BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements (Sprint/Verizon track).	DOCKET NO. 990649B-TP ORDER NO. PSC-03-0951-FOF-TP ISSUED: August 22, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY

ORDER DENYING FDN AND KMC'S PLEADING JOINT NOTICE OF STATUTORY NON-COMPLIANCE WITH PROPOSED MEANS TO CURE AND SUGGESTION FOR NEW HEARING AND GRANTING IN PART SPRINT'S MOTION TO STRIKE

BY THE COMMISSION:

I. 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 this Commission set deaveraged unbundled network element (UNE) rates.

On May 26, 1999, this Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part this Competitive Carriers' petition. Specifically, this 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.

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, this Commission issued its order on final rates for Unbundled Network Elements (UNEs) for Sprint by Order No. PSC-03-0058-FOF-TP (Sprint UNE 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. At the June 17, 2003, Agenda Conference, we voted to deny FDN and KMC's Motion for Reconsideration.

On July 8, 2003, FDN and KMC filed their pleading entitled Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for New Hearing. On July 17, 2003, Sprint filed its Response to, And Motion to Strike, FDN and KMC's Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for a New Hearing (Response and Motion). On July 25, 2003, FDN and KMC filed their Response to Sprint's Motion to Strike.

This Order addresses FDN and KMC's pleading, Sprint's Response and Motion, and FDN and KMC's Response. We are vested with jurisdiction pursuant to Sections 364.01 and 364.051, Florida Statutes, as well as the Telecommunications Act of 1996.

II. ORAL ARGUMENT

Neither party has requested oral argument on this matter; however, due to the unusual nature of the pleading at issue, we considered whether or not oral argument was necessary and appropriate. We determined that the issues before us were fully set forth in the pleadings. Each of the parties' pleadings addressed herein clearly sets forth all of the arguments regarding this Commission's vote and decision in this matter. As such, we found that additional oral argument was not likely to lend any further clarity to the issue being addressed and would prove redundant. Moreover, we found that if oral argument was entertained on this motion, the parties could attempt to inappropriately use the opportunity to further re-argue the underlying Motion for Reconsideration addressed by us at our June 17, 2003, Agenda Conference. Therefore, we declined to receive oral argument on this matter.

III. STATUTORY COMPLIANCE

As noted in the Background, FDN and KMC filed their Motion for Reconsideration of the Sprint UNE Order. This Commission voted at the June 17, 2003, Agenda Conference, to deny FDN and KMC's Motion for Reconsideration. Subsequently, FDN and KMC filed their pleading entitled Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for New Hearing.

a. FDN and KMC's Pleading

In their pleading, FDN and KMC state that when the Sprint UNE Order was entered, the panel consisted of five appointed Commissioners. FDN and KMC further assert that at the time their joint Motion for Reconsideration was filed, the case was assigned to the full commission. They argue that 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. They acknowledge that the CASR is an internal planning document by its own terms.

FDN and KMC argue that on June 17, 2003, the joint Motion for Reconsideration was heard at a scheduled meeting of this Commission. They argue that all five appointed members of this

Commission were present at the time the Joint Motion for Reconsideration was taken up, discussed and voted upon. They contend that 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. They state that the action requested in the Joint Motion for Reconsideration was defeated on a tie vote, 2-2. They argue that in this instance the effect of the alleged statutory noncompliance that being the failure to receive a record vote from Commissioner Davidson, is not a matter of purely academic interest, but served to deprive this Commission, and thus the citizens of Florida, of a pivotal vote on an issue of significance to telecommunications service providers and consumers in Florida.

Specifically, FDN and KMC allege that this Commission committed a violation of Florida law. They cite Section 286.012, Florida Statutes, which 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.

They argue that this Commission's action on the Joint Motion for Reconsideration was "an official decision, ruling, or other official act" within the purpose of Section 286.012, Florida Statutes. Thus, they contend that Commissioner Davidson was required to enter a vote on the matter.

FDN and KMC note that 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. They also note that upon that suggestion,

Commissioner Davidson made an effort, although humorous in nature and intent, to excuse himself from the proceedings. They assert that Commissioner Davidson did not, however, abstain based on a conflict of interest under Sections 112.311, 112.313, or 112.3143, Florida Statutes, which would allow a public officer to abstain when the public officer has a personal financial interest in the outcome of the matter, citing Izaak Walton League of America v. Monroe County, 448 So.2d 1170, 1173 fn 8(Fla.3rd DCA 1984). FDN and KMC state that Commissioner Davidson has no such personal financial interest in the outcome of this proceeding.

FDN and KMC assert that the law required the sitting Commissioner to read the transcript and record of the proceeding and to vote. They argue that the CASR cannot serve to excuse Commissioner Davidson's statutory obligation to vote on the official action of this Commission regarding the Joint Motion for Reconsideration, because a policy cannot serve to exempt an agency from the application of general law. Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982).

