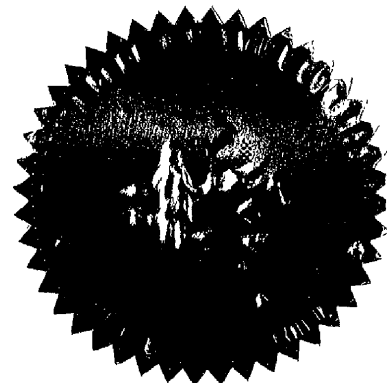


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030296-TP

In the Matter of

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



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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER CHARLES M. DAVIDSON
Prehearing Officer

DATE: Thursday, July 24, 2003

TIME: Commenced at 9:30 a.m.
Concluded at 10:25 a.m.

PLACE: Easley Building
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
Official FPSC Reporter
(850) 413-6734

1 APPEARANCES:

2 LORETTA A. CECIL, ESQUIRE, Womble, Carlyle Law
3 Firm, 1201 West Peachtree Street, Suite 3500, Atlanta, Georgia
4 30309, appearing on behalf of TCG South Florida and AT&T
5 Communications of the Southern States, LLC, participating
6 telephonically.

7 TRACY HATCH, ESQUIRE, 101 North Monroe Street,
8 Suite 700, Tallahassee, Florida 32301, appearing on behalf of
9 TCG South Florida and AT&T Communications of the Southern
10 States, LLC.

11 KENNETH A. SCHIFMAN, ESQUIRE, 6450 Sprint Parkway,
12 Overland Park, Kansas 66251 and J. JEFFRY WAHLEN, ESQUIRE,
13 Ausley & McMullen, 227 S. Calhoun Street, Tallahassee, Florida
14 32302 and SUSAN MASTERTON, ESQUIRE, Sprint-Florida,
15 Incorporated, P. O. Box 2214, Tallahassee, Florida 32316-2214,
16 appearing on behalf of Sprint-Florida, Incorporated.

17 LINDA DODSON, ESQUIRE, and FELICIA BANKS, ESQUIRE,
18 FPSC General Counsel's Office, 2540 Shumard Oak Boulevard,
19 Tallahassee, Florida 32399-0850, appearing on behalf of the
20 Commission Staff.

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P R O C E E D I N G S

1
2 COMMISSIONER DAVIDSON: Call the prehearing
3 conference to order. I'll ask the staff attorney, Linda
4 Dodson, to please read the notice.

5 MS. DODSON: Pursuant to notice issued July 18th,
6 2003, this time and place has been set for a prehearing in
7 Docket Number 030296-TP, petition for arbitration of unresolved
8 issues resulting from negotiations with Sprint-Florida,
9 Incorporated for interconnection agreement by AT&T
10 Communications of the Southern States, LLC d/b/a AT&T and TCG
11 South Florida.

12 COMMISSIONER DAVIDSON: Thank you. Let's take
13 appearances starting with Mr. Hatch.

14 MR. HATCH: Tracy Hatch appearing on behalf of AT&T
15 Communications of the Southern States, LLC. Also appearing
16 with me in this proceeding will be Loretta Cecil of the Womble,
17 Carlyle, Sandridge & Rice Law Firm.

18 MR. WAHLEN: Good morning, Commissioner. I'm Jeff
19 Wahlen of the Ausley & McMullen Law Firm, P. O. Box 391,
20 Tallahassee, Florida, appearing on behalf of Sprint-Florida,
21 Incorporated.

22 Also appearing with me today is Ken Schifman, 6450
23 Sprint Parkway, Overland Park, Kansas, appearing on behalf of
24 Sprint.

25 And also appearing is Susan Masterton, P. O. Box

1 2214, Tallahassee, Florida 32301 on behalf of Sprint.

2 MS. DODSON: Linda Dodson on behalf of staff. And
3 with me is Anne Marsh, Jason Earl Brown and Felicia Banks.

4 (Technical difficulty with audio system.)

5 COMMISSIONER DAVIDSON: All right. I will -- I'll
6 start again.

7 Before we address the other preliminary matters, let
8 me mention one thing I would like to take up at this time.
9 Since these two parties regularly appear before the Commission,
10 I am sure you all have noticed changes in the draft prehearing
11 order. My goal in making these changes is to more closely
12 align the prehearing order with the flow of the hearing, while
13 ensuring that the rights and obligations of the parties
14 regarding the hearing process are clear.

15 If the parties have concerns with any of the changes,
16 please just address those as we go through the order and we'll,
17 we'll take care of it.

18 Ms. Dodson, any preliminary matters?

19 MS. DODSON: Yes. On July 15th, 2003, Sprint filed a
20 motion to compel AT&T to respond to Interrogatories 3 through
21 15 of Sprint's first set of interrogatories.

22 The -- AT&T's response was received on July 22nd,
23 2003, along with a motion for protective order and a motion in
24 limine regarding compensation for VOIP traffic.

25 COMMISSIONER DAVIDSON: Have we received Sprint's

1 response to those motions filed by AT&T?

2 MS. DODSON: No, we have not.

3 MR. HATCH: Commissioner Davidson, I hate to
4 interject, but if you could give us about three more minutes.
5 Loretta was supposed to dial in, but we were told that the
6 bridge wouldn't be up until 9:35.

7 MS. DODSON: That's correct.

8 COMMISSIONER DAVIDSON: Well, let me ask staff and
9 technical, why were we told that the bridge would not be up
10 until 9:35 if the hearing was noticed for 9:30?

11 MS. DODSON: We could not get a telephone available
12 until 9:35.

13 COMMISSIONER DAVIDSON: With all the companies here?

14 MR. HATCH: I'm sure we'd be able to market a product
15 that would help you out.

16 COMMISSIONER DAVIDSON: Mr. Hatch, if -- who is --
17 I'm going to allow a little bit of time to argue the motion to
18 compel but not AT&T's motion since Sprint has not yet filed a
19 response. So who's going to be arguing the motion to compel?

