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BEFORE
THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Wireless One Network, L.P., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with Sprint Florida, Incorporated Pursuant to Section 252 of the Telecommunications Act of 1996.	)))))	Docket No. 971194-TP

WIRELESS ONE'S MEMORANDUM IN OPPOSITION TO SPRINT'S MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF JOHN MEYER AND FRANK HEATON AND THE DEPOSITION OF F. BEN POAG

I. Introduction.

Wireless One Network, L.P. ("Wireless One") opposes the motion of Sprint Florida, Incorporated ("Sprint") to strike the rebuttal testimony of John Meyer and Frank Heaton and the deposition of F. Ben Poag attached as FJH Exhibit 1.9. As has become its practice in this proceeding, Sprint again has devoted its considerable resources to devise a motion for the sole purpose of erecting procedural barriers to prevent this Commission from deciding the straightforward merit issues presented in this case.

Sprint's strategy has become clear -- to bifurcate the issues in this case and require Wireless One to prosecute another proceeding to obtain full relief from Sprint's Reverse Option charge that it is no longer required to pay -- all in the hope that Wireless One's determination and resources will wane so that Sprint can continue to exact the monopolistic charges from Wireless One that the United States Congress and the Federal Communications Commission have forbidden. Sprint is willing to have the Commission decide the secondary tandem interconnection issue which will reduce Wireless One's payments to Sprint by approximately $7,500 per month (see Heaton Direct Testimony at p. 23, l. 19-22); however, it seeks to exclude the primary Reverse Option issue which will reduce Wireless One's payments to Sprint by as

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much as $40,000 per month (see Heaton Direct Testimony at p.13, l. 8-9). The prospect of a significant reduction in the Reverse Option expense was the justification for Wireless One to undertake the considerable expense of this proceeding. It is apparent that Sprint will go to almost any extreme to deny Wireless One this justified rate relief to protect its monopoly revenue stream.

Sprint would have the Commission believe that its authority in this proceeding is limited to the interconnection rates negotiated to supersede those now tariffed in Section A25 G.4-6 of its Mobile Services Tariff. However, the Reverse Option charge (contained in Section A25 G.7 of Sprint's Interconnection of Mobile Services Tariff) is just as much a part of the terms and conditions of Wireless One's interconnection with Sprint as the rates already negotiated and must also be a part of the interconnection agreement to fully comply with the Telecommunications Act of 1996. If the Reverse Option charge is not considered in this proceeding, the resulting rates will not be cost justified as the Act requires them to be.

Throughout its negotiations with Sprint, which commenced in August 1996, Wireless One has steadfastly maintained that the Reverse Option charge must be addressed as a term and condition of its interconnection with Sprint, as it historically had been considered by the parties since the inception of service in 1990. However, Sprint has adamantly refused to negotiate this issue, ignoring all of Wireless One's requests for alternative pricing. Indeed, as the attached letter reflects, Sprint officially removed the Reverse Option issue from the negotiations during a June 17, 1997 conference call and indicated its intention to continue charging the tariff rate of $0.0588. See Attachment A. Sprint's ability to compel Wireless One to continue to pay the expense of the now-unjustified Reverse Option charge for intraMTA traffic and to incur the expense to obtain the relief due it through prosecuting this issue before the Commission is an

egregious example of Sprint's use of monopoly power to impede the development of meaningful competitive alternatives within the Ft. Myers LATA. Wireless One implores the Commission to recognize Sprint's litigious tactics for what they are and resolve all issues in this proceeding on their merits, to save the limited resources of Wireless One and the Commission, itself.

Sprint's tactics are just as evident in this ill-founded motion to strike Poag's deposition and the related rebuttal testimony of Wireless One witnesses Heaton and Meyer. In this vein, Sprint has contorted Florida law to improperly characterize Wireless One's submission of Poag's deposition as "direct testimony." Based upon this erroneous premise, Sprint reasons that the deposition cannot be introduced as evidence in this proceeding because it was not filed by the October 7, 1997 deadline for filing direct testimony and, thus, that it would be "improper" for Heaton and Meyer's rebuttal testimony to address the statements made therein. Accordingly, it requests that the deposition and relevant portions of the rebuttal testimony be stricken.

