

LAW OFFICES
MESSER, CAPARELLO & SELF
A PROFESSIONAL ASSOCIATION

215 SOUTH MONROE STREET, SUITE 701
POST OFFICE BOX 1876
TALLAHASSEE, FLORIDA 32302-1876
TELEPHONE (850) 222-0720
TELECOPIER (850) 224-4359
INTERNET www.lawfia.com

May 28, 2002

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 990649B-TP

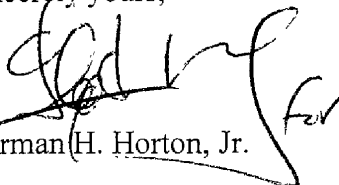
Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III, LLC are an original and fifteen copies of KMC's Posthearing Brief in the above-referenced docket. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 9.0 format.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Parties of Record

DOCUMENT NUMBER - DATE

05629 MAY 28 02

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements) Docket No. 990649B-TP
) Filed: May 28, 2002
)

POSTHEARING BRIEF OF KMC TELECOM III, LLC

KMC Telecom III, LLC (“KMC”), through undersigned counsel, submits this posthearing brief.

BASIC POSITION

Facilities based competitors such as KMC need certain UNEs purchased from the ILECs, and those UNEs need to be priced in a manner that makes them affordable to use. Likewise, the UNE rates that are at or above corresponding end user rates do not help, and in fact, make it difficult to impossible to effectively compete with the ILECs. The proposed Sprint UNE pricing proposals for the key UNEs required by KMC are anticompetitive and should not be adopted.

KMC has been unable to perform the necessary detailed analysis of the cost studies that it would like to undertake. However, KMC does have three basic recommendations for the pricing decisions the Commission must make for Sprint. First, KMC recommends that in analyzing the cost studies the Commission should interpret the data, construe any necessary assumptions, and otherwise make any necessary policy decisions in a manner that leads to results that promote competition.

Second, the final UNE prices to CLECs cannot be set at levels that are above the corresponding ILEC retail rates.

Third, the Commission should carefully consider the proposed geographic deaveraging for loop prices, and if necessary, adopt more rather than fewer bands.

In the final analysis, only this Commission has the resources that can comprehensively and meaningfully evaluate the Sprint UNE proposals. KMC urges the Commission to conduct this needed evaluation and set new UNE rates at levels that will help give customers a real competitive choice.

Based on the decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. ___ (2002), the Commission should initiate rulemaking to establish consistent cost studies that comply with TELRIC mandates to be utilized by all ILECs.

SPECIFIC ISSUES AND POSITIONS

ISSUE 1: What factors should the Commission consider in establishing rates and charges for UNEs (including deaveraged UNEs and UNE combinations)?

SUMMARY OF POSITION: *Sprint has not provided cost studies which are in accord with forward looking TELRIC principles and the UNE rates proposed by Sprint are higher than the rates charged for the corresponding end user services. The Commission should not approve prices which all but eliminate any possibility for the development of effective competition. *

ANALYSIS AND ARGUMENT: In 1995, the Florida Legislature adopted sweeping changes to Chapter 364, Florida Statutes, Telecommunications Companies. The Legislature specifically found that the “competitive provision of telecommunications services, including local exchange telecommunications service, in the public interest . . .” and directed the Commission to exercise its exclusive jurisdiction to “[p]romote competition by encouraging new entrants into telecommunications markets . . .” (section 364.01(3) and (4)(d)). The equally sweeping Telecommunications Act of 1996 was similarly intended to encourage and foster the competitive provision of

telecommunications services. Experience reflects that the intended growth in competition – especially in the residential market – simply has not occurred and one of the obstacles to the growth has been – and is – that the very services and products ALECs need to purchase from ILECs are priced at such a level that preclude competition. (Tr. 246-258) In addition to proposing UNE rates that will increase costs to ALEC's, Sprint is also proposing to geographically deaverage rates and collapse existing multiple bands for UNE loops into 3. The effect of moving to 3 bands significantly increases the rate KMC pays for a loop, especially those most needed by KMC. (Tr. 259).

