

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022-9998
(212) 758-9500 FAX (212) 758-9526

March 16, 1999

VIA FEDERAL EXPRESS

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

990339-TP

99 MAR 17 AM 9 56
MAIL ROOM

Re: **KMC Telecom III, Inc. Petition for Relief To Opt Into An Approved Interconnection Agreement**

Dear Ms. Bayo:

Enclosed for filing on behalf of KMC Telecom III, Inc., please find an original and fifteen (15) copies of the Petition To Opt Into An Approved Interconnection Agreement. Please date stamp the extra copy of the Petition and return it in the enclosed self-addressed envelope.

Sincerely,



Eric J. Branfman
Harry N. Malone
Attorneys for KMC Telecom III, Inc.

Enclosures

cc: John McLaughlin, KMC

DOCUMENT NUMBER-DATE

03346 MAR 17 99

FPSC-RECORDS/REPORTING

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In the matter of)	
)	
KMC TELECOM III, INC.)	
)	
Petition for Relief To Opt Into An Approved)	Docket No. _____
Interconnection Agreement With)	
)	
GTE FLORIDA, INC.)	

PETITION TO OPT INTO AN APPROVED INTERCONNECTION AGREEMENT

KMC Telecom III, Inc. ("KMC III"), by its undersigned attorneys, hereby petitions the Florida Public Service Commission (the "Commission") for approval in accordance with Section 252(i) of the Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. § 252(i) to avail itself of the terms of a previously approved interconnection agreement. In support of this petition, KMC states as follows:

1. KMC III is a Delaware corporation, with offices located at 1545 Route 206, Suite 300, Bedminister, NJ 07921, which has applied for and received certification to provide interexchange and local exchange service in a number of states.

2. KMC III intends to install fiber optic communication networks in a number of states and expects to offer a wide range of high quality digital local access and private line services to communications-intensive businesses and government end users.

3. GTE Florida, Inc. ("GTE") is an incumbent provider of local exchange services within the State of Florida. GTE is a corporation having its principal place of business at One Tampa City Center, 201 North Franklin Street, 14th Floor, Tampa, FL 33602-5187. GTE provides

DOCUMENT NUMBER - DATE

03346 MAR 17 8

FPSC-RECORDS/REPORTING

and at all material times has provided intrastate, local exchange and exchange access service in Florida subject to the regulatory authority of this Commission.

4. For purposes of §§ 251 and 252 of the 1996 Act, GTE 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 1996 Act.

5. On January 13, 1999, KMC sent a letter to GTE informing GTE of its intent to exercise its rights under section 252(i) of the 1996 Act to adopt the same terms and conditions of the agreement between GTE and KMC Telecom II, Inc. ("KMC II"), which agreement was approved by this Commission in Docket No. 980892-TP.

6. By February 4, 1999, the parties had reached an agreement in principle and a partially executed agreement, prepared by GTE and signed by KMC III, had been forwarded to GTE. KMC III and GTE had agreed that, pursuant to Section 252(i) of the 1996 Act, KMC III would opt into the KMC II Agreement. A copy of this opt-in agreement is attached hereto as Exhibit 1.

7. Subsequently, however, GTE issued a letter to KMC III on February 25, 1999 in which GTE refused to permit KMC III to opt into any provisions of the KMC II agreement which might be interpreted to require reciprocal compensation from GTE to KMC III for the delivery of traffic to the Internet.¹

8. Section 252 of the 1996 Act provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting

¹ Letter from Connie Nicholas, Assistant Vice President, GTE, to Michael Sternberg, President and CEO, KMC III 3 (Feb. 25, 1999)(attached hereto as Exhibit 2).

telecommunications carrier upon the same terms and conditions as those provided in the agreement.²

REQUEST FOR RELIEF

KMC III requests that the Commission determine that, in accordance with Section 252(i) of the 1996 Act, GTE is required to allow KMC III to opt into the KMC II Agreement in its entirety, including those provisions that might be interpreted to require reciprocal compensation from GTE to KMC III for the delivery of traffic to the Internet.

KMC III requests that this matter proceed under the provisions of Section 120.57(2) of the Florida Statutes Annotated as there are no material facts in dispute.

