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January 23, 2003

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 Florida Digital Network, Inc. and KMC Telecom III, LLC are the following documents:

1. An original and fifteen copies of the Joint Motion for Reconsideration of Florida Digital Network, Inc. and KMC Telecom III, LLC; and

2. An original and fifteen copies of the Joint Request for Oral Argument of Florida Digital Network, Inc. and KMC Telecom III, LLC.

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,

Floyd R. Self

FRS/amb
Enclosures
cc: Mr. John McLaughlin
Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)	))))	Docket No. 990649B-TP Filed: January 23, 2003

MOTION FOR RECONSIDERATION OF FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM, III, LLC.

Florida Digital Network, Inc. ("FDN") and KMC Telecom, III, LLC ("KMC") ("Movants") respectfully move the Commission to reconsider its Order establishing rates for unbundled network elements ("UNEs") offered by Sprint.[1] The *Order* must be reconsidered and revised – if not rescinded entirely – because it adopts rates that are based on flawed evidence and methodologies, as the Commission acknowledges in the Order itself. For example, the Commission affirmatively criticized Sprint's modeling of customer locations and non-recurring charges. Other assumptions, such as OSS flow-through, are clearly not TELRIC compliant. Important cost drivers such as fill factors, cable material and placement costs, expenses, and the allocation of wire centers to deaveraged rate zones, are not based on substantial evidence.

Notwithstanding the numerous analytical flaws and evidentiary deficiencies that plague Sprint's cost models (and the UNE rates they produce), the Commission nonetheless essentially adopted Sprint's UNE rate proposals, ostensibly on the belief that the record lacked a specific alternative to support different rates. In so doing, the Commission ignored well-established state

[1] *See* Order No. PSC-03-0058-FOF-TP, Final Order On Rates for Unbundled Network Elements Provided by Sprint-Florida Incorporated in Docket No. 990649B-TP, *In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)* ("Order").

and federal law, not to mention its own precedent, which puts the burden squarely on the utility – in this case Sprint – to affirmatively justify its rates with probative evidence and analytically defensible methodologies. Further, because the rates approved by the Commission lack this necessary foundation, the Commission's adoption of rates based on the Sprint proposals was arbitrary and capricious, and an abuse of discretion. The Commission should, instead, instruct Sprint to submit revised cost models that correct the flaws identified by the Commission in the Order, and by Movants in their briefs and herein. In the meantime, the Commission should adopt interim rates based either on Sprint's existing rate structure or the proxy rates of the Federal Communications Commission ("FCC").

I. STANDARD OF REVIEW

A motion for reconsideration should be granted if it identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its Order.[2] The motion should be based upon specific matters set forth in the record and susceptible to review. *Id.* The Commission's substantive determinations in rate proceedings must be based upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached."[3] The evidence must "establish a basis of fact from which the fact at issue can reasonably be inferred."[4] Findings wholly inadequate or not supported by the evidence will not be permitted to stand.[5] The Commission should reconsider its rulings on the

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[2] *Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

[3] *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. DCA 1957); *see also, Agrico Chem. Co. v. State of Fla. Dept. of Environmental Reg.*, 365 So.2d 759, 763 (Fla. 1st DCA 1979); *Ammerman v. Fla. Board of Pharmacy*, 174 So.2d 425, 426 (Fla.3d DCA 1965).

[4] *DeGroot*, 95 So.2d at 916.

[5] *Caranci v. Miami Glass & Engineering Co.*, 99 So.2d 252, 254 (Fla. 3d DCA 1957).

following issues because they lack the requisite foundation of competent and substantial evidence.

II. THE COMMISSION HAS IMPERMISSIBLY REVERSED THE BURDEN OF PROOF

Public utilities always have the burden of *proving* that their rates are just and reasonable. This is especially true of ILECs such as Sprint, who are monopoly providers of UNEs, and who are required, under compulsion of law, to sell UNEs to their direct competitors – CLECs such as Movants. Thus, the procedural rules governing this proceeding require Sprint to "prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements."[6] As part of this burden, Sprint must file whatever information it believes is necessary to satisfy its burden of proof.[7] Simple production of cost records and documentation cannot satisfy this burden.[8]

Sprint's burden of proof pertains, of course, to the case as a whole, and also to each and every issue within the case which is part of the foundation for its request. There is no burden of proof on opposing parties, who may question and raise doubts regarding the evidence submitted by the party with the burden, thus undermining its evidentiary value. The ultimate burden of rebutting the opposing party's allegations, as well as the ultimate burden of proof, resides with Sprint. *Id.* In this case, however, the Commission has improperly relieved Sprint of its proof obligations. Upon finding errors in Sprint's cost model, the Commission validates and accepts

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[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, ¶ 680 (1996) (*Local Competition Order*) (subsequent history omitted).

[7] *Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0326-FOF-SU, 2001 WL 214035, *32 (2001).

[8] *Florida Power Corporation v. Cresse*, 413 So.2d 1187, 1191 (Fla. 1982).

those errors. Thus, the Commission has set a dangerous precedent for all future utility rate cases: the Commission will now accept information it knows is wrong because better information is not part of the record. Hereafter, the Commission will permit all regulated utilities to collect higher charges from ratepayers based on that wrong information. Certainly, this has not been the Commission's traditional approach. The Commission has acknowledged that to do so would violate its statutory obligations. Indeed, it is inconceivable that this Commission would ever approve rates for TECO or Florida Water Services or City Gas knowing full well that its decision was based on incorrect and unadjusted information. And, yet, the Commission now adopts this very approach for Sprint UNE prices. Movants assert that just as adopting this backwards approach for monopoly utility ratemaking would be unlawful, the Commission commits clear legal error in what it has done here for setting Sprint UNE prices and the Commission runs afoul of its statutory mandate to ensure that Sprint UNE rates comply with the federal and Florida pricing rules.

Where a utility does not meet its burden of proof for the case or for a particular issue, the Commission has recognized that it must reject the utility's evidence. *See Application for a rate increase by Southern States Utilities, Inc.*, Final Order Denying Application for Increased Rates and Charges, Dkt. No. 900329-WS; Order No. 24715 (Florida Public Service Commission June 26, 1991) (1991 Fla. PUC Lexis 1017) (Utility's rate case dismissed where Commission found utility did not meet burden of proof). Thus, the Commission's findings that Sprint failed to provide correct or adequate cost support, *i.e.*, that Sprint failed to satisfy its burden of proof with respect to numerous issues and rate elements, should have been the end of the matter. The Commission should have ordered Sprint to submit a conforming study, or should have revised Sprint's rates accordingly through any reasonable means.

Movants do not have the burden of presenting any testimony, let alone testimony specifically advocating an alternative on a given issue and calculating its dollar impact. Movants do not have the burden of establishing what TELRIC-compliant rates are for Sprint in the state of Florida. It was sufficient for Movants to simply point out the inherent flaws in Sprint's case and cost model. The burden of proof has always lied with Sprint, and Sprint must have the responsibility of overcoming the flaws in its case or living with the consequences of those flaws.

Reversing the burden of proof in the manner effected by the Commission's Order will inevitably lead to have several obviously negative policy outcomes. First, and perhaps most importantly, Florida consumers will end up paying higher rates, and will not receive the benefits of competition. This is reflected in the Commission's Order. The Sprint-Florida UNE rates are among the highest in the nation, nearly double those of BellSouth offered in similar service areas. This matter is too important to Florida's consumers for the Commission to simply accept information it knows is in error.

