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February 4, 2003

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 990649B-TP

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Sprint-Florida, Incorporated's Response in Opposition to Motion for Reconsideration of Florida Digital Network, Inc. and KMC Telecom III, LLC.

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

Thank you for your assistance in this matter.

Yours truly,

John P. Fons

Enclosures

cc: All parties of record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
Pricing of Unbundled Network
Elements

DOCKET NO. 990649B-TP
FILED: February 4, 2003

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SPRINT-FLORIDA, INCORPORATED'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM III, LLC.

Sprint-Florida, Incorporated ("Sprint"), pursuant to Rules 25-22.060(b) and 28-106.204, Florida Administrative Code, respectfully opposes the Motion for Reconsideration ("Motion") filed by Florida Digital Network, Inc. ("FDN") and KMC Telecom III, LLC. ("KMC"), stating as follows:

I. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315, 317 (Fla. 1974).

FDN and KMC totally ignore this standard of review and fail to meet that standard. Instead, they propose that the Commission should use a reconsideration review standard that is totally inapplicable to motions for reconsideration. FDN and KMC argue that the "Commission should reconsider its ruling on the following issues because they lack the requisite foundation of competent and substantial evidence." Motion, pp. 2 and 3. Sprint totally agrees that the Commission's decision must be supported by competent, substantial evidence. Sprint has presented record evidence on each issue which meets the competent, substantial evidence standard. On the other hand, FDN and KMC have relied solely upon post-hearing arguments without any record evidence of their own or otherwise to support their positions. Consequently, the Commission has based its decision on the competent, substantial evidence that is available to it; namely, the record evidence presented by Sprint.

As to the appropriate standard of review for a motion for reconsideration, FDN and KMC fail to identify any point of fact or law which was overlooked by the Commission or which the Commission failed to consider. Instead, FDN and KMC reargue and rehash the same matters already considered by the Commission. Nothing put forth in FDN and KMC's Motion is based upon specific factual matter susceptible to a review of the record. As will be demonstrated below, using the conventional review standard, or even using the inappropriate "competent, substantial evidence" standard proposed by FDN and KMC, each element of the Commission's Order challenged by FDN and KMC is not subject to reconsideration.

II. Burden of Proof

Docket No. 990649A-TP (Sprint/Verizon track) is the culmination of a series of actions taken by the Commission in response to a petition filed by a group of carriers in December 1998, titled "Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory." In their Petition, the Competitive Carriers requested, inter alia,

that deaveraged UNE rates be established. The Commission, in Order No. PSC-99-1078-PCO-TP, granted the Competitive Carriers' request to open a generic UNE pricing docket applicable to Sprint-Florida, BellSouth and GTE-Florida (now Verizon). This generic docket was to address deaveraged UNE pricing, together with the pricing of UNE combinations and non-recurring charges. The Commission's Order, Order No. PSC-03-0058-FOF-TP, issued on January 8, 2003, to which FDN and KMC's Motion for Reconsideration is directed, is the direct result of the Competitive Carriers' December 10, 1998, Petition which was filed pursuant to the federal Telecommunications Act of 1996 ("Act").

The Act contemplates that state commissions establish unbundled network elements (UNE) rates in the context of an arbitration proceeding when the competitive (or alternative) local exchange company ("ALEC") and the incumbent local exchange company ("ILEC") are unable to mutually agree upon such UNE rates. The instant proceeding, while not contemplated by the Act, must be construed as a surrogate for an arbitration proceeding, if it is to have vitality and legitimacy. As such, the instant proceeding is governed by the requirements of the Act, not rate case procedures of a bygone era being urged by FDN and KMC in their Motion. In fact, the Act specifically rejects the use of "rate of return or other rate-based proceeding" procedures for determining "the just and reasonable rate for network elements." *See* Act, Section 252(d)(1)(A).

More importantly, the Act also establishes the duty of each party in an arbitration proceeding with respect to the furnishing of "relevant documentation" and "information." Section 252(b)(4)(B) provides as follows:

> The State 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 on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

Contrary to FDN and KMC's assertion that Sprint bears the "burden of proof," in this proceeding, the fact is FDN and KMC have failed to satisfy the requirements of the Act, while Sprint has fully complied with the requirements of the Act.[1] The Commission, in turn, has proceeded "on the basis of the best information available to it from whatever source derived," as it was required to do as a result of FDN and KMC's failure to submit testimony, studies or other exhibits addressing the issues propounded by the Commission. Accordingly, the Commission has applied the requisite burden of proof standard and none of the matters raised by FDN and KMC require reconsideration.[2]

III. Response to Specific Arguments Raised by FDN and KMC's Motion

As just noted, above, there are no matters raised in FDN and KMC's Motion that meet either the conventional reconsideration standard or FDN and KMC's proposed, but improper, "burden or proof" reconsideration standard. Sprint will also demonstrate why the specific arguments raised by FDN and KMC's Motion are factually incorrect and should be rejected.

