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July 22, 2003

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VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of the Commission
Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 030296-TP

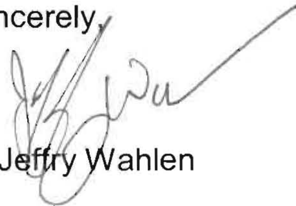
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of the Sprint's Response to AT&T's Motion for Protective Order and Motion in Limine. We are also submitting the Response on a 3.5" high-density diskette using Microsoft Word 98 format, Rich Text.

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

Thank you for your assistance in this matter.

Sincerely,



J. Jeffry Wahlen

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of unresolved issues resulting from negotiations with Sprint-Florida, Incorporated for interconnection agreement, by AT&T Communications of the Southern States, LLC d/b/a AT&T and TCG South Florida

DOCKET NO. 030296-TP
FILED: July 28, 2003

SPRINT-FLORIDA, INCORPORATED'S RESPONSE TO AT&T'S MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE

In accordance with Rules 28-106.204, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, Sprint-Florida, Incorporated ("Sprint" or the "Company") hereby files its response in opposition to the motion for protective order and motion in limine filed by AT&T Communications of the Southern States, Inc. and TCG South Florida ("AT&T") on July 22, 2003, and requests that those motions be denied.

Introduction

AT&T and Sprint began negotiating an interconnection agreement on October 16, 2002, when AT&T sent a letter to Sprint requesting negotiations. [Petition, Attachment A] During those negotiations, the Parties attempted to reach agreement on contract language governing compensation for Voice over Internet Protocol ("VOIP") traffic. AT&T proposed the following contract language:

> The parties have been unable to agree as to whether Voice over Internet Protocol ("VOIP") transmissions should be compensated as exchange access traffic. Notwithstanding the foregoing, and without waiving any rights with respect to either Party's position as to the jurisdictional nature of VOIP, the Parties agree, on a prospective basis, to abide by any effective and applicable FCC rules and orders regarding such traffic and the compensation payable by the Parties for

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the same, provided such FCC rules and orders are incorporated into this Agreement in accordance with Sections 1.4, 1.5 and 1.6 of Part B of this Agreement. [Petition, Attachment C, Draft Interconnection Agreement, Part E, pp. 12-13]

Sprint proposed this:

> Calls that are originated and terminated by telephone but are transmitted via the internet network (VOIP) shall be compensated in the same manner as voice traffic. [Petition, Attachment C, Draft Interconnection Agreement, Part E, p. 13]

The parties were unable to reach agreement on contract language. AT&T filed its Petition for Arbitration of Interconnection Agreement with the Commission on March 24, 2003 ("Petition"). AT&T's Petition included "a matrix of the unresolved issues and the respective positions of each party regarding issues for which AT&T seeks arbitration. (Attachment B.)" [Petition at 1 (¶ 1)] AT&T's matrix identified the following issue as Issue No. 7:

Voice Over Internet Protocol

> What is the appropriate compensation for traffic exchanged between the Parties that originates or terminates to Enhanced Service Providers, including those providing Internet protocol (VOIP) telephony? (Network Interconnection, Part E, Section 4.1.2)

[*Petition*, Attachment B, page 3 of 6.]

This issue was included in the Petition because AT&T was obliged by Section 252(b)(2) of the Telecommunications Act of 1996 ("Act") to include it. The Act does not allow AT&T to unilaterally decide the issues to be arbitrated or how those issues should be decided. Rather, Section 252 (b)(2) of the Act requires that an arbitration petition identify: "(i) the unresolved issues, (ii) the position of the parties with respect to those issues, and

(iii) any other issue discussed and resolved by the parties." AT&T complied with the Act by including Issue No. 7 as an unresolved issue to be arbitrated.

After the issues identification conference, Issue No. 7 was included in the issues to be decided in this case. *See Order Establishing Procedure*, Docket No. 030296-TP, PSC No. 0692-PCO-TP (June 9, 2003). The parties have filed direct and rebuttal testimony on Issue No. 7 and have taken positions on this issue in their prehearing statements. The draft prehearing order includes Issue No. 7 and the parties' positions thereon as follows:

SPRINT: Calls that are originated and terminated by telephone but are transmitted via the Internet network (VOIP) should be compensated in the same manner as voice traffic. If the end points of the call define the call as interstate toll, interstate access charges should apply. If the end points of the call define the call as intrastate toll, intrastate access charges should apply. If the end points of the call define the call as local, reciprocal compensation should apply. The fact that VOIP is a new technology is no reason for the Commission to abandon the traditional end-to-end analysis for determining appropriate compensation.

