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**BEFORE THE PUBLIC SERVICE COMMISSION**  
**REBUTTAL TESTIMONY OF JOHN MONROE**  
**ON BEHALF OF MCIMETRO**  
**DOCKET NO. 011177-TP**  
**OCTOBER 25, 2001**

**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is John Monroe. My business address is 2520 Northwinds Parkway,  
Alpharetta, Georgia 30004.

**Q. HAVE YOU PREVIOUSLY FILED DIRECT TESTIMONY IN THIS DOCKET?**

A. Yes.

**Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

A. My rebuttal testimony responds to numerous points in the direct testimony of Mr. Clayton and Mr. Hunsucker.

**Q. ON PAGE 6 OF MR. HUNSUCKER'S DIRECT TESTIMONY, HE DISCUSSES SPRINT'S INTERPRETATION OF THE TERM "CONFLICT" AS IT IS USED IN THE CHANGE OF LAW PROVISION OF THE INTERCONNECTION AGREEMENT. DO YOU AGREE WITH HIS DISCUSSION?**

1 A. No, in several respects. Mr. Hunsucker does not elaborate on the significance of  
2 the use of the disjunctive “or” between “conflict with” and “unlawful” in the  
3 change of law provision. I infer from his discussion, however, that he believes  
4 my interpretation is that those terms must be applied together or that they mean  
5 the same thing. This is not the case. I agree with Mr. Hunsucker that the change  
6 of law provision is invoked if the change of law renders a contract provision  
7 **either** in conflict with the law **or** unlawful. I do not believe “conflict with” and  
8 “unlawful” mean the same thing, and I do not believe both conditions must be met  
9 to invoke the change of law provision.

10

11 Mr. Hunsucker also points to language in the “remedy” portion of the change of  
12 law provision to define the terms in the “rights” portion of the provision. The  
13 change of law provision establishes that there is a change of law for contract  
14 purposes if the change conflicts with or makes unlawful a section of the contract.  
15 The remedy, that is, the actions required by the parties if there is a change of law,  
16 is to amend the contract to be consistent with the law.

17

18 **Q. PLEASE ELABORATE ON THE SIGNIFICANCE OF MR.**  
19 **HUNSUCKER’S CONFUSION OF THESE TWO PARTS OF THE**  
20 **CHANGE OF LAW PROVISION.**

21 A. Apparently Sprint does not claim the change of law provision is invoked because  
22 a change in the law renders a portion of the contract unlawful, so I’ll confine my  
23 response to a change that creates a conflict. The parties agreed that if a change in

1 the law creates a conflict, the remedy, or action required of the parties, is to  
2 negotiate to amend the agreement to make the contract “consistent with” the law.  
3 The parties could have agreed to any of several other reasonable remedies, such as  
4 amending to resolve the conflict, or declaring the conflicting sections invalid.  
5 But, they did not. They agreed to amend to make the contract consistent with the  
6 law.

7  
8 This particular choice of remedies, however, in no way affects the definition of  
9 the words used to describe the conditions precedent to invoking the change of law  
10 provision. The contract must be in conflict with the law for the change of law  
11 provision to be invoked.

12  
13 **Q. MR. HUNSUCKER DEFINES “CONFLICT” TO MEAN**  
14 **“INCONSISTENT WITH.” IS THIS A VALID INTERPRETATION?**

15 A. No, it is not. It is a general rule of contract interpretation that words in a contract  
16 should be given their ordinary meaning. The contract uses the word “conflict,” so  
17 the parties should look to the ordinary meaning of the word “conflict” to  
18 determine its meaning. The word is used as a verb in the contract, and *Webster’s*  
19 *Ninth New Collegiate Dictionary* gives two definitions of “conflict” when used as  
20 a verb. One is labeled as archaic and has to do with warfare, which clearly does  
21 not apply in the interconnection agreement. The other definition is “to show  
22 antagonism or irreconcilability.” This latter definition is the definition that should  
23 be used to interpret the contract. As I stated in my direct testimony, the contract

1 conflicts with the law if it is impossible to obey the law and perform the contract,  
2 that is, if they are **irreconcilable**.

