LAW OFFICES
Messer, Caparello & Self
A Professional Association

Post Office Box 1876
Tallahassee, Florida 32302-1876
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May 19, 2004

**HAND DELIVERY**
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 040343-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. are an original and fifteen copies of Volo's Response to ALLTEL's Motion to Dismiss in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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|---|---|---|
| Petition to Adopt the ALLTEL and Level 3 Interconnection Agreement Pursuant to Section 252(i) of the Telecommunications Act of 1996 | ) ) ) ) ) | Docket No.040343-TP Filed: Mayl 19, 2004 |

**VOLO'S RESPONSE TO ALLTEL'S MOTION TO DISMISS**

Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. ("Volo"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby responds in opposition to the Motion to Dismiss of ALLTEL Florida, Inc. ("ALLTEL"), and states:

1. On May 7, 2004, ALLTEL filed its motion to dismiss of the Volo 252(i) petition to adopt the interconnection agreement between ALLTEL and Level 3 Communications ("Level 3 Agreement").[1] The basic objection of ALLTEL to the Volo adoption is that the Level 3 Agreement is only effective through June 30, 2004. This is not a valid basis for a motion to dismiss or any objection to the Volo adoption pursuant to section 252(i) of the Federal Telecommunications of 1996, 47 U.S. Code section 252(i).

2. First, the statutory basis by which Volo is able to adopt the Level 3 Agreement does not have a time or any other limitation on a CLEC's ability to adopt an existing, lawfully approved and effective interconnection agreement. The language in section 252(i) is unambiguous and absolute as to a CLEC's ability to adopt an existing, approved interconnection agreement:

[1]Counsel for ALLTEL has agreed to treat service of its motion as if by mail on Volo, thus making May 19th the appropriate date for any responsive pleading to ALLTEL's motion. Rules 28-106.103 and 28-106.204(1), F.A.C.

> (i) Availability to Other Telecommunications Carriers.--A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

As Volo indicated in its initial petition to adopt, it recognizes that the Level 3 Agreement states that it is effective through June 30, 2004. However, Volo was willing to accept the Level 3 Agreement on exactly the same terms and conditions, including the potential that the Level 3 Agreement may well cease to exist after June 30, 2004. Thus, there is no basis under section 252(i) to limit Volo's ability to adopt the Level 3 Agreement.

3. In a similar vein, ALLTEL argues that under the FCC's rules it is unreasonable to allow the adoption of an interconnection agreement for only 71 days. ALLTEL relies on 47 C.F.R section 51.809(c) which states as follows:

> Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act.

Notwithstanding ALLTEL's assertion, this rule is not a limitation on the Volo adoption as is set forth more fully in the following paragraphs.

4. First, there is nothing in the FCC's rules or the rules of the Florida Public Service Commission that specify what is a reasonable period of time. Thus, the reasonable test proposed by ALLTEL is meaningless since there are no standards in the FCC rule or the rules of the FPSC.

5. Second, the predicate to the reasonable test that ALLTEL seeks to assert as a bar to

adoption is the assumption that there is a substantive review and approval process inherent in a section 252(i) adoption, which is not the case.

A. Volo acknowledges that an interconnection agreement arrived at through negotiation or arbitration has a specific statutory review process. *See generally* 47 U.S. Code section 252(e). On the other hand, no such review and approval process is specified under section 252(i) – indeed, the only "review" under the statute is to ensure that the requested interconnection agreement is lawfully approved and effective and that the CLEC is adopting the agreement "exactly as is." Under this process, the only possible response by the ILEC is an objection pursuant to 47 C.F.R. section 809(b) that there is a cost or technical feasibility problem with the adoption, neither of which has been asserted by ALLTEL. While it may have been in error for Volo to file its adoption as a "Petition" instead of a "Notice,"[2] once the Commission has conducted this basic review, no further proceedings are authorized for a section 252(i) adoption. Basically, once filed, as a matter of law the adoption is effective.

B. One of the two cases cited by ALLTEL in its motion to dismiss supports this reading of the statute and rule. In the FCC order on the Virginia case, the FCC acknowledges that the section 252(i) process does not involve the same process as approval of an arbitrated or negotiated interconnectoin agreement, and that the CLEC shall be permitted to obtain its statutory rights "on an expedited basis." 15 F.C.C. R'cd 23318, at 23320 par. 4. Volo in its petition requested immediate approval of the section 252(i) adoption. Unless the FPSC finds that Volo has not requested adoption on exactly the "same terms and conditions" and unless ALLTEL raises a

[2]To the extent necessary or appropriate, Volo hereby amends its pleading to call it a "Notice of Adoption" instead of a "Petition to Adopt."

objection based upon the requirements of 47 C.F.R. section 51.809(b), neither of which is true in this case, the FPSC must immediately approve such an adoption.

