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July 8, 2003

BY HAND DELIVERY
Ms. Blanca Bayó, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

RE: Docket No. 990649B, Sprint UNE phase

Dear Ms. Bayó:

Enclosed for filing in the above referenced docket. is an original and 15 copies of the Joint Notice of Statutory Non-Compliance With Proposed Means to Cure and Suggestion for New Hearing.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self,

AUS
CAF
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GCL
OPC
MMS
SEC 1
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FRS/amb
Enclosures
cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements (Sprint Phase)	Docket No. 990649B-TP Filed: July 8, 2003

JOINT NOTICE OF STATUTORY NON-COMPLIANCE WITH PROPOSED MEANS TO CURE AND SUGGESTION FOR NEW HEARING BY FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM III, LLC

Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") and KMC Telecom III, LLC ("KMC"), pursuant to Rule 28-106.211, Florida Administrative Code, hereby file this Joint Notice of Statutory Non-Compliance With Proposed Means to Cure and Suggestion for New Hearing. FDN and KMC respectfully provide notice to the Commission of a violation of Florida law resulting from the Commission's June 17, 2003, vote on FDN and KMC Joint Motion for Reconsideration, and hereby offer a means to cure the statutory violation. In addition, FDN and KMC further provide the suggestion that the full Commission, on its own motion, should proceed to a new hearing for the Sprint phase of this case to resolve the issues in this case in a manner that fully complies with Florida and federal law.

I. Notice of Statutory Non-Compliance with Proposed Means to Cure

1. On January 8, 2003, the Commission entered its Sprint Order on Rates for Unbundled Network Elements Provided by Sprint-Florida Incorporated in the above referenced docket. Order No. PSC-03-0058-FOF-TP, issued on January 8, 2003 (hereinafter the "Sprint Order"). The Sprint Order was entered by a panel consisting of the five appointed Commissioners.

2. On January 23, 2003, FDN and KMC filed the Joint Motion for Reconsideration, seeking reconsideration of the Commission's Sprint Order. At the time the Joint Motion was filed, the case was assigned to be heard by a panel of the full Commission.

3. On April 16, 2003, a Case Assignment and Scheduling Record ("CASR") was filed that purported to reassign the case to a panel of four Commissioners, excluding Commissioner Charles M. Davidson. The CASR is, by its terms, "an internal planning document."

4. On June 17, 2003, the Joint Motion for Reconsideration was heard at a scheduled meeting of the Commission in Tallahassee, Florida. All five appointed members of the Commission were present at the time the Joint Motion for Reconsideration was taken up, discussed, and voted upon.

5. Although he was present in his official capacity at the Commission meeting, Commissioner Davidson did not vote on the matters in this docket, nor was a vote recorded or counted for Commissioner Davidson.

6. Action on the Joint Motion for Reconsideration was "defeated" on a tie vote, 2-2. Therefore, the effect of the statutory noncompliance set forth herein is not a matter of purely academic interest, but served to deprive the Commission, and thus the citizens of Florida, of a pivotal vote on an issue of significance to telecommunications service providers and consumers in Florida.

A. Violation of Florida Law

7. Section 286.012, Florida Statutes provides as follows:

> No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to

> be taken or adopted may abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143.

8. The Commission's action on the Joint Motion for Reconsideration was "an official decision, ruling, or other official act" for purposes of Section 286.012, Fla. Stat. Commissioner Davidson was present in his official capacity as a Public Service Commissioner at the June 17, 2003, meeting of the Commission at which the Joint Motion for Reconsideration was decided.

9. Upon the recording of a 2-2 vote on the Joint Motion for Reconsideration, the chair of the Commission suggested that Commissioner Davidson might be required to read the transcript and record of the proceeding in order to cast the deciding vote. Upon that suggestion, Commissioner Davidson made an effort, although humorous in nature and intent, to excuse himself from the proceedings.

