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September 5, 2003

BY OVERNIGHT MAIL

Clerk
United States District Court for the Northern District of Florida
Tallahassee Division
U.S. Federal Courthouse
111 N. Adams Street
Tallahassee, Florida 32301

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FLA. [illegible]
CLERK OF COURT
GENERAL COUNSEL

Re: Florida Digital Network, Inc. v. Sprint-Florida, Inc., et al.
Case No. _____

Dear Sir/Madam Clerk:

Florida Digital Network ("FDN"), by its counsel, hereby submits its Complaint for Declaratory and Equitable Relief, Civil Cover Sheet, and a check in the amount of One Hundred Fifty Dollars ($150.00) made payable to the "Clerk, U.S. District Court" to cover the filing fee.

Please date-stamp the enclosed extra copy of the filing and return it in the self-addressed, stamped envelope provided. Should you have any questions, please do not hesitate to contact me at (202) 424-7869.

Respectfully submitted,

Harisha Bastiampillai

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Enclosures

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA DIGITAL NETWORK, INC., a Delaware corporation, Plaintiff, vs. SPRINT-FLORIDA, INC, a Florida corporation; the FLORIDA PUBLIC SERVICE COMMISSION; LILA A. JABER, in her official capacity as Chairman of the Florida Public Service Commission; and J. TERRY DEASON, BRAULIO L. BAEZ, RUDOLPH BRADLEY, And CHARLES M. DAVIDSON in their official capacities as Commissioners of the Florida Public Service Commission, Defendants.	) Civil Action No. ____

COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

Plaintiff, Florida Digital Network, Inc. ("FDN"), by and through their undersigned counsel, for their complaint against Sprint-Florida, Inc. ("Sprint-Florida"), the Florida Public Service Commission ("Commission" or "PSC"), and Commissioners Lila A. Jaber, J. Terry Deason, Braulio L. Baez, Rudolph Bradley

and Charles M. Davidson (collectively, "Commissioners"), in their official capacities, hereby complain and allege as follows:

NATURE OF THE ACTION

1. This action is asserted to enforce various provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act " or "Act"), an Act designed to open local telephone markets to competition. The 1996 Act requires incumbent local exchange carriers ("ILECs") to provide new entrants into local telecommunications markets (such as Plaintiff FDN) with access to the incumbents' telephone networks and services on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. These requirements are specifically intended to open monopoly local telephone markets to effective competition as quickly as possible.

2. Under the 1996 Act, incumbents are required to negotiate in good faith with new entrants and to develop interconnection agreements specifying the term and conditions upon which the new entrants may access the incumbent's network.

3. Where the parties cannot arrive at a complete interconnection agreement through voluntary negotiations, the Act provides the state commission the opportunity to conduct "arbitration" proceedings, to resolve disputed issues in a manner consistent with the substantive requirements of the Act and the implementing regulations adopted by the Federal Communications Commission

("FCC"). Section 252(e)(6) of the 1996 Act, 47 U.S.C. § 252(e)(6), provides aggrieved parties a right to bring an action in federal district court to challenge a state commission's determinations under Section 252 in regard to terms of interconnection between incumbent local exchange carriers and competitive local exchange carriers, including rates pertaining to the terms of interconnection and use of unbundled network elements, to the extent said terms are inconsistent with the 1996 Act and/or the FCC's implementing regulations.

4. In 1999, the PSC commenced generic pricing proceedings to determine pricing terms applicable to all interconnection agreements for BellSouth Telecommunications, Inc., GTE Florida Incorporated and Sprint-Florida, Inc. (the "Pricing Proceedings"). As part of those proceedings, the PSC issued an order on January 8, 2003, in which it, among other things, set new rates for Sprint-Florida's unbundled network elements, said rates to be eventually incorporated into interconnection agreements between Sprint-Florida and CLECs. See Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida, Inc., In re: Investigation into pricing of unbundled network elements, Docket No. 990649B-TP, Order No. PSC-03-0058-FOF-TP (Fla. PSC January 8, 2003) ("Pricing Order") (attached as Exhibit A).

