State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: January 9, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (T. BROWN)
OFFICE OF THE GENERAL COUNSEL (DODSON, KNIGHT)

RE: DOCKET NO. 020099-TP - COMPLAINT OF ALEC, INC. FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH SPRINT-FLORIDA, INCORPORATED AND REQUEST FOR RELIEF.

AGENDA: 01/21/03 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: PLEASE ADDRESS ISSUE 5 IMMEDIATELY FOLLOWING ISSUE 1.

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020099.RCM

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CASE BACKGROUND

On February 5, 2002, ALEC, Inc. f/k/a Metrolink (ALEC), a subsidiary of Duro Communications Corp., filed a complaint against Sprint-Florida, Inc. d/b/a Sprint (Sprint) requesting relief and enforcement of the current Interconnection Agreement between ALEC and Sprint. On March 4, 2002, Sprint filed its response to ALEC's complaint. The parties' agreement at issue here was submitted to this Commission in Docket No. 010877-TP and went into effect by operation of law on September 20, 2001.

By Order No. PSC-02-0594-PCO-TP, issued May 1, 2002 (Order Establishing Procedure), this matter was scheduled for an administrative hearing on August 7, 2002. A prehearing conference was held on July 22, 2002.

The Commission held a hearing on August 7, 2002. Sprint filed its post-hearing brief on September 9, 2002, and ALEC filed its post-hearing brief on September 10, 2002 after receiving leave from the Commission to file its brief late.

Included in the parties' post-hearing briefs were positions on seven issues. Staff notes that one of those, Issue 3, was withdrawn by the parties. Issue 3 addressed what minute-of-use (MOU) charges are applicable for the transport of Sprint-originated traffic from the POI to ALEC's switch. In addition, staff adds Issue 6 to the recommendation in order to address whether the docket should be closed or remain open.

DISCUSSION OF ISSUES

ISSUE 1: Does the Commission have jurisdiction in this matter?

RECOMMENDATION: Yes. Pursuant to Section 252(e) of the Telecommunications Act of 1996, the Commission approved the Agreement between ALEC, Inc. and Sprint-Florida, Incorporated. As such, the Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, and Section 364.162(1), Florida Statutes. **(Dodson, Knight)**

POSITION OF THE PARTIES

ALEC: The Commission's jurisdiction in this matter arises from the express terms of the Agreement, Florida Statutes and federal law. In this particular dispute, the Commission must apply settled principles of contract construction and interpretation, which favor ALEC's positions.

SPRINT: The Commission has jurisdiction to resolve disputes concerning interconnection pursuant to s.364.162(1), F.S. In exercising its jurisdiction the Commission must act consistent with applicable state law and controlling Federal law, including the 1996 Telecommunications Act and FCC regulations and orders issued pursuant to the Act.

STAFF ANALYSIS: Pursuant to Section 252(e) of the Telecommunications Act of 1996, the Commission approved the agreement between ALEC, Inc. and Sprint-Florida, Incorporated. As such, the Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) (state commissions' authority under the Act to approve agreements carries with it the authority to enforce agreements).

Further, the Commission held in Order No. PSC-02-0484-FOF-TP, issued April 8, 2002 in Docket No. 001097-TP, that the Eleventh Circuit Court of Appeals' decision in BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 278 F.3d 1223, (2002), can be distinguished because this Commission has explicit authority under Section 364.162, Florida Statutes, "to arbitrate any dispute regarding interpretation of the interconnection or resale prices and terms and conditions." Staff notes that rehearing was granted in the above decision, and the order was

vacated by BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 297 F.3d 1276 (2002).

ISSUE 2: Under the terms of the Parties' Interconnection Agreement, what are the appropriate dedicated transport charges for transport facilities used to transport Sprint-originated traffic from the POI to ALEC's switch?

ISSUE 2A: Has ALEC applied the correct methodology to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

ISSUE 2B: Has ALEC applied the correct rate to calculate the appropriate recurring and nonrecurring dedicated transport charges to Sprint for such facilities?

STAFF RECOMMENDATION: No, ALEC did not use the correct methodology or rates to calculate the appropriate recurring and nonrecurring dedicated transport charges it billed Sprint. ALEC's practice of billing multiple times for the same underlying facilities is duplicative and should not be permitted. Sprint's methodology and the rates contained in the Agreement should apply. **(T. Brown, Dodson, Knight)**

POSITION OF THE PARTIES

ALEC:

ISSUE 2: The appropriate dedicated transport charges are recurring charges for DS-1 *and* DS-3 facilities, and installation charges for DS-0, DS-1 *and* DS-3 services.

ISSUE 2A: Yes. ALEC has applied the correct methodology to calculate the appropriate recurring and non-recurring transport charges owed by Sprint. ALEC has correctly determined that the appropriate dedicated transport charges include recurring charges for DS-1 and DS-3 facilities, and nonrecurring charges for DS-0, DS-1, and DS-3 services.

ISSUE 2B: Yes. ALEC charged Sprint the correct rate for both recurring and non-recurring transport charges owed by Sprint. The appropriate rates are the lease cost rate for DS-3 recurring charges, the Agreement rate for DS-1 recurring charges, and the ALEC price list for all nonrecurring charges.

SPRINT:

ISSUE 2: The appropriate dedicated transport charges for transport facilities used to transport Sprint-originated traffic to ALEC's switch are Sprint's transport rates as set forth in the parties' Agreement. Such charges are applicable to reciprocal compensation for local traffic only.

ISSUE 2A: No. ALEC is incorrectly assessing Sprint nonrecurring charges for DS-0s, DS-1s and DS-3s when the correct nonrecurring charge is for the installation of DS-1 facilities only. ALEC is incorrectly assessing Sprint a recurring charge for both DS-1 and DS-3 facilities when the correct charge is for DS-1 facilities only.

ISSUE 2B: No. ALEC has billed Sprint rates from ALEC's price list for installation of the dedicated facilities, in violation of the Agreement. In addition, ALEC is billing Sprint recurring rates for interLATA transport of traffic that is not subject to reciprocal compensation under the terms of the parties' Agreement.

STAFF ANALYSIS: Issues 2, 2A, and 2B address the appropriate methodology and rates applicable to Sprint for transport of Sprint-originated traffic from the POI to ALEC's switch. Accordingly, this issue addresses how ALEC should determine the recurring and nonrecurring dedicated transport charges for transporting Sprint-originated traffic from the POI to ALEC's switch. In regard to recurring charges, the parties dispute whether it is appropriate to charge for the service that rides on a facility (DS-1 lines that comprise a DS-3) in addition to the facility itself (DS-3). The parties also disagree as to whether ALEC is permitted to charge Sprint the actual lease cost of facilities used for such transport in addition to Sprint's dedicated interconnection transport rate.

In regard to nonrecurring charges, the parties dispute whether Sprint fully compensates ALEC for DS-0 installation. In particular, the parties dispute whether ALEC is permitted to charge its price list rate or if it is limited to the rates contained in the parties' Interconnection Agreement. The parties also disagree whether Sprint owes reciprocal compensation for certain calls involving customers in two different LATAs where ALEC purchases transport from a third-party vendor to complete the call.

Much of the testimony overlapped or combined all three issues; therefore, staff found it beneficial to set forth a combined recommendation relating to these issues.

ALEC

ALEC witness McDaniel asserts that the parties' Interconnection Agreement sets forth the terms and conditions by which the parties interconnect their networks and exchange traffic. (TR 28) Witness McDaniel contends that the Agreement provides that traffic originated by Sprint has been viewed by the parties as "ISP-bound" traffic. (TR 28) The witness states, "[u]nder the Agreement, both ALEC and Sprint hand off such traffic to the other Party at an 'established' point of interconnection ("POI")." (TR 28) According to witness McDaniel, the Agreement also provides for compensation for termination and transport of Sprint-originated traffic. (TR 28-29) Although the dispute as to the minutes-of-use charge applicable to Sprint-originated traffic was resolved through a settlement agreement, witness McDaniel argues that the transport charge remains at issue. (TR 29) Witness McDaniel states

> [t]here are two elements to transport charges. First, ALEC, like Sprint, charges the other carrier a one-time installation fee to ready ALEC facilities for use by Sprint to transport that traffic. Second, ALEC assesses a recurring, monthly charge for each circuit used to transport that traffic. (TR 29)

Witness McDaniel asserts that ALEC assesses Sprint a monthly unit charge for each DS-1 and DS-3 facility ordered. (TR 30) The witness states, "[t]o compute the total charge, the charge for each type of facility is multiplied by the number of facilities ordered for that month in each Sprint tandem and then the dollar amount totals for DS1s and DS3s for each month are added." (TR 30) The witness argues that the Agreement also governs the level of ALEC's transport charges. (TR 30) Specifically, the witness points to Section 2.2.3 of Attachment IV of the Agreement, which provides that if ALEC provides 100% of an interconnection facility via a lease from a third party, ALEC may charge Sprint for the proportionate amount of such facilities. (TR 30; EXH 2, pp.119-120) Section 2.2.3 of the interconnection agreement provides:

> If CLEC provides one-hundred percent (100%) of the interconnection facility via lease of meet-point circuits

between Sprint and a third-party; lease of third party facilities; or construction of its own facilities; CLEC may charge Sprint for proportionate amount based on relative usage using the lesser of:

2.2.3.1 Sprint's dedicated interconnection rate;

2.2.3.2 Its own costs if filed and approved by a commission of appropriate jurisdiction; and

2.2.3.3 The actual lease cost of the interconnection facility. (EXH 2, pp.119-120)

Witness McDaniel notes that ALEC leases DS-3 lines from Time Warner Telecom (Time Warner) to provide transport for Sprint-originated traffic from the Sprint designated POI in Winter Park to ALEC's switch located in Maitland, Florida. (TR 62). Witness McDaniel also notes that ALEC purchases multiplexing from Time Warner so that traffic delivered by Sprint at the DS-1 level can be transported at DS-3 levels. (TR 63, 69) According to the witness, the recurring charges for such facilities are controlled by Section 2.2.3 of the Interconnection Agreement. (TR 30, 47)

Witness McDaniel alleges that the Agreement contains confusing pricing options, whereby ALEC may charge the lesser of "Sprint's dedicated interconnection rate; its own costs if filed and approved by a commission of appropriate jurisdiction; and the actual lease cost of the interconnection facility." (TR 30; EXH 2, pp.119-120) The witness contends that ALEC provided 100% of the facilities in dispute here by leasing facilities from Time Warner. (TR 62) These facilities provide transport for Sprint-originated traffic from the Sprint designated POI in Winter Park, to ALEC's switch in Maitland. (TR 62)

Witness McDaniel asserts Section 2.2.3 of the Interconnection Agreement entitles ALEC to charge Sprint the actual cost of the facilities leased from Time Warner plus the lesser of Sprint's dedicated interconnection rate or ALEC's price list, for both the DS-3s leased from Time Warner and for each DS-0 that comprises the DS-3 facility. (TR 30-31, 47; EXH 2, pp.119-120) According to witness McDaniel, Sprint's interpretation of the agreement, that limits ALEC to charging only Sprint's dedicated interconnection rates, is wrong because the interconnection agreement has an "and" rather than an "or" between 2.2.3.2 and 2.2.3.3. (TR 30-31, 47; EXH

2, pp.119-120) Assuming, arguendo, that the agreement is ambiguous on whether ALEC is entitled to charge actual lease costs, ALEC argues in its brief that the agreement should be construed against Sprint the drafter, and the lease costs should be allowed. (BR at 7)

In its brief, ALEC also cites Section 2.4.1.2 as being relevant to the cost recovery for these facilities. (BR at 6) Section 2.4.1.2 of the agreement provides:

> When Sprint terminates calls to CLEC's subscribers using CLEC's switch, Sprint shall pay CLEC for transport charges from the POI to the CLEC switching center for dedicated transport. Sprint shall also pay to CLEC a charge symmetrical to its own charges for the functionality actually provided by CLEC for call termination. (EXH 2, p.120)

ALEC contends that while Section 2.4.1.2 of the Agreement governs cost recovery, Section 2.2.3 governs only cost allocation. (BR at 6)

Addressing the recurring charges, that ALEC billed Sprint, witness McDaniel states:

> [w]ith respect to DS3 facilities, ALEC billed Sprint the actual lease cost of the interconnecting facilities, reasoning that this was the least cost available to charge that would allow ALEC to recoup its costs of providing such facilities. (The Agreement appears to grant ALEC the opportunity to add Sprint's dedicated rate or ALEC's tariffed rate to ALEC's actual lease cost, but ALEC chose to interpret the contract to mean that ALEC should charge Sprint only the actual lease cost incurred by ALEC.) With respect to DS1 facilities, ALEC billed Sprint at the agreement rate, an amount listed in the Agreement at Attachment I, Table One, Transport Bands, because the rate was the least costly applicable rate. (TR 30-31)

For nonrecurring dedicated transport charges, witness McDaniel indicates that Sprint is assessed a ". . . one-time charge for [the] installation of each facility." (TR 33) According to the witness, this charge includes:

> . . . a small access order fee for each order, an installation fee for each DS3 circuit (with a substantially higher price to the first DS3 circuit), an installation fee for each DS1 circuit (with a substantially higher price to the first DS1 circuit), and a charge for each Feature Group D trunk ("FGD" or "DS0") installation (again, with a substantially higher price for the first FGD trunk). (TR 33)

ALEC witness McDaniel states "[a] separate installation charge is warranted because separate identification and signaling continuity tests are required for each of the 24 FGD trunks within each DS1 trunk." (TR 33-34) He goes on to assert that billing for both elements is not uncommon, noting that BellSouth is billed for both and has paid such charges. (TR 34, 48-49, 51)

Witness McDaniel asserts that to determine the total charges, one needs to do the following:

> . . . add the access order charge, the first DS1 charge, the first FGD trunk installation charge, the product of the number of additional DS1 circuits multiplied by the lower additional DS1 price, then the product of the number of additional FGD trunk installations multiplied by the lower additional FGD trunk installation price. (TR 34)

The witness continues by stating,

> . . . the Agreement does not contain a separate provision governing DS0 charges in the reciprocal compensation pricing section but does have a DS0 install charge in the transport pricing section. ALEC therefore charged Sprint for each DS0 pursuant to ALEC's Florida price list. Specifically, the facility installation charges contained in Florida Public Service Commission Tariff No. 2 - Access, First Revised Page 3. Sections 3.2 ("High Capacity DS1") and 3.3 ("Signaling Connection") of ALEC's price list address both DS1 and DS0 installation. This price list was filed with, and approved by, the Commission (on January 14th, 2001 and January 15th, 2001). (TR 34-35)

In regards to ALEC's use of its price list rates for non-recurring charges, witness McDaniel argues such a policy is justified by Part B, Section 1.4 of the contract. (TR 47) Witness McDaniel contends Part B, Section 1.4 of the contract allows either party to substitute tariff rates when they conflict with the Agreement. (TR 47; EXH 2, p.14) Witness McDaniel asserts that by not containing a rate for DS-0 installation, the Agreement conflicts with ALEC's tariffs, and therefore ALEC's decision to use its price list rates for such service is proper. (TR 34, 52-53) According to witness McDaniel, BellSouth has paid for both DS-0 and DS-1 installations for the same routes, and therefore such a practice is consistent with industry practice. (TR 34, 48-49, 50-51)

Furthermore, witness McDaniel believes that use of ALEC's price list rates ensure that ALEC recoups all the costs of installing circuits for Sprint's use. (TR 32, 150) ALEC witness McDaniel testified that it takes approximately 2 hours to perform the signaling and continuity testing necessary to install a DS-0 line, and at $100 an hour, ALEC's prices are reasonable. (TR 149) In its brief, ALEC characterized the use of its price list rates for non-recurring costs as a simple application of Section 2.3 of the Agreement. (BR at 14) Witness McDaniel contends ALEC's price list rates are the lowest cost choice of any alternative because Sprint does not have a rate, and Time Warner does not assess any non-recurring charges. (TR 30-31, 118; BR at 14)

Witness McDaniel asserts that Sprint's methodology is incorrect. (TR 36) He contends that the agreement provides that the rates be "filed and approved by a commission of appropriate jurisdiction." (TR 36) The witness states, ". . . there is no requirement under the Agreement that ALEC's tariffed rate for nonrecurring dedicated transport charges be established in a formal Commission proceeding." (TR 36) Witness McDaniel argues that the tariff rates at issue here are based on rates found in BellSouth's Florida Access Service Tariff, specifically E6.8.1.A.2(a) and E6.8.1.F.2(a), pages 108 and 110 of the tariff, respectively. (TR 39, 131)

Responding to Sprint's allegations that the amount ALEC pays Time Warner is much lower than the amount ALEC claims it is billed, ALEC asserts that Sprint is incorrect. Instead, ALEC witness McDaniel states this is simply a billing error on the part of Time Warner. (TR 69, 91, 117) Witness McDaniel contends that ALEC will

eventually have to pay Time Warner the full amount, approximately $3,600 per month. (TR 74-75, 87) In support, witness McDaniel submitted an updated invoice from Time Warner in the form of a late-filed exhibit. (EXH 10)

In response to Sprint's argument that 47 C.F.R. § 51.711 requires any rates charged by ALEC to be symmetrical to Sprint's rates, ALEC contends that 47 C.F.R. § 51.711 only applies to minute of use charges and not nonrecurring charges. (TR 128-131; BR at 15-16, 19) ALEC also contends that Sprint witness Cox's testimony regarding DS-0 installation being covered by the MOU reciprocal compensation rate, should be discounted because it is inconsistent with the confidential settlement between ALEC and Sprint regarding Issue 3. (EXH 7; BR at 18)

ALEC witness McDaniel also asserts that Sprint has improperly refused to pay reciprocal compensation for certain traffic that involves customers located in two separate LATAs. (TR 53, 163-164) Witness McDaniel asserts that such calls, while not usually local, should be considered local for reciprocal compensation purposes because ALEC purchases transport and the call terminates where the transport begins. (TR 53-54, 162) Furthermore, witness McDaniel argues the calls should be local for reciprocal compensation purposes because their NXX code routes them locally, and they are rated as local when dialed by a Sprint customer. (TR 34, 163-164) Additionally, witness McDaniel notes that Sprint does not have to perform additional work above and beyond what is required to complete a traditional local call, and therefore from Sprint's perspective the call is local for reciprocal compensation purposes.