20 MR. HATCH: That will be Ms. Cecil, which is why I
21 interjected. I suspected that was the direction you were
22 going.

23 COMMISSIONER DAVIDSON: Okay. Well, let's, if we
24 can, let's go ahead and just proceed with the draft prehearing.
25 And when Ms. Cecil is on the phone, we'll come back to the

1 motion.

2 MR. HATCH: I don't know if it's relevant for you,
3 but our response to their motion to compel was, in fact, a
4 motion for protective order as well as a motion in limine. So
5 they're sort of intertwined, and I'm not sure that you can take
6 them separately unless you're ready to argue the whole package.
7 And I'm not suggesting that Sprint should be ready to do that.

8 COMMISSIONER DAVIDSON: Well, I'm assuming, I'm
9 assuming though that before you would get to the motion for a
10 protective order and motion in limine, you would address the
11 underlying merits of the motion to compel based on the
12 standards, discovery standards that are applicable. And then
13 once --

14 MR. HATCH: We certainly --

15 COMMISSIONER DAVIDSON: -- a determination was made
16 as to whether that motion satisfied the standards -- if it
17 didn't, then we would get to the issue of a motion in limine, a
18 motion to, for a protective order.

19 MR. HATCH: And that's fine essentially.

20 COMMISSIONER DAVIDSON: Okay.

21 MR. HATCH: The arguments are essentially the same
22 for all three is where you end up being. But, yeah, that's
23 fine.

24 COMMISSIONER DAVIDSON: Well, what's the parties'
25 pleasure on that? I was prepared to allow five minutes for

1 each side to argue the motion to compel.

2 MR. WAHLEN: Well, Commissioner, Jeff Wahlen. I
3 think Mr. Hatch is right in some respects. The motion in
4 limine asks essentially for the Commission to decide Issue 7 in
5 AT&T's favor by removing the issue from the docket. Part of
6 their response to the motion to compel is that this shouldn't
7 really be an issue in the case, and what they've now done is
8 filed a motion which we think is procedurally improper and
9 shouldn't be granted as a means to, to address the underlying
10 issues. So --

11 COMMISSIONER DAVIDSON: Well, let's hold on, Counsel.
12 Let me -- I hear you, but that's getting in a little bit to
13 the, to the argument.

14 MR. WAHLEN: All right. Well, I won't argue.

15 COMMISSIONER DAVIDSON: So I will --

16 MR. WAHLEN: I'll say this: Ordinarily we'd be
17 entitled to have seven days to respond. We're prepared to
18 respond in a preliminary manner today verbally on the motion in
19 limine. And then if you'd like to see some things in writing
20 from us, we'll be prepared to do that. But I agree with
21 Mr. Hatch that it's going to be difficult to, to separate the
22 two the way they've done it.

23 COMMISSIONER DAVIDSON: All right. Well, my
24 preference would be to have a few minutes of oral argument from
25 each side, then allow Sprint its opportunity to submit a

1 written response as it would be entitled to do without -- if we
2 didn't have oral argument. I think argument, however, will
3 provide some guidance to staff and, frankly, to me as to how to
4 think about this issue going forward. But I will leave it up
5 to the parties on that. I would prefer that. But if, if that
6 procedure is fine with you.

7 MR. WAHLEN: We have no objection to that procedure.

8 COMMISSIONER DAVIDSON: Mr. Hatch?

9 MR. HATCH: I don't have any objection, assuming
10 Loretta has dialed in by now.

11 MS. CECIL: I have, Tracy. I'm sorry, Commissioner.
12 This is Loretta Cecil.

13 COMMISSIONER DAVIDSON: Well, let's, let's actually
14 go through the prehearing order revisions and provisions and
15 then come back to the meat of the, the pending motions. I'm
16 going to just group some sections together for the sake of
17 convenience, but please feel free to step in at any time and
18 let me know any concerns you may have.

19 Sections I, II and III, conduct, case background and
20 attendance. Do the parties have any proposed corrections or
21 concerns?

22 MS. CECIL: None from AT&T.

23 MR. WAHLEN: None from Sprint.

24 COMMISSIONER DAVIDSON: Pending motions we've
25 previously covered, and I believe staff is going to make a

1 correction to that text to provide that AT&T's response has
2 been received and we will come back to that issue.

3 Section V, proposed stipulations. Do the parties
4 have any proposed stipulations?

5 MR. WAHLEN: Not at this time.

6 COMMISSIONER DAVIDSON: Are you all thinking about
7 any that we should be thinking about?

8 MR. WAHLEN: Well, we have -- as the prehearing order
9 draft indicates, we have resolved some issues. I think the
10 parties are always continuing to try and resolve issues. As
11 issues become resolved, we will alert staff and let them know
12 what's come off the table.

13 COMMISSIONER DAVIDSON: Thanks.

14 MR. HATCH: Where we have reached agreement, I think
15 that's noted accurately in the prehearing draft.

16 COMMISSIONER DAVIDSON: Thank you. Sections VI and
17 VII, open proceedings and procedure for handling confidential
18 information and pending confidentiality matters. Are there any
19 corrections or concerns as to those two sections?

20 MS. CECIL: None from AT&T.

21 MR. SCHIFMAN: Ken Schifman from Sprint. At this
22 point in time there has been no confidential information
23 produced. But in response to staff's interrogatories to
24 Sprint, Sprint will be asking for confidential protection for
25 those interrogatory responses, some of the interrogatory

1 responses and some of the production of documents that go along
2 with staff's request from Sprint. So at this point in time no
3 confidential information has been exchanged. But once those
4 due dates come and Sprint produces that information as
5 requested by staff, we will be asking for confidential
6 protection for certain documents in requests -- in responses to
7 interrogatories.

8 COMMISSIONER DAVIDSON: Thank you, Counsel. Section
9 VIII, opening statements. Ten minutes per party seems to be
10 the standard. Do the parties have any concerns there? Perhaps
11 would they be willing to shorten that, waive it or do they want
12 the standard ten minutes?