Additionally, by requiring parties who contest an ILECs' UNE rate proposals to present their own, independent evidence, the novel allocation of the burden of proof adopted in this proceeding will effectively discourage public participation in such proceedings. Of the three largest ILECs in Florida, Sprint's largely rural service territory has been the least enticing to competitive entry. AT&T and Worldcom elected not to participate in the Sprint UNE rate proceeding at all. Though resource limitations prevented Movants from sponsoring their own independent witness, Movants scrutinized Sprint's filing and identified many glaring errors in Sprint's models recounted in their Briefs. But if an intervenor has no chance of influencing the Commission's decision-making unless it presents its own evidence, no matter how inadequate the proponent's proof, the Commission may soon find that more and more proceedings are

uncontested, and Florida rate payers will be the ones to suffer. Moreover, it must not be forgotten that, notwithstanding any intervener participation, the Commission is charged by law with protecting the public interest and with properly setting fair and reasonable UNE rates. Regardless of how long the Commission may require to determine UNE rates, the Commission cannot act consistent with its solemn duties by approving UNE rates it knows are based on erroneous information, particularly where, as here, the UNE rates approved are patently unrealistic for promoting competition.

The Commission's approach *might* have been justifiable if there was no alternative whatsoever to simply adopting most of Sprint's proposals. But that was absolutely not the case here. This was not a file-and-suspend rate case where the Commission's statutory deadlines have run out without a ruling. The Commission had alternatives to accepting information the Commission knows was erroneous and which, worse still, produced wholly unreasonable results. The Commission could have left in place the interim rates set by the Commission for Sprint until Sprint carried its burden of showing that different rates were TELRIC-compliant rates. The Commission also could have implemented the proxy rates established by the FCC until such time as Sprint could establish TELRIC-compliant rates.[9] Finally, it could have applied a reduction factor to Sprint's proposed rates. Any of these options would have been preferable to simply accepting Sprint's proposals, despite knowing them to be flawed.

[9] *See* 47 C.F.R. § 51.513(c).

III. THE COMMISSION'S DEAVERAGING APPROACH DOES NOT ENCOURAGE COMPETITION

The policy rationale underlying geographic deaveraging is to assure that UNE rates reflect underlying costs.[10] Within this broad policy objective, many different deaveraging methodologies are possible, as reflected in the disparate methodologies found around the country, and even within Florida. The record in this case supports two Sprint proffered alternatives: (1) a nine zone proposal that results in highly deaveraged rates and (2) a three zone proposal based on the methodology the Commission adopted in the BellSouth proceeding.

Identifying the promotion of competition and administrative convenience as its twin policy objectives,[11] the Commission, *sua sponte* and without public comment, adopted a four-zone approach that the Commission's own staff characterized as "absurd" at the agenda conference because it resulted in so few wire centers being allocated to lowest cost zone. The staff's concern about the 4-zone methodology proved correct, as it led to the following rate zone allocations: 4 wire centers to the lowest cost Zone I ($10.82 per 2-wire loop), 28 wire centers to Zone II ($17.63 per 2-wire loop), 29 wire centers to Zone III ($24.68 per 2-wire loop), and 72 wire centers to the highest cost Zone IV ($45.40 per 2-wire loop). While perhaps administratively simpler than 9 zones, the Commission's methodology will do little to promote competition in the state; indeed, it will actually deter competitive entry.[12]

Competitors will only enter markets where the cost of loops – the paradigm essential facility that facility-based CLECs have no alternative but to purchase from Sprint – are priced at levels that permit CLECs to earn a profit after incurring all the other costs associated with

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[10] *Local Competition Order* at ¶ 766.

[11] Order at 26-29.

providing local dial tone and serving customers. Sprint's retail rates do not vary widely throughout its service territory – from roughly $15.50 to $24.50 depending on location – for business customers. Two-wire UNE loop rates must be priced somewhat below this level in order for UNE-based CLEC competition to stand a chance. Thus, if "promoting competition" was, indeed, one of the Commission's objectives, it would have placed as many wire centers as possible in low cost zones where UNE rates were priced below prevailing retail rates. Because only the rates in Zones 1 are at or below competitive levels, and because only about 112,000 of 2,191,900 lines are in these lower cost zones, it is clear that the Commission's deaveraging methodology is not rationally related to achieving the goal of promoting competition and should be revised by the Commission before it is vacated by a reviewing court.[13]

The FDN and KMC experience is no doubt typical. FDN is currently collocated in eight Sprint central offices, in the Central Florida area, and KMC is collocated in five Sprint central offices in Tallahassee and southwest Florida. Under the three-zone approach advocated by Sprint, *all* of the FDN and KMC collocations would have been allocated into the lower cost Zone 1, which would have better enabled FDN and KMC to compete with Sprint than with the Commission's result where only one of the Sprint central offices FDN operates in and only one of the KMC central offices are in Zone 1. Under the Commission's 4-zone plan, only one of FDN's collocations is in the lowest-cost band; five are in Zone 2, and two are in Zone 3, where

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[12] Movants acknowledge that the Commission struggled with the proper banding methodology and recognized that its methodology appeared problematic for Sprint. However, the achievement of lower rates for loops in the four wire centers that comprise Zone I is no reason to by-pass those problems.

[13] *See Florida Waterworks Association v. Florida Public Service Commission*, 473 So.2d 237 (Fla. 1st DCA 1985) (Commission should present evidence that supports its findings of facts and conclusions of law and shows the rational relationship of the rule to accomplishment of its various beneficial objectives.); *see also, American Trucking Association v. U.S.*, 642 F.2d 916, 924 (5th Cir. 1981) (Interstate Commerce Commission could rationally conclude that a competitive market for the transportation business is in the public interest but petitioners can prevail if they can show that the new operations would "destroy the ability of existing carriers to compete").

CLECs face an insurmountable price squeeze that precludes competition. Likewise, only one of the five Sprint Central offices KMC operates in is considered Zone 1; the remaining four central offices are all Zone 2. Indeed, several of the most attractive localities for competition, including Kissimmee, Altamonte Springs, parts of Tallahassee (including Blairstone), are, under the Commission's order, relegated to higher cost zones, where it is impossible to offer end-users competitive pricing using UNE-based CLEC services. Competition cannot be expected to enter to enter these markets while the Commission approved UNE rates are in place.

The Commission should not, on the one hand, reject adjustment to a Sprint cost model it acknowledges is flawed because the Commission believes there is a lack of advocated adjustments in the record, and then on the other hand, completely alter rate structure in a manner no one specifically advocated adjustment to on the record, particularly where adjustment to the latter does not even achieve the Commission's announced intentions. Absent a better methodology supported by the record and consistent with the design of promoting competition, the Commission should approve the Sprint 3-Zone deaveraging methods.

IV. FILL FACTORS

The Commission adopted the fill factors proposed by Sprint – 100% for distribution (*i.e.*, two lines per household[14]) and 59.17% for feeder[15] – despite the obvious flaws with these utilization rates, which the Commission recognized but nonetheless impermissibly approved for "lack of alternative record evidence proposing another fill rate." *Order* at 84. For the reasons explained below, the Commission should revise these rates.