Sprint

Sprint witness Felz asserts that the Agreement prohibits ALEC from applying recurring charges based on actual lease costs for facilities used to transport Sprint-originated traffic from the POI to ALEC's switch. (TR 193, 199) Witness Felz argues the correct rate for ALEC to charge for such transport is Sprint's dedicated interconnection rate. (TR 193, 199; EXH 2, p.44) Specifically, Attachment 1, Section 3.1 states that "[t]he rates to be charged for the exchange of Local Traffic are set forth in Table 1 of this Attachment and shall be applied consistent with the provisions of Attachment IV of this Agreement."(EXH 2, p.32; TR 193) He contends that Attachment IV, Section 2.4.1.2 sets forth that, when Sprint

customers terminate traffic to the CLEC's customers, ". . . Sprint shall pay CLEC for transport charges from the POI to the CLEC switching center for dedicated transport" along with the symmetrical per minute reciprocal compensation rates for the functionality actually provided by CLEC for the call termination. (EXH 2, p.120; TR 193)

Witness Felz argues that Attachment IV, Section 2.2 describes in detail the compensation schemes for the transport charges from the POI to the CLEC switching center. (EXH 2, pp.119-120; TR 193) Witness Felz notes that this section also distinguishes the transport charges based on which party provides the transport facility. (TR 193) He argues that Attachment IV, Section 2.2.3 governs this portion of the dispute because ALEC provides 100% of the interconnection facilities either through lease of third-party facilities or construction of its own facilities. Witness Felz states,

> [t]he Agreement provides that ALEC may charge Sprint for a proportionate amount of the transport facility based on relative usage, using 'the lesser of: Sprint's dedicated interconnection rate; the CLEC's own cost, if filed and approved by a commission of appropriate jurisdiction; and [or] the actual lease cost of the interconnection facility.' (emphasis by witness) (TR 193-194)

Under the three payment options for the dedicated transport, witness Felz asserts that the qualifier "lesser of" means that Sprint's dedicated transport rates are the highest rates that ALEC can charge Sprint for the non-recurring and recurring charges for the transport facilities (assuming that third-party lease rates are higher than Agreement rates). (TR 194) According to Sprint, even though the terms of the agreement are unambiguous in limiting ALEC to the least-cost alternative, ALEC has attempted to apply "creative construction" in an effort to use the highest cost choice of the agreement's three specified alternatives. (TR 194, 207-208)

According to witness Felz, ALEC's interpretation that the agreement that allows it to charge either Sprint's cost or ALEC's rates, plus the actual lease amount because the Agreement uses "and" before the third alternative is incorrect. He contends this interpretation completely ignores the structure of the section and its subordinate clauses. (TR 194, 207-208; BR at 21) In its post-hearing brief, Sprint asserts that the colon after the phrase

"lesser of" is followed by three clauses, paragraphs 2.2.3.1, 2.2.3.2, 2.2.3.3, with the first two followed by semi-colons and the last one ending in a period. (BR at 22) Sprint argues that commonly understood rules of grammar support that each of these paragraphs is of equal weight and that the three options are meant as an alternative to each other. (Id.) In addition, witness Felz asserts that he believes "or" and "and" may have the same meaning, or at least be interchangeable. (TR 231) Therefore, Sprint believes ALEC should only be allowed to charge Sprint's dedicated interconnection rate. (TR 193, 199)

Witness Felz asserts that the largest portion of the disputed amounts billed by ALEC involves the erroneous, multiple non-recurring charges for the installation of the dedicated transport interconnection facilities. (TR 194, 196) Witness Felz contends that ALEC is charging non-recurring charges to Sprint for three installations for each trunk (or call path) pursuant to a document that ALEC calls "ALEC Florida Tariff No. 2 - First Revised Page 3." (TR 195) Witness Felz states,

> [b]asically, ALEC's billing logic works like this: First, ALEC has charged Sprint (the first time) a non-recurring charge to install a DS3 circuit, which Sprint did not order, between the parties. Next, ALEC has charged Sprint non-recurring charges for each of the DS1's derived from that DS3. Finally, ALEC has charged Sprint non-recurring charges for multiple DS0's derived from each of the DS1's. (TR 195)

Witness Felz states, "[t]his billing scheme defies common logic." (TR 195) He asserts that if the industry were to follow ALEC's methodology, there would never be a circuit ordered above a DS-0 or Voice Grade level. (TR 195) Witness Felz argues that ALEC is charging Sprint three separate times for each transmission channel. (TR 195)

Furthermore, witness Felz contends that since ALEC did not file its own cost study or submit its actual lease rates, Sprint's dedicated transport non-recurring and recurring charges are the appropriate rates. Sprint's non-recurring and recurring rates from Attachment 1, Table 1, are the rates that should apply for the non-recurring installation charges and the monthly recurring charges. (EXH 2, p.44) Witness Felz asserts that instead of the rates outlined in Attachment 1, ALEC appears to have billed Sprint rates

from ALEC's Florida price list for the interconnection facilities' installation and monthly recurring charges. (TR 194) Moreover, Sprint witness Cox contends that these rates are BellSouth rates and should be deemed irrelevant. (TR 210, 259)

In the event this Commission decides ALEC is allowed to charge something other than Sprint's dedicated interconnection rate for recurring charges associated with transport, Sprint argues that ALEC pays Time Warner significantly less than what ALEC claims it pays to lease transport services. (TR 119) In support of this claim, Sprint points to Exhibit 3, which includes among other things a series of bills from Time Warner to ALEC showing that ALEC has only been charged a multiplexing fee for the lines leased from Time Warner to transport Sprint traffic. (TR 69)

Witness Felz goes on to argue that irrespective of the particular rates used, there is no justification for ALEC to bill Sprint for both the DS-3 and DS-1 facilities. (TR 195-196) He contends that Sprint delivers its end-user-originated traffic to the agreed upon POI at the DS-1 level. For purposes of this complaint, witness Felz contends that the agreed upon POI is the Time Warner collocation space in the Winter Park access tandem building. (TR 195) In describing how Sprint-originated traffic is handled, witness Felz states:

> Sprint delivers its end user originated traffic to Time Warner's facilities at the DS1 level using standard DS1 jumpers. Time Warner then transports the traffic to ALEC using its facilities. Sprint's responsibility for delivering the traffic to ALEC is at the Sprint and industry standard DS1 level between the POI and ALEC's switch. ALEC is entitled to carry its traffic at something other that the DS1 level, however, this is not under the control of Sprint and Sprint should not be subject to multiple billings for the same service. (TR 195-196)

As such, witness Felz states, "[t]here is no justification for billing twice for the same service . . . ." (TR 196) Accordingly, Sprint maintains that the appropriate rates to be charged for the transport function are as discussed in the Parties' Agreement. (TR 196)

Sprint witness Felz also objects to ALEC charging Sprint a non-recurring fee based on ALEC's price list for installation of new lines. (TR 208-212, 214-215) As discussed previously, witness Felz believes ALEC should not charge anything for DS-0 and DS-3 installation. (TR 209-210) While witness Felz does believe ALEC is entitled to charge for DS-1 installation, he believes ALEC is limited to the rates outlined in the Agreement and not ALEC's price list rate. (TR 207, 211, 251) Witness Felz contends that ALEC's price list rates are not based on ALEC's cost, not compliant with the terms of the parties' Agreement, and are inappropriate. (TR 214-216)

Further, witness Felz believes that ALEC's argument that Part B, Section 1.4, of the Agreement allows ALEC to charge its price list rate, is incorrect. (TR 52-53) Witness Felz points to the language in Part B, Section 1.4 which shows that Sprint's tariff is to control. (EXH 2, p.14) Even then, the Agreement only provides that in the event of a conflict, another price list shall become applicable. (Id.) According to witness Felz, there can be no conflict with the Agreement not having a rate for DS-0 installation because ALEC is compensated for DS-0 installations as part of the MOU reciprocal compensation it receives for terminating Sprint calls. (TR 254-256, 258) Sprint witness Cox also asserts that DS-0 installation is one of the costs included in the MOU reciprocal compensation charge that ALEC receives for terminating Sprint calls. (TR 254-256, 258)

Witness Felz contends that Attachment IV, Section 2.2.3 of the Agreement provides that the appropriate non-recurring charge for the installation of interconnection facilities is Sprint's dedicated interconnection rates from the Agreement, since those rates are lower than the rates charged by ALEC. (TR 196; EXH 2, pp.119-120) Non-recurring charges for dedicated transport are found in Attachment 1, Table 1, page 44. Witness Felz states that since

> Sprint delivers traffic to Time Warner (who Sprint understands to be the third party from whom ALEC leases the transport facility) at the industry standard DS1 level, Sprint should only be billed for the non-recurring charge for each DS1. Sprint's rates clearly do not include multiple installation charges for the installation of all of the circuits within a particular facility. Instead of charging for each DS0 in a DS1, and

> every DS1 in a DS3, Sprint charges a single installation charge for each facility. (TR 196)

Accordingly, witness Felz concludes that Sprint's prices and methodology should govern here. (TR 196)

Sprint witness Felz contends that 47 C.F.R. § 51.711 outlines the requirements for reciprocal compensation. (TR 197-199) According to witness Felz, that section specifically requires such compensation to be symmetrical, using the ILEC's rates unless certain circumstances are met. (TR 197-199) An example of a situation that would result in a waiver of the symmetry requirement is an ALEC proving to a state commission that its TELRIC cost of providing transport and termination exceeds the ILEC's cost. (TR 198-199) Sprint contends that since ALEC has made no such showing, it is unable to charge more than what Sprint does for the same services. (TR 198-199, 214-215)