AT&T: This is not an appropriate issue in this arbitration. Previously, in the Commission's *Florida Reciprocal Compensation Order,* the Commission decided not to address compensation for voice over internet protocol ("VOIP) traffic finding that ". . . this issue is not ripe for consideration at this time." Thereafter, the Commission also declined to address whether VOIP traffic constitutes "telecommunications" under Florida law in its *CNM Networks, Inc. Order*. The reasoning behind the Commission decision was its recognition that the FCC was considering AT&T's VOIP Petition regarding compensation for VOIP traffic. AT&T's VOIP Petition has yet to be ruled upon by the FCC. Both AT&T and Sprint have had the opportunity to make comments regarding compensation for VOIP traffic in the context of AT&T's VOIP Petition. Therefore, it remains "administratively inefficient to make a determination on this issue while the FCC proceeding is underway and while the VOIP issue is not ripe for consideration."

AT&T has not chosen to take an explicit position on the type of compensation mechanism that should apply, nor has it taken a position consistent with its proposed

contract language. Rather, AT&T has taken the position that Issue No. 7 "is not an appropriate issue in this arbitration."

AT&T has not alleged that the FPSC lacks subject matter jurisdiction to decide this issue. Nor has AT&T suggested that this issue has been preempted. AT&T simply asserts that it would be more efficient for this issue to be decided in some other forum. However, AT&T has not filed a motion to dismiss this issue from this docket, probably because it knows that such a motion would be improper and inconsistent with past FPSC and federal court decisions.

Instead, AT&T seeks to prevent a full and fair evaluation of the substance of Issue No. 7 by refusing to respond to Sprint's interrogatories on VOIP traffic and by requesting that the Commission limit the introduction of evidence on the merits of Issue No. 7. In so doing, AT&T seeks to force the FPSC into adopting its position on this issue by preventing the Commission from considering the competent substantial evidence needed for resolution of the issue.

The procedural history of Sprint's First Set of Interrogatories to AT&T and AT&T's objections thereto is explained in Sprint's Motion to Compel and will not be repeated here. Interrogatory Nos. 3 through 15 seek information about whether and the extent to which AT&T has been and is using VOIP in Florida, the types of technology used, how those calls have been routed and the compensation mechanism for the calls. AT&T's Motion for Protective Order seeks a ruling that AT&T not be required to answer those questions at all. **Sprint does not object to narrowing the scope of the interrogatories, consistent with staff's preliminary recommendation on Sprint's Motion to Compel at the Prehearing Conference, so that they address Sprint and**

Sprint's territory in Florida as opposed to Florida generally. AT&T's Motion in Limine seeks an order that "determining compensation for VOIP traffic is not an appropriate issue in this proceeding." Both Motions are addressed below.

LEGAL ARGUMENT

1. AT&T's Motion in Limine Should Be Denied For Three Reasons.

First, the Act compels the Commission to decide Issue No. 7. That issue was included in this docket because AT&T and Sprint were unable to agree on contract language to resolve the compensation approach for VOIP on a prospective basis. AT&T wants language in the interconnection agreement stating that "the Parties agree, on a prospective basis, to abide by any effective and applicable FCC rules and orders regarding such traffic and the compensation payable by the Parties for the same." Sprint wants contract language stating that "Calls that are originated and terminated by telephone but are transmitted via the internet network (VOIP) shall be compensated in the same manner as voice traffic." Thus, Issue No. 7 is not a policy issue of general application throughout the telecommunications industry in Florida. Rather, it is an unresolved issue between two parties arising from the negotiation of an interconnection agreement to be decided by the FPSC.