13 MR. WAHLEN: Sprint's prepared to waive opening
14 statements. Since the witnesses summarize their testimony, we
15 think that's probably more efficient than having the lawyers
16 talk about the case. But if AT&T wants to make one --

17 MS. CECIL: AT&T would prefer -- I'm sorry. AT&T
18 would prefer a ten-minute opening statement.

19 COMMISSIONER DAVIDSON: Okay. Well, let's go with
20 the ten-minute opening statement for the parties.

21 Section IX and X; are there any changes at this point
22 to the order of the witnesses or to the topics that the
23 witnesses will be discussing as set forth in the order?

24 MS. CECIL: Yes, Commissioner. Jay M. Bradbury will
25 be testifying both in direct and in rebuttal. Mr. Bradbury

1 adopted Mr. Talbott's testimony regarding Issue 11 when he
2 filed direct, I'm sorry, when he filed rebuttal testimony. So
3 Mr. Bradbury will be the only witness from AT&T who will be
4 addressing Issue 12 going forward. We would also like to have
5 direct and rebuttal handled by the witness at the same time.

6 COMMISSIONER DAVIDSON: Okay. Sprint?

7 MR. WAHLEN: We have no objections to taking direct
8 and rebuttal at the same time. And we would request that the
9 order of Sprint witnesses be James Michael Maples, then Kenneth
10 J. Farnan, followed by James R. Burt. So we would like to have
11 Farnan moved in between Maples and Burt in the order of
12 witnesses.

13 COMMISSIONER DAVIDSON: Okay. Staff, did you get
14 that?

15 MS. DODSON: Yes.

16 COMMISSIONER DAVIDSON: Thanks.

17 MR. WAHLEN: And I guess just as a matter of
18 clarification, would Bradbury follow Talbott in the order of
19 witnesses?

20 MS. CECIL: Yes, Mr. Schiffman.

21 COMMISSIONER DAVIDSON: Sections XI and XII,
22 positions and issues.

23 MR. WAHLEN: Sprint has no changes to Section XII.

24 MS. CECIL: AT&T has no changes either, Commissioner.

25 COMMISSIONER DAVIDSON: Thank you, Counsel.

1 Section XIII, decisions that may impact Commission's
2 resolution of issues. This is a new section, I believe, in
3 prehearing orders, in the draft, and it's intended just to
4 identify for the parties key, the key cases and proceedings
5 that the parties have alleged may impact the resolution of the
6 issues. It's really provided there so that the parties are on
7 notice early on of what the, the key decisions are asserted by
8 the other side.

9 Does anyone have any concerns, corrections, issues
10 with that section?

11 MR. WAHLEN: No.

12 MS. CECIL: None from AT&T.

13 COMMISSIONER DAVIDSON: Thank you, Counsel.
14 Exhibit list, Section XIV, any corrections?

15 MR. WAHLEN: None from Sprint.

16 MS. CECIL: None from AT&T.

17 COMMISSIONER DAVIDSON: Section XV, post-hearing
18 procedures. Let me note it's not in the draft prehearing order
19 that I have here, but I intend to add language regarding the
20 ability of the Commission to issue a bench decision just to
21 recognize that it does have that discretion. And, staff, do
22 you have that language in your draft?

23 MS. DODSON: No, not at this time. But it can be
24 entered into the final prehearing order.

25 COMMISSIONER DAVIDSON: Okay. With that, with that

1 addition noted, are there any concerns or issues with regard to
2 post-hearing procedures, Section XV?

3 MR. WAHLEN: I guess it's inherent in the notion of a
4 bench ruling that there would not be a brief filed; it would
5 occur at the hearing?

6 COMMISSIONER DAVIDSON: Correct. That --

7 MR. WAHLEN: I'm just trying to --

8 COMMISSIONER DAVIDSON: That language will preserve
9 the discretion of the Commission to really issue a bench ruling
10 if the Commission deems that appropriate, in which case I
11 expect that there would be no post-hearing brief.

12 MR. WAHLEN: Okay. And is it possible that the
13 Commission might issue a bench ruling on one issue but not all
14 or some but not all?

15 COMMISSIONER DAVIDSON: Possibly. And this issue of
16 the bench ruling has not arisen in this case. That, that issue
17 is not fact specific. We had another incident in which the
18 Commission was prepared to issue a bench ruling and the parties
19 objected because it simply -- there was not clear language in
20 the order establishing procedure. So while I'm including that
21 language in the order establishing procedure going forward,
22 also just as a matter of preserving the Commission's plenary
23 jurisdiction to issue a bench ruling, we're making that clear
24 so that there cannot be an allegation of a denial of due
25 process.

1 MR. HATCH: Just a question. If, if at the point
2 that the bench contemplates a bench decision, would it then be
3 incumbent upon us to ask or would you make provisions for a
4 closing statement? In a sense to -- it would be effectively an
5 oral brief really quickly, if you want to couch it in those
6 terms.

7 COMMISSIONER DAVIDSON: Well, I believe -- I'm not
8 going to put in the, the draft order that a post-hearing brief
9 statement will be mandatory. I mean, that really would be up
10 to the discretion of the Commission based on how the case went
11 and if it feels it, it needs that. The language is really
12 intended to preserve the discretion and jurisdiction of the
13 Commission to issue a bench ruling, which it has the authority
14 to do, if such a ruling would appear to be proper and, and
15 would save time and resources for both the Commission and the
16 parties.

17 MR. WAHLEN: That's fine with us.

18 COMMISSIONER DAVIDSON: Section XVI, rulings. There
19 are no pending rulings, so I'm supposing there are no pending
20 concerns.

21 MS. CECIL: Not from AT&T, Commissioner.

22 COMMISSIONER DAVIDSON: Thank you. Any other matters
23 other than the motion?

24 MR. WAHLEN: No.

25 COMMISSIONER DAVIDSON: Mr. Hatch?

1 MR. HATCH: No. I'm sorry. No. I apologize.

2 COMMISSIONER DAVIDSON: Critical dates coming up:
3 According to the order establishing procedure, discovery must
4 be completed by July 31st. Are there any concerns that the
5 parties will need additional discovery time?

