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July 22, 1997

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 970788-TP

Dear Ms. Bayo:

Enclosed for filing is the original and fifteen (15) copies of Sprint-Florida, Incorporated's Motion to Dismiss and/or Answer in the above referenced docket.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

ACK

AFA

APP

CAF

CMU

CTR

EAG

LEG

LIN

OPC

RCH

SEC

WAS

QTH

Charles J. Rehwinkel
Attorney

cc: Parties of Record

Enclosures

RECEIVED & FILED

EPSC-BUREAU OF RECORDS

DOCUMENT FILED

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EPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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Filed: July 22, 1997

In Re: Complaint and/or petition for)
arbitration against Sprint-Florida,)
Incorporated by Wireless One)
Network, L.P. d/b/a Cellular One)
of Southwest Florida pursuant to)
Section 252 of the Telecommunications)
Act of 1996 and request for)
expedited hearing pursuant to)
Section 364.058, F.S.)
_____)

Docket No. 970788-TP

SPRINT-FLORIDA'S MOTION TO DISMISS AND/OR ANSWER

Sprint-Florida, Incorporated ("Sprint-Florida") hereby files its Motion to Dismiss and or Answer to the Complaint and/or Petition of Wireless One for Arbitration and Request for Expedited Hearing. Sprint-Florida hereby states as follows:

Respondent is :

Sprint-Florida, Incorporated
555 Lake Border Drive
Apopka, Florida 32703

Respondent is represented by :

Charles J. Rehwinkel

General Attorney
1313 Blair Stone Rd.
MC FLTLHO0107
Tallahassee, Florida 32301

Service may be made at the above location.

I. MOTION TO DISMISS

Sprint-Florida hereby moves this The Florida Public Service Commission ("FPSC" or "Commission") to dismiss the action¹ for arbitration pursuant to Section 252 of the Telecommunications Act of 1996 because it is premature and therefore not authorized and because the relief requested is premised on the availability of an agreement that has been filed with the Commission but not yet been approved, contrary to the requirements of 47 U.S.C. Section 252(i).

As discussed¹ in its petition, Wireless One commenced negotiations on April 9, 1997, and hence the 135 day clock for the negotiation period prior to the availability of the arbitration remedy. The window for commencing an arbitration action will not open until August 23, 1997. Thus, as a matter of law the petition must be dismissed as premature. This result is suggested by the

¹Wireless One styles its pleading as a Complaint and/or Petition for Arbitration and readily acknowledges a lack of guidance in the Act and Florida Statutes for bring the type of action that they wish to bring. Nevertheless, the pleading filed by Wireless One, taken as a whole, seeks relief under Section 252 of the Telecommunications Act of 1996 and the FPSC has to date only entertained arbitration actions ensuing from that federal mandate. Herein, for the sake of convenience only, Sprint-Florida will refer to Wireless One's pleading as the "petition". Any assertion that the Commission conduct the proceeding under the authority of Section 364.058, Fla. Stat. is misplaced, because the substantive law (and accompanying mandate) is purely Federal. The limited proceeding statute, though on its face is not so limited, was designed for the purposes of conducting limited rate cases in the era of rate base regulation. Styling the action as a complaint under the limited proceeding statute does not alter the fact that, substantively, arbitration under Section 252 is being requested.

recent decision of the Eighth Court of Appeals in Iowa Utilities Board v. FCC, 1997 WL 403401 (8th Cir.). In striking down the "pick and chose" rules of the FCC, the Court states that the "parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. *Id.* slip op. at 10. Clearly, the FPSC has no jurisdiction to conduct an arbitration filed prior to the 135th day of the negotiation period mandated by Section 252(b). On this basis the petition should be dismissed.

Additionally, Section 252(i) provides that:

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 telecommunications carrier upon the same terms and conditions as those provided in the Agreement.

[Emphasis added]

Taken in the light most favorable to the Petitioner, the admitted facts disclose that the petition is premature at best. It is possible that at the time the FPSC considers the Palmer Interim Agreement (currently scheduled for an August agenda conference), that it may either have been denied because it is not truly interim or because it will have been replaced with a permanent Agreement and thus is no longer available. In any event, the Commission should enter an order dismissing this action on this basis.

For these reasons, the FPSC should decline to entertain the petition at this time and should dismiss it. However, should the FPSC decline to dismiss the

petition, Sprint-Florida also provides herein its Answer to the petition.

