BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by 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.	DOCKET NO. 970496-TP ORDER NO. PSC-97-1036-FOF-TP ISSUED: August 29, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

FINAL ORDER ON 252(i) PETITION

BY THE COMMISSION:

BACKGROUND

On February 25, 1997, pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act), 47 U.S.C. §251 et seq., KMC Telecom Inc., (KMC) filed a petition for arbitration of rates, terms, and conditions for interconnection and related arrangements with Sprint-Florida, Incorporated, (Sprint-Florida) in Docket No. 970242-TP. In its petition, KMC stated that it had reached agreement in principle with Sprint-Florida on all issues except the issue of compensation for termination of traffic involving tandem switching. KMC asserted that Sprint-Florida refused to make available the compensation terms for local traffic termination in Sprint-Florida's interconnection agreement with MFS Communications Company, Inc. (MFS), which was the basis for its negotiation with Sprint-Florida. It requested that we arbitrate that single issue pursuant to Section 252(i) of the Act.

At a prehearing conference on April 21, 1997, KMC withdrew its petition for arbitration. KMC confirmed the withdrawal by letter

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dated May, 6, 1997. Thereafter, on April 25, 1997, KMC filed a new petition, pursuant to Rule 25-22.036, Florida Administrative Code, seeking relief under Section 252(i) of the Act. Docket No. 970496-TP was opened to address KMC's new petition. Sprint-Florida filed an answer and response on May 5, 1997.

On May 21, 1997, KMC and Sprint-Florida filed a Joint Motion for Acceptance of Stipulation of Material Facts and to Proceed on an Expedited and Informal Basis. By Order No. PSC-97-0722-PCO-TP, issued June 19, 1997, the Prehearing Officer granted the motion and the matter was set for an informal hearing on the briefs of the parties pursuant to Section 120.57(2), Florida Statutes. The parties were directed to file briefs of no more than 60 pages and reply briefs of no more than 30 pages on the following issue:

> Under Section 252(i) of the Telecommunications Act of 1996, on what basis if any can Sprint-Florida refuse to allow KMC to opt into a provision in a previously approved interconnection agreement?

The material facts in this case to which the parties stipulated are the following:

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 ("the 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.

6. In the course of the negotiations, KMC stated that it was willing to accept, in the State of Florida, the terms and conditions as set forth in the partial Interconnection Agreement for LATA 458 between United Telephone Company of Florida and MFS Communications Company, Inc. ("MFS Agreement"), which was approved by this Commission in Order No. PSC-97-0240-FOF-TP, including Section 5.4.2 and Section 26.2.

7. KMC and Sprint agreed that, pursuant to Section 252(i) of the 1996 Act, KMC would opt into the MFS Agreement, with modifications to reflect the differences in geography and network design between MFS and KMC.

8. Sprint, however, pursuant to its interpretation of Section 26.2 of the MFS Agreement has refused to permit KMC to opt into Section 5.4.2 of the MFS Agreement, which establishes a reciprocal

call termination rate of $0.0055 per minute of use.

9. KMC is not currently providing tandem switching.

10. The Commission may take official notice and recognition of Order No. PSC-97-0294-FOF-TP, issued on March 14, 1997, in Docket No. 961230-TP.

11. A true and correct copy of the MFS Agreement is attached hereto as Exhibit A.

The parties filed initial briefs on June 30, 1997, and reply briefs on July 11, 1997. Having considered the briefs of the parties and the recommendation of our staff, we set forth our decision below.

DECISION

In its petition, KMC requested that we resolve its dispute with Sprint-Florida over reciprocal compensation for local call termination by requiring Sprint-Florida to make available to KMC Sprint-Florida's interconnection agreement with MFS (MFS Agreement) in its entirety, and, in particular, Section 5.4.2 of that agreement. In its response, Sprint-Florida alleged that KMC is not entitled to Section 5.4.2 of the MFS Agreement because KMC does not perform tandem switching and, furthermore, because Section 5.4.2 has become inoperative as initially intended by the effect of Section 26.2 of the same agreement.

Section 5.4.2 of the MFS Agreement provides that:

> Reciprocal Compensation applies solely for termination of Local Traffic, including Extended Area Service (EAS) traffic billable by Sprint or MFS which a Telephone Exchange Service Customer originates on Sprint's or MFS' network for termination on the other Party's network. The parties shall compensate

> each other for termination of Local Traffic at the rate provided in Schedule 1.0, until such time as Sprint files and the Commission approves a TELRIC study for Local Traffic termination. The issue of compensation for transport for local call termination (between an End Office and a Tandem Switch) has not been agreed to by Sprint and MFS, therefore, this issue will be subject to further negotiations, FCC or Commission Proceedings, and/or Orders and/or Arbitration.