6 MR. WAHLEN: Commissioner, staff and AT&T have sent
7 some interrogatories to Sprint, the due date for which are
8 beyond the discovery cutoff. We aren't objecting to that, but
9 they are beyond the discovery cutoff. So we're just going to
10 go ahead and answer and not raise that objection. I'm not sure
11 it's necessary for you to extend the discovery deadline unless
12 you feel like that's appropriate. We're not going to raise the
13 discovery cutoff as a reason to not answer the interrogatories.

14 COMMISSIONER DAVIDSON: All right. Well, I would
15 like to stick then to the discovery deadline of July 31st, and
16 I appreciate Counsel's willingness not to raise that objection.

17 MS. CECIL: Commissioner, I'm not aware that AT&T has
18 filed any interrogatories or PODs that would go beyond the
19 July 31st date. Our only set of discovery was filed on July
20 the 15th.

21 MR. WAHLEN: That's correct. And under the
22 procedural order we have 15 business days to respond. And 15
23 business days takes us beyond July 31st; fifteen calendar days
24 doesn't, but 15 business days takes us beyond that deadline.

25 MS. CECIL: I'm not aware that the parties were

1 interpreting the 15 days as business, but.

2 COMMISSIONER DAVIDSON: Well, in any event, Sprint,
3 you will, you will get the responses in, do you anticipate
4 before July 31st?

5 MR. WAHLEN: No. The procedural order specifically
6 says, "Discovery responses shall be served within 15 business
7 days of receipt of the discovery request." That's what we'll
8 plan to do. We're just not going to raise the objection that
9 it's beyond the discovery cutoff.

10 (Pause.)

11 MS. CECIL: Hello?

12 COMMISSIONER DAVIDSON: We're still here.

13 MS. CECIL: Okay.

14 COMMISSIONER DAVIDSON: Looking at the calendar. The
15 hearing is scheduled for August 7th and 8th. Are there any
16 concerns that with the discovery coming in after July 31st --
17 and I would urge, Sprint, if you can get it in sooner, please
18 do. If you simply cannot because it's just almost impractical
19 to gather that information, but if it's just a matter of you're
20 just going to wait until the end, I hope that doesn't occur.
21 And when we see the information, if we see it's simple
22 information to gather -- I hope you can get it in here in time
23 so that staff, the Commission and also the parties,
24 notwithstanding that you have that right of 15 business days,
25 have an opportunity to review it. If you can't, that's fine.

1 But if you can, I hope you do.

2 MR. WAHLEN: We will get it in as quickly as we can.
3 I guess the issue that we'd like to raise at this point is --
4 and it goes to the motion to compel. We were going to get
5 interrogatory answers from AT&T some time ago. They have now,
6 you know, objected and we've moved to compel. Don't know how
7 that's going to turn out.

8 But depending on how that turns out, we might not get
9 interrogatory answers until right before the hearing. And
10 because of the delay that's been involved here, it could
11 prejudice our ability to, to prepare for the hearing. That's
12 just one of the -- I mean, we don't know how this is all going
13 to turn out, but that is one possibility. So we're not
14 suggesting right now that we want to move for a continuance,
15 but we think we should have gotten their answers to
16 interrogatories some time ago. And, you know, you may rule
17 that we never get them. But if you do rule that we get them,
18 we need to get them as quickly as we can so we can prepare for
19 the hearing.

20 COMMISSIONER DAVIDSON: All right. Well, let's move
21 forward so we can come back to the motion. The last, the last
22 item before we get back to the motion is the hearing. The
23 hearing is scheduled for August 7th and 8th. And not in terms
24 of a date but in terms of the two-day time frame, do the
25 parties anticipate that two days will, in fact, be required or

1 that the hearing could be conducted in one day?

2 MR. SCHIFMAN: Ken Schifman for Sprint. I would
3 anticipate it would take two days.

4 COMMISSIONER DAVIDSON: Fair enough. That's what we
5 have it scheduled for.

6 All right. Let's move back to the motion to compel,
7 and I'd like to hear for five minutes from each side the basic
8 gist of their arguments on that motion.

9 MR. WAHLEN: On the motion to compel? Okay. Thank
10 you, Commissioner.

11 COMMISSIONER DAVIDSON: And to the extent -- I mean,
12 if you feel they're intertwined, go ahead and say what you need
13 to say with regard to the motion for a protective order and
14 motion in limine since the parties have indicated that, that,
15 that those motions are very intertwined. And, as I mentioned,
16 Sprint is not waiving its opportunity to put in a formal
17 written response to the motion for a protective order and
18 motion in limine.

19 MR. WAHLEN: Could we get a little latitude on the
20 five minutes if we're also going to talk about the motion in
21 limine? I don't want to take up 15 minutes, but we might run
22 over just a minute or two.

23 COMMISSIONER DAVIDSON: Some latitude will be
24 afforded.

25 MR. WAHLEN: Okay. Thank you. Commissioner, Jeff

1 Wahlen on behalf of Sprint. All of this has to do with Issue
2 7 in the case, which is set forth in the prehearing order. And
3 that issue is how traffic originated and terminated by
4 telephone and exchanged by the parties and transported over
5 Internet protocol should be compensated. So the question is
6 how should VOIP traffic be compensated? Okay?

7 Now Sprint has taken the position on the merits that
8 it should be compensated in a certain way. AT&T's position,
9 however, is not that it should be compensated in any particular
10 way. Their position simply is that you shouldn't consider this
11 issue in this case. So as a means for resolving this issue,
12 AT&T wants the Commission to decide this issue not on the
13 merits but wait until the FCC rules or something else happens
14 in the future.

15 AT&T put Issue 7 in its petition because the Act
16 requires it to put issues in the petition that have been
17 negotiated by the parties but have not been resolved. Sprint
18 could have raised the issue if AT&T didn't. The fact that it's
19 in the petition doesn't mean anything except that it is an
20 issue between the two parties to be resolved in this case.

