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January 10, 2002

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

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COMMISSION CLERK

Re: Docket No. 011615-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of KMC Telecom III, Inc. ("KMC") are the following documents:

1. Original and fifteen copies of KMC's Request for Oral Argument; 00390-02

2. Original and fifteen copies of KMC's Response in Opposition to Sprint's Motion to Dismiss KMC's Complaint; and 00391-02

3. A disk in Word Perfect 6.0 containing a copy of the document.

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,

Martin P. McDonnell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of KMC Telecom III, Inc., for Enforcement of Interconnection Agreement With Sprint-Florida, Inc.	)	Docket No.: 011615-TP
	)	Filed: January 10, 2002

KMC'S RESPONSE IN OPPOSITION TO SPRINT'S MOTION TO DISMISS KMC'S COMPLAINT

Complainant KMC Telecom III, Inc. ("KMC"), by its undersigned counsel, hereby files its Response In Opposition to Sprint-Florida, Inc.'s ("Sprint") December 24, 2001 Motion to Dismiss ("*Motion*") filed in the above-captioned proceeding.[1] As discussed in greater detail below, KMC contends that: (i) federal law exclusively governs the question of whether KMC is entitled to receive the tandem interconnection rate under the parties' interconnection agreement, (ii) no amendment to the parties' agreement was or is necessary to afford KMC its rights under federal law, and (iii) although KMC elected to opt in to arbitrated provisions that on their face appear to require actual tandem functionality, KMC did not waive its rights to receive reciprocal compensation at the tandem interconnection rate on the terms dictated by federal law.

KMC's Complaint sets forth a distinct pattern of facts and colorable legal arguments that have not yet been resolved by this Commission, and are entitled to be briefed and considered in the context of a hearing. Sprint's Motion to Dismiss is not a motion for summary judgment and it is not necessary at this juncture for KMC to demonstrate that it will prevail on the merits of its arguments in order for this case to proceed.

[1] By Order of the Commission dated January 4, 2002 (Order No.PSC-02-0048-PCO-TP), and with the consent of counsel for Sprint, KMC's time for opposing Sprint's *Motion* was extended until January 10, 2002.

In sum, Sprint's *Motion* fails to demonstrate that KMC's complaint fails to establish a legal claim for relief. Therefore, Sprint's *Motion* should be denied, and Sprint should be directed to answer KMC's Complaint.

DISCUSSION

I. SPRINT'S MOTION TO DISMISS MUST BE DENIED BECAUSE KMC HAS PRESENTED A VALID LEGAL CLAIM FOR RELIEF TO THIS COMMISSION

As an initial matter, Sprint's *Motion* must fail because it seeks to have the Commission resolve matters that are better left for hearing or, at least on summary judgment (if there are not disputes regarding material ɔts). The crucial issue in resolving Sprint's *Motion* is whether KMC has alleged facts that are sufficient to state a claim, *not*, as Sprint essentially argues in its *Motion*, whether KMC's claim is *correct*. KMC has succeeded in making the necessary allegations in its Complaint.

For example, KMC has alleged that the parties have had an interconnection agreement, approved by the Commission, under which the parties have exchanged local traffic. (Complaint, ¶¶ 12-13). KMC transported and terminated Sprint-originated local calls and billed Sprint for those services. (*id.* ¶¶ 16, 30-31). Sprint has failed to pay for the entire amounts KMC billed it. (*id.* ¶¶ 17-19, 39) KMC alleged facts that the appropriate rate is determined pursuant to Section 2.4 of Attachment IV of the parties' Agreement (*id.*, ¶¶ 13 n.6, 29, 32) and facts as to why the appropriate rate to assess was the tandem interconnection rate. (*id.* ¶¶ 24, 33-38). Thus, KMC has stated a claim for relief. While Sprint may disagree with that claim, that is not an appropriate basis by which this Commission should grant Sprint's *Motion*, as Sprint seems to contend. In order to assess the propriety of KMC's claim under Section 2.4 of Attachment IV to the parties' interconnection agreement, whether it be under the geographic comparability standard that KMC urges or the functionality test that Sprint advocates, it will be necessary for the Commission to have a hearing to resolve the factual issues and the benefit of briefing of both parties. The Commission cannot reasonably

make that assessment now based on the current record in this proceeding, as Sprint urges. Indeed, to do so would be contrary to the Commission's action, as described in more detail below, to have a hearing and invite full briefing by the parties in the *MCI/BellSouth Complaint* proceeding, in Docket No. 991755-TP, which raised issues similar to the issues raised in this proceeding. (This matter, however, should be decided differently than the MCI/BellSouth Complaint for the reasons explained below).

