetrical between the Parties is incorrect as a matter of law.

Sprint is similarly incorrect, therefore, that § 47 C.F.R. § 51.711(b) is applicable to nonrecurring charges. (Tr. pp. 128-131). That is, ALEC need not prove out its nonrecurring charges

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19 *Id.* at ¶ 1069-70 (emphasis added).

20 *Id.* at ¶ 1086.

under a state-level TELRIC[21] proceeding because nonrecurring or other charges are not subject to the symmetrical requirement in the first instance. As noted above, § 47 C.F.R. § 51.711 applies only to MOU charges, and Sprint has agreed that the Parties' MOU charges are symmetrical. (Tr. p. 276). Sprint's TELRIC issue is a red herring.[22]

Next Sprint, through the testimony of Mr. Cox, argues that the MOU rate (*i.e.*, the local switching rate) specific to Sprint captures all work activities associated with setting up DS-0 trunks. (Tr. pp. 261-2, 263). Mr. Cox further testified that nonrecurring costs include, generally, installation costs. (Tr. p. 261). [redacted]

21 "Total element long run incremental cost." *Local Competition First Report and Order* at 15844-869, ¶¶ 672-732; *see also* 47 C.F.R. §§51.501-51.515. The Supreme Court recently upheld these rules. *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646 (2002).

22 ALEC notes that BellSouth and ALEC continue to bill and pay one another at their access tariff rates, although they are not based on TELRIC rates. *See* McDaniel Rebuttal Testimony Exhibits 1 and 2. This is the case even though the Commission has completed a BellSouth proceeding establishing TELRIC rates. *See In re: Investigation into pricing of unbundled network elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (May 25, 2001) ALEC also notes that the Agreement contains no language limiting either party to actual cost recovery, save under the "lease cost" election in Attachment IV, § 2.2.3.3.

23 [redacted]

[redacted]

Thus, Mr. Cox's testimony regarding general cost recovery principles or Sprint-specific accounting methodologies is totally inapposite to this Agreement and this dispute.

In sum, Sprint opposes ALEC's imposition of DS-0 nonrecurring charges, but can point to no Agreement provision to support its position. Moreover, Sprint has conceded that DS-0 installation is necessary and requires the expenditure of resources by ALEC [redacted]

24 [redacted]

[redacted]Sprint also is in error that FCC rules prescribe symmetry for nonrecurring charges. By contrast, ALEC believes the Agreement permits DS-0 nonrecurring charges and has provided a direct citation to its contract authority to include such charges, along with a reasonable interpretation of that provision. Finally, ALEC has shown that the Parties agreed with ALEC's interpretation of what costs elements are included in nonrecurring charges. The Commission therefore must find that ALEC has properly invoiced its nonrecurring DS-0 charges pursuant to the Agreement and direct Sprint to pay ALEC in full for those charges.

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

The parties have withdrawn this issue.

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

****POSITION:**

No. Sprint has underpaid ALEC the appropriate charges pursuant to the terms of the Parties' Interconnection Agreement. **

Until very recently, Sprint had paid ALEC only $45,389.50 of $1,009,245.35 ALEC assessed for transport services rendered during the period described in the Complaint. That amount represents less than five percent of the amount billed. Recently, Sprint paid ALEC an additional $78,601.38. However, it appears that Sprint intended much of the latter sum to apply to later time periods, rather than to the outstanding billed amounts covered by the period of the Complaint. Calculation of exact amounts owed is made difficult because the most recent payments from Sprint

to ALEC do not provide itemization stating clearly to which time periods, and to which facilities, the payments apply.

It also appears that Sprint has paid for a major portion of the recurring costs for the DS-1s, but not for the DS-3s. Similarly, it appears Sprint has paid a portion of the DS-1 installs at the Agreement rate, but not at the appropriate ALEC tariff rate, and that it has not paid any amount for DS-0 installs. ALEC believes that all amounts invoiced to Sprint for the April 2001 to January 2002 period are due and payable to it ALEC because of Sprint's failure to dispute these billed amounts and that the Commission should so hold.