Respectfully submitted,



Eric J. Branfman
Harry N. Malone
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K Street, N.W., Suite 300
Washington, 20007-5116
(202) 424-7500 (Tel.)
(202) 424-7645 (Fax)

Attorneys for KMC TELECOM III, INC.

March 16, 1999

273977.1

² 47 U.S.C. § 252(i).

EXHIBIT 1

Partially Executed Opt-in Agreement

Connie Nichols
Assistant Vice President
Wholesale Markets-Interconnection



GTE Network
Services

972/719-1523
600 Hidden Ridge
P O Box 152092
Irving, TX 75038
972/718-4586
FAX 972/719-1523

January 25, 1999

Michael Sternberg
President and CEO
KMC Telecom III, Inc.
1545 Route 205
Suite 300
Bedminster, New Jersey 07921

Dear Mr. Sternberg:

We have received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, you wish to adopt the terms of the Interconnection Agreement between KMC Telecom II, Inc. and GTE that was approved by the Commission as an effective agreement in the State of Florida in Docket No. 980892-TP ("Terms"). The Terms provide for the election by KMC Telecom II, Inc. of certain additional provisions from a GTE arbitrated agreement ("Arbitrated Provisions"). I understand you have a copy of the Terms.

KMC Telecom III, Inc's adoption of the KMC Telecom II, Inc agreement shall become effective upon filing of this letter with the Florida Public Service Commission and remain in effect no longer than the date the KMC Telecom II, Inc agreement is terminated.

As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of certain Arbitrated Provisions or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Arbitrated Provisions, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission with respect to the Arbitrated Provisions, or to seek review in any way of any provisions included in these Terms as a result of KMC Telecom III, Inc's 252(i) election.

Michael Sternberg
January 25, 1999
Page 2

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or KMC Telecom III, Inc that any Arbitrated Provisions comply with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commission, the decisions of the courts, or other law, and both GTE and KMC Telecom III, Inc expressly reserve their full right to assert and pursue claims arising from or related to the Arbitrated Provisions, or other provisions that could be interpreted contrary to the law. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the July 18, 1997 and October 14, 1997, decisions of the United States Eighth Circuit Court of Appeals.

Should KMC Telecom III, Inc attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

- (A) KMC Telecom III, Inc adopts the Terms of the KMC Telecom II, Inc agreement for interconnection with GTE and in applying the Terms, agrees that KMC Telecom III, Inc be substituted in place of "KMC Telecom II, Inc" in the Terms wherever appropriate.

- (B) KMC Telecom III, Inc requests that notice to KMC Telecom III, Inc as may be required under the Terms shall be provided as follows:

To : KMC Telecom III, Inc
Attention: John McLaughlin
3025 Breckinridge Boulevard, Suite 170
Duluth, Georgia 30096
Telephone number: (770) 931-5260
FAX number: (770) 638-6796

Michael Sternberg
January 25, 1999
Page 3

- (C) KMC Telecom III, Inc represents and warrants that it will make the application to become a certified provider of local dialtone service in the State of Florida, and that its adoption of the Terms will cover services in the State of Florida only

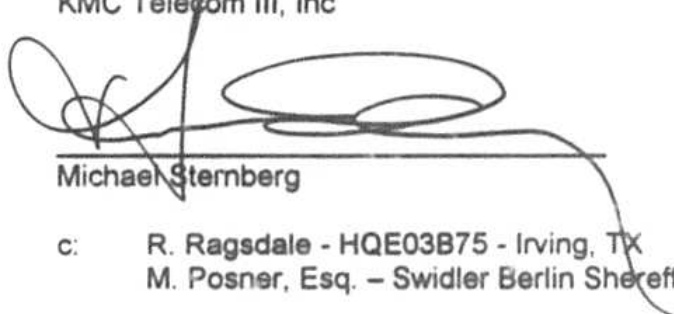
Sincerely,

GTE Florida Incorporated

Connie Nicholas
Assistant Vice President
Wholesale Markets - Interconnection

Reviewed and countersigned as to points A, B, and C:

KMC Telecom III, Inc



Michael Sternberg

c: R. Ragsdale - HQE03B75 - Irving, TX
M. Posner, Esq. - Swidler Berlin Shereff Friedman, LLP

EXHIBIT 2

**Letter from Connie Nicholas, Assistant Vice President, GTE, to
Michael Sternberg, President and CEO, KMC III (Feb. 25, 1999)**