6. Third, ALLTEL cites to two cases from Virginia and Maryland whereby the "reasonable" standard of the FCC's Rule 51.809(c) was utilized. However, these cases are not applicable to the Volo situation for several reasons. Initially, it must be noted that both cases were initiated by Global Naps as petitions for arbitration. Thus, on their face these orders are distinguishable. Moreover, while Global Naps asserted that it was attempting to "opt in" to an existing interconnection agreement, it was really attempting to do so under changed terms and conditions. Thus, these two adoptions on their face did not comply with the "same terms and conditions" requirements of section 252(i), which perhaps explains why Global Naps filed petitions for arbitration.

7. Fourth, even if there is a reasonable standard that applies in Florida, ALLTEL is being discriminatory in its application of such a standard as it has permitted other CLECs to adopt the Level 3 Agreement with less than six months remaining on the initial contract term. On February 17, 2004, Sprint filed a notice of adoption of the very same Level 3 Agreement, and ALLTEL not only did not object but even signed a letter accepting the adoption. See Florida Public Service Commission Docket No. 040155-TP, Letter of February 17, 2004, attached hereto as Exhibit A.

8. Fifth, again, even if there is a reasonable standard that applies, as a practical matter the effective period of the Level 3 Agreement is going to extend beyond June 30, 2004. The Level 3 Agreement in Section 4 states that the agreement does not absolutely terminate on June 30th. See attached Exhibit B hereto. Rather, reading sections 4.1 and 4.2 together, it is clear that the agreement shall continue in effect if the parties (ALLTEL and Level 3) are negotiating a successor

interconnection agreement. Indeed, even if ALLTEL files a notice of termination with Level 3, the fact that the parties are negotiating a successor interconnection agreement enables the Level 3 Agreement to remain in effect until the successor is executed and approved. ALLTEL is simply not going to terminate its agreement and all services to Level 3 until a successor interconnection is negotiated, executed, and approved. Given the clear terms of sections 4.1 and 4.2, if the successor agreement between ALLTEL and Level 3 was negotiated, signed, and filed today, the review and approval process would take 90 days, which would extend the present Level 3 Agreement beyond June 30th. However, the more likely scenario is that negotiations will take additional time, which would extend the effectiveness of the current agreement several if not many months beyond June 30th. Alternatively, ALLTEL or Level 3 could petition this Commission for arbitration, in which case it could be 2005 before there is an approved and effective successor agreement. In any case, the real world reality is that the current Level 3 Agreement is not going to go away any time soon, and certainly not on June 30th.

9. In the final analysis, Volo was admittedly taking a risk when it adopted the Level 3 Agreement. This was a risk Volo took with its eyes wide open, and which it acknowledged in its original filing. Whenever there is a successor agreement to the present Level 3 Agreement, Volo will have to make the business decision to accept that agreement or find something else. It does so at its business risk. What Volo gains by immediately adopting the Level 3 Agreement is the opportunity to begin to do business with ALLTEL and the opportunity to undertake all of the other actions that are necessary preliminary requirements to providing service. In many cases, an ILEC or other companies will not even talk with a CLEC unless it has both a certificate from the FPSC and an interconnection agreement. Given the business circumstances, adoption of the Level 3 Agreement

was the best business decision for Volo at the time. And whenever after June 30, 2004, Volo is forced to deal with the actual termination of the present Level 3 Agreement, it will do so. However, under any successor agreement, the manner of conducting business is not going to change radically – there may be pricing or other operational differences, but any experience gained now by having adopted this agreement will be of benefit to both companies, and certainly to Volo's customers.

10. ALLTEL has requested a section 120.57(1) hearing in the event the Commission determines that it cannot grant ALLTEL's Motion to Dismiss. As has been explained above, there is no basis for granting ALLTEL's Motion to Dismiss. As for ALLTEL's alternative request for a section 120.57(1) hearing, ALLTEL has not specified any disputed issues of material fact or otherwise complied with the pleading requirements under Rule 28-106.201, Florida Administrative Code, for a section 120.57(1) hearing. Thus, the request for a hearing should also be denied.