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[14] As FDN noted in its Brief, the fill factor of 100% is deceptive because it is based on an assumption of two wires. Docket No. 990649B-TP, Post-Hearing Brief of Florida Digital Network, Inc. for Sprint Florida Phase of Proceeding at 18-19 (May 28, 2002) ("FDN Brief").

[15] Order at 83-84.

The Commission based its assumption of two distribution pairs per household on the BellSouth cost assumptions, though the Commission has long (at least since 1999) recognized that BellSouth does not actually deploy two pairs per household.[16] Moreover, BellSouth has recently acknowledged that the average end user is not wired with two pairs, and is unlikely to be so wired in the future, given the reduced demand for second lines caused by increased wireless usage, DSL, and cable modem service.[17] While the Commission erred in basing BellSouth's UNE rates on the assumption of 2 lines per household, the Commission should not compound that error by basing Sprint's rates on the same erroneous assumption, which seriously distorts reality and inflates costs by assuming that Sprint deploys more copper in the network than it actually does, let alone than it actually *should* based on forward-looking assumptions.

But even if the BellSouth assumption of two lines per household was correct – which it is not – it would not follow that BellSouth fill factor assumptions should apply in Sprint's service territory. Under TELRIC, Sprint cost model should determine distribution levels for the specific service and growth characteristics of each distribution area. Thus, fill levels in neighborhoods where line counts have remained stable for many years, particularly rural areas, would be much higher than in other areas. Sprint states that it operates in more rural areas than BellSouth and therefore has slower growth,[18] so there is less of a reason for Sprint to deploy two pairs per household as compared to BellSouth. A utility could instead have spares running down the road

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[16] *Determination of the cost of basic telecommunications service,* Docket No. 980696-TP, Order No. PSC-99-0068-FOF-TP, 1999 WL 112536, *78 (Jan. 7, 1999) ("*FL USF Order*") ("BellSouth itself is not placing two pairs per housing unit, rather it is placing 1.4 to 1.5 pairs").

[17] BellSouth has recently admitted that it only deploys one line for every household. Scott Woolley, *Bad Connection*, Forbes Magazine (August 12, 2002).

[18] Order at 80-81.

for general use for anyone living on the road and provide new service by adding a drop.[19] As the FCC has noted, fill factors are generally lower if there is an anticipation of growth.[20] Since Sprint possesses lower growth prospects than BellSouth, this counsels for higher fill factors for Sprint vis-à-vis BellSouth. Given Sprint's more rural area, fewer spare facilities will need to be provisioned, resulting in more efficient use and higher utilization levels.

The disconnect between Sprint's two pairs per household assumption and its actual growth and service characteristics is starkly demonstrated in Sprint's actual utilization factors. Sprint states that its actual utilization factor for distribution cable runs from lows in the 30s to highs in the 40s.[21] Sprint's approach, which the Commission has sanctioned, requires CLECs to pay for layer upon layer of spare capacity. By designing a hypothetical network sufficient to serve *ultimate* demand, *and*, at the same time allocating the entire cost of such an overbuilt network to CLECs that serve only *current* demand, Sprint would recreate precisely the same entry barriers that the Act and the *Local Competition Order* were intended to eliminate.[22]

The assumptions for feeder are similarly erroneous, and for the same reasons. The Commission correctly recognized that BellSouth's ordered feeder fill stands at 74 percent. *Order* at 84. But rather than serving as a *floor* for Sprint's feeder fill – which would be the logical approach given the disparate service populations – the Commission instead found that "BellSouth's order feeder fill of 74% should serve as the *maximum* rate for Sprint's fill factors."

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[19] *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, CC Docket N0. 96-45, Order, DA 03-24, 2003 WL 57058, ¶ 11 (Jan. 7, 2003) (Noting that the average cost per line for states containing wire centers with lower density zones decreases, relative to the nationwide average, because their service areas require less underground structure, smaller SAIs, and fewer large drop terminals).

[20] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd. 87, Appendix F, Analysis of Proxy Models, ¶ 5 (1996).

[21] Ex. No. 14, KWD-1D (Dickerson Deposition) at 73:20.

Id. This is counter-intuitive given Sprint's more rural service territory, for the reasons explained above.

The unreasonable fill factors adopted by the Commission violate an express FCC prohibition against the use of fill factors calculated to serve *ultimate* demand rather than *current* demand.[23] The FCC concluded that "the fill factors selected for use . . . should reflect current demand . . . [not] the industry practice of building distribution plant to meet 'ultimate' demand." *Id.* at ¶¶ 190, 199 While current demand *may* include a reasonable amount of excess capacity to accommodate short-term growth,[24] Sprint's calculation of distribution fill factors that serve ultimate demand is expressly forbidden. As the FCC has stated:

> [T]he fact that industry may build distribution plant sufficient to meet demand for ten or twenty years does not necessarily suggest that these costs should be supported today . . . [B]asing the fill factors on current demand rather than ultimate demand is more reasonable because it is less likely to result in excess capacity, which would increase the model's cost estimates to levels higher than an efficient firm's costs and could potentially result in excessive universal service support payments.[25]

The FCC was prescient in noting that "correctly forecasting ultimate demand is a speculative exercise" given rapid advances in telecommunications. The FCC cited as an example that ultimate demand drops substantially when "computer modem users switch from dedicated lines serving analog modems to digital subscriber lines where one pair of copper wire provides the same function as a voice line and a separately dedicated line." *Id.* ¶ 199. Clearly, assuming *arguendo* that the two pair assumption was once appropriate, modeling two pairs per household is no longer a least-cost, efficient practice.

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[23] *Tenth Report and Order*, 14 F.C.C. Rcd. 20156 (Nov. 2, 1999).

[24] Federal-State Joint Board On Universal Service; Forward-Looking Mechanism For High Cost Support For Non-Rural LECs, 18 C.R. 2019, 64 F.R. 31780 at ¶ 100 n. 195 (May 28, 1999).

[25] *FCC Tenth Report and Order*, 14 F.C.C. Rcd. *20156* at ¶¶ 199, 200.

Finally, the Commission must consider the impact of its decision regarding fill factors on the resulting rates. As explained below, the resulting UNE rates the Commission has approved render competition utterly non-viable in the vast majority of Sprint territory. But the Commission must also consider this issue in another light. Here, Movants are being asked to in effect pay for substantial, projected capacity costs. Further, the reality of the situation is that when a CLEC's request for a UNE requires Sprint to grow or build new capacity, Sprint requires the CLEC to bear the cost of building these facilities via their Bona Fide Request (BFR) process. Sprint has consistently expressed the position that the FCC did not require ILECs to modify or add (construct) facility arrangements in order to provide an unbundled loop at central offices. In traditional ratemaking for all Florida utilities, this Commission had been extraordinarily guarded in protecting consumers from paying for any more capacity costs than absolutely necessary to ensure safe and reliable service to those customers. Non-used and useful is a significant issue in every rate-of-return-regulated utility rate case, and, certainly, this Commission would not permit captive ratepayers to pay for capacity the Commission was not convinced beyond all doubt would be necessary to serve those ratepayers over a reasonable period, whether gas, electric, or water company customers. Yet, here, the Commission does not protect the ALEC ratepayers from in effect paying for capacity substantially in excess of what can reasonably be expected to be used. Just as the Commission would not permit customers to pay for unnecessary capacity costs in the context of traditional rate making, the Commission should not permit it here with monopoly wholesale services.