Schedule 1.0, LATA 458 Pricing Schedule, provides:

> I. Reciprocal Compensation
>
> Composite Rate = $0.0055 per minute (end office rate of $0.004 and tandem rate of $0.0015)

Section 26.2 of the MFS Agreement provides that:

> This Agreement shall at all times be subject to changes or modifications with respect to the rates, terms, or conditions contained herein as may be ordered by the Commission or the FCC in the exercise of their respective jurisdictions, whether said changes or modifications result from a rulemaking proceeding, a generic investigation or an arbitration proceeding which applies to Sprint or in which the Commission makes a generic determination. This Agreement shall be modified, however, only to the extent necessary to apply said changes where Sprint-specific data has been made available to the Parties and considered by the Commission. Any rates, terms [or] conditions thus developed shall be substituted in place of those previously in effect and shall be deemed to have been effective under this Agreement as of the effective date of the order by the Commission or the FCC, regardless of whether

> such action was commenced before or after the effective date of the Agreement. If any such modification renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon necessary amendments to the Agreement.

KMC submitted that, by Section 252(i), Sprint-Florida is prohibited from refusing to extend to KMC all of the terms and conditions of a previously approved interconnection agreement, i.e., the MFS Agreement. KMC argued that Section 252(i) is clear on its face and that, therefore, we must implement its plain meaning and find that Sprint-Florida may not refuse to make available to KMC the MFS Agreement in its entirety and upon the same terms and conditions. KMC contended that we only need to find that the MFS Agreement is one approved under Section 252 and then to determine what the terms and conditions of the agreement are.

KMC maintained that Sprint-Florida's contentions that Section 5.4.2 of the MFS Agreement has been made inoperative by Section 26.2 of the agreement and that KMC does not provide tandem switching raise ancillary issues that we should not reach in this proceeding. KMC contended that we are not called upon in this proceeding to inquire whether Sprint may be justified in withholding any part of the MFS Agreement from KMC or to in any way interpret the MFS Agreement.

In addition, KMC maintained that it is entitled to each and every provision of the MFS Agreement, including Section 5.4.2 such as it is, subject to a court's decision in a civil action to enforce the agreement. KMC noted that in approving the MFS Agreement in Order No. PSC-97-0240-FOF-TP, issued on February 28, 1997, in Docket No. 961333-TP, we stated that "Sprint[-Florida] has claimed that the tandem switching portion of its negotiated agreement with MFS is inconsistent with the public interest, but it has not shown how that is so."

Sprint-Florida argued that it is not required to make Section 5.4.2 of the MFS Agreement available to KMC because KMC will not perform tandem switching for Sprint-Florida, and because Section 5.4.2 has been modified by an arbitration proceeding that applies to Sprint-Florida. Sprint-Florida argued further that our ruling

in Order No. PSC-97-0294-FOF-TP, issued on March 14, 1997, in Docket No. 961230-TP,[1] is a modification within the contemplation of Section 26.2 of the MFS Agreement, whose effect is to amend Section 5.4.2. In that order, we stated at page 10 that:

> We believe that the Act is clear regarding reciprocal compensation. Section 252(d)(2)(A)(i) requires that a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless "such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . ."
>
> We find that the Act does not intend for carriers such as MCI to be compensated for a function they do not perform. Even though MCI argues that its network performs "equivalent functionalities" as Sprint in terminating a call, MCI has not proven that it actually deploys both tandem and end office switches in its network. If these functions are not actually performed, then there cannot be a cost and a charge associated with them. Upon consideration, we therefore conclude that MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function.

Sprint-Florida maintained that as a result KMC is entitled to reciprocal compensation for tandem switching only if it actually provides that function. Since KMC has conceded that it does not

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[1]In Re: Petition by MCI Telecommunications Corporation for Arbitration with United Telephone Company of Florida and Central Telephone Company of Florida concerning Interconnection Rates, Terms, and Conditions pursuant to the Federal Telecommunications Act of 1996.

now provide tandem switching, Sprint-Florida contended that it is not required to compensate KMC according to the provisions of Section 5.4.2 before it was amended. Sprint-Florida observed that it would discriminate against MCI if it were to compensate KMC for a function KMC does not provide under an interpretation of Section 252(i), creating a tension between that statute and Sections 251(c)(2)(D) and 252(d)(1)(A)(ii).