In the event that the Commission believes that, to resolve the *Motion,* it must determine whether KMC is entitled under the parties' Agreement to the tandem rate on the basis of geographic comparability -- an issue which KMC's submits need not be resolved at this time -- KMC is entitled to the tandem interconnection rate on that basis because the parties' reciprocal compensation terms and conditions are to be interpreted consistently with the test set forth by the FCC under federal law.

II. FEDERAL LAW EXCLUSIVELY GOVERNS THE QUESTION OF KMC'S ENTITLEMENT TO BE PAID RECIPROCAL COMPENSATION AT THE TANDEM INTERCONNECTION RATE

A. The Commission Acknowledges That It Must Impose the Requirements of Federal Law in its Interpretation of Interconnection Agreements

The Commission clearly recognizes that its jurisdiction with respect to resolving issues in interconnection agreement disputes consists of applying the requirements of the Communications Act of 1934, as amended, (the "Act") and the Federal Communications Commission ("FCC") regulations promulgated thereunder. In fact, this requirement is recited in a straightforward manner in one of the Commission Orders that Sprint cites in its *Motion*:

> Section 251 of the Act regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration and approval of agreements.
>
> * * * * * * * *

> Section 252(c)(1) of the Act states that in resolving arbitrations, state commissions shall ensure that resolution and conditions meet the requirements of Section 251, including regulations prescribed by the Federal Communications Commission (FCC) pursuant to Section 251.

Order No. PSC-00-2471-FOF-TP, Docket No. 991755-TP (Arbitration of MCI Complaint against BellSouth for Breach of Interconnection Agreement) at 2-3. Thus, in cases where breaches of approved interconnection agreements are before the Commission, the Commission recognizes that the resolution of the complaint must meet the requirements of the Act and the FCC's implementing regulations.

B. The Commission Recognizes the Primacy of Federal Law with respect to the Question of Whether A Connecting Carrier is Entitled to the Tandem Interconnection Rate

In its *Motion*, Sprint erroneously implies that the question of whether KMC is entitled to receive payment for Sprint-originated local traffic terminated by KMC on its network at the tandem interconnection rate is a question that should be determined by what Sprint calls "Florida law" as reflected solely within the language of the parties' agreement:

> At the time the Sprint/MCI Agreement was executed, the language in Section 2.4.2 reflected *the state of law in Florida* regarding the applicability of the tandem interconnection rate. The Commission has consistently refused to affirm arguments that geographic comparability alone is sufficient to establishment [sic] entitlement to the tandem interconnection rate.

Motion at 3 (emphasis added). Sprint maintains that several Commission orders establish the Commission's distinct legal position with respect to the application of the tandem interconnection rate in Florida, *viz.*, that geographic comparability is *per se* insufficient to entitle a connecting carrier to receive reciprocal compensation at the tandem interconnection rate.[2]

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[2] *See* Sprint *Motion* at 3-4 and 3 n.4, citing *AT&T/BellSouth Arbitration*, Docket No. 000731-TP, Order No. PSC-01-1402-FOF-TP; *MCI/BellSouth Complaint*, Docket No. 991755-TP, Order No. PSC-00-2471-FOF-TP; *Intermedia/BellSouth Arbitration*, Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP.