3

4 **Q. ON PAGE 7 OF HIS DIRECT TESTIMONY, MR. HUNSUCKER SAYS**  
5 **THAT YOUR DEFINITION OF “CONFLICTS WITH” MAKES THE**  
6 **PROVISION UNNECESSARY. DO YOU AGREE?**

7 A. No. In criticizing my definition of “conflicts with,” Mr. Hunsucker uses phrases  
8 different from what I said in my direct testimony. As an example, Mr. Hunsucker  
9 says that “it would be highly unlikely that any provision of the contract would  
10 ever be deemed unlawful and incapable of being provided.” Without commenting  
11 on whether I agree with him on that point, his statement has nothing to do with  
12 my definition of “conflicts with.” I do not use those words (i.e., unlawful and  
13 incapable of being provided), or any expressions with a similar meaning, to define  
14 “conflicts with.”

15

16 **Q. MR. HUNSUCKER ALSO SAYS THAT UNDER YOUR DEFINITION “NO**  
17 **DECISION BY THIS COMMISSION WOULD HAVE ANY EFFECT ON**  
18 **THE AGREEMENT UNLESS THE COMMISSION SPECIFICALLY**  
19 **STATED THAT THE PROVISION WAS UNLAWFUL.” IS THIS TRUE?**

20 A. Not at all. I do not understand the logic by which Mr. Hunsucker comes to this  
21 conclusion. I do not use the word “unlawful” in my definition of “conflicts with.”

22

1 Q. CAN YOU GIVE AN EXAMPLE OF WHY MR. HUNSUCKER'S  
2 CONCLUSION IS INCORRECT?

3 A. Yes, I will give a hypothetical example. Say that the Commission has a generic  
4 compensation docket, and in that docket the Commission orders that all LECs  
5 shall exchange traffic at 5 cents per minute. Say that the interconnection  
6 agreement sets the traffic exchange rate at 0.3 cents per minute. It is not  
7 necessary for the Commission to declare the exchange rate of 0.3 cents per minute  
8 to be unlawful. It is sufficient for the Commission to render its order as I  
9 described it. This is so because it would be impossible for the parties to obey the  
10 law by charging 5 cents per minute and to perform the contract by charging 0.3  
11 cents per minute. The contract would conflict with the Commission's order and  
12 the parties would have to amend the agreement to be consistent with the order.

13

14 Q. MR. HUNSUCKER MENTIONS ON PAGES 8 AND 9 OF HIS DIRECT  
15 TESTIMONY A SPECIFIC INSTANCE WHERE THE COMMISSION  
16 ISSUED AN ORDER SUPERSEDING EXISTING INTERCONNECTION  
17 AGREEMENTS. PLEASE COMMENT ON HIS STATEMENTS  
18 REGARDING THE APPLICATION OF YOUR DEFINITION OF  
19 "CONFLICTS WITH" TO THAT INSTANCE.

20 A. Once again, Mr. Hunsucker uses the word "unlawful" as a substitute for my  
21 definition of "conflicts with." As discussed earlier in this testimony, "unlawful"  
22 is a separate and distinct condition listed in the contract for invoking the change  
23 of law provision. I do not use that term in defining "conflicts with."

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Turning to Mr. Hunsucker’s example, the analysis is the same as in my hypothetical example. If the Commission order had required time frames different from those contained in the interconnection agreement, then the interconnection agreement would clearly conflict with the order. It would be impossible to obey the order (specifically requiring supersession of different time frames) and to perform the contract containing different time frames. Again, the parties would have to amend the contract under the change of law provision to make the contract consistent with the order.

However, Mr. Hunsucker's example is not a good one. The order he referenced specified 90-day and 60-day provisioning intervals for physical and virtual collocation, respectively. The interconnection agreement specifies 3-month and 2-month intervals. The ordered intervals and the contract intervals are virtually identical, so there is no conflict. The order he referenced also established intervals for processing collocation applications, a matter on which the agreement is silent. Since there are no time frames in the agreement to be superceded, it is possible to perform the contract and obey the order simply by applying the time frames specified in the order. While it might be convenient to amend the contract to include these additional time frames, their absence does not create a conflict that triggers the change in law provision.