JURISDICTION

5. These claims arise under the Telecommunications Act of 1996, a law of the United States, and under the FCC's regulations implementing that Act. Jurisdiction is proper pursuant to Section 252(e)(6) of the Act, 47 U.S.C. §

252 (e)(6) and 28 U.S.C. §§ 1331 and 1337. To the extent any state law is implicated, this Court has supplemental jurisdiction under 28 U.S.C. § 1367.

VENUE

6. Venue in this District is proper under 28 U.S.C. § 1391(b). All defendants reside in Florida, defendant Commission is located in this District, upon information and belief defendant Sprint-Florida has offices in this District, and the events giving rise to the claims asserted herein occurred in this District. This Court is thus the "appropriate" district court within the meaning of Section 252(e)(6) of the 1996 Act.

7. Venue in the Tallahassee Division is proper under Rule 3.2 of the Rules of the United States District Court for the Northern District of Florida. Defendant Commission is located in this Division, upon information and belief defendant Sprint-Florida has offices in this Division, and the events giving rise to the claims asserted herein occurred in this Division.

PARTIES

8. Plaintiff Florida Digital Network, Inc. is a corporation organized under the laws of the State of Delaware, is authorized to do business in the State of Florida with its principal place of business in the State of Florida. Plaintiff provides telecommunications services in Florida. Plaintiff is a "telecommunications provider" and "requesting telecommunications carrier" within the meaning of the Act.

9. Defendant Sprint-Florida, Inc. is a Florida corporation with its principal place of business in the State of Florida. Sprint-Florida is the provider of local exchange service throughout a service area covering large portions of Florida. Sprint-Florida is an "incumbent local exchange carrier" within the meaning of Section 251(h)(1) of the Act.

10. Defendant Commission is a legislative agency of the State of Florida and is a "state commission" within the meaning of 47 U.S.C. §§ 153 (41), 251 and 252.

11. Defendants Jaber, Deason, Bradley, Baez, and Davidson are Commissioners of the Florida Public Service Commission. They are being sued in their official capacities only.

BACKGROUND

12. In its service areas, Sprint-Florida has an effective monopoly in the provision of "local exchange service" (local telephone service) and "exchange access services" (originating and terminating long distance calls).

13. The 1996 Act "provide(s) for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. No. 104-458, 104th Cong., 2nd Sess. 113 (1996). The centerpiece of the policy framework is Congress' effort to bring effective competition to the historically monopolized local telephone markets.

14. To facilitate the development of competition, the Act requires incumbents to make their facilities available to new entrants in a variety of ways. Under Section 251(c) of the Act, incumbents must, among other things: allow new entrants to interconnect their facilities with the incumbents' networks at "any technically feasible point" for the purpose of transferring calls to or from the incumbents' networks, see 47 U.S.C. § 251(c)(2); offer the constituent parts or "elements" of their networks for leasing by new entrants on an element-by-element or "unbundled'' basis, see 47 U.S.C. § 251 (c)(3); and make any telecommunications service that the incumbent offers its own customers available to new entrants at wholesale so that new entrants may resell those services to their own customers, see 47 U.S.C. § 251(c)(4).

15. Congress recognized that allowing incumbents to dictate the rates, terms, and conditions upon which their prospective competitors may access the incumbents' bottleneck facilities would stifle competition. Therefore, the Act contains a number of provisions specifically designed to prevent incumbents from acting on their built-in incentives to price new entrants out of the market by charging unreasonable rates or imposing unreasonable and discriminatory conditions for interconnection, network elements, resale of incumbent services, and other statutorily mandated forms of competitive access.

16. Section 251(c) provides that incumbents' rates, terms, and conditions for interconnection and unbundled network elements must be "just, reasonable, and nondiscriminatory." Section 252(d)(1) provides that rates for

interconnection and network elements must be "based on the cost . . . of providing the interconnection or network element," and specifically provides that cost-based rates may not be predicated upon "rate-of-return or other rate-based proceedings" of the sort that prevailed in the monopoly era.