Sprint oversimplifies the Commission's legal position with respect to applicability of the tandem interconnection rate and materially mischaracterizes each of the Commission cases it cites. Significantly, in each of the referenced cases, the Commission was *not* attempting to establish *under Florida law* an approach to the tandem interconnection rate question. Rather, the Commission was using its best efforts to apply its understanding of *federal law* to the facts and circumstances presented to it. Despite Sprint's wishful thinking, the Commission did not in any of the cases reject outright the possibility that the federal law affords connecting carriers the tandem interconnection rate solely on the basis of geographic comparability. To the contrary, this question has deliberately been *left open* by the Commission in each of the cases cited by Sprint.[3]

III. THE CLARIFICATION OF THE MEANING OF RULE 51.711(a)[4] BY THE FCC ON APRIL 27, 2001 PROVIDES THE "MISSING INGREDIENT" NECESSARY FOR APPLYING FEDERAL LAW CORRECTLY TO THE PARTIES' INTERCONNECTION AGREEMENT

A. Contrary to Sprint's Contention, the Commission's Order in the MCI/BellSouth Complaint Proceeding Actually Favors KMC's Position

Sprint places particular reliance on the Commission's order in the MCI/BellSouth Complaint proceeding (Docket No. 991755-TP) (the "MCI/BellSouth Complaint Order"). Sprint's discussion of that case, however, is materially misleading, glossing over key facts in an attempt to persuade the Commission that it has already refused to apply FCC Rule 51.711(a) in resolving interconnection agreement disputes in the face of interconnection agreement language that appears to require a showing of functional equivalency.

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[3] None of the cases cited by Sprint makes a determination as to whether, under the requirements of federal law, a connecting carrier must demonstrate both "geographic comparability" *and* "functional equivalence." Importantly, however, in each of the cases cited by Sprint, the Commission recognized its duty to apply federal law, and more specifically, FCC Rule 51.711(a), to make the required determination. In each case, however, the Commission found it unnecessary to fix upon a specific interpretation of 51.711(a) for purposes of resolving the issue.

[4] 47 CFR § 51.711(a).

Motion at 4. But in fact, this relatively recent order provides significant support for KMC's position in response to Sprint's *Motion.*

During the 1997 proceeding leading to the Commission's arbitration order that specified the language to be used in the MCI/BellSouth interconnection agreement in dispute, MCI had in fact proposed language entitling it to be paid reciprocal compensation at the tandem interconnection rate. MCI relied upon the geographic comparability criterion set forth in FCC Rule 51.711(a). *See* Order No. PSC-97-0309-FOF-TP, Docket No. 960846-TP at 9-10 (March 21, 1997). But the Commission declined to accept MCI's language, concluding that some of the language exceeded the scope of the arbitration. The Commission also observed that "the portions of the FCC rules that MCIm used in its rationale are currently stayed." *Id.* at 12. Accordingly, the Commission inserted, over MCI's objections, the alternative BellSouth-crafted language that stated in pertinent part that:

> BellSouth shall not compensate MCIm for transport and tandem switching unless MCIm actually performs each function [that BellSouth's tandem switch performs].[5]

The tandem interconnection rate entitlement issue was raised again by MCI in Docket No. 991755-TP (the complaint proceeding) after the FCC's pricing rules, including Rule 51.711(a), had been reinstated by order of the United States Supreme Court. *See AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). MCI claimed in the complaint proceeding that, with the reinstatement of Rule 51.711(a), it was now unmistakable that under federal law, BellSouth must pay MCI reciprocal compensation at the tandem interconnection rate if MCI met the geographic comparability test, despite the BellSouth-crafted language that had previously been inserted by order of the Commission in the parties' interconnection agreement.

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[5] *See* Order No. PSC-97-0309-FOF-TP, Docket No. 960846-TP at 12 (March 21, 1997). Notably, the BellSouth-crafted language in the MCI/BellSouth Complaint proceeding in fact bears significant similarity to the language inserted by order of the Commission in the MCI/Sprint interconnection agreement that is the subject of the instant case.

In the MCI/BellSouth complaint proceeding, the Commission looked beyond the four corners of the MCI/BellSouth agreement and focused on federal law. The Commission entertained very lengthy and detailed arguments from both sides concerning the correct interpretation of Paragraph 1090 of the FCC's First Report and Order in Docket 96-98 (FCC 96-325)[6] and Rule 51.711, and whether an "either-or"[7] or "two prong" approach was intended by the FCC. At the end of all of this evidence and analysis, however, rather than taking a definitive position on the disposition of this issue, the Commission demurred on the basis that federal law was still not clear and it *could not discern the FCC's intent:*

