BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Sprint Communications Company L.P., Overland Park, Kansas, Petition for arbitration under the Telecommunications Act, of certain issues associated with the proposed interconnection agreement between Sprint and Southeast Nebraska Telephone Company, Falls City.	)	Application No. C-3429
	)	FINDINGS AND CONCLUSIONS
	)	Entered: September 13, 2005

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BY THE COMMISSION:

I. BACKGROUND

1. Petitioner, Sprint Communications Company L.P. (Sprint), is a limited partnership that has been certificated by the Nebraska Public Service Commission (Commission or NPSC) to provide competitive local exchange carrier (CLEC or competitive LEC) and other telecommunications services in the State of Nebraska, including local exchange areas served by the Respondent, Southeast Nebraska Telephone Company (SENTCO).

2. SENTCO is a corporation and is a rural incumbent local exchange carrier (ILEC) that has been certificated by the Commission to provide LEC and other telecommunications services in certain local exchange service areas in the State of Nebraska.

3. On December 16, 2004, SENTCO received a request from Sprint to negotiate terms and conditions of an interconnection agreement pursuant to § 252(a) of the Telecommunications Act of 1996 (the Act). Thereafter, the parties proceeded with negotiations. As part of that negotiation, SENTCO made clear to Sprint, and Sprint confirmed, that SENTCO would not be engaging in voluntary negotiations "without regard to the standards set forth in subsection (b). . . of section 251." 47 U.S.C. § 252 (a)(1); see also Ex. 4. As a result of such negotiations, Sprint and SENTCO resolved all but two issues relating to the interconnection agreement.

4. On May 23, 2005, Sprint filed a Petition for Arbitration with the Commission, pursuant to § 252(b) of the Act, seeking arbitration as to the remaining open issues. Attached to the Petition was the Interconnection and Reciprocal Compensation Agreement (the Agreement) between the parties that contains the terms and conditions of interconnection as agreed upon by the parties. The Agreement also reflects in Sections 1.6 and 1.22 the provisions that are disputed between the parties. On June 17, 2005, SENTCO filed its Motion to Dismiss, or in the alternative, its Response to the Petition for Arbitration.

5. On June 14, 2005, in response to SENTCO's Motion requesting that the Commission act as the arbitrator in this matter as opposed to a third party arbitrator, the Commission entered its Order granting SENTCO's Motion and designated the Commission to act as the arbitrator in this matter. Sprint did not oppose this designation.

6. On June 22, 2005, a planning conference was held by the Hearing Officer. A Planning Conference Order was entered by the Hearing Officer on June 28, 2005 that approved the parties' agreement that SENTCO's Motion to Dismiss would be resolved in conjunction with the Commission's decision in this proceeding after the presentation of evidence and submission of proposed orders and briefs. Such Order also established a schedule for completion of the arbitration.

7. The hearing of this matter was conducted by the Commission on August 10, 2005 pursuant to the Arbitration Policy established in C-1128, Progression Order No. 3 dated August 19, 2003. Evidence and testimony was introduced and received into the record. Pursuant to the Planning Conference Order, following the hearing the parties were advised that proposed orders and Post-Hearing Briefs should be submitted to the Commission on or before September 2, 2005.

II. ARBITRATED ISSUES

8. The two unresolved issues expressly identified and raised by Sprint in its Petition for Arbitration, and addressed in the Response thereto are:

> Issue I: Should the definition of "End User or End User Customer" include end users of a service provider for whom Sprint provides interconnection and other telecommunications services? (Section 1.6 and as applied elsewhere in the Agreement.)
>
> Issue II: Should the definition of "Reciprocal Compensation" include the transportation and termination on each carrier's network of all Local Traffic? (Section 1.21 and as applied elsewhere in the Agreement.)

III. CASE SUMMARY

9. The parties agree that if Sprint's intended use of the Interconnection Agreement were limited to Sprint's provision of telecommunications service to Sprint retail customers located in SENTCO's exchange service areas, no issues would exist between the parties requiring arbitration. Tr. 99:14-19. Sprint has entered into a business arrangement with Time Warner Cable Information Services (Nebraska) LLC d/b/a Time Warner Cable (Time Warner) to support Time Warner's offering of local and long distance voice services in the Falls City area. SENTCO disputes that Sprint is entitled to utilize the Agreement for

the benefit of Time Warner or any other third party. (*See generally*, Ex. 2).

10. Sprint expressed no intention of being the retail provider of telecommunications services. Rather, Time Warner will provide retail voice telecommunications services, will exclusively have all customer relationships, will market the service in the name of Time Warner, will perform all billing functions and will resolve all customer complaints. Tr. 27:9-28:1. Sprint has entered into a Wholesale Voice Services Agreement with Time Warner pursuant to which Sprint intends to provide certain telecommunications services to Time Warner on a wholesale basis. Ex. 20, Confidential Attachment.