FDN and KMC acknowledge that Section 350.01(5), Florida Statutes, which provides that "[a] petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." However, they assert, however, that in this case, the reconsideration provision has been erroneously applied, and another provision of subsection (5) violated. FDN and KMC assert that the reconsideration provision of Section 350.01(5), Florida Statutes, is designed to assure continuity in the voting make-up of the decision-making body. They contend that the earlier part of subsection (5) allows the chair of this Commission to assign a proceeding to a panel of the full Commission or to a smaller panel but, "only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding." They assert that Section 350.01(5), Florida Statutes, 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." (Emphasis in Pleading) Pleading at page 4. They state that in this case, a substitute commissioner was not assigned. FDN and KMC contend that this

Commission violated the substitution provision in favor of a flawed reading of the reconsideration provision.

FDN and KMC contend that 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. FDN and KMC assert that 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). FDN and KMC assert that Sections 286.12 and 350.01 both affect the same subject matter - - the obligation of a public official to exercise the official duty to vote on the public's business. They assert that since the requirement for full participation established in Section 286.12, Florida Statutes, does not directly conflict with Section 350.01(5), Florida Statutes, both statutory requirements can be given effect. They contend that it is well recognized that potentially conflicting statutes should be construed so as to give full effect to both, citing Jones v. State, 813 So.2d 22 (Fla. 2002); Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987). Citing Dawson v. Saada, 608 So.2d 806, 809(Fla. 1992), FDN and KMC state that 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." They contend that in this case, Sections 286.12 and 350.01(5), Florida Statutes, 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.

FDN and KMC contend that it has long been the policy and practice of this Commission to assign cases to the entire panel when those cases involve important policy, pricing, or major rate decisions. They assert that 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. They argue that this policy and practice has been in recognition that some cases merit the application of the combined wisdom of this Commission as a whole, rather than a subset thereof. FDN and KMC

contend that the law and this Commission's own practice makes clear that 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 important issues.

FDN and KMC assert that this case, which involves major generic rate, pricing and policy matters, was assigned to a panel consisting of the entire Commission. They contend that until very recently this docket was assigned to the full Commission. They assert that at the early stages of this proceeding, consideration was given to the potential importance and magnitude of this case on the "consuming public and 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), Florida Statutes. FDN and KMC contend that 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 has not changed. They argue that 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.

FDN and KMC argue that since this docket was first opened on June 4, 1999, only one Commissioner, Commissioner Deason, remains from the original Commission panel assigned. They state that 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. They assert that since this docket was first bifurcated from Docket No. 990649-TP on October 29, 2001, Commissioner Rudy Bradley assumed office. FDN and KMC contend that 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. They assert that 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.

FDN and KMC argue that at the time the Sprint UNE order was entered, Commissioner Davidson had assumed the office of Commissioner. They contend that at the time the Joint Motion for Reconsideration was filed, the docket was still assigned to a panel of the entire Commission. They assert that in accordance with the mandatory substitution provision in Section 350.01(5), Florida Statutes, Commissioner Davidson was required to be assigned to act as the substitute for Commissioner Palecki. They contend that 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), Florida Statutes.

FDN and KMC argue that this Commission has the means to cure the statutory noncompliance. Citing to Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), they assert that it is recognized that this Commission has the inherent authority to undertake further review of its own orders. They contend that 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 this Commission. Reedy Creek, at p. 253. They assert that the Order on the Joint Motion for Reconsideration has not yet been issued, and thus remains within the control of this Commission. They argue that this 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.

FDN and KMC contend that Commissioner Davidson can effect a cure for his failure to have his vote recorded or counted as required by Section 286.12, Florida Statutes, by reviewing the record in this proceeding, and then participating in a consideration of the Joint Motion for Reconsideration. FDN and KMC assert that 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. 2nd DCA 1996). They argue that given the fact this case was heard on a stipulated

record, consisting only of prefiled testimony and exhibits, deposition transcripts, and discovery responses, the record is particularly suitable for action based on a review of the record. They contend that 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. They conclude that 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.

FDN and KMC assert that 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 Davidson 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.

b. Sprint's Response and Motion

As noted in the Background, on July 17, 2003, Sprint submitted its Response to, And Motion to Strike, FDN and KMC's Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for a New Hearing (Response and Motion). In a footnote, Sprint contends that FDN and KMC's Joint Notice is facially frivolous. Sprint asserts that it is an unauthorized and improper filing, which calls upon this Commission to commit an illegal act. Sprint argues that there is nothing in the statutes governing this Commission or telecommunications companies, and nothing in the Administrative Practices Act (APA), the Florida Administrative Code, or the Commission Rules, authorizes or countenances FDN and KMC's pleading, regardless of how it is styled or how it is perceived. Sprint contends that this Commission is obligated to disregard FDN and KMC's pleading, and this Commission should issue

its Order on FDN and KMC's Motion for Reconsideration forthwith.[1]