> The parties' diametrically opposed interpretations of Rule 51.711 and ¶1090 of FCC 96-325 indicate to us that the FCC's intent regarding recovery of the tandem switching rate is unclear. We are unable to glean from the evidence presented in this docket whether the FCC has mandated an "either-or" or "two-prong" test to establish recovery of the tandem switching rate. *Therefore, we do not reach a determination on which test is applicable.*

Order No. PSC-00-2471-FOF-TP at 12 (emphasis supplied). Thus, instead of determining which "test" correctly reflected federal law the Commission merely concluded that MCI had not sufficiently demonstrated that "the reinstatement of Rule 51.711 dictates a change" in the standard applicable under the parties' interconnection agreement, which on its face required that MCI "actually perform" the tandem switching function in order to receive compensation at the tandem-served rate.

For the purpose of the instant proceeding, the Commission's discussion in the MCI/BellSouth Complaint proceeding confirms several things of importance. First, the Commission recognizes the primacy of federal law on the question of the tandem interconnection rate, and that federal law in general and Rule

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[6] *In re: Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, CC Docket No. 96-98 (Aug. 8, 1996) (hereinafter, the "*First Local Competition Order*").

[7] The "either-or" interpretation was essentially that a connecting carrier could prove either geographic comparability *or* tandem functionality in order to demonstrate its entitlement under law to the tandem interconnection rate. Order No. PSC-00-2471-FOF-TP at 11.

51.711(a) in particular is to be applied in the tandem rate issue. Second, although MCI was unable to sustain its burden of demonstrating that Rule 51.711 should dictate a departure from contrary interconnection agreement language, the Commission did not reject the possibility that such a burden could be met if clarity with respect to the meaning of Rule 51.711 were available – as it is now.

B. The "Missing Ingredient" Preventing the Commission from Applying Rule 51.711(a) to the Parties' Agreement in the MCI/BellSouth Case Was Certainty as to the FCC's Intent

The MCI/BellSouth Complaint proceeding is quite similar to the case at hand except that the "missing ingredient" in the earlier proceeding is now present, which requires a different result in this case. In both cases, a complaint was brought to establish a connecting carrier's entitlement to reciprocal compensation payment from an ILEC at the tandem interconnection rate. In both cases, the stated legal basis for such entitlement was FCC Rule 51.711(a)'s language that a connecting carrier is entitled to the tandem interconnection rate based on a showing that its switch serves a geographic area comparable to that served by the ILEC's tandem switch. In both cases, the parties' interconnection agreement contains ILEC-drafted language inserted by order of the Commission over the ALEC's objection that requires a showing of actual tandem function in order to entitle the connecting carrier to receive compensation at the tandem rate. In both cases, at the time the Commission required the adverse language to be inserted, it was doing so for the stated purpose of correctly implementing federal law.[8]

In fact, there is only one significant distinction between the situation faced by MCI in its complaint proceeding and the situation faced by KMC in this proceeding – but it makes all the difference in the

[8] *See* Order No. PSC-97-0294-FOF-TP at 9-12; Order No. PSC-97-0309-FOF-TP at 9-12.

outcome: today, as a result of the FCC's April 27, 2001 Order, there is no question whatsoever what is intended by Rule 51.711(a).[9]

In the *MCI/BellSouth Complaint* Order, the Commission deemed that MCI had failed to carry its burden of demonstrating that the reinstatement of Rule 51.711 superseded the language of the parties' agreement.[10] But this was not because the Commission considered the requirements of federal law to be secondary to the language of the agreement. In fact, the Commission expressly acknowledged that the resolution of the issues set forth in MCI's complaint would be governed by the interpretation of Rule 51.711 and Paragraph 1090 of the *First Local Competition Order.*[11] It was because the Commission felt that Rule 51.711(a) was insufficiently clear to interpret it in the manner MCI suggested. This is no longer the case, because the propriety of applying Rule 51.711(a) in the manner MCI advocated and KMC now advocates

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[9] *See In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket No. 01-92 (Rel. April 27, 2001) ("April 27, 2001 Order") at ¶ 105 (emphasis supplied):

> In addition, section 51.711(a)(3) of the Commission's rules 170 requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. *Although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test.* Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

[10] *See* Order No. PSC-00-2471-FOF-TP at 12-13.