Alternatively, should the Commission believe separate rulings are necessary on whether each charge for each facility is due, and at what rates, ALEC suggests that because Sprint has not provided ALEC with an accounting of the its most recent payments, the Commission should designate the applicable charge categories and the appropriate payment level for each. Such an approach should allow the Parties to easily calculate any and all additional amounts owed by Sprint to ALEC. The chart immediately below is offered as an example of how the Commission may wish to summarize what amounts are owed for which facilities:

RECURRING	ALEC CHARGE	SOURCE
DS-3	$3,608.82/mo. (includes tax)	Ex. 5 and 10
DS-1	$71.95/mo.	Agreement, p. 71
NON-RECURRING		
Ordering Charge (per order)	$81.00	ALEC FL PSC No. 2 Access, First Revised Page 3
DS-3	$870.50 Initial/ $427.88 Additional	ALEC FL PSC No. 2 Access, First Revised Page 3

DS-1	**$866.97 Initial/ $486.83 Additional**	**ALEC FL PSC No. 2 Access, First Revised Page 3**
DS-0	**$915.00 Initial/ $263.00 Additional**	**ALEC FL PSC No. 2 Access, First Revised Page 3**

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

** **POSITION:**

Yes. Sprint waived its right to dispute charges at least with respect to bills covering the April, May, June and July 2001 period by not following the dispute and notification procedures in the Agreement. **

Section 21.2 of the Agreement governs the procedure when a billed Party seeks to dispute an invoice. The provision provides:

> If any portion of an amount due to a Party ("the Billing Party) under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the "Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give written notice to the Billing Party at the address(es) indicated in Article 17 herein of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying Party shall pay when due all undisputed amounts to the Billing Party, and shall include a copy of the dispute with the payment of the undisputed amounts. The balanced of the Disputed Amount, after the necessary adjustments have been made for the disputed amounts found in CLEC's favor, shall be paid with late charges, if appropriate, upon final determination of such dispute.

The first few sentences of Section 21.2 make clear that the dispute and notice obligations apply equally to Sprint and ALEC. For the charges rendered by ALEC during the period in question, there is in the record uncontroverted evidence that Sprint failed to abide by the express obligations of Section 21.2, and that Sprint has failed in at least one other circumstance to follow the provision's

requirements with another CLEC. The Commission therefore must find that Sprint failed to properly dispute certain invoices rendered by ALEC, and failed to pay certain undisputed amounts as the provision also requires. A reminder of the chain of events leading to Sprint's breach of this particular provision is in order.

ALEC sent Sprint invoices containing charges for facilities and services during the April through July 2001 period on July 12, 2001. (McDaniel Testimony at 16). Mr. Felz admitted that Sprint received these invoices on July 18, 2001. (Tr. p. 240). Not having heard from Sprint by August 11, 2001 (*i.e.*, 30 days after sending the invoice) *ALEC called Sprint* to inquire as to the status of the bill payment. (Tr. pp. 154, 182). Several days after ALEC's call and two days after the 30-day deadline to dispute the invoices – on August 20, 2001 – Sprint generated an email to ALEC in which Ms. Stickel stated:

> At this time payments are being processed on Gietel invoices: T200107-3, T200108-3, T200107-2 and T200108-2. I will be disputing T200107-1 and T200108-1. You stated that these charges were to recoup Gietel's cost of meeting Sprint at the POI and per attachment 4, Section 2.1[.] Each party is responsible for bringing their facilities to the POI. . . .
>
> As for Metrolink. I have validated all of the DS-1's against the ASR's. We are issuing payment on the monthly recurring charges on all except the DS-3. I still need to validate that. I am disputing the invoices for installation charges because these rates should come from the interconnection agreement.