V. CUSTOMER LOCATIONS

A properly constructed cost model generates cost assumptions from the "bottom up," beginning with data reflecting individual customer locations. The Commission recognized in the *Order* that a clustering approach used in conjunction with geocoded customer location data is

preferable for modeling the cost of outside plant, noting that it had endorsed just such an approach in its *Universal Service Order.*[26] Moreover, the data underlying BellSouth's cost model "incorporates all of BellSouth geocoded customer and network data," including all actual customer locations.[27]

Despite this unanimity on the value of using geocoded data for customer locations, the Commission declined to order Sprint to base its model on such data, except for DS-3 customers. And what was the rationale cited by the Commission for excusing Sprint from the requirement that it submit the best data available to estimate costs? Because it noted that Sprint had not, in fact, submitted such information with its cost submission:

> [T]here is no record evidence that Sprint has performed the extensive analysis needed to geocode customer locations throughout its service area. Thus, we cannot find that Sprint should be ordered to "use" such data in its model. Without such geocoded data, it does not appear possible to perform a clustering analysis.

Order at 58.

This reasoning is utterly circular. Sprint's submission does not contain geocoded data because Sprint *chose* not to include any such data. Given the Commission's identification of the data that would facilitate the best estimation of UNE rates, it was incumbent upon Sprint to submit such data, or explain why it could not. And there is no indication in the record that furnishing the geocoded data would require "extensive analysis." Indeed, logic suggests that no such analysis is necessary. Sprint used data from PNR & Associates to assign "... approximately 85% of the business customers to specific CBs."[28] Clearly, Sprint has a commercial relationship

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[26] Order at 57, *citing,* Docket No. 980696-TP, Order No. PSC-99-0068-FOF-TP (Jan. 7, 1999).

[27] *Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP at 130-131, 2001 WL 640804, * 68 (May 25, 2001) ("*BellSouth UNE Order*")

[28] Sprint Loop Cost Model, *Model Methodology*, page 14.

with this company, and it could have obtained geocoded data for other customer locations from it. In fact, PNR & Associates was the source used for geocoded data by the HAI proponents in the FCC's USF platform proceeding.[29] So there is no indication that Sprint would have to undertake any extraordinary efforts to obtain this information. In fact, Sprint never raised cost or difficulty as a reason for why it did not geocode other customer locations. Sprint simply chose not to do so. Sprint conceded that use of geocoded data would enable it to place the customer geographically down to the microgrid that the address maps to.[30] Sprint contended only that the reason it did not geocode data for other services was because it was "less critical" to understand the specific customer site for those services.[31] The FCC clearly found use of geocoded data to be important and that it should be used if available, and this Commission concurred, at least prior to this Order.

Moreover, the Commission relies on an overly narrow definition of "available." The goal of this proceeding is to ensure that forward-looking, cost-based prices are set for unbundled network elements so that competition may take root in Florida. If both the FCC and this Commission have determined that use of geocoded data for customer locations and a clustering approach would further this cause, and the major ILEC in the state, BellSouth, has demonstrated that such information is "available" to it, then the information should be "available" to Sprint. Otherwise, ILECs will have the incentive to ensure that cost information that may not further their interests is "unavailable." As noted above, a utility has the burden to file the information necessary to meet its burden of proof. Sprint failed to file this information, and therefore has

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[29] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket Nos. 96-45 and 97-160, Fifth Report & Order, FCC 98-279, ¶ 34 (Oct. 28, 1998) (*"Platform Order"*).

[30] Ex. No. 14, KWD-1D (Dickerson Deposition) at 45: 7-18.

[31] See FDN Brief at p. 9.

failed to meet its burden of proof on this issue. The Commission cannot ignore Sprint's burden for any reason, particularly given the unreasonable rates that the Sprint cost model produced.

VI. CABLE MATERIAL AND PLACEMENT COSTS

Movants assert that the costs for cable material and placement should be reduced. A separate "utilization rate" for unused transport and loop capacity is inappropriate because these unused facilities are already factored into the utilization rate for loops and transport. *Order* at 97. Thus, Sprint is permitted to double recover the cost of its assets. Though the Commission acknowledged FDN's argument, it dismissed FDN's claims on the ground that "FDN's arguments relate specifically to fill factors and are addressed in other issues." *Id.* In fact, the argument is not addressed elsewhere in the Order, which indicates that the Commission failed to consider FDN's argument, making it ripe for reconsideration.

As FDN has explained, the fill factors have a direct relation to the cable material and placement costs. The Commission adopted Sprint's fill factor of 75% for a dark fiber loop, IOF and channel termination.[32] As FDN noted in its brief, the available dark fiber in Sprint's network is precisely the same fiber that is included as spare in Sprint's loop and interoffice facility cost calculations.[33] Moreover, Sprint does not consider dark fiber demand in its loop and interoffice facility calculations for cost recovery purposes.[34] Hence, Sprint has already attributed the capacity cost of those facilities, and the structure and placement cost for those facilities, to the cost of loops and interoffice facilities.

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[32] Order at 84; *see also,* Ex. No. 14, KWD-1D (Dickerson Deposition) at 65: 10-14.

[33] FDN Brief at 22-23; *See* Ex. No. 14, KWD-1D (Dickerson Deposition) at 66: 20-22; 67: 22-24; 69: 10-13.

[34] Ex. No. 14, KWD-1D (Dickerson Deposition) at 66: 23-25; 67: 1-2.

Sprint's cost study for loop and interoffice fiber facilities includes the cost for the fiber itself, as well as costs for related support structure and placement plus a "fill factor" or utilization adjustment, which has the effect of marking up the cost per fiber to account only for a percentage of the total cable that Sprint projects will be used. Of course, the cost of the unused fibers that Sprint includes as an addition to the cost of each used fiber via the application of a "fill factor" represents precisely the "dark" fiber that will now be made available by Sprint. Each time that a carrier purchases Sprint's spare "dark fiber," that carrier will be paying the full capital cost of that fiber. Yet, the Commission's ruling allows Sprint to "double recover" the same capacity cost from purchases of loops and transport in the form of a fill factor for "spare" fiber. Since the Commission has adopted Sprint's proposed fill factors for dark fiber, it should require Sprint to adjust the capacity related costs in its loop and interoffice facilities charges.