21 AT&T's motion in limine here goes beyond just asking
22 you to limit the evidence that you're going to consider in this
23 case. It asks you to enter an order stating that the
24 compensation framework for VOIP traffic is not an appropriate
25 issue in this case. So basically what they're asking the

1 prehearing officer to do is to decide Issue 7 in AT&T's favor,
2 and we think that you can't do that for three reasons.

3 I brought some handouts here, and Mr. Schiffman is
4 going to help me. Unfortunately, I'm not going to be able to
5 share these with the party on the telephone, but I can show
6 Mr. Hatch. Would you give those to staff?

7 Section 252 of the Act requires that an arbitration
8 petition identify the unresolved issues. And then once the
9 petition identifies the unresolved issues, Section 252(b)(4)(c)
10 states, "The Commission shall resolve each issue set forth in
11 the petition in the response."

12 Now this is a statute the Commission has had some
13 experience with, and that experience went all the way up to the
14 11th Circuit. During one of the first BellSouth arbitrations
15 MCI wanted to include a compensation provision in their
16 interconnection agreement with BellSouth and BellSouth said,
17 no, that shouldn't be in there. The Public Service Commission
18 agreed and said, we're not going to decide that issue.

19 MCI appealed that issue to the Federal District Court
20 here in Tallahassee and Judge Hinkle said, the Commission has
21 to decide that issue. And if you look at what I've handed out,
22 I've handed out both the 11th Circuit opinion and the federal
23 court decision in MCI versus Florida Public Service Commission.
24 If you turn to the back, at the top of Page 10, if you look
25 down at the bottom, there's a highlighted section that says,

1 "When the Florida Commission chose to act as the arbitrator in
2 this matter, its obligation was to resolve each issue set forth
3 in the petition in the response, if any. MCI's request for
4 compensation provision was such an issue. This, therefore, was
5 an issue the Commission was obliged to resolve."

6 COMMISSIONER DAVIDSON: Let me ask you, Counsel,
7 theoretically, and I'm not at all suggesting what the outcome
8 would be, wouldn't a determination that an issue was within or
9 without the jurisdiction of the PSC be a resolution of that
10 issue?

11 MR. WAHLEN: Well, in the MCI case, MCI -- or the
12 Commission took the position they didn't have jurisdiction
13 under the Act to decide that particular issue. The U.S.
14 District Court and then the 11th Circuit both said, yes, you
15 do.

16 Now AT&T has not raised in this case a question of
17 subject matter jurisdiction. They've just suggested that it
18 would be more efficient for the Commission to not decide this
19 issue, but they have not raised lack of jurisdiction as an
20 issue here.

21 So as a matter of law under the Act, we think that
22 the Commission must decide this issue. And for the Commission
23 to decide the issue by saying we're not going to decide it is
24 to not decide the issue. So we don't think that's appropriate
25 under the Telecommunications Act.

1 Now the second point is the motion in limine, and
2 I've got several handouts here. We think the motion in limine
3 filed by AT&T is procedurally incorrect for a variety of
4 reasons.

5 First of all, the law is well settled in the State of
6 Florida. Well, let me back up. I don't practice over here
7 every day, but I've never seen a motion in limine filed at the
8 Florida Public Service Commission. Maybe they're filed and I
9 just don't know it, but I've never seen one. Okay?

10 COMMISSIONER DAVIDSON: They're filed.

11 MR. WAHLEN: Okay. Very good. The law as far as I
12 can understand it and the case law says that a motion in limine
13 is only good in a jury trial. This is not a jury trial. I
14 have handed out for you an excerpt from the, from Florida Jur.,
15 and I've also handed out a case, Baldwin versus Inter City
16 Contractors. It says, "A motion in limine has no place in a
17 court trial. Its use is limited to jury trial." So
18 procedurally we think a motion in limine is improper.

19 Now, moreover, the motion in limine that you have in
20 front of you is not really just a motion that's trying to limit
21 the introduction of prejudicial evidence. What they are doing
22 here is asking you to decide Issue 7 in their favor through a
23 motion in limine. And the law is well settled in Florida that
24 a motion in limine can't be used to dismiss a claim and it
25 can't be used to -- in lieu of a motion for summary judgment.

1 I've handed out Dailey versus Multicon. I'll just
2 read for you. This was a case where the resident of a
3 condominium apartment had some water damage that came in
4 through an exterior wall and he sued the contractor. The
5 contractor said, well, your claim for damages is no good
6 because the only person who can claim damages for this wall is
7 the condominium association because they own the wall, and he
8 filed a motion in limine to prevent the introduction of
9 evidence about damages to the wall and the trial court granted
10 it. The appellate court came along and said, you can't do
11 that. The reason you can't do that is because you basically
12 dismissed his claim for damages.

13 What AT&T is asking you to do as prehearing officer
14 in this case through its motion in limine is to dismiss Issue
15 7, and you can't get there through a motion in limine and I
16 think the law is well settled on that. And when we file our
17 response, we will brief some additional cases for you on that
18 point.

19 I guess the third point is it's kind of hard for us
20 to understand why this has come up now. The issue was in the
21 petition, the parties have filed testimony on it, there was an
22 issue ID meeting. We have not seen any motion to dismiss this
23 issue from AT&T, even today. The motion they filed is
24 inadequate to get where they want to go.