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection



GTE Network
Services

HQE03B28
600 Hidden Ridge
P. O. Box 152092
Irving, TX 75038
972/718-4586
FAX 972/719-1523

February 25, 1999

Mr. Michael Sternberg
President and CEO
KMC Telecom III, Inc.
1545 Route 205, Suite 300
Bedminster, New Jersey 07921

Dear Mr. Sternberg:

We have received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, you wish to adopt the terms of the Interconnection Agreement between KMC Telecom II, Inc. and GTE that was approved by the Commission as an effective agreement in the State of Florida in Docket No. 98-0892-TP (Terms)¹. The terms provide for the election by KMC Telecom II, Inc. of certain additional provisions from the GTE / AT&T arbitrated agreement ("Arbitrated Provisions"). I understand you have a copy of the Terms.

Please be advised that our position regarding the adoption of this agreement is as follows.

On January 25, 1999, the Supreme Court of the United States issued its decision on the appeals of the Eighth Circuit's decision in *Iowa Utilities Board*. Specifically, the Supreme Court vacated Rule 51.319 of the FCC's First Report and Order, FCC 96-325, 61 Fed. Reg. 45476 (1996) and modified several of the FCC's and the Eighth Circuit's rulings regarding unbundled network elements and pricing requirements under the Act. *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, 1999 U.S. LEXIS 903 (1999).

Three aspects of the Court's decision are worth noting. First, the Court upheld on statutory grounds the FCC's jurisdiction to establish rules implementing the pricing provisions of the Act. The Court, though, did not address the substantive validity of the FCC's pricing rules. This issue will be decided by the Eighth Circuit on remand.

¹ *These "agreements" are not agreements in the generally accepted understanding of that term. GTE was required to accept these agreements, which were required to reflect the then-effective FCC rules.

Second, the Court held that the FCC, in requiring ILECs to make available all UNEs, had failed to implement section 251(d)(2) of the Act, which requires the FCC to apply a "necessary" or "impair" standard in determining the network elements ILECs must unbundle. The Court ruled that the FCC had improperly failed to consider the availability of alternatives outside the ILEC's network and had improperly assumed that a mere increase in cost or decrease in quality would suffice to require that the ILEC provide the UNE. The Court therefore vacated in its entirety the FCC rule setting forth the UNEs that the ILEC is to provide. The FCC must now promulgate new UNE rules that comply with the Act. As a result, any provisions in the Agreement requiring GTE to provide UNEs are nullified.

Third, the Court upheld the FCC rule forbidding ILECs from separating elements that are already combined (Rule 315(b)), but explained that its remand of Rule 319 "may render the incumbents' concern on [sham unbundling] academic." In other words, the Court recognized that ILEC concerns over UNE platforms could be mooted if ILECs are not required to provide all network elements: "If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network."

The Agreement which KMC Telecom III, Inc. seeks to adopt does *not* reflect the Court's decision, and any provision in the Agreement that is inconsistent with the decision is nullified.

GTE anticipates that after the FCC issues new final rules on UNEs, this matter may be resolved. In the interim, GTE would prefer not to engage in the arduous task of reforming agreements to properly reflect the current status of the law and then to repeat the same process later after the new FCC rules are in place. Without waiving any rights, GTE proposes that the parties agree to hold off amending (or incorporating the impact of the decision into) the Agreement and let the section 252(i) adoption proceed by maintaining the status quo until final new FCC rules are implemented (the "New Rules"), subject to the following package of interdependent terms:

1. GTE will continue to provide all UNEs called for under the Agreement until the FCC issues the New Rules even though it is not legally obligated to do so.
2. Likewise, KMC Telecom III, Inc. agrees not to seek UNE "platforms," or "already bundled" combinations of UNEs.
3. If the FCC does not issue New Rules prior to the expiration of the initial term of the Agreement, GTE will agree to extend to any new interconnection arrangement between the parties to the terms of this proposal until the FCC issues its New Rules.