To support its proposals in this docket, Sprint has filed what it asserts are TELRIC cost studies and testimony supporting the adoption of UNE rates based on these studies. These studies undoubtedly took many hours to prepare and were probably reviewed, analyzed, modified and amended by layers of employees at Sprint. However, cost studies are not without errors or inappropriate assumptions or simply mistakes. The Commission has changed studies and Sprint has modified some of its proposals in this proceeding. KMC did not analyze or review these studies to the extent Sprint did or to the extent that the Commission can because KMC simply does not have those resources or capabilities. (Tr. 243, 244). Indeed, Mr. Wood, on behalf of KMC acknowledged he is not an economist or a cost study expert, but he reviewed the price proposals filed by Sprint, with particular attention to those UNEs KMC may use. (Tr. 253.) Mr. Wood brings to this proceeding testimony based on his experience of trying to compete with Sprint. Mr. Wood explained the problems with Sprint's proposals for UNE pricing and that problem very simply is that the proposed prices for the key UNEs required by KMC have the potential to crush the ALEC industry (Tr. 258).

In his testimony, Mr. Wood described the network and operations of KMC and the importance of UNEs to the business plan of KMC (Tr. 246-259). KMC wants to provide service to business and residence customers but the investment required is in many instances prohibitive and Sprint's proposals make the entry into and growth of these markets even more difficult. (Tr. 250.) The approval of Sprint's proposals may well squeeze ALEC's out of the markets and, as Mr. Wood explained, virtually wipe out all of the gains made by KMC and other LEC's to offer competition and choice to consumers (Tr. 258.). ALECs do not have the extensive, comprehensive networks that ILEC's have, networks that were paid for by customers during years of rate base regulation, and have to rely on UNEs to bring competitive choices to customers. Mr. Wood testified that KMC must have UNEs in order to provide service, even though KMC would prefer to place customers on KMC facilities (Tr. 250). When the price for UNEs exceed the retail rates charged to end users, as is the case here, the difficulty with having any competition is apparent. If what the ALEC needs to purchase in order to provide a competitive service exceeds the end user price for that service, the math tells you this won't work. Retail rates are not before the Commission in this proceeding, but the Commission must be aware of this and should not turn a blind eye to this situation.

Without the financial resources or subject matter expertise to analyze and critique the studies, KMC must rely upon the Commission to thoroughly and carefully study Sprint's proposal. KMC urges the Commission to be mindful of the legislative charge to promote competition and of the Commission's own mission to encourage competition. If the Commission wants competition to evolve, the Commission must construe any assumptions that will result in a promotion of competition. Moreover, the Commission

should be aware of the end user rates and not allow UNE prices above ILEC retail rates. Competition will not develop if ALECs cannot afford to buy UNEs. A substantial amount of revenue for local service for KMC comes from services provided through UNEs (Tr. 258), thus any adjustment either to the prices or because of changing bands is significant to KMC and any other ALEC. The Commission must not allow the collapsing of bands to result in a further increase in costs to ALECs. That could turn a palatable situation into an unacceptable one.

The Commission must consider the consequences of accepting the pricing proposals offered by Sprint. There is no disagreement that increased competition was the objective of the changes to Chapter 364 and the Telecommunications Act of 1996. The requirement to offer unbundled network elements to competitive carriers was not so ILECs could enhance their revenue; the purpose of unbundling is to enhance the ability of competition providers to offer services to consumers. If ILECs are permitted to price UNEs at a level higher than the bundled retail services, as Sprint proposes, or at levels that cannot be purchased by the ALECs, then the mandates of the legislature have been ignored, and the competition envisioned by the Telecommunications Act of 1996 will not develop.

