

AUSLEY & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

September 22, 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

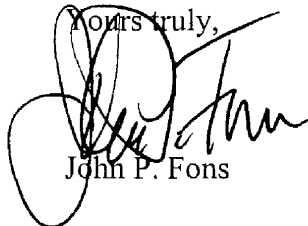
Re: Docket No. 990649B-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and fifteen (15) copies of Sprint-Florida, Inc.'s Response in Opposition to Florida Digital Network, Inc. and KMC Telecom III, LLC's Alternative Motion to Stay the Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida, Incorporated.

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

h:\jpf\utd\990649b\letters\bayo_xmtl.doc

DOCUMENT NUMBER-LATE
09074 SEP 22 8
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
Pricing of Unbundled Network
Elements

DOCKET NO. 990649B-TP
FILED: September 22, 2003

**SPRINT-FLORIDA, INC.'S RESPONSE IN OPPOSITION TO
FLORIDA DIGITAL NETWORK, INC. AND KMC TELECOM III, LLC'S
ALTERNATIVE MOTION TO STAY THE FINAL ORDER ON
RATES FOR UNBUNDLED NETWORK ELEMENTS
PROVIDED BY SPRINT-FLORIDA, INCORPORATED**

Sprint-Florida, Inc. ("Sprint"), pursuant to Rules 25-22.061 and 28-106.204, Florida Administrative Code, respectfully opposes the Alternative Motion to Stay the Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida, Incorporated ("Stay Motion") filed by Florida Digital Network, Inc. ("FDN") and KMC Telecom III, LLC's ("KMC") (collectively, "Movants"), and in response states as follows:

The Commission's Order Constitutes a Change in Law

1. FDN and KMC have asked the Commission to determine that the Commission's Final Order (Order No. PSC-03-0058-FOF-TP, issued January 8, 2003) establishing Sprint's UNE rates ("Sprint UNE Order" or "Order") is not effective unless both Sprint and the CLEC with which it has an interconnection agreement voluntarily agree to execute an amendment reflecting the new rates. This suggestion is an erroneous interpretation of both the Commission's Order and the change in law provisions of the parties' Interconnection Agreements.

2. The Movants claim rests entirely on their interpretation of the Commission's Order establishing the effective date of the new rates. On page 199 of the Order the Commission states:

We find that the recurring and nonrecurring rates and charges shall take effect when existing interconnection agreements are amended to incorporate the approved rates and the amended agreements are deemed approved by us.

This ruling applies the same standard established in the BellSouth UNE Order , Order No. PSC-01-1181-FOF-TP at page 470, and the Verizon UNE Order, Order No. PSC-02-1574-FOF-TP at page 301. It is also consistent with the Commission's rulings in other generic dockets regarding how such generic orders should be implemented, while preserving the parties' rights to voluntarily and mutually agree to other terms.¹ The language of the Order does not in itself establish the mechanism for pursuing amendments to existing interconnection agreements to reflect the rates set forth in the Order. Rather, the parties must look to the terms of their specific Interconnection Agreements to determine whether and how amendments may be pursued.

3. FDN and KMC have improperly characterized the default nature of the Sprint UNE Order. The Commission has deemed the rates in the UNE Order (and the rulings in other generic orders) as "defaults" subject to the right of parties to mutually and voluntarily agree to different terms. FDN and KMC wrongly assert that this means that the "default" rates cannot take effect unless parties mutually and voluntarily agree to them. Rather, by its very nature a default takes effect when parties are unable to otherwise reach mutual agreement on some other rates or terms. In the event that FDN, KMC and Sprint are unable to reach agreement on new UNE rates and terms, the Commission has set forth the rates and terms that it would impose should the parties bring their dispute to the Commission for resolution. As the Commission has

¹ See, e.g., Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP at page 38-39 (establishing generic reciprocal compensation policies); Docket No. 981834, Order No. PSC-99-1744-PAA-TP at page 17 (establishing generic collocation policies)

recognized in respect to other generic proceedings, the purpose of conducting generic proceedings and establishing a default is to conserve resources for parties and the Commission by providing a single forum where common intercarrier issues can be considered, and in which all interested parties have an opportunity to present evidence and arguments regarding the issues.²

4. The procedures set forth in the Interconnection Agreements for seeking an amendment to the agreement to reflect the rates in the Sprint UNE Order are operative as between the parties, and Sprint has properly followed the procedures in the Interconnection Agreements to negotiate the terms of the amendment. (*See* Sprint Letters provided as Attachments to the Stay Motion.)

