State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 5, 2003

TO: **DIRECTOR,** DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN)
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (T. BROWN, KING, MARSH, WRIGHT, CATER, DOWDS)
DIVISION OF ECONOMIC REGULATION (KENNY, LEE, LESTER)

RE: DOCKET NO. 990649B-TP - INVESTIGATION INTO PRICING OF UNBUNDLED NETWORK ELEMENTS (SPRINT/VERIZON TRACK).

AGENDA: 06/17/03 - MOTION FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED - PARTICIPATION AT THE DISCRETION OF THE COMMISSION - ISSUE 11 TO ACKNOWLEDGE WITHDRAWAL OF RECONSIDERATION IN VERIZON TRACK

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\990649B.RCM

CASE BACKGROUND

On December 10, 1998, a group of carriers (collectively the "Competitive Carriers") filed a Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory pursuant to the federal Telecommunications Act of 1996 (Act). Among other matters, the Competitive Carriers' Petition asked that the Commission set deaveraged unbundled network element (UNE) rates.

On May 26, 1999, the Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part the Competitive Carriers' petition. Specifically, the Commission granted the request to open a generic UNE pricing docket for the three major incumbent local exchange providers, BellSouth Telecommunications,

Inc. (BellSouth), Sprint-Florida, Incorporated (Sprint), and GTE Florida Incorporated (GTEFL). Accordingly, this docket was opened to address the deaveraged pricing of UNEs, as well as the pricing of UNE combinations and nonrecurring charges.

On November 2, 1999, the FCC released FCC Order 99-306 in CC Docket No. 96-45, which ordered the stay of the deaveraging rule to be lifted on May 1, 2000. The FCC had ordered the stay on May 7, 1999, after decisions by the U.S. Court of Appeals for the Eighth Circuit and the Supreme Court. The stay was ordered to allow the states to bring their rules into compliance. Order FCC 99-306 provided that "[b]y that date, states are required to establish different rates for interconnection and UNEs in at least three geographic areas pursuant to section 51.507(f) of the Commission's rules." FCC 99-306 at ¶ 120.

The original schedule established in Docket No. 990649-TP would not have resulted in permanent deaveraged UNE rates being in effect until after May 1, 2000. Accordingly, the parties were encouraged to develop and stipulate to interim deaveraged rates to avoid seeking a waiver of the deaveraging rule or conducting an accelerated proceeding. With Commission staff's assistance the parties agreed to interim deaveraged rates, and on December 7, 1999, the parties filed a Joint Stipulation Regarding Interim Deaveraging (Interim Rate Stipulation). In the Interim Rate Stipulation, the parties agreed that "this Stipulation is not intended to set a precedent for the resolution of any issue related to permanent deaveraged rates . . ." Order No. PSC-00-0380-S-TP at p.3. Sprint had at the time of the Interim Rate Stipulation, deaveraged recurring loop rates tariffed in Section E19 of its intrastate Access Service Tariff.[1]

[1]We note that Sprint's tariffs are presumptively valid, and as such, the tariffed rates were not scrutinized. Further, we believe the impetus for the tariffed rates was the negotiated rates arising out of the Sprint/MCImetro arbitration, Docket No. 961230-TP, Order No. PSC-98-0829-FOF-TP. Those negotiated rates were stipulated to by the parties and filed as an amendment to their interconnection agreement. The negotiated recurring rates replaced interim rates for analog 2-wire loops, Bands 1 through 6; local switching, Bands 1 through 6; signal transfer points port and switching; SS7 links; line information database (LIDB) query transport and database query; dedicated transport DS-1 and DS-3; tandem transport, common transport; directory assistance (DA) database query service, toll and local assistance service; DA operator service; and 911 tandem port and lines service per DS-0 equivalent port.

An administrative hearing was held on July 17, 2000, on the Part One issues identified in Order No. PSC-00-2015-PCO-TP, issued June 8, 2000. Part Two issues, also identified in Order No. PSC-00-2015-PCO-TP, were heard in an administrative hearing on September 19 and 22, 2000. On August 18, 2000, Order No. PSC-00-1486-PCO-TP was issued granting Sprint's Motion to Bifurcate Proceedings, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony, as well as Verizon Florida Inc.'s (formerly GTEFL) Motion to Bifurcate and Suspend Proceedings.

By Order No. PSC-01-1592-PCO-TP, issued August 2, 2001, the controlling dates for Phase III were established. By Order No. PSC-01-2132-PCO-TP, issued October 29, 2001, the issues were established and the Docket was divided into 990649A-TP, in which filings directed towards the BellSouth track would be placed, and 990649B-TP, in which filings directed towards the Sprint/Verizon track would be placed. An administrative hearing was held on April 29 and 30, 2002.

For the Sprint portion of this docket, Sprint, Florida Digital Network, Inc. (FDN), and KMC Telecom III, LLC (KMC) filed post-hearing briefs. On January 8, 2003, the Commission issued its order on final rates for Unbundled Network Elements (UNEs) for Sprint by Order No. PSC-03-0058-FOF-TP (Order).

On January 23, 2003, FDN and KMC filed jointly a Motion for Reconsideration as well as Request for Oral Argument. On February 4, 2003, Sprint filed its Response to FDN and KMC's Motion for Reconsideration and its Response to FDN and KMC's Request for Oral Argument. Staff notes that on December 2, 2002, AT&T/MCI filed a Motion for Reconsideration and was subsequently withdrawn (addressed in Issue 11).

Standard for Motion for Reconsideration

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 162 (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). This standard is equally applicable to reconsideration by the Commission of a Prehearing Officer's order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

This recommendation addresses FDN and KMC's joint Motion for Reconsideration. Specifically, staff addresses each of the points raised in the motion for reconsideration in separate issues. This recommendation will also address AT&T Communications of the Southern States, LLC (AT&T) and WorldCom, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services LLC and Intermedia Communications, Inc. (collectively "WorldCom") withdrawal of their Motion for Reconsideration of Order No. PSC-02-1574-FOF-TP, filed December 2, 2002.[2] The Commission is vested with jurisdiction pursuant to Sections 364.01, and 364.051, Florida Statutes, as well as the Telecommunications Act of 1996.

[2]AT&T and WorldCom's Motion for Reconsideration for the Verizon UNE Order was filed on December 2, 2002. The procedural history related to the Motion for Reconsideration in the Verizon track is discussed in Issue 11.

DISCUSSION OF ISSUES

ISSUE 1: Should the parties be granted oral argument?

RECOMMENDATION: No, staff recommends that the Commission deny FDN and KMC's Joint Request for Oral Argument. **(CHRISTENSEN)**

STAFF ANALYSIS: As noted in the Case Background, FDN and KMC filed contemporaneously with their Motion, a Request for Oral Argument (Request). On February 4, 2003, Sprint filed its Response in Opposition to FDN and KMC's Request for Oral Argument (Response).

In support of its Request, FDN and KMC state they believe that oral argument would assist the Commission in comprehending and evaluating the issues raised in their Motion for Reconsideration. FDN and KMC assert that the lack of competition presently experienced by Sprint under the currently effective rates, terms and conditions, was reflected in the fact that very few parties participated in the Sprint phase. They state that notwithstanding their intervention and participation in this docket, their level of involvement has been limited due to the extreme difficulties ALECs face in competing against Sprint, and ILEC that operates predominantly in second and third tier markets in Florida. Further, they assert that oral argument on their Motion will enable the Commission to fully understand and explore the competitive issues and consequences of the Sprint UNE Order. They argue that without proper consideration of the issues raised by the Motion, which can only be fairly accomplished through participation in an oral argument before the Commission, the Commission's attempt to foster competition in the Sprint area will fail.

In its Response, Sprint asserts that oral argument may be granted at the discretion of the Commission citing Rule 25-22.060, Florida Administrative Code. Sprint contends, however, that FDN and KMC, the parties requesting oral argument, must state with particularity why oral argument would aid the Commission in comprehending and evaluating the motion for reconsideration. See, Rule 25-22.058(1), Florida Administrative Code. Sprint argues that FDN and KMC's Request fails in this respect. Sprint contends that FDN and KMC's rationale for oral argument is at best self-serving. Sprint asserts that they have brought little to the process and are simply seeking another opportunity to address matters that were

already considered by the Commission or are outside the record upon which the Commission rendered its decision. Sprint argues that there is nothing in the Motion that is not a rehashing of the arguments made in FDN and/or KMC's Post-Hearing Brief which the Commission comprehend and evaluate without oral argument.

Analysis

Rule 25-22.058(1), Florida Administrative Code, states that:

> The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof.

Rule 25-22.058, Florida Administrative Code, applies to oral argument in the post-hearing context. Rule 25-22.060(f), Florida Administrative Code, states, in part, that:

> Oral argument on any pleading filed under this rule [addressing post-hearing motion for reconsideration] shall be granted solely at the discretion of the Commission.

Staff believes that FDN and KMC have not provided sufficient reasons why granting oral argument would aid the Commission in comprehending and evaluating the issues before it. Specifically, FDN and KMC assert that they should be allowed to have oral argument because their participation has been limited previously in this proceeding. Staff does not believe that granting oral argument would rectify the fact that FDN and KMC did not fully participate before this point in the proceeding. Moreover, staff does not believe that FDN and KMC raise any issues in their Motion for Reconsideration that would require oral argument for the Commission to comprehend and evaluate the issues.

However, as noted above, pursuant to Rule 25-22.060(f), Florida Administrative Code, it is totally within the Commission's discretion to grant oral argument. Should the Commission grant

oral argument, staff would recommend that such oral argument be limited to 15 minutes per party pursuant to Rule 25-22.058(2), Florida Administrative Code. Thus, staff recommends that the Commission deny FDN and KMC's Joint Request for Oral Argument.