Sprint's charges for dark fiber are a blatant attempt to double-recover the same capacity costs it included in studies for its loop and interoffice facilities, under the guise of a fill factor or a utilization factor. The Commission cannot permit Sprint to include the capacity cost of "spare" fiber in the loop and transport studies and then a second time in the dark fiber cost study. The Commission commits plain error by permitting such double recovery, as the California Commission has recognized:

> Pacific Bell's analysis results in double counting of investment costs .... because Pacific fails to account for the nature of the dark fiber UNE, which is fundamentally different from other UNEs. By definition, dark fiber is spare facilities placed based on Pacific's own estimates of its expected demand for its services. Because the TELRIC studies that this Commission adopted for the UNE loop were based on total demand, all the cost for the dark fiber that will be available in Pacific's network on a forward-looking basis is already captured as the "spare capacity" or "fill" loading that is part of the existing loop and transport UNEs. Hence, because forward-looking utilization is already included in all the total network TELRIC cost analysis adopted by the Commission, the cost of spare fibers that Pacific does not currently utilize is, by definition, already included in

existing UNE prices. Pacific's dark fiber pricing proposal would double-recover capacity costs already recovered through other UNE prices.[35]

The fill factor designated by the Commission for the loop and IOF facilities is already compensating Sprint for the capacity costs of the fibers. If the loop and IOF fill factor is less than 100%, then there should be no capacity cost whatever for dark fiber. In the components that reflect the recurring costs for the fiber itself (as opposed to any fixed costs for terminations), Sprint should have studied only *the operations and maintenance costs of the fiber.* Sprint should exclude any *investment* costs for the fiber itself, the structure supporting the fiber as well as placement of the fiber. If Sprint seeks to recover capacity costs of the fiber cable via the dark fiber UNE rate as well, then the capacity costs for loop and IOF facilities must be adjusted accordingly. Either way, the capacity costs need to be adjusted. Sprint cannot impose the same investment costs in both the loop/interoffice fiber facility charges and the dark fiber charge as well.

VII. EXPENSES

Contrary to the established precedent of the FCC, Sprint calculated its expense factors using book investment cost as of the year 2000, and failed to convert its booked investment to replacement cost, as required by the TELRIC methodology. The Commission overlooked this inconsistency in rendering its decision and should require these values be converted to replacement cost just as it required of Verizon-FL.

Plant-specific operations expenses are the expense costs related to the maintenance of specific kinds of telecommunications plant.[36] Input values for plant-specific operations expenses

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[35] *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, California Public Utilities Commission Application 01-01-010, Decision 01-09-054 at 17-18 (Sept. 20, 2001).

are calculated as a percentage of investment. *Id.* ¶ 340. The FCC has required some method of converting booked cost investment to current investment in order to estimate forward-looking plant specific operations expenses based on present day replacement cost, rather than historic, financial account balances. *Id.* ¶ 342.

The Commission found in the Verizon phase of this proceeding that consistency is required between the numerator (expenses) and the denominator (investments) in terms of time period used.[37] Expenses from a given year must be matched with the replacement cost of investment calculated by indices such as C.A. Turner or Telephone Plant Index. The Commission noted:

> If the indices were not used, the expense-to-investment ratio would be calculated using year 2000 expenses, but booked investment from vintage years stretching back decades. In short, the use of C.A. Turner indices does not serve to make the investments forward-looking, nor does that appear to be the intent; rather, the use of these indices sets investment at a vintage that matches the expenses used in calculating the expense-to-investment ration. This is appropriate because the resultant ratio matches year 2000 expenses with a year 2000 level of investments.[38]

This is necessary because book investment balances typically consist of amounts from vintage years stretching back decades. The use of an appropriate index sets investment at a vintage that matches expenses used in calculating the expense-to-investment ratio. The index for a particular plant account is typically greater than 1. This means that replacement cost for investment will be

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[36] *FCC's Tenth Report and Order*, ¶ 341.

[37] *Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649B-TP, Final Order On Rates For Unbundled Network Elements Provided By Verizon Florida, Order No. PSC-02-1574-FOF-TP at 183-184 (Nov. 15, 2002).

[38] Verizon Order at 184.

greater today than its book cost.[39] This approach is also consistent with the methodology adopted by the FCC.[40]

Sprint provided its expense factor calculation in response to an FDN discovery request. *See* Trial Exh. No. 11, Sprint-Stip-2-37-38 (Sprint Response to FDN Request for Production of Documents Item 2). This spreadsheet shows that Sprint calculated its expense factors using book investment cost as of the year 2000, but failed to convert the book investment cost to replacement cost. The Commission should require Sprint to correct this error and resubmit its cost study with conforming data.

VIII. WORK TIMES FOR NON-RECURRING CHARGES ARE INFLATED

Sprint failed to support its non-recurring charges ("NRCs") with substantial competent evidence. Sprint based its non-recurring charges on a combination of Average Time Per Work Function studies and input from its Subject Matter Experts.[41] The Commission noted significant problems with both sources of data, but nonetheless approved Sprint's proposed NRC rates. This was plain error.

First, the Commission clearly found that Sprint's Average Time Per Work Function Study was fundamentally flawed, noting that it was "concerned with the accuracy of the studies."[42] That concern was well founded. For example, the Commission "discovered several occurrences where the total task time was miscalculated." Order at 174. In other cases, the data forming the basis for calculations was flawed.[43] In yet other instances, the Commission found

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[39] *FCC's Tenth Report and Order*, ¶¶ 371.

[40] *FCC's Tenth Report and Order*, ¶¶ 365-369.

[41] Order at 171.

[42] Order at 173.

[43] Order at 174 (noting observations for which ""no beginning or ending times for [the] observed" item was recorded, "even though a corresponding study time was reported . . .").

obvious input errors, which Sprint conceded were present,[44] or reported work times that were unsupported by data altogether.[45] Based on these findings, the Commission should have attached no evidentiary value to Sprint's work time studies.

The subject matter expert ("SME") opinions were no better, and the Commission expressly questioned the evidentiary basis for the SME estimates.[46] In fact, the Commission lamented Sprint's failure to "provide support for many of the SME activity time estimates and probabilities included in their study."[47] The Commission also noted that the inputs provided by the SMEs were not subject to independent verification by third parties.[48] Finally, the Commission found that the SMEs' "estimates [were] based on what they observed and *not on what forward-looking, efficient practices would produce.*"[49] As a consequence, the SMEs' estimates, by definition, were not TELRIC compliant, and likely "tend[ed] to ***bias*** their inputs in favor of higher NRC costs." *Id.* (emphasis added).

It is clear from the Commission's recitation of the litany of errors in Sprint's NRC studies that Sprint did not meet its burden of proof in establishing credible work times, much less TELRIC-compliant ones. Having so found, the Commission had several options. One, it could have disallowed the unsupported charges.[50] Alternatively, it could have applied an across the

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[44] Order at 174.

[45] Order at 174.

[46] Order at 175.

[47] Order at 175.

[48] Order at 176.

[49] Order at 176 (emphasis added).

[50] *See United Water Florida, Inc.*, Docket No. 980214-WS, Order PSC-99-0513-FOF-WS, 1999 WL 287712, *23 (1999) (Utility claimed it had support for uncollectable amount, but did not provide requisite documentation. The Commission reduced the uncollectable expense by the amount it found to be unsupported).

board reduction to the non-recurring charges to correct for the deficiencies in Sprint's NRC study, just as it did in correcting BellSouth's recent rate submission.[51]

The Commission took neither of these actions. Instead the Commission has attempted to validate Sprint's NRC data, which it knows is wrong, by applying a new, "range of reasonableness" test, which essentially consists of comparing Sprint's non-recurring charges to BellSouth's. The Commission offered no explanation as to how it derived this standard, what constituted this range, why it would be fair to apply it to the parties in this case, and how they conducted the comparison. In fact, the Commission conceded that "comparing NRC rates between companies can some times be problematic,"[52] and cited Sprint's and BellSouth's provisioning of a 2-wire loop as an example of a potential apples and oranges comparison.[53] Having conceded that it is "not clear to us whether Sprint's $119.74 NRC charge is comparable to BellSouth's service level 1 or 2 for two-wire analog service,"[54] it surely was unreasonable for the Commission to use this comparative approach to validate Sprint's entire NRC study.