11. The network over which telecommunications service is proposed to be provided to Time Warner's customers consists of a combination of Sprint and Time Warner facilities. *See* Ex. 107. In the case of a call originated by a Time Warner customer to another Time Warner customer, the call would be handled entirely by Time Warner on its own network. *See* Ex. 16, 13:11-23. In the case of a call originated by a Time Warner customer to a party that is not a Time Warner customer, the call travels from the customer's premises over Time Warner facilities to the Time Warner soft switch which routes the call to a gateway device that converts the call from Internet Protocol to circuit switched format, at which point the call would be passed to the Sprint network for termination. Ex. 16, 14: 2-15, 31:5-21 and Ex. 12, Ex. E. Time Warner's soft switch is responsible for routing of calls originated by Time Warner customers. *See* Ex. 16, 32:4-10. The soft switch directly serves the Time Warner customer.

O P I N I O N A N D F I N D I N G S

IV. PRELIMINARY ISSUES

12. On July 29, 2005, Sprint filed a Motion in Limine seeking to exclude from evidence certain documents that SENTCO had identified as exhibits in response to the schedule requirements set forth in the Planning Conference Order. SENTCO submitted a written Response to the Motion in Limine. On August 5, 2005, the Hearing Officer entered an Order that granted Sprint's Motion with regard to Exhibits 7, 13 and 14, and overruled Sprint's Motion in all other respects.

13. At the hearing, SENTCO offered Exhibits 7, 13 and 14 in evidence. The Hearing Officer reserved ruling on these

offers and on August 17, 2005 issued a Hearing Officer Order sustaining Sprint's objections to such exhibits.

14. On August 8, 2005, Sprint also filed a Motion to Strike the Rebuttal Testimony of Steven E. Watkins. SENTCO submitted a Response to the Motion to Strike on August 9, 2005. Later in the day on August 9, the Hearing Officer entered an Order denying the Motion to Strike. Mr. Watkins testified at the hearing of this matter and his Pre-filed Rebuttal Testimony and attachments were received in evidence as Exhibit 22. The Commission affirms the Hearing Officer's August 9, 2005 denial of Sprint's Motion to Strike and the admission of Exhibit 22 in evidence. We do not regard this rebuttal testimony as Mr. Watkins' testifying to a legal question as Sprint contends in its Motion to Strike, any more than similar statements regarding the Act and applicable FCC rules that are cited and addressed by Sprint's witness, James Burt.

V. JURISDICTION

15. Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted to the state commission for approval. The Commission's review of the arbitrated agreement is limited by § 252(b)(4) of the Act, which provides, "Action by State Commission. (A) The state commission shall limit its consideration of any petition [for arbitration] under paragraph (1) [of § 252(b) of the Act] (and any response thereto) to the issues set forth in the petition and the response, if any, filed under paragraph (3)." Thus, in reviewing this matter, the Commission is statutorily constrained to only consider the issues raised by the parties in the Petition for Arbitration and in the Response within the meaning of § 252(b)(4). If necessary, however, § 252(b)(4)(B) of the Act provides that "the commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision . . ."

16. Also, in reviewing interconnection agreements, state commissions are allowed, pursuant to § 252(e)(3) of the Act, to utilize and enforce state law in the review of agreements. Accordingly, the Commission may also consider the Nebraska Legislature's directive that: "Interconnection agreements approved by the commission pursuant to § 252 of the Act may contain such enforcement mechanism and procedures that the commission determines to be consistent with the establishment of fair competition in Nebraska telecommunications markets." *Neb. Rev. Stat.* § 86-122(1).

17. In order to fully implement § 252(e), the Commission has adopted the Arbitration Policy. Under that Policy, the Commission may only approve arbitrated agreements that: "1) ensure that the requirements of § 251 of the Act and any applicable Federal Communications Commission ("FCC") regulations under that section are met; 2) establish interconnection and network element prices consistent with the Act; and 3) establish a schedule for implementation of the agreement (pursuant to § 252(c))."