II. ANSWER

1. Paragraph 1 of the Petition is admitted.
2. Paragraph 2 of the Petition is admitted, except that Sprint-Florida denies that all matters raised by Wireless One are subject to the jurisdiction of the FPSC at this time.
3. Paragraph 3 of the Petition is admitted.
4. Sprint-Florida is without sufficient information to admit or deny Paragraph 4 of the Petition.
5. Paragraph 5 of the Petition is admitted.
6. Paragraph 6 of the Petition is admitted.
7. Paragraph 7 of the Petition is denied to the extent it alleges an agreement had been negotiated in the sense that a binding agreement had been reached on February 12, 1997.
8. Paragraph 8 of the Petition is denied.
9. Sprint-Florida is without sufficient information (or unable to legally disclose such) to admit or deny Paragraph 9 of the Petition.

10. Paragraph 10 of the Petition is admitted.

11. Paragraph 11 of the Petition is admitted.

12. Paragraph 12 of the Petition is admitted.

13. Paragraph 13 of the Petition is admitted.

14. Paragraph 14 of the Petition is denied to the extent that it alleges that Sprint-Florida failed to comply with 47 U.S.C. § 252(i). It is also denied that even if Sprint-Florida failed to comply with 47 U.S.C. § 252(e) that such alleged failure prevented Wireless One from adopting the Palmer Interim Agreement prior to March 1, 1997 or prevented Wireless One from requesting the FPSC to enforce the provisions of 47 U.S.C. § 252(i) prior to that date.

15. Paragraph 15 of the Petition is admitted to the extent that it alleges that Wireless One submitted a letter to Sprint relative to the Palmer Interim Agreement, but is denied in all other respects.

16. Paragraph 16 of the Petition is admitted to the extent that it alleges that Sprint-Florida denied the request contained in Wireless One's May 9, 1997 letter and is denied in all other respects.

17. Paragraph 17 of the Petition is denied to the extent that it alleges that the identical terms of the Palmer Interim Agreement were requested or that such request constituted a continuation of the same request made earlier on May 9, 1997. It is admitted that Sprint-Florida ultimately refused the request made on June 6, 1997 and it is admitted that a letter discussing a June 6, 1997

conference call is attached to the Petition.

18. Paragraph 18 of the Petition is denied.

19. Sprint-Florida responds to Paragraph 19 of the Petition as in Paragraphs 1-18 above.

20. Paragraph 20 of the Petition is denied.

21. Sprint-Florida responds to Paragraph 21 of the Petition as in Paragraphs 1-20 above.

22. Paragraph 22 of the Petition is denied.

23. Sprint-Florida responds to Paragraph 23 of the Petition as in Paragraphs 1-22 above.

24. Paragraph 24 of the Petition is denied.

25. Sprint-Florida responds to Paragraph 25 of the Petition as in Paragraphs 1-24 above.

26. Paragraph 26 of the Petition is denied.

27. Sprint-Florida responds to Paragraph 27 of the Petition as in Paragraphs 1-26 above.

28. Paragraph 28 of the Petition is denied.

29. Sprint-Florida denies that an expedited hearing should be set in this matter.

30. Sprint-Florida denies that the FPSC should find that Sprint-Florida's actions in this matter constitute a violation of 47 U.S.C. §252(e).

31. Sprint-Florida denies that the FPSC should now order Sprint-Florida to do an act that was done on May 20, 1997.

32. Sprint-Florida denies that the FPSC should approve the Palmer Interim Agreement in this proceeding.

33. Sprint-Florida denies that the FPSC should order that the terms and conditions of the Palmer Interim Agreement are available to Wireless One either now, in the future, or in any way effective retroactively to March 1, 1997.

34. Sprint-Florida denies that the FPSC should order Sprint-Florida to make any refund that Wireless One alleges is due.

III. Affirmative Defenses and Argument

I. Sprint-Florida filed the Palmer Interim Agreement with the FPSC on May 20, 1997 and therefore has not violated Section 252(e) or 252(h) of the Telecommunications Act of 1996.

35. To the extent Wireless One's action is grounded in the alleged failure of Sprint-Florida to file the Palmer Interim Agreement with the FPSC, it should be denied. Wireless One alleges that it "monitored the docketing activities at the

FPSC" from "August 2, 1996 onward". It therefor should have discovered that the Palmer Interim Agreement had been filed on May 20th and assigned FPSC docket no. 970611-TP. The FPSC can take notice of its own official docket files and verify the invalidity of Counts 1 and 2 and the allegations offered in support thereof.

II. Because the Palmer Interim Agreement has not yet been approved by the FPSC, Wireless One may not adopt any portion of it pursuant to Section 252(i) of the Telecommunications Act of 1996.