Section 252 (b)(2) of the Act requires that an arbitration petition identify: "(i) the unresolved issues, (ii) the position of the parties with respect to those issues, and (iii) any other issue discussed and resolved by the parties." Once the issues have been identified, the Commission has a duty to resolve, not abstain, from deciding the issues presented. Section 252(b)(4)(C) of the Act states: "The State Commission shall resolve

each issue set forth in the Petition and the response." Thus, the plain language of the statute directs the Commission to resolve Issue No. 7.

If there is any question on this point, the Commission need only recall its experience with this section, which went all the way up to the 11th Circuit Court of Appeals. During one of the first Bellsouth arbitrations, MCI sought to include a compensation mechanism similar to a liquidated damages provision in the interconnection agreement with BellSouth. BellSouth refused. MCI included an issue in its petition on whether the interconnection agreement should include a liquidated damages provision. BellSouth argued that the Commission should not decide the issue, and the Commission agreed. MCI appealed the Commission's refusal to decide the issue to U.S. District Court. Judge Hinkle ruled:

> When the Florida Commission chose to act as the arbitrator in this matter, its obligation was to resolve "each issue set forth in the petition and response, if any." 47 U.S.C. § 252 (b)(4)(C). MCI's request for a compensation provision was such an issue. This was, therefore, an issue the Florida Commission was obligated to resolve.

See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp. 2d 1286, 1297 (N. D. Fla. 2000).

The Eleventh Circuit Court of Appeals affirmed Judge Hinkle on this point, but narrowed his ruling to clarify that the Commission's obligation is to decide issues that the parties are obliged to negotiate, i.e., the items in Sections 251 (b) and (c) of the Act. See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 298 F. 3d 1269, 1274 (11th Cir. 2002).

There is no dispute in this case that intercarrier compensation is one of the matters to be negotiated under Section 251(b) and (c) of the Act. [See Sections

251(b)(5) and 251(c)(2)(D)]. Moreover, Section 251(g) requires local exchange carriers to provide exchange access to interexchange carriers. Section 252(c)(1) then requires that a state commission resolve an arbitration consistent with the requirements of Section 251. A determination of whether reciprocal compensation or access charges apply to different types of VOIP traffic is squarely within the bounds of Section 251 and thus must be resolved according to Section 252(b)(4)(c). The Parties attempted to negotiate the issue, and the absence of an agreement resulted in AT&T listing it as an issue in the Petition. Further, Sprint includes this issue in its interconnection agreement negotiations with other carriers. In Florida, Sprint has entered into an interconnection agreement with Metro Teleconnect Companies, Inc. that includes language on compensation for VOIP traffic. That agreement was filed with the FPSC on July 25, 2003.

The Commission has ruled on VOIP in at least one prior arbitration. [NOTE: VOIP was an issue in several other BellSouth arbitrations, but resolution was deferred by agreement of the parties to the Generic Arbitration.] The Commission's final order in the generic reciprocal compensation docket discusses the arbitration between BellSouth and Intermedia in which the Commission addressed the compensation for a call provisioned using phone-to-phone IP telephony and decided that "switched access traffic [should] be defined in accordance with BellSouth's existing access tariff and include phone-to-phone internet protocol telephony." See *Order on Reciprocal Compensation* at pages 35-36, In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the

Telecommunications Act of 1996, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP (September 10, 2002) ["Reciprocal Compensation Order"].

Compensation for VOIP is also an issue in a current arbitration before the Commission. See *Order Establishing Procedure* at 13, In re: Petition by XO Florida, Inc. for arbitration of certain unresolved issues in negotiations for interconnection and resale agreement with Sprint-Florida, Incorporated., Docket No. 030467-TP, Order No. PSC-03-0865-PCO-TP (Issued July 24, 2003) ("Issue 25: What is the appropriate form of intercarrier compensation for phone-to-phone traffic exchanged between the parties and transmitted in whole or in part over the internet network?")

Clearly, Issue No. 7 is an issue to be decided by the Commission under Section 252(b)4)(C) of the Act, and should not be eliminated from this case.

Second, AT&T's Motion in Limine is procedurally improper. While the Commission may have seen motions in limine in other dockets, a motion in limine is improper because such motions may "be used in jury actions only." Trawick, Fla. Prac. And Proc., §19-6, citing Baldwin v. InterCity Contractors Serv., Inc., 297 N.E.2d 831, 834 (Ind. App. 1973).