10. Commissioner Davidson did not abstain based on a conflict of interest under Sections 112.311, 112.313, or 112.3143, Fla. Stat., which would allow a public officer to abstain when the public officer has a personal financial interest in the outcome of the matter. *Izaak Walton League of America v. Monroe County*, 448 So. 2d 1170, 1173 fn 8 (Fla. 3rd DCA 1984). Commissioner Davidson has no such personal financial interest in the outcome of this proceeding.

11. The law required the sitting Commissioner to read the transcript and record of the proceeding and to vote. The CASR cannot serve to excuse Commissioner Davidson's statutory obligation to vote on the official action of the Commission regarding the Joint Motion for

Reconsideration, as a policy cannot serve to exempt an agency from the application of general law. See, e.g. *Douglas v. Michel*, 410 So.2d 936 (Fla. 5th DCA 1982).

12. FDN and KMC are cognizant of Section 350.01(5), Fla. Stat., which provides that "[a] petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." However, in this case, the reconsideration provision has been erroneously applied, and another provision of subsection (5) violated.

13. The reconsideration provision of Section 350.01(5) is designed to assure continuity in the voting make-up of the decision-making body. The earlier part of subsection (5) allows the chair of the Commission to assign a proceeding to a panel of Commissioners constituting less than the whole of the Commission. However, whether a panel of the full Commission or a smaller panel is assigned, "only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding."

14. Section 350.01(5) provides a remedy for instances, such as the one in this case, where the person holding the seat of commissioner becomes unavailable, by providing that "[i]f a commissioner becomes unavailable after assignment to a particular proceeding, the chair **shall** assign a substitute commissioner." (e.s.) In this case, a substitute commissioner was not assigned. The Commission thus violated the substitution provision in favor of a flawed reading of the reconsideration provision.

15. It is a well settled rule of statutory construction that apparently conflicting provisions of a statute must be read together so as to achieve a harmonious whole. Therefore, any apparent conflict between the substitution provision and the reconsideration provision must be resolved in a manner that will give effect to both. *City of Boca Raton v. Gidman*, 440 So.2d

1277 (Fla. 1983). Harmony between the two provisions can be preserved through the appointment of a substitute Commissioner, and consideration of the Motion for Rehearing by the same Commission panel originally assigned to the case. To hold otherwise sets a precedent that could cripple the decision-making process in an era of more frequent commission turnover.

16. It has long been the policy and practice of the Commission to assign cases to the entire panel when those cases involve important policy, pricing, or major rate decisions. In that regard, the generic rate and policy cases such as this one have been assigned to and considered by panels that consist of the entire five-member Commission. This policy and practice has been in recognition that some cases merit the application of the combined wisdom of the Commission as a whole, rather than a subset thereof. As is clear from the law and the Commission's own practice, it is the office of the Commissioner, rather than the particular appointee filling that office, that is deemed to be essential in the comprehensive overview of these important issues.

17. This case, which involves major generic rate, pricing and policy matters, was assigned to a panel consisting of the entire Commission. Throughout the proceeding, until very recently, the docket has been assigned to a panel of the full Commission. Therefore, at the early stages of this docket proceeding, consideration was given to the potential importance and magnitude of this case on the "consuming public and the utility; value of service involved; the effect on consumer relations, regulatory policies, conservation, economy, competition, public health, and safety of the area involved." See Section 350.01(6), Fla. Stat.

18. Given the obvious and immediate effect of ratemaking for UNEs on competition and cost to the public, the importance of the issues involved in this docket have not changed. Therefore, it is in the interest of the public that decisions in this docket be made with participation of all of the public officers charged with the duties of Public Service

Commissioners, and not to allow issues as significant and far-reaching as those presented in this docket to wither on a 2-2 vote.