36. As discussed in Sprint-Florida's Motion to Dismiss, the Palmer Wireless Interim Agreement has yet to be considered by the FPSC even though it was filed on May 20th. Pursuant to Section 252(e)(4), the FPSC has 90 days to evaluate, consider and approve or reject the Palmer Interim Agreement. Until the Agreement is approved, Wireless One has no right to adopt, if at all, any portion of the Palmer Interim Agreement. For this reason, the allegations offered in support of Count 3 do not support the FPSC granting relief to Wireless One.

III. Because Palmer did not notify Sprint-Florida of its execution of the Palmer Interim Agreement until March 17, 1997, Sprint-Florida was not aware that its offer had been accepted until that time.

37. Wireless One's allegations in paragraphs 7-9, perhaps through incomplete information, create the impression that a binding agreement had been entered into by both sides and that Sprint-Florida knew and failed to disclose this fact to Wireless One on or about the 12th of February. To the contrary, on February 11, 1997, Sprint-Florida had only forwarded by mail a signed offer to

Palmer. It was not until March 17, 1997 that evidence of an accepted offer was received back by Sprint-Florida. In the approximately 60 days following receipt of the executed Interim Agreement, Sprint-Florida was unsure of its obligation to file the agreement. For this reason the FPSC should attach no significance to the date of February 14th (relating to Palmer's execution of the agreement) and the lack of filing at the FPSC by Sprint-Florida for the period February 14-March 17 should not be held against the company.²

IV. Because the Palmer Interim Agreement should be replaced by a permanent, definitive Agreement prior to the opening of the 135 day "arbitration window", the Palmer Interim Agreement will be no longer be available to Wireless One pursuant to Section 252(i) of the Telecommunications Act of 1996.

38. Wireless One has built virtually its entire case around the availability of the Palmer Interim Agreement. The difficulty in this approach is in the "interim" nature of the Palmer agreement. Negotiations for that agreement occurred in the context of a rapidly closing arbitration window. It was designed to be quickly replaced with a definitive permanent agreement and contained an expiration date of December 31, 1997 as an absolute backstop provision in the event good faith negotiations occurred and didn't result in a workable agreement.

39. Complicating the intended swift replacement of the interim arrangement

²This is not to suggest that the 60 or so day period between receipt and filing is attributable to anything other than a good faith doubt on Sprint-Florida's part about the need to file the agreement and a good faith expectation that the Palmer permanent agreement would be reached very shortly after the expiration of the 25 day arbitration window that led to the creation of the interim arrangement.

has been the fact that Palmer Wireless is being sold and that the Ft. Myers, Florida properties/operations will be sold to Wireless One. This was publicly reported in mid-June. This sale activity created a complete cessation of negotiation on Palmer's part. Palmer is aware that its obligation to negotiate in good faith is and always has been a condition of the continued viability of the interim arrangement. Sprint-Florida fully expects that a permanent agreement will be negotiated with Palmer in the very near future. Once that occurs whether prior to FPSC approval of the Palmer Interim Agreement or after, that interim agreement would cease to be available, if at all, under Section 252(i).

V. Wireless One is not entitled to relief under Section 252(i) because it has not alleged in the Petition that it is willing to accept the Palmer Interim Agreement in its entirety.

40. In Wireless One's petition (paragraphs 15 and 17) the company alleges that it has sought the "material terms" and/or the "identical terms" of the Palmer Interim Agreement. The legal significance of this terminology is unclear. However, a close examination of the petition and the documentation attached in support of it, indicates that Wireless One's request was and has been an offer to adopt something other than the entire Palmer Interim Agreement.

41. Paragraph 17 alleges that the company requested the "identical" terms of the Palmer arrangement as indicated in the June 11, 1997 letter from William Adams to Brooks Albery. That letter indicates that the request of June 6, 1997 (the subject of paragraph 17) involved Wireless One "again rais[ing] its request for the terms of the interim Palmer agreement as set forth in my letter of May 9, 1997, which you previously rejected by your letter of May 16, 1997."

42. The May 9, 1997 letter in turn advances a request for the "material terms" of the Palmer Interim Agreement (Petition at para. 15). From the letter attached to the Petition, it is plain to see that the request of May 9, though similar in many respects to the Palmer Interim Agreement is by no means "identical" nor would the request amount to taking the entire Palmer Interim Agreement.

43. In the first place, the Wireless One offer omits the obligation to continue to negotiate in good faith toward a permanent agreement -- a crucial element of the Palmer negotiations and one borne out of the impending expirations of the arbitration window in the Palmer negotiation.

44. Secondly, the Wireless One offer would effectively "slingshot" the adopted Palmer rates past the termination date of the Palmer Interim Agreement and have them remain effective until, and if ever³, a permanent agreement was reached. This would be contrary to the fundamental concept of the Palmer Agreement being "interim".