Contrary to Sprint's contorted assertions, Florida law clearly permits Wireless One to use Poag's deposition "for any reason," including as evidence in its case-in-chief. Florida law just as clearly permits witnesses Heaton and Meyer to comment upon this evidence in their rebuttal testimony. Indeed, these procedural mechanisms were equally available to Sprint which, for whatever reasons, chose not to use them. For this reason, Wireless One resents Sprint's statement that only Sprint has played by the procedural rules in submitting testimony in this proceeding and, by implication, that Wireless One has not. Sprint Motion at p. 3, ¶ 4. As shown below, Wireless One has followed the Commission's rules to the letter. If Sprint is "prejudiced," as it claims, by Wireless One's unilateral use of these procedural mechanisms, it has only itself to blame.

II. Procedural Standard.

The Rules Governing Practice and Procedure before this Commission, Ch. 25-22. *et seq.*, Fla. Admin. Code ("Commission's rules"), provide that the Florida Rules of Civil Procedure shall govern Commission proceedings except when they are in conflict with the Commission's rules. Rule 25-22.035 Fla. Admin. Code. Although the Commission's rules explicitly rely on Fla.R.Civ.P 1.280 - 1.400 for the conduct of discovery, they are silent as to the permissible use of depositions as well as a party's ability to rebut the testimony contained therein. Accordingly, the Florida Rules of Civil Procedure control in these matters.

III. Poag's Deposition May be Used for Any Purpose in this Proceeding under Fla.R.Civ.P 1.330(a)(2), Including as Evidence in Wireless One's Case-in-Chief.

Fla.R.Civ.P. 1.330(a)(2) provides as follows:

> The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or ***managing agent*** or ***a person designated under rule 1.310(b)(6)...to testify on behalf of a public or private corporation***, a partnership or association, or a governmental agency that is a party may be used by an adverse party ***for any purpose***.

(Emphasis added.) There is no dispute that Poag is a managing agent for Sprint. In his prefiled direct testimony (p. 1), Poag states that he is the Director – Tariffs and Regulatory Management for Sprint, and in his deposition confirms that he has been responsible for Sprint's Florida tariffs and regulatory affairs since 1988. Poag Deposition, p. 9, ll. 13-25. On this basis alone, Poag's deposition falls within the purview of Fla.R.Civ.P. 1.330(a)(2), permitting Wireless One to use it for any purpose in this proceeding.

It is equally clear that Sprint designated Poag as its corporate spokesperson on the issues presented in this proceeding by filing his prefiled direct testimony on such issues and presenting him for deposition as the person to address these issues, including those related to the

formulation of Sprint's tariff charges for the Reverse Option. Clearly, Poag has been authorized to speak on behalf of Sprint as to these issues and his testimony is binding on the corporation.

Sprint does not, and cannot, argue that Poag is not a managerial agent of Sprint. Sprint's only argument is a hypertechnical one -- that Wireless One did not name Sprint, as a corporation, in its notice of deposition and request it to designate a person to testify on the issues presented as provided in Rule 1.310(b)(6). It was unnecessary for Wireless One to follow this indirect procedure when Sprint already had indicated that Poag was such designated person. Clearly, the law will not require a party to perform a vain act. See, *e.g.*, *Jasper v. St. Petersburg Episcopal Community, Inc.*, 222 So.2d 479, 483 (1969). Although Poag's status as a managing agent for Sprint alone falls within the purview of Fla.R.Civ.P. 1.330(a)(2), his status as the person designated to testify by Sprint on the issues presented in this proceeding equally qualifies his deposition to be used "for any purpose."

