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June 27, 1997

VIA OVERNIGHT DELIVERY

Ms. Blanco S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2340 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: KMC Telecom Inc. Petition for Relief To Opt into an Approved Interconnection Agreement. Docket No. 970496-TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen (15) copies of the Initial Brief of KMC Telecom Inc. in Support of its Petition in the above-referenced docket. Please date stamp the extra copy of the Brief and return it in the enclosed self-addressed envelope.

In addition, please find enclosed a copy of this Brief on diskette in WordPerfect 6.1 format for the Commission's review. Please call me if you have any questions regarding this filing.

Sincerely,

Richard M. Rindler

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Enclosures

cc: Michael Sternberg
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Joel deJesus
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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition by KMC Telecom Inc.)	
for relief in accordance with)	
Section 252(i) of the Telecommunications)	Docket No. 970496-TP
Act of 1996, with respect to refusal by)	
Sprint-Florida, Incorporated to make)	
available one term in a previously)	
approved interconnection agreement)	

**INITIAL BRIEF OF KMC TELECOM INC.
IN SUPPORT OF PETITION**

KMC Telecom Inc. ("KMC") by their undersigned attorneys, submit this brief pursuant to the notice of the Florida Public Service Commission (the "Commission") in the above-captioned proceeding on May 30, 1997.¹ The sole issue in this proceeding is whether Sprint-Florida, Inc. ("Sprint"), an incumbent local exchange carrier ("LEC") for purposes of Section 251(h) of the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"),² may refuse to enter into an interconnection agreement with KMC upon the same terms and conditions as an approved agreement with another carrier. KMC submits that Section 252(i) of the 1996 Act,³ by its plain language, prohibits Sprint from refusing to extend all of the terms and conditions of a previously approved interconnection agreement to other carriers such as KMC. Accordingly, the Commission should grant KMC's Petition for relief under Section 252(i) by requiring Sprint to allow KMC to opt into the terms and conditions of the Partial Interconnection Agreement for LATA 458 between United Telephone Company of Florida and MFS

¹ 23 Fla. Admin. Weekly 2756-57 (May 30, 1997).

² 47 U.S.C. § 251(h).

³ 47 U.S.C. § 252(i).

Communications Company, Inc. ("MFS Agreement") in its entirety, including Section 5.4.2 of the MFS Agreement which establishes a reciprocal local call termination rate of \$0.0055 per minute of use.

STATEMENT OF THE CASE

Pursuant to the "Stipulation of Material Facts" ("Stipulation") entered into by both KMC and Sprint and filed in this proceeding on May 21, 1997, the parties have agreed on the following underlying facts:

1. KMC is a Delaware corporation, with offices located at 1545 Route 206, Suite 300, Bedminster, NJ 07921, which has applied for and received certification to provide interexchange and local exchange service in a number of states.
2. Sprint is an incumbent provider of local exchange services within the State of Florida. Sprint is a corporation having its principal place of business at 555 Lake Border Drive, Apopka, Florida 32703. Sprint provides and at all material times has provided intrastate, local exchange and exchange access service in Florida subject to the regulatory authority of this Commission.
3. For purposes of §§ 251 and 252 of the 1996 Act, Sprint is and has been at all material times an "incumbent local exchange carrier" in the State of Florida as defined by Sec. 251(h) of the Telecommunications Act of 1996 ("1996 Act").
4. On September 13, 1996, KMC sent a letter to Sprint requesting interconnection pursuant to § 251 of the 1996 Act.
5. The parties have reached an agreement in principle on all except one issue. An agreement reflecting the terms of this agreement in principle is in the process of being prepared and will be filed after it has been executed.⁴

⁴ Since the filing of the stipulation, KMC and Sprint have formalized and executed this agreement, which will be filed with the Commission in the near future.

In response to the Petition, Sprint filed an opposition to the Petition on May 5, 1997.⁸ After conferring with each other and Commission staff, however, KMC and Sprint prepared the Stipulation in an effort to pursue their mutual goal of expediting the resolution of these proceedings. And on May 21, 1997, KMC and Sprint jointly filed the Stipulation and requested that the Commission proceed on an expedited and informal basis under Fla. Stat. Ann. §120.57(2).⁹ In that Joint Motion the parties agreed that sole issue before the Commission in this proceeding is "on what basis if any can Sprint refuse to allow KMC to opt into a provision of a previously approved interconnection agreement."¹⁰

In its May 30, 1997 Notice, the Commission indicated that it would "conduct a Section 120.57(2), Florida Statutes, proceeding" and ordered parties to file briefs by June 30, 1997.¹¹ The Commission's Notice indicated that this case concerned "the refusal of Sprint-Florida, Inc. to make available one term in Sprint-Florida, Inc.'s interconnection agreement with MFS Communications Co., Inc." *Id.* at 2756.