The Commission also failed to provide the parties with notice that it would adopt this comparative approach to evaluating NRCs. Had the Commission so apprised the parties, and had the parameters of the comparison been clearly delineated, the parties could have briefed the issue, and addressed whether it was feasible to do a range of reasonableness comparison for NRCs, and if so, whether the various Sprint NRCs fit within a range of reasonableness.

The comparative approach adopted by the Commission is not valid and cannot withstand scrutiny. Once again, the Commission has relieved Sprint of its obligation to present competent

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[51] FDN Brief at 33-37.

[52] Order at 176.

[53] Order at 176-177. A service level 2 loop requires more engineering work.

[54] Order at 177.

evidence, and risks the setting of a dangerous new precedent: In the future, if a utility's evidence is insufficient to issue a correct ruling, the Commission will nonetheless view itself as free to grant the utility's request if it bears some similarity with another utility's rates. This is unabashed legal error.

Further, the Commission failed to apply its comparative analysis consistently. Only non-recurring charges have been subjected to this new test. Recurring rates have not been so evaluated. If a comparison with BellSouth's rates had been the test, Sprint's recurring UNE rates would have been much lower. The Commission fails to explain why the comparison approach is valid for the one but not the other.

Equally troubling, it is not at all clear that the Commission actually performed the comparison it claims to have done. For example, Sprint's manual service order charge is $28.10, which is 136% higher than the $11.90 charge that the Commission approved for BellSouth.[55] It seems difficult to comprehend how the Commission can justify Sprint's totally unsupported charge solely by comparison to BellSouth's much lower charge. Movants contend that a charge that is more than two times the rate charged by BellSouth cannot, by virtue of a stand-alone comparison, be deemed reasonable. Moreover, even if some of Sprint's NRCs do fall within this unspecified zone, that would still be no justification for validating all of them. If some of Sprint's NRCs are inflated, and cannot be justified even under the "range of reasonableness" then they should be invalidated or reduced.

A comparison approach to evaluating the reasonableness of rates essentially constitutes benchmarking. Tellingly, the FCC has explicitly declined to use a benchmarking analysis for

[55] Ex. No. 13, JRD-1D (Davis Deposition) at 31: 20-21; 32: 21-22.

non-recurring charges.[56] The reason the FCC has bench-marked recurring rates but not NRCs is easy to see. Recurring rates are typically based on objective inputs such as material costs, while NRCs are based more on subjective inputs such as SME inputs, which are harder to validate. Finally, even when the FCC does benchmarking, it only compares common BOCs – e.g., BellSouth-Georgia with BellSouth-Florida.[57] This ensures that there be a proper basis of comparison. Sprint and BellSouth are two different companies and comparisons may or may not be inappropriate. There is no evidence one way or the other.

Even if the Commission is correct that Sprint's work times are generally lower than BellSouth's, the Commission's responsibility is to find the correct, TELRIC-compliant work times for Sprint. It has failed to do so. If there are clear errors in Sprint's NRC studies, they should be corrected, not overlooked. The lack of alternative evidence, however, is not grounds for accepting Sprint's clearly erroneous submission.[58]

As noted previously, the Commission has several alternatives in the face of Sprint's clearly deficient evidence. It could invalidate Sprint's submission and require the submission of new evidence, and, in the mean-time, keep the existing rates in place, or adopt the FCC's proxy rates on an interim basis. Alternatively, could reduce Sprint's proposals, as other state commissions have done. For example, the Maine PUC ordered an overall 57% reduction in

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[56] *In the Matter of Application by BellSouth Corporation, et al., for Authorization to Provide In-region InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, FCC 02-260, ¶ 125 (Sept. 18, 2002).

[57] *In the Matter of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269, ¶¶ 63 (Sept. 19, 2001) ("*Pennsylvania 271 Order*").

[58] *C.f.,* Order at 177.

work times,[59] and reduced NRCs by a factor of 65%. *Id.* at 76-77. The New Hampshire Public Service Commission also recently determined that "we are convinced that Bell Atlantic's NRC figures are too high because its survey samples are very small and subject to upward bias."[60] This led to a reduction in SME survey times of 36%. The Commission could have taken similar action here and reduce Sprint's work times by an appropriate factor.

IX. NON-RECURRING OSS CHARGES

It is uncontroverted that Sprint's OSS is "not fully developed and is being held until more demand is evident."[61] It is also uncontroverted that there are productivity and process improvements available to Sprint for its OSS, and that those improvements when made "would reduce the amount of manual intervention or manual work needed for processing the order." *Id.* Sprint has placed these improvements are on hold until additional demand materializes. *Id.* Sprint based its fallout percentages in its OSS NRC cost study on its actual experience.[62] Thus, the manual intervention required by its existing OSS would be reflected in inflated OSS charges.

The Commission validated Sprint's charges stating that there is "no requirement that Sprint, or any other ILEC, use some hypothetical, fully automated, near perfect OSS as FDN would have us believe."[63] The Commission stated that it agreed with Sprint that the FCC only

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[59] *Investigation of Total Element Long-Run Incremental Cost (TELRIC) Studies and Pricing of Unbundled Network Elements*, Maine Public Utilities Commission Docket No. 97-505, Order at 75 (Feb. 12, 2002) ("*ME UNE Order*").

[60] *Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, New Hampshire Public Service Commission Docket No. DT 97-171, Order Granting In Part and Denying in Part, Order No. 23,738 at 63-64 (July 6, 2001) ("*NH SGAT Order*").

[61] Order at 161.

[62] Ex. No. 13, JRD-1D (Davis Deposition) at 75: 1-3.

[63] Order at 162.

requires a network to be "the most efficient, least-cost and reasonable technology currently available . . . ."[64]

The Commission correctly stated, but incorrectly applied, the standard. There is no dispute that the productivity and process improvements represent "efficient technology" that is "currently available" to Sprint. Sprint's failure to utilize this technology is irrelevant for costing purposes. The Commission's reading of the rule makes "currently available" the OSS system that Sprint is currently using. This represents pricing based on Sprint's embedded network and that is clearly proscribed by the FCC's rules and the 1996 Act.[65]

There are strong policy reasons why the 1996 Act and the FCC's rules require forward-looking pricing based on the most efficient technology available and the rationale is readily apparent in this context. If the Commission allows Sprint to price NRCs on the basis of manual OSS, the demand needed to support electronic OSS will never materialize. The high NRCs coupled with the arduous manual processing of the orders will suppress demand such that competition will never develop. Sprint will have no incentive to improve its ordering process.

Requiring Sprint to base its nonrecurring costs on the most efficient OSS technology currently available will give Sprint the correct incentive to deploy the technology. TELRIC's use of the most forward-looking technology currently available mimics technology choices that would be made in a competitive market.[66] In a competitive market, Sprint would be forced to

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[64] Order at 160 (emphasis in original).

