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July 17, 2003

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 990649B-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and fifteen (15) copies of Sprint-Florida, Incorporated's Response to, and Motion to Strike, Florida Digital Network, Inc. and KMC Telecom III, LLC's Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for a New Hearing.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Yours truly,

John P. Fons

Enclosures

cc: All parties of record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
Pricing of Unbundled Network
Elements (Sprint Phase)

DOCKET NO. 990649B-TP
FILED: July 17, 2003

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SPRINT-FLORIDA, INCORPORATED'S RESPONSE TO, AND MOTION TO STRIKE, FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM III, LLC'S JOINT NOTICE OF STATUTORY NON-COMPLIANCE WITH PROPOSED MEANS TO CURE AND SUGGESTION FOR A NEW HEARING

Sprint-Florida, Incorporated ("Sprint"), pursuant to Rule 28-106.204, Florida Administrative Code, respectfully submits its Response ("Response") to the untimely, unauthorized and contumacious pleading[1] filed by Florida Digital Network, Inc. ("FDN") and KMC Telecom III, LLC ("KMC"), styled "Joint Notice of Statutory Non-Compliance With Proposed Means to Cure and Suggestion for a New Hearing" ("Joint Notice") and moves to strike the Joint Notice, stating as follows:

I. Statutory Non-Compliance

1. FDN and KMC's Joint Notice was filed on July 8, 2003, alleging a "Statutory Non-Compliance" on the basis that Commissioner Charles M. Davidson should have been required to vote on FDN and KMC's Motion for Reconsideration of the Commission's Order No.

[1] FDN and KMC's Joint Notice is facially frivolous. But it is more than that: It is an unauthorized and improper filing, which calls upon the Commission to commit an illegal act. There is nothing in the statutes governing the Commission or telecommunications companies, and there is nothing in the Administrative Practices Act, the Florida Administrative Code, or the Commission Rules that authorizes or countenances FDN and KMC's pleading, regardless of how it is styled or how it is perceived. Sprint believes that the Commission is obligated to disregard this Joint Notice and the Commission can and should issue its Order on FDN and KMC's Motion for Reconsideration forthwith. At the appropriate time, Sprint will file its Motion with the Commission seeking attorneys' fees and costs pursuant to Section 120.595, Florida Statutes.

PSC-03-0058-FOF-TP ("Final Decision"), issued on January 1, 2003.[2] The Joint Notice suggests that it was a "non-compliance" with Florida law for Commissioner Davidson not to cast his vote to break a tie vote on Issue 3 in KMC and FDN's original Motion for Reconsideration.

2. The Joint Notice relies upon Section 286.012, Florida Statutes, as the basis for its unprecedented claim that Commissioner Davidson, because he was present in the hearing room on June 17, 2003, when FDN and KMC's Joint Motion for Reconsideration was being considered and voted upon, was required to cast his vote, yea or nay. It is further contended that Commissioner Davidson's failure to vote amounts to an unlawful abstention. Section 286.012, Florida Statutes, is directed at preventing members of governmental bodies from abstaining from voting on an "official decision," except when there is, or there appears to be, a conflict of interest. This statute is totally inapplicable to Commissioner Davidson's "non-vote" during the Commission's deliberations on FDN and KMC's Petition for Reconsideration. Commissioner Davidson's action - or inaction - is governed by Section 350.01(5), Florida Statutes, which unequivocally prohibits him from voting upon FDN and KMC's Joint Motion for Reconsideration. Thus, because he had no authority to vote in the first place, in no way can Commissioner Davidson's action be considered an abstention.