Part B, Section 3.2 of the interconnection agreements between the parties provides that:

3.2 The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the texts of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date (“Applicable Rules”). In the event of any amendment of the Act, any effective legislative action or any effective regulatory or judicial order, rule, regulation, arbitration award, dispute resolution procedures under this Agreement or other legal action purporting to apply the provisions of the Act to the Parties or in which the court, FCC or the Commission makes a generic determination that is generally applicable which revises, modifies or reverses the Applicable Rules (individually and collectively “Amended Rules”), either Party may, by providing written notice the other Party, require that the affected provisions of this Agreement be renegotiated in good faith and this Agreement shall be amended accordingly to reflect the pricing, terms and conditions of each such Amended Rules relating to any of the provisions of this Agreement. (Emphasis added)³

5. Movants, however, conveniently ignore the applicable provisions of the Interconnection Agreements, choosing instead to offer a tortured construct of other provisions which have no bearing on the application of the change of law provisions to the Sprint UNE

² In individual arbitration proceedings, parties are free to introduce evidence that might be the basis for the Commission reaching a conclusion different from the conclusion it reached in the generic proceeding.

³ This provision is identical in the FDN and KMC interconnection agreements

Order. Clearly, the Order is an “effective...regulatory...order...purporting to apply the provisions of the Act to the Parties.” Such an effective regulatory order is deemed an “Amended Rule” under the terms of the Agreement. The Movants’ references to the definitions of a “rule” and an “order” in chapter 120, F.S., are inapplicable and erroneous in the context of the parties’ Interconnection Agreements.

6. Contrary to their assertions in the Stay Motion, it is Movants rather than Sprint that have failed to comply with the provisions of the Interconnection Agreements to incorporate the “change in law” reflected by the Sprint UNE Order. Section 3.3 of the applicable Interconnection Agreements provides:

3.3 Notwithstanding any other provision of this Agreement to the contrary, §3.2 hereof shall control. Any rates, terms or conditions thus developed or modified shall be substituted in the place of those previously in effect and shall be deemed to have been effective under this Agreement as of the effective date established by the Amended Rules, whether such action was commenced before or after the Effective Date of this Agreement. Should the Parties be unable to reach agreement with respect to the applicability of such order or the resulting appropriate modifications to this Agreement, either party may invoke the Dispute Resolution provisions of this Agreement, it being the intent of the parties that this Agreement shall be brought into conformity with the then current obligations under the Act as determined by the amended rules.

FDN and KMC have refused to enter into good faith negotiations to implement the changes reflected in the Sprint UNE Order. On the other hand, Sprint has not, as alleged by FDN and KMC, attempted to unilaterally impose “immediate and mandatory rates,” but rather has properly attempted to implement the rates in accordance with the Sprint UNE Order, pursuant to the change in law provisions of the parties’ Interconnection Agreements.

7. The proper response of FDN and KMC to Sprint’s invocation of the change in law provisions under the terms of the Interconnection Agreements would be for the Movants and Sprint to attempt to negotiate an amendment and, if agreement on the amendment could not be reached, to invoke the dispute resolution provisions of the Agreement (which ultimately could

result in a request for this Commission to resolve the parties' dispute concerning the proper way to implement the Sprint UNE Order). The Commission should reject Movant's attempt to circumvent this process and violate the clear terms of their Agreements. Additionally, the Commission should find that Sprint has appropriately pursued amendments to the Interconnection Agreements to reflect the new rates embodied in the Sprint UNE Order, consistent with the terms of the Order and the terms of the parties' Interconnection Agreements.