ISSUE 2: Has the Commission Impermissibly Reversed the Burden of Proof?

RECOMMENDATION: No. Staff recommends that the Commission find that it did not overlook a point of fact or law, nor was there an impermissible reversal of the burden of proof. **(CHRISTENSEN)**

STAFF ANALYSIS: As noted in the Case Background, each of the points raised in FDN and KMC's Motion for Reconsideration shall be addressed in a separate issue. This issue address whether FDN and KMC have met the standard for reconsideration.

FDN and KMC Motion

1. Standard of Review

In their motion, FDN and KMC state that based on the standard of review, a motion for reconsideration should be granted if it identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its Order.[3] FDN and KMC state that the Motion should be based upon specific matters set forth in the record and susceptible to review. FDN and KMC contend that the Commission's substantive determinations in rate proceedings must be based upon evidence that is "'sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached.'"[4] FDN and KMC state that the evidence must "'establish a basis of fact from which the fact at issue can reasonably be inferred.'"[5] FDN and KMC argue that findings wholly inadequate or not supported by the evidence will not be permitted to stand.[6] FDN and KMC argue that the Commission should reconsider its rulings on the issues raised in

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[3]Order No. PSC-01-0961-FOF-SU, issued April 2001, in Docket No. 991643-SU, In Re: Aloha Utilities, Inc.

[4]DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. DCA 1957); see also, Agrico Chem. Co. v. State of Fla. Dept. of Environmental Reg., 365 So.2d 759, 763(Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So.2d 425, 426 (Fla. 3rd DCA 1965).

[5]DeGroot, 95 So.2d at 916.

[6]Caranci v. Miami Glass & Engineering Co., 99 So.2d 252, 254 (Fla. 3rd DCA 1957).

its Motion because these rulings lack the requisite foundation of competent and substantial evidence.

2. Burden of Proof

FDN and KMC argue that public utilities always have the burden of proving that their rates are just and reasonable. FDN and KMC contend that this is especially true of an ILEC such as Sprint, who is a monopoly provider of UNEs and who is required to sell UNEs to CLECs under compulsion of law. FDN and KMC assert that the procedural rules governing this proceeding require Sprint to "prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements."[7] Motion at p. 3. FDN and KMC contend further that as part of this burden, Sprint must file whatever information it believes is necessary to satisfy its burden of proof.[8] They argue that simple production of cost records and documentation cannot satisfy this burden.[9]

FDN and KMC assert that Sprint's burden of proof pertains to the case as a whole and to each and every issue within the case which is part of the foundation of its request. They argue that there is no burden of proof on the opposing parties (i.e., FDN and KMC), who may question and raise doubts regarding the evidence submitted by the parties. FDN and KMC assert that the Commission improperly relieved Sprint of its burden because upon finding errors in Sprint's cost model, the Commission validated and accepted the errors. They argue that the Commission sets a bad precedent by accepting information known to be wrong because better information is not available. They contend that the Commission commits legal error in what it has done here for setting Sprint UNE prices and runs afoul of its statutory mandate to ensure that Sprint UNE rates comply with federal and Florida pricing rules.

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[7]First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, Order No. FCC 96-325 (First Interconnection Order) ¶680 (released August 8, 1996), In the matter of: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers.

[8]Order No. PSC-01-0326-FOF-SU, issued April 2001, in Docket No. 991634-SU, In Re: Aloha Utilities, Inc.

[9]Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191(Fla. 1982).

FDN and KMC cite to Order No. 24715, issued June 26, 1991, in Docket No. 900329-WS, In Re: Application for a rate increasers by Southern States Utilities, Inc., for the proposition that a utility's rate case was dismissed where the Commission determined that the utility did not meet its burden of proof. They argue similarly that in this case the Commission's findings that Sprint failed to provide correct or adequate cost support (i.e., that Sprint failed to satisfy its burden of proof with respect to numerous issues and rate elements) should have ended the matter. They assert that the Commission should have ordered Sprint to file a conforming study or should have revised Sprint's rates accordingly through any reasonable means.

FDN and KMC argue that it is not their burden to provide testimony at all, let alone to a specific issue. They contend that the burden rests solely with the ILEC to prove its case. To do otherwise, they argue, would lead to several negative policy outcomes. They contend that it lead to Sprint having some of the highest UNE prices in the nation. Further, FDN and KMC contend that the shift in burden will negatively impact participation. FDN and KMC state that although they could not afford to sponsor their own independent witness, they scrutinized Sprint's filing and identified "errors." They claim that if an intervener has no chance of influencing the decision unless it offers its own evidence, regardless of inadequacy of the proponent's proof, the Commission may find more uncontested proceedings and Florida consumers will suffer. They argue that contrary to a file-and-suspend rate case in which statutory deadlines apply, in this case the Commission could have left in place the interim rates until Sprint met its burden or could have applied a reduction factor. They contend that either of these approaches is preferable to accepting Sprint's proposals, despite knowing them to be flawed.

Sprint Response

1. Standard of Review

Sprint agrees that 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.[10] Sprint also notes that it is inappropriate to reargue matters already considered.[11] Further, Sprint notes that a motion for reconsideration should not be granted based on an arbitrary feeling that a mistake may have been made but should be made on specific factual matters set forth in the record and susceptible to review.[12]

Sprint argues that FDN and KMC failed to meet the reconsideration standard and instead propose that the Commission adopt a completely new standard that "the 'Commission should reconsider its ruling on the following issues because they lack the requisite foundation of competent and substantial evidence.'" Response at p. 2. Sprint states that it agrees that the decision must be supported by competent and substantial evidence and that it has provided such evidence on each issue. However, FDN and KMC only presented their arguments in their post-hearing brief without any evidence in the record of their own or otherwise to support their position, contends Sprint. Thus, Sprint asserts that the Commission relied on the substantial competent evidence in the record that was presented to it. Sprint argues that FDN and KMC reargue and rehash the same matters already considered by the Commission. Sprint contends that by either standard, the motion for reconsideration standard or the substantial competent evidence standard, none of the elements in the Commission's Order challenged by FDN and KMC is subject to reconsideration.

2. Burden of Proof

Sprint argues that the Telecommunications Act of 1996 (the Act) contemplated that state commissions would establish UNE rates in the context of an arbitration proceeding when the ALEC and the ILEC are unable to mutually agree upon UNE rates. Sprint contends that although an instant, generic type proceeding was not contemplated by the Act, it must be construed as a surrogate for an arbitration proceeding, if it is to have vitality and legitimacy.

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[10] 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 162 (Fla. 1st DCA 1981).

[11]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).

[12]Stewart Bonded Warehouse, Inc.

Sprint asserts that, as such, the instant proceeding is governed by the requirements of the Act, not the rate case procedures of a bygone era being urged by FDN and KMC in their motion. Sprint states that the Act specifically rejected "rate of return or other rate-based proceeding" procedures for establishing UNEs. Sprint contends that the Act places a duty on each party in an arbitration proceeding to furnish relevant documentation and information, citing Section 252(b)(4)(B) of the Act.

Sprint argues that contrary to FDN and KMC's argument that Sprint bears the burden of proof, the fact is FDN and KMC have failed to satisfy the requirements of the Act, whereas Sprint has satisfied the requirements of the Act. Sprint asserts in a footnote that even under the rate case scenario, FDN and KMC bear the burden of proof, not Sprint, because they are the ones seeking a change to established rates. See, Florida Power Corp. v. Cresse, 413 So. Sd 1187, 1191 (Fla. 1982). Sprint contends that the Commission has proceeded on the basis of the best information available to it from whatever source derived, as it was required to do since FDN and KMC failed to provide any testimony, studies, or other exhibits addressing the issues. Sprint states that accordingly, the Commission has applied the requisite burden of proof standard and none of the matters raised by FDN and KMC require reconsideration.

Analysis

1. Standard of Review for the Motion for Reconsideration

Staff notes that there is no controversy as to the standard to be applied for a motion to reconsider. That standard 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.[13] Sprint also notes that it is inappropriate to reargue matters already considered.[14] Further, Sprint notes that a motion for reconsideration should not be granted based on an arbitrary feeling that a mistake may have been made but should be made based on

[13] 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 162 (Fla. 1st DCA 1981).

[14] 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).

specific factual matters set forth in the record and susceptible to review.[15]

2. Burden of Proof

However, there is disagreement as to which party has the burden of proof and to what degree that party has the burden. Essentially, FDN and KMC argue that it is sufficient for them to have pointed out what they deem to be flaws in the evidence, and they need not provide any independent evidence. They contend that the burden of proof rests solely with Sprint to justify its costs in this proceeding, citing to a previous rate case decision. Further, FDN and KMC conclude that ultimately the burden of proof for rebutting their allegations rests with Sprint, such that FDN and KMC's mere assertions that Sprint's evidence is flawed renders that evidence insufficient to be relied upon.

Staff believes that FDN and KMC's reasoning is inherently flawed. Staff agrees that in this proceeding, Sprint bears the burden of proof in establishing the reasonableness of its proposed UNE rates. However, it does not follow that merely because FDN and KMC make allegations that there are errors or flaws, without testimony or independent evidence, that Sprint has failed to meet its burden of proof. Staff believes that would go to the weight the evidence should be given. Contrary to FDN and KMC's assertions, they do have an obligation to place before the Commission some evidence to support their position. Otherwise, the Commission would have no evidence on which to rely to support its decision. Although staff acknowledges that there may be imperfections in Sprint's cost study, the Commission did not find in its Order that those imperfections were fatal or require that Sprint file an additional or supplemental cost study. Staff notes that where the Commission has determined that a filing was sufficiently flawed, new filings have been required by the Commission. However, that is not the case here.