WHEREFORE, Volo respectfully requests that ALLTEL's Motion to Dismiss be denied, that the Commission not set this matter for a section 120.57(1) hearing, and that it immediately approve the section 252(i) adoption on the same terms and conditions.

Respectfully submitted this 19th day of May, 2004.

Floyd R. Self, Esq.
Messer, Caparello & Self, P.A.
215 S. Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, Florida 32302-1876

Counsel for Volo Communications of Florida, Inc.

ORIGINAL

Sprint

**Nancy Schnitzer**
Docket Manager
Florida

**Regulatory Affairs**
Box 2214
Tallahassee, FL 32316
Mailstop FLTLHO0107
Voice 850 599 1276
Fax 850 878 0777

February 17, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

040155-TP

04 FEB 19 PM 4:49
FPSC-COMMISSION CLERK

RE: Notice of Adoption of ALLTEL Florida, Inc. and Level 3 Communications, LLC Agreement by Sprint Communications Company Limited Partnership

Dear Ms. Bayó:

Sprint-Florida, Incorporated hereby provides notice to the Florida Public Service Commission of the adoption by Sprint Communications Company Limited Partnership of the Interconnection Agreement for the State of Florida entered into by ALLTEL Florida, Inc. and Level 3 Communications, LLC which was filed with the Commission on June 13, 2002 in Docket 020517-TP.

Sprint Communications Company Limited Partnership is adopting the agreement as provided by Section 252(i) of the Telecom Act of 1996.

Enclosed are the original signed and two (2) copies of the letter of agreement of adoption between ALLTEL Florida, Inc. and Sprint Communications Company Limited Partnership for your records.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me at 850-599-1276.

Sincerely,

Nancy Schnitzer

Nancy Schnitzer

cc: ALLTEL
Wholesale Services
One Allied Drive
1269B4F4NB
Little Rock, Arkansas 72202

EXHIBIT "A"

DOCUMENT NUMBER-DATE
02462 FEB 19 04
FPSC-COMMISSION CLERK

ALLTEL COMMUNICATIONS
1 Allied Drive
Little Rock, AR 72022

**Jimmy Dolan**
*Manager*
*Negotiations*

501-905-7873
501-905-6299 fax
jimmy.dolan@alltel.com

January 27, 2004

Douglas M. Puckett
Sprint Communications Company L.P.
Carrier & Interconnection Management
KSOPHN0214-2A618
6450 Sprint Parkway
Overland Park, KS 66251

RE: Agreement of adoption of an approved interconnection agreement pursuant to 47 U.S.C. 252(i).

Dear Mr. Puckett,

ALLTEL Florida, Inc. ("ALLTEL") has received your notice stating that, under Section 252 (i) of the Telecommunications Act of 1996 (the "Act"), Sprint Communications Company L.P. ("Sprint") wishes to adopt the terms of the Interconnection Agreement between ALLTEL Florida, Inc. and Level 3 Communications, LLC. ("Level 3") that was approved by the Florida Public Service Commission as an effective Agreement in the state of Florida (the "Terms"). This letter shall confirm that you have a copy of the Terms. Please note the following with respect to your adoption of the Terms.

By your countersignature on this letter, you hereby represent and commit to the following:

1. Sprint adopts the Terms of the Level 3 agreement for Interconnection with ALLTEL and in applying the Terms, agrees that Sprint shall be substituted in place of Level 3 in the Terms wherever appropriate.

2. Sprint requests that notice to Sprint as may be required under the Terms shall be provided as follows:

   To: Sprint Communications Company L.P.
   Attn: Douglas M. Puckett
   Carrier & Interconnection Management
   KSOPHN0214-2A618
   6450 Sprint Parkway
   Overland Park, KS 66251

ALLTEL requests that notice to ALLTEL as may be required under the Terms shall be provided as follows:

To: ALLTEL
Wholesale Services
One Allied Drive
1269B4F4NB
Little Rock, Arkansas 72202

Copy: ALLTEL
Attn: Mandy Jenkins
One Allied Drive
1269B4F4NB
Little Rock, Arkansas 72202

Attn: Stephen Weeks
One Allied Drive;
1269B4F4NB
Little Rock, Arkansas 72202

3. **Sprint represents and warrants that it is licensed to provide telecommunications service in the state of Florida, and that its adoption of the Terms will be applicable to services in the state of Florida only.**

4. Sprint's adoption of the Level 3 Terms shall become effective upon approval of this Agreement by the Florida Public Service Commission and shall terminate simultaneous with the termination of the Level 3 Agreement.