Movants have not met the criteria for granting a stay

8. Because Sprint is properly attempting to implement the rates embodied in the Sprint UNE Order in accordance with the terms of the parties' Interconnection Agreements, the Commission should deny the stay of the Order requested by the Movants. The Movants have not met the criteria for obtaining a stay set forth in Rule 25-22.061, F.A.C. First, the Movants have not demonstrated that they are likely to prevail on appeal. Mere recitations of the alleged grounds for appeal do not constitute sufficient proof that there is a reasonable basis for asserting that the Order should be overturned.⁴ The grounds asserted by the Movants are the same grounds the Movants have raised unsuccessfully with this Commission on at least three prior occasions, namely, in their briefs, in their Motion for Reconsideration and in their Joint Notice of Statutory Non-Compliance with Proposed Means to Cure and Suggestion for a New Hearing. Sprint has diligently responded to these claims in its responses to these pleadings and the Commission has consistently rejected the Movants' arguments on their merits.⁵ Movants have included nothing

⁴ See, *In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company*, Order No. PSC-96-0020-FOF-TP, Docket No. 920260 (denying FIXCA's request for a stay)

⁵ Order Denying FDN and KMC's Motion for Reconsideration of Sprint UNE Order, PSC-03-0918-FOF-TP, issued August 8, 2003; Order Denying FDN and KMC's Pleading Joint Notice of Statutory Non-compliance with Proposed Means to Cure and Suggestion for a New Hearing and Granting in Part Sprint's Motion to Strike, Order No. PSC-03-0951-FOF-TP, issued August 22, 2003.

new in their Stay Motion that would now suggest that the Commission's prior decisions were in error or that a court would likely find so. Failure to meet this criterion alone should result in the Commission's denial of the request for a stay.⁶

9. Movants renew their "shop-worn" claim that they and the public will be harmed irreparably because the UNE rates set by the Commission will prevent competition. However, they can point to no evidence to support this bald assertion, which Sprint rejects. First, the potential for competition cannot be viewed in the light of a single factor, but must be evaluated based on many factors, including population, demand, potential revenues and margins and the availability of various avenues for competing. The Movants do not attempt even a rudimentary form of the necessary analysis, but merely assert that the level of Sprint's UNE rates will prevent them from competing in Sprint's markets. A stay of the Commission's Order cannot be based on unsupported allegations that Movants will be irreparably harmed.⁷

10. While FDN and KMC allege that they will suffer harm from the implementation of the Sprint UNE Order, it is actually Sprint that is being harmed by delay in the implementation of its approved UNE rates. As the Act requires, and as the Commission has recognized, Sprint's UNE rates are TELRIC-based and, therefore, represent costs Sprint is currently incurring in providing UNEs to requesting carriers. To the extent Sprint has been prevented from imposing these cost-based rates for providing UNEs, Sprint is not today recovering its costs. If a stay is granted, Sprint will be irreparably harmed by this continuing inability to recover its costs of providing UNEs to FDN and KMC, as well as to all other CLECs. If the Commission's order is upheld on appeal (the likely outcome), there is little, if any,

⁶ See, *In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, Order No. PSC-02-1033-FOF-TP, Docket No. 001305 (denying Supra's request for a stay); *In re: Petition and complaint of Harris Corp. against BellSouth Telecommunications, Inc. concerning complex inside wiring*, Order No. PSC-97-0894-PCO-TL Docket No. 951069 (denying BellSouth's request for a stay)

⁷ See Order No. PSC-96-0020-FOF-TP, *supra*, (denying FIXCA's request for a stay)

likelihood that Sprint will be able to recoup the moneys owed to it from CLECs who have obtained UNEs at less than Sprint's costs during the pendency of the appeal.

11. FDN and KMC even wish to escape any obligation to post a bond to ensure that Sprint could, at least, recover the moneys it is due from FDN and KMC, should Sprint's UNE rates be upheld. A bond based solely on FDN's and KMC's projected UNE orders alone would not be sufficient to ensure that Sprint could be made whole since a stay of the Sprint UNE Order could prevent the rates from applying for all CLECs not just FDN and KMC. Accordingly, any bond must be based on the moneys that would ultimately be due Sprint from all of the CLECs that purchase UNEs from Sprint. While Sprint urges the Commission to deny the stay, Sprint requests, in the event that a stay is granted, that the Commission require FDN and KMC to post a bond in sufficient amount to cover all of Sprint's potential losses during the pendency of the stay and appeal.