Staff also agrees that this proceeding is not equivalent to a traditional rate case proceeding under state law, in that this is a proceeding undertaken in accordance with federal law, the Act. Sprint correctly points out that under Section 252(b)(4)(B) of the Act, both parties have an obligation to provide information as may

[15]Stewart Bonded Warehouse, Inc.

be necessary for the Commission to reach its decision. However, even if this were a proceeding solely under state law, the trier of fact determines whether or not the evidence is sufficient, not the party making allegations of insufficiency. Staff would hope that no party would be dissuaded from participating in future proceedings merely because they are required to provide necessary information.

FDN and KMC have failed to demonstrate that the Commission overlooked a point of fact or law. Further, FDN and KMC have failed to demonstrate that the Commission impermissibly reversed the burden of proof. There is no dispute that Sprint placed evidence in the record relating to its cost studies. The Commission addressed each aspect of the cost studies in its final order and specifically related to evidence in the record. Merely raising "questions or doubts" by the opposing party does not equate to undermining the evidence. Nor does the fact that the Commission chose to accept Sprint's evidence over the opposing side's assertions of doubt amount to an impermissible shift of the burden of proof.

Staff recommends that the Commission find that it did not overlook a point of fact or law, nor was there an impermissible reversal of the burden of proof.

ISSUE 3: Did the Commission overlook or fail to consider a point of fact or law regarding the deaveraging approach utilized in this proceeding?

RECOMMENDATION: No. Staff recommends that the Commission did not overlook or fail to consider a point of fact or law regarding the deaveraging approach utilized in this proceeding. **(CHRISTENSEN, DOWDS)**

STAFF ANALYSIS:

This issue addresses FDN and KMC's request for reconsideration of the deaveraging approach taken in the Sprint proceeding.

FDN and KMC Motion

FDN and KMC state that Sprint offered two deaveraging approaches in this proceeding, a nine-zone proposal that resulted in highly deaveraged rates and a three-zone proposal based on the Commission-approved BellSouth methodology. FDN and KMC assert that the Commission on its own adopted a four-zone approach which they claim was referred to as "absurd" because it resulted in so few wire centers being allocated to the lowest cost zone. FDN and KMC assert that while a four-zone approach may result in an administratively easier approach than nine zones, it will do little to promote competition in Florida.

FDN and KMC argue that "Sprint's retail rates do not vary widely throughout its service territory - from roughly $15.50 to $24.50 depending on location - for business customers. Two-wire UNE loop rates must be priced somewhat below this level in order for UNE-based CLEC competition to stand a chance." They contend that the Commission should reconsider its deaveraging methodology and revise it now, before it is vacated by a court because it does not promote competition.

FDN and KMC contend that under the new structure, many of the areas they operate in are now in a higher cost zone. They assert that under the Commission's Order, several of the most attractive locations are relegated to higher cost zones, where it is impossible to offer end-users competitive pricing using UNE-based CLEC services. They assert that competition cannot be expected to enter these markets while the Commission approved UNE rates are in place.

Finally, FDN and KMC argue that the Commission should not reject adjustments to Sprint's cost model, which it acknowledges to be flawed, because there is a lack of advocated adjustments in the record. Yet, at the same time, the Commission is completely altering the rate structure in a manner that no one specifically advocated, and whose adjustments do not achieve the Commission's announced intentions. They conclude that the Commission should approve Sprint's three-zone deaveraging method, absent a better methodology supported by the record and consistent with the goal of promoting competition.

Sprint Response

Sprint contends that FDN and KMC's argument that the Commission's deaveraging approach does not encourage competition and should be reconsidered, is specious. Sprint asserts that FDN and KMC acknowledge that the underlying policy rationale for geographic deaveraging is to assure that UNE rates reflect underlying costs, citing to the FCC's Local Competition Order at ¶76. Sprint asserts that in their brief at page 4, FDN and KMC argued that the Commission should 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. Sprint asserts that in selecting the four-zone approach, the Commission found that four zones will have the greatest likelihood of encouraging competition. See, Order at p. 29. Sprint argues that FDN and KMC fail to identify any record evidence that the Commission ignored or overlooked in establishing four zones for deaveraged UNE loop rates.

Sprint asserts that FDN and KMC contend that the four-zone approach is "absurd." Sprint asserts that rather than looking at the number of wire centers in a particular zone, it is more appropriate to look at the number of access lines available in each band because this tells the competitors how many customers are available per band. Sprint states that Band 1 has 5.1% of the total access lines, Band 2 has 32.7%, Band 3 has 38.8%, and Band 4 has 23.4%. Sprint contends that other than Band 1, the access lines are obviously quite evenly distributed. Sprint contends that there is no record evidence that supports FDN and KMC's claims that the four-zone approach will do little to promote competition. Sprint concludes that FDN and KMC have failed to meet any legal or factual basis for requiring reconsideration of the Order.

Analysis

As noted earlier, FDN and KMC argue that " . . . the Commission, *sua sponte* and without public comment, adopted a four-zone approach that the Commission's own staff characterized as "absurd" at the agenda conference because it resulted in so few wire centers being allocated to lowest cost zone." The recommendation presented to the Commission contained the results of applying the +/- 20% criterion - previously adopted by the Commission for BellSouth and Verizon. See, Order at p. 25. Consistent with the Commission's prior decisions for BellSouth and Verizon, four different options were presented that collapsed the initial nine zones, designed to reflect administrative ease and a rate structure that accounts for cost variations. The Commission adopted Option 4. Staff notes that the fact the Commission adopted one of Staff's options is not surprising, especially given that the general approach followed is essentially identical to that used previously for BellSouth and Verizon.

During the special agenda there was extensive discussion regarding the distribution of Sprint's wire center costs, noting that Sprint's distribution is highly dissimilar to that of BellSouth or Verizon - in particular, the cost data indicate that Sprint has significantly fewer low-cost wire centers than BellSouth or Verizon. As such, it makes it more difficult to aggregate wire centers to yield a truly low price in Zone 1. Staff agrees with Sprint that staff may have stated that it was "odd" to have only four wire centers in a band, but that does not equate to attributing to staff FDN and KMC's position that the banding results are "absurd."

FDN and KMC also argue that "Sprint's retail rates do not vary widely throughout its service territory - from roughly $15.50 to $24.50 depending on location - for business customers. Two-wire UNE loop rates must be priced somewhat below this level in order for UNE-based CLEC competition to stand a chance." Staff notes that the level of retail rates, in and of itself, is not dispositive of the appropriate levels for wholesale UNE rates. The requirement that must first be met is that embodied in Section 252(d)(1) of the Act, which requires that UNEs be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of provisioning the UNE and be nondiscriminatory and may include a reasonable profit. The various rate proposals considered by the Commission (shown on page 27 of the Order) all

comport with Section 252(d)(1); the Commission concluded that Alternative 4 ". . . has the greatest likelihood of encouraging competition." Order at p. 29. FDN and KMC just disagree.

Further, FDN and KMC argue that "[b]ecause only the rates in Zone 1 are at or below competitive levels, and because only about 112,000 of 2,191,000 lines are in these lower cost zones, it is clear that the Commission's deaveraging methodology is not rationally related to achieving the goal of promoting competition and should be revised by the Commission before it is vacated by a reviewing court." Motion at p. 8.

As noted above, the level of retail rates, in and of itself, is not dispositive of the appropriate levels of wholesale UNE rates. Rather, the primary consideration is whether the UNE rates comply with Section 252 (d)(1) of the Act. In this case, Option 4 comports with the requirements of the Act; FDN and KMC merely disagree with the Commission. However, FDN and KMC's mere disagreement is not sufficient to meet the burden for a Motion for Reconsideration. In fact, staff recommends that the Commission did not overlook or fail to consider a point of fact or law regarding the deaveraging approach utilized in this proceeding.

ISSUE 4: Did the Commission overlook or fail to consider a point of fact or law regarding the fill factors utilized in this proceeding?

RECOMMENDATION: No. Staff recommends that the Commission did not overlook or fail to consider a point of fact or law concerning Sprint's fill factors. **(CHRISTENSEN, CATER)**

STAFF ANALYSIS:

FDN and KMC Motion

FDN and KMC argue that the Commission was in error in ordering that the distribution fill be set at 100 percent, which models two lines per household. FDN and KMC argue that while two lines per lot was also ordered for BellSouth, BellSouth does not actually deploy two lines per lot. FDN and KMC believe this Commission erred in the development of the distribution fill assumption of two lines per lot for BellSouth. Motion at p. 10. In support of this, FDN and KMC refer to this Commission's 1999 Universal Service Order.[16] Id.

Additionally, FDN and KMC argue that BellSouth's fill factor assumptions should not apply to Sprint, since the record shows that Sprint's service territory is more rural than BellSouth's. As support for this argument, FDN and KMC refer to an FCC Universal Service Order[17] released on January 7, 2003, which is approximately one month after this Commission's December 2, 2002, vote on this matter, and one day before this Commission's Order was issued. See, Motion at p. 11. This Order (DA 03-24) addresses technical improvements to the FCC's universal service cost model and its relevant cost per line. FCC Order No. DA 03-24 at ¶ 11. Staff points out that the FCC's Universal Service Order addresses statewide average costs per line and is not company-specific.

Further, FDN and KMC argue that the Commission erred in its assumptions for feeder fill in the same way that it did for

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[16]Order No. PSC-99-0068-FOF-TP, issued January 7, 1999, in Docket No. 980696-TP, Determination of the cost of basic local telecommunications service pursuant to Section 364.025, Florida Statutes.