25 And really what they're asking you to do is jump

1 ahead and without a hearing and without considering the
2 evidence they want you to act on behalf of the panel and decide
3 this issue in their favor. Their position on this issue is it
4 shouldn't be decided. So for all of those reasons we think
5 their motion in limine, which would strike the, the case or
6 strike the issue from the case, is inappropriate. As long as
7 the issue is in the case our discovery is clearly relevant. I
8 mean, the question is VOIP compensation. Their position is we
9 shouldn't consider it because it's nascent technology and
10 various things like that. We're asking, how much are you doing
11 and how are you doing it? And that's relevant to determine
12 whether the Commission should decide the issue. If they're, if
13 they're not doing any of it, maybe their position that this is
14 nascent technology is correct. If they're doing a lot of it,
15 it's not nascent technology. All of that information that
16 we've requested is calculated to lead to the discovery of
17 admissible evidence. And if you need to look at their
18 testimony --

19 COMMISSIONER DAVIDSON: Let's -- Counsel, let's -- if
20 we can sort of wrap up here.

21 MR. WAHLEN: Yeah. This is, this is my last remark.
22 If you look in Mr. Talbott's rebuttal testimony, he's accused
23 Sprint of claiming the sky is falling. He thinks Sprint is
24 Chicken Little; this VOIP, you know, we're overreacting. All
25 we're asking for is for AT&T to tell us how much of this stuff

1 they're doing for Sprint. That's important evidence for our
2 use in cross-examining Mr. Talbott on whether the sky is
3 falling.

4 So we think it's clearly relevant. We think the
5 motion to compel should be granted; the motion in limine should
6 be denied.

7 COMMISSIONER DAVIDSON: Thank you, Counsel. AT&T?

8 MS. CECIL: Yes, Commissioner. As Mr. Wahlen has
9 indicated, the issue involves voice over Internet protocol
10 traffic, and this Commission has a significant history on this
11 issue. It was for that reason that during the course of the
12 negotiations AT&T was steadfast in its position with Sprint
13 that this is not an issue that we should be addressing in the
14 interconnection agreement. This Commission has ruled that at
15 the current state of affairs that it was not going to make a
16 determination on VOIP traffic by virtue of its order in the CNM
17 Networks, Inc., order as well as in the generic proceeding in
18 Docket 000075-TP.

19 Nevertheless, Sprint continued to try to negotiate
20 the issue as a policy matter. And as a result, as Mr. Wahlen
21 indicates, AT&T was forced to include the issue in its
22 arbitration petition. We did that straight up, we did that
23 ethically, we did it as we should have done it. As a result,
24 the issue was framed as a policy issue. And that has continued
25 to be AT&T's position that this is a policy issue, that the

1 Commission should stay with its current course, which is we're
2 not going to decide this issue until there has been further
3 information rulings from the FCC, given that there is both an
4 AT&T petition pending on this issue before the FCC, as well as
5 the fact that it is included in the FCC's intercarrier
6 compensation proceeding which is ongoing.

7 COMMISSIONER DAVIDSON: Let me ask you this, if I
8 can, if I can interrupt. Is the gist of the argument that the
9 PSC lacks jurisdiction over this issue or that an exercise of
10 jurisdiction would somehow be improvident at this juncture?

11 MS. CECIL: We have not argued that the Commission
12 does not have jurisdiction. The argument is you decided this
13 issue at least on two prior occasions, one of which was within
14 the last seven months. The argument is this is a significant
15 industry-wide question for the Commission to decide. This
16 Commission has a track record of taking issues which are
17 fundamental to the industry, which cut across many different
18 companies, and not deciding them in individual interconnection
19 negotiation arbitrations.

20 COMMISSIONER DAVIDSON: Let me, if I can jump in one
21 more time so I can -- I appreciate your referring us to past
22 Commission decisions.

23 Have there been any decisions that you're aware of in
24 which the VOIP has been raised as an interconnect issue but has
25 not been addressed?

1 MS. CECIL: That has not been addressed?

2 COMMISSIONER DAVIDSON: Right. Have the parties in
3 other matters to your knowledge raised this as an issue but
4 declined to address? And a follow-up: Does AT&T have any
5 interconnect agreements with any other carriers in which VOIP
6 is addressed? And the same question at the end of AT&T's
7 argument for Sprint: Does Sprint have any interconnect
8 agreements with other carriers in which VOIP is addressed?

9 MS. CECIL: Commissioner, to your first question
10 about other Florida Commission decisions in an interconnection
11 situation regarding VOIP traffic, my understanding is that
12 there is an arbitration decision that was issued between
13 ITC^DeltaCom and BellSouth, I don't remember the year, I think
14 it was much earlier on after passage of the 1996 Act, where
15 VOIP traffic was addressed by the Commission. It's my
16 understanding after that the Commission entered into its
17 decision in the generic proceeding that I referenced and also
18 in the CNM Networks proceeding.

19 With respect to other interconnection agreements that
20 AT&T has, to the best of my knowledge AT&T does not have any
21 interconnection agreement where VOIP traffic is covered.
22 Specifically in the BellSouth/AT&T interconnection agreement it
23 specifically indicates that the parties are unable to agree as
24 to how the traffic should be compensated and that they have
25 therefore decided to abide and wait for further rulings from

1 the FCC and other bodies, courts as to how that traffic is to
2 be compensated.

3 Tracy, are you aware of any other provisions that we
4 should bring to the Commissioner's attention?

5 MR. HATCH: I am not aware of any others where the
6 issue of VOIP was addressed in an interconnection or an
7 arbitration and then specifically resolved or not resolved.

8 COMMISSIONER DAVIDSON: Thank you. If you can,
9 continue with your argument. I'll try and save my questions
10 for the end.

11 MS. CECIL: Yes. Commissioner, as I indicated, the
12 issue was formulated as a policy issue from the very beginning.
13 And to Mr. Wahlen's question about, well, why are we now seeing
14 this type of motion from AT&T is very simple. We basically got
15 backslighted (phonetic) in this situation. We thought we were
16 arguing this from a policy perspective, and then the next thing
17 we know we get interrogatories from Sprint which ask for
18 detailed information about multiple years of traffic as to how
19 AT&T has provided services in Florida. That clearly is beyond
20 any policy discussion.

21 And as we indicated in our response to the motion to
22 compel and in the motion in limine, whether AT&T is or is not
23 at this time or has in the past used any particular technology
24 to provide service to its customers is really irrelevant on a
25 prospective going-forward basis. We very much believe, based

1 on conversations that Sprint has had with AT&T executives, that
2 this is the proverbial fishing expedition, that they are trying
3 to elicit from us in a policy issue very, very detailed
4 information that really has no impact on what the Commission's
5 decision should be.