Sprint states that Section 286.012, Florida Statutes, is directed at preventing members of governmental bodies from abstaining from voting on an official decision, except when there is, or appears to be, a conflict of interest. Sprint asserts that this statute is totally inapplicable to Commissioner Davidson's "non-vote" during this Commission's deliberation on the Motion for Reconsideration. Sprint contends that Commissioner Davidson's action or inaction is governed by Section 350.01(5), Florida Statutes, which unequivocally prohibits him from voting on the Motion for Reconsideration. Sprint asserts that because he had no authority to vote in the first place, in no way can Commissioner Davidson's action be considered an abstention.

Sprint states that FDN and KMC's pleading acknowledges the existence of Section 350.01(5), Florida Statutes, which provides that: "A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." Sprint contends that KMC and FDN have the audacity to suggest that this provision has been erroneously applied, and another provision of subsection (5) violated. Pleading at ¶12. Sprint contends that there has been no flawed reading of the "reconsideration" provision or the "substitution" provision of Section 350.01(5), Florida Statutes. Sprint asserts that it is FDN and KMC's reading of Section 350.01(5), Florida Statutes, that is flawed, contrived, self-serving, and erroneous.

Sprint asserts that the "substitution" provision is applicable only to the pre-final determination phase of this Commission's proceedings citing Order No. PSC-99-2438-PAA-EU, issued December 13, 1999, in Docket No. 991462-EU, In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, LCC. Sprint states that

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[1]Sprint further notes in a footnote that at the appropriate time, it will file its Motion with this Commission seeking attorneys' fees and costs pursuant to Section 120.595, Florida Statutes.

in Order No. PSC-2438-PAA-EU at page 9, this Commission correctly explains the application of the substitution provision:

> Because this Commission currently consists of only four sitting Commissioners, assigning this matter to the full Commission creates the possibility of a tie vote. We are cognizant of this possibility, yet we are compelled to approve assignment to the full Commission to consider the regulatory policy implications of this case. We note that a fifth Commissioner may be appointed prior to hearing on this matter. Our decision should be construed as assigning this case to be heard and decided by all sitting Commissioners as of the hearing date for this case. Thus, if a fifth Commissioner has been appointed by the hearing date, that Commissioner will take part in hearing and deciding this case. (Emphasis added. Response and Motion at p. 3).

Sprint contends that if the "substitution" provision were to be interpreted otherwise, there would be no need for the "reconsideration" provision of Section 350.01(5), Florida Statutes. Sprint asserts that in fact, if Section 350.01(5), Florida Statutes, was read as FDN and KMC suggest, then the "reconsideration" provision would be rendered meaningless. Sprint asserts that adoption of FDN and KMC's reading of the "reconsideration" provision would mean that the Chair could add or remove commissioners after a vote on a final decision - - perhaps as a means of steering the outcome in a way favored by the Chair. Sprint contends that this is just what the "reconsideration" provision was designed to prevent. Citing Hechtman v. Nations Insurance of New York, 840 So.2d 993 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." Id. at 996). Sprint asserts that in this case, the Chair correctly followed the law to the letter.

Sprint asserts that the cases cited by FDN and KMC are inapplicable. Furthermore, Sprint contends that clearly the statutory sections at issue do not cover the same area, since Section 286.012, Florida Statutes, covers abstentions in cases of "conflict of interest" and Section 350.01(5), Florida Statutes,

applies to only this Commission and in a very specific voting situation. Sprint also contends that these sections do not conflict because there is nothing in the "reconsideration" provision of Section 350.01(5), Florida Statutes, that invalidates the purpose or application of Section 286.012, Florida Statutes.

Sprint contends that even assuming for the sake of argument that the two statutes cover the same area, the "reconsideration" provision is a specific exception to the more general provisions of Section 286.012, Florida Statutes, which provides one general exception to voting, namely, a conflict of interest. Sprint states that the specific statutory exception is that a Commissioner cannot vote on reconsideration if he or she did not vote on the final disposition of the case. Sprint contends that, as stated in the Palm Harbor case, ". . .in effect, the specific statute operates as a exception to the general (citations omitted)." Sprint states that the Florida Supreme Court in the Palm Harbor case approved the district court's analysis and conclusion because it construed "the statutes in question to give effect to both." Id. Sprint argues that this Commission applied the statutes correctly, and it is wrong to suggest that the "substitution" provision can "trump" the clear intent of the "reconsideration" provision.

