

State of Florida



Public Service Commission
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DATE: FEBRUARY 21, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYO)

FROM: OFFICE OF THE GENERAL COUNSEL (TEITZMAN, FORDHAM) *AK BK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BARRETT) *MCB*

RE: DOCKET NO. 011615-TP - COMPLAINT OF KMC TELECOM III, INC.
FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH SPRINT-
FLORIDA, INCORPORATED. *MA*

AGENDA: 03/05/02 - REGULAR AGENDA - MOTION TO DISMISS - ORAL
ARGUMENT REQUESTED/ARGUMENT AT COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL-GCO\WP\011615.RCM

CASE BACKGROUND

KMC Telecom III, Inc. (KMC), is an alternative local exchange carrier (ALEC) operating in the state of Florida. Effective April 22, 1999, KMC opted into an existing Interconnection and Resale Agreement (Agreement) between Sprint-Florida, Incorporated (Sprint) and MCImetro Transmission Services, Inc. (MCImetro). The adoption of the Interconnection and Resale Agreement by KMC was approved by this Commission in Docket No. 990734-TP, Order No. PSC-99-1413-FOF-TP. The Interconnection and Resale Agreement governs the relationship between the companies regarding local interconnection and the exchange of traffic pursuant to 47 U.S.C. 251.

On November 29, 2001, KMC filed a formal complaint with this Commission alleging that Sprint had violated applicable law and the terms of the Agreement. Sprint filed its Motion to Dismiss the

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Complaint on December 24, 2001. On December 27, 2001, KMC filed its Motion for Extension of Time to file a response, which was granted by the Commission by Order No. PSC-02-0048-PCO-TP. KMC filed its Response to Sprint's Motion to Dismiss and a Request for Oral Argument on January 10, 2002. Sprint's Motion to Dismiss and KMC's Request for Oral Argument are the subject of this Recommendation.

JURISDICTION

Pursuant to Section 252(e) of the Act, the Commission approved the agreement between Sprint and KMC. As such, the Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir 1997) (state commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements)¹. The Commission does have jurisdiction pursuant to Section 364.162(1), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should KMC's Request for Oral Argument on its Response to Sprint's Motion to Dismiss Complaint be granted?

RECOMMENDATION: Yes. The parties should be granted oral argument, because it may aid the Commission in its consideration of the complex issues to be addressed. (TEITZMAN)

STAFF ANALYSIS: On January 10, 2002, KMC filed a Request for Oral Argument with its Response to Sprint's Motion to Dismiss pursuant to Rule 25-22.058, Florida Administrative Code. In support of its request, KMC states that oral argument "would aid the Commission in

¹But see BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc., 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002) (finding State commission did not have jurisdiction to resolve complaint arising out of interconnection agreement.)

comprehending and evaluating the issues raised in the foregoing pleadings." KMC asserts that the issues involved in this complaint "are complex and some may present issues of first impression." Sprint did not respond to KMC's request.

Staff notes that Rule 25-22.058, Florida Administrative Code, applies to post hearing motions, and therefore, is not directly applicable in this instance. Nevertheless, staff believes in light of the complexity of the issues involved, it would be helpful to this Commission to grant KMC's Request for Oral Argument. Accordingly, staff recommends that the Commission grant KMC's Request for Oral Argument.

ISSUE 2: Should the Commission grant Sprint's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should grant Sprint's Motion to Dismiss. (TEITZMAN)

STAFF ANALYSIS: On December 24, 2001, Sprint filed a timely Motion to Dismiss. On January 10, 2002, KMC filed a Response to Sprint's Motion to Dismiss and in a separate document filed a Request for Oral Argument.

Sprint has originated local calls to KMC's customers which are terminated on KMC's network pursuant to an Interconnection and Resale Agreement approved by this Commission on July 23, 1999, in which KMC adopted the MCImetro agreement. The agreement has been in effect from April 22, 1999 to the present.

