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June 30, 1997

**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. 970496-TP

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Initial Brief of Sprint-Florida, Inc.

We are also submitting the Initial Brief on a 3.5" high-density diskette generated on a DOS computer in WordPerfect 5.1 format.

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.

Sincerely,

John P. Fons

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In the matter of<br><br>KMC TELECOM, INC.<br><br>Petition For Relief To Opt Into An Approved Interconnection Agreement<br><br>SPRINT-FLORIDA, INC. | DOCKET NO. 970496-TP<br><br>Filed: June 30, 1997 |

**INITIAL BRIEF OF SPRINT-FLORIDA, INC.**

Pursuant to the Prehearing Officer's Procedural Order, Order No. PSC-97-0722-PCO-TP, issued June 19, 1997, Sprint-Florida, Inc. ("Sprint"), hereby submits its Initial Brief on the following issue:

> Under Section 252(i) of the Telecommunications Act of 1996, on what basis if any can Sprint refuse to allow KMC to opt into a provision in a previously approved interconnection agreement?

Summary of Position

1. Sprint is not required by Section 252(i) of the Telecommunications Act of 1996 ("the Act") to allow KMC Telecom, Inc. ("KMC") to opt into Section 5.4.2 of the previously approved MFS/Sprint Interconnection Agreement - which section requires Sprint to reciprocally compensate MFS for tandem switching - because: (1) KMC will not perform tandem switching for Sprint; (2) the provision in the MFS agreement which KMC wants to opt into has been changed and modified by an arbitration proceeding which applies to Sprint; and (3) KMC's request does not meet the

requirement of Section 252(i) of the Act that the requested provision be upon the same terms and conditions.

2. Section 252(i) of the Act states:

> (i) Availability to Other Telecommunication Carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The critical element of Section 252(i) of the Act is that Sprint's obligation to make any interconnection, service or network element available to KMC contained in a previously approved agreement is "upon the same terms and conditions." Because Section 5.4.2 of the MFS Agreement has been revised pursuant to Section 26.2 of that Agreement to reflect the Commission's decision in the subsequent MCI/Sprint Arbitration proceeding (Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP), KMC's request does not meet the requirements of Section 252(i) of the Act.

Background

3. KMC, which claims to be a telecommunications carrier under the Act, and Sprint, which is an incumbent local exchange carrier under the Act, have been negotiating an interconnection agreement which is based upon the terms and conditions contained in the Partial Interconnection Agreement for LATA 458 between United Telephone Company of Florida and MFS Communications Company, Inc. ("MFS Agreement")[1], which was approved by this Commission in Order

[1] Effective December 31, 1996, United Telephone Company of Florida and Central Telephone Company of Florida were merged and the surviving entity is named Sprint-Florida, Inc.

No. PSC-97-0240-FOF-TP. KMC and Sprint have agreed that KMC would opt into the MFS Agreement with modifications to reflect the differences in geography and network design between MFS and KMC. Sprint, however, pursuant to its interpretation of Section 26.2 of the MFS Agreement, has refused to permit KMC to opt into Section 5.4.2 of the MFS Agreement, which establishes a reciprocal call termination rate of $0.0055 per minute of use. That rate contains an element to compensate for tandem switching. KMC is not providing tandem switching.

4. Section 26.2 of the MFS Agreement provides:

> 26.2 This Agreement shall at all times be subject to changes or modifications with respect to the rates, terms, or conditions contained herein as may be ordered by the Commission or the FCC in the exercise of their respective jurisdictions, whether said changes or modifications result from a rulemaking proceeding, a generic investigation or an arbitration proceeding which applies to Sprint or in which the Commission makes a generic determination. This Agreement shall be modified, however, only to the extent necessary to apply said changes where Sprint-specific data has been made available to the Parties and considered by the Commission. Any rates, terms [or] conditions thus developed shall be substituted in place of those previously in effect and shall be deemed to have been effective under this Agreement as of the effective date of the order by the Commission or the FCC, regardless of whether such action was commenced before or after the effective date of the Agreement. If any such modification renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon necessary amendments to the Agreement. (Emphasis added.)