VI. ANALYSIS

A. Issue I

18. Sprint has entered into a business arrangement with Time Warner to provide competitive alternatives to customers in Falls City, Nebraska to the extent Time Warner can provide last mile facilities to customers. Time Warner would be the company customers would interface with while Sprint would provide Time Warner with certain functionalities to enable Time Warner to provide a finished telecommunications product. Sprint will provide telephone numbers, 911 circuits, to the appropriate PSAP through the ILEC's selective routers, would perform 911 database administration, directory listings, and some switching functionalities, the extent to which is disputed by the parties. Clearly, at the time the Commission granted Time Warner its certificate of public convenience and necessity in Application No. C-3228, we anticipated that Time Warner would enter the market in Falls City. The Commission granted Time Warner the authority to provide service in that area. However, we established a process in that Order by which Time Warner was to use to enter the market in competition with SENTCO. We stated that Time Warner must:

1. File written notice with the Commission when a bona fide request has been sent either by it or its underlying carrier to a rural ILEC.
2. The rural ILEC then will have 30 days in which to raise the rural exemption as a reason not to negotiate or arbitrate an agreement.
3. The Commission will rule on the rural exemption in accordance with the Telecommunications Act of 1996 (Act).
4. The parties will either negotiate or arbitrate an agreement. The parties will file the agreement for approval. The Commission will

> then approve or reject the agreement in accordance with the Act.

In the Matter of the Application of Time Warner Cable Information Services, LLC, d/b/a Time Warner Cable, Nebraska, Stamford, Connecticut, for a Certificate of Authority to provide local and interexchange voice services within the state of Nebraska, Application No. C-3228 (November 23, 2004) at 5-6.

19. Time Warner has not taken any of the foregoing steps. Rather, Sprint takes the position that it is entitled to establish and interconnection agreement with SENTCO that will apply to end user customers of a third-party telecommunications carrier such as Time Warner.

20. We wholeheartedly support Time Warner and Sprint's goals to provide competitive alternatives to the Falls City consumers; however, we agree with SENTCO that Time Warner is the proper party to negotiate with SENTCO for bringing that service to Falls City. We encourage Time Warner and SENTCO, who we believe are the appropriate parties, to expeditiously work towards an interconnection agreement to provide service to customers in the Falls City exchange.

21. Independently of our finding that Time Warner is a necessary party to negotiate interconnection with SENTCO, we find, based on the record before us, Sprint has failed to demonstrate that it is a "telecommunications carrier" (47 U.S.C. § 153(44)) when it acts under its private contract with Time Warner. Further, we conclude the duty of the ILEC under § 251(b)(5) to establish reciprocal compensation arrangements extends properly to Time Warner as the entity operating the end office switch or, in this case its functional equivalent – the Time Warner soft switch – that directly serves the called party.

22. Through this soft switch, Time Warner ensures that only calls destined to the Public Switched Telephone Network originated by a Time Warner end user are transported through Sprint for termination, and it is through this soft switch that all calls are correctly routed to the Time Warner end user customers. Further, it is this soft switch that routes and delivers calls within the Time Warner network between two Time Warner end users. In this latter class of calls, Time Warner in no way utilizes the Sprint transport arrangement that Sprint and Time Warner have established through their private contract. Accordingly, we find that the soft switch operated by Time Warner provides the switching envisioned by the applicable FCC Rules and the Act. Consequently, under the Sprint/Time Warner private contract, it is only Time Warner as the owner of the

soft switch, that can request a § 251(b)(5) reciprocal compensation arrangement from SENTCO.

23. While we find that our C-3228 Order addresses this issue, we also find independently, that we reach the same conclusion based on applying applicable case law, the Act and controlling FCC rules. A necessary pre-condition for an entity to assert rights under §§ 251 (a) or (b) of the Act is that it must be a "telecommunications carrier." Compare 47 U.S.C. §§ 153(44), 251(a), and (252(a)(1). Section 153 (44) defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in Section 226)." Section 153(46), in turn, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

24. Relevant FCC and judicial precedents have interpreted the definition of "telecommunications carrier" to include only those entities that are "common carriers." *See Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) ("VITELCO"); *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) *cert denied*, 425 U.S. 992 ("NARUC I"). Thus, as a matter of law, only where an entity is a common carrier can that entity assert rights to seek interconnection agreements under Section 251 of the Act. *See* 47 U.S.C. § 252 (a)(1); see also 47 U.S.C. § 251(a). The VITELCO court also made clear that the "key determinant" of common carrier/telecommunications carrier status is whether an entity is "holding oneself" out to serve indiscriminately." VITELCO, 198 F.3d at 927; citing NARUC I, 525 F.2d at 642. "But a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." NARUC I, 525 F.2d at 641 (footnotes omitted); see also VITELCO, 198 F.3d at 925. Moreover, since a state commission assumes federal authority when it acts pursuant to Section 252 of the Act, the Commission is required to employ these standards when arbitrating an interconnection agreement. *See Bell Atlantic-Delaware, Inc. v. Global NAPs South, Inc.*, 77 F. Supp.2d 492, 500 (D.DE 1999) compare *AT&T Communications Systems v. Pacific Bell*, 203 F.3d 1183, 1188 (9th Cir. 1999); *Indiana Bell Telephone Company, Inc. v. Smithville Telephone Company, Inc.*, 31 F. Supp.2d 628, 632 (S.D. IL 1998).