A. Deaveraging

FDN and KMC contend that the Commission's deaveraging approach does not encourage competition and must therefore be reconsidered. This is a specious contention. FDN and KMC acknowledge that "the policy rationale underlying geographic deaveraging is to assure that UNE rates reflect underlying costs." *Local Competition Order* at ¶ 766. In compliance, Sprint proposed a **three-zone** proposal which reflect underlying costs. FDN and KMC gave the

[1] Interestingly, FDN and KMC rely upon decisions relating to traditional "rate cases." As noted above, this proceeding is not a "rate case," but is pursuant to the Act as a surrogate for an arbitration proceeding pursuant to Section 252(b) of the Act. Even under a "rate case" scenario, FDN and KMC, not Sprint, are the ones seeking to change established rates, and they, not Sprint, bear the "burden of proof." *See Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).

[2] *See DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957). In a case cited by FDN and KMC, the Florida Supreme Court stated: "We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* at 916.

Commission the alternative to "either strictly follow the 20% methodology and allow nine zones for 2-wire loops and determine the appropriate number of zones and zone costs for each deaveraged element, or factor in competitive considerations as well." FDN Post-Hearing Brief, p. 4. In fact, in selecting the **four-zone** approach, the Commission found that it has the "greatest likelihood of encouraging competition." *Order*, p. 29. Now, FDN and KMC criticize the Commission's Order for doing exactly what they requested. Yet, in their Motion, FDN and KMC fail to identify any record evidence that the Commission ignored or overlooked in establishing a **four-zone** deaveraged UNE loop rate.

FDN and KMC further contend that the **four-zone** approach is, using words allegedly attributable to Staff, "absurd."[3] Motion, p. 7. FDN and KMC attempt to support this contention by looking at the number of **wire centers** assigned to each of the four zones. As the record indicates, wire centers are made up of access lines which vary dramatically by wire center. Thus, the more appropriate comparison is to look at the number of **access lines** available in each band as a percentage of total access lines. This tells the competitor how many customers are available to it in each band. Band 1 has 5.1 percent of the total access lines, while Band 2 has 32.7 percent, Band 3 has 38.8 percent, and Band 4 has 23.4 percent. Except for Band 1, it is obvious that access lines are quite evenly distributed.[4] Contrary to FDN and KMC's assertions, there is no record evidence disregarded or overlooked by the Commission that supports their contention that the Commission's four-zone approach will "do little to promote competition in the state; indeed, it will actually deter competitive entry." Motion, p. 7. Simply put, FDN and

[3] A review of the Agenda Conference transcript does not reveal any member of Staff using the term "absurd" with respect to the use of the **four-zone** approach. Although Staff did point out that it would be "rather odd" to have a Zone 1 rate that only has four out of 133 wire centers (Agenda Transcript, pp. 37-38), Staff also acknowledged that such an approach would be consistent with cost-based rates (Agenda transcript, p. 65.)

[4] Again, FDN got what it asked for. In its Post-Hearing Brief, FDN argued that: "If the Commission will allow Sprint to deviate from its methodology for administrative considerations, then it should also consider deviations from the methodology that will ensure that competition will be promoted." *Id.* pp. 4-5.

KMC have failed to meet any legal or factual basis for requiring reconsideration of the Commission's Order.

B. Fill Factors

FDN and KMC contend that "[t]he Commission adopted the fill factors proposed by Sprint – 100% for distribution (i.e., two lines per household) and 59.17% for feeder – despite the obvious flaws with these utilization rates, which the Commission recognized but nonetheless impermissibly approved for 'lack of alternative record evidence proposing another fill rate.' *Order*, p. 84." Motion, p. 9. FDN and KMC's plea for a different result does not satisfy the conventional standard for reconsideration that the Commission overlooked or failed to consider any fact. Additionally, the Commission's decision, which is based on competent substantial evidence presented by Sprint, satisfies the requirements of the Act.