Sprint further disagrees with FDN and KMC's argument that since Commissioner Bradley replaced Commissioner Jacobs while the matter was still pending before a final decision, likewise, Commissioner Davidson should have replaced Commissioner Palecki, who participated in the final disposition of the proceeding on December 2, 2002, but is no longer available because he was replaced by Commissioner Davidson on January 7, 2003. Sprint claims that FDN and KMC's position is based on their distorted reading of the substitution clause of Section 350.01(5), Florida Statutes. Sprint argues that the substitution clause only applies when a Commissioner becomes unavailable before there is a final disposition, not after a final disposition as is the case here.

Sprint contends that FDN and KMC's position is that since Commissioner Davidson replaced Commissioner Palecki, Commissioner Davidson would be included as one of the five-member panel that participated in the final disposition of the proceeding on December 2, 2002. Sprint asserts that in FDN and KMC's view, this means that Commissioner Davidson is the "successor" to the same "office"

held by Commissioner Palecki and should have been "franchised" by the Chair to vote on reconsideration, just as if he were Commissioner Palecki's alter ego. Sprint asserts that there is nothing in Florida law and nothing found in Commission precedent that would support such a bizarre result. Sprint contends that in fact a simple reading of the reconsideration provision makes it clear that it applies to the specific Commissioner, not an "office." Sprint asserts that the language of the reconsideration provision applies to "those [C]ommissioners participating in the final disposition of the proceeding." Emphasis in Response and Motion; Response and Motion at p. 6. Sprint contends that the terms "those" is used to identify the "same" Commissioners that participated in the final disposition of the proceeding. See, Aloha Utilities, Inc.[2] ("[I]t follows that the same Commissioners who ruled on the Motion for Emergency Relief should rule on the Motion for Reconsideration of that decision." Emphasis added.)[3]

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[2]Order No. PSC-03-0259-PCO-SU, issued Feburary 24, 2003, in Docket No. PSC 020413-SU, In Re: Initiation of Show Cause Proceedings Against Aloha Utilities, Inc. in Pasco County for Failure to Charge Approved Service Availability Charges, in Violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes (Aloha Utilities, Inc.)

[3]Sprint in a footnote cites the following cases for the proposition that the Commission has consistently interpreted the reconsideration provision in this manner. In re: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom for Arbitration of Certain Unresolved Issues in Interconnection Negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc., Order No. PSC-00-2233-FOF-TP, issued November 22, 2000, in Docket No. 990750-TP, at p. 2; In Re: Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. Regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers, Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, in Docket No. 981008-TP, at p. 15; In Re: Petition for Emergency Relief by Supra Telecommunications & Information Systems against BellSouth Telecommuncations, Inc. Concerning Collocation and Interconnection Agreements, Order No. PSC-99-0047-FOF-TP, issued January 5, 1999,

Sprint argues that Commissioner Davidson was not one of the same Commissioners.

Sprint states that FDN and KMC's proposed cure would require Commissioner Davidson to be appointed to the panel and review the record, and then vote on whether to grant the Motion for Reconsideration. Sprint argues that this cure is worse than the alleged non-compliance. Sprint asserts that FDN and KMC's proposed cure is itself a proposal to violate the reconsideration provision of Section 350.01(5), Florida Statutes.

Sprint states that the Collier case cited by FDN and KMC is inapplicable to the current situation. Sprint asserts that the Collier case involved the propriety of a substitute hearing officer, at the hearing stage, reviewing the hearing transcript, exhibits, etc., of a matter and rendering a decision without holding a "de novo" hearing. Sprint states that in the Collier case, the Court concluded that Section 120.57(1)(b)(ii), Florida Statutes, controls. Sprint contends that that section specifically requires that the substitute hearing officer use any existing record to reach a decision, which is not the situation here. Sprint contends that the final decision has already been made, Commissioner Davidson did not participate in that decision, and he cannot now be brought in to second-guess that decision.

c. Decision

Section 350.01(5), Florida Statutes, states, in pertinent part, that

> . . . the chair . . . has authority to assign the various proceedings pending before the commission requiring hearings to two or more commissioners . . . . Only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding; provided, if only two commissioners are assigned to a proceeding requiring hearings and cannot agree on a final decision, the chair shall cast the deciding vote for final disposition of the

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in Docket No. 980800-TP, at p. 15.

> proceeding. If more than two commissioners are assigned to any proceeding, a majority of the members assigned shall constitute a quorum and a majority vote of the members assigned shall be essential to final commission disposition of those proceedings requiring actual participation by the commissioners. **If a commissioner becomes unavailable after assignment to a particular proceeding, the chair shall assign a substitute commissioner. . . . A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding.** (Emphasis added)

We have consistently interpreted this Section to require the substitution of a Commissioner up to the point in time when a final vote is taken on the merits of the case. Thereafter, a substitute Commissioner would not be assigned to the matter. This interpretation has been based upon the restriction in Section 350.01(5), Florida Statutes, which permits only those Commissioners participating in the final disposition of the proceeding to vote on petitions for reconsideration.