19. Since Docket No. 99-0649-TP was first opened on June 4, 1999, only one Commissioner, Commissioner Deason, remains from the Commission as empaneled at that time. Subsequently, each time a Commissioner received appointment to the Commission, that person was substituted for the predecessor in office and the substituted Commissioner has participated in this proceeding. Since this docket was first bifurcated from Docket No. 990649-TP on October 29, 2001, Commissioner Rudy Bradley assumed office. In keeping with the recognized interest in giving the matter the benefit of the wisdom of the full panel of Commissioners, Commissioner Bradley was substituted for his predecessor, Commissioner Jacobs. That interest is equally served by allowing the participation of Commissioner Davidson who is the successor in office to Commissioner Palecki beginning on January 7th of this year.

20. At the time the Sprint Order was entered, Commissioner Davidson had assumed office as a Commissioner. At the time the Joint Motion for Reconsideration was filed, the docket was still assigned to a panel of the entire Commission. In accordance with the mandatory substitution provision in Section 350.01(5), Fla. Stat., Commissioner Davidson was required to be assigned to act as the substitute for Commissioner Palecki.

21. Since Commissioner Davidson was the successor to Commissioner Palecki, and since the rehearing should have been considered by the panel of five Commissioners assigned to the original proceeding, there was no authority for Commissioner Davidson's abstention under either Sections 286.12 or 350.01(5), Fla. Stat.

22. Sections 286.12 and 350.01 both affect the same subject matter, i.e. the obligation of a public official to exercise the official duty to vote on the public's business. Since the

requirement for full participation established in Section 286.12 does not directly conflict with Section 350.01(5), both statutory requirements can be given effect. It is well recognized that potentially conflicting statutes should be construed so as to give full effect to both. *Jones v. State*, 813 So.2d 22 (Fla. 2002); *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987). As set forth by the Florida Supreme Court, "[t]he statutes at issue operate on the same subject, but are 'without positive inconsistency or repugnancy in their practical effect and consequences [and thus] should each be given the effect designed for them unless a contrary intent clearly appears.'" *Dawson v. Saada*, 608 So.2d 806, 809 (Fla. 1992). In this case, Sections 286.12 and 350.01(5) can be harmonized by maintaining the panel structure established for the action on the disposition of the proceeding, i.e., consideration by a panel of all five Commissioners as has been the assignment for this docket since its inception.

B. Means to Cure the Statutory Noncompliance

23. It is well recognized that the Commission has the inherent authority to undertake further review of its own orders. *Reedy Creek Utilities Co. v. Florida Public Service Commission*, 418 So.2d 249 (Fla. 1982). Such a further review is not limited by any specific time, but is limited only by the time at which the order passes out of the control of the Commission. *Reedy Creek*, at 253. The order on the Joint Motion for Reconsideration has not yet been issued, and thus remains within the control of the Commission. Therefore, the Commission has ample authority to retain jurisdiction over the Joint Motion for Reconsideration so as to allow for its consideration by the panel of five Commissioners originally assigned, with Commissioner Davidson acting as the panel substitute for Commissioner Palecki.

24. Commissioner Davidson can effect a cure for his failure to have his vote recorded or counted as required by Section 286.12, by reviewing the record in this proceeding, and then

participating in a consideration of the Joint Motion for Reconsideration. It is well within the authority of a substitute or successor fact-finder to base official action on a review of the record of an earlier proceeding, even when the substitute or successor fact-finder did not preside or participate in the proceeding. *Collier Development Corporation v. State Department of Environmental Protection*, 685 So.2d 1328 (Fla. 2d DCA 1996). Given the fact that this case was heard on a stipulated record, consisting only of prefiled exhibits, deposition transcripts, and discovery responses, the record is particularly suitable for action based on a review of the record. Commissioner Davidson will be in precisely the same situation as Commissioner Palecki was at the time of his deliberations leading up to the issuance of the January 8, 2003 Order. Therefore, Commissioner Davidson's substitution and participation at this time will have no effect on his ability to analyze the issues and participate fully as a member of the five Commissioner panel hearing this case.

C. Conclusion

25. Given the fact that this docket has, since its beginning, seen the effective substitution of a Commissioner, and given the importance of this ratemaking proceeding on competition and the consuming public, Commissioner Davison should be allowed to cure his improper abstention in the June 17, 2003, action on the Joint Motion for Reconsideration by participating as a member of the five member panel in this proceeding.

