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September 5, 2003

VIA FEDERAL EXPRESS

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

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Re: Petition by AT&T Communications of the Southern States, LLC  
And TCG South Florida for Arbitration of Interconnection  
Agreement with Sprint-Florida, Incorporated Under the  
Telecommunications Act of 1996  
Docket No.: 030296-TP

Dear Mrs. Bayo:

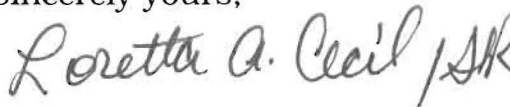
Please find enclosed for filing in your office the original and fifteen (15) copy of AT&T Communications of the Southern States, LLC and TCG of South Florida (collectively "AT&T") Motion for Protective Order regarding the Notice of Deposition of David L. Talbott by Sprint-Florida, Incorporated in the above referenced docket.

Please stamp two (2) copies of the Response and Motion in the usual manner and return to us via our courier.

If you have any questions, please do not hesitate to contact me at 404-888-7437.

AUS \_\_\_\_\_  
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Sincerely yours,



Loretta A. Cecil

Enclosure(s)

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition for Arbitration of	)	
Unresolved Issues Resulting From	)	Docket No.: 030296-TP
Negotiations with Sprint-Florida,	)	
Incorporated for Interconnection,	)	
Agreement By AT&T	)	Filed: September 5, 2003
Communications of the Southern	)	
States, LLC d/b/a AT&T and TCG	)	
South Florida	)	

**AT&T'S MOTION FOR PROTECTIVE ORDER**

AT&T Communications of the Southern States, LLC and TCG South Florida ("AT&T"), pursuant to Rules 28-106.204 and 28-106.303, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby request that the Florida Public Service Commission ("Commission") enter a Protective Order finding that AT&T is not required to answer in deposition "fact specific, fact intensive, or fact dependent" questions regarding voice over internet protocol ("VOIP") because VOIP traffic is not an appropriate issue in this proceeding.

**BACKGROUND**

As agreed to by AT&T, Sprint, and the Commission Staff, the text of Issue 7 asks:

VOICE OVER INTERNET PROTOCOL: How should traffic originated and terminated by telephone and exchanged over internet protocol (in whole or in part, including traffic exchanged between the parties originated and terminated to enhanced service providers) be compensated?

Sprint has insinuated in this proceeding that because AT&T included Issue 7 in its Petition, AT&T opened the "floodgates" relative to all discovery

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regarding VOIP traffic.<sup>1</sup> Nothing could be further from the truth. From the very beginning of this proceeding, AT&T's position regarding compensation for VOIP traffic has been ever constant -- that determining compensation for VOIP traffic is not an appropriate issue in this proceeding. Moreover, AT&T has reiterated this position in no less than four (4) pleadings filed in this proceeding. Specifically, in its original Petition, AT&T stated:

Issue 7 – VOIP Traffic: Determining compensation for VOIP traffic is not an appropriate issue in this arbitration. In Docket No. 000075-TP,<sup>2</sup> the Commission previously determined that compensation regarding VOIP traffic was not “ripe” for consideration. Subsequent to the Commission’s Order in this Docket, on October 18, 2002 AT&T filed with the FCC its “Petition For Declaratory Ruling That Phone-To-Phone IP Telephony Services Are Exempt From Access Charges.”<sup>3</sup> Recognizing the pendency of this AT&T Petition at the FCC, on December 31, 2002 in Docket No. 021061-TP the Commission declined to address whether phone-to-phone IP telephony services constitute “telecommunications” under Florida law, noting that “the FCC currently is considering a similar matter.”<sup>4</sup> In such Order, the Commission specifically found that “it would be administratively inefficient” to make such a determination while the FCC proceeding was underway.<sup>5</sup>

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<sup>1</sup> Sprint Motion to Compel, July 15, 2003, at Page 1; Pages 3-4.

<sup>2</sup> *In Re: Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Florida PSC Docket No. 000075-TP, FL PSC Order PSC-02-1248-FOF-TP, September 10, 2002 (“*Florida Reciprocal Compensation Order*”).

<sup>3</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361 (“*AT&T's FCC VOIP Petition*”).