25. Applying these standards to the record before us, we find that Sprint has not produced sufficient evidence to persuade us that it is a "telecommunications carrier" when it fulfills its private contractual obligation to Time Warner. Rather, Sprint's arrangement with Time Warner is an individually negotiated and tailored, private business arrangement shielded from public review and scrutiny. As such, Sprint cannot sustain any claim that it is eligible under Sections 251 and 252 to assert rights afforded "telecommunications carriers" through its arrangement with Time Warner. Although the Sprint witness testified that Sprint is willing to make its wholesale services available to others, it has not demonstrated by its actions that it is holding itself out "indiscriminately" to a class of users to be effectively available directly to the public.

26. We are unconvinced for many reasons. First, the Wholesale Voice Services Agreement is a private contract between Sprint and Time Warner and is treated by Sprint as confidential. Also, Sprint states that any agreement will be individually tailored to the cable company with which Sprint is contacting and Sprint will address the needs and capabilities as presented. *See* Ex. 102, Burt Testimony at 27. Independently, the individualized nature of Sprint's arrangements is demonstrated by the existence of both the Sprint-Time Warner Wholesale Voice Services Agreement and the Sprint-Cable Montana LLC Wholesale Voice Service Agreement. *See* Ex. 20. Thus, the record confirms that Sprint tailors its arrangements with respect to those entities with which it wishes to contract. Further, Sprint has no tariff in place describing the standard business relationship that it will provide to an entity. *See* Ex. 102, Burt Testimony at 27. While Sprint has indicated that it will file such a tariff if directed by the Commission, we question that suggestion in that no submission of the sort has been made. Even if a tariff filing were to be made, we need the opportunity to scrutinize whether, as a matter of fact, the tariffed relationship was an indiscriminate offering of Sprint. In addition, the only service that Sprint unequivocally states will be offered "to the general public" is Sprint's offering of "exchange access." *See id*. at 21-22. However, we note that exchange access is the input for telephone toll services and is not local exchange traffic that is subject to § 251 (b)(5) reciprocal compensation according to 47 C.F.R. § 51.701(a) and (b) in which the FCC expressly excluded "intrastate exchange access" from the definition of "telecommunications traffic" to which reciprocal compensation applies.

27. Based on the record, there is only one user of Sprint's private contract services in Nebraska, Time Warner. *See* Ex. 20, Sprint Response to Admission No. 7. As one court

noted, there is a substantial question as to whether a "single network user" could be found to be a "common carrier without being arbitrary and capricious . . ." *United States Telecom Association v. FCC*, 295 F.3d 1326, 1335 (D.C. Cir. 2002). Thus, as a consequence of Sprint's provision of services to Time Warner, Sprint fails to convincingly persuade us that its private contract service fits within the "classes of users as to be effectively available directly to the public . . ." in order to make Sprint qualify as a telecommunications carrier.

28. Sprint points out that a few other state commissions have addressed the type of contractual relationship established between Sprint and Time Warner. *See* Post-Hearing Brief of Sprint Communications Company L.P. (September 2, 2005) at 9. Specifically, Sprint states, the Illinois Commerce Commission, the New York Public Service Commission and the Public Utility Commission of Ohio have held that a service provider which provides network interconnection and other similar services to cable companies can interconnect with rural LECs. *Id.* We have reviewed those decisions but we cannot agree with their conclusions based on the legal arguments and the facts provided to the Commission in this case.

B. Issue II

29. Even if Sprint were a telecommunications carrier when it fulfills its private contractual obligations to Time Warner we also find that Sprint cannot assert any right to seek § 251(b)(5) reciprocal compensation. In establishing the pricing standards for reciprocal compensation, Congress stated that "such terms and conditions [for reciprocal compensation] provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(ii). Moreover, the "origination" of a call occurs only on the network of the ultimate provider of end user service, which the FCC confirmed.

> We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that ***directly serves the called party*** *(or equivalent facility provided by an non-incumbent carrier).*

See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499 (1996) at 16015 (¶1039) (emphasis added). Further, the applicable FCC rules state the same concept.