II. Suggestion for New Hearing

26. In the process of correcting the procedural errors associated with the nonparticipation of all five Commissioners at the June 17, 2003, Agenda Conference, the full Commission should on its own motion reconsider the Sprint Order, and proceed to order new

proceedings to establish fair and reasonable UNE rates for Sprint that meet the cost and nondiscrimination requirements of and competition enabling intent of the Telecommunications Act of 1996 (47 U.S.C. § 252(d)(1), hereinafter "1996 Act"). Alternatively, the Commission should at a minimum reconsider the Sprint Order on its own motion and direct such further proceedings that will establish deaveraged Zone 1 rates that will enhance and promote competition in the Sprint service area while complying with the fair and reasonable, cost, and nondiscrimination requirements of the 1996 Act.

27. Like a traveler deep in the wood with a compass and map who believes he knows this true course but who discovers, when he emerges from the woods, that he is not where he thought he was, the Commission, Sprint, and the CLECs trying to compete with Sprint certainly have all ended up in the wrong place. In making the thousands of individual piece part decisions that lead to nearly 1000 actual rates, the end result are rates that no longer comply with the law. A decision by the Commission, on its own motion, to reconsider this matter and direct new proceedings is certainly an extraordinary action, but this case demands such an extraordinary remedy.

28. The necessity of acting now to correct the many problems with the Sprint Order is further compelled by Sprint's own actions since the Sprint Order's issuance. Sprint has unilaterally withdrawn its UNE tariff and is directing the CLECs to immediately execute amendments to their existing interconnection agreements that adopt the Sprint Order rates. This conduct by Sprint is not consistent with the decision to implement rates pursuant to the decision in the BellSouth proceeding. While this problem will be mooted by the Commission's decision to reconsider this matter on its own motion and order new proceedings, the way Sprint has chose to implement Sprint Order is as dubious as the rates contained therein.

A. The Zone 1 Problem

29. The best example of a good intent leading to a wrong result may be the four wire centers that the Sprint Order approves for Zone 1 (Sprint Order, at 271). The $10.82 2-wire monthly recurring charge for Zone 1 looks good on paper – it is some 40% less than the $18.58 rate proposed by Sprint, and it is very close to the Zone 1 rates separately established for BellSouth and Verizon. Order No. PSC-01-1181-FOF-TP (May 25, 2001) and Order No. PSC-02-1311-FOF-TP (Sept. 27, 2002) (BellSouth); Order No. PSC-02-1574-FOF-TP (Nov. 15, 2002) (Verizon).

30. However, unlike the BellSouth and Verizon Zone 1 rates, the Sprint Zone 1 rate is essentially unavailable to the CLECs. Two of the Zone 1 wire centers, Tallahassee-FSU and Shalimar, are unavailable to facilities based competition because of who they serve. The third wire center, Tallahassee-Calhoun, also is largely foreclosed to facilities competition due to the high concentration of government offices downtown. This leaves Maitland as the only Zone 1 wire center available to full CLEC facilities based competition, which means the $10.82 Zone 1 monthly recurring charge for a 2-wire loop does almost nothing for competition. Moreover, Maitland is one of Sprint's smallest wire centers, and since the Maitland office serves a relatively new customer base, much of the base is served over fiber, which means that Sprint will often deny the availability of UNE loops claiming that it has "no facilities" available to CLECs. These problems only further demonstrate that this Zone 1 decision fails to provide any meaningful cross section of residential and business customers.