KMC alleges in its complaint that, under their present agreement, Sprint owes KMC in excess of four million dollars as a result of Sprint's refusal to pay KMC reciprocal compensation at the tandem interconnection rate. Under the terms of the Agreement, KMC is obligated to terminate Sprint's local traffic, and in return Sprint is obligated to compensate KMC for termination of such traffic. Since June 1, 1999, in accordance with the terms of the Agreement, KMC has terminated Sprint's local traffic on KMC's networks in Tallahassee and Fort Myers, Florida. KMC further alleges that its switch serves a geographic area comparable to that

served by Sprint's tandem switch and therefore, KMC is entitled to reciprocal compensation at the tandem interconnection rate pursuant to FCC Rule 51.711(a)(3). As a result, KMC has proceeded to bill Sprint reciprocal compensation at the tandem interconnection rate for KMC's termination of Sprint's local traffic. In Sprint's Motion to Dismiss, Sprint asserts it has refused to compensate KMC at the tandem interconnection rate for KMC's termination of Sprint's local traffic because KMC has not established equivalent functionality as required in the Agreement.

In its Motion, Sprint argues that the issue of when KMC was entitled to reciprocal compensation at the tandem interconnection rate was specifically addressed and decided by the Commission's Final Order on Arbitration, *In re: Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida and Central Telephone Company of Florida concerning interconnection rates, terms and conditions, pursuant to the Federal Telecommunications Act of 1996*, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Sprint/MCI Arbitration Order). Sprint further asserts that Attachment IV, section 2.4.2 in the Sprint/MCI metro Interconnection and Resale agreement subsequently adopted by KMC, which requires Sprint to pay KMC "a charge symmetrical to its own charges for the functionality actually provided by [KMC]," directly implements the Commission's decision in the Sprint/MCI Arbitration Order.

~~Prior to April 27, 2001, several state commissions, including this Commission during the Sprint/MCI Arbitration, had interpreted FCC Rule 51.711(a)(3) to require a "two prong" test to determine eligibility to receive reciprocal compensation at the tandem interconnection rate. The "two prong" test required an ALEC to establish both geographic comparability and functional equivalence before it was eligible to receive reciprocal compensation at the tandem interconnection rate. On April 27, 2001, the FCC issued a Notice of Proposed Rulemaking in Docket No. 01-92, *Developing a Unified Intercarrier Compensation Regime*. (Intercarrier Compensation NPRM) which dispelled the confusion state commissions had undergone in applying Rule 51.711(a)(3). In the Intercarrier Compensation NPRM, the FCC clarified that Rule 51.711(a)(3) contemplates that an ALEC need only establish geographic comparability to be entitled to reciprocal compensation at the tandem interconnection rate.~~

At the time this Commission issued the Sprint/MCI Arbitration Order, the Eighth Circuit Court of Appeals had issued a stay of FCC Rule 51.711(a)(3) in Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1997). As a result, this Commission did not rely on FCC Rule 51.711(a)(3) as a basis for its decision in the Sprint/MCI Arbitration Order and found that MCI would need to establish functional equivalence before being eligible to receive reciprocal compensation at the tandem interconnection rate. Subsequent to the issuance by this Commission of the Sprint/MCI Arbitration Order, the Eighth Circuit Court of Appeals vacated FCC Rule 51.711(a)(3) in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). However, the U.S. Supreme Court later reversed the Eighth Circuit's decision in AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999) and on remand, FCC Rule 51.711(a)(3) was reinstated by the Eighth Circuit in Iowa Utilities Board v. Federal Communications Commission, 1999 U.S. App. LEXIS 38496 (8th Cir. 1999).

In addition to the lack of clarity created by the lengthy period of time the rule was vacated, the application and interpretation of FCC Rule 51.711(a)(3) has suffered a significant lack of consensus among state commissions. Some state commissions' interpretation of FCC Rule 51.711(a)(3) required an ALEC to establish both geographic comparability and functional equivalence before it was eligible to receive reciprocal compensation at the tandem interconnection rate². This was known as the "two prong" test. Other state commissions interpreted the rule to require that an ALEC need establish just one of these two prongs for eligibility to receive reciprocal compensation at the tandem interconnection rate.