> (c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to ***the terminating carrier's end office switch that directly serves the called party,*** or equivalent facility provided by a carrier other than an incumbent LEC.
>
> *(d) Termination.* For purposes of this subpart, termination is the switching of telecommunications traffic at the ***terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party' s premises.***
>
> *(e) Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the *transport* ***and termination*** on each carrier's network facilities of ***telecommunications traffic that originates on the network facilities of the other carrier.***

47 C.F.R. §§ 51.701(c), (d) and (e) (emphasis added).

30. When these standards are applied to the facts, we find that substantial record evidence confirms that it would be Time Warner *not* Sprint that could assert the right to seek a reciprocal compensation arrangement under § 251(b)(5) with SENTCO. First, the record is clear that Time Warner serves the "called party" and is the only entity with the relationship with that end user that is the called party. *See, e.g.,* Tr. 27:20-23, 28:3-6.

31. Second, Time Warner operates the end office switch or equivalent facility since Time Warner has a "soft switch" (*see* Ex. 16, at 31 (lines 5-21)); it is the soft switch that performs switching since only those calls that are intended to be sent to

the Public Switched Telephone Network are sent to Sprint with all other calls between Time Warner end users being switched solely between those end users by Time Warner. *See, e.g.,* Tr. 43:5-44:6. To this end, we agree with SENTCO that Sprint's efforts to equate the term "end office switch" with a Class 5 end office should be rejected. Since the term used by the FCC is "end office" or "equivalent facility" (*see* 47 C.F.R. §51.701(c)), industry identifiers for Class 5 switches are not controlling. *See* Tr. 147:3-19.

32. Finally, the record confirms that all calls either originate or terminate on the Time Warner network facilities. *See, e.g.,* Ex. 102, Burt Testimony at 6 (line 131). Therefore, Sprint *does not* "directly serve . . . the called party" (47 C.F.R. §51.701(c)), nor does the traffic "originate" on Sprint's network. 47 C.F.R. § 51.701(e). Rather, it is Time Warner that owns the "last mile" over which the end user will "originate" a call, it is Time Warner's facilities that will "directly serve . . . the called party," and it is Time Warner's soft switch (or Sprint's newly enunciated term for Time Warner's soft switch – the Time Warner "PBX-like switch") that terminates the call and provides the final switching to the called party.

33. We find unpersuasive Sprint's efforts to recast the network arrangement it anticipates having with Time Warner. Sprint seems to suggest that the Time Warner-provided network components are comprised of only the "local loop" (*see, e.g.,* Ex. 102, Burt Testimony at 6 (lines 131-132), 15 (line 354) to 16 (line 356) and Ex. 107), also suggesting that the Time Warner soft switch is a "PBX-like switch." Ex. 102, Burt Testimony at 16 (line 370). From the testimony provided by Time Warner, we believe Time Warner operates a soft switch and that this device provides switching not only for Time Warner end user to Time Warner end user calls but also for those calls made by and sent to a Time Warner end user from another carrier's end users.

34. Accordingly, we reject Sprint's efforts to suggest that its *current* network description *now* differs from that previously described to the Commission. Even during his testimony at the hearing, Sprint witness Burt stated "Any – any call that does not go to the pubic switch telephone network, such as the example you gave, one Time Warner Cable subscriber to another, would stay within *Time Warner Cable switch.*" Tr. 47:5-9 (emphasis added). We are not persuaded by Sprint's attempts to portray its switching facilities as the switch that directly serves the Time Warner end users.

VII. RESOLUTION OF ISSUES

A. Issue No. 1

Should the definition of “End User or End User Customer” include end users of a service provider for whom Sprint provides interconnection and other telecommunications services? (Section 1.6 and as applied elsewhere in the Agreement.)

35. For the reasons stated above, we find that this issue should be resolved in favor of SENTCO and that any reference to “third party” or “third parties” within the definition of “end user” be removed.

B. Issue No. 2

Should the definition of “Reciprocal Compensation” include the transportation and termination on each carrier’s network of all Local Traffic? (Section 1.21 and as applied elsewhere in the Agreement.)

36. For the reasons stated above, we find that this issue should be resolved in favor of SENTCO and that no third party traffic shall be subject to this Agreement. Thus, the only traffic that will be exchanged between SENTCO and Sprint under the terms of the Agreement is that which is generated by or terminated to the end user customers physically located within the SENTCO certificated area and for which both SENTCO and Sprint shall compete to provide retail end user services.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission acting as Arbitrator in this proceeding that the issues presented in the Petition for Arbitration filed by Sprint shall be resolved in accordance with the foregoing Findings and Conclusions.

IT IS FURTHER ORDERED that an interconnection agreement containing the terms and conditions consistent with the findings set forth herein shall be filed with the Commission not later than October 13, 2005.

MADE AND ENTERED at Lincoln, Nebraska this 13th day of September, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director