The purpose for which Poag's deposition may be used is not limited to impeachment, as Sprint erroneously argues, but may be introduced in evidence as a part of Wireless One's case-in-chief. See *LaTorre v. First Baptist Church of Ojus*, 498 So.2d 455, 458 (1986):

> The rule is clear: "The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent [of a corporation that is a party] ... may be used by an adverse party for any purpose." Fla.R.Civ.P. 1.330(a)(2); *Vecsey v. Vecsey*, 115 So.2d 719 (Fla. 3d DCA 1959). See also *Hill v. Sadler*, 186 So.2d 52 (Fla. 2d DCA) (error to require defendant to place plaintiff on stand as witness in lieu of reading his deposition), cert. denied, 192 So.2d 487 (Fla. 1966). Such a deposition may be used notwithstanding that the deponent is available to testify at the trial. *Haines v. Leonard L. Farber Co.*, 199 So.2d 311 (Fla.2d DCA 1967) cert. dismissed, 210 So.2d 218 (Fla.1968); *Cooper v. Atlantic Coast Line Railroad Co.*, 187 So.2d 673 (Fla. 1st DCA), cert. denied, 194 So.2d 617 (Fla.1966); *Montalvage & Co. of Miami v. Ryder Leasing, Inc.*, 151 So.2d 453 (Fla. 3d DCA 1963).

Wireless One has noticed its intent to use Poag's deposition testimony in its Prehearing Statement filed November 7, 1997, and also has filed a separate notice and the original deposition transcript on November 13, 1997. Wireless Once is permitted to present this evidence as a part of its case-in-chief.

IV. Wireless One's Use of Poag's Deposition in its Case-in-Chief Does Not Make Poag Wireless One's Witness Nor Operate to Characterize the Deposition as "Direct Testimony" Under Fla.R.Civ.P. 1.330(c).

Sprint's motion to dismiss is premised on its glaring misimpression that by introducing Poag's deposition as evidence in its case-in-chief, Wireless One will make Poag its witness which somehow will transform the deposition into direct testimony. Sprint contrives these bold assumptions only to enable it to argue that the deposition must be stricken as untimely filed direct testimony.

However, the Florida Rules of Civil Procedure unambiguously provide that depositions introduced as evidence under Fla.R.Civ.P. 1.330(a)(2) will not make the deponent the witness of the adverse party introducing the deposition. See Fla.R.Civ.P. 1.330(c) ("The introduction in evidence of the deposition or any part of it for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, ***but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule.***" (Emphasis added.)) Wireless One's introduction of Poag's deposition in its case-in-chief will not make Poag Wireless One's witness and, thus, will not transform the deposition into "direct testimony." Because the deposition is not direct testimony, it was not required to be filed by the October 7, 1997 deadline established by the Order Establishing Procedure. The filing

of the deposition past that date simply does not affect Wireless One's ability to introduce it as evidence in this proceeding.

V. Wireless One's Rebuttal Testimony May Address the Deposition Testimony of Poag.

Sprint also is mistaken in its argument that Heaton and Meyer cannot address Poag's deposition in their rebuttal testimony. It reasons that the Commission permits only statements in prefiled direct testimony to be rebutted.[1] However, the Commission's rules do not contain such a restriction, nor does the Order Establishing Procedure, which merely provides the dates for filing direct and rebuttal testimony, without providing any definitional restrictions. Because the Commission's rules are silent on this issue, the Florida Rules of Civil Procedure control. Fla.R.Civ.P. 1.330(c) clearly provides that, "[a]t the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party."

Considering that Poag's deposition cannot be characterized as direct testimony but nevertheless is the proper subject of rebuttal, and that the Commission's Order Establishing Procedure requires rebuttal testimony to be reduced to writing and filed prior to hearing, Wireless One had no choice but to address Poag's deposition in Heaton's and Meyer's rebuttal testimony, lest it be precluded from addressing the matters presented therein.

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[1] Of course, much of Heaton's and Meyer's testimony of which Sprint complains does rebut Poag's direct testimony as elaborated on during deposition. This rebuttal testimony, delineated on Attachment B of this memorandum in opposition, is not objectionable and cannot be stricken.

VI. Conclusion.

Contrary to Sprint's assertions, Poag's deposition does not constitute direct testimony (Fla.R.Civ.P. 1.330(c)), was timely filed, may be introduced as evidence in Wireless One's case-in-chief (Fla.R.Civ.P. 1.330(a)(2)) and may be addressed by Wireless One's witnesses Heaton and Meyer in their rebuttal testimony (Fla.R.Civ.P. 1.330(c)). Accordingly, Wireless One respectfully requests that Sprint's motion to strike the deposition and related testimony be denied.