Additionally, Sprint-Florida asserted that by claiming an entitlement to Section 5.4.2 as it existed before our ruling in Order No. PSC-97-0294-FOF-TL, KMC ignores the requirement of Section 252(i) that a local exchange carrier must make available to a requesting carrier a previously approved interconnection agreement on the same terms and conditions. Sprint-Florida argued that KMC is entitled to take Section 5.4.2 only as modified by the MCI arbitration order through the operation of Section 26.2, if the requirement of Section 252(i) to take the agreement on the same terms and conditions is to be satisfied. That is to say that Sprint-Florida is obligated to compensate KMC for tandem switching only if KMC performs that function. It asserted that KMC has failed to show that it requests Section 5.4.2 upon the same terms and conditions available to other entrants and that, consequently, its claim for relief under Section 252(i) is not sustainable.

Sprint-Florida stated that it will offer to KMC Section 5.4.2 as modified by the MCI arbitration. It suggested that KMC thereafter may seek a determination from this Commission or from the courts that Sprint-Florida is obligated to compensate KMC for tandem switching whether or not KMC performs that function.

Section 252(i) of the Act provides that:

> 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.

We believe that Section 252(i) enables a competitive entrant to take in its entirety any previously approved interconnection agreement upon the same terms and conditions. Sprint-Florida does

not argue otherwise. Thus, we find that Sprint-Florida must make the MFS Agreement available to KMC in its entirety and upon the same terms and conditions we approved in Order No. PSC-97-0240-FOF-TP.

We approved a negotiated partial interconnection agreement between MFS and Sprint-Florida, the MFS Agreement, in Order No. PSC-97-0240-FOF-TP. In granting our approval, we denied Sprint-Florida's motion to reject as inconsistent with the public interest, convenience and necessity the portion of the negotiated interconnection agreement that establishes symmetrical reciprocal compensation for tandem switching at a rate of $0.0015 per minute (Section 5.4.2). We stated that Sprint-Florida had not shown how that was inconsistent with the public interest, adding that:

> It has only shown that if it had known at the time it executed the agreement that the FCC's rules would be stayed, and if it had known at the time that the Commission would decide as it did in the arbitration, Sprint would not have made the same deal. The fact that the FCC's rules requiring symmetrical compensation for tandem switching have been stayed does not show that a freely executed private agreement based on those rules is inconsistent with the public interest.

Noting the Congressional intent to encourage negotiated interconnection, unbundling and resale agreements, we declined to reform the MFS Agreement, and stated that "we believe that it would be harmful to the public interest and inconsistent with the Act's intent to reject a negotiated agreement because a party to the agreement determined that things had not turned out like they thought they would." Section 252(a)(1) of the Act provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier ... without regard to the standards set forth in subsections (b) and (c) of Section 251." Accordingly, we found the MFS Agreement to have been freely negotiated and consistent with the Act. It follows, therefore, that the MFS Agreement as approved by this Commission is the sort of agreement that Sprint-Florida is obligated to make available to any requesting telecommunications carrier pursuant to Section 252(i).

We do not believe that our subsequent arbitration decisions necessarily have the effect Sprint-Florida claims through the operation of Section 26.2 of the MFS Agreement. These rulings were reached in deciding unresolved issues in arbitration proceedings. Our ruling concerning Section 5.4.2 in the MFS Agreement was reached in the context of a negotiated agreement. In that ruling, we did not find it appropriate to address the necessity for performance. Rather, we validated Section 5.4.2 on the basis that it had been freely negotiated by the parties in harmony with the Act. That being said, we do not need to decide what the effect of Section 26.2 is at this time. We need only decide whether Sprint-Florida may preclude KMC from accepting any term of a previously approved interconnection agreement under Section 252(i). We are not called upon to interpret the provisions of the MFS Agreement here.

We conclude that the plain meaning of Section 252(i) requires Sprint-Florida to make available to KMC Sprint-Florida's negotiated interconnection agreement with MFS, just as it is, and without exception.[2] Upon consideration, we find, therefore, that under Section 252(i), Sprint-Florida shall not refuse KMC any provisions of the MFS agreement.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Sprint-Florida, Incorported, shall make available to KMC Telecom Inc., each and every provision of the partial interconnection agreement negotiated by Sprint United-Centel, Inc., and MFS Communications Company, Inc., as further described in the body of this Order. It is further

ORDERED that this docket shall be closed.

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[2]We note that the Eighth Circuit has vacated the FCC's "pick and choose" rule (47 C.F.R. §51.809), holding that the FCC's interpretation of Section 252(i) conflicts with the Act's design to promote negotiated agreements. U.S. Court of Appeals for the Eighth Circuit, Opinion, Case Nos. 96-3321 et al, July 18, 1997.

By ORDER of the Florida Public Service Commission, this 29th day of August, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

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 Records and Reporting, 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 in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).