It is also important that the Commission be aware of the diversity in prices among the ILECs and to assess the reasonableness of such diversity. The great variance in ILEC UNE prices cannot along be attributable to mere company differences, rather is the diversity of methodology used by the ILECs. The United States Supreme Court has now spoken the final word and endorsed TELRIC pricing for UNEs. To fully and fairly implement that single pricing standard, there should be a single TELRIC pricing

methodology – not the three we have now. Accordingly, the Commission should now take the opportunity to establish through rulemaking, pursuant to Chapter 120, F.S., a single cost study methodology that complies with the Telecommunications Act of 1996 and the recent U.S. Supreme Court decision. In the interim, the Sprint cost study should be rejected and the BellSouth rates should be employed as interim rates until a single cost study methodology can be established.

ISSUE 2(a): What is the appropriate methodology to deaverage UNEs and what is the appropriate rate structure for deaveraged UNEs?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 2(b): For which of the following UNEs should the Commission set deaveraged rates?

- (1) loops (all);
- (2) local switching;
- (3) interoffice transport (dedicated and shared);
- (4) other (including combinations).

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 3: (a) What are xDSL capable loops?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

Issue 3(b): Should a cost study for xDSL-capable loops make distinctions based on loop length and/or the particular DSL technology to be deployed?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 4(a): Which subloop elements, if any, should be unbundled in this proceeding, and how should prices be set?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 4(b): How should access to such subloop elements be provided, and how should prices be set?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 5: For which signaling networks and call-related databases should rates be set?

SUMMARY OF POSITION: *Stipulated to Sprint position.*

ISSUE 6: Under what circumstances, if any, is it appropriate to recover non-recurring costs through recurring rates?

SUMMARY OF POSITION: *Stipulated to Sprint position.*

ISSUE 7: What are the appropriate assumptions and inputs for the following items to be used in the forward-looking recurring UNE cost studies?

(a) network design (including customer location assumptions);

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(b) depreciation;

SUMMARY OF POSITION: *Stipulated to Sprint position.*

(c) cost of capital;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN) and Z-Tel.*

(d) tax rates;

SUMMARY OF POSITION: *Stipulated to Sprint position.*

(e) structure sharing;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(f) structure costs;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(g) fill factors;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(h) manholes;

SUMMARY OF POSITION: *No position.*

(i) fiber cable (material and placement costs);

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(j) copper cable (material and placement costs);

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(k) drops;

SUMMARY OF POSITION: *No position.*

(l) network interface devices;

SUMMARY OF POSITION: *No position.*

(m) digital loop carrier costs;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(n) terminal costs;

SUMMARY OF POSITION: *No position.*

(o) switching costs and associated variables;

SUMMARY OF POSITION: *No position.*

(p) traffic data;

SUMMARY OF POSITION: *No position.*

(q) signaling system costs;

SUMMARY OF POSITION: *No position.*

(r) transport system costs and associated variables;

SUMMARY OF POSITION: *No position.*

(s) loadings;

SUMMARY OF POSITION: *No position.*

(t) expenses;

SUMMARY OF POSITION: *No position.*

(u) common costs;

SUMMARY OF POSITION: *No position.*

(v) other.

SUMMARY OF POSITION: *No position.*

ISSUE 8: What are the appropriate assumptions and inputs for the following items to be used in the forward-looking non-recurring UNE cost studies?

(a) network design;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(b) OSS design;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(c) labor rates;

SUMMARY OF POSITION: *No position.*

(d) required activities;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(e) mix of manual versus electronic activities;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(f) other.

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 9(a): What are the appropriate recurring rates (averaged or deaveraged as the case may be) and non-recurring charges for each of the following UNEs?

- (1) 2-wire voice grade loop; and**
- (8) DS-1 loop.**

SUMMARY OF POSITION: *UNEs should be priced at a level that enables ALECs to purchase them and effectively compete.*

