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November 26, 1996

VIA FEDERAL EXPRESS

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

Re: MFS Communications Company, Inc.'s Opposition to Sprint's Motion to Reject Portion of Negotiated Interconnection Agreement
Docket Nos. 960838-TP and 961333-TP

Dear Mrs. Bayo:

Enclosed for filing is an original and 30 copies of MFS Communications Company, Inc.'s Opposition to Sprint's Rejection of Portions of the Negotiated Interconnection Agreement in the above-captioned dockets.

Please date-stamp the extra copy of the Opposition and return it in the enclosed self-addressed envelope.

Also enclosed is a computer disk formatted in WordPerfect 6.1 for Windows containing the enclosed document.

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

Sincerely,

Morton J. Posner

Enclosures

cc (w/o encl.): Andrew D. Lipman, Esq.
cc (w/encl.): Timothy Devine
Alex Harris

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CERTIFICATE OF SERVICE

I, Morton J. Posner, hereby certify that on this 26th day of November, 1996, a copy of the foregoing **Opposition to Sprint's Motion to Reject Portion of Negotiated Interconnection Agreement - Docket Nos. 960838-TP and 961333-TP** was served, via overnight delivery, on the following:

John P. Fons, Esq.
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Jerry Johns, Esq.
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Staff Counsel
Florida Public Service Commission
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Tallahassee, FL 32399-0850

Morton J. Posner, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the matter of MFS COMMUNICATIONS COMPANY, INC. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with SPRINT UNITED-CENTEL OF FLORIDA, INC. (Also known as CENTRAL TELEPHONE COMPANY OF FLORIDA AND UNITED TELEPHONE COMPANY OF FLORIDA)	Docket No. 960838-TP
In the matter of METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC and UNITED TELEPHONE COMPANY OF FLORIDA Request for Approval of Negotiated Interconnection Agreement Pursuant to 47 U.S.C. § 252(e)	Docket No. 961333-TP

OPPOSITION OF
MFS COMMUNICATIONS COMPANY, INC.
TO SPRINT MOTION TO REJECT PORTION OF
NEGOTIATED INTERCONNECTION AGREEMENT

MFS Communications Company, Inc. and its operating subsidiary, Metropolitan Fiber Systems of Florida, Inc. (collectively "MFS"), by its undersigned attorneys, hereby files its Opposition to the November 15, 1996 Motion of United Telephone Company of Florida ("Sprint") to Reject Portion of MFS/Sprint Negotiated Interconnection Agreement. MFS and Sprint have executed a valid negotiated interconnection agreement ("negotiated agreement" or "the Agreement") which MFS has submitted to the Commission in accordance with Section 252(e) of the

Telecommunications Act of 1996 ("1996 Act"). Sprint's Motion is a bald attempt to seek rescission of an otherwise valid contract provision. Sprint has no cognizable reason to bring its request before the Commission and the Commission has no power to order contract rescission. Sprint's efforts, moreover, fly in the face of its contractual obligation "to fully support approval of this Agreement."

I. BACKGROUND

MFS requested interconnection with Sprint pursuant to the 1996 Act on February 8, 1996. Unable to reach a negotiated agreement with Sprint by the 1996 Act's arbitration petition filing window, MFS preserved its right to arbitration by filing a petition on July 17, 1996. MFS and Sprint executed the Agreement on September 19, 1996, which represented a settlement of most of the issues in MFS' arbitration petition. Consequently, MFS withdrew these issues from arbitration.[1] The Commission then conducted an arbitration hearing on September 19 on the unresolved issues in MFS' arbitration. Specifically, those issues were the cost of unbundled loops and cross connects, whether or not MFS is entitled to reciprocal compensation for the transport function and the terms of billing information services traffic. The Commission voted on MFS' arbitration on November 1, 1996. After the Commission issues its written order, the parties will file an agreement memorializing the Commission's decision on the three arbitrated issues.

MFS filed the negotiated agreement on November 7.[2] This Agreement represents a settlement of the universe of all interconnection issues between the parties, save the three arbitrated

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[1] *See* September 19, 1996 Hearing Transcript at 7-8, Docket 960838-TP (withdrawing provisions of negotiated agreement from arbitration).

[2] MFS and Sprint were entitled to file the Agreement on September 19. Administrative considerations, and not any displeasure with the Agreement, caused MFS to delay filing until November 7.

issues. Under the 1996 Act, the Commission has 90 days to review the Agreement and may only reject it if: (1) it discriminates against other carriers; or (2) it is inconsistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). The Commission may not reject the Agreement on any other basis.