<sup>4</sup> *In Re: Petition of CNM Networks, Inc. For Declaratory Statement That CNM's Phone-To-Phone Internet Protocol (IP) Technology Is Not “Telecommunications” And That CNM Is Not A Telecommunications Company Subject To Florida Public Service Commission Jurisdiction*, FL PSC Docket No. 021061-TP, Florida PSC Order 02-1858-FOF-TP, December 31, 2002 at Page 1 (“*Florida CNM Networks, Inc. Order*”).

<sup>5</sup> AT&T Petition for Arbitration, Attachment B, Issue 7 – VOIP Traffic.

Thereafter in David L. Talbott's Direct Testimony, AT&T stated:

Although the Commission's Order in the CNM proceeding is less than six (6) months old, once again Sprint is seeking to have the Commission rule on VOIP telephony (this time in the context of an arbitration with Sprint making inappropriate industry-wide allegations regarding [CLECs'] use of VOIP telephony to avoid access charges.) The Commission should not be persuaded by Sprint's repeated efforts to push this Commission into rendering a decision on VOIP - particularly in the context of this arbitration which is limited to AT&T and Sprint.<sup>6</sup>

Additionally, in Mr. Talbott's Rebuttal Testimony, AT&T stated:

The vast majority of Sprint's arguments center in its allegation that increased VOIP traffic is causing Sprint to lose access revenues. I will address Sprint's "the sky is falling" argument further below, but first I believe it necessary to reiterate AT&T's position that the Commission should not address compensation for VOIP traffic in the context of this arbitration. As the Commission will recall, my direct testimony sets forth in great detail the many reasons why the Commission should not rule on compensation for VOIP traffic in the context of this arbitration. Thus, I will not repeat them here. Accordingly, to the extent I have provided testimony to rebut Sprint's direct testimony, I am doing so solely to "correct the record," and not because AT&T believes it appropriate for the Commission to consider the complex technical and regulatory issues *raised by Sprint* relative to compensation for VOIP traffic.<sup>7</sup>

Finally in its Pre-hearing Statement relative to Issue 7, AT&T stated:

This is not an appropriate issue in this arbitration. Previously, in the Commission's *Florida Reciprocal Compensation Order*, the Commission decided not to

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<sup>6</sup> Direct Testimony of David L. Talbott, page 67, lines 13-22 filed June 19, 2003 in this proceeding ("Talbot Direct Testimony").

<sup>7</sup> Rebuttal Testimony of David L. Talbott, page 34, lines 5-18, filed July 10, 2003 in this proceeding ("Talbot Rebuttal Testimony") [emphasis added].

address compensation for voice over internet protocol (VOIP) finding that “. . . this issue is not ripe for consideration at this time.”<sup>8</sup> Thereafter, the Commission also declined to address whether VOIP traffic constitutes “telecommunications” under Florida law in its *CMN Networks, Inc. Order*.<sup>9</sup> The reasoning behind the Commission’s decision was its recognition that the FCC was considering AT&T 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 the issue while the FCC proceeding is underway and while the VOIP issue is not right for consideration.”<sup>10</sup>

Accordingly, it is disingenuous for Sprint to assert that because AT&T included Issue 7 in its Petition, AT&T opened the “flood gates” relative to all discovery regarding VOIP traffic. As Sprint well knows, AT&T only included Issue 7 in its Petition *because Sprint -- and not AT&T --* affirmatively and repeatedly raised compensation for VOIP traffic in the interconnection negotiations between the Parties. Throughout these negotiations, AT&T remained steadfast in its position that compensation for VOIP traffic was not an appropriate issue for the Commission to decide in this proceeding.

Moreover, AT&T’s Petition clearly frames Issue 7 as a policy issue - - the wording for which both the Commission Staff and Sprint have agreed. As a result, Issue 7 is not “fact specific, fact intensive, or fact dependent.” In this respect, Sprint did not propose any such additional “fact” issues in

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<sup>8</sup> *Florida Reciprocal Compensation Order* at Page 37.

<sup>9</sup> *CMN Networks, Inc. Order* at Page 1.

