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July 10, 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. Reply Brief in Support of Petition
Docket No. 970496-TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen (15) copies of the Reply Brief of KMC Telecom Inc. in Support of 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.

ACP ✓
AFA _____
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CAF _____
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CTR _____
EAG _____
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Enclosures

Sincerely,

Joel de Jesus
Joel de Jesus

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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)	

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

KMC Telecom Inc. ("KMC") by its undersigned attorneys, submits this reply brief pursuant to the notice of the Florida Public Service Commission (the "Commission") in the above-captioned proceeding on May 30, 1997¹ and the June 19, 1997 "Order Granting Joint Motion for Acceptance of Stipulation of Facts and To Proceed on an Expedited and Informal Basis."² As discussed below, Sprint-Florida, Inc. ("Sprint") admits that KMC has requested to opt into the terms of an interconnection agreement previously approved by this Commission. Sprint's refusal is premised on issues that are irrelevant to this case and are not properly before the Commission in this proceeding. Accordingly, under Section 252(i) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), the Commission should find that Sprint may not refuse to allow KMC to opt into one term of the Partial Interconnection Agreement for LATA 458 between United Telephone Company of Florida and MFS Communications Company, Inc.

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

² Order No. PSC-97-0722-PCO-TP, Docket No. 970496-TP (June 19, 1997) ("Procedural Order").

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("MFS Agreement"), namely, Section 5.4.2 of the MFS Agreement which establishes a reciprocal local call termination rate of \$0.0055 per minute of use.

INTRODUCTION

As KMC demonstrated in its initial brief, Sprint, an incumbent local exchange carrier ("LEC") for purposes of Section 251(h) of the 1996 Act, may not refuse to enter into an interconnection agreement with KMC upon the same terms and conditions as an approved agreement with another carrier. Section 252(i) of the 1996 Act, by its plain language, prohibits Sprint from refusing to extend all of the terms and conditions of a previously approved interconnection agreement to KMC. Under Section 252(i) of the 1996 Act, the only factual issues that must be determined are (1) whether the Commission has approved the interconnection agreement with the other carrier and (2) whether the terms and conditions the interconnecting party seeks to enter into are contained in that approved agreement. Once these facts have been established, as they have been in this case,³ KMC has a right to opt into the same terms and conditions of that agreement. Accordingly, Sprint is required by Section 252(i) to allow KMC to opt into the MFS Agreement in its entirety, including Section 5.4.2.

³ See Stipulation of Material Facts ¶ 6 and Exh. A, filed jointly by KMC and Sprint in Docket No. 970496-TP on May 21, 1997 and accepted by the Commission in the Procedural Order on June 19, 1997.

DISCUSSION

I. Sprint Has Not Justified Its Violation of Section 252(i).

Despite the clear and simple mandate of Section 252(i) of the 1996 Act, Sprint nevertheless insists that it may refuse to allow KMC to opt into one of the terms of the MFS Agreement. Sprint bases its refusal on an argument that Section 5.4.2 of the MFS agreement is no longer operative by virtue of Section 26.2 of the MFS Agreement. Sprint Initial Brief at 6-10. Sprint also argues that KMC is not entitled to the reciprocal compensation provision because it does not provide tandem switching. *Id.* at 5-6.

KMC, however, anticipated these arguments in its initial brief, and explained why they are not relevant to the Commission's decision in this case. KMC Initial Brief at 8-9. 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 252.⁴ This includes the terms concerning reciprocal compensation found in Section 5.4.2 of the MFS Agreement.

Given these facts, nothing in Section 252(i) of the 1996 Act requires or contemplates that the Commission in the context of a 252(i) proceeding consider the issues raised by Sprint. The plain language of Section 252(i) does not provide for, and thus prohibits, consideration of ancillary issues such as how to interpret the terms of the approved agreement or whether a particular carrier "deserves" to have those approved terms in its own interconnection agreement. Because the MFS Agreement was approved by the Commission, Sprint's refusal to extend the terms of that agreement

⁴ See Order No. PSC-97-0250-FOF-TP, Docket No. 961333-TP (Fla. P.S.C. Feb. 28, 1997).

to KMC is a violation of the plain language of the 1996 Act, regardless of the rationalizations Sprint has attempted to interpose.⁵

II. Sprint's Claim that Section 5.4.2 Is No Longer Operable Is Irrelevant and Dubious.

Sprint devotes the bulk of its initial brief to arguing that Section 5.4.2 of the MFS Agreement is no longer effective by operation of Section 26.2 of the MFS Agreement and the Commission's Order No. PSC-97-0294-FOF-TP ("the MCI Decision"). Sprint's interpretation of the MFS Agreement, however, is irrelevant to the matters before the Commission.

As KMC demonstrated in its initial brief, the Commission is not called on in this proceeding to interpret the MFS Agreement. KMC Initial Brief at 8. Under the plain language of Section 252(i) the Commission may not allow Sprint to withhold a term of the MFS Agreement based on Sprint's unilateral interpretation of the agreement. The Commission should require Sprint to 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 in the context of the

⁵ Sprint has apparently agreed with KMC that the language of Section 252(i) is plain, unambiguous and "unqualified." See Sprint Initial Brief at 9. Accordingly, the Commission must not depart from the plain language of the statute by addressing issues not provided for in that plain language. See Van Pelt v. Hilliard, 75 Fla. 792, 798, 78 So. 693, 694 (Fla. 1918); see also Citizens of the State of Florida v. Public Service Commission, 425 So. 2d 534 (Fla. 1982); Hernando County v. Florida Public Service Comm'n., 685 So. 2d 48, 52 (1st Dist. Fla. Ct. App. 1996). There is, therefore, no room for the Commission to entertain Sprint's excuses for not complying with Section 252(i).