5. As the Terms are being adopted by you pursuant to Section 252(i) of the Act, ALLTEL does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by ALLTEL of the Terms does not in any way constitute a waiver by ALLTEL of any position as to the Terms or a portion thereof, nor does it constitute a waiver by ALLTEL of all rights and remedies it may have to seek review of the Terms, or to seek review in any way of any provisions included in these Terms as a result of Sprint's 252(i) election.

6. The Terms shall be subject to any and all applicable laws, rules, or regulations or changes therein that subsequently may be prescribed by any federal, state or local governmental authority. To the extent required by any such subsequently prescribed law, rule, or regulation, the Parties agree to modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such law, rule, or regulation.

7. ALLTEL reserves the right to deny Sprint's adoption and/or application of the Terms, in whole or in part, at any time:

   (A) when the costs of providing the Terms to Sprint are greater than the costs of providing it to Level 3;

   (B) if the provision of the Terms to Sprint is not technically feasible; and/or to the extent Sprint already has an existing Interconnection Agreement (or existing 252(i) adoption) with ALLTEL and the Terms were approved before the date of approval of the existing Interconnection Agreement (or the effective date of the existing 252(i) adoption);

8. Should Sprint attempt to apply the Terms in a manner that conflicts with the provisions set forth herein, ALLTEL reserves its rights to seek appropriate legal and/or equitable relief.

9. The Parties acknowledge that ALLTEL is entitled to assert that it is a less than 2% carrier (as defined in 47 U.S.C. 153 and as provided by 47 U.S.C. 251(f). By entering into this Agreement, ALLTEL is not waiving its right to maintain at any point during the term of this Agreement that it is a less than 2% carrier entitling it to exemption or suspension or modification under 47 U.S.C. 251(f).

Please indicate your agreement to the provisions of this letter by signing this letter on the space provided below and return it to the undersigned.

Sincerely,

ALLTEL Florida, Inc.

(SIGNATURE)

Michael D. Rhoda
(Print Name)

Vice President – Business Development
(Print Title)

Reviewed and countersigned:

Sprint Communications Company L.P.

(SIGNATURE)

W. Richard Morris
(Print Name)

Vice President External Affairs
(Print Title)

such governmental actions may be resolved pursuant to any process available to the Parties under law, provided that the Parties may mutually agree to use the dispute resolution process provided for in this Agreement.

## 4.0 Term of Agreement

4.1 The Parties agree to the provisions of this Agreement for an initial term commencing on the Effective Date of this Agreement and ending on June 30, 2004, and thereafter, unless terminated or modified pursuant to the terms and conditions of this Agreement, this Agreement shall continue in force and effect unless and until terminated or modified as provided herein.

4.2 Either Party may request for this Agreement to be renegotiated upon the expiration of the initial term or upon any termination of this Agreement. The Party desiring renegotiation shall delineate the items desired to be negotiated in a written notice to the other Party. Not later than thirty (30) days from receipt of said notice, the receiving Party will notify the sending Party in writing of additional items desired to be negotiated, if any. Not later than forty-five (45) days from the receipt of initial request for renegotiations, the Parties will commence negotiation, which shall be conducted in good faith. Except in cases in which this Agreement has been terminated for Default pursuant to §4.4 or has been terminated for any reason not prohibited by law pursuant to §4.3, the provisions of this Agreement shall remain in force during the negotiation and up to the time that a successor agreement is executed by the parties and, to the extent necessary, approved by the relevant state commission.

4.3 After completion of the initial term, this Agreement may be terminated by either Party for any reason not prohibited by law upon ninety (90) days written notice to the other Party. By mutual agreement, the Parties may amend this Agreement in writing to modify its terms.

4.4 In the event of Default, as defined in this §4.4, the non-defaulting Party may terminate this Agreement provided that the non-defaulting Party so advises the defaulting Party in writing ("Default Notice") of the event of the alleged Default and the defaulting Party does not cure the alleged Default with sixty (60) after receipt of the Default Notice thereof. Default is defined as:

4.4.1 Either Party's insolvency or initiation of bankruptcy or receivership proceedings by or against the Party;

4.4.2 A final non-appealable decision under §9.0, Dispute Resolution that a Party has materially breached any of the material terms or conditions hereof, including the failure to make any undisputed payment when due; or

4.4.3 A Party has notified the other Party in writing of the other Party's material breach of any of the material terms hereof, and the default remains uncured for sixty (60) days from receipt of such notice, and neither Party has commenced Formal Dispute Resolution as prescribed in §9.4 of this Agreement by the end of the cure period; provided, however, that if the alleged material breach involves a material interruption to, or a material degradation of, the E911 services provided under this Agreement, the cure period shall be five (5) days from receipt of such notice.