[11] MCI/BellSouth Complaint Order at 4 ("The crux of this issue lies in the appropriate interpretation and application of Rule 51.711 and the related discussion in ¶1090 of the FCC's First Report and Order in CC Docket No. 96-98 (FCC 96-325) . Rule 51.711 and ¶1090 of FCC 96-325 both deal specifically with setting symmetrical rates for reciprocal compensation.")

is now clear.[12] The crucial "missing ingredient" – the ingredient without which MCI had been unable to meet its burden in its complaint proceeding – is in place.

The Commission, in applying federal law to the case at hand, need not demur, or fall back on the language of the parties' contract for lack of ability to interpret federal intent, since that intent is now clear.[13] The language of the parties' agreement is no bar, as Sprint's *Motion* argues. The *Motion* must be denied.

IV. KMC WAS NOT REQUIRED TO AMEND THE PARTIES' AGREEMENT, BECAUSE NO CHANGE IN THE LAW OCCURRED

Sprint attempts to distract the Commission with the argument that KMC has somehow waived its right to the protection of federal law because it did not insist on an amendment to the parties' agreement when FCC Rule 51.711 was clarified by the FCC in its April 27, 2001 Order. *See* Sprint *Motion* at 6. This argument fails for a number of reasons. First, as discussed below, no change in law occurred with the FCC's clarification of the rule last year that would necessitate the amendment of the parties' agreement. Second, the parties' agreement does not place any timeframe on when an amendment must be sought, or require that either party forego its rights under law if an amendment is not sought.

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[12] *See* April 27, 2001 Order at ¶ 105 ("Although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test.")

[13] As pointed out by Sprint (*Motion* at 5), the Commission has acknowledged recently in its Generic Reciprocal Compensation Docket, Phase II (Docket No. 000075-TP) that it must apply the "geographic comparability" test of Rule 51.711(a) as clarified by the FCC, and that the rulings in the Generic Docket are to be applied *prospectively*. Sprint appears to contend that this ruling would prohibit application of Rule 51.711(a) to periods *prior to* the issuance of the Commission's Order in its Generic Docket. KMC submits, however, that the Commission's recent ruling does not (and, in any event, could not) act to bar the application of pre-existing federal law to the reciprocal compensation relationship of the parties in the instant case.

A. The Clarification of Rule 51.711 Did Not Constitute a "Change in Law" for Purposes of the Parties' Agreement.

The parties' interconnection agreement is expressly governed by federal law, and any rules promulgated thereunder, and orders of the FCC. The "change in law" provision referred to by Sprint, set forth in Part A, Section 2.2 of the Agreement, requires the parties to "negotiate promptly and in good faith" to amend the agreement to substitute contract provisions in the event that:

> the FCC or the Commission promulgates rules or regulations or issues orders, or a court with appropriate jurisdiction issues orders which conflict with or make unlawful any provision of this Agreement.

But the clarification of Rule 51.711 by the FCC in its April 27, 2001 Order did not effect a "change" in law that would require amendment of the parties' agreement, because that would imply that there was some pre-existing, *different* law that was altered when Rule 51.711 was clarified. That was not the case. At all times pertinent to the instant case, the FCC's *First Local Competition Order* was in effect, even though Rule 51.711 had been vacated for a time by the 8th Circuit Court of Appeals. As is manifest with the FCC's issuance of its April 27, 2001 Order, the FCC's intent was *always* to afford a connecting carrier the tandem interconnection rate upon proof of comparable geographic coverage.[14]

Sprint wants to make the argument, without stating it outright, that the clarification of Rule 51.711 *did* change existing law *viz.*, the "state of the law in Florida," which Sprint characterizes as rejecting outright the possibility that geographic comparability could be the sole criterion in awarding the tandem

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[14] The FCC's clarification was, by its terms, intended to "dispel confusion" concerning the correct application of Rule 51.711. *See* April 27, 2001 Order at ¶ 105. No notice or comment proceeding was commenced, or deemed necessary by the FCC in issuing this clarification, a testament to the FCC's belief that the clarification did not effect a change in substantive law. On the other hand, it is significant that in paragraph 107 of the April 27, 2001 Order, the FCC seeks public comment on the possibility of including a "functional equivalency" test in the Rule – unquestionably signaling that such a concept was *never* previously intended to be a part of Rule 51.711, and that such an inclusion would constitute a substantive change in the law, requiring a formal proceeding to effect. April 27, 2001 Order at ¶ 107.