31. The end result of this decision is that the real 2-wire loop first zone rates for competition are the Zone 2 rates, at $17.63. Comparing the old Band 2 rates to the new Zone 2 rates means that the CLECs face a rate increase of more than 14% ($15.41 under the old Band 2

to $17.63 for the new Zone 2). But even more importantly, most of the former Band 1 wire centers are now in Zone 2, resulting in a rate increase of more than 63% ($10.78 under the old Band 1 to $17.63 for the new Zone 2). As you go higher up the new rate bands, the impact of the rate increase is just a bad – the Band 3 to Zone 3 increase is more than 20% ($20.54 to $24.68), and the Band 4 to Zone 4 increase is more than 67% ($27.09 to $45.40).

32. The 2-wire loop rates are critical to small businesses that cannot afford, and do not need, the high capacity available from a DS-1. The UNE wholesale zones do not lay down exactly with the Sprint retail rate groups, but the 2-wire Zone 3 loop rate is higher than all of the Sprint retail business end user rates with the Zone 2 UNE rate being higher than some of the retail business rate group rates. Similarly, if there is to ever be any local residential competition, it will come through the availability of reasonably priced 2-wire loop rates. However, the Zone 2 loop rate of $17.63 is higher than all of the Sprint retail residential end user rates.

33. For DS-1s the results are even worse. Comparing Band 1 to the largely useless Zone 1 rate, the increase is over 34% ($64.49 to $86.90). Going from Band 1 to Zone 2 means an increase of over 119% ($64.49 to $141.64). The increase for the Band 2 to the Zone 2 rate is over 88% ($74.96 to $141.64); the increase for Band 3 to Zone 3 is over 133% ($84.83 to $$198.29); and the increase for Band 4 to Zone 4 is a whopping 274% ($97.37 to $364.70).

34. Fairly priced DS-1 UNE rates are vital for most CLEC customers as it is unreasonable and uneconomic (especially in the current economy) to build a lateral from the CLEC's existing fiber networks to every business in the community they are trying to serve, especially when the cost of a lateral can be as much as $10,000 per mile or more. The ability to actually sell competitive DS-1 service via UNEs is only further compounded when compared to the Sprint retail rates for DS-1s that average $168.

35. As if the Sprint Order's monthly recurring rates were not bad enough, even more egregious are the rate increase under the Sprint Order are the nonrecurring rate increases. For 2-wire loops the nonrecurring charge has gone from $25.16 to $119.74, a 376% increase. For DS-1s, the increase in nonrecurring charges is almost as bad, going from $90.19 to $325.88, a 261% increase. Nonrecurring charges at these levels are a clear barrier to entry. The cost to serve a CLEC customer must address both the nonrecurring charges and the monthly recurring charges that must be paid to Sprint for the UNE loops, and it must be remembered that the discussion so far of the UNE loop has not included the other necessary piece part charges the Sprint requires (e.g., the NID, conditioning charges, prequalification charges, OSS charges, construction charges, and BFRs) nor the CLEC's own direct costs (e.g., network, personnel, operational systems, taxes, and other equipment).

36. Monthly recurring and nonrecurring rates at these levels cannot possibly meet all of the requirements in the 1996 Act for rates that are fair and reasonable, cover cost, and are nondiscriminatory. The cost recovery requirement is especially problematic. First, it must always be remembered that the "cost" element in the 1996 Act is not embedded, actual costs, but rather cost is defined as a theoretical cost based upon the deployment of forward looking technologies. 47 C.F.R. §§ 51.505, 51.511 Second, the FCC rules provide that if a state commission determines that the cost information does not support the adoption of a rate, then the state commission may adopt the proxy rates set forth in 47 C.F.R. § 51.513. The statewide average UNE rate proxy for Florida is only $13.68. 47 C.F.R. § 51.513., *aff'd*, *Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646 (2002). Fulfilling the 1996 Act's definition of cost thus is very different than establishing costs under a traditional rate base, rate of return regime, especially

given the fact that in this case there was no evidence of record that Sprint was losing money at the preexisting, negotiated rates.