This Commission, in Order No. PSC-99-2438-PAA-EU, found that

> We note that a fifth Commissioner may be appointed prior to hearing on this matter. Our decision should be construed as assigning this case to be heard and decided by all sitting Commissioners as of the hearing date for this case. Thus, if a fifth Commissioner has been appointed by the hearing date, that Commissioner will take part in the hearing and deciding this case.

Id. at p. 5. At the time, though, this Commission only had four Commissioners due to the resignation of the fifth Commissioner. Similarly, in Order No. PSC-99-1453-FOF-TP, this Commission denied BellSouth's request that a motion for reconsideration be heard by the full Commission when the matter had been assigned to a panel through the hearing. Specifically, this Commission stated that

> Rule 25-22.060, Florida Administrative Code, sets forth the specific requirements applicable to a motion for reconsideration. That rule does not, however, require the full Commission to address a motion for

> reconsideration of a decision made by a panel. Such a requirement would lessen the validity of panel decisions and would conflict with Section 350.01(5), Florida Statutes, which states, in pertinent part, that "A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." Therefore, only the panel assigned to this case has considered BellSouth's Motion for Reconsideration.

Id. at p. 10. Finally, this Commission stated in Order No. PSC-00-2233-FOF-TP that

> This docket was originally assigned to a two member panel. In light of the resignation on [sic] one of the panel members, the remaining panel members rendered the decision on reconsideration consistent with Section 350.01(5), Florida Statutes.

Id. at p. 2.

All of these previous decisions clear sets forth this Commission's interpretation that Section 350.01(5), Florida Statutes, vests the "person" not the "office" of the Commissioner with the right to vote on motions for reconsideration. This is a reasonable and logical interpretation of this Section, because only the person who renders a vote would have knowledge of his or her own internal deliberations in rendering the final disposition. While another may be able to review a written record, a substitute could not replicate the previous person's internal weighing of evidence or deliberations. Thus, the consistent with previous Commission decisions, we find it appropriate to maintain our interpretation that only those Commissioners who personally participated in the final disposition on the merits should vote on motions for reconsideration. We reject FDN and KMC's interpretation that "those commissioners" refers to the office and not the person.

In addition, FDN and KMC raise the issue that Commissioner Davidson should have participated in the vote on their Motion for Reconsideration in accord with Section 286.012, Florida Statutes. Section 286.012, Florida Statutes, provides that no member of a

commission who is present at any meeting of such body at which an official decision is to be taken or adopted may abstain from such decision except if there is, or appears to be, a conflict of interest under certain sections. FDN and KMC argue that because Commissioner Davidson was present at the Agenda Conference, he should have voted since he did not abstain as specified. However, FDN and KMC fail to address the issue of whether Commissioner Davidson was eligible to vote. Based on this Commission's previous interpretations of Section 350.01(5), Florida Statutes, Commissioner Davidson was not eligible to vote regardless of his presence or absence from the meeting.

FDN and KMC argue that Section 350.01(5), Florida Statutes, and Section 286.012, Florida Statutes, must be read to harmonize with each other such that Commissioner Davidson is compelled to vote on the motion for reconsideration. We disagree with FDN and KMC's interpretation that a statute of general applicability trumps a specific statute. Clearly, Section 286.012, Florida Statutes, applies to all state, local, municipal governmental boards, commissions, or agencies, whereas, Section 350.01(5), Florida Statutes, applies only to the governance of the Florida Public Service Commission. In the Jones case, the Florida Supreme Court found that

> . . . we are obligated "to adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both." Id. The sentencing guidelines and section 948.01(13) may be so harmonized **by recognizing that one is general, whereas the other is specific.**

(Emphasis added) Jones at p. 25. The Florida Supreme Court also noted in the Palm Harbor case that

> Moreover, a statute such as section 447.04(1)(a), covering a specific subject, is controlling over a statute such as section 455.10 that applies to a general class of subjects; in effect, the specific statute operates as an exception to the general.

Palm Harbor at p. 251. Thus, to the extent that there is a conflict between Sections 286.012 and 350.01(5), Florida Statutes,

regarding who is required to vote on a given matter, Section 350.01(5), Florida Statutes, should be given precedence. We find that in this situation one not only looks to the general reasons a member may abstain from voting on a matter as set forth in Section 286.012, Florida Statutes, but must also consider whether the Commissioner is eligible to vote on a matter under Section 350.01(5), Florida Statutes.

Section 350.01(5), Florida Statutes, allows for a matter set for hearing to be heard by as few as two Commissioners. Under that section only the Commissioners assigned to a matter set for hearing may vote on the final disposition. Section 286.012, Florida Statutes, assumes there is a legal obligation to vote in the matter. Thus, the Commissioners not assigned to the matter would not be eligible to vote on the matter pursuant to Section 350.01(5), Florida Statutes, regardless of their presence at the meeting, and as such they could not violate Section 286.012, Florida Statutes.