3. The Joint Notice acknowledges the existence of Section 350.01(5), Florida Statutes, which provides that: "A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." However, KMC and FDN have the audacity to suggest that this provision "has been erroneously applied, and another provision of subsection (5) violated." Joint Notice, at ¶ 12. The rationale offered in the Joint

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[2] FDN and KMC contend that their Joint Notice is filed pursuant to Rule 28-106.211, Florida Administrative Code. That Rule provides no basis for filing FDN and KMC's Joint Notice. That rule relates to Conduct of Proceedings as applicable to the authority of "the presiding officer" to issue orders "to effectuate discovery, to prevent delay, and to promote the just, speedy and inexpensive determination of all aspects of the case, including bifurcating the proceeding." If anything, FDN and KMC's Joint Notice is the antithesis of promoting a "just, speedy, and inexpensive determination." In fact, there is nothing in the Administrative Code or the Commission's Rules that permits the instant Joint Notice.

Motion suggests that, because the full panel that voted on the final decision was no longer available and the chair was required by Section 350.01(5) to assign a substitute commissioner, the substitute Commissioner would thereby have authority to vote on "a petition for reconsideration." In the words of the Joint Notice: "The Commission thus violated the substitution provision in favor of a flawed reading of the reconsideration provision." Joint Notice, at ¶ 14 (emphasis added).

4. Contrary to FDN and KMC's assertion, there has been no flawed reading of the "reconsideration" provision or the "substitution" provision of Section 350.01(5), Florida Statutes. It is FDN and KMC's reading of Section 350.01(5), Florida Statutes, that is "flawed," contrived, self-serving and erroneous. The "substitution" provision is applicable only to the pre-final determination phase of the Commission's proceedings. See, *In re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, LCC*, Order No. PSC-99-2438-PAA-EU219, in Docket No. 991462-EU, issued December 13, 1999 at page 9, in which the Commission correctly explains the application of the substitution provision this way: "Because this Commission currently consists of only four sitting Commissioners, assigning this matter to the full Commission creates the possibility of a tie vote. We are cognizant of this possibility, yet we are compelled to approve assignment to the full Commission to consider the regulatory policy implications of this case. We note that a fifth Commissioner may be appointed prior to hearing on this matter. Our decision should be construed as assigning this case to be heard and decided by all sitting Commissioners as of the hearing date for this case. Thus, if a fifth Commissioner has been appointed by the hearing date, that Commissioner will take part in hearing and deciding this case." (emphasis added)

5. If the "substitution" provision were to be interpreted otherwise, there would be no need for the "reconsideration" provision of Section 350.01(5). In fact, if Section 350.01(5) were

to be read as FDN and KMC suggest, then the "reconsideration" provision would be rendered meaningless. Adoption of FDN and KMC's reading of the "reconsideration" provision would mean that the chair could add or remove commissioners after a vote on a final decision - perhaps as a means of steering the outcome in a way favored by the Chair. This is just what the "reconsideration" provision was designed to prevent, and the words of that provision mean what they say. *Hechtman v. Nations Insurance of New York*, 840 So.2d 993 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Id.* at 996). In this case, the Chair correctly followed the law to the letter.

6. The cases cited by FDN and KMC to bolster their argument that Commissioner Davidson is required to have cast a vote to break the tie vote on reconsideration are inapplicable. In fact, these cases actually support the wisdom of him not voting. FDN and KMC contend that Commissioner Davidson is, notwithstanding the requirements of the "reconsideration" provisions of Section 350.01(5), Florida Statutes, required to vote because Section 286.012, Florida Statutes, requires him to vote, and a.) the two statutes cover the "same subject," and b.) any conflict between the two statutes must be construed so as to give effect to both. This argument turns on whether the two statutes cover the same subject area and whether they conflict. Clearly, they do not cover the same subject area (Section 286.012, Florida Statutes, covers general situations in which the abstainer may or may not vote because of a "conflict of interest," while the "reconsideration" provision of Section 350.01(5), Florida Statutes, applies only to the Florida Public Service Commissioners and only in a very specific voting situation), nor do they conflict (there is nothing in the "reconsideration" provision of Section 350.01(5), Florida Statutes, that invalidates the purpose or application of Section 286.012, Florida Statutes).