<sup>10</sup> *Id.*; See also, AT&T’s Pre-hearing Statement at Page 6.

its Response to AT&T's Petition, or during the issues identification conference held with the Commission's Staff.<sup>11</sup> Sprint also did not seek such facts from AT&T in its interconnection negotiations with AT&T. Rather, despite many months of negotiations, Sprint improperly and unfairly has waited until just before the hearing in this proceeding to raise such "fact" questions before the Commission.

### **ARGUMENT**

#### **I. SPRINT IS IMPROPERLY USING DISCOVERY IN THIS PROCEEDING TO DISCOVER "FACTS" FOR A SUBSEQUENT COMPLAINT AGAINST AT&T.**

Sprint's Interrogatories to date clearly signal the types of questions which Sprint will ask Mr. Talbott during his deposition regarding compensation for VOIP traffic. In particular, Sprint's Interrogatories all ask the same two basic questions: Does AT&T provide service in Florida using VOIP? If so, in what amounts? The answers to both questions have no bearing regarding whether, and in what form, the Commission should establish compensation for VOIP traffic between AT&T and Sprint on a prospective basis. In this respect, Sprint's Interrogatories constitute the proverbial "fishing expedition" in which Sprint hopes to develop facts for a complaint regarding AT&T's past and present behavior -- and not to seek

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<sup>11</sup> Moreover, Sprint had every opportunity to propose additional "fact specific, fact intensive, or fact dependent" issues regarding VOIP traffic at the issue identification conference. In fact, during this conference, the Parties and Commission Staff discussed Issue 7 at length, and changed the issue to accommodate proposed "policy related" word changes requested by Sprint to AT&T's framing of Issue 7.

information that is “reasonably calculated to lead to admissible evidence” regarding the prospective policy ramifications presented by Issue 7.

Relative to Sprint’s Interrogatories, AT&T filed its Motion for Protective Order and Motion in Limine regarding compensation for VOIP traffic on July 22, 2003. AT&T renewed these Motions in filings on August 25, 2003 and August 28, 2003. Oral argument was heard by the Prehearing Officer on July 24, 2003. The Prehearing Officer has yet to rule on these Motions and renewed Motions. During the pendency of these Motions and renewed Motions, on September 3, 2003, Sprint noticed the deposition of David L. Talbott for September 9, 2003. AT&T believes that Sprint will ask the same improper “fact specific, fact intensive, and fact dependent” questions regarding VOIP traffic included in Sprint’s Interrogatories of Mr. Talbott during this deposition.<sup>12</sup> In order to avoid using valuable time objecting to such questions during the deposition, AT&T files this Motion for Protective Order.

The Commission must conclude that Sprint’s Interrogatories and potential deposition questions regarding VOIP traffic serve no purpose except to gather information to support a future Sprint complaint for AT&T’s past and present behavior - - behavior which is irrelevant to prospective application of Issue 7. Consider the following Direct Testimony filed by James R. Burt on behalf of Sprint:

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<sup>12</sup> To the extent Sprint asks Mr. Talbott “policy” questions regarding VOIP traffic arising out of his direct and rebuttal testimony during the deposition, AT&T does not object so long as the questions are not otherwise objectionable under the Florida Rules of Civil Procedure.

Q. Are you aware of the Florida statute that addresses the issue of carriers knowingly using local interconnection facilities to avoid access charges?

A. Yes. Section 364.16(3)(b), Florida Statutes, states that "No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service."

Q. In your opinion, is this statute relevant to Issue 7 in the Sprint/AT&T interconnection agreement?

A. Although I am not an attorney, the statute appears to relate directly to Issue 7, which addresses the inter-carrier compensation that applies to Phone-to-Phone VOIP. If AT&T were to terminate VOIP toll traffic over Sprint local interconnection trunks, *it appears it would be a violation of the statute.*<sup>13</sup>

Sprint's own testimony reflects that AT&T's past and present actions regarding VOIP traffic are of interest to Sprint solely in regards a future complaint by Sprint alleging AT&T's violation of Section 364.16(3)(b), Florida Statutes, and not this proceeding. In Mr. Burt's Rebuttal Testimony, he specifically testifies that *in this proceeding*, it would be ". . . inappropriate to specifically quantify the amount of [VOIP] traffic AT&T has terminated without appropriately compensating Sprint . . ." <sup>14</sup> This testimony is

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<sup>13</sup> Direct Testimony of James R. Burt, page 12, lines 19-24 and page 13, lines 1-10, filed June 19, 2003 in this proceeding ("Burt Direct Testimony") [emphasis added].