In response to ALEC's claim that because BellSouth pays these same rates and charges, Sprint should as well, Sprint contends ALEC's relationship with BellSouth is not relevant. (TR 210, 214-215, 259) Sprint witness Felz states,

> [b]ecause I do not have knowledge of the interconnection agreement between ALEC and BellSouth, I cannot comment on whether ALEC's arrangement with BellSouth has any similarity to Sprint's arrangement with ALEC. I would simply reiterate that the Interconnection Agreement between ALEC and Sprint is the controlling document at issue in this dispute, and the arrangements that ALEC may have with other carriers is not relevant. (TR 210)

According to Sprint, even though ALEC's price list rates are based on BellSouth's intrastate access tariffs, there is no requirement that any such tariff be cost-based. Sprint witness Felz believes ALEC's price list rates are unreasonable, inappropriate, and excessive. (TR 214-216)

Sprint witness Felz also believes that ALEC improperly bills Sprint reciprocal compensation for certain calls that originate and terminate in two different LATAs. (TR 192) In its post-hearing brief, Sprint contends that because the originating and terminating points of such calls are not in the same LATA, it is not local and there is no obligation to pay reciprocal compensation. (BR at 28-

29) Sprint witness Felz asserts that it is the physical locations of the parties that matters, not the NXX code as ALEC claims. (Id.) Witness Felz contends it does not matter that ALEC purchases transport from another party because the call does not terminate where transport begins, but rather the physical location of the parties associated with the call. (Id.)

In support, Sprint provides several footnotes explaining that it is the physical locations of the parties to a call that matters for determining its status as local for reciprocal compensation purposes. (BR at 27-29) In particular, Sprint contends, "[i]n the generic reciprocal compensation docket, the Commission has ruled that for reciprocal compensation to apply, a call must physically terminate in the same local calling area as it originated." (BR at 28) In a footnote on the same page, Sprint asserts that ". . . [the] local calling area is consistent with the local calling area definition in the Agreement, at least as it relates to Sprint-originated traffic, which is 100% of the traffic that is the subject of this dispute." (Id.)

ANALYSIS

Interpretation/Construction of Section 2.2.3

Attachment IV, Section 2.2.3, of the Interconnection Agreement addresses the appropriate rates for recurring charges, providing that,

> [i]f CLEC provides one-hundred percent (100%) of the interconnection facility via lease of meet-point circuits between Sprint and a third-party; lease of third party facilities; or construction of its own facilities; CLEC may charge Sprint for proportionate amount based on relative usage using the lessor of:
>
> 2.2.3.1 Sprint's dedicated interconnection rate;
> 2.2.3.2 Its own costs if filed and approved by a commission of appropriate jurisdiction; and
> 2.2.3.3 The actual lease cost of the interconnection facility. (EXH 2, pp. 119-120)

Absent any ambiguities, the actual language used in the agreement is the best evidence of the intent of the parties, and the plain meaning of the language controls. Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So. 2d 738, 739 (Fla. 3d DCA 1989). In interpreting the agreement, the Commission should first look to the plain language of the agreement. Thayer v. State, 335 So. 2d 815, 816 (Fla. 1976)("To determine the... intent we look to the plain language..."). If the plain language of the agreement is ambiguous, then the Commission can resolve the ambiguity utilizing principles of contract interpretation. Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199 (Fla. 1st DCA 1975). See also Barakat v. Broward County Housing Authority, 771 So. 2d 1193, 1195 ("where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document.").

While staff agrees with ALEC that the agreement would be clearer had it used "or" instead of "and," staff believes the agreement clearly indicates that ALEC is entitled to charge Sprint the least costly of the three listed items. (TR 30) Also see Queen v. Clearwater Electric, 555 So. 2d 1262, 1265, n. 4 (Fla. 4th DCA 1989), citing Land & Lake Ass'n v. Conklin, 182 A.D. 546, 170 N.Y.S. 427, 428 (1918) ("And" may sometimes be construed as "or.") and Capital City Bank v. Hilton, 59 Fla. 215, 223 (Fla. 1910) ("It frequently happens that the word "and" means "or," and will be so construed by the court in order to carry out the intention of the parties.") Further, the ending words of the introductory paragraph, "using the lessor of," followed by the use of semicolons at the end of each subsection clearly indicates only one of the three options may be chosen.

Even if, arguendo, the contract was not clear on its face, a reasonable interpretation of a contract is preferred to an unreasonable one. In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953), the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, for the following general proposition concerning contract construction:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two

> constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

According to ALEC's interpretation of Section 2.2.3, ALEC could have chosen all three alternatives, acting as if the semicolons were commas. This would be an unreasonable interpretation, particularly in light of the words "the lessor of" in the introductory paragraph. Further, since each subparagraph contains a means by which ALEC can recover its costs, allowing the use of more than one subparagraph would allow ALEC to recover more than its costs.

Therefore, staff recommends that ALEC should only be allowed to charge Sprint the dedicated interconnection rate contained in the parties' Interconnection Agreement, which is the least-cost option.

Recurring Charges

Staff believes ALEC's distinction between a transport facility and the interconnection service that rides on the facility is without merit. Staff believes that ALEC's billing practice is analogous to buying a 12-pack of cola and in addition, being charged again for each individual can that made up that 12-pack. ALEC witness McDaniel testified that such billings were standard industry practice, and are currently billed to and paid by BellSouth. (TR 34, 48-49, 51) Despite ALEC's argument, staff believes ALEC's billing practice is irrational. As such, staff is persuaded by the testimony of Sprint witness Felz that to claim such a practice is industry standard, "defies common logic." (TR 195)

According to Sprint, it never ordered any DS-3 facilities from ALEC. (TR 205, 209, 237-238) In fact, ALEC admits that DS-3 facilities were not ordered by Sprint. (TR 94) In addition, Sprint witness Cox contends that Sprint should not be billed for DS-3s because Sprint has paid for those facilities through DS-1 charges. (TR 280) Witness Felz states,

> Sprint would order the facilities at the DS-1 level in multiples of DS-1, and that is the only way Sprint has ordered with ALEC. We have not ordered a DS-3 . . . (TR 237-238)

At hearing, witness Felz agreed that at some threshold, it may make sense for a carrier to deploy a DS-3 instead of a DS-1 for cost efficiency purposes. (TR 238-239) However, he later went on to state that based on the current billing arrangements, " . . . there wouldn't be any cost efficiencies." (TR 247) He goes on to state,

> [o]ur position is that ALEC has billed two different charges for the same facilities. First they billed the DS-3 charge for the facility, and then they have billed 24 DS-1s for each and every - - I'm sorry, 28 DS-1s for each one of those DS-3s. So there are multiple charges for what is one facility . . . (TR 247)

Like witness Felz, Sprint witness Cox also asserts that it is inappropriate for Sprint to be assessed recurring charges for both the DS-1 and DS-3 rates simultaneously. (TR 257) He states,

> [t]he rates listed in the signed interconnection agreement between Sprint and ALEC for DS-1 and DS-3 dedicated transport are listed as individual or stand alone rates. In other words, the DS-1 rate recovers its cost of the SONET terminals and the fiber facilities. The DS-3 rate recovers its portion of the SONET terminals and fibers individually also. Applying and billing Sprint both rates associated with the same dedicated transport route would essentially reflect a double recovery mechanism. (TR 257)

He goes on to state,

> Sprint is in agreement with the monthly recurring billing associated with the DS-1s at the DS-1 rate specified in the agreement and has paid ALEC for those. However, it is not appropriate to bill Sprint the duplicative DS-3 rates for the same route that Sprint is currently paying ALEC DS-1 rates for. (TR 258)

Additionally, witness Felz notes that Sprint delivers its traffic to ALEC at the industry standard DS-1 level. Witness Felz

contends that "ALEC is entitled to carry its traffic at something other than DS1 level, however, this is not under the control of Sprint and Sprint should not be subject to multiple billings for the same service." (TR 195-196) Staff agrees. On the other hand, ALEC witness McDaniel asserts that this is not billing twice for the same service. (TR 49) Witness McDaniel states, "[t]his ignores, however, that both facilities are used to provide the service." (TR 49) Witness McDaniel purports that the billing arrangement merely attempts to recompense ALEC ". . . for all expenses involved in the provisioning of that single transport service." (TR 49) Staff, however, sees no compelling reason to force Sprint to pay for something that it never ordered.

Staff believes that ALEC should only be permitted to charge Sprint for the transport facilities at the level ordered, in this case DS-1, rather than aggregating them and billing for an additional facility which was never ordered.