[17]In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order DA 03-24 (Released January 7, 2003).

distribution fill. Motion at p. 11. For feeder fill, FDN believes that BellSouth's ordered rate of 74 percent is correct, but should serve as a floor, and not the ceiling for Sprint's feeder fill, since the Commission found that Sprint's territory is more rural. Id. at pp. 11-12. Sprint points out that the 74 percent fill being the maximum fill for Sprint ". . . is counter-intuitive given Sprint's more rural service territory." Id.

In regards to impact on rates, FDN and KMC argue that "the Commission must consider the impact of its decision regarding fill factors on the resulting rates." Motion at p. 13. FDN and KMC argue that in traditional ratemaking proceedings, the Commission does not permit utilities to pass on the costs of more capacity than absolutely necessary to ensure safe and reliable service to its customers.

Sprint Response

In its response to FDN and KMC's motion, Sprint argues that:

> FDN and KMC's basis for seeking reconsideration of the fill factors decision is that "the Commission is 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."

Response at p. 6. Sprint asserts that the assumption of two pairs per household was made "based upon the record evidence" and not on "any finding in the BellSouth proceeding." Response at pp. 6-7.

Analysis

In its Order, the Commission determined that the distribution fill should be "set at 100 percent, with two lines per household" since it was a more efficient assumption than "adding an additional line when a household requests a second line." Order at p. 83. Additionally, two lines per lot is consistent with what was ordered for Verizon and BellSouth in their respective UNE proceedings. Id.

This Commission in Order No. PSC-03-0058-FOF-TP indicates that the fill factors Sprint used are based on wire-center specific data "adjusted to allow for the fact that the model must select cable sizes that result in additional unused cable pair." Order at p.

77. Sprint witness Dickerson argued that Sprint's feeder fill rate is lower than BellSouth's and "he believes that the trend is for rural areas to have lower fill than urban areas due to slower growth. . . . He continued by saying that he did not think that Sprint could manage its network, for both ALEC and retail customers, with a three day turn around, with a fill of 74 percent over the life of the cable." Order at pp. 80-81.

In this proceeding, FDN proposed an alternative to Sprint's proposed feeder fill of at least 90 percent, but FDN did not provide any justification for its proposed utilization factor. Order at p. 83. FDN also pointed out that "[t]he unreasonable fill factors adopted by the Commission violate an express FCC prohibition against the use of fill factor calculated to serve *ultimate* demand rather than *current* demand." Motion at p. 12. (emphasis in original) As support for this argument, FDN cites various FCC Universal Service orders regarding high-cost support mechanisms for non-rural carriers, which indicate the fill factors should be based on current demand and not ultimate demand.

While the FCC's Universal Service orders may prohibit fill factors to serve ultimate demand, the FCC's First Interconnection Order[18] states the following on fill factors:

> Per-unit cost shall be derived from total costs using reasonably accurate "fill factors" (estimates of the proportion of a facility that will be "filled" with network usage); that is, the per-unit costs associated with the element must be derived by dividing the total cost associated with the element by a reasonable projection of the actual total usage of the element.

For both feeder and distribution fill, there was a lack of record evidence in support at any fill factors other than the ones proposed by Sprint; those proposed fills are not an unreasonable projection of the usage of the element. Order at p. 84.

Staff notes that there is nothing in the record suggesting that the Commission-approved fill factors are more than what is necessary to ensure safe and reliable service. In fact, the record is silent on the impact of fill factors on various UNE rates.

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[18]Order No. FCC 96-325 at ¶682

Staff believes that the Commission's decision to accept Sprint's fill factors is based on the record in this proceeding. Concerning the impact that fill factors have on rates, there is nothing in the record of the Sprint UNE proceeding to substantiate the effect of fill factors on UNE rates. Therefore, staff recommends that the Commission did not overlook or fail to consider a point of fact or law concerning Sprint's fill factors.

ISSUE 5: Did the Commission overlook or fail to consider a point of fact or law regarding the customer locations utilized in this proceeding?

RECOMMENDATION: No, staff recommends that the Commission find that it did not overlook or fail to consider a point of fact or law regarding the customer locations utilized in this proceeding. **(CHRISTENSEN, DOWDS)**

STAFF ANALYSIS: This issue addresses FDN and KMC's assertion that the Commission should reconsider its acceptance of Sprint's customer location inputs utilized in its cost study.

FDN and KMC's Motion

FDN and KMC argue in their Motion that a properly constructed cost model generates cost assumptions from the "bottoms up." Motion at p. 13. They assert that the Commission in its Order recognizes that a clustering approach used in conjunction with geocoded customer location data is preferable for modeling outside plant. FDN and KMC contend that despite the Commission's agreement on the value of using geocoded data for customer locations, the Commission declined to order Sprint to base its modeling on such data, except for DS-3 customers. FDN and KMC assert that the reason that the Commission excused Sprint from using geocoded data was that Sprint had not in fact submitted such information with its cost submission. They argue that this reasoning is utterly circular. FDN and KMC contend that Sprint's submission does not contain geocoded information because Sprint chose not to include such information. Further, they insist that since the Commission identified that geocoded data would facilitate the best estimation of UNE rates, it was incumbent upon Sprint to submit such data, or explain why it could not. Moreover, FDN and KMC contend that there is no indication in the record that furnishing the geocoded data would require "extensive analysis."

FDN and KMC argue that Sprint used data from PNR & Associates to assign its business customers to specific CBs (Census Blocks), so clearly based on this commercial relationship, Sprint could have obtained geocoded data for other customer locations from PNR. They argue that in fact PNR & Associates were the source of the geocoded data used by the HAI proponents in the FCC's USF platform

proceeding.[19] They assert that there is no indication that Sprint would have to undertake any extraordinary efforts to obtain this information; in fact, Sprint never raised cost as an issue. FDN and KMC contend that Sprint conceded that use of geocoded data would enable it to place the customer geographically down to the microgrid that the address maps to. They assert that Sprint contended only that the reason it did not geocode data for other services was because it was "less critical" to understand the specific customer site for those services. They state that the FCC clearly found use of geocoded data to be important and that it should be used if available, and this Commission concurred, at least prior to this Order.

FDN and KMC argue that the Commission relies on an overly narrow definition of "available." They assert that the goal of this proceeding is to ensure that forward-looking, cost-based prices are set for UNEs so that competition may take root in Florida. They contend that if both the FCC and this Commission have determined that the use of geocoded data for customer locations and a clustering approach would further this cause, and the major ILEC in the state, BellSouth, has demonstrated that such information is "available" to it, then the information should be "available" to Sprint. They contend that otherwise, ILECs will have the incentive to ensure that cost information that may not further their interests is "unavailable." FDN and KMC state that a utility has the burden to file the information necessary to meet its burden of proof. They contend that Sprint failed to file this information, and therefore has failed to meet its burden of proof on this issue. They argue that the Commission cannot ignore Sprint's burden for any reason, particularly give the unreasonable rates that the Sprint cost model produced.

Sprint's Response

Sprint summarizes FDN and KMC's arguments as to why the Commission should reconsider its decision and require Sprint to use geocoded data. Sprint contends that FDN and KMC's position in its motion is the same position they advocated in FDN's post-hearing brief at pages 7 to 16. Sprint also contends that FDN and KMC

[19] Fifth Report & Order, CC Docket Nos. 96-45 and 97-160, Order No. FCC 98-279, In the Matter of Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECS. (Released October 28, 1998) (Platform Order).

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. Sprint contends that 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. Sprint asserts that contrary to FDN and KMC's whining, the Commission's decision is based on record support and does not overlook or disregard any record facts, and does not warrant reconsideration.

Analysis

> As noted above, FDN and KMC state in their Motion that
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> Despite this unanimity on the value of using geocoded data for customer locations, the Commission declined to order Sprint to base its model on such data, except for DS-3 customers. And what was the rationale cited by the Commission for excusing Sprint from the requirement that it submit the best data available to estimate costs? Because it noted that Sprint had not, in fact, submitted such information with its cost submission . . .

FDN and KMC Motion at p. 14. Further, FDN and KMC argue that "[g]iven the Commission's identification of the data that would facilitate the best estimation of UNE rates, it was incumbent upon Sprint to submit such data, or explain why it could not." Id. Staff notes that Sprint's loop cost study (Sprint Loop Cost Model, SLCM) is based on an older model called BCPM. BCPM uses a clustering technique where it attempts to estimate customer locations based on census data (e.g., households by census block). This Commission had previously concluded in another proceeding that this approach was reasonable. See Order at p. 58. Further, the Commission notes in the Order that all models have flaws. Hence, Sprint was not on notice that it should use geocoded data. Although the Commission noted that in principle use of geocoded data and a clustering technique were superior, the Commission concluded that what Sprint filed yielded reasonable results. Since it was deemed reasonable, the Commission determined that there was no need to have Sprint submit a new filing. See Order at pp. 57-58.

Staff notes that FDN and KMC state in their Motion that "Sprint used data from PNR & Associates to assign '. . . approximately 85% of the business customers to specific CBs.' Clearly, Sprint has a commercial relationship with this company, and it could have obtained geocoded data for other customer locations from it." Motion at pp. 14-15. Staff notes that when people refer to geocoded data, they mean determining the longitude and latitude of an actual customer location. The business data Sprint got from PNR is not geocoded in this sense; it only assigns and distributes business locations throughout a census block. In other words, they may know there are 29 businesses in a given CB, but they don't know precisely where each is located; it is usually assumed that the customers are evenly distributed in the CB, e.g., along the road network. As indicated in Sprint's Response, this argument is a rehash of pages 7 through 16 of FDN's post-hearing brief.