6 If the Commission were to make a decision in this
7 arbitration which was based on the level of traffic, I'm not
8 sure how that could be handled from a subsequent policy
9 perspective for the Commission. Do you then in subsequent
10 arbitrations look to the level of the traffic before you
11 determine as a policy matter how voice traffic is going to be
12 compensated? It's just extremely awkward to handle this type
13 of substantive discussion in the context of an arbitration,
14 which we have said from the very beginning. And, more
15 importantly, this Commission has already ruled very, very
16 recently that on this particular issue, given its significant
17 industry-wide impact, you know, we're going to wait and see.
18 And we still believe that that is the appropriate position for
19 the Commission to take.

20 I think that in terms of Mr. Wahlen's arguments that
21 a motion in limine is not appropriate -- motions in limine, as
22 you know, Commissioner, are filed all the time before the
23 Florida Public Service Commission. That is the way that you
24 get an issue of this matter, of this magnitude before the
25 Commission. We're not asking that you dismiss the issue.

1 We're basically saying the testimony is there, it's been framed
2 as a policy issue, it's always been framed as a policy issue.
3 And so you're clearly in a situation where you can decide,
4 look, for this particular issue it is not appropriate to be
5 decided in the context of this arbitration based on previous
6 decisions from the Commission.

7 So we feel very strongly that there's just absolutely
8 no way that this discovery is appropriate in this proceeding.
9 Had we known that Sprint was attempting to ferret out facts to
10 file a subsequent complaint against AT&T, we certainly would
11 have done or made different arguments at the prehearing
12 conference, we certainly would have made different arguments at
13 the issue identification conference. But we were not given
14 that latitude. As I said, we were sort of, you know, at one
15 time given questions from Sprint that are nothing more than
16 fuel and fodder for a particular complaint that they hoped to
17 file against AT&T.

18 COMMISSIONER DAVIDSON: Does that wrap up your
19 argument?

20 MS. CECIL: Yes. Thank you, Commissioner.

21 COMMISSIONER DAVIDSON: I'd like to give two or three
22 minutes to Sprint for a rebuttal. And please address
23 specifically, if you can, the relevancy standard under the
24 discovery rules. I'd like to just hear an articulation as to
25 how the information you seek is likely to lead to the discovery

1 of admissible evidence to this issue. And then with the
2 wrap-up of that two or three minutes, AT&T, you will have the
3 same amount of time for a, a short surrebuttal.

4 MR. WAHLEN: Thank you, Commissioner. The discovery
5 standards set forth in the Rules of Civil Procedure says that,
6 "Discovery is allowed if it's relevant to the subject matter of
7 the pending action. And it's not grounds for objection that
8 the information sought will be inadmissible at trial, if the
9 information sought appears to be reasonably calculated to lead
10 to the discovery of admissible evidence." That's the standard.

11 What AT&T just argued to you was you shouldn't decide
12 this issue because things haven't advanced enough since the
13 last time the Commission looked at this in a generic
14 proceeding. We're asking them factual questions about how much
15 VOIP they are using with Sprint in Florida right now so that
16 you can decide whether things have changed. That's why it's
17 relevant.

18 They have put in testimony that's accused Sprint of,
19 of being Chicken Little, crying that the sky is falling. I
20 mean, we've taken the position that there's a lot of this stuff
21 going on. They've said we're wrong; the sky is not falling.
22 The questions we've asked are how much of this are you doing?
23 That's directly relevant to whether the sky is falling. It's
24 directly relevant to how much of this is going on. They --
25 they're asking you to not decide this because things haven't

1 changed in the last seven months, but they're not willing to
2 share information with you about how much of this stuff is
3 going on. That doesn't make any sense. This is clearly,
4 clearly relevant to this case.

5 Now I don't understand what they say when they, they
6 call this a policy issue. The issue is what's the proper
7 compensation. They haven't argued with us about what the
8 proper compensation level is. We've said what we think it
9 should be. They have not said in this case what they think it
10 should be. They have declined to join the issue on
11 compensation. They're simply taking the position, don't do it,
12 don't consider it.

13 COMMISSIONER DAVIDSON: Does Sprint have any
14 interconnects in other states that address VOIP?

15 MR. SCHIFMAN: Commissioner Davidson, Ken Schifman
16 from Sprint. Ken Schifman for Sprint. Actually Sprint is
17 negotiating in interconnection agreements in multiple states
18 with parties suggesting that voice over IP should be subject to
19 the traditional compensation schemes.

20 In fact, right here in Florida --

21 COMMISSIONER DAVIDSON: Well, I understand that and
22 that's really, as I understand it, the RBOC policy position on
23 that. But my question is do you have any existing
24 interconnects? Have any interconnects been signed that address
25 VOIP?

1 MR. SCHIFMAN: We can certainly get you that
2 information. I don't have any knowledge yet if a CLEC has
3 signed onto that.

4 COMMISSIONER DAVIDSON: And it's not that that, it's
5 not that that will in any way be dispositive of this case.

6 MR. SCHIFMAN: Right.

7 COMMISSIONER DAVIDSON: I'm just curious as to if any
8 exists out there in the industry.

9 MR. SCHIFMAN: If I may, let me address two other
10 issues. One is Sprint has an arbitration ongoing at this
11 Commission with a company called XO. Voice over IP is an issue
12 identified in that arbitration, so like in this case there's
13 specific contract language that the parties are arguing about.
14 The Commission -- the issue has been raised in the petition.
15 That is an issue in that arbitration as well.

16 So AT&T's argument, I mean, what we're dealing with
17 is a contract issue. In fact, the Commission's recip comp
18 case, the generic order on recip comp --

19 COMMISSIONER DAVIDSON: Let me jump in just with one
20 question following up here. To your knowledge has the, has
21 this Commission or other Commissions in cases in which you're
22 doing business ordered or provided for the production of this
23 type of information sought here?