5. Subsequent to this Commission's approval of the MFS Agreement, this Commission issued its Order No. PSC-97-0294-FOF-TP, issued March 14, 1997, in the MCI/Sprint Arbitration proceeding (Docket No. 961230-TP) holding that:

> We believe that the Act is clear regarding reciprocal compensation. Section 252(d)(2)(A)(i) requires that a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless "such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . ."
>
> We find that the Act does not intend for carriers such as MCI to be compensated for a function they do not perform. Even though MCI argues that its network performs "equivalent functionalities" as Sprint in terminating a call, MCI has not proven that it actually deploys both tandem and end office switches in its network. If these functions are not actually performed, then there cannot be a cost and a charge associated with them. Upon consideration, we therefore conclude that MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function.

(Order No. PSC-97-0294-FOF-TP, page 10.)

6. This holding, that carriers are not entitled to be compensated for a function - tandem switching - they do not actually perform, changes and modifies the rates, terms and conditions of the MFS Agreement in "an arbitration proceeding which applies to Sprint." Moreover, because KMC has agreed to opt into Section 26.2 of the MFS Agreement, KMC is bound by the terms and requirements of that section to the same extent as MFS.

7. The MFS Agreement was negotiated during the period immediately following the issuance of the FCC's First Report and Order in CC Docket No. 96-98, released August 8, 1996 ("FCC Order") and prior to the Court stay issued by the Eighth Circuit Court of Appeals on October 15, 1996 (109 F.3d 418), ("Court Stay"). At that time, both MFS and Sprint were of the opinion that the FCC Order mandated reciprocal compensation for call termination even

when tandem switching was not provided by MFS. Consequently, unlike other elements of call termination not provided by MFS, and which were submitted to this Commission for arbitration, Sprint did not request arbitration of whether it must compensate MFS for tandem switching. Subsequent to signing the MFS Agreement, the Eighth Circuit Court of Appeals granted its stay, which stay is still in effect. The Court Stay affected, inter alia, the mandated tandem switching compensation requirement contained in the FCC Order.

## Argument

### I. KMC will not perform tandem switching for Sprint

8. It is patently clear that KMC wants to opt into Section 5.4.2 of the MFS Agreement because, as written, that section requires reciprocal compensation for a function which MFS will not perform for Sprint. As a consequence, if KMC prevails, it will receive an undeserved windfall which this Commission has ruled is unwarranted and not available to other alternative local exchange carriers, like MCI, or for that matter MFS, with respect to non-provided call termination functions, i.e., tandem switching.

9. It was only because of the then-in-effect FCC Order that Sprint agreed to the rates, terms and conditions reflected in Section 5.4.2. In fact, after the Court Stay and this Commission's decision in the MFS/Sprint Arbitration proceeding on the transport issue, Sprint sought to have Section 5.4.2 of the MFS Agreement reformed by the Commission prior to Section 252(d) approval. KMC should not be allowed to take advantage of, nor to perpetuate,

compensation for a non-provided function when KMC would not otherwise be entitled to tandem switching compensation. Indeed, requiring Sprint to compensate KMC - like MFS - for a function not actually provided would create a discrimination between KMC and other competitors who, like MCI, are not compensated for functions they do not provide. The Commission should not knowingly create a tension between Section 252(i) of the Act and the non-discrimination provisions of Sections 251(c)(2)(D) and 252(d)(1)(A)(ii) of the Act.

## II. The Provision in the MFS Agreement Which KMC Wants to Opt Into Has Been Changed and Modified by an Arbitration Proceeding which Applies to Sprint

10. The rates, terms and conditions set forth in Section 5.4.2 of the MFS Agreement are subject to the provisions of Section 26.2 of the MFS Agreement quoted above. In its simplest terms, Section 26.2 requires that any rates, terms or conditions contained in the Agreement shall be changed or modified in accordance with changes or modifications ordered by the Commission in "an arbitration proceeding which applies to Sprint." Thus, the rates, terms and conditions set forth in Section 5.4.2 are subject to change or modifications as the Commission ordered in the MCI/Sprint Arbitration proceeding.

11. Section 26.2 of the MFS Agreement is clear and unambiguous. It very clearly states that the rates, terms and conditions set forth in the Agreement are subject to change or modification; clearly identifies the circumstances requiring changes or modifications; and clearly states the mechanism for

incorporating the changes or modifications. Under Florida law, where a contractual provision is clear and unambiguous, the parties are bound by those terms, and a court is powerless to rewrite it. See Emergency Associates of Tampa, PA v. Sassano, 664 So.2d 1000 (Fla. 2d DCA 1995); Medical Center Health Plan v. Brick, 572 So.2d 548 (Fla. 1st DCA 1990). Likewise, it is settled law in Florida that a court may resort to the process of interpretation only when the words used in the contract are unclear, but when that language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning. Hall v. Burger King Corp., 912 F.Supp. 1509 (USSD Fla. 1995). Furthermore, in the absence of an ambiguity on the face of a contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls. Acceleration Nat'l Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So.2d 738, 739 (Fla. 3d DCA 1989), review denied 548 So.2d 662 (Fla. 1989).