More importantly, even if a motion in limine has some application in an administrative proceeding to control the introduction of improper evidence, the law is well settled that a motion in limine may not be used to summarily dismiss a portion of a party's case or as a motion for summary judgment. See Dailey v. Multicon Development, Inc., 417 So.2d 1106, 1107 (Fla. 4th DCA 1982) (a motion in limine that attempted to summarily dismiss a portion of appellant's case was improperly used for more than its purpose of merely excluding irrelevant or improper prejudicial evidence);

Brock v. G.D. Searle & Co., 530 So.2d 428, 431 (Fla. 1st DCA 1988); Saunders v. Alois, 604 So.2d 18, 19 (Fla. 4th DCA 1992) (finding it was error for the trial court to grant a motion in limine that a party could not collect certain damages where such a ruling operated like a motion for partial summary judgment); Buy-Low Save Centers, Inc. v. Glinert, 547 So.2d 1283, 1284 (Fla. 4th DCA 1989).

Here, the motion in limine seeks to have the prehearing officer decide Issue No. 7 in AT&T's favor before the hearing occurs and the panel considers the evidence. AT&T's position on Issue No. 7 is: "[t]his is not an appropriate issue in this arbitration." Its motion in limine states: "[T]he Commission should grant AT&T's Motion in Limine and issue an order determining that compensation for VOIP traffic is not an appropriate issue in this proceeding." See AT&T's Motion for Protective Order & Motion in Limine & Resp. to Motion to Compel, page 14 (emphasis added). Clearly, the motion seeks to do more than to exclude evidence – it is intended to either dismiss Issue No. 7 from the docket or decide Issue No. 7 on a summary basis in AT&T's favor. Either way, the motion is procedurally improper and should be denied.

Third, the Commission has invited telecommunications companies to present precisely this issue to the Commission for decision. In the generic reciprocal compensation docket, the Commission considered how to define IP telephony and what intercarrier compensation mechanism to apply to VOIP traffic, but declined to adopt a definition or a compensation mechanism. The Generic Reciprocal Compensation Order states:

> We believe that with an emerging technology such as IP telephony, a more in-depth factual examination should be made of specific IP telephony services being provided in the market to determine how they should be compensated

> between carriers. Unfortunately, such factual information is not in the record of this proceeding. [Generic Reciprocal Compensation Order at 37] (emphasis added).

FCCA witness Joe Gillan disagreed with this approach in the generic proceeding and advocated that the FPSC defer action on VOIP pending the Federal Communications Commission's review of the issue. AT&T's motion in limine echoes Gillan's approach on pages 11 through 13 by quoting from pleadings filed in the FCC's investigation and urging the FPSC to abstain from deciding this issue. However, AT&T's current pleas were considered by the Commission in the generic docket when it rejected Gillan's approach, and stated:

> [W]e disagree [with Gillan's proposal to defer to the FCC] and believe that where telecommunications are being provided via IP telephony, intercarrier compensation issues may arise that must be addressed by us. We merely believe that this generic docket is not the appropriate avenue for addressing those issues. [Id.] (emphasis added)

The Commission then concluded:

> We find that this issue is not ripe for consideration at this time. We believe that this is a relatively nascent technology, with limited application in the present marketplace. As such, we reserve any generic judgment on this issue until the market for IP telephony develops further. However, we find this shall not preclude carriers from petitioning us for decisions regarding specific IP telephony services through **arbitration** or complaint proceedings. [Id.] (emphasis added)

The time has come. An intercarrier compensation issue has arisen that must be decided by the Commission. Two telecommunications companies have a dispute over VOIP contract language. Sprint is attempting to present an "in-depth factual examination" for the Commission's consideration in an arbitration. The Act requires the

Commission to decide this unresolved issue. Therefore, AT&T's motion in limine should be denied.

2. AT&T's Motion for Protective Order Should Be Denied in Part.

As noted above, Sprint does not object to narrowing the scope of the Interrogatory Nos. 3 through 15 so that they address Sprint and Sprint's territory in Florida as opposed to Florida generally. To that extent, AT&T's Motion for Protective Order can be granted; however, to any other extent, it must be denied.