Therefore, we find that Section 350.051(5), Florida Statutes, permits only those Commissioners who personally participated in the final disposition on the merits to participate in a motion for reconsideration. Further, we find that since Commissioner Davidson was not eligible to vote pursuant to Section 350.01(5), Florida Statutes, there was no statutory violation of either Section 286.012 or Section 350.01(5), Florida Statutes.

IV. "SUGGESTION FOR A NEW HEARING"

In that pleading, FDN and KMC argue that this Commission committed procedural error due to the nonparticipation of all five Commissioners at the June 17, 2003, Agenda Conference, and to correct that error this Commission should reconsider the Sprint UNE Order and proceed to order a new hearing. They argue that in the alternative, this Commission, upon its own motion, should at a minimum reconsider the Sprint UNE Order and direct such further proceedings that will establish new deaveraged Zone 1 rates.

a. FDN and KMC's Pleading

Like its Motion for Reconsideration, FDN and KMC argue that the zones approved by this Commission in the Sprint UNE Order are

not only incorrect but detrimental. They again argue that the rates are much higher than those for Verizon and BellSouth. FDN and KMC also bring up a new argument regarding the customer make-up of the zones and how it affects them and competition.

Moreover, FDN and KMC contend that the increase in recurring and non-recurring rates will further preclude competition. They argue that setting monthly recurring and nonrecurring rates at these levels cannot possibly meet all of the requirements of the 1996 Act for rates that are fair and reasonable, cover cost, and are nondiscriminatory. They argue that the "cost" element in the 1996 Act is not embedded, actual cost, but a theoretical cost based on the deployment of forward-looking technologies. 47 C.F.R. §51.505 and §51.511. They contend that the FCC rules provide that if a state commission determines that the available cost information does not support the adoption of a rate, then the state commission may adopt the proxy rate set forth in 47 C.F.R. §51.513, which is $13.68 for Florida. They assert that Sprint's rates demonstrate the inherent problems in the whole cost study process, and the lack of standardization allows for greater disparity in the implementation of rates making it impossible to ascertain whether the Sprint rates fully comply with the TELRIC pricing requirements.

FDN and KMC also argue that the statutory violations inherent in the Sprint UNE rates become even more egregious when compared to the realities of the Florida marketplace in the Sprint service area. They cite to the Commission's Telecommunication Markets in Florida: Annual Report on Competition as of June 30, 2002, that the CLEC share of Sprint's market is 4.1% versus 17.8% for BellSouth and 7.5% for Verizon.[4] They argue that if the competitors obtained only 4% of the market under the old rates there will be fewer competitive choices for customers under a rate increase of this magnitude. FDN and KMC assert that when you compare the new UNE rates to Sprint's previous UNE rates, the lack of competitive viability becomes more apparent. They argue that the prospects for residential customers is even more sobering because there is no facilities-based competition at all today for residential customers, and under these rates, there never will be.

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[4]We note that to the extent that the report is outside the record, it would not be a basis for reconsideration.

FDN and KMC assert that the correct remedy for this case is to throw out the Sprint UNE Order and start over again with a new proceeding that fully and completely complies with the law. FDN and KMC argue that under the Reedy Creek decision, this case still remains under the jurisdiction and control of this Commission and, thus, it is legally permissible for this Commission to move to reconsider this case on its own motion. Further, they argue that this Commission should reconsider on its own because the end results reflected in the Sprint UNE Order do not accomplish the goals set forth for this proceeding. They contend that in vacating the Sprint UNE Order, this Commission should explicitly reinstate the status quo previous rates, which were set by negotiation, compromise, or acceptance. They assert that if this 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.

FDN and KMC also complain that Sprint is not complying with the requirements of the plain language of the Sprint UNE Order at pages 216-218. They state that Sprint is attempting to make them adopt the rates in the Sprint UNE Order into their existing interconnection agreements. They assert that when the parties negotiated amendments, executed and filed amendments, and this Commission approves those amendments, then, and only then, would such amendments take effect. They note that BellSouth did not send out a mass notice to all CLECs telling them this Commission has implemented new rates that must now be adopted. FDN and KMC contend that Sprint, in contrast, is attempting to compel the CLECs to execute amendments, and is threatening them with bad faith and other unspecified actions if they fail to agree to the new rates. They state that they 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 this Commission's procedures are not followed, and request that this Commission see to it that its intent in implementing any rates be consistent with its orders.