⁸ "Sprint-Florida, Inc.'s Answer and Response to MCI's [sic] Petition to Opt into an Approved Interconnection Agreement," filed in Docket No. 970496-TP on May 5, 1997 ("Response").

⁹ "Joint Motion for Acceptance of Stipulation of Material Facts and to Proceed on an Expedited and Informal Basis," filed in Docket No. 970496-TP on May 21, 1997 ("Joint Motion").

¹⁰ *Id.* The Prehearing Officer has confirmed that this sole issue would be the focus of the proceeding in his order granting the parties' Joint Motion. Petition of KMC Telecom Inc. for relief in accordance with Section 252(i) of the Telecommunications Act of 1996, with respect to refusal by Sprint-Florida, Incorporated to make available one term in a previously approved interconnection agreement. Order No. PSC-97-0722-PCO-TP, Docket No. 970496-TP (Fla. P.S.C. June 19, 1997).

¹¹ 23 Fla. Admin. Weekly 2756-57 (May 30, 1997).

DISCUSSION

I. The Commission Must Adhere to the Plain Language of Section 252(i) and Avoid Ancillary Considerations.

This case concerns how the Commission should implement Section 252(i) of the 1996 Act. Section 252(i), which is entitled "Availability to Other Telecommunications Carriers," states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [Section 252] to which it is a party to any other telecommunications carrier upon the same terms and conditions as those provided in the agreement.¹²

As discussed below, KMC submits that this provision is plain on its face and requires Sprint to make interconnection available to KMC under the same terms as found in the MFS Agreement, including Section 5.4.2 of that agreement. Because Section 252(i) is clear on its face, this Commission should not stray from a simple application of the plain language of Section 252(i).

The federal and state courts, as well as this Commission, have made clear that the plain language of a statute allows no room for the infusion of ancillary issues. As the Florida Supreme court stated nearly 80 years ago:

The Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will

¹² 47 U.S.C. § 252(i) (1996).

not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.¹³

Florida courts continue to apply this basic rule of statutory interpretation through today.¹⁴ The federal courts have also echoed this rule.¹⁵

Several cases make it readily apparent that this Commission is bound by the same rules of statutory interpretation as the state courts.¹⁶ Indeed, this Commission has previously found in several rulings that it is bound to apply the plain language of the statute.¹⁷ The Commission is

¹³ Van Pelt v. Hilliard, 75 Fla. 792, 798, 78 So. 693, 694 (Fla. 1918).

¹⁴ See, e.g., Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993) (citations omitted) ("If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended."); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992) (quoting Van Pelt with approval).

¹⁵ See, e.g., Robinson v. Shell Oil Co., ___ U.S. ___, 117 S. Ct. 843, 846 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (citations omitted).

¹⁶ See Citizens of the State of Florida v. Public Service Commission, 425 So. 2d 534 (Fla. 1982) ("The rule in Florida is that where the language of the statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, the courts should not depart from the plain language used by the legislature."); Hernando County v. Florida Public Service Comm'n., 685 So. 2d 48, 52 (1st Dist. Fla. Ct. App. 1996) ("The cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning.").

¹⁷ See, e.g., Re Southern States Utilities, Inc., PSC-96-1320-FOF-WS, Docket No. 950495-WS, 1996 WL 780127, *7 (Fla. P.S.C. Oct. 30, 1996) ("We agree . . . that we should not depart from the plain and unambiguous language of the statute, which should be strictly construed."); Petition for Declaratory Statement Regarding Designation as Telecommunications Company for Providing Proposed Carrier-to-Carrier, POP-to-POP Transport to Telecommunications Companies by Interstate FiberNet, Order No. PSC-95-1270-FOF-TP, Docket No. 950890-TP, 1995 WL 620181 (Fla. P.S.C. Oct. 17, 1995) ("Under these

(continued...)

therefore constrained to implement the plain language of Section 252(i) of the 1996 Act, and it may not depart from that plain language by addressing issues beyond the scope of that provision.

II. The Plain Language of Section 252(i) of the 1996 Act Prohibits Sprint from Refusing to Make Available All of the Terms and Conditions of the MFS Agreement.