Respectfully submitted,

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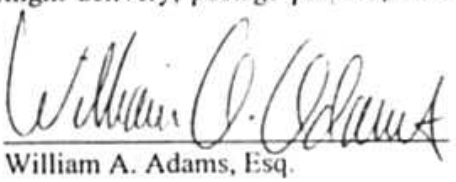
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was served upon the following persons by regular U.S. Mail or overnight delivery, postage prepaid, on this 13th day of November, 1997.



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Attachment A

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June 18, 1997

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Mr. Brooks Albery
Sprint-Florida, Inc.
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Altamonte Springs, FL 32716-5000

Re: Wireless One Interconnection Negotiations

Dear Mr. Albery:

This will confirm the discussions in the June 17, 1997 conference call with you, Alan Berg, Deb Terry, Betty Smith and Christine Carson for Sprint and Frank Heaton and me for Wireless One.

With regard to the reciprocal compensation bill and the 2B credit, Sprint will complete the process of analyzing the minute-of-use data in Frank Heaton's billing backup analysis which you received on June 10, 1997 and provide Wireless One with a specific written response by noon, Friday, June 20, 1997. We have scheduled a conference call for 3:00 p.m., Friday, June 20, 1997, in an effort to review your response and finalize these matters. We also will attempt to agree on a mechanism for calculating minutes for future reciprocal compensation billings.

With regard to SS7, Sprint agreed to provide us with the same arrangement provided to Palmer Wireless, Inc. in the interim agreement dated February 11, 1997. Specifically, Sprint agreed to waive the IX lease portion of the proposal previously sent to Frank Heaton from the STP to the Ft. Myers tandem for the duration of the Palmer interim agreement. You also agreed to check with your planning personnel to determine whether any plans exist to construct a new STP in Ft. Myers and to determine if month to month pricing is available for STP service.

With regard to the reverse charge option, Sprint disagreed with Wireless One's position outlined in my letter of June 11, 1997. Specifically, it is Sprint's position that the Telecommunications Act of 1996 and the FCC's Local Competition Order does not affect the relationship between Sprint and its customers. Rather, it only impacts the relationship between carriers. On that basis, you indicated that it is your intention to continue the reverse toll option charge of 5.88 cents/mou.

The logical consequence of your position is that Sprint must compensate Wireless One for all reverse charge option minutes of use terminating on Wireless One's network. Because all of the reverse charge option traffic is terminating on Wireless One's network at the Sprint Ft. Myers tandem and Wireless One is switching and transporting that traffic throughout its service area, Wireless One's switch is operating as a tandem and the higher Type 2A tariff rates must be paid to Wireless One until lower rates can be reached in these interconnection negotiations. Some state Commissions, like Ohio, have reviewed this issue and determined that, where a carrier's switch serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier is the incumbent LEC's tandem interconnection rate. See, e.g., *In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, PUCO Case No. 96-88-TP-ARB (Arbitration Award at 18). Frank Heaton be sending you his computations of this issue. Sprint agreed to respond to these issues during the conference call this Friday at 3:00 p.m.

Very truly yours,

William A. Adams

cc: James A. Dwyer
Frank Heaton

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ATTACHMENT B

The following segments of Heaton's and Meyer's testimony properly rebuts Sprint witness Poag's direct testimony as elaborated on during his deposition, is not objectionable and cannot be stricken.

WITNESS	DIRECT/REBUTTAL	TESTIMONY SEGMENT
Meyer	Rebuttal	p. 1, ll. 9-12 (beginning "This testimony…").
Meyer	Rebuttal	p. 2, ll. 6-21; pp. 7 -11 (all); p. 12, ll. 1-5.
Heaton	Rebuttal	p. 1, ll. 8-10 (beginning "In addition…" and ending "…FJH 1.9").
Heaton	Rebuttal	p. 2, ll. 20-21; p. 3, ll. 1-5.
Heaton	Rebuttal	p. 5, ll. 13-22; p. 6, ll. 1-3.
Heaton	Rebuttal	p. 7, ll. 21-22; p. 8, ll. 1-2 (ending "…end offices.")
Heaton	Rebuttal	p. 11, ll. 6-15 (beginning "In his deposition…"; ll 17-18 (ending "…tandem office"); p. 11, l. 22 - p. 12, l. 1 (beginning… "In essence…" ending "…This is wrong")