FDN and KMC argue that in order to have rates that meet the fair and reasonable, cost, and nondiscrimation requirements of the 1996 Act, there must be competent and substantial evidence of record which does not exist in this case. They contend that under these circumstances, the only alternative for this Commission are

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. They assert that if this Commission does not act on its own motion to remedy this situation, a year from now there may well be no facilities-based competitors in Sprint's area. They argue that this Commission should follow their suggestion to have a new hearing as the means to cure the alleged statutory non-compliance.

b. Sprint's Response and Motion

Sprint argues that because FDN and KMC's Notice of Statutory Non-Compliance with Proposed Means to Cure provides no basis in law, and its proposed means to cure would require this Commission to violate a clear statutory prohibition, this Commission should strike FDN and KMC's pleading as an unauthorized and frivolous pleading. Sprint asserts that the balance of FDN and KMC's pleading is devoted to reasons why the full Commission should reconsider the Sprint UNE Order. Sprint states that this section of FDN and KMC's pleading is nothing more than a shameless effort to seek reconsideration of an order on reconsideration. Sprint emphasizes that Commission Rule 25-22.060(1)(a), Florida Administrative Code, provides that this Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration. Sprint contends that disguising the true intent of the pleading by urging this Commission reconsider the Order upon its own motion does not allow FDN and KMC to escape the prohibition against motions to reconsider a denial of reconsideration. Further, Sprint asserts that even if the "suggestion of hearing" is not construed to be a motion for reconsideration because the order on reconsideration has yet to be issued, the "suggestion of hearing" must still be rejected because it is an untimely motion for reconsideration of the original Sprint UNE Order, because the time for filing a motion for reconsideration expired in January 2003.

Sprint contends that each recitation made by FDN and KMC to support their "suggestion for new hearing" is either patently outside the record evidence, or is a blatant rehash of those arguments rejected by this Commission in the Sprint UNE Order and

rejected again by this Commission on reconsideration. Sprint contends that FDN and KMC are prohibited from raising anything new at this stage of proceeding, and they have, in fact, raised nothing new.

Sprint asserts that perhaps the most striking evidence of the abusive nature of FDN and KMC's pleading is that the only issue previously on reconsideration that could be affected by this pleading is the rate structure of Sprint's UNE rates (Issue 3 in the original Motion for Reconsideration.) Sprint asserts that the rate structure issue is the only issue upon which the fifth Commissioner would be called upon to break a tie. Sprint asserts that for all the other issues, the fifth Commissioner's lone vote could not impact their outcomes.

Sprint argues that the "Suggestion for New Hearing" is couched in terms of this Commission being urged to reconsider its final decision on its own motion. Sprint states that even if this Commission were to harbor any interest in pursuing the suggestion, the law is quite clear that this Commission's inherent authority to reconsider a decision on its own motion is limited, citing Reedy Creek and Peoples Gas System, Inc. v Mason, 187 So. 2d 335, 338 (Fla. 1966). Sprint states that the Reedy Creek case involved amending a prior order to correct a FPSC staff error in calculating the appropriate amount to be refunded by a utility based on the terms of a previously approved stipulation. Sprint states that the Florida Supreme Court found that "[t]he power of the Commission to modify its orders is inherent by reason of the nature of the agency and the functions it is empowered to perform. This inherent authority to modify is not without limitation." Sprint argues that FDN and KMC's suggestion of total abandonment of the policy decision in the Sprint UNE Order clearly exceeds this limited authority. Sprint argues that FDN and KMC's reliance upon the Reedy Creek case as a basis for this Commission to throw out the Sprint UNE Order and start over again is totally misplaced. Sprint asserts that although this Commission has not yet issued its order on reconsideration and the matter technically has not passed out of its hands, this Commission's inherent authority to change a final order on its own motion is limited to correcting clear errors, not changing fundamental policy decisions. See Sunshine Utilities v. Florida Public Service Commission, 577 So.2d 663,665 (Fla. 1st DCA 1991)(involving the Commission's revision of a prior order relating

to the establishment of rates for a water and wastewater company based on the Commission's determination that the factual premise for its prior order was in error); Taylor v. Department of Professional Regulation, 520 So.2d 557, 560 (Fla. 1988) (holding that an administrative tribunal, exercising quasi-judicial powers, may correct its own orders, but "simply for the purpose of correcting clerical errors and inadvertent mistakes").

b. FDN and KMC's Response to Motion to Strike

In responding to Sprint's Motion to Strike, FDN and KMC basically argue that Sprint is incorrect in its assertion this Commission does not have the authority to reconsider a preliminary ruling on its own motion. FDN and KMC contend that the Reedy Creek case stands for the proposition that this Commission has the authority to modify or clarify its orders, even when they have become final. Reedy Creek at pp. 253-254. FDN and KMC argue that since this order has not been rendered, there can be no reliance or prejudice and consequently, this Commission has ample authority to exercise its inherent power and statutory duty to amend its order to protect the customer. Reedy Creek at p. 253. They also contend that the other cases cited by Sprint are distinguishable, because those orders dealt with final orders among other things.