1 **Q. ON PAGES 10-11 OF HIS TESTIMONY, MR. HUNSUCKER SAYS THAT**  
2 **THE CHANGE OF LAW PROVISION AS INTERPRETED BY**  
3 **MCIMETRO ALLOWS “MCIMETRO UNFETTERED DISCRETION TO**  
4 **REQUIRE SPRINT TO AMEND THE AGREEMENT TO ADOPT ONLY**  
5 **THOSE CHANGES THAT ARE FAVORABLE TO MCIMETRO, WHILE**  
6 **FOREVER FORECLOSING SPRINT FROM INCORPORATING THOSE**  
7 **CHANGES THAT MIGHT BE FAVORABLE TO SPRINT.” IS THIS**  
8 **ACCURATE?**

9 A. Of course not. In both preceding examples, my hypothetical and Mr. Hunsucker’s  
10 example, the parties would be required under the change of law provision to  
11 amend the contract to make it consistent with the law. This is true regardless of  
12 which party benefited from the outcome.

13  
14 **Q. MR. HUNSUCKER STATES THAT THERE IS LIMITED BUSINESS**  
15 **RISK TO MCIMETRO BY TERMINATION OF THE EXISTING**  
16 **AGREEMENT. HOW DO YOU RESPOND?**

17 A. I believe Mr. Martinez will address the business aspects of Mr. Hunsucker’s  
18 statement. From a legal standpoint, however, I would say that Mr. Hunsucker’s  
19 statement is irrelevant. In the context of contracts generally, there is no legal  
20 basis for a one party to terminate a contract unilaterally because it believes the  
21 risk to the other party for doing so is small. In the context of interconnection  
22 agreements, it would be a very curious thing indeed to give ILECs the power to  
23 terminate the agreements based on the ILEC’s, or even the Commission’s,

1 determination that the risk to the ALEC was small. The purposes of the Act and  
2 the entire interconnection agreement negotiation/arbitration system are to foster  
3 competition and to prevent ILECs from using their monopoly power to stifle  
4 competition. This purpose would be frustrated in its entirety if ILECs could  
5 terminate agreements they believed were not valuable to ALECs.

6

7 **Q. MR. HUNSUCKER LISTS SEVERAL CHANGES IN THE LAW AND**  
8 **WHY HE BELIEVES THE CONTRACT OUGHT TO BE AMENDED. DO**  
9 **YOU HAVE A REPLY?**

10 A. Yes. Let me begin with some general comments regarding Mr. Hunsucker's  
11 discussion.

12

13 Mr. Hunsucker devotes some of his discussion to what can be described as policy  
14 or equitable arguments in favor of amending the agreement. If the parties were in  
15 arbitration, asking the Commission to determine what the change of law provision  
16 ought to be, Mr. Hunsucker's discussion on policy and equity might be  
17 appropriate. In this case, the MCImetro is asking the Commission to enforce the  
18 agreement as already executed by the parties. Sprint is trying to escape the terms  
19 of the contract it agreed to by asking the Commission to reform the contract,  
20 applying policy and equitable principles, but Sprint has not made a case for doing  
21 so.

22



1 Q. PLEASE RESPOND TO THE SPECIFIC CHANGES OF LAW CITED BY  
2 MR. HUNSUCKER.

3 A. I have already discussed some of the changes Mr. Hunsucker mentions, so I will  
4 not address them all. I will, however, comment on a few of Mr. Hunsucker's  
5 points.

6

7 Definition of Combinations

8 On page 15 of his testimony, Mr. Hunsucker criticizes the definition of  
9 "combinations" used in the interconnection agreement. The definition in the  
10 contract is "provision by Sprint of two (2) or more connected Network Elements  
11 ordered by MCIIm to provide its Telecommunications Services in a geographic  
12 area or to a specific subscriber and that are placed on the same order by MCIIm."