12. As noted previously, MCI petitioned the Commission to arbitrate, among other matters, the very same rates, terms and conditions for tandem switching as set forth in Section 5.4.2 of the MFS Agreement. Because the Commission found in Sprint's favor and rejected MCI's request for compensation, that Commission determination changes and modifies the rates, terms and conditions of Section 5.4.2 as of the effective date of the MCI/Sprint order.

13. In light of the Commission's MCI/Sprint Arbitration proceeding decision, the compensation for tandem switching in the

MFS Agreement Section 5.4.2 is not present and available to either MFS or KMC. Because MFS is not yet providing service in Sprint's territory, MFS has not been compensated at the rates set forth in Section 5.4.2. KMC will not, therefore, be discriminated against if it does not receive tandem switching compensation from Sprint. On the other hand, if KMC does receive tandem switching compensation, then MCI will be discriminated against in violation of the Act.

III. KMC's Request Does not Meet the Requirements of Section 252(i) of the Act that the Requested Provision be Upon the Same Terms and Conditions

14. Section 252(i) of the Act reflects Congress' concerns that the local exchange carriers not discriminate between new entrant competitors in the areas of interconnection, service or network elements. Moreover, this section of the Act specifically limits the "make available" requirements to requests "upon the same terms and conditions as those provided in the agreement." In the instant case, 'the same terms and conditions" include those identical terms and conditions contained in both Section 5.4.2 and Section 26.2 of the MFS Agreement. The use of the phrase "upon the same terms and conditions" in Section 252(i) of the Act means that the terms and conditions which the entity opting in must receive are identical to the specific terms and conditions being sought in the previously approved agreement. See The American Heritage Dictionary, Second College Edition: "Same . . . being the very one; identical . . . conforming in every detail." As noted in Green v. First American Bank and Trust, 511 So.2d 569 (Fla. 4th DCA, 1987),

the use of the phrase "same terms and conditions" means the same price or the matching price.

15. Because the phrase "upon the same terms and conditions" has an accepted meaning, that is the meaning Congress intended. When Congress utilizes a phrase that has an accepted definition, a court must infer that Congress meant to incorporate the accepted definition unless the statute otherwise defines the language. Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, 732 F.Supp. 248 (US D.C.,Me. 1990), reversed, 946 F.2d 4 (1st Cir. 1991), citing Perrin v. United States, 44 U.S. 37, 100 S.Ct. 311 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 98 S.Ct. 2923 (1978).

16. The language in Section 252(i) of the Act is clear and unqualified. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Norfolk & Western v. American Train Dispatchers, 111 S.Ct. 1156 (US 1991). In this case, the phrase in Section 252(i), "upon the same terms and conditions as those in the agreement" can only refer to the MFS Agreement, as it exists today. Otherwise, MFS and KMC will not be receiving the same terms and conditions. Yet, granting KMC's request will create the very discriminatory treatment that Section 252(i) of the Act was designed to prevent.

17. Sprint is required to provide KMC with a provision in the MFS Agreement only if KMC is requesting the same provision "upon the same terms and conditions." It is clear from KMC's request

that it wants a tandem switching-based compensation rate of $0.0055 per minute. In that event, KMC requires the original Section 5.4.2, not the Section 5.4.2 as amended by the operation of Section 26.2. Therefore, KMC is not asking for Section 5.4.2 "upon the same terms and conditions" as those provided in the MFS Agreement. Sprint is, accordingly, entitled to refuse to let KMC opt into Section 5.4.2 of the MFS Agreement because KMC insists on taking Section 5.4.2 in its pre-MCI/Sprint Arbitration decision state, which is not on the same terms and conditions as Section 5.4.2 of the MFS Agreement as it exists today.

Dated this 30th day of June, 1997.

Respectfully submitted,

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ATTORNEYS FOR SPRINT-FLORIDA, INC.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, hand delivery (*) or overnight express (**) this 30th day of June, 1997, to the following:

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