FDN also notes that "[m]oreover, the Commission relies on an overly narrow definition of 'available.'" Motion at p. 15. This is sophistry. In order to obtain geocoded data, it is necessary to determine the longitude and latitude of something - a customer's location that corresponds to his address, the terminal from which he is served, etc. This data is not readily "available" but requires significant efforts to produce it. As noted on page 58 of the Order, there is no evidence that Sprint had done "the extensive analysis" required to generate geocoded data. Sprint notes in its Response that much of FDN and KMC's claims rely on data outside of the record. Sprint also notes that "[o]n 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." Exhibit 14 at pp.62-65, Response at p. 7.

Finally, staff observes that the Commission considered these same arguments in the Order:

> FDN asserts that Sprint should be required to use geocoded data in conjunction with a clustering technique. FDN claims that a cost model that incorporates geocoded data on actual customer locations is superior to one that does not, and that such data is "clearly available." Moreover, FDN contends that the FCC has previously

> concluded that clustering approaches better reflect natural customer groupings.

Order at p. 57. These arguments were not overlooked by the Commission in its Order. Further, staff notes that the only argument that FDN and KMC raise which is not mere reargument, is its contention that the geocoded information is readily "available" through its association with PNR & Associates. As noted in the Order, Sprint was the only one who provided evidence on this issue, not FDN or KMC. See Order at p. 57. Thus, FDN and KMC's assertions regarding PNR & Associates are outside the record and this argument should be disregarded.

For the reasons stated above, staff recommends that the Commission find that it did not overlook or fail to consider a point of fact or law regarding the customer locations utilized in this proceeding.

ISSUE 6: Did the Commission overlook or fail to consider a point of fact or law regarding Cable Material and Placement Costs utilized in this proceeding?

RECOMMENDATION: No, staff recommends that the Commission find that the Commission did not overlook or fail to consider any point of fact or law regarding Cable Material and Placement Costs utilized in this proceeding. **(CHRISTENSEN, LEE)**

STAFF ANALYSIS: This issue addresses whether the Commission overlooked or failed to consider FDN and KMC's arguments regarding cable material and placement costs utilized in this proceeding.

FDN and KMC's Motion

FDN and KMC ask that the Commission reconsider its decision regarding the costs for cable material and placement. Specifically, they ask that these costs be reduced. They contend that a separate "utilization rate" for unused transport and loop capacity is inappropriate because these unused facilities are already factored into the utilization rate for loops and transport. Motion at p. 19. Thus, they contend that Sprint is permitted to double recover the cost of its assets. FDN and KMC acknowledge that this argument was raised in FDN's Brief, and considered and rejected by the Commission on the basis that "FDN's arguments relate specifically to fill factors and are addressed in other issues." See Order at p. 97. However, they contend that FDN's argument is not addressed elsewhere in the Order, ". . . which indicates that the Commission failed to consider FDN's argument, making it ripe for reconsideration." Motion at p. 16.

FDN and KMC note that FDN explained in its Brief that fill factors have a direct relationship to the cable material and placement costs.[20] They note that the Commission adopted Sprint's 75 percent fill factor for a dark fiber loop, interoffice (IOF) facility, and channel termination. They contend that FDN's Brief discussed that the available dark fiber in Sprint's network is precisely the same fiber that is included as spare in Sprint's loop and interoffice facility cost calculations.[21] Furthermore, they contend that Sprint does not consider dark fiber demand in its loop

[20] FDN Brief at 22-23.

[21] Id.

and IOF facility calculations for cost recovery purposes. Therefore, FDN and KMC argue that Sprint has already attributed the capacity cost of those facilities, and the structure and placement cost for those facilities, to the cost of loops and interoffice facilities.

FDN and KMC assert that Sprint's cost study for loop and interoffice fiber facilities includes the cost for fiber, as well as costs for related support structures and placement. Additionally, the costs include a fill factor or utilization adjustment, which they contend has the effect of increasing the cost per fiber to account only for a percentage of the total cable that Sprint projects will be used. They also contend that the cost of unused fibers that Sprint includes as an addition to the cost of each used fiber via a fill factor represents the dark fiber that will now be made available by Sprint. FDN and KMC assert that each time a carrier purchases Sprint's dark fiber, the carrier will pay the full capital cost of that fiber. They contend that the Commission's decision allows Sprint to double recover the same capacity cost from purchases of loops and transport in the form of a fill factor for spare fiber. Since the Commission adopted Sprint's proposed 75 percent fill factor for dark fiber, they contend that the Commission should require Sprint to adjust the capacity related costs in its loop and interoffice facilities charges.

FDN and KMC assert that Sprint's charges for dark fiber double recover the same capacity costs included in its loop and interoffice facilities through its fill factor. They note that the California Commission recognized that:

> Because the TELRIC studies that this Commission adopted for the UNE loop were based on total demand, all the cost for dark fiber that will be available in Pacific's network on a forward-looking basis is already captured as the "spare capacity" or "fill" loading that is part of the existing loop and transport UNEs. Hence, because forward-looking utilization is already included in all the total network TELRIC cost analysis adopted by the Commission, the cost of spare fibers that Pacific does not currently utilize is, by definition, already included in existing UNE prices. Pacific's dark fiber pricing

proposal would double-recover capacity costs already recovered through other UNE prices.[22]

They assert that the fill factor designated by the Commission for Sprint's loop and IOF facilities is already compensating Sprint for the capacity costs of fiber cables. If the loop and IOF fill factor is less than 100 percent, FDN and KMC contend that there should be no capacity cost for dark fiber. They contend that Sprint should have studied only the operations and maintenance costs of the fiber to reflect the recurring costs for the fiber itself. They assert that Sprint should exclude any investment, supporting structure, and placement costs for the fiber itself. If Sprint seeks to recover capacity costs of the fiber cable via the dark fiber UNE rate as well, FDN and KMC contend then the capacity costs for loop and IOF facilities must be adjusted accordingly. They argue that either way, the capacity costs need to be adjusted. They assert that Sprint should not impose the same investment costs in both the loop and interoffice fiber facility charges and the dark fiber charge as well.

Sprint's Response

Sprint argues that FDN and KMC simply reargue points that they have already made to the Commission and that the Commission rejected. Sprint emphasizes that nothing in FDN and KMC's Motion is based upon specific factual matter susceptible to a review of the record. Thus, Sprint contends FDN and KMC's challenges do not meet the reconsideration standard and should be rejected.

Sprint notes that FDN and KMC acknowledge that the Commission considered their arguments and dismissed the claims on the grounds that ". . . FDN's argument relates specifically to fill factors and are addressed in other issues." See Order at p. 97. On the basis of this statement, Sprint asserts that FDN and KMC argue that "the Commission failed to consider FDN's argument, making it ripe for reconsideration." Motion at p. 16. Sprint argues that, to the contrary, FDN and KMC's arguments are "unripe" and they ignore the legal requirements for reconsideration.

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[22] Application by Pacific Bell Telephone /Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, California Public Utilities Commission Application 01-01-010, Decision 01-09-054 at 17-18 (Sept. 20, 2001).

Sprint argues that the Commission, by FDN and KMC's own admission, considered their arguments and rejected them. Sprint argues that FDN and KMC simply reargue this issue, which has already been fully considered and rejected by the Commission. Sprint also argues that 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. Additionally, Sprint points out that the Commission noted that " . . . fill factors do not effect [sic] the material and placement inputs of cables." See Order at p. 97. Finally, Sprint argues that 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.

Analysis

Staff recommends that FDN and KMC have failed to identify anything the Commission overlooked or any mistake of fact or law made in rendering its decision on the material and placement costs for copper and fiber cable. The Commission thoroughly considered FDN and KMC's' arguments, as set forth at pages 80-81, 83-84, 95-97, and 134-136 of the Order. Specifically, the Commission addressed FDN's argument that ". . . there is double counting of the costs of the spare fiber in the loop and transport cost studies and in the dark fiber study" and its proposal of a ". . . fiber cable utilization rate on a forward-looking basis of at least 90 percent. . . ." See Order at pp. 83. The Commission rejected the argument finding that ". . . the appropriate assumptions and inputs for fill factors in the forward-looking UNE cost studies shall be the fills filed by Sprint." See Order at pp. 83-84.

The Commission also addressed FDN and KMC's arguments that

> . . . the material and placement costs of dark fiber are included in Sprint's inputs for loop and interoffice facility calculations; however, the demand was not. FDN alleges that Sprint already attributes the capacity cost of dark fiber loop facilities, and the structure and placement cost for those facilities, to the costs of loops and interoffice facilities.

Order at p. 97. In the Order, FDN also argued that this would result in double recovery for the same capacity costs as included

in studies for other UNEs. Further, as noted in the Order, FDN asserted that if the fill factor for dark fiber is not adjusted to 100 percent, there should be no capacity cost for dark fiber. Moreover, in the Order, the Commission noted FDN's argument that if the fill factors for dark fiber are not adjusted, Sprint's material and placement costs for fiber loop and interoffice facilities should be recovered in the dark fiber rates. Order at p. 97. Again, staff notes that the Commission addressed all the arguments raised by FDN and KMC in the Order. Specifically, the Commission found that

> . . . FDN's arguments relate specifically to fill factors and are addressed in other issues. We note that adjusting fill factors will effect fiber loop and interoffice facility costs. However, fill factors do not directly effect the material and placement cost inputs of cables. Moreover, FDN does not offer a specific adjustment to the material and placement costs, but merely asserts that one should be made. We disagree with FDN's arguments that cable material and placement cost inputs should be reduced.