37. The end result rates coming out of this process only underlie the inherent problems in the whole cost study process – Sprint, Verizon, and BellSouth have each pursued separate and different cost study methodologies that have sapped the ability of the Commission and the CLECs to meaningfully investigate the methodological differences between them, which is especially true in Sprint's case which has had the least critical examination of both the methodology and inputs. The lack of standardization in the Sprint cost model allows for greater disparity in the implementation of rates and makes it impossible to ascertain whether the Sprint rates fully comply with the TELRIC pricing requirements. Indeed, the Sprint rates do not pass any kind of reasonableness test because the rates are so wildly divergent from the results of the other two ILECs that the combined effects of differences in geography, equipment, and customer base cannot explain Sprint's unique results.

38. A cursory examination of the rates set forth in the Sprint Order should be enough to sound the alarm. However, a further examination only confirms the obvious – the rates set in the Sprint Order are wrong, grossly wrong. The Commission should take bold action and correct this problem rather than take a wait and see approach as prices at these levels will simply drive away what little competition there is in Sprint's territory.

B. The Lack of Competition in Sprint's Service Area

39. The rates in the Sprint Order, and the fact that they represent sizable relative and actual rate increases, standing alone are enough to substantiate revisiting the rate setting process. However, the statutory violations inherent in these rates becomes even more egregious when compared to the realities of the Florida marketplace in the Sprint service area..

40. According to this Commission's *Telecommunications Markets in Florida: Annual Report on Competition as of June 30, 2002*, the ALECs share of the Sprint market is a total of 4.1%, versus 17.8% for BellSouth and 7.5% for Verizon. The report does not differentiate between pure resale and facilities based or facilities based plus UNEs competition. For example, it is very likely that the 1.9% residential competition figure is all resale whereas the 9.9% business market share is some combination of complete facilities based competition and mixed facilities plus UNEs competition.

41. But irrespective of the breakdown between the 3 types of competition, 4% for all of Sprint territory after seven years is not very impressive. More importantly, the Commission must ask itself this question: If the old rates led to competitors obtaining only 4% of the market, how many competitive choices will there be for customers under a rate increase order, especially at this magnitude? This is especially true for those nonrecurring charges, which mean that CLECs will have to pay more than $119 for services that formerly cost only $25 for 2-wire loops, and this does not even begin to factor in all of the hidden charges that are required for a complete install.

42. The lack of competitive viability becomes even more apparent when you compare these new UNE rates to Sprint's retail rates. FDN or KMC cannot say to a prospective customer, "switch to me and pay more" – in this market, that strategy would send the 4% market penetration number down to near zero. The prospects for residential customers are even more sobering – there is no facilities competition at all today for residential customers, and under these rates, there never will be.

C. The Commission Still Has the Opportunity to Act

43. The correct remedy for this case is to throw out the Sprint Order and start over again with a new proceeding that fully and completely complies with the law. When you compare the results of this case to those in the BellSouth and Verizon cases, there is a huge gap between the other ILECs and Sprint that cannot be rationally explained on any basis. In fact, because the Commission up to now has permitted the ILECs to use three different cost study methodologies, the results have to be disparate and inconsistent. Indeed, the significant differences between the Sprint results and those for BellSouth and Verizon should be a serious concern for the Commission as it tries to substantiate its BellSouth and Verizon decisions on appeal. So how does the Commission remedy this situation?

44. First, under the *Reedy Creek* decision, this case still remains under the jurisdiction and control of the Commission. Hence, it is legally permissible for the Commission to move to reconsider this case on its own motion.

45. Second, the Commission should proceed to reconsider this matter on its motion. The end results reflected in the Sprint Order do not accomplish the goals set forth for this proceeding. Accordingly, the Commission on its own motion should vacate the Sprint Order and provide notice of a new proceeding within this docket to set rates that fully comply with the fair and reasonable, cost, and nondiscrimination requirements of the 1996 Act.

46. Third, in vacating the Sprint Order rates, the Commission should explicitly reinstate the status quo ante rates. These former rates were set by negotiation, compromise, or acceptance. Yes, they did lead to only a 4% level of competition in Sprint's area, but they did at least give the CLECs a toenail in the door.