interconnection rate. But, as noted above, the Commission *always* intended to apply the federal law correctly and to mirror the intent of the FCC and Congress. The Commission *never* intended to legislate a separate body of law at odds with Congress or with the federal agency charged with interpreting the Communications Act. Accordingly, federal law did not change with the issuance of a clarification by the FCC. There was no conflicting "state law" or "federal law" that was affected. The only thing that "changed" is the Commission's perception of the law as it always existed due to the FCC's efforts to dispel any confusion its *First Local Competition Order* and rule may have created.

B. The Parties' Agreement Does Not Require That the Parties Amend the Agreement Within Any Certain Time Frame, or Forego Their Rights Under Federal Law If an Amendment Is Not Sought.

Sprint attempts to argue that KMC has the sole responsibility to seek an amendment of the parties' agreement upon a change in law and that, if KMC fails to seek such an amendment, KMC somehow waives its right to the benefit of the change in law. But this is simply not true. Under the express terms of the parties' agreement, if an obligation to raise a change of law issue with respect to the clarification of Rule 51.711 were to exist, that obligation would fall fully and equally on Sprint, not just on KMC. The fact that neither party raised the issue when the FCC's April 27, 2001 Order was issued indicates that *neither party considered it to be a change in law* -- until Sprint found it convenient to take such a position in its *Motion*.

In the circumstances, to argue that KMC failed to initiate negotiation of new contractual provisions under the change in law language, and that therefore KMC has waived its right to the protection of federal law, seems misdirected. There is no "use it or lose it" clause in the parties' agreement, and nothing that places a "deadline" on a parties' right to raise a change of law issue. If a change in law issue truly exists, it can be raised at any time.[15] Further, by imposing an unconditional obligation on both parties to

[15] By bringing its Complaint immediately to the attention of the Commission, KMC effectively skips the futile steps of proposing to Sprint that the parties' Agreement be amended, failing to agree, and bringing the dispute before the Commission. Both parties were well aware due to their billing disputes, discussions and

incorporate any actual changes in law, the parties' Agreement contemplates that, if there is a change and law, it should apply immediately. The requirement that the parties craft agreed-upon language to implement the change is ministerial.

In this case, however, no valid change in law has occurred: On April 27, 2001, the FCC merely reiterated, and explicated more clearly, its pre-existing intent in Rule 51.711(a) with regard to the tandem interconnection rate.

V. THE LANGUAGE IN THE PARTIES' AGREEMENT REQUIRING EQUIVALENT FUNCTIONALITY FOR ENTITLEMENT TO THE TANDEM INTERCONNECTION RATE WAS NOT NEGOTIATED, BUT MANDATED BY THE COMMISSION AND THUS MUST BE TREATED AS ANY OTHER REGULATORY DECISION IN AN ENFORCEMENT ACTION SUCH AS THIS

KMC submits that, now that federal intent with respect to Rule 51.711 is beyond question, it is entirely appropriate to apply it in this situation. Language in the parties' Agreement that Sprint argues requires KMC to show actual tandem functionality does not alter that conclusion. The reason for this, in light of the foregoing discussion is clear: not only does the federal rule have primacy in resolving reciprocal compensation issues between the parties, but also its application simply fulfills the Commission's intent for the parties' Agreement. As noted above, the Commission in the MCI/BellSouth arbitration and subsequent complaint case did not intend to create a distinct, Florida-based body of law with regard to the tandem interconnection rate. The Commission sought to follow federal law, as it understood the FCC to interpret it.[16] The language requiring actual tandem functionality that Sprint seeks to interpose as an obstacle to the

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correspondence, what the nature of the disagreement with regard to the tandem interconnection rate was, and they were also aware that no agreement or compromise on the issue was possible. Therefore it would have made little practical sense for either party to propose amendment to the Agreement on this issue.