ANALYSIS AND ARGUMENT: As discussed in response to Issue 1, KMC has not conducted an in depth analysis of the Sprint cost studies, but has looked at the price proposals based on practical experience. Based on that experience, the UNE rates proposed in this proceeding do more to hamper and impede any growth in competitive services than to help. The proposed rates present an increased impact because there is both a revision of the UNE rates and also a proposal to deaverage rates by collapsing the existing 6 rate bands into 3. As noted by Mr. Wood, Sprint's current rates for two wire analog loops by band are \$10.78 in Band 1, \$15.41 in Band 2, \$20.54 in Band 3, \$27.09 in Band 4, \$39.66 in Band 5 and \$74.05 in Band 6. (Tr. 259). Moving to three bands results in rates of \$18.58, \$30.22 and \$68.81 for Bands 1-3 respectively (Hunsucker Supplemental Direct Testimony). The effect of moving to three bands nearly doubles the current rate for Band 1. There is a similar effect for DS1 rates; the current prices for DS1 Bands 1-3 \$64.79, \$74.96 and \$83.83 respectively while the proposal would be \$211.27, \$219.26 and \$418.09 respectively.

If the Commission approves the rates as proposed by Sprint, KMC would face even greater challenges to compete than it does today. KMC has been able to establish

networks in 7 markets in Florida and has only recently begun to generate revenues sufficient to begin payment on debt service. To continue this trend, KMC must be able to add customers and continue to reflect a growth in revenues, but the proposals of Sprint in this proceeding will not allow that and if approved, will seriously hamper any potential for effective competition.

(2) 4-wire analog loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(3) 2-wire ISDN/IDSL loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(4) 2-wire xDSL-capable loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(5) 4-wire xDSL-capable loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(6) 4-wire 56 kbps loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(7) 4-wire 64 kbps loop;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

If the Commission approves the rates as proposed by Sprint, KMC would face even greater challenges to compete than it does today. KMC has been able to establish networks in 7 markets in Florida and has only recently begun to generate revenues sufficient to begin payment on debt service. To continue this trend, KMC must be able to add customers and continue to reflect a growth in revenues, but the proposals of Sprint in this proceeding will not allow that and if approved, will seriously hamper any potential for effective competition.

- (9) **high capacity loops (DS3 and above);**
- (10) **dark fiber loop;**
- (11) **subloop elements (to the extent required by the Commission in Issue 4);**
- (12) **network interface devices;**
- (13) **circuit switching (where required);**
- (14) **packet switching (where required);**
- (15) **shared interoffice transmission;**
- (16) **dedicated interoffice transmission;**
- (17) **dark fiber interoffice facilities;**
- (18) **signaling networks and call-related databases;**
- (19) **OS/DA (where required).**

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 9(b): Subject to the standards of the FCC's Third Report and Order, should the Commission require ILECs to unbundle any other

elements or combinations of elements? If so, what are they and how should they be priced?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 10: What is the appropriate rate, if any, for customized routing?

SUMMARY OF POSITION: *No position.*

ISSUE 11(a): What is the appropriate rate if any, for line conditioning, and in what situations should the rate apply?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 11(b): What is the appropriate rate, if any, for loop qualification information, and in what situations should the rate apply?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 12: Without deciding the situations in which such combinations are required, what are the appropriate recurring and non-recurring rates for the following UNE combinations:

- (a) **“UNE platform” consisting of: loop (all), local (including packet, where required) switching (with signaling), and dedicated and shared transport (through and including local termination);**

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

- (b) **“extended links,” consisting of:**

(1) loop, DSO/1 multiplexing, DS1 interoffice transport;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(2) DS1 loop, DS1 interoffice transport;

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

(3) DS1 loop, DS1/3 multiplexing, DS3 interoffice transport.

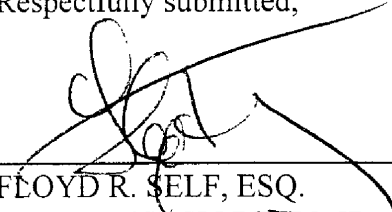
SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

ISSUE 13: When should the recurring and non-recurring rates and charges take effect?

SUMMARY OF POSITION: *KMC concurs with the position and analysis of Florida Digital Network (FDN).*

Dated, this 28th day of May, 2002.

Respectfully submitted,



FLOYD R. SELF, ESQ.
NORMAN H. HORTON, JR.
MESSER, CAPARELLO, & SELF, P.A.
Post Office Box 1876
Tallahassee, FL 32303-1876
(850) 222-0720

Attorneys for KMC Telecom III, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*), and/or U. S. Mail this 28th day of May, 2002.