7. Even assuming, *arguendo*, that the two statutes cover the same area, the "reconsideration" provision is the specific exception to the more general provisions of Section 286.012, Florida Statutes, which provide one exception to voting; namely, a conflict of interest. Here the specific statutory exception is that the Commissioner cannot vote because he or she did not vote on the final disposition. As stated in the case cited by FDN and KMC, *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249, 251 (Fla. 1987); "in effect, the specific statute operates as an exception to the general (citations omitted)." Also, the Supreme Court in the *Palm Harbor* case approved the district court's analysis and conclusion because it construed "the statutes in question to give effect to both." *Id.* So, too, the Commission, here, gave effect to both statutes by not allowing or requiring Commissioner Davidson to vote to break the tie on reconsideration. It is wrong to suggest, as FDN and KMC have argued, that the "substitution" provision can "trump" the clear intent of the "reconsideration" provision.

8. In further support of their flawed reading, FDN and KMC point out that Commissioner Bradley replaced Commissioner Jacobs while the matter was still pending before a final decision. In their view, Commissioner Davidson should, therefore, have been substituted for Commissioner Palecki, who participated "in the final disposition of the proceeding" on December 2, 2002, but is no longer "available" because he was replaced by Commissioner Davidson on January 7, 2003. Joint Notice, at ¶¶ 20 and 21. FDN and KMC's position is based upon their distorted reading of the "substitution" language in Section 350.01(5), Florida Statutes, which requires that the chair shall assign a substitute commissioner, "[i]f a commissioner becomes unavailable after assignment to a particular proceeding." As noted previously, the "substitution" requirement applies only when the unavailability of a commissioner occurs before there is a "final disposition of the proceeding," not after a final disposition as is the case here.

9. Next, FDN and KMC contend that, because Commissioner Davidson replaced Commissioner Palecki, Commissioner Davidson should be included as one of the five member panel that participated "in the final disposition of the proceeding" on December 2, 2002. In their view, this means that Commissioner Davidson is the "successor" to the same "office" held by Mr. Palecki and should have been "franchised" by the Chair to vote on reconsideration just as if he were Commissioner Palecki's alter ego. Joint Notice, at ¶ 21. There is nothing in Florida law and nothing found in Commission precedent that would support such a bizarre result. In fact, a simple reading of the "reconsideration" provision makes it clear that it applies to the specific Commissioner, not to an "office." The language of the "reconsideration" provision applies to "those commissioners participating in the final disposition of the proceeding." (Emphasis added.) The term "those" is used to identify the "same" Commissioners that participated in the final disposition of the proceeding. *See, Re Aloha Utilities, Inc.*, 2003 WL 1818162 (Fla. P.S.C.) *6 ("[I]t follows that the same Commissioners who ruled on the Motion for Emergency Relief should rule on the Motion for Reconsideration of that decision."[3] (Emphasis added.)) Commissioner Davidson was not one of the same commissioners.

II. Proposed Means to Cure

10. FDN and KMC contend that the alleged "violation of law" can be cured. The "Proposed Means to Cure" would require Commissioner Davidson to a.) be appointed to the

[3] The Commission has consistently interpreted the reconsideration provision in this manner. See also, *In re: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITCDeltaCom for arbitration of certain unresolved issues in interconnection negotiations between ITCDeltaCom and BellSouth Telecommunications, Inc.*, Order No. PSC-00-2233-FOF-TP, Docket No. 990750-TP, issued November 22, 2000 at page 2; *In re: Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers*, Order No. PSC-99-1453-FOF-TP, Docket No. 981008-TP, issued July 26, 1999 at page 15; *In re: Petition for emergency relief by Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc. concerning collocation and interconnection agreements*, Order No. PSC-99-0047-FOF-TP, Docket No. 980800-TP, issued January 5, 1999 at page 15.