Non-recurring Charges

Staff notes the non-recurring charges for the installation of DS-1s and the underlying DS-0s contained within, while somewhat analogous, present several key differences. Sprint witness Felz disagrees that each DS-0 contained in a DS-1 needs separate signaling and continuity testing in addition to the DS-1 line itself. (TR 209) Witness Felz believes that " . . . a separate charge is unwarranted for these functions because the costs for these switch-related functions are included in Sprint's end office switching rate element, not in the non-recurring charge associated with transport facilities that ALEC has attempted to apply." (TR 209) However, ALEC witness McDaniel believes that separate charges are necessary. (TR 48)

Agreeing with witness Felz, Sprint witness Cox also testified that compensation for charges associated with DS-0 installation are included in the minute of use reciprocal compensation charges. (TR 254-256) Witness Cox states, "Sprint is in agreement that ALEC should be compensated for this function and has developed its per minute-of-use rate with this intent." (TR 259) This position is repeated by witness Felz when he contends that DS-0 activation functions are included in the end-office switching rate element. (TR 214, 226) As such, Sprint's position is that a separate rate is not appropriate, and has not been included in the agreement. (TR

210, 226) Further, Sprint asserts in its post-hearing brief that the minute-of-use charge found in the interconnection agreement is higher than the minute of use charge found in the ALEC/BellSouth agreement, thus explaining why BellSouth pays separately for DS-0 installation. (BR at 18) Staff agrees with Sprint that the installation charges are appropriately recovered through the MOU charges. (TR 254-256, 258).

ALEC contends that because there is no nonrecurring DS-0 rate listed in the contract, ALEC is entitled to charge Sprint ALEC's price list rate. (TR 30-31, 34-35, 58, 118) Witness McDaniel claims, ". . . ALEC is unable to use the Agreement for rates because the Agreement contains no rate for DS0 charges." (TR 52) Witness McDaniel states that Section 1.4 of the General Terms and Conditions of the Agreement provides that "should there be a conflict between the terms of this agreement and any such tariffs and practices, the terms of the tariff shall apply." (TR 53; EXH 2, p.14)

According to ALEC witness McDaniel, it is ALEC's belief that ". . . the lack of a key rate, the DS0 rate, to be a conflict that causes the ALEC's price list rate to control." (TR 53) Staff disagrees, noting that Section 1.4 provides,

> 1.4 The services and facilities to be provided to CLEC by Sprint in satisfaction of this Agreement may be provided pursuant to Sprint tariffs and then current practices. Should there be a conflict between the terms of this Agreement and any such tariffs and practices, the terms of the tariff shall control to the extent allowed by law or Commission order. (emphasis added)(EXH 2, p.14)

Based on Section 1.4, staff believes that Sprint's tariff applies as the default, not ALEC's tariff as witness McDaniel alleged. Staff notes that even then, Sprint's tariff would only apply in the event of a conflict. If a tariff other than Sprint's was to apply as a "default," staff believes specific reference to ALEC's tariff or an alternative would have been included. ALEC witness McDaniel appears to recognize this when he states ". . . it does not specify ALEC," while commenting on whether Section 1.4 addressed the ALEC's price list or tariff at the hearing. (TR 126)

ALEC appears to believe that because no DS-0 rate was referenced in the Agreement, it is entitled to apply a rate of its own choosing. Staff disagrees with ALEC's contention, and notes that it appears as if the non-recurring charge for DS-0 specifically references "NA." (TR 258) If the parties had intended a rate for the activity, staff believes that one would have been posted. Similarly, if the parties had contemplated using rates from a different price list or tariff, staff believes that specific reference to the document would have been made. However, neither occurred. Instead, the parties addressed the charge through the use of "NA." As witness Cox points out, ". . . it means it is not applicable." (TR 258) Staff agrees.

Staff is also troubled by ALEC's assertion that the Agreement, specifically Section 1.4, permits ALEC to arbitrarily manipulate the Agreement's price list rate. (TR 34, 52-53) As staff noted above, the agreement makes explicit mention of Sprint's tariffs, not ALEC's. This very fact was acknowledged by ALEC witness McDaniel. (TR 126) Furthermore, staff is particularly perplexed by ALEC's decision not to charge the agreement rate for DS-1 installation, when it recognizes there is such a rate. The fact that the Agreement references "NA," and contains no DS-0 installation rate, only bolsters Sprint's claims that such charges are included in the MOU rates for reciprocal compensation. (TR 254-256, 258)

Staff notes there was a great deal of testimony on the "reasonableness" of ALEC's rates. ALEC claims that Sprint's rates do not allow it to recover all the costs it incurs installing dedicated transport lines for Sprint traffic. (TR 52, 150) On the other hand, Sprint asserts that ALEC's charges are excessive. (TR 214-216) Staff believes such testimony is of little value here. The rates and the agreement are what they are. The posture of this docket involves a breach of contract, not a generic policy or rate setting proceeding. Furthermore, staff recognizes that this agreement is a voluntary adoption. (TR 61) As such, staff believes the parties are entitled to the benefit of their bargain, and that there is no need to examine the "reasonableness" of the terms in this instance. As such, staff recommends that ALEC only be allowed to charge Sprint the rates for nonrecurring charges provided for in the Agreement. Accordingly, staff recommends that all charges based on ALEC's price list be disallowed.

Symmetry (47 U.S.C. 51.711)

Even though the issue of symmetry was only discussed briefly in the record, staff addresses it for purpose of clarification here. Staff notes that the relevant subparts of §51.711 state:

> **§51.711 Symmetrical reciprocal compensation.**
>
> (a) Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).
>
> (1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.
>
> . . .
>
> (b) A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in 51.505 and 51.511 of this part, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

ALEC witness McDaniel contends that this section only applies to MOU charges, not other recurring charges. (TR 128-131) Staff disagrees with ALEC, noting that there do not appear to be any restrictions on the application of symmetrical rates according to the First Report and Order. (Order FCC 96-325, ¶1069) Instead, ¶1069 appears to apply to ". . . costs associated with the transport and termination on each carrier's network facilities . . . ."

Sprint witness Felz contends that the provisions of the Agreement are consistent with §51.711. (TR 197) Witness Felz asserts that the rates should be symmetrical, using ILEC rates unless an exception applies. (TR 197-199) Staff agrees. In Order FCC 96-325, the FCC stated "[i]f a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate." (¶1089) In this case, ALEC has not made such a demonstration.

Reciprocal Compensation for InterLATA Calls

The parties also dispute whether or not Sprint owes reciprocal compensation for certain calls involving customers in two different LATAs where ALEC purchases transport from a third-party vendor to complete the call. (TR 53, 163-164) ALEC witness McDaniel argues that such calls should be considered local for reciprocal compensation purposes because they are completed using a third-party vendor who transports the call from Sprint's tandem switch located in the same LATA that the call originated, to ALEC's switch in a separate LATA. (TR 53-54, TR 162) ALEC witness McDaniel argues that such calls from Sprint's perspective terminate at the tandem switch where ALEC purchases transport, making them a local call for reciprocal compensation purposes. Additionally, witness McDaniel notes that such calls should be treated as local because they contain local NXX codes, and Sprint bills such calls as local calls to customers who dial them. (TR 54, 163-164)

Staff notes that in order to be eligible for reciprocal compensation, calls must originate and terminate in the same LATA. In Order No. PSC-02-1248-FOF-TP, Docket No. 000075-TP, this Commission held that it is the physical end points of a call that determine whether a call is local for the purposes of reciprocal compensation, not NXX codes. The Commission held that,

> We believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. We believe this is true regardless of whether a call is rated as local for the originating end user (e.g., 1-800 service is toll traffic even though the

originating customer does not pay the toll charges). (Order No. PSC-02-1248-FOF-TP, p.30)

Staff believes that ALEC's argument that such calls terminate where the transport begins is erroneous. While it is true that from Sprint's perspective the same amount of work is required to complete this call as a traditional local call, the same could be said of all interLATA calls. Using ALEC's logic, every regular long distance call would be considered local because it uses third-party transport to cross LATA boundaries. Therefore, staff recommends that ALEC is not entitled to reciprocal compensation under the circumstances addressed above.

CONCLUSION

ALEC did not use the correct methodology to calculate the appropriate recurring and nonrecurring dedicated transport charges it billed Sprint. ALEC's practice of billing multiple times for the same underlying facilities is duplicative and should not be permitted. Sprint's methodology and the rates contained in the Agreement should apply.

ISSUE 3: Under the terms of the Parties' Interconnection Agreement, what minute-of-use charges are applicable for the transport of Sprint-originated traffic from the POI to ALEC's switch?

STAFF RECOMMENDATION: The parties have withdrawn this issue. Thus, no vote is necessary on this issue. **(T. Brown)**

POSITION OF THE PARTIES

ALEC: The parties have withdrawn this issue.

SPRINT: This issue has been WITHDRAWN.

STAFF ANALYSIS: The parties withdrew this issue prior to hearing.

ISSUE 4: Has Sprint paid ALEC the appropriate charges pursuant to the terms of the Parties' Interconnection Agreement?

STAFF RECOMMENDATION: Yes. Based on staff's recommendation in Issues 2, 2A and 2B, and its analysis here, staff believes that Sprint has paid ALEC all sums appropriately due according to the terms of the interconnection agreement. **(T. Brown)**

POSITION OF THE PARTIES

ALEC: No. Sprint has underpaid ALEC the appropriate charges pursuant to the term of the Parties' Interconnection Agreement.

SPRINT: Yes. Sprint has paid ALEC undisputed amounts for the dedicated transport portion of the reciprocal compensation charge pursuant to the parties' Agreement.

