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July 25, 2003

**BY HAND DELIVERY**

Ms. Blanca Bayó, Director  
Division of Records and Reporting  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 990649B-TP

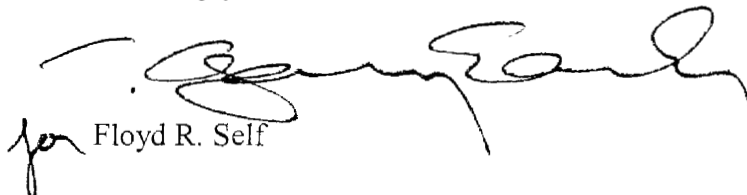
Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III, LLC are an original and fifteen copies of KMC Telecom, Inc.'s Response to Sprint-Florida, Incorporated's 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 in the above referenced docket.

Please acknowledge receipt of these documents 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,

  
for Floyd R. Self

FRS/amb  
Enclosures  
cc: Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Investigation into Pricing of )  
Unbundled Network Elements )  
(Sprint/Verizon Track) )  
\_\_\_\_\_ )

Docket No. 990649B-TP

Filed: July 25, 2003

**FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM III, LLC'S  
RESPONSE TO SPRINT-FLORIDA, INCORPORATED'S MOTION TO STRIKE  
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**

Florida Digital Network, Inc. ("FDN") and KMC Telecom III, LLC ("KMC"), pursuant to Rule 28-106.204(1), F.A.C. hereby file this response to Sprint-Florida, Incorporated's ("Sprint") Motion to Strike, and state:

1. FDN and KMC limit their response to the portion of Sprint's Motion to Strike that intimates that the Commission does not have the authority to reconsider a preliminary ruling on its own motion.

**FACTUAL BACKGROUND**

2. On January 8, 2003, the Commission entered its Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida Incorporated in the above referenced docket.

3. On January 23, 2003, FDN and KMC timely filed a Motion for Reconsideration, seeking reconsideration of the Commission's Final Order. Pursuant to Rule 25-22.060(1)(c), the January 8, 2003, order has not been "rendered" pending final disposition of the motion.

4. On June 17, 2003, the Motion for Reconsideration was heard at a scheduled meeting of the Commission in Tallahassee, Florida. The motion was discussed, and a preliminary oral vote

of four commissioners was taken. However, that disposition does not become final until it is reduced to writing and filed with the Commission's agency clerk. Section 120.52(7), Fla. Stat. (2002); see also Rule 9.020(h)(1), Fla. R. App. P. ("If such a motion or motions [including a motion for rehearing, clarification, etc.] have been filed, the final order shall not be deemed rendered with respect to any claim between the movant and any party against whom relief is sought by the motion or motions until the filing of a signed, written order disposing of all such motions between such parties.")

## ANALYSIS

5. The case of *Reedy Creek Utilities Co. v. Florida Public Service Commission*, 418 So.2d 249 (Fla. 1982), stands for the proposition that the Commission has the authority to modify or clarify its orders, **even when they have become final**. As stated by the court:

The 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. In *Peoples Gas System v. Mason*, 187 So.2d 335 (Fla.1966), this Court set forth the rule that:

The effect of these decisions is that orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

*Reedy Creek* at 253.

6. The ability to modify a preliminary and non-final oral ruling as presented in this case is even clearer than the facts as presented in *Reedy Creek*. In *Reedy Creek*, a written order had been

rendered by the Commission and become final. Even then, the Court found that:

An underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling. We find that Reedy Creek did not change its position during the lapse of time between orders [2½ months], and suffered no prejudice as a consequence.

*Reedy Creek* at 254.

7. In this case, a written order on the motion for reconsideration has **not** been rendered. Thus, there can be no reliance, and no prejudice. As a consequence, the Commission has ample authority to exercise its “inherent power and the statutory duty to amend its order to protect the customer.” *Reedy Creek* at 253.

8. The cases cited by Sprint to support its Motion to Dismiss are based on the theory that the Commission is limited in its ability to modify its June 17, 2003, preliminary oral vote on the Motion for Reconsideration. The cases cited by Sprint are facially inapposite. Aside from the fact that none of the cases dealt with a situation in which the Commission was modifying a preliminary ruling that had not become final, the cases are otherwise factually distinguishable.