Now that MFS and Sprint have : (1) settled their differences; (2) filed their settlement as the Agreement; and (3) concluded their arbitration, there should be no further need for recourse to the Commission on those issues. As described above, the standard for Commission review of the Agreement is narrow and well-defined. Nevertheless, Sprint now asks the Commission to reopen the process and reject a portion of its own contract with MFS. Essentially, Sprint asks the Commission to order contract rescission. Without exception, Sprint's arguments in favor of Commission rejection of a portion of the Agreement are meritless.

II. THE EIGHTH CIRCUIT STAY HAS NO RELEVANCE TO THE ISSUES INVOLVED IN APPROVING THIS AGREEMENT

Sprint's primary argument for rejection of a portion of the Agreement is "changed circumstances." The basis of this argument is that the U.S. Court of Appeals for the Eighth Circuit's October 15, 1996 stay pending appeal of the FCC's interconnection rules[1] somehow is cause for contract rescission. Nothing could be farther from the truth. First, no change in any relevant provision of law has occurred. Second, Sprint was fully aware of the status of the FCC Order when

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[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1966*, FCC 96-325, CC Docket No. 96-98 (released Aug. 8, 1996) ("FCC Interconnection Order"), *partial stay pending appeal granted, Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. Oct. 15, 1996).

it executed the Agreement and bargained with its eyes open. Third, Sprint's argument is internally inconsistent as it has only selectively chosen a portion of the agreement it seeks to rescind.

Under Section 252(a)(1) of the 1996 Act, voluntarily negotiated interconnection agreements bind incumbent local exchange carriers ("ILECs") and new entrants "*without regard* to the standards set forth in subsections (b) and (c) of section 251." (emphasis added). *Accord* FCC Interconnection Order at ¶ 56 ("under the statute, parties may voluntarily negotiate agreements 'without regard to' the rules that we establish").[4] The MFS/Sprint Agreement has *never* been subject to the pricing rules the FCC promulgated in its Interconnection Order. The fact that the parties incorporated portions of those rules was a decision of the parties as part of their negotiated bargain. It follows then that the Eighth Circuit's temporary stay of the Order pending an appeal on the merits has *no effect whatsoever* on the MFS/Sprint Agreement in general, and the provision Sprint seeks to rescind in particular.

Sprint's claim that there is a change in the law demonstrates either a basic misunderstanding of legal process or a total disregard for it. A temporary appellate stay is not a ruling on the merits of an appeal. Even if the Eighth Circuit's stay had an effect on the Agreement -- which it does not -- the FCC Interconnection Order has not been adjudicated as unlawful. Indeed, agency regulations are presumed lawful until found otherwise.[5] The portions of the FCC Order stayed are not unlawful, rather they simply cannot be enforced by the FCC.

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[4] This is not to say that negotiated interconnection agreements must not be filed with this Commission. Such filing is compelled by the 1996 Act.

[5] *See, e.g., Hoffenberg v. Kaminstein,* 396 F.2d 684 (D.C. Cir. 1967).

The FCC Order was issued on August 8 and published in the Federal Register on August 29.[6] Sprint and MFS executed their Agreement on September 19, 1996. Subsequent to August 8, numerous parties filed petitions for FCC reconsideration of its Order. The first appeal of the FCC Order was filed by NARUC on the day the Order was published in the Federal Register.[7] One need hardly tell the Commission that a veritable avalanche of other appeals followed. Thus, it is wholly disingenuous for Sprint to claim that once the FCC Order was issued "[i]t was unquestioned by the parties that the FCC had preempted the states . . . from imposing requirements . . . different from those included in the FCC's [Interconnection Order]." Sprint Motion at 3. Sprint was surely aware that the FCC Order was not a final order on the day it signed its Agreement with MFS. It is also disingenuous for Sprint to claim that it never would have signed an Agreement with MFS because "it would have been pointless to arbitrate the issue." Sprint Motion at 3. Sprint and MFS had equal information when they signed the Agreement. Sprint knew that it could make any agreement with MFS and the FCC Order would not bear on that Agreement.[8] Sprint and MFS were fully able to evaluate the benefits and risks of reaching agreement on September 19, including the risks of lack of finality of the FCC Order, possible court rulings and FCC rule changes, and the like.[9]

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[6] 61 Fed. Reg. 45476.

[7] *National Ass'n of Regulatory Utility Commissions v. FCC*, No. 96-1303 (D.C. Cir. filed Aug. 29, 1996).

[8] Of course, negotiated agreements must be lawful and in the public interest.

[9] Sprint's argument is not even internally consistent. Sprint has identified only a single provision in the Agreement which it wants rescinded on the basis of "changed circumstances." Apparently, Sprint is satisfied with all other Agreement provisions in the face of the temporary Eighth Circuit stay. It simply does not like the tandem switching result.