[16] Thus, the Commission acted consistently with the requirements in Section 252(c)(1) and 252(e)(2(B) of the Act that the Commission review and approve arbitrated provisions consistently with Section 251 and 252 and the FCC's implementing regulations.

application of Rule 51.711(a) in this case was language that was suggested by Sprint in the first instance, and adopted by the Commission precisely because the Commission at the time believed it best reflected the FCC's interpretation of the reciprocal compensation obligation of Section 251(b)(5) of the Act.

It is beyond question that if the Commission had had the benefit of the FCC's clarification issued in the April 27, 2001 Order when it arbitrated the Sprint-MCI agreement, it would not have ordered the inclusion of the language suggested by Sprint - - language that was then and is now inconsistent with federal law. However, the Commission's determination requiring the insertion of the inconsistent language in the parties' Agreement was based on an understandable misconception of federal Rule, and it makes sense to correct that misconception now that any misconception concerning the meaning and application of Rule 51.711(a) has been removed by the FCC's April 27, 2001 Order.

The Sprint-crafted language requiring tandem functionality was not negotiated or accepted voluntarily by MCI, but was required by the Commission. This mandatory aspect of the language carried through to KMC upon KMC's adoption of MCI's contract, because the act of adopting MCI's contract put KMC in the same legal position as MCI under federal law. Contrary to Sprint's assertions, by opting into MCI's interconnection agreement, KMC -- like MCI -- did not voluntarily consent to the inclusion of the "tandem functionality" language. The act of opting into that agreement under Section 252(i) of the Act does not somehow convert the arbitrated provisions with MCI into negotiated provisions with KMC. KMC is and was just as subject to the Commission order mandating the inclusion of that language as MCI had been. MCI had objected to that language, but had been overruled by the Commission. Neither MCI nor KMC can be said to have waived its rights under federal law on the basis of a Commission-mandated action. The notion that KMC somehow voluntarily negotiated the arbitrated provisions at opt-in and thereby put itself

in a position different than the legal position of MCI conflicts with the requirements of Section 252(i) of the Act, and would deny KMC its statutory entitlements under that Section.[17]

For this reason, it makes sense to treat the Commission's prior decision to include the "tandem functionality" language in the parties' Agreement in the same fashion as any other regulatory decision. Since the Commission's decision to include the language was based on a misperception of the intent of federal law, an intent that is now clarified, the results of the Commission's decision should be revisited and corrected as they are applied to these parties' Agreement in this case.

CONCLUSION

KMC is not bound by arbitrated terms and conditions mandatorily inserted in the parties' agreement by the Commission in an attempt to implement federal law if those terms and conditions are in fact inconsistent with the requirements of federal law. Consistent with its approach in the MCI/BellSouth Complaint, the Commission must apply FCC Rule 51.711(a) to the parties' agreement to require Sprint to accord the tandem interconnection rate to KMC if KMC's switch serves a geographic area comparable to that served by Sprint's tandem switch. The clarification of Rule 51.711(a) did not constitute a change in law, and in any event the protection of federal law was not lost to KMC simply because neither party sought an amendment of the agreement immediately after the FCC issued its clarification of the Rule. Nor did KMC voluntarily agree to waive its rights under Rule 51.711(a) by opting into MCI's agreement, and the arbitrated language concerning the tandem interconnection rate retains its arbitrated character for KMC's purposes.

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[17] Notably, KMC opted into the MCI-Sprint Agreement in its entirety, even agreeing to take any amendments that resulted from appeals. The primary reason for Section 252(i) is to ensure non-discriminatory treatment of CLECs. Sprint's *Motion,* by advocating that the terms in the KMC-Sprint Agreement regarding the application of the tandem interconnection be treated as voluntarily negotiated, in effect, is arguing that KMC be treated differently than MCI even though KMC opted-into MCI's agreement -- a result that would contravene Section 252(i).

KMC is not required at this stage to demonstrate that it will prevail on the merits of its arguments: it has submitted a distinct factual pattern and colorable legal arguments that have not been resolved previously by the Commission. In sum, Sprint has failed to show that KMC has not submitted a legal claim for relief before this Commission. Accordingly, Sprint's *Motion* must be denied, and the instant complaint proceeding must be allowed to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of KMC's Response in Opposition to Sprint's Motion to Dismiss KMC's Complaint was furnished by U.S. Mail to the following this 10th day of January, 2002:

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