Rule 1.280(c), Florida Rules of Civil Procedure, allows a court, for good cause shown, to protect a party from discovery that would cause "annoyance, embarrassment, oppression, or undue burden or expense." Office of the Attorney General v. Millenium Comm. & Fulfillment, Inc., 800 So.2d 255, 258 (Fla. 3d DCA 2001). The party moving for the protective order has the burden to show good cause. Medina v. Yoder Auto Sales, Inc., 743 So.2d 621, 623 (Fla. 2d DCA 1999). AT&T has failed to show good cause for a protective order.

AT&T's Motion for Protective Order essentially claims that Interrogatory Nos. 3 through 15 seek information that is not relevant, *i.e.*, is beyond the scope of discovery. Rule 1.280(b)(1) of the Florida Rules of Civil Procedure defines the scope of discovery in civil cases:

> *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of the other party.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

The concept of relevancy in civil cases is broader in the discovery context than in the trial context, and a party may be permitted to discover evidence that would be inadmissible at trial, if it would lead to the discovery of relevant evidence. Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995). The test with respect to discovery is relevancy to the *subject matter* of the action rather than to the precise issues framed by the pleadings. Allstate Ins. Co. v. Langston, 655 So.2d 91 (Fla. 1995). Thus, Sprint need not show that its requested discovery would result in evidence that would be admissible at the final hearing, but rather, that its discovery is reasonably calculated to lead to the discovery of admissible evidence. Sprint's discovery requests clearly meet this standard.

Issue No. 7 deals with the compensation mechanism for VOIP traffic. It should remain in this case for the reasons explained above. Sprint seeks information about whether and the extent to which AT&T has been and is using VOIP in Florida, the types of technology used, how those calls have been routed and the compensation mechanism for the calls. Interrogatory No. 9 seeks information about AT&T's IP Centrex and IP PBX services, and the routing and compensation AT&T pays for those calls. Interrogatory No. 10 asks whether AT&T uses VOIP for 800 service. Interrogatory No. 11 seeks information about the use of VOIP for prepaid card services. Interrogatory Nos. 13 and 14 ask about specific routing, switching and transport used for VOIP. These questions are clearly relevant to the subject matter of this docket, *i.e.*, Issue No. 7.

> Moreover, this is exactly the kind of "in-depth factual" information the Commission indicated that it would want to consider when it addresses VOIP.

As quoted previously, the Commission, in the Generic Reciprocal Compensation Order, specifically recognizes that "a more in depth factual examination should be made of specific IP telephony services being provided in the market to determine how they should be compensated between carriers." The information Sprint seeks is intended specifically to develop the record necessary for such an in depth factual analysis. Clearly, Interrogatory Nos. 3 through 15 seek information relevant to the Commission's decision on Issue No. 7 and are well within the scope of discovery.

If there is any remaining doubt on the scope of discovery issue, Sprint's interrogatories seek information that will allow Sprint to test specific assertions in the testimony of AT&T's witnesses. Here are two examples.

First, to support its position that Issue No. 7 must be decided by the Commission, not deferred, Sprint has filed testimony stating that carriers like AT&T are terminating their VOIP toll traffic on Sprint's network over local interconnection trunks, and that the amount of access revenue being lost due to this practice is "substantial." [Burt Direct Testimony at 14]. AT&T has filed rebuttal testimony labeling this argument "Sprint's sky is falling" argument and implying that Sprint is not losing significant access revenue. Sprint's interrogatories (e.g., Nos. 3, 4, 5, 6, 7, 9, 10, 11 and 12) seek information about the extent to which AT&T is using VOIP in Sprint's territory, whether access charges would traditionally apply to those calls and whether AT&T has or plans to pay access charges for those calls. Since AT&T has filed testimony claiming that Sprint is acting like Chicken Little, *i.e.*, "the Sky is Falling," Sprint is entitled to discovery that would lead to evidence that would prove or disprove that assertion.