45. Third, the Wireless One version of the Palmer arrangement would have the rates become effective retroactively to a time prior to the time the agreement was executed. The Palmer arrangement was negotiated to have rates that were to be in effect after the execution of the agreement. This is again a significant difference between the Wireless One offer and the interim

³At the time the Palmer agreement was reached, Sprint-Florida had no tariff in place for local interconnection. Now that a revised tariff Section E-19 is in place effective July 1, 1997, it is conceivable that partial taking of the Palmer Interim Agreement could be combined with the tariff provisions to allow Wireless One to operate indefinitely under the interim Palmer arrangement. This would clearly be counter to the spirit in which the Palmer arrangement was reached.

agreement. Wireless One has cited no authority for being able to adopt an agreement and apply the rates backwards in time to the date of the original adopted agreement⁴ between Sprint-Florida and another Cellular One provider with whom they do not directly compete.

46. Clearly, there are material differences between the Wireless One offer and the Palmer Interim Agreement. Wireless One has not alleged in the alternative that it should be entitled to opt into a portion of the Palmer Interim Agreement. Rather, perhaps to avoid the appearance that it has been engaged in negotiations⁵ and perhaps to avoid the problem of the 135 day jurisdictional starting date for arbitration actions, the company has attempted to now say that the effort is to opt into the entire Palmer Interim Agreement. The facts disclose a different story, however.

47. The bottom line is that Wireless One is seeking to complain mid-negotiation simply because they are not happy with the status of the negotiations and do not wish to wait for a resolution. Seeking to adopt a modified version of the Palmer Interim agreement involves a process of negotiation that must be completed before the Commission should begin to entertain an arbitration action. For these reasons, the relief sought under Count 4 should be denied as well⁶.

⁴This proposed retroactive application does not compare favorably with Wireless One's corresponding request to write into the Palmer agreement an open-ended termination date with no obligation to quickly convert it to a permanent agreement.

⁵The Commission should not lose sight of the fact that after receiving a copy of the Palmer Interim Agreement on April 30, 1997, Wireless One continued to negotiate up to the time of filing this action as evidenced by the attached letter (Exhibit 1).

⁶Count 5 is without support if all other Counts are denied by the Commission. As Count 4 is the only one that would give rise to monetary relief, denial there would preemptively

III. Conclusion

48. Wireless One has failed to establish that Sprint-Florida has committed a violation of the Telecommunications Act of 1996. Sprint-Florida negotiated an interim arrangement with Palmer Wireless under unique circumstances. That interim agreement was filed with the FPSC as required. If the FPSC acts to approve the agreement, then and only then should Sprint-Florida's actions in allowing or disallowing Wireless One to adopt all or a portion of the Palmer Interim Agreement be judged. The FPSC should deny any and all requests for the refunds as there is no sustainable basis for Wireless One to adopt the Palmer rates prospectively, much less retroactively.

WHEREFORE, based on the forgoing, the FPSC should dismiss Wireless One's Petition as being premature or outside FPSC jurisdiction. Alternatively, for the reasons stated herein, if the Commission decides to arbitrate the matter, Counts 1-5 should be denied.

RESPECTFULLY SUBMITTED this 22nd day of July, 1997.



Charles J. Rehwinkel
General Attorney
Sprint-Florida, Incorporated
P.O. Box 2214
MC FLTLHO0107
Tallahassee, Florida 32301

foreclose any refund obligation on Sprint-Florida's part assuming that a difference in rates and usage yielded a difference that could lawfully be retroactively imposed. That would involve a factual determination by the Commission should this action ever go to hearing.

RECEIVED
JUN 23 1997
BY: _____

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June 20, 1997

Via Federal Express

Mr. Brooks Albery
Sprint-Florida, Inc.
555 Lake Border Drive
Apopka, Florida 32703

Re: Wireless One Interconnection Negotiations

Dear Mr. Albery:

I am forwarding the following pleadings which we will file with the Florida Public Service Commission next Friday, June 27, 1997:

1. Complaint and/or Petition for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 and Request for Expedited Hearing Pursuant to Fl. St. Section 364.058 and
2. Memorandum in Support of Complaint and/or Petition for Arbitration and Request for Expedited Hearing.

In the spirit of working toward an expeditious resolution to our interconnection arrangements, we are providing you with these documents in advance of filing to give you one more opportunity to reconsider your position before these are made part of the public record. Please call me if you would like to discuss the matters raised in these pleadings.

Very truly yours,



William A. Adams

cc: James A. Dwyer
Frank Heaton

CERTIFICATE OF SERVICE
DOCKET NO. 970788-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, this 22nd day of July, 1997, to the following:

Beth Culpepper
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

William A. Adams, Esq.
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