9. In *Peoples Gas System, Inc. v. Mason*, 187 So.2d 335 (Fla. 1966), the Court dealt with a final order that had been rendered **4½ years** before the Commission effort to modify. Significantly, the Court found that “[t]he order here involved was not entered on rehearing or reconsideration as permitted by the commission's rules of procedure.” *Peoples Gas* at 339. Since this docket involves a case that is before the Commission on a motion for reconsideration, and since the disposition of that motion has not become final, *Peoples Gas* is inapplicable to this case.

10. In *Sunshine Utilities v. Florida Public Service Commission*, 577 So.2d 663 (Fla. 1st DCA 1991), the Court again dealt with a final order involving rate-making, this one (though the date

of the order was not identified in the opinion) apparently being rendered at least **five years** after the February 20, 1984 first order. In *Sunshine Utilities*, the Court **allowed** the modification, and held that:

In *Reedy Creek, supra*, the court recognized PSC's inherent authority to modify its orders but noted that such authority is not without limitation. See also, *Richter, supra* ("where a substantial change in circumstances, or fraud, surprise, *mistake, or inadvertence is shown* ... the PSC must have the *power to alter* previously entered **final rate orders** "). *Peoples Gas Systems, Inc. v. Mason*, 187 So.2d 335, 339 (Fla.1966), and *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So.2d 679 (Fla.1979), recognize an exception to the doctrine of administrative finality where there is a demonstrated public interest. Unlike the issues raised in those cases (authority to approve territorial agreements and the dormancy of transportation certificates), **the issue of prospective rate-making is never truly capable of finality.** (e.s.)

*Sunshine Utilities* at 666. Since this docket involves a case that is before the Commission on an issue of prospective rate-making, and since the issue in this case concerns a preliminary oral ruling that has not become final, *Sunshine Utilities* is also inapplicable to the instant case.

11. Finally, Sprint cites to *Taylor v. Department of Professional Regulation*, 520 So.2d 557 (Fla. 1988). In that case, the Court was asked to answer the following certified question:

Does an administrative agency exercising its quasi-judicial power in a license revocation proceeding have the inherent authority to change or modify its final order within a reasonable time after filing it so that the time for taking an appeal begins to run from the date of filing the amended order?

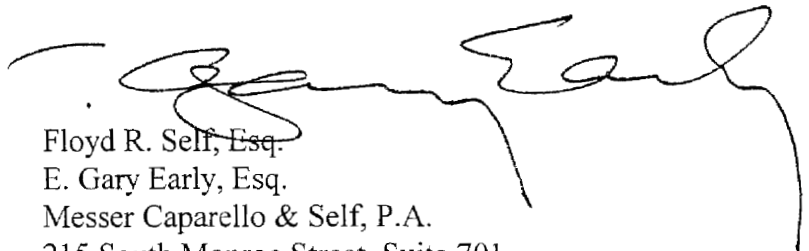
*Taylor* at 558. This Commission proceeding does not deal with either a license revocation or an exercise of quasi-judicial powers. Rather, it deals with prospective rate-making through an exercise of the Commission's quasi-legislative powers. Of equal significance in *Taylor* is the Court's comment that "[i]t is important to emphasize that this case **does not involve a petition for**

**rehearing or reconsideration.”** *Taylor* at 559 (e.s.). Therefore, for the reasons set forth herein, as well as for the overriding fact that this case concerns a preliminary oral ruling that has not become final, *Taylor* is inapplicable to this case.

## CONCLUSION

12. The Commission has the authority, upon its own motion, to take up and consider the issues raised in 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. That authority is unquestionable given that the January 23, 2003 Motion for Reconsideration has not become final. Therefore, the Commission should deny Sprint-Florida, Incorporated’s July 17, 2003, Motion to Strike.

Respectfully submitted, this 25<sup>th</sup> day of July, 2003.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U. S. Mail this 25<sup>th</sup> day of July, 2003.

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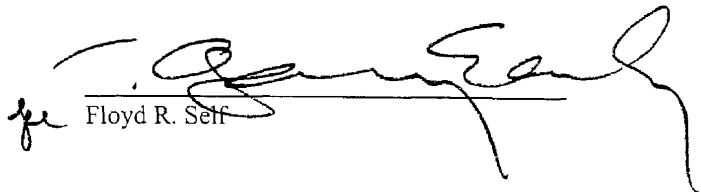
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