STAFF ANALYSIS:

ALEC

ALEC witness McDaniel contends that Sprint has paid ALEC only $45,389.50 of the $1,009,245.35 that ALEC assessed for transport services rendered during the period described in the Complaint. (TR 55) According to witness McDaniel, that amount represents less than five percent of the amount billed. (TR 55) The witness also notes that Sprint paid ALEC an additional $78,601.38 on May 22, 2002.(TR 55) However, witness McDaniel notes that ALEC believes that Sprint intended much of the latter sum to apply to other time periods, rather than exclusively to the period in dispute.(TR 55) ALEC asserts in its post-hearing brief that calculating the exact amounts owed is made difficult because the most recent payments from Sprint to ALEC do not provide itemization stating clearly to which time periods, and to which facilities, the payments apply. (BR at 19-20)

ALEC witness McDaniel states,

> . . . it appears that Sprint has paid for a major portion of the recurring costs for the DS-1s, but not for the DS-3s. Similarly, a portion of the DS-1 installs has been paid at the Agreement rate not the tariff rate, but no DS-0 or DS-3s installs have been paid. (TR 55)

ALEC witness McDaniel believes that all amounts invoiced to Sprint for the April 2001 to January 2002 period are due and payable to it because of Sprint's failure to dispute these billed amounts. (TR 55-56) Alternatively, should the Commission believe separate rulings are necessary on whether each charge for each facility is due, and at what rates, ALEC suggests in its post-hearing brief that because Sprint has not provided ALEC with an accounting of its most recent payments, the Commission should designate the applicable charge categories and the appropriate payment level for each. (BR at 20) ALEC asserts that such an approach should allow the Parties to easily calculate any and all additional amounts owed by Sprint to ALEC. (Id.) An example of these rates can be found in the ALEC's brief at page 20, reproduced in Table 4-1 below.

Table 4-1: ALEC's Proposed Rate Chart

RECURRING	ALEC CHARGE	SOURCE
DS-3	$3,698.82/mo. (includes tax)	Ex. 5 and 10
DS-1	$71.95/mo.	Agreement, p. 71
NON-RECURRING		
Ordering Charge (per order)	$81.00	ALEC FL PSC No. 2 Access, First Revised Page 3
DS-3	$870.50 Initial/ $427.88 Additional	ALEC FL PSC No. 2 Access, First Revised Page 3
DS-1	$866.97 Initial/ $486.83 Additional	ALEC FL PSC No. 2 Access, First Revised Page 3
DS-0	$915.00 Initial/ $263.00 Additional	ALEC FL PSC No. 2 Access, First Revised Page 3

Source: ALEC Brief of the Evidence, p.20, filed September 9, 2002.

Sprint

According to Sprint, the appropriate rates that ALEC should be billing Sprint for providing dedicated transport of Sprint's traffic from the POI in Winter Park to ALEC's switch in Maitland, are the rates set forth in the Agreement in Table 1. (EXH 2, pp.35-77). Those rates are $79.80 in nonrecurring charges per DS-1, and $71.95 in monthly recurring charges for each DS-1. (Felz TR 199;

EXH 2, pp.44, 71) Witness Felz argues that Sprint has paid the full amount of these charges for the time period that is the subject of this dispute: a total of $123,990.88, which is the amount due and owing for the DS-1 facilities provided at the rates set forth in the Agreement.(TR 200) Witness Felz believes that the amount ". . . satisfies all outstanding balances for the non-recurring and recurring charges to date." (TR 200) The undisputed amounts paid by Sprint were calculated based on the nonrecurring and recurring charges set forth in the Agreement for the dedicated DS-1 transport provided by ALEC to Sprint from April 2001 through January 2002.

ANALYSIS

Staff addresses this issue in combination with Issue 2 because it poses the same essential question, whether Sprint owes ALEC under the interconnection agreement, only in greater detail. Staff notes, however, that even though it believes Sprint has paid ALEC all sums due under the Interconnection Agreement, if this Commission were to reject staff's recommendation regarding the methodology and rates charged by ALEC, Sprint would owe ALEC a varying amount depending on the Commission's decision regarding staff's recommendation.

CONCLUSION

Based on staff's recommendation in Issue 2, 2A and 2B, and its analysis here, staff believes that Sprint has paid ALEC all sums appropriately due according to the terms of the interconnection agreement.

ISSUE 5: Did Sprint waive its right to dispute charges because it did not properly follow applicable procedures outlined in the Parties' Interconnection Agreement?

PRIMARY RECOMMENDATION: Yes. Primary staff believes that taking the language of the agreement as a whole, Sprint has waived its right to dispute ALEC's charges for April, May, June, and July 2001, under Section 21.2 of the Agreement. Sprint failed to properly notify ALEC of its billing dispute, and ALEC has not waived any provision, including Section 21.2, of the Agreement. Although the audit provisions of the contract are otherwise available to Sprint, those provisions are inapplicable here as Sprint failed to request an audit within the appropriate time frame such that the audit would cover the time period in dispute here. **(Knight)**

ALTERNATIVE RECOMMENDATION: No. Alternative staff believes that while Sprint did not adhere to the letter of the dispute resolution procedures as outlined in the agreement, Sprint does appear to have substantially performed its obligations and did not waive its right to dispute charges rendered by ALEC for April, May, June, and July 2001. **(T. Brown, Dodson)**

POSITION OF THE PARTIES

ALEC: Yes. Sprint waived its right to dispute charges at least with respect to bills covering the April, May, June and July 2001 period by not following the dispute and notification procedures in the Agreement.

SPRINT: No. Sprint informed ALEC that it was disputing its inappropriate and excessive billing and the reasons for this dispute upon receipt and review of ALEC's initial bill for reciprocal compensation charges. Sprint has paid the amounts not disputed, as required by the parties' Agreement.

STAFF ANALYSIS: This issue concerns whether Sprint waived its right to dispute invoices sent by ALEC for April, May, June, and July of 2001 by failing to comply with the dispute resolution procedures outlined in the Agreement.

ALEC

dispute an invoice. (TR 41) Section 21.2 of the Agreement provides:

> If any portion of an amount due to a Party ("the Billing Party") under this agreement is subject to a bona fide dispute between the Parties, the Party billed (the"Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give written notice to the Billing Party at the address(es) indicated in Article 17 herein of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying Party shall pay when due all undisputed amounts to the Billing Party, and shall include a copy of the dispute with the payment of the undisputed amounts. The balance of the Disputed Amount, after the necessary adjustments have been made for the disputed amounts found in CLEC's favor, shall be paid with late charges, if appropriate, upon final determination of such dispute. (EXH 2, p.27)

According to the witness, Sprint failed to meet the notice requirements of Section 21.2 in the instant dispute; therefore, Sprint has waived its right to contest the amounts currently in dispute before this Commission. (TR 42-43)

Witness McDaniel asserts that ALEC sent Sprint invoices containing charges for facilities and services provided during the April through July 2001 period on July 12, 2001. (TR 42). ALEC notes Sprint witness Felz stated that Sprint received these invoices on July 18, 2001. (TR 240). According to ALEC, because 30 days had passed without hearing anything from Sprint regarding the invoice, ALEC called Sprint asking to discuss the invoice and payment. (TR 154-155, 182) On August 20, 2001, several days after ALEC's call and two days after the 30-day deadline to dispute the invoices, ALEC witness McDaniel contends that Sprint responded to ALEC via e-mail. (TR 42) That e-mail stated:

> At this time payments are being processed on Gietel invoices: T200107-3, T200108-3, T200107-2 and T200108-2. I will be disputing T200107-1 and T200108-1. You stated that these charges were to recoup Gietel's cost of meeting Sprint at the POI and per attachment 4, Section

> 2.1. Each party is responsible for bringing their facilities to the POI. . . .
>
> As for Metrolink. [sic] I have validated all of the DS-1's against the ASR's. We are issuing payment on the monthly recurring charges on all except the DS-3. I still need to validate that. I am disputing the invoices for installation charges because these rates should come from the interconnection agreement. (TR 42-43; EXH 3)

ALEC's position is that Sprint's e-mail is does not meet the notice requirements set forth in Section 21.2 of the Agreement for at least three reasons. First, ALEC argues that the e-mail was untimely. (TR 241) Second, the e-mail was not written notice and was not delivered to the address listed in Article 17 of the Agreement. (TR 242) Third, the e-mail does not include "the specific details and reasons for disputing each item" as required by Section 21.2. (TR 182) According to witness McDaniel, the e-mail sent by Sprint failed to explain the rationale for not making such payment, or was "cursory" at best.(TR 43) Witness McDaniel asserts that Sprint's explanation also failed to link it to any particular invoice. (TR 43) Moreover, in its brief, ALEC characterizes the e-mail as a general and unspecific "placeholder" designed to give Sprint more time outside the 30-day deadline. (BR at 23) The witness contends that such a tactic is not contemplated by the Agreement and must be rejected. (TR 57-59) Witness McDaniel also points out that ALEC received another e-mail from Sprint on October 23, 2001 indicating that Sprint does not bill for DS-0 installs so it was disputing ALEC's charges for that service. (TR 43) Based on the preceding, witness McDaniel argues that for the charges covering the months of April, May, June, and July 2001, Sprint waived its right to dispute the invoices and should be directed by the Commission to compensate ALEC for the full amount billed. (TR 57-59; BR at 23)