panel; b.) review the record; and c.) vote on whether to grant FDN and KMC's Joint Motion for Reconsideration of the Commission's January 8, 2003, Order. The proposed "Cure" is worse than the alleged "Non-Compliance." As noted earlier, FDN and KMC's "proposed means to cure" is itself a proposal to violate the "reconsideration" provision of Section 350.01(5), Florida Statutes. The suggestion that Commissioner Davidson can "cure . . . . his failure to have his vote recorded and counted as required by Section 286.12, by reviewing the record in this proceeding, and then participating in a consideration of the Joint Motion for Reconsideration" (Joint Motion, at ¶ 24) would not, as discussed previously, legitimize a clearly prohibited vote by Commissioner Davidson on FDN and KMC's Petition for Reconsideration.

11. The case cited by FDN and KMC in support of their proposed "cure," *Collier Development Corporation v. State Department of Environmental Protection*, 685 So.2d 1328 (Fla. 2nd DCA 1996), is inapplicable to the current situation. The *Collier* case involved the propriety of a substitute hearing officer - at the hearing stage - reviewing the hearing transcript, exhibits, etc. of a matter and rendering a decision without holding a "denovo" hearing. The Court concluded that Section 120.57(1)(b)(ii), Florida Statutes, controls. That section specifically requires that the substitute hearing officer "use any existing record. . . " to reach his or her decision. That is not the situation here. The final decision has already been made, Commissioner Davidson did not participate in that decision, and he cannot now be brought in to second-guess that decision.

12. Obviously, if there has been no "statutory non-compliance," there is no basis or need to employ FDN and KMC's "proposed means to cure." Because FDN and KMC's "Notice of Statutory Non-Compliance with Proposed Means to Cure" provides no basis in law or fact that the Commission is in any "Statutory Non-Compliance," and because its proposed "Means to

Cure" would require the Commission to violate a clear statutory prohibition, the Commission should strike FDN and KMC's Joint Notice as an unauthorized and frivolous pleading.

III. Suggestion for New Hearing

13. The balance of FDN and KMC's Joint Notice is devoted to reasons why "the full Commission should, on its own motion, reconsider the Sprint Order." ¶¶ 26-49. This section of FDN and KMC's Joint Notice should be stricken because it is, in reality, nothing more than a shameless effort to seek reconsideration of an order on reconsideration. By its own Rules, the Commission "will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration." Rule 25-22.060(1)(a), Florida Administrative Code. Disguising the true intent of the pleading by urging the Commission to reconsider the "Sprint Order" on its own motion does not allow FDN and KMC to escape the prohibition against motions to reconsider a denial of reconsideration. Even if the "Suggestion for Hearing" is construed by the Commission not to be a motion to reconsider an order disposing of a motion for reconsideration because the order has not yet been issued, the "Suggestion for Hearing" must still be rejected because it is an untimely "Motion for Reconsideration" of the original Sprint Order - the time for filing a motion for reconsideration of that order expired in January 2003. Thus, FDN and KMC's "Suggestion for New Hearing" is just another example of FDN and KMC's flagrant disregard for the Commission's Rules, the Administrative Procedures Act, and the Florida Administrative Code, by filing an unauthorized and "frivolous" pleading.

14. Each recitation made by FDN and KMC to support their "Suggestion for New Hearing" is either patently outside the record evidence, or it is a blatant rehash of those arguments rejected by the Commission in its Order No. PSC-03-0058-FOF-TP, issued on January 8, 2003, and rejected again at the Commission Agenda on June 17, 2003, at which time the Commission considered FDN and KMC's Joint Motion for Reconsideration. Not only are

FDN and KMC prohibited from raising anything new at this stage of the proceeding, they have, in fact, raised nothing new. FDN and KMC's actions are the actions of petulant children whining that they must have their way. This dysfunctional behavior must be stopped now or the Commission is sure to get more of the same, resulting in procedural chaos.