III. THE COMMISSION MAY NOT IMPAIR PRIVATE CONTRACTS

Sprint seems to ask the Commission to relieve it from what Sprint -- albeit erroneously, MFS submits -- considers to have been a bad bargain. That is not the Commission's role. As the U.S. Supreme Court forcefully stated:

> While a state may exercise its legislative power to regulate utilities and fix rates . . . there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking . . . . Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution.

Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379, 382 (1923). The Florida Supreme Court, citing *Arkansas Natural Gas Co.*, has agreed that "[t]o modify private contracts in the absence of such public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution." *United Telephone Co. of Fla. v. Public Service Comm'n*, 496 So.2d 116, 119 (Fla. 1986). If Sprint has a colorable contract claim, which it does not, Sprint should take its dispute to an appropriate forum. Sprint should not burden this Commission by confusing what is a simple agreement approval process under the 1996 Act.

IV. SPRINT IS BOUND TO SUPPORT THE AGREEMENT

Sprint contends current submission of the Agreement to the Commission "is an unnecessary imposition on the Commission's limited resources." Sprint Motion at 5. To the contrary, not only does the 1996 Act require filing of the Agreement, so does the Agreement itself. According to § 26.1 of the Agreement:

> The Parties understand and agree that this Agreement will be filed with the [Florida] Commission and may thereafter be filed with the FCC. The Parties covenant and agree that this Agreement is satisfactory to them as an agreement under Section 251 of the [1996] Act. Each Party covenants and agrees to fully support approval of this

> Agreement by the [Florida] Commission or the FCC under Section 252 of the Act without modification.

Sprint's instant challenge is a violation of the very Agreement of which it "reaffirms all other aspects." Sprint Motion at 5. The Agreement compels Sprint to seek and support Commission approval of the document. Sprint's request that the Commission reject a portion of the Agreement clearly conflicts with its contractual obligation.

Sprint's assertion that "MFS will not be harmed" by Commission rejection of a part of the Agreement because "Sprint proposes that the Commission now arbitrate this issue" is preposterous. First, MFS has a valid contract with Sprint and MFS is harmed if Sprint does not honor the contract. Second, contrary to Sprint's assertions, it is not at all clear that the Commission may arbitrate further interconnection issues between MFS and Sprint. The 1996 Act's filing window for MFS to file an arbitration petition has passed. Third, arbitration litigation is time consuming and costly. Sprint's suggestion that further arbitration is necessary demonstrates its obvious intent to delay local competition. Indeed, MFS' experience in negotiating interconnection agreements nationwide is that independent ILECs have no incentive to negotiate because they do not require interconnection agreements as a condition precedent to their entry into the long distance market. Consequently, Sprint has every incentive to erect obstacles to local competition implementation. Given its bottleneck control of its Florida network, Sprint's behavior is hardly surprising. The Commission should see Sprint's efforts for what they really are: an anticompetitive attempt to delay local competition ordered by federal and state law.

Sprint's argument that the Commission should not separately approve the negotiated and arbitrated terms of MFS/Sprint interconnection is misleading. Different legal standards and

timetables apply to negotiated and arbitrated agreements. State commissions must pass on negotiated agreements within 90 days of submission under the standards of Section 252(e)(2)(A). By contrast, state commissions must pass on arbitrated agreements within 30 days of submission under the standards of Section 252(e)(2)(B). Sprint's position since the outset of its arbitration with MFS has been that the negotiated agreement would be filed.[10/] Any argument that the Agreement is not suitable for filing now is simply dilatory.

V. CONCLUSION

The 1995 Act's standard for Commission review of the Agreement under Section 252(e)(2)(A) is very narrow. The Commission may only reject the Agreement if it: (1) discriminates against other carriers; or (2) is inconsistent with the public interest, convenience, and necessity. These are the only issues before the Commission. Sprint is barred from contesting the Agreement it voluntarily signed. The Commission has no authority to impair a valid contract which

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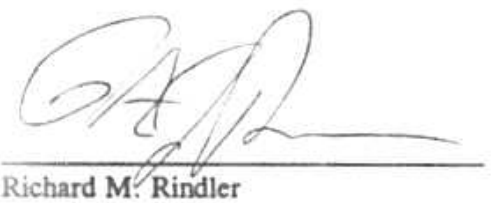
[10/] Prehearing Order, Order No. PSC-96-1154-PHO-T.P., Docket No. 960838-T.P., at 20 (Sept. 17, 1996) (setting forth parties' positions on filing of negotiated agreement).

is lawful and in the public interest. The Commission should proceed with its public interest review of the Agreement and ignore Sprint's egregious attempt to rescind a portion of its contract with MFS.

Respectfully submitted,



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