<sup>14</sup> Rebuttal Testimony of James R. Burt at page 3, lines 19-20, filed on July 10, 2003 in this proceeding ("Burt Rebuttal Testimony"). In his Rebuttal Testimony, Mr. Burt goes on to state that Sprint ". . . has identified millions of dollars in lost access revenue over the last several months resulting from this access toll arbitrage by AT&T." *Id.* Clearly, this testimony clearly begs the question of why Sprint needs AT&T to answer Sprint's Interrogatories in the first place.



particularly revealing regarding Sprint's discovery motives, and Sprint cannot have it both ways. It cannot request information in discovery, and then at the same time, argue that the requested information is not "appropriate" for disclosure in this proceeding.

Additionally, the Commission need look no further than Sprint's Interrogatories themselves to determine that they do not constitute permitted discovery in this proceeding. Sprint's Interrogatories ask for numerous details regarding AT&T's service offerings over the course of years in Florida, including minutes of use or other measurement factors for such services, and what compensation AT&T has paid local exchange carries for transporting and terminating such traffic. These questions clearly are not focused on the prospective policy ramifications of Issue 7. Rather, all are focused on discovering information for a potential Sprint complaint against AT&T, and AT&T has every reason to believe that Sprint will ask these same questions at Mr. Talbott's deposition. Thus, because Sprint's Interrogatories and potential deposition questions are not relevant to determining compensation on a prospective basis, *by definition they are "burdensome" and "overly broad."* Accordingly, AT&T hereby moves the Commission for a Protective Order that AT&T is not required to answer "fact specific, fact intensive, or fact dependent" questions at deposition regarding VOIP traffic.

**II. THE COMMISSION PREVIOUSLY HAS DETERMINED THAT COMPENSATION FOR VOIP TRAFIC IS NOT "RIPE" FOR CONSIDERATION AND SPRINT HAS AGREED THAT THE ISSUE SHOULD BE DECIDED BY THE FCC.**

Support for this Motion for Protective Order is found in AT&T's Talbott Direct Testimony. As AT&T described in the Talbott Direct Testimony, in the *Florida Reciprocal Compensation Order* the Commission previously determined that compensation regarding VOIP traffic was not "ripe" for consideration.<sup>15</sup> Thereafter, on October 18, 2002, AT&T filed with the FCC its *AT&T's FCC VOIP Petition*. Recognizing the pendency of *AT&T's FCC VOIP Petition*, on December 31, 2002 in the *Florida CMN Networks, Inc. Order*, the Commission declined to address whether Phone-To-Phone IP telephony services constitute "telecommunications" under Florida law, noting that the ". . . the FCC currently considering a similar matter."<sup>16</sup> In such Order, the Commission also specifically found that ". . . it would be administratively inefficient" to make such a determination while this FCC proceeding was underway."<sup>17</sup>

Additionally, as AT&T indicated in Talbott's Direct Testimony, Sprint is fully engaged in *AT&T's FCC VOIP Petition*, having filed Comments with the FCC on December 18, 2002, Reply Comments on January 24, 2003, and an Exparte Presentation on March 13, 2003. In its Comments, Sprint indicated that it ". . . agree[d] with AT&T that there was a pressing need for the [FCC] to clarify whether Phone-To-Phone VOIP traffic should be subject

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<sup>15</sup> *Florida Reciprocal Compensation Order* at Page 37.

<sup>16</sup> *Florida CNM Networks, Inc. Order* at Page 3.

to or exempt from access charges.”<sup>18</sup> Moreover, in urging the FCC to so rule, Sprint specifically brought to the FCC’s attention that this Commission had dismissed CNM’s Petition. Sprint stated:

On December 17, 2002, the Florida PSC dismissed a petition filed by CNM Networks, Inc. for a declaratory statement that Phone-To-Phone IP telephony is not telecommunications (PSC Docket No. 0216061-TP). The PSC cited, among other factors, the instant proceeding before the FCC as a reason to defer action at the state level at this time. Thus, it is clear that at least some state PUC’s expect the FCC to assume a leadership role in this matter and clarify this *national policy*.<sup>19</sup>