FDN and KMC contend that the Peoples Gas case dealt with a four and a half-year-old final order that this Commission was attempting to modify. They cite to the Court's finding that the order involved was not entered on rehearing or reconsideration, which is the case here. Peoples Gas at p. 339. They assert that the Sunshine Utilities case involved a final order regarding rate-making, which had been entered five years earlier. They contend that the Court allowed the modification finding that the issue of prospective rate-making is never truly capable of finality. Sunshine Utilities at p. 666. They argue Sunshine Utilities is inapplicable. They also argue that the Taylor case is inapplicable because this case does not deal with quasi-judicial powers, but rather prospective rate-making through exercise of this Commission's quasi-legislative powers. Further, they note that the

Court found it important to emphasize that the case did not involve a petition for rehearing or reconsideration. Taylor at p. 559.

d. Decision

We concur with Sprint that the portion of FDN and KMC's pleading which discusses the "Suggestion for New Hearing" is nothing more than a thinly veiled motion for reconsideration of an order on reconsideration. Specifically, FDN and KMC's arguments revolve around the issue raised in their Motion for Reconsideration regarding the zones set by us in the Sprint UNE Order. We find that such a pleading is prohibited by Rule 25-22.060(1)(a), Florida Administrative Code, regardless of whether the reconsideration order has been issued. Rule 25-22.060(1)(a), Florida Administrative Code, states in pertinent part that: "[t]he Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration." While no written order has yet been issued, it is clear that FDN and KMC's pleading is an unauthorized motion for reconsideration of a decision on a motion for reconsideration. We find that the intent of Rule 25-22.060(1)(a), Florida Administrative Code, is to prohibit endless rounds of reconsideration and to ensure that some finality attaches once the parties have had a fair and full opportunity to seek reconsideration. Clearly, FDN and KMC have exercised their right to seek reconsideration, which was denied by us at the June 17, 2003, Agenda Conference. Thus, we find that consistent with Rule 25-22.060(1)(a), Florida Administrative Code, we strike this portion of the pleading.

Further, we note that we already addressed reconsideration of the rate issue upon our own motion, which was defeated by a tie vote. We find it appropriate to decline to act upon our own motion, since we have determined that a procedural error did not occurred and a fifth Commissioner should not have voted on the original Motion for Reconsideration. We believe that FDN and KMC are asking us to act on our own because FDN and KMC also believe that they do not have the right to ask us to act on a motion for reconsideration of the denial of their motion for reconsideration. Clearly, this portion of the pleading is far beyond what the rules contemplated.

FDN and KMC also complain in a brief paragraph that Sprint's implementation of the Sprint UNE Order is inconsistent with the actually implementation ordered. They complain that Sprint is making them accept the UNE rates set forth in the Sprint UNE Order prior to the expiration of their agreements, which is not what is required in the Order. However, FDN and KMC only ask that ". . . the Commission see to it that its intent in implementing any rates be consistent with its order." Pleading at p. 16. We find that the language of the Sprint UNE Order is clear regarding implementation and that if the parties are unable to work out the implementation, they are free to file an appropriate complaint.

While we maintain authority to correct our orders under the Reedy Creek case, we find that this is not a situation in which we should exercise such authority absent a procedural error. We disagree with the implication that we are unable to correct our own order upon our own motion, should we determine that an error was committed and it is in the public interest to correct such error. We agree with FDN and KMC in so far as we have the authority to correct our own orders of our own accord.[5]

Thus, we find that since FDN and KMC's pleading is merely a thinly-veiled, unauthorized motion for reconsideration of a decision on reconsideration, FDN and KMC's requested relief is hereby denied. Moreover, we grant in part Sprint's Motion to Strike regarding FDN and KMC's "suggestion for a new hearing."

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[5]In Reedy Creek, even though the Florida Supreme Court stated that our ability to correct our own order was not without limitation, the Court also stated that "[w]hen the Commission determined that it had erred to the detriment of the using public, it has the inherent power and the statutory duty to amend its order to protect the customer." Reedy Creek at p. 253. Further, the First District Court of Appeals in the Sunshine Utilities case found that we have the authority to determine whether there are mistakes of this character [regarding an error in ratemaking] in its prior orders and has a duty to correct them. Sunshine Utilities at p. 665. The Florida Supreme Court in the Taylor court reaffirms an agency's inherent authority to correct clerical errors and errors arising from mistake or inadvertence in its own orders. Taylor at p. 560.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc. and KMC Telecom III, LLC's Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for New Hearing is hereby denied. It is further

ORDERED that Sprint-Florida, Incorporated's Motion to Strike is hereby grant in part regarding FDN and KMC's "suggestion for a new hearing." It is further

ORDERED that this portion of the docket shall remain open until the expiration of the appeals period. Should no appeal be taken on the Sprint portion of this docket, our staff has administrative authority to close the Sprint portion of this docket.

By ORDER of the Florida Public Service Commission this 22nd Day of August, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Marcia Sharma
Marcia Sharma, Assistant Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.