[65] In fact, the Commission appears to be relying on the U.S. Court of Appeals for the Eighth Circuit's interpretation of the Act as requiring rates based on the "actual" not "hypothetical" "cost ... of providing the ... network element," an interpretation that was clearly invalidated by the U.S. Supreme Court. *Verizon Communications, Inc. v. FCC,* 122 S.Ct. 1646, 1666-1667 (2002) (Noting that what the incumbents call the "hypothetical" element is simply the element valued in terms of a piece of equipment an incumbent may not own.)

[66] *Local Competition Order* at ¶ 683.

deploy the most efficient technology to lower its costs of service. Thus, Sprint's nonrecurring costs should reflect use of such technology.

X. THE COMMISSION FAILED TO CONSIDER WHETHER ITS RATES MAY DISCOURAGE COMPETITION AND DID NOT ESTABLISH FAIR AND REASONABLE RATES

The Commission, despite stating that its goal was to "encourage competition," also failed to consider the impact the particular rates would have on competition. Since the Commission invoked the goal of "encouraging" competition and since it has concomitant duties of ensuring fair and reasonable rates and promoting the public interest in the state of Florida, the Commission should have been vigilant that the rates it set for Sprint were not too high such that they may imperil competition. Unfortunately, while there was much talk about the Commission's design to promote competition, the Commission's actions can readily be shown to contradict those words. The Commission set Sprint UNE rates that are not only significantly higher than those currently in effect, thereby raising the bills of the ALECs struggling to compete in Sprint territory today, but the Commission approved rates which have absolutely no basis in reason when put in the context of the competitive market place. Hence, competition is not "encouraged" in Sprint territory as the Commission said it had intended; indeed, just the opposite is the obvious product of the Commission's order. Thus, the Commission's order is but a paradox, and this paradox cannot survive any test of reasonableness or the reconsideration standard.

The Commission's order does not explain how a price increase promotes competition, and, yet, the Commission approved a substantial price increase while claiming it promotes competition. Neither the staff recommendation nor the order shows any comparison of current Sprint UNE rates and the Commission's approved UNE rates. A simple comparison of the two

would have made it obvious that the Commission's approved loop rates were higher overall. On the surface, there is just one apparent rate decrease for UNE loops – that, in Zone 1, from a recurring charge of $11.73 to $10.82. However, that decrease is entirely illusory. There are just four wire centers in Zone 1 per the Commission's order, so the dozens of former Zone 1 wire centers where Movants have loops are now, at best, in Zone 2 where the monthly recurring rate is $17.63 – an increase of $5.90 per loop over the old Zone 1 rate. Even comparing the Zone 2 rates and the Zone 3 rates straight up, current and approved, side by side, displays a rate increase notwithstanding the impact of the Commission's shifting wire centers from zone to zone to produce a rate increase through the manipulation of rate structure. It is axiomatic in rate setting that price influences consumption. It is common knowledge that UNE loop rates across the country are coming down. Further, it is understood that the TELRIC methodology is designed to produce economical UNE loop rates, assuming a least-cost forward-looking network. And, yet, the Florida Commission does not square any of this to its decision to grant Sprint UNE rate increases. Rather, the Commission summarily, and without support, concludes that its decision will promote competition.

This Commission is entrusted with setting fair and reasonable rates, and promoting the public interest. The Commission cannot look at set fair and reasonable rates in a vacuum. The Commission must look at the impacts of its decision. Since one of the Commission's stated goals in setting rates is to "encourage competition" the Commission should have examined whether the UNE pricing dooms competitors to failure. The Commission failed to conduct such an analysis; instead, the Commission, without any basis to support its finding, declared its approved rates fair and reasonable and conducive to competition. A simple comparison of the Commission's approved wholesale rates to Sprint's retail rates illustrates the absurdity of the

Commission's ruling. As shown in Exhibit A attached hereto, even the lowest UNE loop rate is higher than the highest Sprint retail residential rate. The average UNE cost per 2-wire analog circuit across all Sprint network lines ($26.20) is higher than the highest Sprint Retail Flat Rate Business Line ($24.56). In addition, the lowest wholesale non-recurring charge for installation of a first UNE 2-wire analog circuit ($119.74) is **70%** higher than the highest retail non-recurring charge for installation of a flat rate business line ($66.40).

Exhibit B provides a more detailed comparison in five specific wire centers. In Punta Gorda, a UNE loop costs Movants $45.40, while a Sprint residential customer can get a line for $8.17 and a Sprint business customer can get a line for $19.14. A CLEC has no hope of mitigating this cost gap through other means, particularly where the CLEC also faces an additional cost over the retail nonrecurring charges of $60.09 for the residential customer and $49.89 for the business customer. The disparity in the nonrecurring costs alone is a permanent disincentive for the ALEC to enter the Sprint market. This wire center is symptomatic of all that is infirm with the new Sprint wholesale zones and rates. The stark, and insurmountable, gaps between the wholesale and retail rates ensure that both residential and business customers in this area will never realize the benefits of competitive providers.

In West Kissimmee, a UNE loop costs Movants $24.68, while a Sprint residential customer can get a line for $8.17 and a Sprint business customer can get a line for $19.14. Thus, while the negative margins in regard to recurring cost are somewhat less for the business customer, they still remain stark for the residential customer, and the CLEC still also faces the additional cost for non-recurring charges. Once again high wholesale rates will operate to preclude competition in this area.

In Fort Myers, a UNE loop costs Movants $24.68, while a Sprint residential customer can get a line for $9.71 and a Sprint business customer can get a line for $22.78. The negative margins in regard to recurring monthly costs have narrowed more, but still the CLEC cannot afford to enter or remain in the market and continues to face the additional higher up-front cost through the non-recurring charges. In this wire center, higher wholesale rates foil competition in both the business and residential markets. While the negative margin is somewhat smaller in the business market, there are once again huge installation cost deficits to overcome.

In Tallahassee (Blairstone), the wholesale UNE rate of $ 17.63 is substantially higher than the retail residential rate of $ 9.88. While there is a prospect for a marginal profit on the business side, significant installation costs need to be overcome. The margin is still negative for residential services, and the differential between retail and wholesale installation, again, presents an obstacle to competition.

Finally, in Maitland, a UNE loop costs Movants $10.82, while a Sprint residential customer can get a line for $10.47 and a Sprint business customer can get a line for $24.56.[67] This wire center represents a "best case" scenario, as the wire center is in the lowest cost UNE band and highest rated retail rate group. Even under this "best case" scenario, however, the retail residential rate is lower than the wholesale rate, and the retail business installation rate is significantly lower than the wholesale installation rate.

There are only four of these "best case" wire centers in the **entire** Sprint region. Florida's consumers cannot accept a result whereby this Commission claims it promotes competition by creating a viable environment for competitors in just the 112,000 line market that is Sprint Zone 1 while the balance of Sprint's 2,079,800 lines in Zones 2 – 4 have no hope for the

[67] Exhibit C.

benefits of facilities-based competition because of this Commission's decision. Further, the Commission must bear in mind that the above comparisons only account, on the wholesale side, the cost of the loop itself and not the other costs an ALEC would incur in acquiring the customer and providing service. In addition, this analysis is only for the 2-wire loops and not the DS1 loops that are particularly important for business customers – the effect of the Commission's final decision are rate increases from 25% to over 400%.