Second, Sprint's interrogatories will allow Sprint and the Commission to evaluate AT&T's claim that VOIP is still a "nascent technology, with limited application to the present market place." In his direct testimony, AT&T witness Talbott uses this quote from the Generic Reciprocal Compensation Order and suggests that conditions have not changed enough in the time since that order was issued for the Commission to revisit the issue. [Talbott Direct Testimony at 65-66] Interrogatory Nos. 5, 6, 7, 9, 10, 11 and 12 ask AT&T to quantify the amount of VOIP traffic terminated on Sprint's network in Florida. Interrogatory Nos. 3, 4, 8, 9, 10 and 11 ask AT&T to describe some of the services it provides using VOIP. The answers to these questions relate directly to and will prove whether VOIP is still a "nascent technology, with limited application to the present market place" as asserted by AT&T. Interrogatory Nos. 3 through 15 are clearly relevant to AT&T's own testimony; therefore, Sprint's interrogatories are clearly within the scope of discovery.

AT&T's claim on pages 5 and 6 of its motion that Issue No. 7 is a policy issue for which no facts or evidence are needed has no merit.

First, as explained above, Issue No. 7 is not a policy issue of general application throughout the telecommunications industry in Florida. Rather, it is an unresolved issue between two parties from the negotiation of an interconnection agreement to be decided by the FPSC.

Second, even if Issue No. 7 has a policy dimension to it, so what? Almost every issue presented to the Commission in arbitration has some "policy" implications, but they must be resolved and cannot be resolved without adequate factual and evidentiary support. For example, the Commission cannot undertake to decide the parties'

obligations regarding establishment of points of interconnection without understanding the facts about the two interconnecting networks. Even though a determination of whether ILECs must establish a POI on the CLEC network is a policy issue, Sprint does not dispute that facts regarding the parties' networks will be helpful in making the policy determination. Further, in the Verizon/Global NAPs arbitration, the Commission has recognized the importance of developing a factual record on local calling areas. See *Final Order on Arbitration at 25-26,* In re: Petition by Global NAPS, Inc. for arbitration pursuant to 47 U.S.C. 252 (b) of interconnection rates, terms and conditions with Verizon Florida, Inc., Docket No. 011666-TP, Order No. PSC-03-0805-FOF-TP (July 9, 2003). It is axiomatic that the Commission should not make decisions without the facts and competent substantial evidence as support; therefore, AT&T's argument has no merit.

Third, AT&T's "no facts needed" argument is completely inconsistent with the Commission's announced position in the Generic Reciprocal Compensation order. Without again quoting the reciprocal compensation decision, the Commission has clearly stated that an "in-depth examination" is required for a decision on VOIP. Sprint's Interrogatories will facilitate an in-depth examination as prescribed by the generic Reciprocal Compensation Order.

AT&T claims on page 6 of its motion that Sprint's discovery will serve no purpose other than to enable Sprint to file a future complaint against AT&T for past and current behavior. The relevancy and usefulness of the requested information in this docket has been explained above and need not be repeated. The fact that the requested information might be relevant in a proceeding designed to remedy past wrongs does not

make it irrelevant in this proceeding, which will serve to determine the language of an interconnection agreement that will define the economic relationship between the parties on a going forward basis.

WHEREFORE, Sprint respectfully requests that AT&T's Motion in Limine be denied. In addition, with an agreement that Interrogatory Nos. 3-15 can be narrowed so that they address Sprint and Sprint's territory in Florida as opposed to Florida generally, Sprint requests that its Motion to Compel be granted and that AT&T's Motion for Protective Order be denied.

DATED this 28th day of July, 2003.

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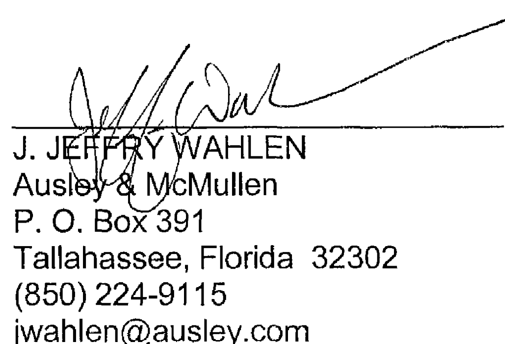

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ATTORNEYS FOR SPRINT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail or hand delivery (*) this 28th day of July, 2003, to the following:

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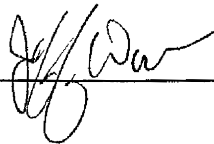

Attorney

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