Jason Fudge, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301

Claudia Davant-DeLoach, Esq.
AT&T
101 N. Monroe St., Suite 700
Tallahassee, FL 32301

Virginia Tate, Esq.
AT&T
1200 Peachtree St., Suite 8068
Atlanta, GA 30309

Jeffrey Whalen, Esq.
John Fons, Esq.
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

Michael A. Gross
Vice President, Regulatory Affairs
& Regulatory Counsel
Florida Cable Telecommunications Assoc., Inc.
246 E. 6th Avenue
Tallahassee, FL 32301

Kimberly Caswell
Verizon Select Services
FLTC-0007
8800 Adamo Drive
Tampa, FL 33619

Donna McNulty, Esq.
WorldCom
The Atrium Building, Suite 105
325 John Knox Road
Tallahassee, FL 32303

Mr. Brian Sulmonetti
WorldCom, Inc.
6 Concourse Parkway, Suite 3200
Atlanta, GA 30328

Marc W. Dunbar, Esq.
Pennington, Moore, Wilkinson, Bell &
Dunbar, P.A.
P.O. Box 10095
Tallahassee, FL 32302-2095

Charles J. Rehwinkel
Sprint-Florida, Incorporated
MC FLTHO0107
P.O. Box 2214
Tallahassee, FL 32399-2214

Mark Buechele
Supra Telecom
1311 Executive Center Drive, Suite 200
Tallahassee, FL 32301

Carolyn Marek
Vice President of Regulatory Affairs
Southeast Region
Time Warner Communications
233 Bramerton Court
Franklin, TN 37069

Ms. Wanda Montano
US LEC of Florida, Inc.
6801 Morrison Blvd
Charlotte, NC 28211-3599

Vicki Kaufman, Esq.
Joe McGlothlin, Esq.
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 S. Gadsden Street
Tallahassee, FL 32301

Patrick Wiggins
Charles Pellegrini
Katz, Kutter Law Firm
106 East College Avenue, 12th Floor
Tallahassee, FL 32301

Richard D. Melson
Hopping Green Sams & Smith, P.A.
P.O. Box 6526
Tallahassee, FL 32314

BlueStar Networks, Inc.
Norton Cutler/Michael Bressman
5 Corporate Centre
801 Crescent Centre Drive, Suite 600
Franklin, TN 37067

Mr. John Spilman
Broadslate Networks of Florida, Inc.
585 Loblolly Lane
Charlottesville, VA 22903-7656

William H. Weber
Senior Counsel
Covad Communications Company
1230 Peachtree Street, NE, 19th Floor
Atlanta, GA 30309

Florida Digital Network, Inc.
390 North Orange Avenue, Suite 2000
Orlando, Florida 32801

Mr. Don Sussman
Network Access Solutions Corporation
Three Dulles Tech Center
13650 Dulles Technology Drive
Herndon, VA 20171-4602

Rodney L. Joyce
Shook, Hardy & Bacon LLP
600 14th Street, NW, Suite 800
Washington, DC 20005-2004

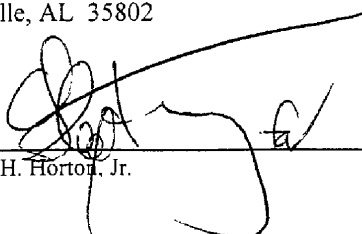
Michael Sloan
Swidler & Berlin
3000 K Street, NW #300
Washington, DC 20007-5116

George S. Ford
Z-Tel Communications, Inc.
601 S. Harbour Island Blvd.
Tampa, FL 33602-5706

Lisa Korner Butler
Vice President Regulatory & Industry Affairs
Network Plus, Inc.
41 Pacella Park Drive
Randolph, MA 02368

Andrew O. Isar
Miller Isar, Inc.
7901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335

Nanette Edwards
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, AL 35802


Norman H. Horton, Jr.