The approved UNE rates, especially the 2-wire and DS1 rates, will deter and ultimately extinguish competition in Sprint territories. The Commission has an obligation to ensure that a telephone company's rates are fair and reasonable.[68] The Commission cannot make an assessment of what constitutes fair and reasonable rates without considering the impact of its rate and rate structure decisions. For a number of years, this Commission, in the context of monopoly utility services, reviewed as part of its Staff's recommendation an analysis of what effect the new rates and rate structures would have on customers' bills. Today, however, the Commission considers changes in UNE rates and deaveraging methodologies in a vacuum at Agenda – looking just at the rates themselves and manipulating same without giving any meaningful consideration or conducting any analysis of the impact of these numbers on customers and the marketplace. Thus, the Commission has no basis to support its finding that these rates are fair and reasonable or will promote competition.

The Commission has set as its standard a rate structure that, among other things, "has the greatest likelihood of encouraging competition."[69] Yet it failed to conduct the requisite analysis to determine if its chosen approach would encourage competition. It is clear that not only does

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[68] *International Telecharge, Inc. v. Wilson*, 573 So.2d 816 (1991).

[69] Order at 29.

the Commission's approach not encourage competition, but will instead doom it to failure. For the Commission to set impact on competition as a standard, and then to ignore the standard, is a clear error. A comparison of Sprint's UNE rates in Florida with Sprint's retail rates demonstrate that UNE rates are set too high to permit profitable entry in the residential marketplace and that they also foreclose entry into the vast majority of the business marketplace. Thus, rather than encouraging competition in the Sprint area, the Commission is dooming it to failure. The ultimate losers are the consumers in the Sprint region who will not be able to enjoy the benefits of competition. The Commission needs to make the corrections urged by Movants in the preceding sections not only to undo mistakes of law, but to truly encourage competition.

XI. CONCLUSION

For the foregoing reasons, the Commission should grant the Motion for Reconsideration of Florida Digital Network, Inc. and KMC Telecom III, LLC.

Respectfully submitted,

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Dated: January 23, 2003

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)	))))	Docket No. 990649B-TP Filed: January 23, 2003

EXHIBIT A

Wholesale/Retail Rate Comparison

Sprint UNE / Retail	Overview Sheet	
WHOLESALE		
SPRINT UNE 2 Wire Analog Loop	MRC Loop Only	NRC 1st Line
PSC Approved 12/02		
BAND 1	$10.82	$119.74 (w/ NID) $111.24 (w/o NID)-
BAND 2	$17.63	$119.74 (w/ NID) $111.24 (w/o NID)
BAND 3	$24.68	$119.74 (w/ NID) $111.24 (w/o NID)
BAND 4	$45.40	$119.74 (w/ NID) $111.24 (w/o NID)
Simple Rate Average	$24.63	
Rate Average Adjusted for lines by Bands	$26.20	
RETAIL		
Sprint Centel Rates by Rate Group	Residential Flat Rate Line MRC	Residential NRC First Line
Rate Group 1	$7.57	$51.15
Rate Group 2	$8.04	$51.15
Rate Group 3	$8.44	$51.15
Rate Group 4	$8.90	$51.15
Rate Group 5	$9.36	$51.15
Rate Group 6	$9.88	$51.15
Sprint Centel Rates by Rate Group	Business Flat Rate Line MRC	Business NRC First Line
Rate Group 1	$17.03	$66.40
Rate Group 2	$18.06	$66.40
Rate Group 3	$18.98	$66.40
Rate Group 4	$20.05	$66.40
Rate Group 5	$21.07	$66.40
Rate Group 6	$22.24	$66.40
Sprint United Rates by Rate Group	Residential Flat Rate Line MRC	Residential NRC First Line
Rate Group 1	$6.62	$51.15
Rate Group 2	$7.38	$51.15
Rate Group 3	$8.17	$51.15
Rate Group 4	$8.93	$51.15
Rate Group 5	$9.71	$51.15
Rate Group 6	$10.47	$51.15
	Business Flat Rate Line MRC	Business NRC First Line
Rate Group 1	$15.56	$61.35
Rate Group 2	$17.36	$61.35
Rate Group 3	$19.14	$61.35
Rate Group 4	$20.93	$61.35
Rate Group 5	$22.78	$61.35
Rate Group 6	$24.56	$61.35

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)	))))	Docket No. 990649B-TP Filed: January 23, 2003

EXHIBIT B

Wire Center Rate Comparison

	EXAMPLE SHEET			
LSO				
	WHOLESALE		**RETAIL**	
FTMYFLXB				
Fort Meyers	**UNE BAND**	3	5	**Rate Group**
	Circuit Cost MRC	$24.68	$9.71	**Retail Residential MRC**
	Circuit Cost NRC	$119.74	$51.15	**Residential NRC 1st**
	Circuit Cost MRC	$24.68	$22.78	**Retail Business MRC**
	Circuit Cost NRC	$119.74	$61.35	**Business NRC 1st**
	WHOLESALE		**RETAIL**	
KSSMFLXB				
West Kissimmee	**UNE BAND**	3	3	**Rate Group**
	Circuit Cost MRC	$24.68	$8.17	**Retail Residential MRC**
	Circuit Cost NRC 1st	$119.74	$51.15	**Residential NRC 1st**
	Circuit Cost MRC	$24.68	$19.14	**Retail Business MRC**
	Circuit Cost NRC 1st	$119.74	$61.35	**Business NRC 1st**
	WHOLESALE		**RETAIL**	
MTLDFLXA				
Maitland	**UNE BAND**	1	6	**Rate Group**
	Circuit Cost MRC	$10.82	$10.47	**Retail Residential MRC**
	Circuit Cost NRC 1st	$119.74	$51.15	**Residential NRC 1st**
	Circuit Cost MRC	$10.82	$24.56	**Retail Business MRC**
	Circuit Cost NRC 1st	$119.74	$61.35	**Business NRC 1st**
	WHOLESALE		**RETAIL**	
PNGRFLXA				
Punta Gorda	**UNE BAND**	4	3	**Rate Group**
	Circuit Cost MRC	$45.40	$8.17	**Retail Residential MRC**
	Circuit Cost NRC	$119.74	$51.15	**Residential NRC**
	Circuit Cost MRC	$45.40	$19.14	**Retail Business MRC**
	Circuit Cost NRC	$119.74	$61.35	**Business NRC**
	WHOLESALE		**RETAIL**	
TLHSFLXDDS0				
Tall-Blairstone	**UNE BAND**	2	6	**Rate Group**
	Circuit Cost MRC	$17.63	$9.88	**Retail Residential MRC**
	Circuit Cost NRC	$119.74	$51.15	**Residential NRC**
	Circuit Cost MRC	$17.63	$22.24	**Retail Business MRC**
	Circuit Cost NRC	$119.74	$66.40	**Business NRC**

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 23rd day of January, 2003.

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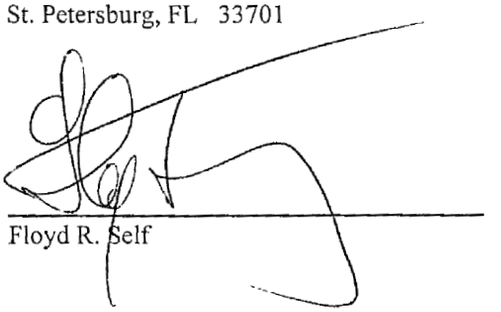

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