In the past, this Commission had also struggled with the interpretation of this rule in other arbitrations. For instance, in Docket No. 000731-TP, in resolving the Petition by AT&T Communications of the Southern States, Inc. d/b/a AT&T for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. pursuant to 47 U.S.C. Section 252, the Commission noted that:

... there appear to be two criteria presented by the FCC in §1090, by which a state commission may establish

² This interpretation, by and large, was the result of statements by the FCC in Order 96-325 at §1090.

symmetrical rates at the ILEC tandem level. There seems to be no dispute among the parties regarding this. However, the parties disagree vehemently on how these two criteria are to be applied.

Order No. PSC-01-1402-FOF-TP, issued June 28, 2001, at p. 76. The Commission went on to find that:

Although the evidence in the record may indicate that from a policy perspective we should examine both functionality and geographic coverage to determine if an ALEC satisfies one or both of the criteria, the practical question of whether AT&T does in fact meet one or both criteria is left to be evaluated.

Based upon the record in this proceeding, we find that AT&T is not entitled to the tandem rate for the purposes of reciprocal compensation. Although the evidence in the record may indicate that geographic coverage alone may determine eligibility for the tandem rate, AT&T has failed to show that it meets this criterion. Therefore, any policy decision regarding the functionality/geography test is better left to the Commission's generic docket on this issue³.

On April 27, 2001, the FCC issued a Notice of Proposed Rulemaking in Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime (Intercarrier Compensation NPRM), which dispelled the confusion regarding the interpretation of Rule 51.711(a)(3). In the Intercarrier Compensation NPRM, the FCC clarified that Rule 51.711(a)(3) contemplates that an ALEC need only establish geographic comparability to be entitled to reciprocal compensation at the tandem interconnection rate.

Sprint argues in its Motion to Dismiss that the clarification by the FCC of Rule 51.711(a)(3) is equivalent to a "change of law" affecting the applicability of Attachment IV, section 2.4.2 of the parties' agreement. As a result, Sprint asserts that Part A, section 2.2 of the parties' Agreement was triggered, which sets

³ Id. at pgs. 79, 80.

forth the procedures to be used when a change of law affects the applicability of the terms of the Agreement. In Part A, section 2.2 of the parties' Agreement, the parties agreed that:

In the event 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, the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which are consistent with such rules. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 23 (Dispute Resolution Procedures) hereof.

Sprint asserts that per their Agreement, KMC should have requested negotiation of an amendment rather than file a complaint with this Commission, and that until such a request is made, the parties are bound by the terms of the Agreement.

In its Response to Sprint's Motion to Dismiss, KMC argues that the FCC's Intercarrier Compensation NPRM served as a clarification of Rule 51.711(a)(3) and that "no change of law occurred that would necessitate the amendment of the parties' agreement." KMC contends that neither "state law" or "federal law" was changed as a result of the clarification, and therefore, the change of law clause in the Agreement was not triggered. KMC further asserts in its Response, that they have set forth a distinct pattern of facts and colorable legal arguments that are entitled to be briefed and considered in the context of a hearing.

Staff agrees with KMC that the FCC's Intercarrier Compensation NPRM clarified an established rule, instead of implementing a new rule. However, it is staff's belief that as a direct result of the clarification of Rule 51.711(a)(3), Part A, section 2.2 of the parties' Agreement is no longer applicable and should be amended by the parties. Staff further believes that the clarification of Rule 51.711(a)(3), within the backdrop of confusion that had surrounded this rule when the subject Agreement was executed, rises to such a significant level as to trigger the change of law clause provided for in the Agreement.

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Accordingly, staff recommends that the Commission grant Sprint's Motion to Dismiss and that the parties enter into a period of negotiations as prescribed in their Agreement. If the parties are unable to reach an agreement after a period of negotiation, Part A, section 23 of the Agreement provides the following:

The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution.

Therefore, if the parties are unable to reach agreement after a period of negotiations, either party may resubmit this dispute to the Commission for resolution.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 2, the Docket should be closed upon issuance of the order. (TEITZMAN)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, there would be no further action required in this Docket, and it should be closed upon issuance of the order.