Additionally, in its Reply Comments, Sprint emphasized the need for the FCC to resolve compensation for VOIP traffic, stating that “. . . [t]he Commission should so clarify [that VOIP traffic is subject to access charges] on an expedited basis, to ensure that, on a going forward basis, all basic telecommunications calls are properly assessed appropriate access charges on a non-discriminatory basis.”<sup>20</sup> In these same Reply Comments, Sprint also urged the FCC to take action relative to VOIP traffic, stating that “. . . [it is critical that the FCC specifically define what is and what is not considered Phone-To-Phone IP telephony.”<sup>21</sup> Sprint then provided the FCC with four criteria for defining Phone-to-Phone IP telephony. These criteria mirror the criteria which Sprint has suggested that this Commission use in order to

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<sup>17</sup> *Id.*

<sup>18</sup> *AT&T FCC VOIP Petition*, Sprint Comments at Page 9.

<sup>19</sup> *Id.* at Pages 9-10 [emphasis added].

<sup>20</sup> *AT&T FCC VOIP Petition*, Sprint Reply Comments at Page 2.

<sup>21</sup> *Id.* at Page 3.

define VOIP traffic.<sup>22</sup> Moreover, contrary to the discovery position taken by Sprint in this proceeding, in its Reply Comments Sprint also advised the FCC that “[t]he Commission now has before it the requisite information needed to issue an explicit clarification about the applicability of access charges to the type of VOIP traffic at issue here.”<sup>23</sup> Finally, Sprint stated that the time was right for the FCC to resolve this issue:

The Commission now has before it a sufficiently developed record to rule on this matter: a description of the Phone-To-Phone VOIP service being offered by AT&T and other carriers; an explanation of how the LEC network is used to originate and terminate these calls; analyses of the impact grant of AT&T’s petition would have on various segments of the telecommunications industry and on universal service funding; and a summary of relevant, previously issued, orders and rules. Although complete data on actual Phone-To-Phone VOIP usage may be difficult to obtain, commenting parties agree that VOIP is a measurable and growing market segment. If such usage accounts for only one percent of total switched interstate access minutes of use (and this percentage is almost certainly understated to a significant degree), there would be approximately 5.4 billion minutes of Phone-To-Phone VOIP. If VOIP service providers are not paying switched access charges for half of those minutes, this equates to \$21.1 million in “lost” switched access revenues at an average interstate access charge of \$.0078 per minute. Actual switched access charge revenue losses are undoubtedly higher, since some percentage (perhaps the majority) of Phone-To-Phone VOIP usage is undoubtedly intrastate calling, and intrastate access charges are generally higher than interstate rates.<sup>24</sup>

### **CONCLUSION**

Thus, because (1) Sprint is engaged fully in the current FCC proceeding dealing with VOIP traffic; (2) Sprint agrees that the FCC now has

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<sup>22</sup> Id. at Pages 3-4. See also, Burt Direct Testimony at Page 4-11.

<sup>23</sup> Id. at Page 6.

before it all relevant information regarding VOIP traffic, and that the FCC should decide compensation for VOIP as a matter of *national policy*; and (3) the Commission should not “overrule” itself and decide what compensation, if any, is appropriate for VOIP traffic only eight (8) months after issuing its *Florida CNM Networks, Inc. Order*, the Commission should grant AT&T’s Motion for Protective Order and issue an order determining that AT&T is not required to answer in deposition “fact specific, fact intensive, or fact dependent” questions regarding VOIP traffic.

WHEREFORE, AT&T respectfully requests that the Commission grant AT&T’s Motion for a Protective Order and issue an order that AT&T is not required to answer in deposition “fact specific, fact intensive, or fact dependent” questions regarding VOIP traffic.

Respectfully submitted this 5th day of September, 2003.

  
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Attorney for:  
AT&T Communications of the  
Southern States, LLC and  
TCG South Florida

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<sup>24</sup> *Id.* at Pages 7-8.

**CERTIFICATE OF SERVICE  
DOCKET NO. 030296-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically and U.S. Mail this 5<sup>th</sup> day of September, 2003 to the following:

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