FDN and KMC's basis for seeking reconsideration of the fill factors decision is that "the Commission erred in basing BellSouth's UNE rates on the assumption of 2 lines per household," and "the Commission should not compound that error by basing Sprint's rates on the same erroneous assumption." Motion, p. 10. Amazingly, FDN and KMC again argue, as they did in their Post-Hearing Brief, that the Commission, in its USF proceeding, found that BellSouth was "not placing two pairs per housing unit, rather it is placing 1.4 to 1.5 pairs."[5] Motion, p. 10. Contrary to FDN and KMC's attempt at misdirection – by referring to the BellSouth and USF proceedings – the competent, substantial record in this proceeding shows that Sprint does in fact – and for good reasons – place two lines to every household. See Ex. 14, pp. 72-77. Clearly, the Commission has made a determination in the instant proceeding, based upon the record evidence, that two pairs per housing unit is appropriate for Sprint, and not based on any finding

[5] FDN and KMC fail to inform the Commission that in that same USF Order, the Commission acknowledged that, "Sprint witness Dickerson stated that the distribution cable sizing factor 'works in concert with the related model input assumption of two pairs per housing unit to achieve a reasonable overall distribution cable fill.'" *USF Order*, p. 78.

in the BellSouth proceeding.[6] *See Order*, p. 83, wherein the Commission concurred with Sprint's record evidence, stating: "We also concur with the distribution fill being set at 100 percent, with two lines per household. This is more effective than adding an additional line when a household requests a second line." *Id.*

In a final effort to seek reconsideration on the fill factor issue, FDN and KMC resort to urging the Commission to "consider the impact of its decision regarding fill factors on the resulting rates." Motion, p. 13. Again, FDN and KMC have failed to show that the Commission has overlooked any point of fact or issue of law. In fact, FDN and KMC simply reargue matters that have already been considered and rejected by the Commission.

C. Customer Locations

FDN and KMC argue that the Commission's decision must be reconsidered because: a.) Sprint's cost model does not use geocoded data; b.) the Commission acknowledged that geocoded data is better; but c.) the Commission still approved Sprint's cost model. In FDN and KMC's view, Sprint had the burden of proof and failed to file this information. Yet, FDN and KMC's position is the same position that was discussed at length in FDN's Post-Hearing Brief, at pages 7 to 16. Additionally, FDN and KMC resort to a recitation of alleged facts – e.g., Sprint could have obtained the data from PNR & Associates – which alleged facts are totally outside of the record. On the other hand, the record evidence FDN and KMC ignore shows that while geocoding may have some benefits, the customer identification data which Sprint provided uses areas as small as a census block to locate customers, which essentially results in geocoded customer locations. Ex. 14, pp. 62-65. Even Commission Staff recognized this fact. Agenda Conference Transcript, pp. 86-87. The Commission's decision, contrary to FDN and KMC's

[6] FDN and KMC attempt to bolster their "shop-worn" argument by citing a magazine article for the contention that BellSouth is deploying only one line per household. Not only is this magazine article irrelevant – since it does not relate to Sprint – it is not record evidence overlooked by the Commission.

continued whining, is based upon record support, does not overlook or disregard any record facts, and does not warrant reconsideration.

D. Cable Material and Placement Costs

FDN and KMC assert that "the costs for cable material and placement should be reduced." Motion, p. 16. They point out that although the Commission acknowledged FDN's argument, it dismissed FDN's claims on the grounds that "FDN's argument relates specifically to fill factors and are addressed in other issues." On the basis of this statement, at page 97 of the Order, FDN and KMC argue that "the Commission failed to consider FDN's argument, making it ripe for reconsideration." Motion, p. 16. To the contrary, the arguments are "unripe." FDN and KMC continue to ignore the legal requirements for reconsideration.

The Commission, by FDN and KMC's own admission, considered their arguments and rejected them. *See* FDN Post-Hearing Brief, pp. 21-24. FDN and KMC simply reargue this issue, which has already been fully considered and rejected by the Commission. *Order*, p. 97. Even FDN and KMC's reargument is not based on any factual record and, in fact, totally ignores the record evidence regarding Sprint's "dark fiber" fill factor, which underlies the Commission's decision. *See* Ex. 14, pp. 66-69. Additionally, as noted by the Commission: "fill factors do not effect [sic] the material and placement inputs of cables." *Order*, p. 97. The Commission's decision is fully supported by competent, substantial evidence, and FDN and KMC have not identified any point of fact overlooked or disregarded by the Commission.

E. Expenses

FDN and KMC assert that "Sprint calculated its expense factors using book investment costs as of the year 2000, and failed to convert its booked investment to replacement costs, as required by the TELRIC methodology." Motion, p. 18. Based on this assertion, FDN and KMC contend that "[t]he Commission overlooked this inconsistency in rendering its decision."

Motion, p. 18. FDN and KMC do not cite any record evidence that Sprint has, in fact, made the criticized calculation. Instead, they rely upon a spreadsheet submitted by Sprint in response to a discovery response (Motion, p. 20), but never previously mentioned by FDN or KMC. Merely citing to a spreadsheet that Sprint submitted in response to a discovery request, and drawing a conclusion – albeit an erroneous conclusion - for the first time in a Motion for Reconsideration, does not support a claim that the Commission overlooked this fact. Indeed, a review of the record suggests quite a different conclusion. The record demonstrates that the expense factor is not applied to book investment – as asserted by FDN and KMC - but is, instead, applied to forward-looking costs. *See* Ex. 14, pp. 70-72. It is upon this record evidence that the Commission based its decision. *Order*, p. 146. Again, FDN and KMC have failed to provide a legitimate basis for requiring reconsideration.