Section 252(i) is a key component of the 1996 Act. This section remains the primary tool for preventing discrimination under section 251 of the 1996 Act. This non-discriminatory scheme, central to the statutory goal of opening markets to competition, requires an incumbent local exchange carrier to grant any requesting telecommunications carrier access to the terms of a publicly-filed interconnection agreement. The plain language of this section makes clear that Sprint, as an incumbent local exchange carrier, "shall make available . . . interconnection" to KMC "upon the same terms and conditions as those provided" in the MFS Agreement. This would include the terms concerning reciprocal compensation found in Section 5.4.2 of the MFS Agreement. Section 252(i) does not authorize Sprint to withhold from KMC specific terms of the MFS Agreement, nor does it authorize the Commission to consider ancillary issues in applying Section 252(i). There are in fact only two questions for the Commission to resolve at this time: (1) whether the MFS Agreement has been approved and (2) what terms and conditions are included in that agreement.

Despite the clear cut nature of the issues in this case, Sprint's arguments earlier in this proceeding suggest that Sprint will try to justify its refusal to allow KMC to opt into the MFS agreement in its entirety by raising ancillary considerations. In its Response, Sprint alleges that

¹⁷(...continued)

circumstances, we believe that amending the statute, if that result called for, is preferable to interpreting the statute contrary to its plain meaning, even though the end achieved by that interpretation may be unobjectionable.").

Section 5.4.2 of the MFS agreement is no longer operative by virtue of Section 26.2 of the agreement.¹⁸ Sprint also argues that KMC is not entitled to the reciprocal compensation provision because it does not provide tandem switching. *Id.*

The Commission need not, and indeed should not, reach these ancillary issues in determining Sprint's responsibilities under Section 252(i) of the 1996 Act. Sprint, as an incumbent local exchange carrier, is required to make interconnection available to KMC "upon the same terms and conditions as those provided" under the MFS Agreement, which was approved by this Commission under Section 252. This would include the terms concerning reciprocal compensation found in Section 5.4.2 of the MFS Agreement. Section 252(i) does not authorize Sprint to withhold from KMC specific terms of the MFS Agreement, and indeed the plain language of the statute prohibits Sprint from refusing to extend the same terms and conditions to KMC in their entirety. Nothing in Section 252(i) of the 1996 Act authorizes the Commission to inquire whether Sprint may be justified in refusing to make particular terms and conditions of the MFS Agreement available to KMC. Because the MFS Agreement was approved by the Commission, any such refusal by Sprint is a violation of the plain language of the federal statute.

The Commission is not called in this proceeding to interpret the MFS Agreement. Although Sprint's interpretation of the MFS Agreement is subject to dispute, it is simply irrelevant to the matters before the Commission. KMC is willing to accept the terms of Section 5.4.2 of the MFS Agreement and whatever construction the Commission and the courts deem appropriate for that provision. Under the plain language of Section 252(i), however, the Commission may not allow

¹⁸ Response of Sprint, at p. 2-3, ¶ 13.

Sprint to withhold in the first instance a term of the MFS Agreement based on its own unilateral interpretation of the agreement. Interpretation of the MFS Agreement is beyond the scope of Section 252(i) and this proceeding. The Commission should incorporate Section 5.4.2 of the MFS Agreement into Sprint's Agreement with KMC and should leave to another time or to the courts the question of how that provision should be interpreted.

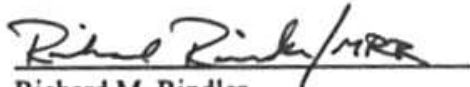
Also beyond the scope of this proceeding is Sprint's assertion that Section 5.4.2. is inapplicable because KMC is not currently providing tandem switching. Under 252(i) of 1996 Act, Sprint must offer the terms of the MFS Agreement to "any other requesting telecommunications carrier." Sprint's refusal to make available various terms and conditions of the MFS Agreement based on its own unilateral decisions about who is entitled to benefit from those provisions is discriminatory and violates the plain meaning of Section 252(i).

In short, the plain language of Section 252(i) of the 1996 Act requires Sprint to make available to KMC the same terms and conditions as those provided in the MFS Agreement. Nothing in Section 252(i) explicitly or implicitly gives Sprint the authority to refuse to extend to KMC any term or condition of the MFS Agreement. Accordingly, Sprint is prohibited as a matter of law from withholding any such terms or conditions, and by the plain language of the statute, the Commission should not entertain any attempts by Sprint to rationalize its refusal to extend the terms of the MFS agreement to KMC.

CONCLUSION

KMC Telecom Inc. respectfully requests that the Commission grant its Petition and find that Section 252(i) of the 1996 Act prohibits Sprint from refusing to make available to KMC all of the terms of the MFS Agreement, including Section 5.4.2 of that agreement.

Respectfully submitted,



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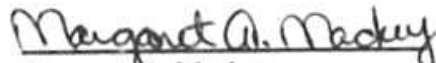
Dated: June 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 1997, copies of the foregoing Initial Brief of KMC Telecom Inc. in Support of the Petition were served, via overnight mail, on the following:

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