17. The Act expressly authorizes the FCC to promulgate regulations implementing the Act's local competition provisions. 47 U.S.C. § 251(d)(1); see also AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). Pursuant to that authority, the FCC released its First Report and Order containing implementing regulations on August 8, 1996. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order ("Local Competition Order").

18. Among other things, the Local Competition Order and the implementing regulations prescribed a mandatory cost methodology, known as the "Total Element Long Run Incremental Cost" or "TELRIC" methodology, for setting the rates at which an incumbent must lease the individual components of its network, known as unbundled network elements ("UNEs"), to new entrants, see Local Competition Order ¶¶ 672-732; 47 C.F.R. §§ 51.503-51.505. The implementing regulations also called for rates to account for variations in the costs associated with providing UNEs and interconnection in different geographic areas within states with different population densities, a method known as "geographic deaveraging." Specifically, the regulations require state commissions

to "establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences." 47 C.F.R. § 51.507(f).

19. The U.S. Supreme Court affirmed the FCC's TELRIC pricing regulations as consistent with the requirements of the 1996 Act. See Verizon Communications, Inc. v. FCC, 122 S.Ct. 1646 (2002).

20. Section 252 of the 1996 Act sets forth an expedited procedure for implementing the Act's substantive provisions. The state commission must ensure that the terms of interconnection and use of unbundled network elements comply with the requirements of Sections 251 and 252(d) of the Act and the FCC's implementing regulations. 47 U.S.C. § 252(c).

21. A proposed interconnection agreement, whether developed through voluntary negotiations alone or through arbitration, must be submitted for review to the appropriate state commission pursuant to Section 252(e). The state commission then may review the agreement and resolve any disputed issues in compliance with the requirements of Sections 251 and 252(d) of the Act and applicable FCC regulations. 47 U.S.C. § 252(e)(2)(B).

22. The 1996 Act provides for federal district court review of the terms for interconnection. As part of this review, federal courts are required to "determine whether the agreement . . . meets the requirements" of Sections 251 and 252. Because terms that are inconsistent with the FCC's implementing regulations also violate the Act, 47 U.S.C. § 252(c), (e)(2)(B), the federal court's mandate under Section 252(e)(6) includes review of terms for compliance with

FCC regulations. See Verizon Maryland, Inc. v. Public Service Commission of Maryland, 122 S.Ct. 1753, 1758-59 (2002).

The Pricing Proceedings

23. On December 10, 1998, a group of new entrant carriers and competitive carrier organizations filed with the PSC a Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory, Docket No. 981834-TP.

24. The PSC granted the competitive carriers' request in that Petition to open a generic pricing docket for the three major incumbent local exchange carriers in Florida: BellSouth, Sprint-Florida Inc. and GTE Florida Inc. (now known as "Verizon Florida"). In May 1999, the PSC opened Docket No. 990649-TP to address UNE pricing, as well as the methodology for deaveraging prices for UNEs. In October 29, 2001, the PSC created sub-dockets 990649A-TP to address UNE rates for BellSouth,[1] and 990649B-TP to address UNE rates for Sprint-Florida and Verizon Florida. Docket 990649B-TP is the docket that pertains to this complaint.

25. An administrative hearing was held on April 29 and 30, 2002. Pursuant to a stipulation between FDN, Sprint-Florida, and Staff of the PSC, the parties, in lieu of examination of the witnesses at the hearing, read into the record

[1] In *MCI WorldCom Communications, Inc., et al., v. BellSouth Telecommunications, Inc., et al.*, Civil Action No.4:01-CV-492-SPM (N.D.Fla. filed Nov. 19, 2001), this Court is considering the appeal of BellSouth's UNE rates set by the PSC. FDN has intervened in that case.

deposition transcripts and designated discovery responses as exhibits. FDN filed a Post-Hearing Brief on May 28, 2002.

26. On January 8, 2003, the PSC issued its Pricing Order. That order set recurring UNE rates, as well as rates for nonrecurring UNE charges and combinations, and designated a deaveraging methodology for Sprint-Florida's interconnection agreements. It relied on Sprint-Florida's cost model and relied substantially on Sprint-Florida's proposed inputs and assumptions into that model.