F. Work Times For Non-Recurring Charges

FDN and KMC contend that "Sprint failed to support its non-recurring charges ('NRCs') with substantial competent evidence." Motion, p. 20. They then argue that the Commission's approval of Sprint's proposed NRC rates in the face of "significant problems" with the sources of data, "was plain error." Motion, p. 20. Once again, FDN and KMC seek application of an inappropriate standard of review and fail to meet the appropriate standard of review.

The Commission fully considered FDN and KMC's arguments in the context of record evidence and reached a decision fully compliant with the evidentiary standards of the federal Act. *Order*, pp. 176-177. On the other hand, as the Commission observed, FDN and KMC have failed to provide any record evidence on this issue – *Order*, p. 177, and have not cited any record evidence that supports their contention that the Commission's use of a "range of reasonableness" test is not appropriate. The fact that FDN and KMC are dissatisfied with the result is no grounds for reconsideration, especially when FDN and KMC have failed to provide competent,

substantial evidence on the issue as required by the federal Act. They certainly have identified no point of fact or law that the Commission either overlooked or disregarded.

G. Non-Recurring OSS Charges

FDN and KMC take exception (Motion, p. 25) to the Commission's decision that there is "no requirement that Sprint, or any other ILEC, use some hypothetical, fully automated, near perfect OSS as FDN would have us believe." *Order*, p. 162. FDN and KMC are simply rearguing the same issue as addressed in FDN's Post-Hearing Brief. *See* FDN Post-Hearing Brief, pp. 28-32. Again, just because FDN and KMC don't agree with the Commission's decision, this does not provide any basis for reconsideration. The Commission has fully considered FDN and KMC's position and has rejected it on the basis of the record evidence. FDN and KMC have failed to point out any fact the Commission overlooked in its decision. In fact, the record shows that while some portions of Sprint's OSS are fully automated and some are not, for NRC pricing purposes, Sprint has assumed a fully automated OSS. Tr., pp. 195-197; Ex. 13, p. 20.

H. Competition and Fair and Reasonable Rates

FDN and KMC assert, as a grounds for reconsideration, that the Commission's decision fails "to consider the impact the particular rates would have on competition." Motion, p. 27. In an effort to support its Motion, FDN and KMC engage in a lengthy analysis of comparing wholesale and retail rates, which analysis is outside the record evidence in this proceeding. At the risk of sounding repetitive, FDN and KMC have once again failed to meet the legal standard for requiring reconsideration. FDN and KMC have not identified any record fact overlooked or not considered by the Commission in reaching its decision.

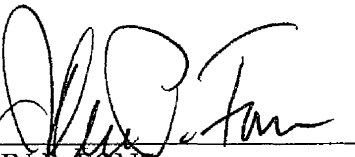
Additionally, contrary to the clear inference created by FDN and KMC's Motion, there is no legal requirement that wholesale rates be less than retail rates. *See* Act, Section 252(d)(1);

Hearing Transcript, pp. 55-56. The pricing standard is TELRIC, as FDN and KMC acknowledge elsewhere in their Motion; although they seek to ignore that standard here for the sake of the instant argument. They can't have it both ways. Even if the analysis urged by FDN and KMC was otherwise warranted, it is an improper and incomplete analysis. A proper – but ultimately irrelevant - analysis would also have included the entire revenue stream available from each residential and business customer served by FDN or KMC. In any event, FDN and KMC's request for relief, at this stage of the proceeding, is not countenanced by the Act or the rules implementing the Act, and should be rejected.

IV. Conclusion

FDN and KMC, as they have done throughout this proceeding, are attempting, by their Motion, to have the Commission reach a decision on reconsideration in their favor based upon speculation and conjecture in the absence of any record evidence supporting their position. Not only does FDN and KMC's Motion not meet the appropriate standard for reconsideration, it ignores the requirements of the federal Act regarding a party's required level of participation. The Commission's Order in this proceeding should not be reconsidered, even if the Commission were left to make its decision based upon the "best information available to it from whatever source derived." Such, of course, is not the case here because the Commission's Order is based upon the record evidence on each issue, which evidence, presented by Sprint, constitutes competent, substantial evidence.

Respectfully submitted this 4th day of February, 2003.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail transmission, U. S. Mail, or hand delivery(*) this 4th day of February, 2003, to the following:

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