15. Perhaps the most striking evidence of the abusive nature of FDN and KMC's Joint Notice is that the only issue previously on reconsideration that could be affected by this faux pleading is the rate structure of Sprint's UNE rates (Issue 3 in FDN and KMC's original Motion for Reconsideration). The rate structure issue is the only issue upon which a fungible fifth commissioner would have been asked, under the ludicrous theory proposed by FDN and KMC, to break the tie. Nevertheless, having constructed this nonsensical defect in the process, FDN and KMC seek to reargue the entire case, including the cost levels, which were matters that were disposed of unanimously by the panel that sat on final disposition and by the four remaining Commissioners on reconsideration. Even assuming, *arguendo,* that there was a procedural defect in need of a "cure," Commissioner Davidson's lone vote could not impact the outcome on all the other issues. The length and breadth of the argument on the underlying costs betrays the true motivation of the entire pleading as a thinly disguised effort to reargue a matter that has already been decided on reconsideration.

16. Finally, the "Suggestion for New Hearing" is couched in terms of the Commission being urged to reconsider its final decision on its own motion. Even if the Commission were to harbor any interest in pursuing the "suggestion," the law is quite clear that the Commission's inherent authority to reconsider a decision on its own motion is limited. *Reedy Creek Utilities Co. v. Florida Public Service Commission*, 418 So. 2d 249, 253 (Fla. 1982); *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 338 (Fla. 1966) In the *Reedy Creek* case, which involved amending a prior order to correct a FPSC staff error in calculating the appropriate amount to be

refunded by a utility based on the terms of a previously approved stipulation, the Florida Supreme Court stated "[t]he power of the Commission to modify its orders is inherent by reason of the nature of the agency and the functions it is empowered to perform. This inherent authority to modify is not without limitation." FDN and KMC's suggestion of a total abandonment of the Commission's Sprint Order policy decisions clearly exceeds this limited authority. FDN and KMC's reliance on *Reedy Creek* for the proposition that the Commission should "throw out the Sprint Order and start over" (Joint Motion at ¶ 43) is totally misplaced. Although the Commission has not yet issued its order on reconsideration and the matter technically has not passed out of its hands, the Commission's inherent authority to change a final order on its own motion is limited to correcting clear errors, not changing fundamental policy decisions. See, *Sunshine Utilities v. Florida Public Service Commission*, 577 So. 2d 663, 665 (Fla. 1st DCA 1991) (involving the Commission's revision of a prior order relating to the establishment of rates for a water and wastewater company based on the Commission's determination that the factual premise for its prior order was in error); *Taylor v. Department of Professional Regulation*, 520 So.2d 557,560 (Fla. 1988) (holding that an administrative tribunal, exercising quasi-judicial powers, may correct its own orders, but "simply for the purpose of correcting clerical errors and inadvertent mistakes").

WHEREFORE, the Commission should either disregard, deny or strike FDN and KMC's Joint Notice, including the suggestion for a new hearing, as an unauthorized and frivolous pleading and, further, the Commission should issue its Order on Reconsideration in this matter forthwith and without further delay.

Respectfully submitted this 17th day of July, 2003.

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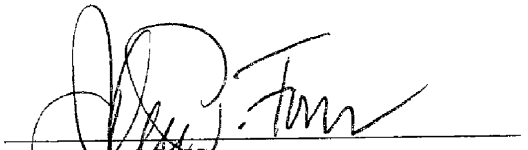

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ATTORNEYS FOR SPRINT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail transmission, U. S. Mail, or hand delivery (*) this 17th day of July, 2003, to the following:

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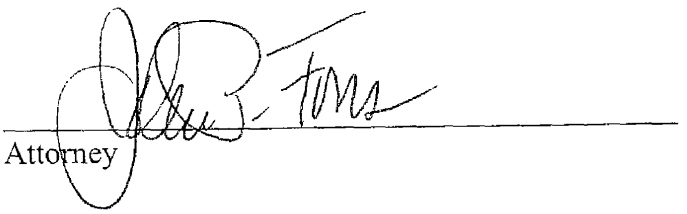

Attorney

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