27. On January 23, 2003, FDN and KMC Telecom III, LLC filed a Motion for Reconsideration and Request for Oral Argument requesting that the PSC reconsider nine issues, including whether the PSC impermissibly reversed the burden of proof. On August 8, 2003, the PSC rejected all of FDN's and KMC's requests and also denied its request for oral argument. Order Denying FDN and KMC's Motion for Reconsideration of Sprint UNE Order, In re: Investigation into pricing of unbundled network elements, Docket No. 990649B-TP, Order. No. PSC-03-0918-FOF-TP (Fla. Pub. Serv. Comm'n August 8, 2003) ("Reconsideration Order") (attached as Exhibit B).

28. The new UNE rates set by the PSC in the Pricing Order, as affirmed by the Reconsideration Order, remain unlawfully high, do not comply with the Act and the FCC's TELRIC regulations, and are not based on the evidence that was before the PSC.

COUNT ONE
(Violation of the 1996 Act and the Implementing FCC Orders, Rules and Regulations)
(UNE Rates)

29. FDN realleges herein the allegations in paragraphs 1 through 28 above.

30. Sections 251(c)(2), 251(c)(3), and 252(d)(1) of the 1996 Act require that rates for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory" and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and . . . may include a reasonable profit."

31. A long-run forward-looking cost method is necessary to satisfy the Act's requirement that rates be based on cost "without reference to" a rate-based, rate-of-return proceeding. A pricing methodology that uses "embedded" or historical costs violates the Act and FCC implementing regulations because it compensates the incumbent with a rate of return on its past investments.

32. FCC regulations require UNE rates to be set pursuant to the FCC's long-run, forward-looking cost methodology. 47 C.F.R. §§ 51.501(a)-(b), 51.503, 51.505. The FCC's pricing rules require that the rate for a particular element be based on the "forward-looking cost over the long run" of providing the element, 47 C.F.R. § 51.505(b), using the "most efficient telecommunications technology currently available and the lowest cost network configuration," 47 C.F.R. § 51.505(b)(1). The FCC regulations further mandate that UNE rates be

based on a cost model that meets the FCC's requirements, 47 C.F.R. §§ 51.505(e), 51.511, and prohibit state commissions from considering the incumbent's embedded historical costs, 47 C.F.R. § 51.505(d)(1). In addition, UNE rates are required to be properly deaveraged. 47 C.F.R. §§ 51.507(f).

33. During the Pricing Proceedings, Sprint-Florida submitted, and the PSC relied upon, a cost model and provided inputs and assumptions that do not meet the Act's requirements and the FCC's regulations because, among other defects, they rely in part on Sprint Florida's embedded costs and other inflated, unjustified cost factors.

34. The UNE rates set by the PSC in the Pricing Order are unlawful in that they: i) ignored well-established federal and state law regarding burden of proof for rates, not to mention its own precedent, which puts the burden squarely on the utility – in this case Sprint – to affirmatively justify its UNE rates with probative evidence and analytically defensible methodologies; ii) are not based on TELRIC, as required by the FCC's binding regulations; iii) are not properly deaveraged as the FCC's regulations require; iv) are based on inputs and assumptions that reflect embedded costs, inefficient practices and outdated technology, in violation of the Act and the FCC's regulations; v) do not accurately model customer locations; vi) provide for double recovery of material costs; vii) were arbitrarily and capriciously determined without regard for the evidence before the PSC; viii) sets rates which do not further the pro-competitive purpose of the Act; and ix) are otherwise contrary to law.

35. FDN has been aggrieved by the commission's pricing determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

PRAYER FOR RELIEF

WHEREFORE, FDN requests that this Court grant it the following relief:

(a) That the Court declare that the Commission's UNE rate determinations from the Pricing Proceedings violates the 1996 Act and the FCC's implementing orders and regulations;

(b) That the Court reform the PSC's UNE rate determinations, as required to eventually be incorporated into interconnection agreements, to be consistent with the FCC's implementing orders and regulations, and the decision of this Court; and

(c) That the Court award FDN such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Dated: September 5, 2003