Order at p. 97.

Finally, the Commission noted FDN's arguments with interoffice transport inputs:

> FDN alleges that Sprint has included the cost of dark fiber in its loop and transport cost studies and also in the dark fiber study. FDN opines that this results in double counting the same costs.

The Commission considered FDN's arguments. However, the Commission rejected those arguments in its Order. Specifically, the Commission found that

> We have reviewed Sprint's dark fiber cost study and agree with Sprint that the rates ensure CLECs pay a pro rata share of unutilized capacity based on their bandwidth purchase. We believe that this is an equitable approach. Otherwise, the cost of all unutilized bandwidth would

> shift to retail customers. We think that FDN's disagreement regarding Sprint's dark fiber interoffice transport facilities is unwarranted.

Order at p. 136.

Recognizing the above, staff recommends that the Commission find that the Commission did not overlook or fail to consider any point of fact or law regarding Cable Material and Placement Costs utilized in this proceeding.

ISSUE 7: Did the Commission overlook or fail to consider a point of fact or law regarding Expenses in rendering its decision in this proceeding?

RECOMMENDATION: No, staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding expenses utilized in this proceeding. **(CHRISTENSEN, MARSH)**

STAFF ANALYSIS:

FDN and KMC's Motion

FDN and KMC argue that contrary to the established precedent of the FCC, Sprint calculated its expense factors using book investment cost as of the year 2000 and failed to convert its booked investment to replacement cost, as required by the TELRIC methodology. They contend that the Commission overlooked this inconsistency in rendering its decision and should require these values be converted to replacement cost just as it required of Verizon-Florida.

FDN and KMC assert that plant-specific operations expenses are the expense costs related to the maintenance of specific kinds of telecommunications plant. They argue that input values for plant-specific operations expenses are calculated as a percentage of investment. They assert that the FCC has required some method of converting booked cost investment to current investment in order to estimate forward-looking plant-specific operations expenses based on present day replacement cost, rather than historic, financial account balances, citing the FCC's Tenth Report and Order, in CC Docket No. 96-45, at ¶ 342.

FDN and KMC assert the Commission found in the Verizon phase of this proceeding that consistency is required between the numerator (expenses) and the denominator (investments) in terms of time period used. They argue that the expenses from a given year must be matched with the replacement cost of investment calculated by indices such as C.A. Turner or a Telephone Plant Index. They assert that this is necessary because book investment balances typically consist of amounts from vintage years stretching back decades. They contend that the use of the appropriate index sets investment at a vintage that matches expenses used in calculating the expense-to-investment ratio. FDN and KMC state that the index

for a particular plant account is typically greater than 1. They argue that this means that replacement cost for investment will be greater today than its book cost. FCC Tenth Report and Order at ¶371. They argue that this approach is also consistent with the methodology adopted by the FCC.

FDN and KMC contend that Sprint provided its expense factor calculation in response to an FDN discovery request. See Exhibit 11. They state that this spreadsheet shows that Sprint calculated its expense factors using book investment cost as of the year 2000, but failed to convert the book investment cost to replacement cost. They contend that the Commission should require Sprint to correct this error and resubmit its cost study with conforming data.

Sprint's Response

Sprint contends that FDN and KMC do not cite any record evidence that it has, in fact, made the criticized calculation. Sprint asserts that instead, FDN and KMC rely upon a spreadsheet submitted by it in response to a discovery response, but never previously mentioned by FDN and KMC. Sprint argues that 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 their Motion, does not support a claim that the Commission overlooked this fact. Sprint asserts that indeed, a review of the record suggests quite a different conclusion. Sprint contends that 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 cost. Sprint asserts that it is upon this record evidence that the Commission based its decision citing to the Order at page 146. Sprint concludes that FDN and KMC again fail to provide a legitimate basis for requiring reconsideration.

Analysis

As noted above, FDN and KMC argue that

> . . . Sprint calculated its expense factors using book investment cost as of the year 2000, and failed to convert its booked investment to replacement cost, as required by the TELRIC methodology. The Commission overlooked this inconsistency in rendering its decision

> and should require these values be converted to replacement cost just as it required of Verizon-FL.

Motion at p. 18.

Staff observes that this is in direct opposition to the position taken by FDN and KMC in the Verizon case. In its brief on the Verizon portion of the docket, AT&T, MCI, and FDN argued that

> The Commission should reject Verizon - FL's use of the C. A. Turner indices because this methodology does not consider what physical quantity or type of support asset is necessary in a forward-looking construct. Instead, the C.A. Turner indices only serve to inflate the current embedded base of assets to today's prices. (Tr. 530) Consequently, the Commission should require Verizon - FL to recalculate its annual support costs using a forward-looking investment base to calculate forward-looking support costs and using appropriate capital cost factors for depreciation and cost of capital as recommended above. Clearly the forward looking investment base should be less than its current book investment.

AT&T/MCI/FDN Brief(Verizon track) at p. 51. KMC, in a separate letter, concurred with the AT&T/MCI/Verizon/FDN Brief. Neither KMC nor FDN took a position in their brief on the Sprint portion of the docket.

This is the very methodology that KMC and FDN are now stating the Commission should have applied to Sprint. While it is true that this Commission accepted Verizon's application of the G.A. Turner indices, disregarding the opposition of the ALECs, there is no record evidence to suggest that investment must be converted to replacement cost, to the exclusion of all other methodologies. No evidence was presented that replacement cost meets or does not meet TELRIC, let alone that it is the only possible appropriate methodology.

Verizon and Sprint submitted totally different models. There is no record on which to base application of Verizon's methodology to Sprint's model. If the Commission wished to apply Verizon's methodology, Sprint would have to provide data on its vintage year investment costs, by account. There is no such evidence in the

record, nor is there any evidence to suggest how, or even whether, Sprint's model would work if such a methodology was applied.

In response to the Motion, Sprint contends that FDN and KMC based their motion on a spreadsheet that Sprint provided in response to discovery. (See EXH 11, pp. 37-38) Sprint argues that other evidence in the record shows that its model is forward-looking. (Sprint response, p. 9)

Staff notes that the spreadsheet to which Sprint refers is a supporting document for its model, and therefore is indicative of the methodology applied by Sprint. However, this spreadsheet is not evidence that Sprint's methodology is not TELRIC-compliant, but only an indication of how the calculations were performed.

While staff does not wholly agree with Sprint's arguments as submitted in its response, nevertheless, Sprint's position that its model is forward-looking is unrebutted in the record. The Commission did not overlook any facts in rendering its decision. Therefore, staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding expenses utilized in this proceeding.

ISSUE 8: Did the Commission overlook or fail to consider a point of fact or law regarding Work-Times For Non-Recurring Charges utilized in this proceeding?

RECOMMENDATION: No, staff recommends that the Commission find that FDN and KMC's Motion did not identify any point of fact or law which was overlooked or which the Commission failed to consider regarding the Work-Times for Non-Recurring Charges utilized in this proceeding. **(CHRISTENSEN, WRIGHT)**

STAFF ANALYSIS:

FDN and KMC Motion

FDN and KMC state that Sprint failed to support its non-recurring charges (NRCs) with substantial competent evidence.[23] They assert that Sprint based its non-recurring charges on a combination of Average Time Per Work Function studies and input from its Subject Matter Experts (SMEs). They contend that the Commission noted significant problems with both sources of data, but nonetheless approved Sprint's proposed NRC rates. FDN and KMC argue this constitutes plain error.

FDN and KMC assert that, first, the Commission clearly found that Sprint's Average Time Per Work Function Study was fundamentally flawed, noting its concern with the accuracy of the study. They cite the Order at page 174 where the Commission noted that there were several occurrences where the total task times were miscalculated. They also assert that in other cases, the data forming the basis of the calculation was flawed. Finally, they contend that the Commission also found obvious input errors, which Sprint conceded were present, or reported work times that were unsupported by data altogether. They argue that based on these flaws the Commission should have attached no evidentiary value to Sprint's work time studies.

FDN and KMC contend that the SME opinions were no better and that the Commission questioned the basis for the SMEs' estimates. They state that the Commission noted Sprint's failure to provide support for many SME activity time estimates and probabilities included in their studies and the inputs were not subject to

[23]Staff notes that "competent substantial evidence" is the standard for appellate review, not the standard for a motion for reconsideration.

independent third-party verification. Further, they cite to the Commission's finding that the estimates were based on what the SMEs observed and not on what a forward-looking, efficient practice would produce. They argue that "[a]s a consequence, the SMEs' estimates, by definition, were not TELRIC compliant, and likely 'tend[ed] to ***bias*** their inputs in favor of higher NRC costs.'" Order at p. 176; Motion at p. 21 (emphasis in Motion).

FDN and KMC argue that based on the Commission's identification of errors in Sprint's NRC studies, Sprint did not meet its burden of proof in establishing credible work times or TELRIC-compliant ones. They argue that the Commission justified Sprint's NRC data by applying a new "range of reasonableness" test comparing Sprint's NRCs to BellSouth's NRCs. They assert that the Commission offered no explanation as to how it derived this standard, what constituted this range, why it would be fair to apply it to the parties in this case, and how they conducted the comparison. They argue that the Commission even noted that this approach could be problematic. They assert that given this concession, it was unreasonable for the Commission to use this comparative approach to validate Sprint's entire NRC study.

FDN and KMC contend that the Commission failed to provide the parties with notice that it would use this approach, thereby depriving them of the opportunity to address this in their brief. Further, they assert that the comparative approach adopted by the Commission is not valid and cannot withstand scrutiny. They also contend the Commission failed to apply its comparative analysis consistently. FDN and KMC contend that only NRCs have been subjected to the new test, not the recurring charges. They argue that if a comparison with BellSouth's rates had been the test, Sprint's recurring UNE rates would have been much lower. They contend that the Commission failed to explain why the comparison test is valid for one but not the other.