overall agreement. The issue raised by Sprint is neither appropriate under 252(i) nor ripe for decision in this proceeding.⁶

As reflected in ¶ 5 of the Stipulation jointly submitted in this proceeding by KMC and Sprint on May 21, 1997, KMC and Sprint have already agreed to terms comparable to virtually every term in the MFS Agreement, including a provision identical to Section 26.2 of the MFS Agreement. Therefore, as indicated in KMC's initial brief, KMC, in opting into this MFS Agreement, is willing to accept the interpretation the Commission and the courts would apply to Section 5.4.2 of the MFS Agreement as a whole, if and when it became an issue in an appropriate proceeding, such as an effort to enforce the contract. KMC Initial Brief at 8. The Commission need not and should not address that issue in determining the parties' rights and obligations under Section 252(i) of the 1996 Act.⁷

⁶ The Commission certainly should not accept Sprint's unilateral interpretation of the MFS Agreement. Clearly, Section 5.4.2 remains a part of the MFS Agreement. Section 26.2 of the MFS Agreement by its terms provides for modification of the contract only if there is a Commission decision in which "Sprint-specific information was provided to the Parties," namely MFS and Sprint, and even then the provision states that "the Parties will negotiate in good faith to agree to necessary amendments to the Agreement." There is no evidence in the record that either of these conditions has occurred, and, therefore, the Commission cannot conclude in this case that Section 5.4.2 of the MFS Agreement is inoperative.

⁷ Sprint itself admits that the application of Section 5.4.2 of the MFS Agreement has not become an issue between Sprint and MFS. Although it is outside the record in this case, Sprint asserts that "[b]ecause MFS is not yet providing service in Sprint's territory, MFS has not been compensated at the rates set forth in Section 5.4.2." Sprint Initial Brief at 8. Accordingly, because the parties to the MFS Agreement have not had occasion to enforce Section 5.4.2, it would be particularly inappropriate to address the unripe question of how to interpret Section 5.4.2 of the MFS Agreement in this case.

Accordingly, Sprint's erroneous arguments concerning the continued effect of Section 5.4.2 are at best simply misplaced.⁸

III. Sprint May Not Refuse To Comply with Section 252(i) Because KMC Is Not Currently Providing Tandem Switching.

The Commission should also reject Sprint's assertion that Section 5.4.2 is inapplicable because KMC is not currently providing tandem switching. As with Sprint's unfounded contract interpretation arguments, the Commission need not and should not give any credence to such alleged public interest arguments in this proceeding. The plain language of Section 252(i) of the 1996 Act leaves no room for consideration of Sprint's excuses.

Moreover, even if it were appropriate to consider Sprint's argument, the clear policies and procedures underlying the 1996 Act supersede Sprint's so-called public interest arguments. 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 a term of the MFS Agreement based on its own unilateral decisions about who is entitled to benefit from the provision violates the plain language of Section 252(i).

In fact, the Commission previously rejected Sprint's "public interest" argument relating to the provision of tandem services, when it approved the MFS Agreement in Order No. PSC-97-0240-FOF-TP. Shortly after MFS and Sprint executed the MFS Agreement, Sprint tried to back out of

⁸ Similarly misplaced are Sprint's claims that allowing KMC to opt into the MFS Agreement in its entirety would be discriminatory. See Sprint Initial Brief at ¶¶ 13 and 16. Because KMC is seeking the identical reciprocal compensation provision as found in the MFS Agreement and is willing to accept the Commission's and the courts' interpretation of that provision in an appropriate proceeding, there can be no undue discrimination.

the deal by arguing to the Commission that Section 5.4.2 was contrary to the public interest because MFS does not provide tandem switching. See Order No. PSC-97-0240-FOF-TP at 2. Recognizing that the policies underlying the 1996 Act and the Commission's own policies supported the negotiated resolution found in the MFS Agreement, the Commission rejected Sprint's public interest arguments as unsupported. Id. at 4.

Likewise, to the extent the Commission considers Sprint's public interest arguments at all, the Commission in this case should follow the clear mandate of Congress in Section 252(i) of the 1996 Act by allowing KMC to opt into the MFS Agreement in its entirety and by rejecting as irrelevant Sprint's alleged public interest arguments. As KMC noted in its Initial Brief, Section 252(i) is a primary tool for preventing discrimination and is central to the goal of the 1996 Act of opening markets to competition. KMC Initial Brief at 7. As Sprint itself admits, Section 252(i) is "unqualified" and requires incumbent local exchange carriers to provide the same terms and conditions to any requesting carrier. See Sprint Initial Brief at 9. Consistent with the Act's underlying goal of opening the local exchange market to competition, Section 252(i) also affords new entrants an expedited and, hopefully, less responsive means of entering the market by not requiring each new entrant to individually renegotiate interconnection agreements to the extent it is prepared to adopt a previously approved agreement. The underlying policies embodied in Section 252(i) of promoting competition and preventing discrimination must prevail over Sprint's rationalizations, and the Commission should recognize KMC's "unqualified" right under Section 252(i) to opt into Section 5.4.2 of the MFS Agreement.

CONCLUSION

Sprint has not provided any relevant or valid justification for its refusal to make available to KMC Section 5.4.2 of the MFS Agreement. Accordingly, the Commission should require Sprint to comply with Section 252(i) of the 1996 Act and to allow KMC to opt into the MFS Agreement in its entirety.

Respectfully submitted,



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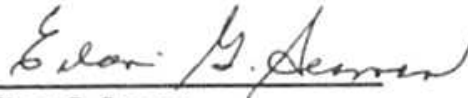
Dated: July 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 1997, copies of the foregoing Initial Brief of KMC Telecom Inc. in Support of the Petition were served, via first class mail, on the following:

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