4. By making this proposal (and by agreeing to any settlement or contract modifications that reflect this proposal), GTE does not waive any of its rights, including its rights to seek recovery of its actual costs and a sufficient, explicit universal service fund. Nor does GTE waive its position that, under the Court's decision, it is not required to provide UNEs unconditionally. Moreover, GTE does not agree that the UNE rates set forth in any agreement are just and reasonable and in accordance with the requirements of sections 251 and 252 of Title 47 of the United States Code.
5. The provisions of the contract that might be interpreted to require reciprocal compensation from GTE to the CLEC for the delivery of traffic to the Internet are not available for adoption and are not a part of the 252(i) agreement pursuant to FCC Rule 809 and paragraphs 1317 and 1318 of the First Report and Order.

GTE believes that the first four conditions above are adequately explained by the first part of this letter. The reason for the last condition is the FCC gave the ILECs the ability to except 252(i) adoptions in those instances where the cost of providing the service to the requesting carrier is higher than that incurred to serve the initial carrier or there is a technical incompatibility issue. The issue of reciprocal compensation for traffic destined for the Internet falls within FCC Rule 809. GTE never intended for Internet traffic passing through a CLEC to be included within the definition of local traffic and the corresponding obligation of reciprocal compensation. Despite the foregoing, some forums have interpreted the issue to require reciprocal compensation to be paid. This produces the situation where the cost of providing the service is not cost based under Rule 809 or paragraph 1318 of the First report and Order. As a result, that portion of the contract pertaining to reciprocal compensation is not available under this 252(i) adoption.

In sum, GTE's believes its proposal as described above would maintain the status quo until the legal landscape is settled.

KMC Telecom III, Inc.'s adoption of the KMC Telecom II, Inc. agreement shall become effective upon filing of this letter with the Florida Public Service Commission and remain in effect no longer than the date the KMC Telecom II, Inc. agreement is terminated.

As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of certain Arbitrated Provisions or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Arbitrated Provisions, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant with respect to the Arbitrated Provisions, or to seek review in any way of any provisions included in these Terms as a result of KMC Telecom III, Inc.'s 252(i) election.

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or KMC Telecom III, Inc. that any Arbitrated Provisions comply with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commissions, the decisions of the courts, or other law, and both GTE and KMC Telecom III, Inc. expressly reserve their full right to assert and pursue claims arising from or related to the Arbitrated Provisions. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the Supreme Court's decision of January 25, 1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals.

Should KMC Telecom III, Inc. attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

- (A) KMC Telecom III, Inc. adopts the Terms of the KMC Telecom II, Inc. agreement for interconnection with GTE and in applying the Terms, agrees that KMC Telecom III, Inc. be substituted in place of KMC Telecom II, Inc. in the Terms wherever appropriate.
- (B) KMC Telecom III, Inc. requests that notice to KMC Telecom III, Inc. as may be required under the Terms shall be provided as follows:

To : KMC Telecom III, Inc.
Attention: John McLaughlin
3025 Breckinridge Boulevard, Suite 170
Duluth, Georgia 30096
Telephone number: 770/931-5260
FAX number: 770/638-6796

Michael Sternberg
February 25, 1999
Page 5

- (C) KMC Telecom III, Inc. represents and warrants that it is a certified provider of local dialtone service in the State of Florida, and that its adoption of the Terms will cover services in the State of Florida only

Sincerely,

GTE Florida Incorporated

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

Reviewed and countersigned as to points A, B, and C only:

[KMC Telecom III, Inc.

Michael Sternberg

c: R. Ragsdale - HQE03B75 - Irving, TX
R. Vogelzang - HQE03J41 - Irving, TX

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 1999, copies of the foregoing PETITION TO OPT INTO AN APPROVED INTERCONNECTION AGREEMENT were served, via overnight mail, on the following:

Martha Carter Brown
Charles J. Pellegrini
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Fax: 904-413-6250

Connie Nicholas
Assistant Vice President
Wholesale Markets - Interconnection
GTE Network Services
HQE03B28
600 Hidden Ridge
P.O. Box 152092
Irving, Texas 75038
Fax: 972-719-1523

Joseph A. Lazzara
Staff Manager
Local Competition/Interconnection
GTE Telephone Operations
19845 U.S. 31 North
P.O. Box 407
Westfield, Indiana 46074
Fax: 317-896-6361

Beverly Y. Menard
Regional Director
Regulatory & Industry Affairs
106 East College Avenue, Suite 810
Tallahassee, Florida 32301-7704
Fax: (813) 223-4888



Sonja Sykes-Minor