The August 20, 2001 email was deficient under Section 21.2 for at least three reasons. First, as Mr. Felz conceded on the stand, the email was untimely. (Tr. p. 241). Second, pursuant to the express terms of Section 21.2 (and contrary to Mr. Felz's assertion to the contrary; Tr. p. 243), *written notice of any dispute should have been given to ALEC at the address included in Article 17 of the Agreement, not by email.* As Mr. McDaniel explained, no formal or written notice was sent to

the address listed in Article 17 for several months past the 30-day deadline. (Tr. p.182).[25] Third, Ms. Stickel's email does not include "the specific details and reasons for disputing each item" required by Section 21.2. Rather, the email appears to be a general and unspecific "placeholder" designed to give Sprint more time outside the 30-day deadline, but that tactic is not contemplated by the Agreement and must be rejected. Thus, for the charges for the months of April, May, June and July 2001, Sprint waived its right to dispute the invoices and should be directed by the Commission to compensate ALEC in full.[26]

Mr. Felz's attempt to soften Sprint's breach by implying other instances where Sprint has not held a CLEC to the 30-day deadline for notice is not supported by any corroborative evidence. (Tr. pp. 241-2). By contrast, Exhibit 11 demonstrates that ALEC is not alone in trying to enforce the 30-day dispute deadline against Sprint. Mr. Felz agreed that another CLEC advised Sprint that the company had missed its window of opportunity to dispute an invoice that had been overnighted to Sprint. (Tr. pp. 224-5). As was the case with ALEC, Sprint attempted to dispute a CLEC's invoice by email some 21 days after the dispute deadline passed. The other CLEC promptly rejected Sprint's attempt, noting that by missing the 30-day deadline "Sprint has forfeited its right to dispute this invoice." (Ex. 11).

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25 Sprint has tried to rehabilitate its untimely notice by implying that *post hoc* email correspondence and one face-to-face meeting between ALEC and Sprint cures Sprint's breach of Section 21.2. Of course, the provision contains no such opportunity for rehabilitation. In addition, another section of the Agreement, Part B, § 3.3, provides for "written notification appropriate under the Act" during negotiations, making clear that the Parties were well aware of how to provide for alternative notice provisions that vary from those in Section 17.

26 This is also the case for the remainder of the invoices with respect to transport charges. Sprint provided sufficient notice only as of January 4, 2002. *See* note 27, *infra*. Ms. Stickel also misconstrues the Parties' interconnection obligations and cost responsibilities under the Agreement. Where Sprint departs from the established POI, Sprint bears cost responsibility for the interconnection circuits it uses on ALEC's side of the Sprint-selected POI.

Mr. Felz testified that a written, itemized dispute or claim must be filed with the billing party within 30 days of the receipt of an invoice. (Tr. p. 222). Mr. Felz conceded that the email dated August 20, 2001 was untimely and, as demonstrated above, the communication was deficient as to form and delivery address, and substance. Mr. Felz testified repeatedly that the terms of the Agreement should be afforded their plain meaning. (Tr. 222, 231). Under the express terms of Section 21.2, the Commission must find that Sprint failed to provide timely and proper notice to ALEC for the invoices covering April, May, June and July 2001.[27]

27 Sprint's breach of the dispute and notification procedures of Section 21.2 extends to *all* transport invoices rendered by ALEC from April 2001 through January 2002. No sufficient notice under Section 21.2 was received for any of these bills until ALEC received two notices dated January 4, 2002 that disputed MOU, not transport, charges. *See* Complaint, Ex. E. Those two late notices covered only MOU charges, which have been removed from this dispute by agreement of the Parties. ALEC also notes that the January 4, 2002 notice letters, and a dispute notice letter Sprint sent another CLEC dated February 14, 2002 (Ex. 12, p.12), demonstrate that Sprint was aware of the need to provide formal, written notice to dispute invoices and that it earlier elected not to do so.

CONCLUSION

The Commission has jurisdiction to hear this matter and should find that Sprint breached the Parties' Agreement by failing to pay ALEC properly billed amounts for Sprint-ordered and/or necessitated transport facilities. Sprint also failed to timely dispute invoices rendered by ALEC, according to the express terms of the Agreement, which Sprint itself drafted. Although ALEC does not necessarily agree that there are ambiguities in the Agreement, to the extent there are, they must also be construed against Sprint.

ALEC requests that the Commission direct Sprint to pay ALEC all outstanding billed amounts for the complaint period and through the date below, where shortfalls are caused through erroneous Sprint rates or methodologies, and that Sprint be ordered to apply proper rates and methodologies thereafter. ALEC requests that the Commission award it attorney's fees and costs.

Respectfully submitted this 10th day of September, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was hand delivered on this 10th day of September, 2002, to the following:

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