According to ALEC witness McDaniel, Sprint witness Felz's attempt to soften Sprint's breach by referencing other instances where Sprint has not held a CLEC to the 30-day deadline for notice is not supported by any corroborative evidence. (TR 241-242). By contrast, ALEC believes that it is not alone in trying to enforce the 30-day dispute deadline against Sprint and offers an e-mail as support. (EXH 11) In support, ALEC offers that another CLEC had advised Sprint that it had missed its window of opportunity to dispute an invoice due to untimely notice. (EXH 11; TR 224-225). As

was the case with ALEC, Sprint attempted to dispute a CLEC's invoice by e-mail some 21 days after the dispute deadline passed. The other CLEC promptly rejected Sprint's attempt, noting that by missing the 30-day deadline, "Sprint has forfeited its right to dispute this invoice." (EXH 11)

In conclusion, witness McDaniel asserts that Sprint witness Felz conceded that the e-mail dated August 20, 2001 was untimely, and was deficient as to form and delivery address, and substance as required by Section 21.2 of the Agreement. (TR 42-43, 56) Additionally, ALEC argues that witness Felz testified repeatedly that the terms of the Agreement should be afforded their plain meaning. (TR 222, 231). Therefore, witness McDaniel asserts that because Sprint failed to provide timely and proper notice to ALEC for the invoices covering April, May, June and July 2001, the Commission should find Sprint waived its right to dispute these charges. (TR 57-59; BR at 24)

Sprint

According to Sprint's brief, ALEC's view on this issue is unreasonable. Sprint asserts that it is ALEC's belief that even if the Commission determines that the charges billed by ALEC are not in compliance with the reciprocal compensation provisions of the Agreement or the FCC rules, Sprint must nevertheless pay the full amount billed by ALEC for the services. This is based on ALEC's position that Sprint did not provide written notice to ALEC within 30 days of receiving the bills containing the disputed amounts. (BR at 30) Sprint argues that its actions substantially complied with the dispute resolution provisions and, therefore, it acted properly in withholding payment. (TR 24; BR at 33) Sprint claims that under no circumstances did it intend to or act in a manner that would be construed as a waiver of its rights to enforce the reciprocal compensation provisions of the Agreement.(TR 24)

Sprint alleges that the Dispute Resolution provisions of the Agreement address when payment may be properly withheld. Section 5.4 of the Agreement provides that bills ". . . for which written, itemized disputes or claims have been filed are not due for payment until such disputes or claims have been resolved in accordance with the provisions governing dispute resolution of this Agreement." (EXH 2, p.18) Sprint argues in its brief that it believes that this provision appears to provide for a procedure by which the due date for disputed amounts is postponed until resolution of a dispute,

thereby suspending the collection procedures set forth in Section 5.6. (BR at 31)

Additionally, Section 6 of the Agreement authorizes either party to audit the services performed and amounts billed by the other party pursuant to the Agreement for the 12 months preceding the audit. (EXH 2, pp.19-20) Section 6.4 allows adjustments based on the audit findings to be applied to the 12-month period included in the audit. Sprint claims that this provision allows for refunds of improperly billed amounts whether or not such amounts were disputed within 30 days of the due date of the bill. (EXH 2, p.19) Sprint believes that this contradicts ALEC's assertion that Sprint's failure to comply in all technical respects with the process for disputing an invoice constitutes a "waiver" of Sprint's rights to challenge at a later time the propriety of the charges imposed by ALEC. (TR 24) Section 18.1 of the Agreement states,

> [n]o waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed. (EXH 2, p. 25)

Sprint believes that while it may not have technically complied with all of the provisions that allowed it to properly withhold payment of disputed amounts, it did not waive any of its rights to assert any substantive claim that ALEC's billing practices are in violation of the Agreement and federal law. (TR 24) In fact, Sprint argues that its actions to communicate its disagreement with ALEC's billing practices, while perhaps not strictly in compliance with the Agreement's provisions relating to whether such payment could be withheld legitimately, clearly demonstrate Sprint's assertion of its right to contest the billings. (TR 24) Sprint maintains in its brief that its actions substantially comply with the intent of the notice provisions. (BR at 30)

According to witness Felz, Sprint received the first bill from ALEC, representing billing for the months of April, May, and June 2001, on July 18, 2001. (TR 240) According to the witness, the invoices contained charges of approximately $500,000.(TR 241) Discussing the July 18, 2001 billing, witness Felz stated that the bills

> . . . included a significant number of charges that Sprint was not expecting, and Sprint could not determine what the rate that ALEC was billing - - the source or the rate that ALEC was billing us for. So I think that contributed to the delay. Again, its not a substantial delay, but I think that had bearing upon our ability to work through the invoices and understand what was being billed. (TR 241)

Witness Felz believes that ALEC had notice, in writing, of Sprint's disagreement with the bills no more than two days past the 30-day time frame specified in the Agreement. (TR 201, 212, 240-241) Sprint witness Felz contends that an e-mail notice is proper, stating,

> . . . e-mail has - - I think generally is an acceptable notification between companies now. It's a form of our normal business dealings, and e-mail is a very quick and efficient way for all of us to communicate and that would include notifications between customers and their suppliers. (TR 242)

He goes on to state,

> I believe that e-mail meets the requirements of the agreement. The agreement actually does not have any specific format or document template that is to be used. It does simply say that the dispute must be in writing and that it must provide details of the issues at hand in the dispute. (TR 243)

In support, witness Felz notes that it accepts e-mail notifications on matters such as this. (TR 242) In addition, Sprint asserts in its post-hearing brief that based on Mr. McDaniel's reference to a phone call made by ALEC prior to August 20, 2001, it is likely that ALEC had verbal notice of Sprint's intent to question the bills prior to the end of the 30-day period. (BR at 34, TR 154)

Sprint contends that although it did not transmit its notice to the individual listed in the Notice section of the Agreement, Sprint did substantially perform the requirements of the Dispute Resolution provision by providing written notice to the individual designated on ALEC's invoices as the appropriate contact person. (EXH 2, p.25; EXH 3; TR 201, 211-212) Sprint asserts that ALEC can

make no claim that it did not have actual notice of the current dispute, as evidenced by the numerous e-mails and other correspondence exchanged between the parties and the face-to-face meeting conducted to attempt to resolve the dispute. (EXH 3; TR 201, 212) In fact, Sprint argues that there is no question that, from a practical perspective, ALEC has been aware that Sprint disputed ALEC's bills since no later than August 20, 2001. (TR 201, 212, 42) Subsequent to that date, Sprint and ALEC exchanged multiple e-mails concerning Sprint's dispute of ALEC's charges, and ALEC witness McDaniel flew to Kansas City to meet with Sprint personnel in an attempt to resolve the dispute.(TR 155-156, 201, 212, 225-226; EXH 3) During these ongoing negotiations, witness Felz states ". . . Sprint and ALEC struggled to understand each other's logic." (TR 201) When negotiations between the parties eventually failed, ALEC filed an informal letter of dispute with the Commission on October 29, 2001. (EXH 8, DRM-1) In turn, Sprint responded to the informal dispute and discussions between the parties continued until ALEC filed the formal complaint that is the subject of this docket. (TR 201, 212)

In its post-hearing brief, Sprint asserts that any argument ALEC may make regarding the alleged harm caused by Sprint's failure to comply in all technical respects with the dispute notification provisions, is not supported by the facts. (BR at 35) Witness Felz asserts that despite an insubstantial delay, ALEC had notice within a matter of days that Sprint had no intention of paying ALEC's bills for the reasons previously cited. (TR 201, 212, 241)

PRIMARY STAFF ANALYSIS

The Agreement, at Section 17, provides:

> 17.1 Except as otherwise provided herein, all notices or other communication hereunder shall be deemed to have been duly given when made in writing and delivered in person or deposited in the United States mail, certified mail, postage prepaid, return receipt requested and addressed as follows:
>
> If to Sprint: Sprint Director-Local
> Carrier Markets
> 6480 Sprint Parkway
> KSOPHMO316-3B774
> Overland Park, KS 66251

If to CLEC: James Puckett
ALEC Inc.
1211 Semoran Blvd
Suite 295
Casselberry, FL 32707

With a Copy to: Norman B. Gerry
Gerry, Friend, and Sapronov, LLP
Three Ravina Drive
Suite 1450
Atlanta, GA 30346

17.2 If personal delivery is selected to give notice, a receipt of such delivery shall be obtained. The address to which notices or communications may be given to either party may be changed by written notice given by such Party to the other pursuant to this Article 17. (EXH 2, p.25)

Immediately thereafter, Section 18.1 states:

No waiver of any provision of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed. (EXH 2, p.25)

Finally, Section 24.1 appears to reinforce and expand the above provision, by stating:

No provision of this Agreement shall be deemed waived, amended or modified by either party unless such waiver, amendment of modification is in writing, dated, and signed by both Parties. (EXH 2, p.28)

Sprint witness Felz admits to the untimely delivery of what Sprint purports to be notice of its dispute of ALEC's bills. He states, "I would say it's [Sprint's e-mail notification to ALEC] probably 2 days late." (TR 240) However, Sprint believes that not complying with every part of the notice requirement does not rise to the level of waiving its right to dispute the charges levied by ALEC. Alternatively, Sprint believes that the notice as sent constituted substantial performance, thereby preserving its substantive rights. Alternative staff disagrees.