13

14 Mr. Hunsucker somehow interprets this definition to require Sprint to combine  
15 any elements MCIIm places on the same order. I do not see how Mr. Hunsucker  
16 comes to that conclusion. This is a definition, not a contractual obligation. In  
17 order to fit the definition of a combination, the combined elements must be on the  
18 same order. But, this is a far cry from constituting a requirement for Sprint to  
19 combine elements. The definition of combinations is not changed by the law.

20

21 Quality of Service

22 On page 17 of his direct testimony, Mr. Hunsucker cites changes to the "superior  
23 quality" rules. By his own testimony, Mr. Hunsucker admits that the contract

1 requires that interconnection be “equal in quality to or better than” what Sprint  
2 provides for itself. And, the law now requires that interconnection be “at a level  
3 of quality that is at least equal in quality” to what an ILEC provides itself. Not  
4 only does the contract not conflict with the law, the contract is not even  
5 inconsistent with the law.

6

7 OS/DA Services

8 On page 18, Mr. Hunsucker notes that FCC regulations require ILECs to provide  
9 operator services and directory assistance on an unbundled basis to only those  
10 areas where the ILEC does not provide customized routing. Mr. Hunsucker goes  
11 on to note that the interconnection agreement does not contain this limitation. I  
12 should mention that, to my knowledge, Sprint has not claimed that it provides  
13 customized routing in Florida. Because Sprint has never taken Mr. Martinez up  
14 on his suggestions that Sprint propose amendments, I do not know what Sprint’s  
15 position is regarding its provision of customized routing. I do know, however,  
16 that I have been involved in the past few weeks in the negotiation of an  
17 interconnection agreement between Sprint and Intermedia in Florida. In the  
18 language proposed by Sprint to Intermedia, Sprint lists operator services and  
19 directory assistance as unbundled network elements, without limitation.

20

21 Collocation

22 Mr. Hunsucker cites several FCC and Commission collocation orders generically,  
23 and states that the interconnection agreement conflicts with these orders. I have

1 not attempted to compare these orders to the agreement on a section by section  
2 basis, so I cannot address Mr. Hunsucker's comments directly. I do, however,  
3 reiterate Mr. Martinez' suggestion that Sprint propose whatever amendments it  
4 would like to make the agreement.

5  
6 Mr. Hunsucker also mentions the FCC's Fourth Report and Order regarding  
7 collocation. That order became effective contemporaneously with the filing of  
8 MCImetro's complaint in this case, so I assume that Mr. Hunsucker is not citing  
9 the order as justification for Sprint's termination of the agreement. Again, I have  
10 not compared that order to the agreement, as Mr. Hunsucker cites no sections of  
11 the contract that conflict with specific provisions of the order. MCImetro will,  
12 however, consider any amendments to the agreement that Sprint proposes based  
13 on the order.

14

15 Interference

16 On page 22 of his direct testimony, Mr. Hunsucker says that Section 4.1.1 of  
17 Attachment III of the agreement states that if MCImetro uses a loop to provide a  
18 service that interferes with other services the parties will mutually agree upon a  
19 process to resolve the issue. He goes on to say that this provision conflicts with  
20 the law. It does not conflict with the law, because it is possible to obey the law  
21 and perform the contract, simply by agreeing to use the process stated in the  
22 FCC's regulations.

23

1           Advanced Services Deployment

2           Also on page 22, Mr. Hunsucker says that “certain provisions of the Agreement  
3           conflict with the FCC’s advanced services deployment rules.” Without a citation  
4           to the contract and to the rules, I cannot reply to Mr. Hunsucker’s statement.

5

6           ISP Remand Order

7           Finally, on pages 22-23 of his testimony, Mr. Hunsucker cites the FCC’s ISP  
8           Remand Order. The ISP Remand Order, by its own terms, does not apply to  
9           current interconnection agreements unless the change of law provision is invoked.  
10          The Order also does not affect compensation between the parties unless the ILEC  
11          offers to exchange all traffic under the terms of the Order. Sprint explicitly has  
12          told us that it has not made that offer in Florida. The Order, therefore, does not  
13          apply to our interconnection agreement with Sprint, and it is misleading for Sprint  
14          to suggest otherwise.