12. The Commission has been involved in the process of setting new UNE rates for Sprint since 1999. Sprint has participated fully and with good faith in this effort, submitting TELRIC-based studies that comply with the requirements of the Act. Movants, on the other hand, have participated minimally, if at all, over the four years of the Sprint phase of this proceeding as the Commission recognized in its order denying Movants request for oral argument on their Motion for Reconsideration⁸. Instead, they have chosen to charge in at the very end of the process and attempt, in all kinds of unorthodox ways, to undo the Commission's correct and legitimate ruling that was based on the competent, substantial evidence properly presented in the course of this docket. Such antics on the part of the Movants have delayed and impeded Sprint's ability to seek implementation of the Commission's ruling for an additional nine months since the issuance of the Final Order. The Commission should put a stop to FDN's

⁸ Order No. PSC-03-0918-FOF-TP at page 6.

and KMC's contrived efforts to prevent the implementation of the Commission's Order by denying the stay and allowing Sprint to move forward with its implementation of the approved rates.

WHEREFORE, Sprint requests that the Commission: deny the relief sought by FDN and KMC in the Stay Motion; find that Sprint has properly pursued implementation of the rates in the UNE order consistent with the terms of the FDN and KMC Interconnection Agreements; deny the stay requested by FDN and KMC because Movants fail to demonstrate that they meet the criteria set forth in the Commission's rule and because a stay would cause continued, significant, material and irreparable harm to Sprint; and if the stay is granted, require Movants to post a bond in sufficient amount to cover all of Sprint's potential losses during the pendency of the stay and appeal.

Respectfully submitted this 22nd day of September, 2003.

A handwritten signature in black ink, appearing to read "John P. Fons", is written over a horizontal line.

JOHN P. FONS
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115

And

SUSAN MASTERTON
CHARLES J. REHWINKEL
Sprint-Florida, Incorporated
P. O. Box 2214
Tallahassee, Florida 32316
(850) 599-1560

ATTORNEYS FOR SPRINT-FLORIDA, INC.

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 22nd day of September, 2003, to the following:

Beth Keating *
Jason Fudge
Division of Legal Services
Florida Public Service Comm.
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy B. White
c/o Nancy Sims
BellSouth Telecommunications
150 S. Monroe St., Suite 400
Tallahassee, FL 32301-1556

Laura King/Todd Brown *
Florida Public Service Comm.
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Tracy Hatch/Floyd Self
Messer, Caparello & Self
P. O. Box 1876
Tallahassee, FL 32302

Donna C. McNulty
MCI WorldCom
1203 Governors Square Blvd.
Suite 201
Tallahassee, FL 32301-2960

John D. McLaughlin, Jr.
KMC Telecom, Inc.
1755 North Brown Road
Lawrenceville, GA 30043

Michael A. Gross
Florida Cable Telecommunications
Assoc., Inc.
246 East 6th Avenue
Tallahassee, FL 32303

Z-Tel Communications, Inc.
Joseph McGlothlin
McWhirter, Reeves, et al.
117 South Gadsden Street
Tallahassee, FL 32301

Matthew Feil
Florida Digital Network, Inc.
390 North Orange Ave., Suite 2000
Orlando, FL 32801

Catherine F. Boone
COVAD
10 Glenlake Parkway
Suite 650
Atlanta, GA 30328

Kimberly Caswell
Verizon
P. O. Box 110, FLTC0007
Tampa, FL 33601-0110

Charles Beck
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street., Room 812
Tallahassee, FL 32399-1400

Broadslate Networks of Fla., Inc.
c/o John Spilman
585 Loblolly Lane
Charlottesville, VA 22903

Scott Sapperstein
Intermedia Communications, Inc.
One Intermedia Way (MC:FLT HQ3)
Tampa, FL 33647-1752

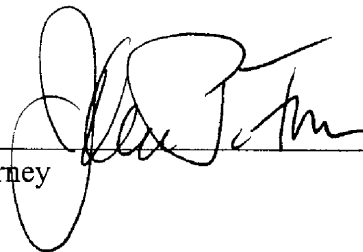
Mark Buechele
Supra Telecom
Koger Cntr-Ellis Bldg, Ste 200
1311 Executive Center Drive
Tallahassee, FL 33201-5027

Harisha J. Bastiampillai
Michael Sloan
Swidler Berlin Shereff Friedman
The Washington Harbour
3000 K Street, NW, Suite 300
Washington, DC 20007-5116

Richard Guepe
AT&T Communications
101 N. Monroe St., Suite 700
Tallahassee, FL 32301

Genevieve Morelli
Andrew M. Klein
Kelley Drye & Warren LLP
1200 Nineteenth St., N.W.
Washington, DC 20036

Attorney



h:\jpf\utd\990649b\pleadings\rsp in opp to fdn ait mtn.doc