Further, FDN and KMC argue that it is not even clear if the Commission performed a comparison. They contend that a charge that is more than two times BellSouth's rate cannot, by virtue of a stand-alone comparison, be deemed reasonable. They assert that even if some of the NRCs do fall within the "zone of reasonableness," that would still not justify validating all of them. FDN and KMC conclude that if some of the NRCs are inflated and cannot be justified under a "range of reasonableness" test, then they should be invalidated or reduced.

Moreover, FDN and KMC assert that this comparison is benchmarking, which the FCC explicitly declined to use for NRCs. They argue that it is easy to see why the FCC has bench-marked recurring rates but not NRCs. Recurring rates are based on objective inputs, while NRCs are based on more subjective inputs which are harder to validate. Further, they argue if such a comparison should be done, it should be between like companies such as like BOCs, rather than two different companies where the comparisons may or may not be appropriate. They contend there is no evidence one way or the other.

FDN and KMC contend that it is the Commission's duty to find the correct, TELRIC-complaint work times for Sprint, and it has failed to do so. They argue that if there are errors in the work studies, they should be corrected, not overlooked. They contend that the lack of alternative evidence is not grounds for accepting Sprint's clearly erroneous submission.

FDN and KMC argue that the Commission has several alternatives in the face of the deficient evidence. They assert that the Commission could invalidate the submission and require the submission of new evidence and in the mean time keep the existing rates in place, or adopt the FCC's proxy rates on an interim basis. They contend that in the alternative, the Commission could reduce Sprint's proposals, as other state commissions have done.

Sprint Response

Sprint asserts that 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 at pp. 176-177. Sprint notes that in the Order at page 177, FDN and KMC failed to provide any record evidence on this issue, and have not cited any record evidence that supports their contention that the Commission's use of the "range of reasonableness" test is not appropriate. Sprint states that the fact that FDN and KMC are dissatisfied with the result is not grounds for reconsideration, especially when FDN and KMC failed to provide competent, substantial evidence on the issue as required by the federal Act. Sprint contends that they certainly have identified no point of fact or law that the Commission either overlooked or disregarded.

Analysis

FDN and KMC state that the Commission clearly found that Sprint's Average Time Per Work Function Study was "fundamentally flawed," because the Order raised some concerns about the accuracy of the studies. The Order did note some errors in total task times, but the Order also explained that the errors noted did not affect the actual times used in the non-recurring study; therefore it is incorrect to conclude that the Average Time Per Work Function Study is "fundamentally flawed." Though the beginning and ending times for the actual activity durations used in the study were not reported, it does not mean that the times reported are incorrect. No evidence was in the record that demonstrated that the times included in the NRC study were inaccurate. Sprint states in its Response that FDN and KMC seek application of an inappropriate standard of review and fail to meet the appropriate standard of review. Staff agrees.

FDN and KMC state that the SMEs' estimates, by definition, were not TELRIC-compliant, and likely tended to bias their inputs in favor of higher NRC costs. Sprint states in their response that the Commission fully considered FDN and KMC's arguments within the context of record evidence and reached a decision fully compliant with the evidentiary standards of the federal Act. Staff notes that the Commission recognized the subjectivity of the SMEs' time and probability estimates but took note that no other evidence was presented by other parties to contradict the SMEs' estimates.

In their Motion, FDN and KMC argue that the Commission has attempted to validate Sprint's NRC data, which it knows is wrong, by applying a new "range of reasonableness" test, which essentially consists of comparing Sprint's non-recurring charges to BellSouth's. Though the Order recognizes that there may be errors that affect Sprint's NRC study, it does not conclude that it is wrong. Staff notes that there are no clear errors in Sprint's NRC studies that should have been corrected, and, therefore, Sprint's submission is not clearly erroneous as FDN and KMC assert.

The Commission adopted the "range of reasonable" comparison because of the lack of evidence from other parties. Thus, a comparison between Sprint's NRC rates and BellSouth's NRC rates was made to determine if Sprint's NRC rates, on balance, were reasonable. This comparison was made to provide a comfort level regarding the numbers; however, as noted above, there was no record

evidence that the Sprint study was fatally flawed such that a new filing was required. Contrary to FDN and KMC's assertions, the comparison of Sprint and BellSouth's NRCs was not a benchmark or standard since the Sprint numbers were solely derived from the evidence in Sprint's cost study. While the Order acknowledges that these types of comparisons can be problematic, the comparison was utilized for the limited purpose of determining if Sprint's rates fall within a range of reasonableness when compared with other rates the Commission previously approved, absent any contrary evidence.

Further, staff notes that the Commission mention of concerns in the Order does not equate to a fundamental flaw as FDN and KMC assert. The Commission, while acknowledging problems with the studies, overall accepted the studies and based its determination on those studies. Thus, staff recommends that the Commission find that FDN and KMC's Motion did not identify any point of fact or law which was overlooked or which the Commission failed to consider regarding the Work-Times for Non-Recurring Charges utilized in this proceeding.

ISSUE 9: Did the Commission overlook or fail to consider a point of fact or law regarding Non-Recurring OSS Charges utilized in this proceeding?

RECOMMENDATION: No. Staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding Non-Recurring OSS Charges utilized in this proceeding. **(CHRISTENSEN, T. BROWN)**

STAFF ANALYSIS:

FDN and KMC's Motion

FDN and KMC argue that it is uncontroverted that Sprint's OSS is "not fully developed and is being held until more demand is evident" citing the Order at page 161. They argue that it is also uncontroverted that there are productivity and process improvements available to Sprint for its OSS, and that those improvements when made would reduce the amount of manual intervention or work needed for processing an order. Further, they state that Sprint has placed these improvements on hold until additional demand materializes. They contend that Sprint based its fallout percentages in its OSS NRC cost study on its actual experience. FDN and KMC assert that the manual intervention required by its existing OSS would be reflected in inflated OSS charges.

Citing the Order at page 162, FDN and KMC contend that the Commission validates Sprint's charges, stating 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." Motion at p. 25. They state that the Commission agreed with Sprint in its Order and found that the FCC only requires a network to be the most efficient, least-cost and reasonable technology currently available.

FDN and KMC assert that the Commission correctly stated, but incorrectly applied, the FCC standard. They argue that Sprint's failure to utilize the efficient "productivity and process improvements" that are currently available, is irrelevant for costing purposes. They argue that under the Commission's interpretation, the "currently available" OSS system equates to the OSS system Sprint is currently using, and this represents pricing based on Sprint's embedded network which is prohibited by the Act and FCC rules.

FDN and KMC contend that there are strong policy reasons why the Act and FCC rules require forward-looking pricing based on the most efficient technology available, and the rationale is readily apparent in this context. They argue that if Sprint's NRCs are based on manual OSS, the demand needed to support an electronic OSS will never materialize. They argue that Sprint will have no incentive to improve its ordering process. They state that requiring Sprint to base its non-recurring costs on the most efficient OSS technology currently available will give Sprint the correct incentive to deploy the technology. They argue that in a competitive market, Sprint would be required to use the most efficient technology to lower its cost of service, and Sprint's non-recurring costs should reflect use of such technology.

Sprint's Response

Sprint states that FDN and KMC are simply rearguing the same issue as addressed in FDN's Post-Hearing Brief. Sprint states that merely because FDN and KMC do not agree with the Commission's decision, this does not provide a basis for reconsideration. Sprint asserts that the Commission has fully considered FDN and KMC's position and rejected it on the basis of the record. Sprint states that in fact, the record shows that while some portions of Sprint's OSS are fully automated, some are not. Sprint has assumed a fully automated OSS, for NRC pricing purposes. Thus, Sprint concludes that FDN and KMC failed to point out any fact that the Commission overlooked in reaching its decision.

Analysis

As noted above, FDN and KMC assert that the Commission correctly stated, but incorrectly applied, the FCC standard which requires a network be "the most efficient, least-cost and reasonable technology currently available . . . ." As part of their argument, FDN and KMC allege that there are strong public policy reasons requiring forward-looking pricing and that allowing Sprint to price NRCs using manual OSS will suppress demand and give Sprint no incentive to improve its OSS. Further, they argue that use of the most forward-looking technology currently available mimics technology choices that would be made in a competitive market and that Sprint's rates should reflect technology choices that lower its cost of service.

Staff believes that FDN and KMC's arguments are basically a reargument of what was contained in their brief. Staff also believes that FDN and KMC have mischaracterized the issue by focusing on what Sprint has currently in place, instead of actually looking (as the issue is worded) to the appropriate assumptions and inputs for purposes of the forward-looking non-recurring cost studies. The Commission noted in its Order, and the parties have acknowledged, that Sprint's OSS is not fully developed and that Sprint will hold additional improvements in abeyance until demand dictates those changes. Order at p.191. Despite that, Sprint did factor in improvements for purposes of the cost study. In fact, for purposes of this proceeding, Sprint assumed the availability of a fully automated OSS. Order at p.181, EXH 13 at p.20. The excessive manual intervention that FDN complains about has been addressed through the use of higher flow-through rates and increased mechanization in the cost studies. For example, Sprint's model includes a flow-through rate of 85%, when the actual flow-through rate is only 51%. Order at p. 192, EXH 11 at p.6.

Further, staff notes that the Commission's decision on this issue should not be viewed alone, but in concert with other modifications made in the context of the Order. Based on the foregoing, staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding Non-Recurring OSS Charges utilized in this proceeding.