15

16   **Q.   MR. HUNSUCKER ASKS THE COMMISSION TO ORDER THE**  
17           **PARTIES TO NEGOTIATE A NEW AGREEMENT TO REPLACE THE**  
18           **EXISTING AGREEMENT. IS THERE ANY BASIS FOR THIS**  
19           **REQUEST?**

20   **A.**   No. Even if Sprint is correct, that the change of law provision is properly invoked  
21          by one or more of the items raised in Mr. Clayton’s letter, the action required by  
22          the interconnection agreement is for the parties to negotiate amendments. Sprint  
23          does not provide an explanation of by what legal basis the Commission would

1 order a renegotiation, and I am not aware of one. The only explanation Sprint  
2 provides for renegotiation is that “Sprint believes it is prudent...because of the  
3 numerous, material and comprehensive changes that have occurred....” Without  
4 addressing the accuracy of that statement, the statement does not describe a set of  
5 facts that constitute a reason for a state commission to order the termination of an  
6 interconnection agreement.

7  
8 The parties have a valid interconnection agreement. The most that is required if  
9 the change of law provision is invoked is an amendment – not complete  
10 replacement of the contract.

11

12 **Q. MR. CLAYTON DISCUSSES A NOTICE OF BREACH AND A NOTICE**  
13 **OF TERMINATION SENT BY SPRINT TO MCIMETRO. DID SPRINT**  
14 **PROVIDE MCIMETRO WITH PROPER NOTICE OF BREACH AND**  
15 **PROPER NOTICE OF TERMINATION?**

16 **A.** No. Section 14 of Part A of the interconnection agreement provides for specific  
17 processes to be followed to provide notice under the agreement. In order to be a  
18 proper notice, Sprint must send the notice to MCImetro’s official address in  
19 Vienna, Virginia, with a copy to the general counsel in Washington, DC. Mr.  
20 Clayton's own exhibits (Exhibits JC-7 and JC-8) show that Sprint’s “notices”  
21 were not sent to those addresses as specified in Section 14 of Part A.

22

1 **Q. HAS SPRINT PROVIDED PROPER NOTICE TO WORLDCOM OR ITS**  
2 **AFFILIATES IN OTHER CONTEXTS?**

3 A. Yes. Sprint clearly is aware of notice provisions in other contracts. Just this  
4 week, I received a copy of a notice Sprint served on our general counsel for an  
5 unrelated contract. I can only assume that Sprint was aware of the notice  
6 provision in our interconnection agreement, and did not intend for Mr. Clayton's  
7 letters to be proper notice.

8

9 **Q. MR. CLAYTON REQUESTS THAT THE COMMISSION ORDER**  
10 **MCIMETRO TO OPT INTO THE SPRINT/XO INTERCONNECTION**  
11 **AGREEMENT. DO YOU HAVE ANY COMMENT?**

12 A. Yes. Mr. Clayton's suggestion is wholly outside the bounds of the law. The  
13 Commission is empowered by the Act to hear arbitrations of interconnection  
14 agreements, and to enforce provisions of those agreements, but there simply is no  
15 legal authority for the Commission to order MCImetro to opt into the  
16 interconnection agreement of a third party.

17

18 **Q. DOES THE COMMISSION HAVE INDEPENDENT STATE LAW**  
19 **AUTHORITY TO ISSUE SUCH AN ORDER?**

20 A. No, and it is not necessary to analyze Florida law to reach that conclusion. The  
21 federal Act gives ALECs the right to request interconnection and to negotiate an  
22 interconnection agreement, with an additional right of arbitration if negotiations  
23 are not completely successful. Any state law that purports to give a state

1           commission authority to order an ALEC to opt into a third party agreement would  
2           deprive the ALEC of its right under the federal law to negotiate its own  
3           agreement. In that case, the state law is preempted by the federal law under the  
4           supremacy clause of the U.S. Constitution.

5

6   **Q.    DOES THAT CONCLUDE YOUR TESTIMONY?**

7   **A.    Yes.**