47. More importantly, FDN and KMC note that notwithstanding the plain language of the Sprint Order at pages 216-218, Sprint is attempting to force the CLECs to adopt amendments to their existing interconnection agreements that reflect the Sprint Order rates. The Commission expressly conditioned the implementation of its decision on the same terms as those it established for BellSouth: When the parties negotiated amendments, executed and filed the amendments, and the Commission approved the amendments, then, and only then, would such amendments take effect. BellSouth did not send out a mass notice to all of the CLECs in its area telling them the Commission has implemented new rates that must now be adopted. Sprint, on the other hand, is attempting to compel the CLECs to execute amendments, and is threatening them with bad faith and other unspecified action if they fail to agree to the new rates. FDN and KMC have disputed Sprint's attempts to compel them to adopt rate amendments, do not agree that Sprint has the right to implement the rates if the Commission's procedures are not followed, and request that the Commission see to it that its intent in implementing any rates be consistent with its orders.

48. Fourth, if the Commission believes it needs a formal means by which to address this situation, it can utilize the errors FDN and KMC identified that are discussed in Issue 10 and Issue 3 in the June 5, 2003, Staff Recommendation.

49. The bottom line is that the Commission can act, but it must act now if it intends to correct its decision and set competition on a correct course. Fixing any problems a year from now, or several years from now after some appellate decision, would be too late. The ability of CLECs to obtain and retain customers is effectively removed if the Sprint Order is allowed to come into effect.

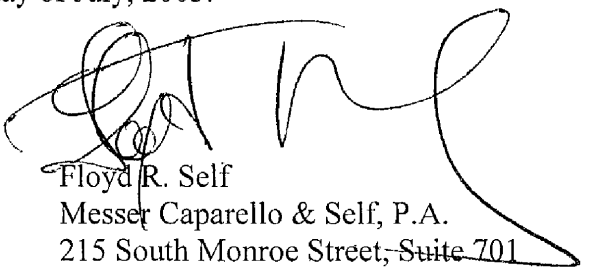
D. Conclusion

50. There are numerous other individual problems with Sprint Order that were raised in the FDN and KMC Joint Motion for Reconsideration that only further exacerbate the statutory violations inherent in the Sprint Order. As the Commission Staff itself acknowledged several times in its June 5, 2003, recommendations to the Commission, and again at the June 17, 2003, Agenda Conference, the rate decisions are based upon evidentiary holes in the record that compelled guess work and unsubstantiated assumptions. In order to have rates that meet the fair and reasonable, cost, and nondiscrimination requirements of the 1996 Act, there must be competent and substantial evidence of record. This does not exist in this case. Under these circumstances, the only alternatives for the Commission is to provide proper notice of a new proceeding to establish rates that fully and completely comply with all of the requirements of federal and Florida law or to approve the FCC proxy rates. The unintended consequences of the Sprint Order compel this Commission to take the necessary action to have a proceeding that gets everyone to where they need to be. If the Commission does not act on its own motion to remedy this situation, a year from now there may well be no facilities choices in Sprint's area.

III. Conclusion

51. WHEREFORE, Florida Digital Network, Inc. and KMC Telecom III, LLC respectfully provide this Notice of Statutory Non-Compliance With Proposed Means to Cure and their Suggestion for New Hearing as the most expeditious means of setting UNE rates for Sprint that comply with the fair and reasonable, cost, and nondiscrimination requirements of the Telecommunications Act of 1996 and of Florida law.

Respectfully submitted, this 8th day of July, 2003.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U. S. Mail this 8th day of July, 2003.

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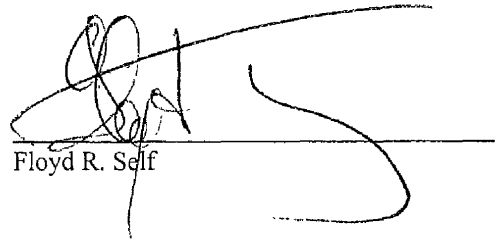

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