ISSUE 10: Did the Commission overlook or fail to consider a point of fact or law regarding whether its rates may discourage competition and did not establish fair and reasonable rates?

RECOMMENDATION: No, staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding the rates established in this proceeding. **(CHRISTENSEN, DOWDS)**

STAFF ANALYSIS: This section addresses whether the rates approved by the Commission in its Order may discourage competition and whether the rates established for Sprint in the Order are fair and reasonable.

FDN and KMC's Motion

FDN and KMC argue that the Commission set Sprint's UNE rates higher than those currently in effect, thereby raising the bills of ALECs trying to compete in Sprint's territory. Further, they assert that the Commission-approved rates have absolutely no basis in reason when put in the context of the competitive market place. They contend that despite the Commission's goal of encouraging competition, the Commission failed to consider the impact the particular rates would have on competition. FDN and KMC assert that compeition is not encouraged in the Sprint territory, but rather the opposite is the obvious product of the Order.

FDN and KMC claim that the Order does not explain how "a price increase" promotes competition, while the Commission finds that it promotes competition. Motion at p. 27. They assert that neither the recommendation nor the Order show any comparison between the current Sprint UNE rates and the Commission's approved UNE rates. They argue that a simple comparison of the two would demonstrate that the Commission-approved loop rates that were higher overall. Further, FDN and KMC argue that the Commission should have examined whether the UNE pricing dooms competitors to failure. They assert that the Commission failed to conduct such an analysis, but rather declared the rates fair and reasonable and conducive to competition without any basis to support those findings. FDN and KMC cite to the prices in several wire centers, comparing loop rates and Sprint's retail rates.

FDN and KMC argue that "Florida consumers cannot accept a result whereby this Commission claims it promotes competition by

creating a viable environment for competitors in just the 112,000 line market that is Sprint Zone 1, while the balance of Sprint's 2,079,800 lines in Zones 2-4 have no hope for the benefits of facilities-based competition because of this Commission's decision." Motion at pp. 30-31. Further, they argue that the approved UNE rates, especially the 2-wire and DS1 rates, will deter and extinguish competition. FDN and KMC argue that the Commission considered changes in the UNE rates and deaveraging methodologies in a vacuum at the Agenda Conference ". . . looking just at the rates themselves and manipulating same without giving any meaningful consideration or conducting an analysis of the impact of these numbers on customers and the marketplace." Motion at p. 31.

FDN and KMC contend that for the Commission to establish as a standard the "impact on competition," and then ignore that standard is a clear error. They claim that a comparison of Sprint's UNE rates and its retail rates clearly demonstrates that the UNE rates are too high to permit profitable entry into the residential marketplace and foreclose entry into a vast majority of the business marketplace. FDN and KMC argue that the Commission needs to make the corrections they urge throughout their Motion not only to undo mistakes of law, but to truly encourage competition.

Sprint's Response

Sprint states that in an effort to support its Motion, FDN and KMC engage in a lengthy analysis of comparing wholesale and retail rates, which is outside the record in this proceeding. Sprint states that they have yet again failed to point out any point of fact or law that the Commission overlooked in rendering its decision.

Sprint states in its Response that contrary to FDN and KMC's assertions, there is no legal standard that wholesale rates be less than retail rates, citing Section 252(d)(1) of the Act. Sprint asserts that the standard is TELRIC pricing, which FDN and KMC acknowledge elsewhere in their Motion but ignore for the sake of imposing a new standard herein. Sprint contends that they cannot have it both ways. Further, Sprint asserts that the analysis FDN and KMC urge is incomplete and improper. Sprint contends that a proper, although irrelevant, analysis would also include the entire revenue stream available from each residential and business customer served by FDN and KMC. Sprint concludes that FDN and KMC's request for relief, at this stage of the proceeding, is not

contemplated by the Act or FCC rules implementing the Act, and therefore should be rejected.

Analysis

As noted above, FDN and KMC argue in their Motion that "[t]he Commission set Sprint UNE rates that are not only significantly higher than those currently in effect, thereby raising the bills of the ALECs struggling to compete in Sprint territory today, but the Commission approved rates which have absolutely no basis in reason when put in the context of the competitive market place." Motion at p. 27. As noted above by Sprint, the key criterion that must be met is Section 252(d)(1), before any other standard, including promoting competition, can be met. Section 252(d)(1), states that:

> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section -
> (A) shall be-
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of the interconnection or network element (whichever is applicable), and
> (ii) nondiscriminatory, and
> (B)may include a reasonable profit.

Staff notes that there was discussion at the December 2, 2003, Agenda Conference addressing Sprint's final rates as to why many proposed rates were higher than current rates. Staff further notes that it was discussed that: a) some rates were higher, some rates were lower; and b) current rates were not PSC-approved, but resulted from a settlement, which were filed and treated as presumptively valid, and thus it cannot be determined whether or not that the old rates were cost-based.

There is extensive discussion by FDN and KMC regarding how new rates are generally greater than old rates, and thus competition is doomed to failure. Staff notes that the Commission was aware of the current versus the new rates when the Commission made its decision.

FDN and KMC argue that "[a] comparison of Sprint's UNE rates in Florida with Sprint's retail rates demonstrate that UNE rates are set too high to permit profitable entry in the residential marketplace and that they also foreclose entry into the vast majority of the business marketplace." Motion at p. 32. Staff notes that this is the same sort of argument that KMC's witness raised in his direct testimony (the need to ensure that wholesale rates are less than retail), which while considered by the Commission in its decision, was largely discounted. Staff notes that Section 252(d)(1) must be satisfied before any other criterion can be considered. The goal of the Act is not solely a "fair and reasonable rate" standard, which could be quite subjective. Rather, the resulting rates must be compensatory, but not excessive, wholesale rates that satisfy Section 252 (d)(1) of the Act. As such, staff notes that the standard for appropriate UNE rates is not primarily that the rates will stimulate competition. Although "stimulating competition" is a goal, it is not the only goal. Whether rates "stimulate competition" must be evaluated in light of whether those rates are compensatory, non-excessive, wholesale rates.

Further, staff notes that FDN and KMC's Motion contains lengthy discussion and comparison of Sprint's retail rates versus its wholesale rates, much of which is outside of the record. Staff notes, however, that FDN and KMC do not identify any record fact overlooked by the Commission.

For the reasons stated above, staff recommends that the Commission find that it did not overlook or fail to consider any point of fact or law in rendering its decision regarding the rates established in this proceeding.

ISSUE 11: Should the Commission acknowledge AT&T Communications of the Southern States, LLC (AT&T) and WorldCom, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services LLC and Intermedia Communications, Inc. (collectively "WorldCom") withdrawal of their Motion for Reconsideration of Order No. PSC-02-1574-FOF-TP, filed December 2, 2002?

RECOMMENDATION: Yes, staff recommends that the Commission should acknowledge the withdrawal of AT&T and WorldCom's Motion for Reconsideration of Order No. PSC-02-1572-FOF-TP. **(CHRISTENSEN)**

STAFF ANALYSIS: By Order No. PSC-02-1574-FOF-TP, issued November 15, 2002, the Commission rendered its final decision regarding UNE rates for Verizon. On December 2, 2002, AT&T and WorldCom filed their Motion for Reconsideration. Shortly thereafter, on December 16, 2002, Verizon filed a Notice of Appeal to the Florida Supreme Court, as well as a Response in Opposition to the Motion for Reconsideration. Verizon also filed a Motion for Mandatory Stay Pending Judicial Review. On December 30, 2002, AT&T, WorldCom, and FDN filed a joint Response in Opposition to the Motion for Stay, as well as a Request for Oral Argument.

On January 8, 2003, the Commission filed a Motion to Dismiss or Abate with the Supreme Court, asking that the Court abate its proceedings regarding Verizon's appeal to allow the Commission to address the pending Motion for Reconsideration. On January 23, 2003, Verizon filed its response with the Court, indicating that it did not oppose the request for abatement, as long as the Commission granted its request for a mandatory stay pending appeal. On March 3, 2003, the Court stayed its proceedings to allow the Commission to address the pending Motion for Reconsideration. At the April 9, 2003, Agenda Conference, the Commission voted to grant Verizon's Motion for Stay pending appeal.

On May 16, 2003, AT&T and WorldCom filed their Notice of Withdrawal of their Motion for Reconsideration of Order No. PSC-02-1574-FOF-TP, issued November 15, 2002, the Order on the final UNE rates for Verizon. Staff recommends that the Commission acknowledge AT&T and WorldCom's withdrawal of their Motion for Reconsideration. Staff believes that it is appropriate to issue a separate order on this issue that may be forwarded to the Court.

Based on the foregoing, staff recommends that the Commission should acknowledge the withdrawal of AT&T and WorldCom's Motion for Reconsideration of Order No. PSC-02-1572-FOF-TP.

ISSUE 12: Should this docket be closed?

RECOMMENDATION: Staff recommends that this portion of the docket remain open until the expiration of the appeals period. Should no appeal be taken on the Sprint portion of this docket, staff recommends that staff should be granted administrative authority to close the Sprint portion of this docket. However, staff notes that currently there is an appeal pending on the Verizon portion of this docket, and therefore, this docket should remain open for further proceedings in the Verizon portion. **(CHRISTENSEN)**

STAFF ANALYSIS: Staff recommends that this portion of the docket remain open until the expiration of the appeals period. Should no appeal be taken on the Sprint portion of this docket, staff recommends that staff should be granted administrative authority to close the Sprint portion of this docket. However, staff notes that currently there is an appeal pending on the Verizon portion of this docket, and therefore, this docket should remain open for further proceedings in the Verizon portion.