24 MR. SCHIFMAN: I'm not aware that the New York
25 Commission did decide the issue of voice over IP. I'm not

1 aware of what discovery occurred in that case. It was not a
2 Sprint case. It was between Frontier and a different CLEC. So
3 I am not aware of discovery that's occurred on this issue.

4 This Commission did, as, as AT&T suggested, did look
5 at this issue and decided it, accepted it as an issue and made
6 a determination in the Intermedia/BellSouth arbitration. It
7 was done -- the Commission decision was issued on August 22nd,
8 2000.

9 The recip comp case generic order suggests that at
10 that point in time even after that arbitration that there was
11 some information that, that they didn't want to make a decision
12 based on the record on that, in that proceeding. However, they
13 suggested that parties should bring to them individual disputes
14 and arbitrations where such factual information can be brought
15 before the Commission so the Commission can make a
16 determination. That's what we're asking for here. We're
17 asking to develop a record on voice over IP. We're asking for
18 factual information.

19 COMMISSIONER DAVIDSON: Let me ask you a question.
20 How would, how would the arguments of the parties and this
21 issue be impacted with implementation of the Access Reform Bill
22 that Florida recently passed?

23 MR. SCHIFMAN: Well, the Access Reform Bill was
24 passed. It, it basically says, to my understanding, that if a
25 decision is made on voice over IP is determined not to be

1 access traffic, then parties get to rebalance their rates
2 without petitioning the Commission is my understanding of the
3 legislation. Jeff, correct me if I'm wrong.

4 MR. WAHLEN: That's right.

5 MR. SCHIFMAN: So, I mean, we, we have a particular
6 contract language dispute with AT&T on this. We want to
7 understand what type of traffic AT&T is providing to us over
8 voice over IP. It's an issue that the Commission has to decide
9 under the MCI case that Mr. Wahlen handed to you, it's an open
10 issue for arbitration, and there's just -- and AT&T's
11 suggestion that this is a policy issue, all the issues before
12 the Commissions and arbitrations are policy issues. The POI
13 issue in this case is a policy issue. It is before the FCC in
14 the intercarrier NPRM. But we're not suggesting that the
15 Commission defer action on that until the FCC acts. If this
16 Commission had to defer action every time the FCC was supposed
17 to decide something, nothing would ever be done here.

18 COMMISSIONER DAVIDSON: All right. Let's move on.
19 AT&T, a surrebuttal, please.

20 MS. CECIL: Yes, Commissioner. I won't address the
21 relevancy argument because, as you indicate, it's really the
22 linchpin of the compelling, the competing motions. But if you
23 look at AT&T's motion in limine -- I mean, we quoted
24 specifically from Mr. Maples' testimony in this case that it
25 would be improper for Sprint to disclose how much traffic they

1 believe that AT&T has transported and terminated using Internet
2 protocol. That specifically is, in my opinion, and I believe
3 that, you know, anyone who reasonably looks at it would have to
4 say, okay, well, what is the relevancy of the information if
5 Sprint itself says that it's not appropriate to discuss it in
6 this proceeding? And that's because the information is solely
7 being asked for in terms of a subsequent complaint.

8 I would indicate that we have not heard anything from
9 Sprint's counsel on the phone this morning that indicates that
10 they're not going to file a complaint against AT&T. They could
11 have told you that affirmatively during the argument today, but
12 they didn't do that, Commissioner. So the relevance, I would
13 say, is still just not there based on what their own witnesses
14 said.

15 Second to the relevance, if you look at the motion
16 that we filed, we also laid out in detail the comments that
17 Sprint had filed at the FCC in the AT&T VOIP petition, and
18 Sprint told the FCC very directly, you now have all of the
19 information that you need to make this decision. There was
20 information about the amount of the traffic, the level of the
21 traffic, the impact to the industry if the FCC makes a decision
22 one way or the other. So for Sprint to now say that they have
23 got to have this issue addressed by this Commission, which has
24 significant industry-wide impact, it's just not proper. It's
25 not proper from a policy perspective and it's certainly not

1 proper from a relevancy perspective if you look at the very
2 testimony that their witness has filed. Thank you.

3 COMMISSIONER DAVIDSON: Thank you, parties. And I
4 look forward to receiving Sprint's response to, written
5 response to the motions.

6 Staff, I understand that you had a preliminary
7 recommendation prepared. I didn't receive that until about
8 9:00 this morning. But if you could briefly summarize for the
9 benefit of the parties, that would be useful.

10 MS. DODSON: Staff tentatively recommends that the
11 motion to compel and the motion for protective order be granted
12 in part and denied in part. A number of the interrogatories in
13 question ask for information about VOIP services provided in
14 Florida, and staff suggests that the questions should be
15 limited to calls that originate or terminate in Sprint's
16 service territory and services provided or offered within
17 Sprint's service territory.

18 COMMISSIONER DAVIDSON: All right. Parties, there
19 you have staff's preliminary recommendation. If you would like
20 to address that in your, in your responses, that would be
21 great. I think we've -- I've heard plenty and I think each
22 side knows the other's position.

23 What's -- Sprint, what's your anticipated time frame
24 for getting in a written response to the motions?

25 MR. WAHLEN: I think under the rule we're entitled to

1 next Tuesday, but hopefully we can get something in Monday for
2 you.

3 COMMISSIONER DAVIDSON: Yeah. That would be great, I
4 mean, as soon as you can get it here. The quicker you get it,
5 the sooner I can rule.

6 MR. WAHLEN: Thank you.

7 COMMISSIONER DAVIDSON: Anything else, parties?
8 Staff?

9 MS. DODSON: Nothing further.

10 COMMISSIONER DAVIDSON: Prehearing conference
11 adjourned.

12 (Prehearing conference adjourned at 10:25 a.m.)
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STATE OF FLORIDA)
 ;
COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 28th DAY OF JULY, 2003.



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