Substantial performance has been defined by the court as " . . . performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price." National Constructors v. Ellenberg, 681 So. 2d 791, 793 (Fla. 3rd DCA, 1996). The question is whether the e-mail sent by Sprint is nearly equivalent to what was bargained for in the contract? Section 17.1 calls for the communication to have been given in writing and delivered in person or by United States mail, certified mail, postage prepaid, return receipt requested. (EXH 2, p.25) It appears that the e-mail sent, albeit in writing, fails to meet any of the criteria of means of delivery specified by the contract. The Section further specifies that such delivery is to be made to a particular individual, James Puckett, at the prescribed address. A copy of the communication was to be sent by the same means as the original, to another individual, Norman B. Gerry, at his specified address. The e-mail also fails to satisfy these requirements of the contract. Sprint notes that it did send the e-mail to the person listed on the bills, but even this action seems contrary to Section 17.2 of the contract. This section contemplates changing the notification address by written notice, pursuant to Section 17. There is no evidence of ALEC having provided an alternate address such as an e-mail address for the dispute of bills, pursuant to Section 17, and Sprint's unilateral decision to use an alternate address does not comport with the contract.

Sprint appears to also argue that Section 18.1 essentially forgives its non-compliance, by stating that "no waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the party against whom such waiver or consent is claimed." Thus, said Sprint, it did not waive any of its rights to assert any substantive claim that ALEC's billing practices are in violation of the Agreement and federal law. Primary staff finds this argument disingenuous.

By arguing in support of the language of Section 18.1, Sprint actually bolsters ALEC's position. Rather than serving to preserve Sprint's right to assert a substantive claim, staff believes this language plainly means that for a provision of the contract to be waived or for a default under the contract to be consensual, there must be approval in writing by the party against whom such waiver or default is claimed. Sprint's argument would result in a waiver of the provisions of Section 21.2. ALEC has provided no such

waiver or consent to default of any provisions of its contract with Sprint as contemplated by Section 18.1. Primary staff believes this language serves notice to both parties that they will be held to the letter of the contract. As such, primary staff believes that Sprint has not met the burden of substantial compliance in giving ALEC proper notice of its dispute of ALEC's billing, pursuant to Section 21.2 of the Agreement.

However, primary staff believes that Sprint and ALEC have agreed to an alternative means of disputing bills under Section 6 of the Agreement. This section allows either party, upon 30 days written notice, to perform an audit of the twelve months preceding the request, with payments or credits to be applied within 30 days of a final audit report. (EXH 2, pp.19-20) Primary staff believes this effectively serves as a "back door" for either party to challenge the validity of the other's billing whether or not the initial dispute period is met. Although this dispute covers a time period which falls outside that covered by the auditing provision in the Agreement, primary staff believes that this provision is available to Sprint as a means to challenge the validity of ALEC's billing, when and where appropriate.

Primary staff believes that taking the language of the agreement as a whole, both parties were put on notice that no provision of the contract would be waived without prior consent in writing. Sprint failed to substantially comply with Section 21.2. Thus, without a waiver pursuant to Section 18.1, primary staff recommends that Sprint has waived its right to use the billing dispute provisions of Section 21.2 of the Agreement. Had Sprint properly notified ALEC that it was disputing the bills, or had Sprint requested an audit within 12 months of the period in question, then Sprint would have complied with the requirements necessary to dispute the billing, and the proper adjustments outlined in other sections of this recommendation would be available for Sprint's relief. Primary staff emphasizes that it believes this relief is not available to Sprint here because it failed to properly notify ALEC of its billing dispute, and ALEC has not waived any provision, including Section 21.2, of the agreement. Sprint also failed to request an audit within the appropriate time frame such that the audit would cover the time period in dispute here.

CONCLUSION: Primary staff believes that taking the language of the agreement as a whole, Sprint has waived its right to dispute ALEC's

charges for April, May, June, and July 2001 under Section 21.2 of the Agreement. Sprint failed to properly notify ALEC of its billing dispute, and ALEC has not waived any provision, including Section 21.2, of the Agreement. Although the audit provisions of the contract are otherwise available to Sprint, those provisions are inapplicable here as Sprint failed to request an audit within the appropriate time frame such that the audit would cover the time period in dispute here.

ALTERNATIVE STAFF ANALYSIS

The relevant portion of Section 21.2 of the Agreement, which outlines the notice requirements, provides:

> If any portion of an amount due to a Party ("the Billing Party") under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the "Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give written notice to the Billing Party at the address(es) indicated in Article 17 herein of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. (EXH 2, p.27)

Both parties agree that Sprint did not comply with the exact terms of this dispute resolution clause. Alternative staff notes that while there is disagreement over whether the e-mail was proper and whether it provided the specific details and reasons for the dispute, as required, there can be no dispute that it was untimely and not delivered as required by the agreement. In fact, Sprint witness Felz explicitly stated, "I would say it's [Sprint's e-mail notification to ALEC] probably 2 days late." (TR 240) Even though Sprint did not comply with every part of the notice requirement, witness Felz states "[t]he consequences of not notifying within the 30 days, in my reading of the agreement, are not spelled out, and they certainly don't go to the level of waiving - - any party waiving their rights to dispute the charges by virtue of not responding within the 30 days." (TR 222) In the alternative, Sprint believes that the notice it sent to ALEC constituted substantial performance, thereby negating waiver of its substantive rights. Alternative staff agrees. (BR at 33)

Furthermore, alternative staff believes this finding of no waiver of substantive rights is consistent with Florida law. Florida case law recognizes,

> [t]he modern trend of decisions concerning brief delays in performance of a contract or conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is to not treat such delays as a failure of a constructive condition discharging the other party, unless performance on time was clearly a vital part of the bargain. Edward Waters College v. Johnson, 707 So. 2d 801, 802 (Fla. 1st D.C.A. 1989)

Further, alternative staff believes that the exhibit which shows another ALEC is claiming Sprint waived its right to dispute invoices by failing to provide timely notice of a dispute, is irrelevant to how this Commission should interpret the agreement at issue in the current proceeding. (EXH 11) Therefore, alternative staff believes this Commission should find that Sprint did not waive its right to dispute the April, May, June and July 2001 invoices from ALEC by failing to comply with the letter of the dispute resolution requirements of the Agreement.

Even if the Commission finds that the appropriate remedy for failure to comply with the dispute resolution portions of the Agreement is waiver of substantive rights, alternative staff believes that Sprint's actions constituted substantial performance. Substantial performance has been defined by the court as ". . . that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price. . . ." National Constructors v. Ellenberg, 681 So. 2d 791, 793 (Fla. 3rd DCA, 1996)

While there is conflicting testimony regarding when the e-mail "notice" was actually received, alternative staff agrees with Sprint witness Felz that the e-mail was 2 days late. (TR 240) Alternative staff notes that the e-mail, combined with the meeting and subsequent conversations between the parties, must certainly have put ALEC on notice of the pending dispute and served as substantial performance. Alternative staff believes it would be unreasonable to deny Sprint the ability to dispute ALEC's invoices because they failed to specifically comply with all the requirements of the dispute resolution notice procedure, especially

when it appeared that ALEC had some type of notice regarding Sprint's billing dispute, despite being deficient in some respects. Therefore, even if the Commission believes that the appropriate remedy for failing to comply with the dispute resolution notice requirement is waiver of substantive rights, alternative staff recommends this Commission view Sprint's communications as substantial performance. Thus, Sprint should not be deemed to have waived its right to dispute the invoices on the merits.

Furthermore, the provisions of a contract should be construed as a whole to give every provision meaning. Florida Polk County v. Prison Health Services, 170 F. 3d 1081 (11th Cir. 1999). And see, City of Homestead v. Johnson, 760 So. 2d 80, 84 (Rule of construction requires courts to read provisions of a contract harmoniously in order to give effect to all portions thereof; Sugar Cane Growers Cooperative of Florida, Inc., v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions); Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 315 (Fla. 2d DCA 1963) (stating "All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each.").

Alternative staff notes that in addition to Section 21.2, referenced above, Sections 21.3 and 21.4 provide for inter-company meetings to discuss the dispute. (EXH 2, p.27) Ultimately, a claim may be filed before this Commission if the dispute remains unresolved. (Id.) Based on the parties' testimony, this appears to be the very procedure that Sprint and ALEC have followed. As such, alternative staff believes the notice requirements of Section 21.2 were meant to function as a prerequisite step prior to bringing a claim before this Commission, rather than an absolute condition on enforcing an underlying claim under the agreement. Such an interpretation is supported by Section 18.1 of the agreement, which addressed waiver. That section provides, "[n]o waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such a waiver or consent is claimed." (EXH 2, p.25) Also, alternative staff believes Section 6 of the Agreement, which provides for adjustments based on audit findings for a 12-month period, is persuasive evidence that lack of notice is not a bar to substantive claims. (EXH 2, pp.19-20) Such audit adjustments are

unlikely to comply with the notice requirements of Section 21.2, yet specifically require refunds if appropriate.

CONCLUSION: Alternative staff believes that while Sprint did not adhere to the letter of the dispute resolution procedures as outlined in the agreement, Sprint does appear to have substantially performed its obligations and did not waive its right to dispute charges rendered by ALEC for April, May, June, and July 2001.

ISSUE 6: Should this docket be closed?

RECOMMENDATION: Yes. Whether the Commission approves staff's primary or alternative recommendation on Issue 5, this docket should be closed. **(Dodson, Knight)**

STAFF ANALYSIS: Whether the Commission approves staff's primary or alternative recommendation on Issue 5, this docket should be closed.