4.5 Upon expiration or termination of this Agreement, except in the case of termination for Default under §4.4 or termination for any reason not prohibited by law under § 4.3 above, if either Party desires uninterrupted service under this Agreement during negotiations of a new agreement, the

requesting Party shall provide the other Party written notification appropriate under the Act. Upon receipt of such notification, the same terms, conditions, and prices will continue in effect, on a month-to-month basis as were in effect at the end of the latest term, modification or renewal, so long as negotiations are continuing in good-faith and then until resolution pursuant to this Section and the Act. If the Parties are actually in arbitration or mediation before the appropriate Commission, commercial arbitrator or FCC prior to such expiration or termination of this Agreement, this Agreement will continue in effect only until the issuance of an order, whether a final non-appealable order or not, by the Commission, commercial arbitrator or FCC resolving the issues set forth in such arbitration or mediation request.

4.5 The Parties agree to resolve any impasse in any such renegotiation by submission of the disputed matters to the Public Utility Commission of ("PUC") for arbitration. Should the PUC decline jurisdiction, either Party may petition the FCC under the Act or resort to a commercial provider of arbitration services.

## 5.0 Assignment

5.1 Neither Party may assign, subcontract, or otherwise transfer its rights or obligations under this Agreement except under such terms and conditions as are mutually acceptable to the other Party and with such Party's prior written consent, which consent shall not be unreasonably withheld. Notwithstanding anything to the contrary, a Party may assign, subcontract or otherwise transfer its rights or obligations under this Agreement upon notice to the other Party, but without needing the other Party's consent, to a subsidiary, affiliate, or parent company, including any firm, corporation, or entity which the Party controls, is controlled by, or is under common control with, or has a majority interest in, or to any entity which succeeds to all or substantially all of its assets whether by merger, sale, or otherwise. Nothing in this Section is intended to impair the right of either Party to utilize subcontractors.

5.2 Each Party will notify the other in writing not less than sixty (60) days in advance of anticipated assignment.

## 6.0 Confidential and Proprietary Information

6.1 For the purposes of this Agreement, confidential information means confidential or proprietary technical, customer, end user, network, or business information disclosed by one Party (the "Discloser") to the other Party (the "Recipient"), which is disclosed by one Party to the other in connection with this Agreement, during negotiations or the term of this Agreement ("Confidential Information"). Such Confidential Information shall automatically be deemed proprietary to the Discloser and subject to this §6.0, unless otherwise confirmed in writing by the Discloser. All other information which is indicated and marked, as Confidential Information at the time of disclosure shall also be treated as Confidential Information under §6.0 of this Agreement. The Recipient agrees: (i) to use Confidential Information only for the purpose of performing under this Agreement; (ii) to hold it in confidence and disclose it to no one other than its employees or agents having a need to know for the purpose of performing under this Agreement; and (iii) to safeguard it from unauthorized use or disclosure using at least the same degree of care with which the Recipient safeguards its own Confidential Information. If the Recipient wishes to disclose the Discloser's Confidential Information to a third-party agent or consultant, such disclosure must be agreed to in writing by the Discloser, and the agent or consultant must have executed a written agreement of nondisclosure and nonuse comparable to the terms of this Section.

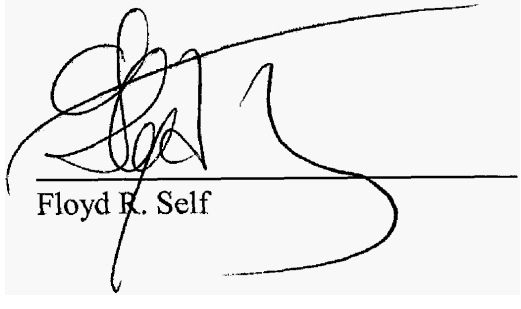
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and/or U. S. Mail this 19th day of May, 2004.

Victor McKay, Esq.*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Jeffrey Whalen, Esq.
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

Mr. Cesar Caballero
Direct – Telecom Policy
ALLTEL Communications
P.O. Box 2177
Little Rock, AR 72203-2177



Floyd R. Self